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AN ANALYSIS OF RHETORICAL SITUATION IN THE CONTEXT OF COMMUNITY MEDIATION

by

Renee Louise Kuperman

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A Dissertation Submitted to the Faculty of the
DEPARTMENT OF ENGLISH
In Partial Fulfillment of the Requirements For the Degree of
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In the Graduate College
THE UNIVERSITY OF ARIZONA

2000
As members of the Final Examination Committee, we certify that we have read the dissertation prepared by Renee Louise Kuperman entitled An Analysis of Rhetorical Situation in the Context of Community Mediation and recommend that it be accepted as fulfilling the dissertation requirement for the Degree of Doctor of Philosophy.

Tilly Warnock
Ken McAllister
Yvonne Merrill

Final approval and acceptance of this dissertation is contingent upon the candidate's submission of the final copy of the dissertation to the Graduate College.

I hereby certify that I have read this dissertation prepared under my direction and recommend that it be accepted as fulfilling the dissertation requirement.

Dissertation Director Tilly Warnock and Ken McAllister
STATEMENT BY AUTHOR

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DEDICATION

This dissertation is dedicated to my mother, Theo Kuperman, whose tireless encouragement and inexhaustible love has made this a shared achievement.
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ABSTRACT

This dissertation is a rhetorical study of mediation that theorizes ways in which people can use language to consistently achieve peaceful resolutions of conflicts. In this study, I analyze community mediation at the Our Town Community Mediation Program, which provides free or low cost dispute resolution services. Disputants engage in a conflict defined by a particular rhetorical situation with its own exigence and constraints. The major finding of this study is that once the disputants have entered into a mediation, they become engaged in a second rhetorical situation that is in a dynamic relationship with the first. Thus the mediation experience involves a “rhetorical system” of situations.

The primary exigence is defined as the urgency that obliged the unresolved conflict. The primary constraints are those factors that determined the rhetorical discourse. Through interviews with four mediators and a case study of a mock mediation, I identify eleven new constraints in the secondary situation that give presence to a secondary exigence, namely, miscommunication. The secondary situation values conciliatory rhetoric, making a mutually satisfactory resolution possible. In this way, rhetorical situation is itself used as a rhetorical device to elicit a resolution.

I begin by arguing that mediation is a rhetorical activity that resembles ideal public discourse as described by Chaim Perelman and Kenneth Burke. Qualities such as on going dialog and situationally specific justice make mediation a useful model for critiquing deliberative democratic discourse. In Chapter Two, I explain
that my research methodology serves to acknowledge mediation as a living process. In Chapter Three I explore the rhetorics of mediation taking into account, for example, its unusual use of argument and its transformative goals. In Chapter Four, I analyze the data from my research, redefining concepts such as neutrality, agency, good communication and conflict. And in Chapter Five, I explore the possibility of a wider application for the concept of rhetorical system, concluding that while the discourse of mediation may be too situationally specific to apply whole cloth to other forms of public discourse, the concept of rhetorical system has wide ranging applications.
CHAPTER ONE
INTRODUCTION: THE POTENTIAL OF RHETORIC, THE PROMISE OF MEDIATION

*I have by means of speech removed disgrace from a woman... I have tried to end the injustice of blame and the ignorance of opinion...*

--Gorgias, Encomium of Helen

In our earliest written records of the study and practice of rhetoric we can read about rhetoric’s potential to free those unjustly blamed (Gorgias 40). The potential implicit in *The Encomium of Helen* is that if we study hard we will be able to use our words to create justice, protect the innocent, avoid wars, and even reach backward to change our histories. Rhetoricians have recognized this awesome power, this awesome potential, made possible through the complex mixture of language and culture. As a community mediator, I have seen that potential alive in the process of mediation. Community mediation as it is currently practiced is relatively new, and few discussions have analyzed the process in strictly rhetorical terms.¹ This dissertation is a rhetorical study of mediation. In this study, I will analyze community mediation, defined as a free or low cost dispute resolution process in which a volunteer mediator acts as a neutral third party to facilitate communication between disputing parties. A rhetorical analysis of mediation reveals that it is a dispute resolution process housing competing and collaborating rhetorical

situations and rhetorics. The work of this study is to lay out an analysis of the richly rhetorical practice of mediation, so that we can better understand how the potential for achieving peaceful resolutions from conflict is practiced in mediation, and, specifically, how situation theory works to achieve that goal. Through the rhetorical analysis of mediation, I argue that it puts into practice ideals of communication explored by contemporary rhetoricians such as Chaim Perelman, Kenneth Burke, Susan Jarratt, and James Corder.

This dissertation will restrict its analysis to community mediation. Although almost any kind of case can be mediated,² from international disputes over water rights, to landlord and tenant disputes, community mediation centers typically handle disputes between neighbors. For example, Ms. Jones owns a Basset Hound whose barking wakes her elderly neighbor, Mr. Smith, from his afternoon naps. Although Mr. Smith has left several notes on her door complaining about the disturbance, the dog still barks. Finally, Mr. Smith becomes angry and frustrated enough to call the police. The police pay a visit to Ms. Jones who finds their visit threatening rather than helpful. If Mr. Smith complains to the local animal protection agency or begins procedures for taking Ms. Jones to court, their case may be referred to community mediation through those institutions. They will contact a community mediation center and schedule a time to meet together with one or two volunteer mediators to discuss their conflict. The mediators will lead them through a process that

² The structure of community mediation and international mediation is similar. See John Burton, "Conflict Resolution as Political Philosophy," *Journal of Negotiation* 2 4 (1986): 55-64, for a discussion of the application of international mediation to national and local sites.
encourages a kind of conciliatory communication that will help them resolve their conflict in a way that is mutually satisfactory.

Mediation becomes an option when an exigence brings two or more parties into conflict. The parties understand the exigence to varying degrees. They find themselves in a specific rhetorical situation with its own particular constraints. Once they find that they are not willing or they are unable to settle their disagreement, scheduling a mediation session becomes an option. The mediation experience is a process that begins when the parties agree to work toward a resolution with the help of a neutral third party. One can say that they decide to have their conflict mediated, or simply, that they decide to mediate. The distinction in terms depends on whether or not one assumes agency lies more with the mediator or more with the disputants. The argument in this dissertation is that agency is negotiated in the dynamic nature of the rhetorical situation in a mediation.

Mediating their dispute has several advantages over the disputants' other options. If they choose to continue as they are, their conflict may escalate further. If they pursue litigation in the courts, they will be responsible for document processing fees and perhaps attorney's fees. The courts will schedule hearings that may be inconvenient, and it could be a long time before the case is heard. If both parties choose mediation at a community mediation center, however, the service will likely be free, and they will be able to arrange for a convenient time to meet. Also, the mediation process affords them the advantage of creating a resolution that may be
more sensitive to their particular needs and concerns than a judgement would be from the courts.

Community mediation centers are, in general, grass-roots organizations. They are created to fulfill a need in their community, and so each center has its own slightly different style or way or managing cases. However, community mediation is based on principles and assumptions similar to those used by any institution or individual practicing mediation. According to Barbara Hill, a theorist in conflict resolution, the mediation process is based on assumptions regarding the nature of conflict. These include the assumption that conflict is a necessary part of a healthy society and as such it should not be eliminated, but rather managed (Hill 113). Another assumption is that individuals are capable of “learning and modifying their behavior” (Hill 113). If we agree that conflict is inevitable, and that humans are capable of real change, then our response to conflict does not have to be defensive or hopeless.³

This dissertation argues that once the disputants have entered into a mediation, they will find themselves engaged in a second exigence and a second rhetorical situation that is in dynamic relationship with the primary rhetorical situation. The relation between these rhetorical situations presents disputants with a forum that values a particular kind of conciliatory rhetoric that makes a mutually satisfactory resolution possible. The second situation, like the primary situation, also

³ See also Troy Smith, JD, “A Few Simple Truths About Conflict.” Mediation Monthly Feb. 1997: 7-9, for a list of six “truths” about conflict which include, “Not all conflict is ‘bad,’” and “Change is the intended outcome of nearly all conflict.”
has its own particular constraints, all of which help to create the best possible chance for a mutually satisfactory resolution. Within this second rhetorical situation, attention is paid equally to clarifying the first exigence (exchanging information) and finding a mutually satisfying resolution through improved communication. The two situations are inextricably connected. The first anticipates the second, and the second recalls the first. I recognize that identifying only two situations artificially limits my study since there may be in fact multiple situations. However, I have chosen to limit my study to two clear and distinct situations that give the most comprehensive account of the rhetoric in mediation.

Rhetoric and mediation both propose the possibility of achieving peace through dialog, but we know that peaceful alternatives to conflicts are never simply a matter of choosing one’s words carefully. Is it possible to duplicate our successes in future conflicts? What can mediators do to make successes more likely? This dissertation is guided by the desire to theorize ways in which people can use language successfully and consistently to achieve peaceful resolutions when there are conflicts. In this dissertation I claim that the structure of the rhetorical situation is a determining element in the success or failure of a mediation. In arriving at this conclusion, personal experience and theory had to be measured against practice. I needed to weigh my hypotheses against my own personal experience as a mediator and that of other volunteer mediators who have known successes and failures and who can add necessary insight into the living process of mediation. In particular, my analysis sought answers to the following questions:
• How does rhetorical situation have an impact in mediation? Can a theory of rhetorical situation explain how rhetorical discourse in a mediation helps to achieve peaceful resolutions?

• To what extent are mediators instrumental in producing the rhetorical situation(s) in mediation? Are mediators' intentions aligned with the purposes of the rhetorical situation(s)?

• How do mediators' obligations to be neutral and impartial affect the function of the rhetorical situation(s) in a mediation? How does the secondary rhetorical situation function to uphold or deconstruct those values and obligations?

• What are the social implications of a dispute resolution process that constructs the rhetorical situation to achieve peaceful resolutions?

In this first chapter, I will continue with a discussion of the potential for rhetoric to achieve peaceful resolutions through the use of language as an alternative to violence. As one of the most famous early examples of conciliatory rhetoric, I begin with Gorgias' rhetorical maneuver to "excuse Helen for succumbing to Paris" (Bizzel 38) in his *Encomium of Helen*. Then I will survey influential 20th Century rhetoricians, such as Chaim Perelman and Kenneth Burke, who stretch the boundaries of classical rhetoric to realize rhetoric's potential to change the course of human events, past and future. Their broad definition of rhetoric grounds the theory that rhetorical situation is fundamentally responsible for creating the possibility of peaceful resolutions. All my subsequent discussions of rhetorical situation are framed within the larger argument for constructing contexts that support peaceful
alternatives to violence, since the larger purpose of this work is to advance possibilities for peace. In the another section of this chapter, I will survey definitions of rhetorical situation to determine its value to the field of rhetoric. Used as a rhetorical devise, a rhetor might engage her audience in a new rhetorical situation as a way to persuade them to act. In the next section I review the literature of those scholars who recognize the potential for rhetoric to settle differences without resorting to violence.

ACHIEVING PEACE BY MEANS OF SPEECH ALONE

It is possible to move from the edge of violence and mistrust to a place of peace through epestemic rhetoric. Peaceful means of resolution are superior to violent responses for obvious reasons. Lives can be saved, and helpful alliances can be made that will improve the quality of life for disputing peoples who might otherwise languish in embittered conflicts for decades or more. When there is the potential for peaceful resolution, it is certainly worthwhile to study all the "available means of persuasion" to achieve it (Aristotle 36). But persuading enemies to cooperate is a complicated enterprise. Attempting an alternative to violence through rhetoric relies on getting offended parties to listen to each other, perhaps even speak to each other. Since rhetoric can inflame hostilities as well as promote understanding, we must not only encourage communication, but we must encourage a kind of communication that works towards peace. In this dissertation I am claiming that perusading adversaries to work toward peace is achieved by altering
their rhetorical situation, so that the inflammatory rhetoric they had been using becomes inappropriate, or loses its intended effect. Furthermore, I am claiming that we can study the process of deliberately creating a rhetorical situation in the context of a mediation.

The risks, failures, and visions of a rhetorician are similar to those of a mediator. The currently accepted definition of a mediator is a neutral third party. Likewise, the mediation process itself is also considered "neutral" in that disputants may either use it to create an agreement or to maintain their irreconcilable positions. Similarly, Aristotle's definition of rhetoric maintains that it is "an ability in each particular case to see the available means of persuasion" (36). The definition does not describe rhetoric as a skill which persuades audiences to choose what is good or to choose peace. There is a possibility that a skilled rhetorician will use her art to persuade audiences to believe what is not true or to commit acts of violence. But even as this problematic potential is acknowledged in Aristotle's definition, a parallel vision of rhetoric's immense potential to create peace is also indicated.

Scholars who see a connection between rhetoric and the pursuit of peace tend to view rhetoric as an integral part of the larger human enterprise that requires an understanding of the psychological, sociological, and political factors (among

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4 See for example, Jacobs, "Ideal Argument;") Shailor, Jonathan G. Empowerment in Dispute Mediation (Conn.: Praeger, 1994); Jerry M. Wittmer et. al., "General Alignment and Overt Support in Biased Mediation," Journal of Conflict Resolution 35.4 (1991): 594-610, for more about the influence of mediator's interest and the disputants' perceptions of those interests.

5 I am using the translation that includes the words "particular case" (omitted in most translations) because the notion of rhetorical situation is particularly sensitive to context. The context provides the constraints of a situation that will determine its particular effects on an audience.
others) influencing a discussion of reality.\textsuperscript{6} I will primarily use two influential scholars, Chaim Perelman and Kenneth Burke, to make two points. First, that when the definition of rhetoric is broadened to encompass the majority of human enterprises, its power and potential for peaceful resolution can be more fully understood. Second, that it is possible to identify particular aims of rhetoric that are especially suited to peacemaking, specifically "gaining adherence," to use Perelman's term, and creating "identification," to use Burke's. Having thus established that rhetoric has the potential to create peaceful resolution to conflict, I will define the notion of \textit{rhetorical situation} and use the concepts of gaining adherence and identification, along with other concepts introduced by other current rhetoric scholars, to broaden the theory created by Lloyd Bitzer.

Chaim Perelman's work has been used across several disciplines (law, philosophy and rhetoric) to explain how people are able to come to judgments about each other when logic is unavailable and values are at stake. In \textit{New Rhetoric: A Treatise on Argumentation}, he and Lucie Olbrechts-Tyteca reconstruct a theory of argument that addresses the complexity of all Western human society. The text defines four large categories of arguments: quasi-logical arguments, arguments based on the structure of reality, arguments establishing the structure of reality, and arguments that use the dissociation of concepts. These four categories contain thirteen subcategories of arguments that reconceptualize Aristotle's \textit{topoi}. One of

\textsuperscript{6} See, for example works listed in this dissertation's references by Richard Andrews, James Corder, Ellen Cushman, Henry Giroux, Gerald Graff, Charles Kneupper, Dennis Lynch, and Edward Said for a wide variety of scholars who assert that rhetoric plays an essential role in creating and maintaining peace.
their most influential conclusions is that logic itself is yet another kind of rhetorical *topos*. This taxonomy has never become part of the current traditional rhetorical canon. It is rarely used in text books or in its specific detail to discuss argument theory. One exception is a 1992 article by Barbara Warnick and Susan Kline in which they call Perelman and Olbrechts-Tyteca’s taxonomy an “argument scheme.” These researchers find that his classification system is a useful way to categorize arguments, but they found that it presupposes a strong cultural element and works best when all participants are from a similar culture. Perelman and Olbrechts-Tyteca’s work, however, has had more impact as an argument for encouraging open public discussion.

Theorists across several academic fields have focused on the larger concepts developed by Perelman and Olbrechts-Tyteca, such as justice in the field of law, argumentation and validity in philosophy, and audience in rhetoric. The most cited discussions in rhetoric are two articles in the *Central States Speech Journal* discussing Perelman’s concept of universal audience by Lisa Ede and Allen Scult. Ede argues that Perelman’s concept of the universal audience betrays him as a rationalist, in spite of his arguments against rationalism and his defense of reason. Allen Scult, however, defends Perelman’s universal audience as a metaphorical concept that was intended to be used as a heuristic for rhetorical invention. But these theorists have for the most part chosen not to explore the more profound and far reaching principles that gave rise to Perelman’s work, his belief in the potential of rhetoric to save lives.
Perelman was a Polish Jew who was active in the Resistance during World War II. His New Rhetoric proposes rules for a pluralistic, democratic society that can avert violence through dialog. His friend, Mieczyslaw Maneli, draws out Perelman’s larger vision in Perelman’s New Rhetoric as Philosophy and Methodology for the Next Century. Maneli writes, “[Perelman] struggled during his whole life against the potential danger of intolerance coming from people who think they possess the truth in matters of ethics and politics,” a succinct description of the Nazi position (xi). Perelman contends that a society that values open and continuous dialog will never become a society that condones murdering those with opposing views. By “open” he means that any topic is open for discussion, that there is always an opportunity to continue the debate, and that the speakers can talk honestly without fear of retribution. The New Rhetoric is his answer to the questions, “How did the Holocaust happen?” and “How can we prevent it from happening again?”

Perelman wrote one of his germinal essays about justice while in hiding during the Nazi occupation. His experiences in the war motivated him to imagine more peaceful ways of resolving conflicts. Maneli describes Perelman’s inspiration this way:

While analyzing world experience, the course and the results of the totalitarian reigns and the aftermath of World War II, the atrocities committed in the name of the ideologies based either on open irrationalism and fanaticism or rationalization of cruelty, he found himself deeply dissatisfied with the prevalent state of scholarship in the field of politics and ethics. (Maneli 121)
Without oversimplifying the historical forces that created the holocaust, Perelman understands rhetoric as at least a path towards tolerance and at most an antidote to violence. He describes his philosophy as "gaining adherence." For Perelman, the rhetor’s purpose is to win a degree of approval from the audience. Gaining adherence is an alternative to kinds of arguments that force an audience to comply by claiming validity, perfection, goodness, logic, or ethics.

Charles Keupper also argues that formal logic is inappropriate for practical argument (114). He draws on Perelman’s work and supports Perelman’s general conclusion that formal logic is ultimately tyrannical because in any conflict one position is unequivocally wrong, whereas most (for Perelman, all) conflicts concern the probable. Thus, rhetors must argue for the best solution from among several competing possibilities. The world of logic, according to Perelman, is rigid, compelling, and does not obligate people to take responsibility, but the use of rhetoric means that "choices are made freely" and "those who make such choices are responsible for them" (120). My research has helped me to see how Perelman’s definitions of rhetoric that compels and rhetoric that is free plays out in the practical application of mediation. Through my research these terms become more complex.

The second quality of an argument necessary for gaining adherence is that agreement does not have to be absolute. Rather, it can be gauged on a kind of infinite continuum from absolute disagreement to absolute agreement, neither of which is possible. Perelman writes that argumentation "presupposes a meeting of minds: the will on the part of the orator to persuade and not to compel or command,"
and a disposition on the part of the audience to listen" (The Realm 1076). If rhetoric calls people to take action, then it is only necessary for the rhetor to persuade an audience to the point where they will take that action, even if the alternatives have not been proven wrong, even if the audience is not in complete compliance. Almost any political debate is a good example of this concept. If a mayor wants voters to add a traffic light, she does not need to persuade them that all her reasons are valid or that all the alternatives are unfeasible. She only needs to persuade them that her reasons are good enough to put in the light and that the alternatives are worse.

Kenneth Burke is another 20th Century philosopher and rhetorician who explores rhetoric's interdisciplinary nature and its essential connection to humanity. Burke states that humanity is profoundly enmeshed in language. In a line definition of man, he describes us as "symbol-using (symbol-making, symbol-misusing) animal[s]" (Language 16). In another part of his definition of man, he writes that we are "separated from [our] natural condition by instruments of [our] own making" (Language 16). This definition means that people are dependent on and affected by language even though we are creating and creative with language. He explains that we are enmeshed in language when he defines man as "a species of symbolic action" (Language 15). When we communicate, we "do" something. And it is his particular emphasis on the drama in language that gives this tool its power and potential. It follows that whatever humans want to "do" or "be," we must do so through language.
Furthermore, Burke claims that people use language for rhetorical purposes. He expands the domain of rhetoric by redefining its boundaries with his concept of identification. Identification broadens the boundaries of rhetoric beyond persuasion. He reasons that in seeking identification, “we would but rediscover rhetorical elements that had become obscured when rhetoric as a term fell into disuse” (Rhetoric xiii). Identification implies a profound relationship between the speaker and the audience. Burke’s description of this relationship echoes Perelman’s definition of gaining adherence as a meeting of the minds when Burke writes, “Some of their [the audience’s] opinions are needed to support the fulcrum by which he [the rhetor] would move other opinions” (56). In this concept of rhetoric, the rhetor and audience are in a cooperative relationship.

In Rhetoric of Motives, Burke formally applies identification in five instances across his first two sections titled, “The Range of Rhetoric” and “Traditional Principles of Rhetoric.” In these instances, we see that he uses the concept broadly, for example, describing transformations in poetic imagery (20), recognizing the similarity between two people (20), or proving divisions between humans (22). All of these variations contribute to his later discussion of persuasion through identification. Burke writes, “You persuade a man only insofar as you can talk his language by speech, gesture, tonality order, image, attitude, idea, identifying your

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7 Perelman agrees: “As soon as a communication tries to influence one or more persons, to orient their thinking, to excite or calm their emotions, to guide their actions, it belongs to the realm of rhetoric. Dialectic, the technique of controversy, is included as one part of this larger realm. Thus rhetoric covers the vast field of nonformalized thought.” From Chaim Perelman, The Realm of Rhetoric, trans. William Kluback (Indiana: U of Notre Dame P. 1982) 1076.
ways with his" (55). He adds, by seeking identification, the speaker can "awaken an attitude of collaborative expectancy in us" (58). In other words, Burke argues that most communication is rhetorical, that is, in some ways, persuasive. Persuasion depends on identification, wherein the speaker chooses to validate some of her audience's opinions in order to create the sense that the audience is working collaboratively with the speaker to create a mutually satisfying conclusion. It then follows that when one party is able to recognize parts of the other in himself, he is able to take on part of the other's argument as his own. In a notoriously ironic observation Burke concludes, "And so, in the end, men are brought to that most tragically ironic of all divisions, or conflicts, wherein millions of cooperative acts go into the preparation for one single destructive act. We refer to that ultimate disease of cooperation: war . . . [a] perversion of communion" (A Rhetoric 22). Even conflict is a cooperative endeavor.8

Other contemporary scholars in rhetoric and composition also argue that rhetoric can help to settle differences without resorting to violence. This theme can be traced over a range of perspectives from those scholars whose interests are mainly in improving academic institutions (Graff, Corder), focusing on political implications of rhetoric (Andrews, Jarratt, Bizzell), and those studying rhetoric from a feminist perspective (Gearhart, Lamb). These scholars echo the opinions of Perelman and

8 Burke's observation is not unfamiliar to mediators who understand the relationship between disputing parties as deeply co-active. Mediator David Strawn writes, "The disputants may enjoy their argument. They may even wish to protract negotiation because it is all they have known for months, perhaps years." From, David Strawn, "The Fully Functioning Mediator." Dispute Management, Inc. 1989.
Burke as they explore the possibilities of rhetoric. They too begin from the assumption that rhetoric has an essential contribution to make in the affairs of people. From that assumption it follows that we can change the course of events by changing our modes of communication. We can steer away from violence and resolve our conflicts by choosing to engage in open-ended dialogs when objective truths cannot be established.

Gerald Graff takes both an anti-foundationalist and anti-relativist position similar to Perelman's when he argues for a "sensible alternative" to avoiding conflicts in the classroom. He claims that teaching the conflicts would "locate the principle of coherence in the cultural conversation itself in all its contentiousness" (54). Furthermore, he argues that by openly discussing conflicts, students would get the "opportunity to become active informed participants in those battles rather than passive objects of them" (55). Argument is encouraged in his class. Jim Corder would also seem to recognize the importance of engaging in argument. In his often cited article, "Argument as Emergence, Rhetoric as Love," he describes people as authors of their lives. He writes, "argument, then, is not something we make outside ourselves; argument is what we are. Each of us is an argument" (18). If our arguments are our identities, he reasons, then coming to understand each other takes place on a much more personally profound level than we may realize when we talk about persuasion. Corder's discussion of argument in these terms deepens our understanding of what is at stake when we communicate and attempt to persuade.
When we attempt to persuade someone to change their position, we are, in a sense, asking them to change how they define themselves, how they know themselves.

Two other contemporary theorists who believe that rhetoric encourages open discussion is important not only for learning but also for maintaining social structure are Richard Andrews and Susan Jarratt. Andrews writes that since argument is essential to a democracy and “to thinking as well as to social harmony” (69), we should “extend the range” of argument that is taught in all the disciplines. By this he means that students should be taught the appropriate ways to question and dispute information from every field. Susan Jarratt argues for an alternative to the model of communication theory in which “one individual speaks to another, so that the speaker is an agent and the listener is characterized as a passive recipient of a reified message” (37). Instead, she argues that students should be engaged in a “collective activity through which we are all constantly engaged in processes of semiotic transformation” (37). Such observations bridge the theories of Perelman and Burke to the practice of mediation. Jarratt’s claim that a certain level of conflict is essential in a politicized classroom applies the philosophical orientations of Perelman and Burke.

Feminist theory, provides an even more direct line of reasoning from an alternative kind of argument to mediation. Sally Gearhart argues for a collective rather than a competitive mode of argument whose goal is not persuasion, which she understands as a kind of violence. Gearhart writes that in a conflict or in a learning situation the participants would be assured “that each party would seek to contribute
to an atmosphere in which change for both/all parties can take place" (198). Another feminist, Catherine Lamb, makes the connection between the kind of communication Gearhart describes and mediation when she writes, “This line of exploration has taken me to the study of negotiation and mediation . . . [An] argument still has a place, although now as a means, not an end” (12). According to situation theory, these various notions of argument are appropriate largely depending on the rhetorical situation. That is, the particular combination of audience, exigence and constraints will impact whether or not the “atmosphere” values change for “both/all parties.”

All of these theorists work from similar assumptions about rhetoric. I argue that mediation is one practical application of the principles and philosophies espoused by the theorists I have surveyed. It is my argument in this dissertation to make a more specific case for the role that situation theory plays in achieving peace. The theorists I have surveyed explore argument in terms that do not refer directly to situation theory. The unique properties of a mediation, however, put situation in the forefront of a rhetorical analysis. In the next section, I will survey and compare definitions of rhetorical situation in order to show how the notion of rhetorical situation works in rhetoric aimed at resolving conflicts. My purpose is to show that situation theory is compatible with the theoretical assumptions guiding the mediation process.
USING SITUATION THEORY TO ANALYZE MEDIATION: A REVIEW AND APPLICATION

In this section I will show how Lloyd Bitzer's influential working theory of rhetorical situation can be used to analyze mediation. I will review Bitzer's theory and survey critiques of his theory in order to establish a definition of rhetorical situation that explains mediation. I begin from the premise that an effective rhetorical analysis of mediation must involve an understanding of its rhetorical situation. From this analysis I will conclude that the notion of situation theory best suited to describe what happens in mediation shares the same philosophical assumptions as Perelman's and Burke's broad view of rhetoric as essential to human enterprises.

The Winter 1968 issue of Philosophy and Rhetoric published "The Rhetorical Situation" by Bitzer, an associate professor of speech from the University of Wisconsin.9 In the article, Bitzer claims that until that time, "No major theorist [had] treated rhetorical situation thoroughly as a distinct subject in rhetorical theory" and that in fact, "many ignore it" (2). Bitzer intended to address this deficiency in his article in which he would, "set forth part of a theory of situation . . . to revive the notion of rhetorical situation, to provide at least the outline of an adequate conception of it, and to establish it as a controlling and fundamental concern of rhetorical theory" (3). Bitzer's claim that rhetorical situation is fundamental challenged scholars who believed that the rhetor was a more powerful agent of

9 Bitzer presented this article as a paper two years earlier at Cornell and then five months later at the University of Washington.
rhetorical discourse than the situation. Nevertheless, Bitzer continued to explore situation theory in his later articles to explain how rhetorical discourse is motivated. For example, Bitzer’s 1980 essay “Functional Communication” asks, “What are the conditions, characteristics, and factors operative in that process of communication through which human beings achieve harmonious adjustment with the environment?” (21).

Although Bitzer outlined a theory of rhetorical situation in his 1968 article, relatively few modern scholars in the field of rhetoric and composition (such as Lisa Ede and Allen Scult) responded directly to Bitzer’s challenge to improve on his theory and recognize rhetorical situation as a “fundamental concern.” This is not to say that they have ignored the broader sense of situation. The arguably similar notion of context, has become a fundamental concern for rhetoricians working in cultural studies and multi-culturalism. Context is the history and circumstances that surround a rhetorical performance. Rhetorical theory recognizes the significance of context because it provides innumerable constraints for the rhetor. Context, however, is arguably a more general term than rhetorical situation, and Bitzer makes the distinction early in his article. He writes, “I do not mean merely that understanding a speech hinges upon understanding the context of meaning in which

10 A much more substantial discussion has taken place in Speech-Communications as surveyed by J. Robert Heppler in his doctoral dissertation, “Rhetorical Situation Theory,” diss., Penn. State U., 1985, 40. His scholarship, however, has not been published outside his dissertation and has probably for that reason, not been especially influential in the field of Rhetoric and Composition.

the speech is located" (3). While context might include elements that do not necessarily produce a rhetorical utterance, rhetorical situation is limited to those elements which do have a direct effect in producing rhetoric.

To further make his distinction between rhetorical situation and context, Bitzer narrows the definition of rhetorical speech. He distinguishes rhetoric from "philosophical, scientific, [and] poetic utterances" (3). Bitzer begins with a standard definition of rhetoric and then develops the definition by elaborating on rhetorical situation. Because Bitzer’s definition of rhetoric recognizes its potential to change reality, I quote his definition here:

In short, rhetoric is a mode of altering reality, not by the direct application of energy to objects, but by the creation of discourse which changes reality through the mediation of thought and action12. The rhetor alters reality by bringing into existence a discourse of such a character that the audience, in thought and action, is so engaged that it becomes a mediator of change. In this sense rhetoric is always persuasive. (4)

In this definition, the rhetor is capable of “altering reality” and bringing a discourse “into existence” that will transform the audience. The passive audience is transformed as an effect of becoming engaged. This conception of rhetorical speech gives the rhetor impressive power and control. When Bitzer refines this definition later in the same article, he moves the source of power from the rhetor to the situation. The location of power in a rhetorical exchange will be a central issue in the rhetorical analysis of the process of mediation. The success of mediation is often

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12 Bitzer’s use of the word “mediation” is an interesting coincidence. The mediation process also effects outcomes at the point between thought and action, as will be discussed later in this dissertation. Rhetoric is a kind of mediation, and mediation is the practice of rhetoric.
attributed to shifting the decision making power from an impartial third party, such as a judge, to the disputants themselves.

Bitzer criticizes the "commonplace" definition of rhetoric that he has just offered by saying it is "altogether general" (4). He alters the definition by saying that "a particular discourse comes into existence because of some specific condition or situation which invites utterance" (4). Therefore, what is rhetorical depends on whether or not it evolved from a rhetorical situation. He amends this further by claiming that utterance is not only invited but "strongly invited" (5). And in the next paragraph he strengthens that statement further, saying that utterance is not only strongly invited but "obliged" (5). He ends this paragraph by stating, "So controlling is situation that we should consider it the very ground of rhetorical activity" (5). Here Bitzer commits himself to a compelling argument: It follows that an orator cannot help but produce rhetoric from a rhetorical situation. He states simply, "the situation controls the rhetorical response" (6). His position is emphatic and unmistakable. He writes, "Not the rhetor and not persuasive intent, but the situation is the source and ground of rhetorical activity . . ." (6). He insists that rhetoric is neither a function of the speaker's intention nor "a response of the speaker to the demands or expectations of an audience" but that rhetorical discourse begins from and is controlled by rhetorical situation (6).

Although the question of what we study in the field of rhetoric has been historically debated, it is commonly understood that for rhetoricians graduating from current rhetoric programs, the study of rhetoric takes in much more than these
definitions by Bitzer would allow. Rhetoricians who would like to study rhetorical situation, find they are not beginning from the same assumptions as Bitzer. That is, for Bitzer, rhetoric is a more limited term. Whereas for theorists such as Perelman all communication is in some way rhetorical, for Bitzer the purpose must be apparent in the discourse. This fundamental difference creates other problems with situational theory for rhetoricians that will be discussed later.

Having established what generates rhetorical speech, Bitzer claims, in a more subtle move, that rhetorical situation is different from a situation involving "communicative purpose" or curiously enough, even from a "persuasive situation" (3). Since this distinction may be confusing given that rhetorical speech is typically considered persuasive, I quote him:

Nor would I equate rhetorical situation with persuasive situation, which exists whenever an audience can be changed in belief or action by means of speech. Every audience at any moment is capable of being changed in some way by speech; persuasive situation is altogether general. (3)

From this we may conclude that Bitzer intends rhetorical situation to be something more narrowly defined than persuasive situation. Bitzer attempts another definition:

Let us regard rhetorical situation as a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance; this invited utterance participates naturally in the situation, is in many instances necessary to the completion of the situational activity, and by means of its participation with situation obtains its meaning and its rhetorical character. (5)

Yet, this statement broadens the definition of rhetorical situation so that it would seem to include what his earlier definition attempted to exclude.
So much rhetorical situation theory hinges on this definition, which is altogether too general for subsequent scholars to use as a dependable starting point, that Bitzer attempts to clarify himself again in his 1980 article, “Functional Communication.” Here he claims that certain conditions “must be present in the situation” (23). These conditions are an exigence, an audience, and “a set of constraints capable of influencing the rhetor and the audience” (23). If these conditions can be easily identified, then we can be sure we have a “genuine” rhetorical situation (24). I find his narrow definitions of what is rhetorical and his hair splitting distinction between persuasive situation and rhetorical situation problematic. A persuasive situation is a rhetorical situation. And rhetorical discourse is persuasive, meaning that it calls on the listener to reconsider her position or to take action.

The implications, controversies and problems with Bitzer’s theory are thoroughly explicated in J. Robert Heppler’s 1985 doctoral thesis in speech communication titled, “Rhetorical Situation Theory: An Analysis, Synthesis, and Evaluation.” Heppler reviews all of Lloyd Bitzer’s writings on rhetorical situation along with a comprehensive list of the scholars in rhetoric and speech communications who have written on the topic. From his research he concluded that, although rhetorical situation has been a topic of ongoing debate in the field of speech communications, “no coherent and thorough attempt had been made to analyze the position in its full scope” (1). He undertakes the task of collecting all the work on the topic of rhetorical situation from 1968 to 1983, and then he attempts to categorize
and synthesize the scholarship into a coherent theory. His work serves as an
invaluable resource for defining and critiquing rhetorical situation in terms of how it
may be applied to mediation.

Heppler provides a useful way of utilizing Bitzer's theory to determine
whether or not discourse is rhetorical. Heppler's explanation is as follows: First, one
determines if there is a rhetorical situation by assessing whether or not the exigence
is "susceptible to being modified to advantage and that speech is either required or
can assist in bringing about their modification" (4). If so, then the exigence is
rhetorical. All the participants of a mediation must agree that the conflict in question
could be resolved through mediated communication for a mediation to be scheduled.
This qualification also addressed Heppler's second determining factor, that the
audience is "capable of recognizing the exigence as a problem, willing to pass
judgment on the problem, and in a position to do something positive to ameliorate
the problem" (4-5). These qualifications make the audience a rhetorical audience.

Next, one must determine to what extent the constraints (the various \textit{a priori}
cultural and/or material factors that will influence the speaker and the audience) are
dictated by or pertinent to the particular situation (5). The strength of the constraints
will affect the discourse to the extent that the orator must effectively deal with the
constraints to be successful. Lastly, one notices if there is any discourse present. If
there is discourse, and it functions pragmatically and is shaped by that situation's
constraints, it is rhetorical discourse (6).
This method provides researchers with some of the most careful guidelines available to determine whether or not discourse is rhetorical. One implication of this method is that there are non-rhetorical kinds of discourse, which therefore, are not available for the same kind of analysis. Another is that non-rhetorical discourse embodies certain other qualities of communication not found in rhetorical discourse. The subtleties and complexities of human discourse make these assumptions very difficult to defend when it comes to applying this process to actual discourse. Scholars who take issue with Bitzer’s work tend either to believe that more discourse is rhetorical than would fit this definition or find his definition too vague.  

Heppler describes five problems like the ones mentioned above that lead him to conclude that the theory of rhetorical situation as Bitzer has conceived it is too vague and positivist and therefore reduces rhetoric to a “reflex” rather than an art. He considers this a flaw because rhetoric is able to describe discourse more profoundly if it is understood as an art that is sensitive to the relationships among human motives, feelings and action. Heppler and others who are critical of Bitzer’s theory reason that if the situation ultimately determines the discourse, and if the situation is an event outside the control of the orator or the audience, then there is no genuine element of creativity in the process. The implications are that any orator is influenced in the same way by a particular rhetorical situation, and audiences are compelled to react in accordance with the particular combinations of situation and

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constraints. Heppler accurately points out the implications of Bitzer's theory taken in the extreme:

Because of the strict formalism of the theory proper, constraints seem less to guide judgment than to determine audience decision. . . . There is no room for choice of motive, nor for deviant decisions regarding the satisfaction of motive, nor for creative dialogue on the part of the audience . . . . [The theory] tends towards elitism, restricts expression, maintains the status quo, and justifies manipulating audience decision in the name of that audience's better interests. (207-8, 222)

At this point it would seem that the assumptions of Bitzer's situation theory (that a rhetor's discourse is dictated by situation, and that audiences are compelled to respond in ways fixed by the rhetorical discourse) are incompatible with the assumptions of the rhetorical theories previously described arguing for the unpredictable, open endedness of discourse in which the orators and audiences influence each other in a process that at best achieves degrees of persuasion—a theory that strives to do without compulsion altogether.

Richard Vatz' criticizes Bitzer's situation theory for reasons similar to Heppler's. Like Heppler, Vatz is also dissatisfied with the implication that the rhetor is reacting reflexively to a situation. Vatz argues instead that the rhetor is ultimately the creative force in any rhetorical discourse, beginning with choosing which situational exigence to respond to. He uses Perelman's concept of 'presence' to describe the purely creative process of choosing situations that are worthy of rhetorical discourse. He writes, "Once the choice is communicated, the event is
imbued with *salience*, or what Chaim Perelman calls ‘presence . . .’” (157). According to Perelman, “[t]hings present, things near to us in space and time, act directly on our sensibility” (*New Rhetoric*). The rhetor gives “presence” certain issues by making choices about what to bring forward in a given rhetorical situation.

In Bitzer’s article, “Function and Communication,” he indicates that he intends to define rhetoric as broadly as do Perelman and Burke. Bitzer quotes both authors in order to establish a context for discussing what he feels are the fundamental considerations of rhetoric. He writes, “This inquiry therefore looks toward a starting point similar to that examined by Kenneth Burke, who observed that experience presents divisions that can be bridged through identifications . . .” (22). This implies that Bitzer sees the rhetorical impulse as emanating from the nature of the human community (Heppler 108). Although a strict interpretation of Bitzer’s theory locates agency in the situation, the spirit of his theory would seem to take into account the complexity of human communication.

The answer to the question what or who determines discourse is ultimately a critical question in the analysis of mediation. The answer to that question is complex and must depend on a theory that can acknowledge and then go beyond the two options presented so far. Scott Consigny’s article, “Rhetoric and Its Situations,” helps to bridge the differences between the conflicting positions so that each position

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improves upon each other. Consigny defends Bitzer's conception of rhetorical situation while claiming to "resolve the apparent antimony of rhetor and situation...[by proposing] a mediating third factor, namely, rhetoric as an "art" (176). Consigny agrees with Vatz that "The rhetorical situation is an indeterminate context marked by troublesome disorder which the rhetor must structure so as to disclose and formulate problems" (Consigny 178). But Consigny cautions us not to take that to the other extreme because "the rhetorical situation is not one created solely through the imagination and discourse of the rhetor" (178). Consigny takes a middle ground that elevates rhetoric to the Aristotelian "art of topics." He argues that the rhetor’s role is to offer a new perspective of a situation (179). The rhetor is involved in a process of constructing (selecting, ordering, and creating) while simultaneously remaining receptive to the particulars of the situation through interaction with them. Consigny refers to these two competing forces as "integrity and receptivity." He describes the rhetor's mediation of these forces as the art of rhetorical topics in which, on the one hand, the topics provide integrity because they are universal, and yet on the other, they allow the rhetor to be receptive and creative because the rhetor's choice of topic is not predetermined (184). Consigny's "compromise" works particularly well in that it does not deny either view, but rather compliments both. The integrity of the speaker's rhetorical creation is preserved while acknowledging the powerful influence of the rhetorical situation on it.

Mediation theory assumes the rhetor has creative power. Mediation asserts that it is possible and desirable for people to resolve conflicts through responsible
and creative rhetoric. The process depends on the creativity of the rhetors to the extent that all the participants (the disputant as well as the mediators) can frame their arguments, gain adherence, and identify with one another. In Consigny’s understanding of situation theory, only Bitzer’s and Vatz’s positions are at odds, while their interests (to analyze the relationships between the rhetor, the audience and the situation) are similar. Consigny’s perspective frames the two arguments in such a way as to emphasize the genuine flexibility in both views so that it is possible to have an understanding of rhetorical situation that allows for creativity among the orators without damaging the integrity of situational theory. Consigny’s move to reframe and find a resolution that satisfies both positions rather than compromise them is the very definition of a mediated resolution. Situational theory can accommodate the theoretical assumptions that guide the mediation process.

Like Consigny, William Benoit argues that rhetorical discourse is determined by the situation and by the rhetor, rather than one or the other. After carefully examining Bitzer and Vatz’s theories, Benoit concludes that, “it is a mistake to limit one’s view of rhetoric to any single element, whether it be the situation, the rhetor, the rhetor’s purpose or any other component” (348). Benoit finds a more flexible explanation of rhetorical situation in Burke’s notion of symbolic action and Burke’s description of how rhetoric is motivated through the “ratios” of the elements in a “pentad” (353). Burke’s pentad is five key terms that work in relation to each other.

are listed as follows: Act, Scene, Agent, Agency, and Purpose. Benoit argues that Burke’s theory of motivation for rhetorical discourse has enough flexibility to take into account all the situations that are exceptions to either Bitzer’s or Vatz’s extreme positions. Benoit uses Burke’s pentad as a heuristic device “locating the elements present within the rhetorical situation” (349). The situation is, therefore, broken down into parts that can be considered discreetly by the rhetor.

My research shows that these theories of rhetorical situation do not take into account the unique situation in mediation. Currently, theories of rhetorical situation focus on single situational events, whereas in mediation there are two related situations going on at the same time. The second rhetorical situation, co-created by the mediators, the disputants and the mediation process, is itself rhetorical. That is, in a mediation, rhetorical situation itself can be used as a rhetorical device. In the situational theories I have surveyed, the rhetor is obliged to have integrity, but in mediation the mediator as rhetor is also obliged to be neutral and impartial. It is critical to the integrity of the mediation process to understand to what extent the resolution is dependent upon the choices the disputants make on their own behalf and to what extent disputants are compelled to resolve their conflicts or to create certain kinds of resolutions.

A theory of rhetorical situation describing the mediation process would have to recognize the mutability of the rhetorical situation during dialog. And because the mediation process is equally committed to promoting open dialog that does not require compromise or even necessarily a resolution, a situational theory appropriate
for mediation must also include the philosophical principles of gaining adherence and identification.

Therefore, I would amend rhetorical situation theory to say that 1) there may be more than one rhetorical situation involved in a given discourse at one time, 2) it is possible for a rhetor to develop a rhetorical situation as a rhetorical device, 3) the purpose of rhetorical discourse produced from a rhetorical situation can be ongoing and unrestricted dialog, and 4) a critical constraint of the rhetorical situation is the extent to which participants feel empowered to author their own resolutions. This implies both a shift in the quality and application of the theory of rhetorical situation, which may have implications for other rhetorical experiences beyond mediation.

In Chapter Two I will describe my research methodology and show how I propose to use the transcripts from my interviews and mock mediation to answer my research questions. I will also explore the ethical considerations underlying my method of research, and the special challenges inherent in being part of the community I am researching. In Chapter Three I will argue that there are constraints defining the rhetorical situation in mediation revealed in four metaphorical perspectives. I will use the notion of bridge as a metaphor to begin unpacking the qualities that describe the human dimension of mediation. Then I will use three other perspectives, space, argument, and politics, to flesh out the particular rhetoric of mediation. In Chapter Four I will use the descriptions from the previous chapter to analyze transcripts from four interviews with practicing mediators and one video taped mock mediation session. From that analysis, I identify eleven constraints
specific to a secondary rhetorical situation. Those constraints support a secondary exigence having to do with poor communication, they re-define good communication, and provide a forum in which conciliatory rhetoric is appropriate and valued.

In Chapter Five I summarize the conclusions from my analysis and discuss the implications of using a rhetorical system for peace making. I also explore the practical application of rhetorical situation as a rhetorical device outside of mediation. The questions I ask are how situation theory functions for participants in a mediation, and whether the broader understanding of situation theory can be applied to less artificial contexts than mediation.
CHAPTER TWO
RESEARCH METHODOLOGY: JUSTIFICATION FOR TESTING MY HYPOTHESIS USING QUALITATIVE FOCUSED INTERVIEWS AND A VIDEO TAPED MOCK MEDIATION

During the entire session, the mediator remains in a responsive posture. When he makes a move, he does not know what his next move will be.

The Promise of Mediation

The reason for developing a research model including the perspectives of mediators is that mediation is a living process; it is a unique experience for all the participants every time. The rhetoric is shaped to a significant extent by the particular participants and the unique circumstances of each mediation. As Bush and Folger’s approach quoted at the top of this section indicates, the mediators’ “moves” that are meant to take disputants through the mediation are distinctly reactive in nature (193). Mediation is a fluid process that requires the researcher to recognize the relevant human dimension informing the rhetorical, situational and mediation theories. Furthermore, like many researchers, I am interested in finding “practical” applications of the theories I critique. How they play out in “real life” tests and challenges our hypotheses in unpredictable ways. To pursue a significant contribution to scholarship and practitioners in the fields of rhetoric and mediation, my research requires me to include the complicating and often contradictory effects of people experiencing the interplay of rhetorical situations in mediation. In this section I will discuss my rationale for conducting a qualitative focused interview study of practicing volunteer mediation and one case study.
EXPLANATION OF MY RESEARCH METHODOLOGY

In the interviews and case study I depart from the work of rhetorical scholars, mediation theorists and even my own experiences. I chose to conduct a qualitative focused interview study as it is defined by Merton, Lowenthal and Kendall in, *The Focused Interview: A Manual of Problems and Procedures*. Coming from the social sciences, they distinguish a focused interview from other types of ethnographic research with four criteria: 1) the interviewees have all been involved in a "particular situation," 2) this situation has been "provisionally analyzed," 3) a set of hypotheses has been derived from the analysis by which an interview guide is written, and, 4) "the interview is focused on the subjective experiences of persons exposed to the pre-analyzed situation in an effort to ascertain their definitions of the situation" (3). The authors go on to explain that these interviews "give rise to fresh hypotheses" because the interviews may create "unanticipated responses" (4). This definition accurately describes the criteria for my interviews. Having hypothesized a definition for rhetorical situation in a community mediation context, I solicited interview subjects who have been involved in mediation as volunteer mediators. I too have been a mediator for over eight years, during which time I have "provisionally analyzed" the field and created a set of hypotheses that guided my interview questions. I used the transcripts from the interviews to ascertain the interviewees' definitions of their experiences, and those descriptions gave rise to a new understanding of the way mediation is made to work.
Robert Weiss’ *Learning From Strangers* defines focused qualitative interviews in a way that suited my purposes better than other possible research methods because he promotes an explorative style that is flexible enough to change as new information is gathered. According to Weiss, qualitative interviews can be used for “developing detailed descriptions ... integrating multiple perspectives ... describing process ... learning how events are interpreted ... bridging intersubjectivities ... [and] identifying variables” (9-10). In the interviews I tried to cast a wide enough net to gather nuances of the mediation experience beyond my preconceived notions of what I might learn.

Because my purpose was to gather sample experiences from an infinite number of possible experiences, I used a sampling technique called “statistically nonrepresentative stratified sampling” described by sociologist Jan Trost for small-sample qualitative studies. In contrast to other sampling techniques that either choose respondents to compare and contrast as the study progresses, i.e. constant comparison, or use respondents to refer the researcher to other respondents, i.e. “snowball,” Trost describes a method for choosing respondents that follows seven steps based on the relevant independent variables (55). The four independent variables I chose for my focused interview study were 1) gender; 2) ethnicity (minority or Euro); 3) experience (secondary or primary); and 4) mediation style (transformative or evaluative). Except for gender, the dichotomies are arbitrary. By using Trost’s technique, I was able to derive a sample with variations along these independent variables. Of my four interview subjects, two are women, three are
experienced mediators (primary status), and three consider their style more transformative than evaluative. In the mock mediation, both mediators are men, one is a minority, and both are experienced. One disputant is a woman and one is a man. Neither disputant had ever mediated before.

In the interviews, I gathered mediators’ subjective experiences of mediation experiences in order to challenge or advance my hypotheses that the mediator’s role and the mediator’s intention are key factors in the analysis of rhetorical situations in mediation. My interview guide focused their interviews specifically on their actual experiences while at the same time it allowed the subject to divert the interview towards unanticipated responses (see appendix A). Dean Hammer and Aaron Wildavsky (1993) contributed a chapter to a collection titled The Open-Ended, Semistructured Interview, in which they explore the peculiarities of this kind of interviewing, which requires a lot of flexibility and revision. My own experience conducting interviews confirms their description that “everything is provisional” (57). Hammer and Wildavsky warn new interviewers that “interviewing without much structure or closure is an extremely uncertain business . . . because no specific move can cover over the inherent uncertainties of brief, asymmetrical, mixed-motive encounters” (59). Weiss also emphasizes the need for flexibility during an interview. He advises that “the interviewer should be prepared to drop the guide entirely if the interview takes an unexpected direction” (51). With these three models, I constructed a semi-structured interview guide that combined open-ended questions asking for the respondents to recall their past experiences in a mediation and some more focused
kinds of questions that asked respondents to comment directly on their roles as mediators, their possible influence on the disputants during a mediation, and their mediation philosophies.

Because there is a strict ethic of confidentiality concerning researching and/or recording actual mediations, my research was necessarily restricted. For example, the questions guiding the interview part of my research do not ask for specific details about the disputants or the cases in order to assure confidentiality. Instead, I asked respondents to focus on their own experiences. Likewise, my case study does not record an actual mediation case but is instead a study of a mock mediation. Mock sessions are familiar to mediators because they are used extensively in mediation training. They are also used as part of the testing for mediation certification. In a typical mediation training course, students will be assigned roles as either mediators or disputants for several mock sessions. The students acting as disputants will be given brief scripts that describe their histories, what brought them to mediation, and their emotional states. The students acting as mediators will also be given a little information about the case like the names of the disputants, their professions, and some information about the type of conflict. The group of student disputants and mediators is then supervised by a trainer as they go through the mediation process. Their performance is evaluated at the end of the session. At the local mediation center where the two mediators who participated in my research were trained, these mock sessions are called "role plays." Role plays are generally considered "real" enough by the mediation community to give mediation students practice developing
their skills. They are not, however, entirely realistic because the students acting as disputants tend to be either more or less passionate than actual disputants. Also, because the students acting as disputants are familiar with mediation, they sometimes act differently than would disputants unfamiliar with the mediation process.

I have experienced two training sessions at different community mediation programs where I participated in six mock mediation sessions as a student. I have also coached as other students performed mock mediations in two different training sessions. In comparing my mock mediation experiences with my eleven years' experience mediating actual cases, I find that the difference between mock and real is difficult to pinpoint. The main difference seems to reside with the disputants rather than with the mediators. (At Our Town Community Mediation mediators work in pairs). Actual disputants tend to be affected more profoundly by hidden agendas than student actors are able to simulate. The mediators' role, on the other hand, is to act as neutrally as possible and to listen as carefully as possible. Their performance and engagement is, therefore, very much the same regardless of whether or not they are in a mock mediation or an actual mediation.

The mock mediation I video taped for my research was based on the training model at my mediation center, with a few exceptions that were intended to improve the authenticity of the experience. The mediators who volunteered to be video taped were not student mediators. One had four years of experience; the other over ten years of experience. The disputants in the mock mediation were also not student mediators. They had never participated in a mediation before. Also, the people
acting as disputants in the mock mediation were given a much more comprehensive
description of their characters' histories, conflict, and emotional states than student
mediators are typically given. This information was given to the actors three weeks
prior to the mock session, so that they had time to become familiar enough with the
material not to need to bring their scripts to the session. Using trained, experienced
mediators and disputant actors unfamiliar with mediation made the mock mediation
more like an actual mediation than the training model.

After the session, the participants debriefed in a post-mediation processing
session. At that time, the participants assessed the authenticity of their experience.
Although the disputants felt they got into their roles, the mediators thought the
disputants were more amicable than is typical. One mediator commented, “It was
atypical in that, the amount of openness. There was a lot of openness” (G 296). The
other agreed, “To some degree it was a role play, and what I mean by that is their
real emotions weren’t there . . .” (G 297). The disputants were somewhat surprised.
The actor playing the role of Betty said, “So that’s atypical to have that sort of
openness?” (G 296). The mediators explained that disputants usually come to the
mediation more “dug in” to their positions then were the actors playing Betty and
Carl. It is interesting to note that the intensity of emotions in a conflict was
underestimated by the people acting as disputants. In my experience, this is
consistent with other role plays I’ve either witnessed or participated in. In actual
conflicts, intense emotions are common.
Still, the mediators in the mock mediation session both talked about being familiar with real disputants who were as cooperative. One explained, “But it happens, and sometimes it happens later on. Sometimes there’s a turning point where, I mean, they’re sparked by all sorts of different things” (G 296). The other agrees, “In fact, I’ve seen it more than once, especially in situations like this. After you see the person as a human being as opposed to an object . . . . It’s happened more than one time where the guy goes, ‘let me like take her under my wing.’ Especially when you get to talk about, you know, the husband, the divorce . . . .” (G 294). So although the level of cooperation and openness was unusual for a real mediation, it was not beyond the experience of the mediators.

Before the disputants were brought in to the mock mediation, the mediators were given a very brief “intake information” sheet (see Appendix H). At the community center where the mediators were trained, they are given intake information a half hour or so before they mediate. The mediators participating in the mock mediation were given a similar but more succinct information sheet to read and discuss. A typical information sheet includes disputants’ names, occupations, and the type of conflict. Before a mediation, a staff person, who is also a trained mediator, speaks to disputants over the phone and helps them to decide if a mediation is appropriate for them. Information from their conversations is recorded on an intake form and handed to the mediators when they arrive to mediate.

Mediators who have not mediated together before, as was the case with these two volunteers, also typically use the time before a mediation to get to know each
other's mediation styles, preferences and philosophies. The two mediators participating in the mock mediation were seated next to a recorder and left alone for a half hour to do pre-processing work in any way they felt necessary.

I chose two mediators who were not part of my interview study to mediate the mock mediation. Both are male. Both are experienced mediators, and one is an ethnic minority. Both mediators use a transformative style of mediation. The purpose of recording the mock mediation was to create a transcript typical of mediation as it is practiced at the community mediation center. These particular mediators were chosen to represent volunteer community mediators who use a transformative style. I relied on my experience as a mediator and the advice and expertise of the Our Town community Mediation Program director, as well as on the advice of the mediators I chose, to construct a mock mediation that could be useful as a model for a typical community mediation. The disputants in the mock mediation were not mediators, nor had either one ever participated in a mediation before, as is typical in most community mediation cases. One disputant was male, the other female.

My case study methodology is informed by Robert Yin's *Case Study Research: Design and Methods*. Along with taping a mock mediation, I also recorded the pre-mediation processing between the co-mediators and a post processing meeting with the co-mediators, the subjects acting as disputants, and me. These two conversations reflected upon and analyzed the mock mediation and were
extremely helpful in my overall analysis. The participants’ viewpoints provided an opportunity to expose my hypothesis to possible alternative perspectives (Yin 142).

I also conducted a two hour in-service training at the community mediation center where I welcomed other mediators’ responses to my analysis of the data from the mock mediation data. Sixteen volunteer mediators attended the in-service meeting. I described my research and shared my analysis. I took down all the various comments and perspectives from the mediators and carefully considered how their views affected my hypothesis. Two participants from my research were in attendance at that meeting. All the participants of my study were given drafts of the analysis chapter for comment which proved helpful as I revised.

JUSTIFICATION FOR CHOOSING COMMUNITY MEDIATION

My research focuses on community mediation for two reasons. First, this kind of mediation reflects a political agenda that I am exploring in this work: the potential of rhetoric to create peaceful resolutions to conflict. Second, my association with community mediation over the past eleven years gives me a valuable perspective as participant and researcher.

I chose to work with one community mediation center rather than sampling practices from across the country. Although this affects the generalizability of my research to some extent, the Our Town is statistically and philosophically a typical program. The National Association for Community Mediation publishes a yearly membership directory, which I surveyed for 1998 to gauge where the mediation
program I chose to study fell compared to community mediation programs across the United States. The NACM membership directory lists community mediation centers from 44 states including the District of Columbia with one to thirty-three community mediation centers in each state. I randomly chose one community mediation center from each state to compare on the basis of four criteria: number of staff, number of volunteers, size of budget, and measure of mediation training for their communities. On average, the community mediation centers I surveyed had four staff members (3.98), and 55 volunteers (55.46). A simple majority conduct mediator training; 22 do, compared with 15 that do not train (5 centers not indicating either way). The range for number of volunteers was from 6 to 372, but more than half the centers listed 55 volunteers. Of those who listed their budget (32), four centers spend less than $50,000 a year; 19 spend between $50,000 and $150,000; four spend between $150,000 and $300,000; and three spend over $300,000 a year.

Our Town falls within the average in every category. It employs five staff members, 60 volunteers, offers mediation training, and has a $150,000 annual budget. Although an “average” center is not by definition representative of all mediation centers, it is important to note that the mediation center I used is not anomalous in its structure or personnel compared to other community mediation centers.

More relevant to my study are the training materials used by community mediation programs that train volunteers. In this respect, the mediation center in my study is also an “average” center. The transformational style it practices is typical
for community mediation centers. My most compelling reason for sampling subjects from one mediation center is that each of my interview subjects has been trained using the same training materials and the same teachers. Therefore, differences in their understanding of mediation will more likely reflect their own personal perspectives than different training philosophies. In this way, I can control the training variable and sample different personal experiences, rather than gather extraneous data on the effects of different training philosophies and materials.

METHOD FOR ANALYZING DATA

A community mediation program may strive to unify its philosophy in its training materials, but the program has much less control over how its training will be interpreted and how it will be practiced. One of the respondents interviewed is the program manager of a community mediation center. In the interview, this respondent described being frustrated with a co-mediator who was not following her training in practice. The manager disagreed with his co-mediator about the pace of the process. He believed his co-mediator was too eager to settle a conflict before the details of the conflict were thoroughly discussed:

[My co-mediator] heard one thing from one person and it triggered to her what a great idea was going to be and so she said it to them and they kind of half heartedly nodded, it was like, “Oh! we have a great agreement!” ((laughs)) But whose issue was this here? It was very frustrating for me. I don’t believe in that at all. I think our tendency in society in general is to jump to solutions without really hearing the problem first. So if somebody comes to you and says, “I’m frustrated about this” and you say, “Oh great, well we’l just take care of that!” And you haven’t really understood why they were concerned. You haven’t gotten to the interest. So, it’s frustrating for me. for a mediator to do that because I think that’s what all of our training
is, is wait a minute, let’s make sure we hear each other out. Let’s make sure we get to the interests so that way when we start talking about solutions we really are making up ones that are meeting peoples’ needs. So to hear a mediator do the opposite of that was very frustrating for me. At least that’s what I see my role as being. (B 195)

This transcript excerpt describes an experienced mediator apparently choosing to disregard a relatively fundamental principle of mediation and even ignoring the stages in the mediation process. What is particularly interesting, however, is that the program manager is merely “frustrated” with his co-mediator’s interpretation of the process. He is not, as one might expect, particularly surprised or appalled by his co-mediator’s interpretation of the mediation process. The manager explains that his strategy for keeping the mediation on track was to “use her name and say, I’m not very comfortable going there right now; can I explore this a little bit more first?” The mediation was then allowed to continue without interruption. The co-mediator continued conducting other mediations without being formally retrained. This example points out the danger of assuming that mediation theory is necessarily always mediation practice.

I used a clustering technique described by Matthew Miles and A. Huberman in Qualitative Data Analysis to analyze the data from my interviews as. They outline thirteen steps in the process of “drawing and verifying conclusions,” which are as follows: 1) noting patterns and themes, 2) seeing plausibility, 3) clustering, 4) making metaphors, 5) counting, 6) making contrasts/comparisons, 7) partitioning variables, 8) subsuming particulars into the general, 9) factoring, 10) noting relations between variables, 11) finding intervening variables, 12) building a logical chain of
evidence, and 13) making conceptual/theoretical coherence (245-6). Although they describe this process as "verifying conclusions," (245) it does not necessarily lead to conclusive statements as much as "theoretical coherence." That latter goal is more appropriate for my purposes.

Sonja Foss summarizes Burke's description of Cluster Criticism in Rhetorical Criticism (65-6). In her summary, the analysis of data is done in three steps that correlate to the Miles and Huberman process. First the researcher identifies key terms on the basis of frequency or intensity. Second, she "charts the clusters" according to their proximity, and third, she "attempts to find patterns" (66). For example, in my transcripts I noted the frequency of the terms *communicate*, *communication*, *understand*, *listen*, and *hear*. I clustered these terms under the conceptual heading of communication and found that these terms were used by mediators when they described their responsibility to the disputants. In other words, they felt their role was to encourage these kinds of behaviors in the disputants.

**ETHICAL CONSIDERATIONS**

In this study I was limited by the mediation program's rules of confidentiality, which are typical of community mediation programs in general. The program issues a confidentiality and reporting statement meant to be delivered at the beginning of mediations. The statement raises the issue of confidentiality and assures disputants that the program is obligated to keep their case as confidential as is legally possible:
Mediation is a confidential process within certain limits. Nothing disclosed in this mediation session will be reported to any outside party by the mediation program unless it meets the following criteria: if we as mediators were to become aware of a reportable incident of child abuse or neglect, or the abuse or neglect of an elderly or incapacitated adult, or we were to become concerned about imminent danger to self or others based on threatened or actual violence witnessed, we would be required to seek appropriate intervention services. (Our Town)

Mediators cannot be called as witnesses in court. Besides this formal statement that promises mediators will not report to "outside parties," the information in disputants' cases is protected by the mediator's ethical obligation not to discuss the cases in any way that might make it possible for the disputants or their case to be recognized.

When I asked one respondent, "What do you tell [disputants] about confidentiality?"

He summarized his position like this:

That everything in the room is confidential, will remain confidential. I won't be sharing anything that I learned there with anybody, including my wife, and I ask them to do the same thing. And then I also mention, especially in cases where the reality is that they'll probably go on to court if they don't reach a resolution, I mention to them that there's a statute that says that I can't be subpoenaed, that nothing mentioned within the mediation including offers to settle that case can be brought in... even if you're not associating names, if it's something that will get a lot of press, and then you know people will put one and one together. You have to be careful about that as a mediator. I mean, it's an ethical duty: you have to be careful about that. (D 227)

Tape recording, videotaping, or observing mediations for research would breach this promise. Since the disputants are generally new to the mediation process, any degree to which they wonder how their performance is being interpreted by the researcher could easily become distracting and detrimental to the process. Besides the potentially disruptive effect a researcher could have in a mediation by causing disputants to become overly self conscious, research that intrudes in the mediation
process sets up a precedent for any possible outside party who has a stake in the proceeding to influence the outcome.

The assurance of confidentiality is key to a mediation process asking disputants to speak openly and honestly. Because mediators believe that disputants must often risk vulnerability to engage in discourse that will give them the best chance at a resolution, mediators are ethically obligated to assure them that their vulnerability will not be used against them later. In other words, it may be quite helpful in a mediation for a disputant to admit to wrongdoing in order to build common ground and trust with the other disputant. That particular admission might have harmed their case in court where they are obligated to protect themselves. The alternative rhetorical situation offered by mediation allows disputants safety in some amount of vulnerability. Any threat to confidentiality erodes the possibility of creating a safe alternative rhetorical situation and, therefore, the possibility of a mediation.

Assuring confidentiality justifies the need for strict limitations on research in mediation. Although other researchers have negotiated with mediation programs in order to record actual mediations (Bush and Folger, Felstiner, Jacobs), as a mediator myself, I agree with my own mediation program's resolve not to allow research that will intrude into mediations. Trust is both key to the process and extremely fragile. The added and unexpected burden of asking disputants to agree to be researched compounds tensions and threatens the balance of trust among all the participants. An attempt to research mediations at this particular mediation program failed five years
ago when the disputants began to request transcripts of their mediation to use in their own court defenses. The community mediation program had to rescind its agreement to help with the research. For my mock mediation case study, I chose a typical scenario, but it was not based on an actual case.

A second ethical issue involved in my research design concerned impartiality. Impartiality and confidentiality are the two most pressing ethical demands on a community mediation volunteers. Impartiality refers specifically to the mediator’s interest in the outcome of the mediation. It is much more difficult to define and to maintain that confidentiality since there is an inherent contradiction in the obligation. Not only are community mediators obliged not to “care” how a conflict will be resolved, there is a definite tension surrounding whether or not they should “care” if the conflict is resolved. These two issues are similar but distinct enough to be dealt with separately. It may be impossible to ask a mediator not to “care” emotionally. Ideally, they should not become invested in the dispute enough to favor some possible solutions over others. Showing any kind of favoritism to a particular solution damages the mediation in two ways: It damages the mediator’s ethos as a neutral third party, which then risks the mediator’s being drawn into the dispute, and it threatens the disputants’ sense of their own investment in a solution. The second issue, which I have described as not “caring” if the conflict is resolved, is also not actually a matter of disengaging emotionally from the conflict, though ideally the mediator should not be so invested in helping the disputants to produce an agreement
that she finds herself encouraging solutions. To encourage a solution could again compromise the mediation in the two ways already described.

Mediators generally find it easier to remain impartial about how the conflict gets resolved than if the conflict gets resolved. While they may see the contradictions inherent in making suggestions or encouraging particular solutions and still maintaining a neutral posture, this awareness does not necessarily carry over to their desire for an agreement to be reached. The dilemma is one in which the mediator is obligated to persuade disputants to engage in a process that is meant to give them the best possible chance for resolution without necessarily promoting resolution. As one respondent put it, "I am an advocate for the process." This idea conflicts with the fact that mediators are trained to believe that resolution is always possible, and that it is often darkest before dawn. Often, the co-mediators are the only people in the mediation who believe a resolution is possible. They must maintain that position in the face of seemingly unresolvable conflict in order for the process to continue. When asked about his definition of success, one respondent recognized the conflicted nature of impartiality in his response. He is describing a case in which neighbors need to negotiate water rights.

RESPONDENT: Whether or not they talked to each other as neighbors or not, that’s an added bonus, but the real issue to me was keeping them out of the courts and allowing them to use this water in a way that they wouldn’t waste it and everybody would have an equal portion of it. That to me was the important thing.

INT: Some people say that, well, because I gave them a chance to talk to each other I feel like I did a good job. Some people take that kind of approach (.) ((respondent shakes his head)) That doesn’t wash with you?
RESPONDENT: For me to think I did a good job. That's a different story. There's a difference between having a successful mediation and doing a good job as a mediator. To me, if I stay neutral, I allow the parties to share all their information, I ask good questions, I bring issues out on the table so it's out there for everybody to see. For me, I did a good job, and if they don't settle it's not my fault; you know it's not my fault. I did a good job. On the other hand a successful mediation to me is when the people resolve their problem, you know? To me that's the best. If I do a good job, I'm happy. I'm happier if the people leave there with some sort of resolution. And a lot of mediators say that's not it. If you do the process well, you have a successful mediation. That's great for them if they believe that. I don't believe that. (D 231)

Obviously, mediators must decide for themselves to what extent the process requires them to remain positive about the possibility of a resolution and to what extent the process requires them to allow for the possibility that a resolution (in the form of an agreement) is not appropriate or is unlikely. Regardless of how this distinction is made, mediators are typically sensitive to the dissonance inherent in the concept of impartiality. The ideal, remaining completely impartial, is usually defined in the injunction, "do not influence the disputants."

But since my study of the rhetorical situation in mediation requires an understanding of how mediators create and/or react to situation in a mediation, I must ask respondents how they are influencing mediations. Because some mediators believe they should not be influencing mediations at all, they find themselves uncomfortable answering that question. It is as if my questions are asking them to betray themselves and admit fault. I found that I needed to bring up the issue of influence directly during the interviews and redefine it so that the respondents do not feel accused or attacked. I framed the issue by making a statement to the effect that,
since disputants were unable to communicate productively outside of mediation, the process must be offering them something different that enables them communicate.

CHALLENGES TO STUDYING MEDIATION AS A MEDIATOR

Because I am a mediator myself, my interviews were conducted from the position of an insider. Although this is not an ethnographic study, Beverly Moss' essay, "Ethnography and Composition: Studying Language at Home," describes the advantages and disadvantages of doing research in a setting where you are a member of the community. Being a mediator means that I have a good idea of what kinds of information I might find, and it means that my hypothesis that rhetorical situation plays a significant role in mediation is very likely to be accurate. However, I did not begin my research knowing how situation is used in mediation. I cooperated with my research subjects to describe a phenomenon peculiar to a method of communication that we share. In this way, a kind of peer/colleague relationship existed between my subjects and me. In my interviews I presented my hypothesis to the subjects and recorded their appraisal of my tentative conclusions. We were in a sense doing the research together. I was and am still in a conversation with the other members of this particular discourse community. I have used my interviews, mock mediation, and in-service work-shop to create a special discourse community for myself apart from the scholarly community of the academy.

One challenge that Moss describes is the paradoxical position of having to make the "familiar strange." While in the analysis of most kinds of research, the
researcher is challenged to make the strange seem familiar to her readers; when a researcher is part of the community she is analyzing, she is challenged to make the familiar strange, in order to question knowledge taken for granted. Moss uses the observations from the Arab anthropologist Seteney Shami to describe this shift in perspective. Shami recognized that as a member of the community she was studying she risked “dismissing what they were telling me as somehow not being data, because it was not new” (163). I must be careful to guard against glossing over what seems obvious and making unwarranted assumptions. In preparing for the interviews I asked myself what I might be assuming or expecting? Could I be mistaken? Do I tend to overemphasize what seems out of the ordinary, rather than notice common patterns?

Besides those possible pitfalls, I noticed that my relationship with my respondents interfered in a way I had not expected. My respondents seemed to feel split at times between two audiences, my readers and me. This happened in my early interviews before I understood what was happening. One respondent in particular had this problem. When my questions seemed to be asking for basic information that the respondent assumed I should already know, she imagined herself “teaching” my readers in her responses. For example, when I asked, “when you got there to mediate, what did you do?” The respondent, thinking that I must already know what a mediator “does” when she arrives to mediate, took on a teaching persona for the absent audience that might someday read her transcript. Her response was unnecessarily detailed for our conversation:
Well, usually I come to the door. If it's after five, I get rung into the door. I press the bell, they let you in, and I come into the office and they have the cases stacked up that I will mediate. (C 209)

In this excerpt the respondent is teaching an uniformed reader. One might argue that it would be ideal for my respondents to pretend I didn’t know anything about mediation, but in fact, this kind of response felt awkward and elicited a different kind of information than I was looking for. This kind of response is an answer to the question, “How do mediators think the mediation process works?” rather than my question, “How did a mediation process work for you, the mediator?” In my question, the analysis is separated out of the experience. I averted the problem of multiple audiences in later interviews by being more conversational with my respondents so that it was clear I was their primary audience for the interview. I was also more careful to emphasize that I wanted them to describe a particular experience. Finally, as I interviewed I kept in mind Hammer and Wildavsky’s caution that “interviews are good for setting up, not solving, a research problem” (94).

In the next chapter, I will explore the complexity of rhetorical discourse in mediation by surveying what is currently understood about the process. In order to convey the multi-dimensional characteristic of mediation, I have chosen five lenses with which to examine it. I use (1) metaphor, (2) argument, (3) transformative theory, (4) space, and (5) political theory to organize a rich and complex definition of the rhetorics of mediation. Each lens attempts to capture some essential element of mediation that is re-defined in a discussion of my research in Chapter Four.
CHAPTER THREE
UNDERSTANDING THE RHETORICS OF MEDIATION

Literally, for two years now, I have dreamed of a bridge... In the dream, I am always met at the river.

--Cherrie Moraga, This Bridge Called My Back

In this chapter I will analyze mediation from four perspectives: metaphorical, argumentative, spacial, and political. Each view highlights a particular aspect of mediation and of rhetorical situation that will provide the groundwork for the analysis of my research. I will use these perspectives to explore the known complexities of mediation rhetoric, which I will re-define in the next chapter through an analysis of my research. First, mediation is a dynamic process taking into account the variability of human interaction. To appreciate fully the implications of my research, it is necessary to understand that underlying principles of respect, impartiality and neutrality have as much influence on the mediation process as the procedural structure. Metaphor is useful for discussing subtleties in human exchanges. Second, argument has been an integral part of the history and development of mediation. For example, questions like "Are the disputants having an argument?" and "How can an argument be settled by a win-win resolution?" go to the heart of the transformative style of mediation usually preferred at community mediation centers. Third, physical and metaphorical space is critical to the mediation process because disputants are placed in a neutral territory and given the time, or "emotional space" to speak without interruption. The concept of rhetorical
situation also implies that circumstance and place play important roles in its definition. And fourth, as a public human enterprise, mediation is by definition a political process, depending on the rules, laws and endoxa that govern society. Under this topic I will continue to use Chaim Perelman and like minded theorists to draw out the larger political implications of using alternative means to resolve conflicts. Specifically, I will argue that mediation is an effective use of rhetorical situation offering a conflict resolution process that satisfies humanitarian and ethical principles of democracy and cooperation.

BRIDGING CONFLICTS

Mediation is a complex and dynamic process necessarily depending on the disputants for much of its structure. The relationship among the participants in a mediation is critical to the success of a mediation. By definition, mediators work under the barest of guidelines: to ask disputants to explain their situation, articulate what they want, and consider what they are willing to do. Mediators are described as taking a "responsive posture," in which they "[follow] the parties around" as they explore and clarify their options, challenge each other's views, and consider possible points of settlement" (Bush 193). At points, they step into the discourse, like a referee at a boxing match pulling apart a clinch, then telling the boxers to continue their match. Like a referee, the mediator has set up the rules and then reacts to the disputants' behaviors. Of the many possible metaphors that might be used to describe the relationship among the mediators and the disputants, I find that the
metaphor of a bridge, while not perfect, offers a way to look at the essential emotional aspects of the interaction. Every stage and every element in the mediation process works to connect disputants to each other on an emotional level and help them understand each other as fully human and complex and not just as the opponent. Every aspect of the mediation process is intended to aid communication by opening as many channels as possible for the participants to speak and be heard. Searching for common ground, creating a community of minds among the participants, in other words enabling identification, is critical in mediation. Acting as a bridge between the disputants, the mediator affords them the opportunity to communicate while strategically permitting acceptable communication. In this way, the mediators and disputants co-create the secondary rhetorical situation.

A bridge spans between two shores, and because of it, the shores are connected. Likewise, the mediator intervenes between disputants, then helps them to connect (communicate) through productive, rhetorical discourse, whereas before there had been either accusations or silence. One could describe the mediator as a pathway for the disputants’ communication. Just as the sides of the bridge make a barrier to keep the traveler on track, the mediator uses the guidelines of the process to provide a structure for the disputants’ communication. The disputants can use the mediator to deliver messages to each other — to reach each other. The mediator is herself like a bridge, and the rhetorical exchanges among all the participants are strategically constructed to become bridges. Even the experience of a mediation —
the seating, introductions, opening statements, and so forth -- in addition to the mediators and the discourse, works to bridge the disputants' positions.

For further discussion of rhetorical discourse as a bridge, we can turn to Henry Johnstone Jr. and Mari Lee Mifsud's article, "Wedge and Bridge: A Note on Rhetoric as Distinction and as Identification," which argues that a complete rhetorical transaction acts simultaneously as distinction, a "wedge," and as identification, a "bridge." As a wedge, rhetoric reveals the problem, and as a bridge, rhetoric makes possible a decision about the problem. These images work well to describe the dual purpose of a mediator's rhetoric. In mediation, the mediator will use rhetoric to "call attention to hitherto unnoticed consequences or assumptions" (Johnston 75) and is therefore a kind of wedge. But at the same time, the mediator's intention is to use rhetoric that "appeals to the identification of 'like' consciousness" (Johnston 76) between disputants, bringing two disparate positions closer together, therefore acting as a bridge.

A discussion of the mediator as a bridge between disputants must take into consideration the mediator's obligation to be neutral and impartial. Neutrality in this context has two interrelated meanings: first the mediators have nothing to gain personally from any particular resolution, and second, they are not committed to finding a resolution. Impartiality requires the mediators not to favor, or even seem to favor, one party over the other. These two obligations are at the heart of what makes a mediator act more as a bridge than a judge or jury. Even more to point, the mediator must appear neutral and impartial, so the disputants feel as though they
alone are responsible for their resolution. Maintaining the disputants' authority is key to producing a resolution that will be successful in the long term. The extent to which that ideal can be realized is debated among mediators. Nevertheless, the neutrality and impartiality of the mediator are the hallmarks of mediation that set it apart from arbitration, counseling, or other forms of dispute resolution.

As we know, even as a bridge connects two shores, the bridge is not like either shore. For its purpose, the bridge needs to be something different from the shores, made of different material. Furthermore, the bridge does not have to become like the shores in order to connect them. One might even say that the bridge shouldn't be shore-like at all. And so it is with the mediator. A mediator does not take on the role of either disputant, and does not attempt to become a third disputant. The mediator must remain an outside element, with the intention to be neutral. In Christopher Moore's definition of the mediator and the mediation process, he emphasizes that the mediator cannot be directly involved in the dispute. He writes that the mediator's presence as an outsider to the dispute "is a critical factor in conflict management and resolution, for it is the participation of an outsider that frequently provides parties with new perspectives on the issues dividing them..." (Moore 15). Mediation theory's fundamental assumption is that the disputants' sole ownership and authorship of a resolution is key to creating resolutions that will work.

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well and last over time. The reasoning here is that the disputants must be responsible for their resolution and also know that they and they alone are responsible, because a sense of ownership will strengthen their commitment to follow through on the resolution.

To explore impartiality further, one can look at the relationships among the two shores and the bridge. The bridge may have to accommodate to the peculiarities of each shore: one may be higher, the other may be rockier. The shores can be bridged without being compromised. I choose the word "compromised" deliberately because it can also be used to describe the experience of the disputants in a mediation. Although disputants unfamiliar with mediation may not realize it, they are not going to be asked to compromise during their mediation. In fact, disputants are discouraged from making agreements that diminish or undermine their interests. This goal may seem ironic. The common sense assumption is that for opposing sides to agree, there must be compromise. This paradox is at the heart of mediation. The reason is that a compromise, that is, a decision to give in on one issue for the sake of some other issue, will not produce a resolution that has integrity. The philosophy in mediation is, instead, to work with disputants until they find that they can satisfy their interests in ways that are acceptable for everyone involved. The distinction between compromise and mutual satisfaction is significant although it is always at risk of being glossed over in mediation theory and during mediations.

For a more intimate discussion of what it means to act as a bridge, I offer Cherrie Moraga's personal narrative. She is a Chicana lesbian writer who
understands herself as a bridge between women of different races in a way that echoes the mediator’s role and the premise of the mediation process. Moraga and Gloria Anzaldúa edited a collection of writings titled, *This Bridge Called my Back: Writings by Radical Women of Color*. The quote that begins this section is from the preface written by Moraga. Moraga’s use of the bridge as metaphor reveals the emotional component at the heart of mediation. In her preface she describes the process of collecting the writings that make up the book as a journey of “struggle, growing consciousness, and subsequent politicization and vision as a woman of color” (Moraga xiii). Moraga compares her growing consciousness as a woman of color to her emerging sense that she is a bridge. Being a woman of color means that she is a bridge between white women and women of color.

As she reflects on what brought her to edit the collection, she understands that her role as a bridge seemed at first to set her apart from every one on either side. Moraga includes a poem titled “The Bridge Poem” by Donna Kate Rushin to explain this experience. Rushin writes, “I explain . . . /The white feminists to the Black church folks the Black church folks/ To the ex-hippies . . . / Then/I’ve got to explain myself/To everybody/I do more translating/Than the Gawdamn U.N. (xxi). To Rushin and Moraga the experience of being a bridge is, at first, painful and frustrating. Rushin continues, “I’m sick of filling in your gaps/Sick of being your insurance against/The isolation of your self-imposed limitations . . . (xxi). Moraga concurs that living in the space “in between” is tiring work. She writes, “I cannot continue to use my body to be walked over to make a connection . . . I have felt so
very dark: dark with anger, with silence, with the feeling of being walked over (xv).

In this passage she describes how the recognition of her Latina heritage made her feel more Latina or as she says, “dark” among white women. Communicating Latina women’s lives to white women made her feel “walked over.” Her growing realization of the distance between her and white women is disappointing and frustrating. Her attempt to be the one who helps both races know each other is overwhelming. In this description we can appreciate the hard work of mediation and the hard work of creating identification. In order to identify with each other, it would seem that we must question and discard defenses that are imbedded in our psyches. Mediations are often exhausting and frustrating for all the participants. The emotional component is not merely incidental to the process. It is essential to the process. Disputes are quite frankly hurtful. Ignoring the insults that have accompanied misunderstandings will produce a resolution with a weak foundation. On the other hand, a resolution that addresses what is disappointing, frustrating, or aggravating will begin to build trust, and trust will hold together the logistical details of the resolution.

Later, Moraga recognizes that she has been living under a “system of damage, intended to ensure [women’s] separation from other women, but particularly those we learned to see as most different from ourselves and therefore, most fearful” (xvi). She learns that her feeling of separateness stems from a society that has oppressed all women albeit in different degrees. Her new perspective shows her a way out of frustration. The society at large benefits from the fear that divides
her from other women. An awareness of this social context gives her the strength to challenge her fears. A parallel to mediation exists here too. Everywhere people suffer from the violence of our social structure, manifested in either physical attacks or in the devastating effects of silence and separation. Dissatisfaction with the alternatives to a peaceful resolution gives the mediator and the disputants a unifying perspective. Sometimes it is helpful for a mediator to point out to the disputants that outside forces may be damaging to everyone in the dispute. For example, poverty or an unresponsive health care system may have created a context for their conflict. Mediators may also point out that the conflict itself is hurtful to all parties, and so it is worthwhile to come to a resolution.

In the third section of her preface, "I have Dreamed of a Bridge," Moraga talks about having the faith to attempt connection. She writes, "But what I really want to write about is faith. That without faith, I'd dare not expose myself to the potential betrayal, rejection, and failure that lives throughout the first and last gesture of connection" (xviii). At this point for Moraga, being a bridge has changed its meaning from being used, or as she says, "walked over," to being enriched by the connections she has the faith to make. As a mediator, I depend very much on the belief that a connection is possible and worthwhile. That belief, conveyed to disputants, is often the only thing that keeps everyone in the room talking.

Moraga considers herself an activist. She describes what she calls an "activist faith" that inspires action, rather than a faith that waits for the future to reveal itself. She writes, "I am talking about believing that we have the power to
actually transform our experience, change our lives, save our lives” (xviii). Her activist faith gave her the inspiration and the courage to create a collection of writing. Her collection is part of what she calls a “total vision.” Her vision is “about intimacy, a desire for life between all of us, not settling for less than freedom even in the most private aspects of our lives” (xix). It seems to me that she is describing the faith necessary to mediate, and ultimately a faith in rhetoric. I would use her words to describe the vision that allows us to imagine mediation. Mediation responds to our desire for a “life between all of us.” She ends her preface with the words, “In the dream, I am always met at the river” (xix). In her dream she is not alone. She is met at the river by other women who will help her become the bridge. This image also captures the mediation process, which depends on a neutral third party to assist disputants in bridging their differences. The mediator is not working alone. Ideally all the participants share a common task.

The differences between what Moraga describes and what occurs in a mediation also help to characterize mediation. Moraga is a bridge that spans from herself and her own heritage to other women’s lives. A mediator is a bridge between two other lives. Moraga connects and is connected to what she touches. The mediator’s experience comes from witnessing the connections that are made between other people. The mediator’s responsibility to the disputants is both clear and complex. On the one hand mediators are taught that the process belongs to the disputants. On the other hand, mediators celebrate when we see evidence of communication, and we berate ourselves when mediations seem to “fail.”
The bridge as metaphor for mediation is imperfect in a few other critical ways. First, although the mediator helps disputants to "reach each other," a bridge is merely a pathway, and it does not change whatever is crossing over it. In contrast, the mediator translates or "re-frames" the communication passing between the disputants so that the language is less likely to offend, or so that commonalities or possible resolutions are revealed. Also, while it is important for the mediator to try to remain a neutral third party, she must be sensitive to the underlying emotional interests of the disputants so that she can draw those interests out. And thirdly, the definition of compromise may not be so cut and dried. While the ideal of mediation is not to produce a compromise, other cultural forces lead disputants to believe that compromise will either be inevitable or is the most ethical line to pursue. Therefore, disputants are likely to choose compromises even though they may not be necessary. Furthermore, resolutions may require disputants to change their positions in order to get their original interests met, and those changed positions may look like compromises. In some cases, disputants may voluntarily move to a new interest that would have otherwise been a compromise.\(^3\)

Furthermore, a bridge evokes an image of a straight, unswerving path while the mediator experiences conflict within her own position in three ways. First, the mediator is "in charge" of the flow of the process, and yet she is also led by the disputants. Second, the mediator advocates for the possibility of a resolution, but she

\(^3\) An "interest" is what a disputant wants to experience. For example, a neighbor does not want to be woken in the morning by a barking dog. A "position" is a disputant's solution. For example, they may want their neighbor to keep their barking dog indoors. Their position does not have to happen for their interests to be met. Their neighbor can find some other way to keep their dog quiet.
is also neutral. That is, she does not advocate for any particular resolution, nor does she hold out for the possibility of a resolution, she does not encourage the disputants to resolve their conflict after she is convinced that they do not want to resolve it. The mediator is obligated to take a skeptical or critical view of resolutions to help test for their soundness, practicality and integrity. Third, a mediator is impartial, that is, she does not take sides, but her role requires her to be sensitive to the disputants’ values. These tensions are what make the differences between an ideal mediation process and actual mediated. Because my research analyzes mediator’s views of themselves and their roles, it is worthwhile to look more closely at how it feels to be a mediator.

To summarize, the qualities of a bridge that make it an appropriate metaphor for mediation are that it comes in between in order to connect, that it is something separate from what it connects, that it is neutral, and that it does not require either side to compromise itself in order to be connected. Mediation is an experience designed in every way to give disputants the opportunity to engage in discourse that values identification and resolution. Although the metaphor is not perfect because it implies that the mediators have less influence than they actually do, it is broad enough to allow for other images appropriate to the experiences of mediators. In the next part of this chapter I will move from a metaphorical overview of mediation to an analysis of it from the perspective of argumentation.

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UNEXPECTED USES OF ARGUMENT

The discourse of mediation is argumentation. Ideally, the goal of dialog in a mediation is to elicit a change in the attitude or the behavior of the disputants, making the discourse wholly persuasive. Rhetoricians tend to think of argument as one kind of persuasive discourse, citing scholars such as Stephen Toulmin, Carl Rogers, or Aristotle to delineate the boundaries of argument. Typically, when argument is studied in rhetoric it is “argument as reason giving.” The set of claims and evidence, the choice of appeals, the strategy of topics, all work to persuade a specific audience toward a definable end. For example, in rhetorical argument there may be passionate emotions involved, but there is a tacit understanding that those emotions get packaged in ways that will persuade rather than offend an audience. The various authors I have cited to define rhetorical situation are typical of scholars who work primarily with argument as reason giving. This position is not entirely different from that in communications theory, in which combative natural language is considered either mere bickering, or, ironically, an object of study for rhetoric. Even in the area of dispute resolution, theorists tend to study argument as reason giving because they believe that “successful dispute resolution assumes rationality” (Benoit 38).

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5 An exception is Lloyd Bitzer’s reference to Bronislaw and Malinowski’s discussion of primitive language in his article, “The Rhetorical Situation” (4).

6 See John Heritage, Garfinkle and Ethnomethodology (NY: Polity P, 1984), for an overview of conversation analysis. Briefly, it describes how “speakers produce their own behavior and interpret the behavior of others” (241). It is a distinctive field of research studied within the ethnomethodological movement in the social sciences. Because its focus is on linguistic details of specifically “mundane” interactions, it is not an appropriate methodology for this dissertation.
Generally, winning an argument depends on making a "better" argument than the opposition. A better argument usually provides irrefutable proof and commonly accepted quasi-logical principles like cause and effect or reference to typical behavior as described in Aristotle's *topoi*. But those qualities do not carry much weight in a mediation. Scott Jacob's article, "Finding Common Ground and Zones of Agreement: Two Models of Rationality for Conflict Resolution," identifies this critical irony.

One might expect mediators to act as something like concrete representatives for an ideal model of critical discussion . . . so that lines of argument are extended and their implications examined . . . In fact, mediators frequently seem to ignore the substance of arguments; they do little to encourage the extension of the positions advanced through argument; they often show little interest in identifying and resolving points of clash; and they appear to generally work to suppress debate over the issues. (511)

By examining a case study of a mediation, Jacobs demonstrates that, although the disputants attempt to demonstrate that their understanding of the facts are accurate and that "their proposal is fair and justified by those facts," the mediators do not encourage reconciling differences of opinion (512). Jacobs writes, "The argumentation occurs within a quite different framework . . ." (514). He continues by saying, "argumentation becomes a way of searching for the implications of shared beliefs and values-a common ground-that may serve as the basis for reasoning to shared conclusions" (515). Jacobs surmises that the role of argumentation is different in a mediation from that in other circumstances. In a mediation, a disputant's arguments are indications of their commitment to their subjective point of view, rather than justifications of their point of view (515). Sometimes, mediators
encourage arguing as a way to allow disputants to "vent" their emotions and have their emotions validated.

Jacob's tone is cautionary. He implies that something valuable is lost when argumentation has a "marginalized" role in a mediation and the "facts" do not influence the resolution as much as he believes would seem prudent. Theorists like Perelman, who are more critical of the positivist's reliance on "facts" and "logic," may not judge Jacob's observation with the same wariness. If logic is merely another rhetorical device as Perelman argues, how much less can we rely on it in a situation such as mediation where there are no judge, jury or counsel to isolate issues or apply cultural standards? In other words, one should not be dependent on logical arguments that require social validation. Jacob's observation that argumentation is devalued in mediation indicates that something essential in the rhetorical situation affects the value of argumentative techniques that would otherwise be effective determiners in a resolution. That is, the rhetorical situation in mediation is such that arguments given one kind of value in other contexts are valued differently in a mediation. Defining argument is a tremendous enterprise and far beyond the scope of this dissertation; however, because argument is an essential component of mediation discourse, I will necessarily have to attempt a definition in order to analyze the role of rhetorical situation in mediation.

The most useful definition of argument for my purposes is argument as
disagreement, sometimes also called either conversational argument, or natural language argument as defined in the discipline of speech communication. This definition of argument describes the discourse in a mediation more accurately than argument as reason giving because the speaker may not be trying to persuade from an intellectual or moral position. At times the speaker may be angry, hurt, frustrated, or ashamed and is as likely to speak out to wound as much as to persuade.

Argument as disagreement is a significant part of the discourse that goes on in the contentious and unrehearsed mediation setting.

Jacobs and Jackson offer a definition of argument that includes both argument as disagreement and argument as reason giving, making their definition particularly useful for an analysis of mediation discourse. Their research indicates that disagreement alone is the litmus test for defining argument as disagreement. Conversational argument (their preferred term for argument-as-disagreement) "results from the occurrence of disagreement in a rule system built to prefer agreement" (224). That is, speakers prefer agreement. The presumption is that a request will always elicit an agreeable response. An agreeable response needs no explanation, while a refusal requires a reason or an excuse. These presumptions create the discourse we recognize as argument (223). In their work they do not distinguish argument as reason giving from conversational argument. They do, however, list many subdivisions of argument. Some examples are reason-giving,

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having an argument wherein no arguments are made, and making an argument when no overt expression of disagreement is heard. After cataloguing several more kinds of argument, Jacobs and Jackson assert that in fact any kind of discourse holds the potential for argument because any statement could elicit a disagreement. Using Jacobs and Jackson’s concept of conversational argument in the analysis of my sample case study data, I will be able to identify developments in arguments and hypothesize the relationship between argument and rhetorical situation.

A few researchers in speech communications are convinced that the study of natural language is as compelling as the study of formal argument. According to argumentation theorist Pamela Benoit, natural language research has contributed greatly to our understanding of dispute resolution (38). In her analysis of conflict resolution, she finds it extremely helpful to work with natural language. Benoit claims that it is more appropriate to study natural language in argument theory when studying conflict resolution, because disputants are more likely to use argument-as-disagreement kinds of discourse. Benoit agrees with colleagues who believe that natural language holds the key to understanding argument. She cites work done by Jackson and Jacobs that uses natural language to describe “the grounds for arguing, indicating the nature of argument” (38).

Disputants in a mediation must use both natural language arguments and argument as reason giving. They are asked to be responsible for their own resolution. By implication, this means they are responsible for wording their accusations and their own defense. Therefore argument as reason giving is at least
ideally at work during a mediation. However, since disputants are also being asked to acknowledge the emotional factors that led them to their positions, and since the issues at stake are intensely personal, the mediation process usually involves argument as disagreement. Recognizing that both kinds of argument function in the mediation process will be essential to analyzing data from my case studies.

Mediation's ideological purpose is to persuade disputants to engage in discourse that values cooperation. Just as our system of conversation prefers agreement, mediation prefers a kind of conciliatory discourse that values listening and divulging emotional commitments to positions. One might describe the argument style preferred in mediation as a combination of argument theories defined by Carl Rogers, James Corder, and Robert Fisher and William Ury. The three styles of argument described by these theorists are similar in that they all value self determination and mutual satisfaction.

According to rhetorician Doug Brent, Rogerian rhetoric was originally brought to the attention of rhetoricians in the 1970's through a revolutionary book by Richard Young, Alton Becker and Kenneth Pike, entitled Rhetoric: Discovery and Change. Carl Rogers had published his theory much earlier in the late 1950's. Brent contends that by the 70's it was clear to rhetoricians that the classical definition of rhetoric as platform speaking was not as useful to describe interpersonal communication, international relations and labor negotiations. The emphasis had shifted in rhetoric from persuasion to more cooperative models of argument, or problem solving. The history of cooperative argumentation has run parallel to the
history of agnostic rhetoric, beginning with the sophists. As part of more recent developments in rhetoric as social cooperation, Carl Roger's work in psychology has been used to define an alternative kind of discourse that attempts to persuade through intense psychological cooperation. Specifically, Roger's work was informed by Hayakawa, who recommends delaying "one's reactions and to be able to say 'Tell me more,' and then to listen before reacting" (Brent 232). Roger's therapeutic program follows that direction. He instructs the therapist to restate and reflect, but never to evaluate the client. According to Brent, Roger's view can be summarized this way, "To evaluate is to threaten, and to threaten is to block communication. The therapist must be content to open the channels of communication and let the client to his own healing" (232). A client engaged in Rogerian therapy is not, however, the same as a disputant engaged in a mediation. But, the philosophy behind the Rogerian technique is notably similar to the philosophy that informs mediation wherein the disputants are also provided an opportunity to "heal" themselves and mediators are prohibited from evaluating.8

Rogerian rhetoric, derived from Carl Roger's therapeutic technique, de-emphasizes persuasion and values self-determination. That is, while it encourages the audience to take an action that is in some way different from or more enlightened than its original position, the particular nature of that change is created through a process that respects the audience's will to a greater extent than the speaker's. The

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8 The prohibition on evaluation is the key difference between evaluative and transformative mediation techniques discussed later in this chapter.
same can be said for the theoretical work of Perelman and Burke, which also respects
the contributions of the audience at least as much as the speaker’s and certainly to a
greater extent than traditional Aristotelian or Socratic rhetorics.

The rights of the persons being persuaded are most fully acknowledged in
James Corder’s article, “Argument as Emergence, Rhetoric as Love,” in which he
argues that the speaker and the audience cannot be separated from their arguments.
He explains that our identities are created out of the narrative of our lives. Argument
is a narrative that comes from the speaker’s history. He explains that if a “person
says something we don’t understand, or something that offends us or something we
cannot easily agree to, then we have to start searching that person’s history until we
begin to understand what led him or her to speak just so” (17). For Corder there is a
direct link between understanding someone’s position in an argument and knowing
the person speaking the argument. Likewise, mediation also does not draw a clear
distinction between the argument and the person.

In my analysis of the communication technique advocated by Fisher and Ury,
I recognize a synthesis of the elements of argument as defined by Perelman, Burke,
Benoit, Jackson and Jacobs, Rogers, and Corder. Fisher and Ury’s slim text Getting
to Yes is a standard text for community mediation training. Their technique assumes
that rhetoric is capable of creating new knowledge, that the goal of persuasion is to
gain adherence, that gaining adherence is achieved to a large extent through
identification, that identification is achieved through listening, and that one’s
argument is deeply connected to one’s own sense of self. These principles inform
the negotiation technique that has had a great deal of influence on the development of mediation.

MEDIATION THAT LIVES UP TO ITS POTENTIAL

Mediators are trained in either evaluative techniques that persuade disputants to come to a resolution or transformative techniques that encourage disputants to find their own truth, but they are not trained in both styles. The critical difference is that evaluative mediation is more resolution oriented or "problem-solving," while transformative mediation's goal is to help disputants see their situations in a new way. In the name of achieving a resolution, mediators using evaluative techniques are more likely to offer their opinions or give "evaluative" comments; transformative mediators are more likely to watch for indications that the disputants are coming to new realizations and then bring those realizations to light. Although mediators understand these as conflicting approaches to conflict resolution, both styles are usually found side by side in the context of individual conflicts. As Frances Kandel points out, "the theoretically clear cut distinctions among the familiar categories of process and content; facilitation and evaluation; and information,

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9 Odd Arne Tjersland uses the terms *structured* and *confirming and meaning-expanding* to describe the differences in the two techniques similar to evaluative and transformative. The *structured* approach "reduces attacks," while the *confirming* approach "acknowledge[s] emotional outbursts and give[s] them a legitimate place" (110-111). Odd Arne Tjersland, "Strategies in Mediation Explored and Developed During a Research Project," *Mediation Quarterly* 15.2 (1997): 105-117.

advice, and suggestions are necessarily blurred and inextricably intertwined in the real world of mediation practice and hence inadvisable as the defining criteria . . . (303). As I will explain in the next chapter, my study has allowed me to conclude that while an actual mediation is sometimes facilitative and sometimes evaluative, researchers might rely on the intention of the mediator to define the parameters of transformative mediation. The distinction between the two styles may seem academic, but it is a significant difference to the extent that intention is a significant factor in mediation. I argue that intention is, in fact, quite critical in a mediation since the process depends on trust. The intention of the mediator to be neutral and impartial, and the intention of the disputants to go through with their agreement is more important to the process then the actual neutrality or the actual written agreement. A mediator might slip up and an agreement might neglect some critical detail, but the intention on the part of the mediator and the disputant to adhere to the standards of neutrality and honesty will make them able to overlook those errors, while ulterior motives will use those slip-ups as excuses to dissolve resolutions.

The cornerstone of transformative mediation is self determination. Transformative mediators believe that in order for a transformation to take place, whatever the content of the conflict and whatever the exigences, the disputants must be
given the opportunity or the space to determine their own resolution. Mediators
who use a transformative style of mediation are particularly interested in the
psychological factors motivating disputants’ responses because that is where a
transformation takes place. One well documented psychological factor in mediation
is disputant’s confidence. In their article “Confidence-Building Measures in
Mediation,” Daryl and Sy Landau write, “Mediators may find it difficult to
encourage distrustful parties to try an interest-based process, and once there, such
parties may continue to employ tactics of humiliation and sabotage” (97). Unless the
issue of confidence is addressed, the disputants will not be in a position to achieve a
transformation. Landau and Landau divide confidence-building measures into four
categories: willingness to talk, to listen, to meet the other’s needs, and to improve the
relationship. These measures assume that if the disputants feel more confident, they
will feel less vulnerable and more free to make psychological changes that benefit
them in the long run. Meanwhile, the audience (and in a mediation the audience
alternates among the mediators and the disputants) is simultaneously being asked to
consider an alternative perspective and to guard themselves (and guard others) from
being coerced.

A tension exists between holding one’s own ground and changing one’s
mind. The ideal mediation resolution is a mutually advantageous solution wherein
all parties leave getting everything and losing nothing: “win-win.” Unfortunately
this description of the process makes it sound more mysterious than it actually is.
How can people who disagree get everything they want? One could say with more
accuracy that the purpose of mediation is to change what the parties want so that what they want can be achieved. But this is an unnecessarily cynical description that is also not entirely accurate. Rather, mediation is a process that allows parties the freedom and safety to change their positions and sometimes even their interests when it is advantageous for them to do so. The change is not so much a change of position as a change of attitude that makes other changes possible. Changes are made through a process that eases tensions where it is safe to ease tensions.

Transformative mediators assume that if self-determined change inspires a resolution, it will be a more effective resolution because the author becomes the embodiment of a new perspective. "Effective" means more likely to last and more likely to satisfy. For example, the author/disputant does not merely agree that there are advantages to a new perspective, but she actually becomes an advocate for that perspective. This new perspective is most likely a third viewpoint that makes it possible for everyone's needs to be satisfied. The work of the transformative mediator is not to help disputants find a resolution; it is to help disputants trust that they have the power to create their own resolution. Two factors prevent this from being a coercive process: first, the option not to change one's opinion is respected in the mediation, and second, disputants allow themselves to shift their perspective and explore alternative positions only when they sense that it is for their own benefit. This makes a strong argument for the absolute importance of self-determination. The disputants must not only be afforded self-determination, but they must also believe that they are not being coerced in order for this kind of shift or transformation to take
place. Self-determination and mediator neutrality are the elements that make possible resolutions that have internal integrity.

To summarize, mediation theory practiced in either transformative or evaluative styles reasons that if disputants are allowed to feel fully responsible for their own resolutions, and if they are able to assure themselves that some minimum level of trust is possible, they will author resolutions that are more satisfying and realistic than resolutions created for them by an arbitrator or judge.

It takes quite a bit of faith and humility to mediate a dispute under the principles described above. The mediator has to trust that the disputants are the best source for their resolution. Disputants unfamiliar with the ideological basis of mediation are likely to expect the mediator to help them resolve their dispute. An unresolved dispute is considered a failure, a waste of time, and a waste of money. The commercial growth in the field of mediation has put pressure on mediators to take more and more responsibility for the resolution. This has pushed mediators who are paid for their services to become more and more directive, or evaluative. Robert Baruch Bush and Joseph Folger have responded to the surge in evaluative mediation in *The Promise of Mediation*, which defends transformative techniques against criticism that it is ineffectual, naive and hard to describe. They find what they call “problem-solving mediation” to have severe limitations, the most notable being that when the mediator is a problem solver, the disputants have less power to determine their resolution, ultimately risking the extent to which they are satisfied with their
resolution. The subtitle to their text is Responding to Conflict Through Empowerment and Recognition. It points to two key elements in transformative mediation that set it apart from evaluative techniques. Instead of the mediators positioning themselves as problem solvers, they set out to be advocates for the disputants’ personal agency and advocates for the potential of a transformative experience. It is my claim that through empowerment and recognition, the secondary rhetorical situation makes a transformation more likely. Transformation can improve the chances for a resolution because disputants who are transformed in the process get a new perspective on their conflict. The new perspective can help them overcome feeling stuck or helpless.

During a mediation the disputants find themselves in a position to think about their conflict in an completely different way. For Bush and Folger a conflict provides two opportunities: to strengthen “one’s inherent human capacity for dealing with difficulties of all kinds by engaging in conscious and deliberate reflection, choice, and action” and to strengthen “one’s inherent human capacity for experiencing and expressing concern and consideration for others” (81). This is an entirely different orientation to the conflict for the disputants than the orientation that produced and escalated their conflict. For example, neighbors that disagree about how to care for trees growing between their homes speak to each other from a particular rhetorical situation with its own peculiar constraints. The exigence may be

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11 Helping disputants achieve a mutually satisfying resolution through some degree of evaluation and direction does not necessarily exclude the possibility that the disputants will be transformed by their experience. See Michael Williams, “Can’t I Get No Satisfaction? Thoughts on The Promise of Mediation,” Mediation Quarterly 15.2 (1997): 143-154.
a broken promise to take responsibility for the leaves that fall from one neighbor's
trees into the other neighbor's pool. The neighbors' relationship history, their
individual social/economic statuses, or any number of other variables, all go into
creating a rhetorical situation that produces ineffectual communication and an
escalation of the conflict. Bush and Folger describe the transformative mediation
experience this way: "asking the parties to commit to specific points in an agreement
seems almost unnecessary, because the parties themselves are changed in ways that
eclipse any particular problem or dispute" (5). In the next chapter I will use data
from my research to argue that the phenomenon described by Bush and Folger is a
factor of a secondary rhetorical situation.

Even within a transformative model, the issue of whether or not the mediator
persuades disputants is not clear cut. The rhetorical situation in a transformative
mediation does include some evaluative techniques and it does require the mediator
to be persuasive. John Cooley argues that whatever we may say a mediator does, in
fact a mediator persuades. He claims that the reason there is some debate about
whether or not the mediator is persuading is that "effective mediators use techniques
such as the dialectic (or Socratic Method), whose essence is to grant to the parties the
facility to persuade themselves" (84). Along with dialectic, Cooley cites other
classical rhetorical techniques that include building rapport in the opening remarks
and "establish[ing] his or her integrity, credibility, neutrality, and overall
acceptability" relying "heavily on ethos as a means of persuasion" (96). Jacobs has
argued for getting mediators to take responsibility for their influence as a persuasive
For most theorists, the question is not whether or not there is influence, but what is the intention behind the influence? When we understand why and how we are influencing mediations, rather than pretending we are not, we will be able to make more controlled and conscious decisions about our influence. Transformative mediation emphasizes disputant's self-determination by being especially diligent to avoid making evaluative comments or giving advice, and it also holds out the higher potential that the disputants will become transformed through their experience.

THE EFFECTS OF SPACE ON SITUATION

In a mediation, space is a constraint of the rhetorical situation managed by the mediator. Sitting together in one place is an extremely influential constraint in mediation's rhetorical situation, second only to the structure of the process itself. According to Bitzer, "every rhetorical situation contains a set of constraints made up of persons, events, objects, and relations which are parts of the situation because they have the power to constrain decision and action needed to modify the exigence" (8). Constraints are either managed by the rhetor or they are not (8). The location of the mediation, the physical arrangements of the room, and the atmosphere of the proceedings all have a tremendous effect on the process and experience of mediation.

Under this perspective is included the various subtle distinctions we commonly make to describe the concept of place. A collection of synonyms

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12 See Scott Jacobs, "Ideal Argument."
included under this heading of space are area, arena, atmosphere, circumstance, climate, condition, context, environment, place, setting, site, situation, state, state of mind, surroundings, and territory. These terms can be divided between the physical, such as area or place, and the "emotional" such as climate or state of mind, while still others seem to bridge that distinction, for example, condition or context. Our language itself shows that there is a limited distinction between a physical place and its effect on our senses. One can exist in a particular location and one can also exist in a particular state of mind.

In her article discussing the various uses of space metaphor in critical discourse, Kathleen Kirby writes, "as a metaphorical substrate, space provides the very medium for measuring interconnection and difference, similarity and distance – markers that become important in evaluating the possibilities of coalition or the desirability of separatism (174). She reviews the ways in which various theorists like Adrienne Rich, Michel Foucault and Julia Kristeva use spatial metaphors to orient their theories. To exemplify the way physical locations are also psychological, Kirby quotes Rich's use of the phrase "The United States of America" to point out that for Rich, "'The United States of America' stands for a national identity and a political attitude, as well as a locatable place" (181). In a similar way the mediation process capitalizes on the blurring between location and attitude and is therefore able to use space as a particular rhetorical element. The disputants and the mediator(s) "sit down together" in "neutral territory." Their "coming together" is both a physical reality and a metaphor that is not lost on the participants. Once you have agreed to
share a table with your enemy, you have actually agreed to do much more than that.
You are acknowledging the possibility of a resolution, and you are working from a
modicum of trust that reveals a willingness to cooperate with your opponent.

Whether or not the mediation will be conducted privately in a mediator's
office, for example, or publicly in an institutionalized structure, as is the case in
government mediations, is a decision inseparable from decisions about the
“approach” to the mediation. Therefore as one would expect, Christopher Moore ties
together “approach” and “arena” in his chapter explaining how to select a strategy to
guide mediation (98). In deciding the approach one considers questions like, will it
be formal? or voluntary? Will everyone be allowed to participate equally or will
there be observers? How much time has been set aside for the mediation? Will there
be caucusing or breaks? Moore notes, “The location chosen for negotiations may
significantly affect the interaction of the negotiators” (148). In fact, the location
itself may need to be mediated before the mediation can begin.

Moore argues for a neutral territory. Among his list of benefits he includes,
“Distance from the usual environment may promote the psychological distance
needed for an open-minded exploration of issues” (149). Community centers
provide a neutral territory for disputants. The mediation does not take place at either
party’s home or business. Although a disadvantage to a neutral location may be that
it may disorient the disputants, one would assume that barring cultural differences,
everyone is equally unfamiliar with the surroundings. A mutual disadvantage still
contributes to a sense of equality.
Besides the location, the physical arrangement of the setting "may also affect the dynamics and outcome of negotiations (Moore 150). For example Moore mentions "the disputes that erupted over seating arrangements and the shape of the table at the Vietnam peace negotiations held in Paris in the early seventies" (150). Different seat arrangements work to separate or engage the participants. How far apart will the disputants sit from each other? To what degree will they face each other? The mediation program at Our Town sets up the chairs so that, in the beginning of a mediation, the disputants face the mediators. But as the mediation progresses and communication improves, they can swivel to face each other.

Cultural differences can very much come into play in spacial considerations. Whether or not to sit at a table is one example. For most people in the United States, a table gives the impression of a more formal atmosphere. One can "get down to business" sitting around a table. Will all the chairs have arm rests? In some cultures, those people with decision making power get arm rests while every one else does without. Picture a formal rectangular dining room table. The chairs that stand alone at either short end have arm rests. The other chairs do not. Likewise at a business conference table, the boss gets a chair with arm rests, and the employees do not. Other details such as who will sit next to the door and who next to the window may be significant if those places signify more or less respect. In the Supreme Court of the United States, for example, the newest justice sits closest to the door. The seating arrangement signifies her lower status. When there is a knock at the door, the newest justice is expected to rise and open the door. These are all examples of
cultural hierarchies. The mediator needs to be familiar with cultural preferences and symbolic gestures that may affect disputants working form different cultural traditions. All of these environmental constraints take on more significance when disputants are burdened with distrust and are either trying to jockey for a psychological advantage or are trying to maintain their dignity. Before a single word is spoken in a mediation, the mediator arranges the physical space to promote as much comfort trust and equality as possible.

THE POLITICAL IMPLICATIONS OF SITUATION THEORY

Third party intervention has had a complicated history. Some historians claim that mediation is a process originally created to address international disputes, which developed into a community based response to litigation and arbitration. Eventually, mediation developed simultaneously in such fields as law, business, and political science. Bush and Folger define four distinct and divergent stories of the mediation movement, claiming that “This divergence is so marked that there is no one accepted account of how the mediation movement evolved or what it represents” (15). Conflict theory developed in law, political science, psychology, and sociology and was quickly taken up in other fields, such as environmental sciences and communications. But, common to all the histories is that the legal system failed

certain populations or was inappropriate for certain kinds of disputes. Mediators believed that mediation could fill the cracks in the system. In general, it is a method developed to respond to a social need and as such it has a political agenda. In the same way that Chaim Perelman’s work attempts to supplant social systems that work from positivist assumptions, mediation works to put decision making power back into the hands of disputants. This agenda aims to change the public’s habit of deferring to officials. Mediation attempts nothing short of shifting power away from courts, judges and lawyers and putting power directly in the hands of the people in conflict. Depending on one’s perspective, this is at best a profound move and worst a dangerous one that threatens our system of justice.

Mediation advocates a kind of justice that comes from what Denis Sandole describes as Political Idealism. According to Sandole, Western civilization’s dominant ideology is Political Realism, which he describes as “competitive processes of conflict resolution: power-based, adversarial, confrontation, zero-sum, ‘win-lose’ approaches to dealing with conflict” (4). Sandole compares this dominant ideology to Political Idealism, which promotes a “cooperative [approach] to conflict resolution: non-adversarial, non-confrontational, non-zero-sum (positive-sum), ‘win-win’” (5). Political Idealism is aligned with the assumptions that produce mediation. According to Sandole, these philosophical difference are the result of a difference in a belief about what produces conflict. The Realists believe conflict is inevitable due to our nature as humans, while the Idealists believe conflicts are the result of many contributing factors and behaviors (4). If conflicts arise from discernable causes,
then the parties involved in the conflict should be able to overcome the conflict by addressing those causes. Addressing causes describes a kind of justice different from justice that might be meted out to punish the guilty party.

We might assume that the rhetoric deployed from these opposing ideologies would be different too. Under the Realist model, we might expect to find euristic rhetoric, propaganda, or what Perelman describes as arguments that compel the audience by claiming to be natural, obvious or logical. On the other hand, under the Idealist model we might expect rhetoric to be “open-ended,” dialectical, reasonable and to aim at gaining adherence. Exploring these ideologies along with two other variations, Sandole points out the significant overlap in all the categories. In his conclusion, he advocates third party intervention by which “competitive processes can be replaced (or supplemented) by cooperative processes of conflict resolution” (21). The third party performs a “magical” act of persuading conflicting parties that their conflict is not irreconcilable (Sandole 21).

I argue that the rhetoric in a mediation is based on three core beliefs that can be traced to Political Idealism as described by Sandole: 1) resolution is possible by means of rhetorical discourse alone, 2) rhetorical discourse must not compel or force a particular resolution for it to be ethical, have integrity and lasting value, and 3) it
must try to assure that the discourse is not compelling by re-framing disputants' positions in as neutral and impartial a way as is possible. 14

These three common values are evident in John Burton's account of political agenda in mediated conflicts. Burton is one of the original theorists in the field of conflict resolution. He defined a "controlled communication" technique in 1965. 15 He worked with labor and international disputes and helped to shape the current process used in all mediations. In "Conflict Resolution as a Political Philosophy" (1992), he carefully distinguishes between dispute settlement, an arbitrated outcome of a negotiable interest, and conflict resolution, an outcome from a non-negotiable dispute that satisfies the inherent needs of everyone (55). Burton points out a specific need for mediated conflict resolution. He claims there are kinds of conflicts that cannot be served by our justice system of courts, judges and arbitrators. He states that conflicts "that relate to ontological human needs of identity and recognition, and associated human developmental needs . . . cannot be contained, controlled, or suppressed . . . [but must be] resolved" through mediation (55). His perspective adds an interesting dimension to Perelman's more generalized argument against authoritative, centralized decision-making protocols.

14 Recognizing that a representative democracy is bureaucratic, Richard Andrews claims that rhetoric is important to a democracy in which one must be able "to use language to persuade and convince and argue one's position as well as to be critical about other people's use of language to persuade and control (especially the language of those in power)" (64). Richard Andrews, "Democracy and the Teaching of Argument," English Journal Oct. (1994): 62-69.

Burton concedes that some kinds of negotiable disputes may be subject to a central authority, but the justice system fails to provide satisfactory outcomes for those disputes in which there can be no compromise. Furthermore, those conflicts that deal with the ontological needs of people cover a wide range of national and international disputes. He claims, for example, “Drug violence and gang warfare are symptoms of social deprivations, and can be tackled only by dealing with such deprivations” (59). Burton’s method for dealing with these issues is a step-by-step process “in which relationships are analyzed in depth” and proposals are entertained only after there is “an agreed definition of the problem and a full assessment of the costs . . .” (59). This process parallels the current popular mediation theory, but Burton goes on to assert a strongly transformative perspective in his concept of conflict “provention” (60). Provention is different from prevention, because it takes a pro-active approach to conflict, not only preventing the conflicts we can predict, but preventing future conflicts born out of dysfunctional social systems.

A proventative conflict resolution processes, like a transformative one, transforms relationships so that future unpredictable conflicts can be prevented through cooperation. Conflict resolution methods that aim to promote ongoing cooperation indicate an entirely different purpose for the justice system and a different relationship between the institutions of social justice and the public. It is difficult to imagine the alternative system Burton describes from the viewpoint of our current system of centralized power, relatively static laws, and the use of
coercion and punishment to settle conflicts in the majority of cases. Burton concedes that "such a shift in orientation would require a substantial change in professional training and practices in many fields" (61). He advocates a wholly new "alternative political system" that does not assume people are "malleable and can be socialized or coerced into required behaviors" (62-3).

Burton believes that his concept of prevention is the greatest benefit of mediation. In a similar way, Bush and Folger identify empowerment and recognition as the most significant dimensions of mediation. They argue that these two dimensions "matter as much or more than settlement, and they matter not only in themselves but as expressions of a much broader shift to a new moral and social vision" (4). The reference here to a "new moral and social vision" calls into question our current popular concept of justice at its core. What is justice? How is justice served? Take for example a seemingly simple dispute over stolen property. Under our current system, if it can be proven to the court's satisfaction that property was stolen and that the defendant is guilty of stealing, the law requires that the property be returned to the rightful owner and the guilty be punished. Although most citizens might be satisfied that justice had been served and perhaps even that the punishment will persuade the guilty person not to repeat his crime, theorists who advocate for mediated conflict resolution would take a more skeptical view. They would argue that not only has justice not been served (i.e. the victim has not been freed from the

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16 For a discussion of how the law is a deeply rhetorical enterprise created in a process that acknowledges cultural factors see Austin Sarat, *Rhetoric of Law* (Ann Arbor: U of MI, 1994).
tyranny of a system that victimizes), but it is very unlikely that the criminal will turn over a new leaf as long as the causes of the crime have not been dealt with and resolved.

What is the nature of justice in a mediated conflict? In a mediation there are no moral authorities upholding written laws. The victim and the accused mete out their own fates themselves. How can the public trust the people immersed in their own conflicts with the responsibility of creating a just resolution? Justice would seem to require a view from a loftier neutral position. According to mediation theorist Dean Peachy, mediation offers a different concept of justice than the disputants may understand before they begin the process. He writes that, in deciding what kinds of cases are appropriate for mediation, the type of case (criminal, civic, small claims, child custody, property . . . ) does not matter as much as whether or not the possible outcomes will fit the disputants' sense of justice. Mediation outcomes are non-punitive. That is, there is no form of punishment, as such. If a disputant will only be gratified with retribution, mediation will not satisfy them. The disputant responsible for creating a hardship is not likely to agree to a resolution in which he suffers punishment.

Peachy claims that mediation depends on a sense of equity. A successfully mediated resolution often depends on disputants believing that an apology is as fair as vindication. He calls this "restorative justice." Restorative justice occurs when a situation or a relationship is restored or healed. Peachy notes that originally, victims may think they want retribution when they can't figure out why they were wronged.
In that case, the mediation gives the disputants and opportunity to exchange information, which may then very well change what kind of justice will satisfy the disputants. For example, in a case of stolen property, the victim may want some form of retribution (money, or a replacement for what was stolen) and therefore not choose to mediate. However, during a mediation this same victim may learn something about the person who stole from them, perhaps the object was only accidentally stolen, or borrowed, and now the victim will feel satisfied with an apology. Ironically, it takes a mediation to determine the kind of justice that will satisfy the disputants.

To summarize, mediation can be understood metaphorically as a process that bridges people who are disconnected. It is sensitive to the variability and subtlety of human interaction, making mediation akin to therapy in that it allows for the possibility of personal transformation. Because the process relies on the disputants themselves to arrive at resolutions, it requires mediators to be respectful, impartial and neutral. The rhetorical situation peculiar to mediation values honesty, vulnerability, and the acknowledgement of opposing views. In such a context, argument takes on a role different from rhetorical situations when argument is used to prove one's position or persuade an audience to take a specified action. Since proofs and coercion are devalued in a mediation, arguments are used to gauge the emotional connection between disputants and their positions. Besides the structure and verbal content of a mediation, the location and the atmosphere play important roles as constraints in the rhetorical situation. And finally, the political goals inherent
in the development of mediation ultimately drive the mediator's decisions in every aspect of the mediation experience.

In Chapter Four I will rhetorically analyze the data from my research in order to evaluate the role of rhetorical situation in the process of mediation. Chapter Four lists, defines and analyzes eleven constraints of the situation in mediation. These constraints have been defined through the study of transcripts made from four interviews and an original mock mediation, created and video taped for this project. Through that exploration I will continue to refine the definition of rhetorical situation in mediation offered in this chapter.
CHAPTER FOUR
DEFINING CONSTRAINTS IN THE SITUATION OF MEDIATION: RE-DEFINING THE RHETORICS OF MEDIATION

I try to create an atmosphere that I feel is really important which is one of comfort early on by the introduction and going over the ground rules one by one. I think it also helps them focus on being there as opposed to “what am I going to say?” or “what’s going to happen here?” 1 (F 268)

– “Tom,” professional mediator

In this chapter I will analyze data from my research to show how the mediation process fulfills its potential to create peaceful resolutions through a system of interrelated rhetorical situations. In analyzing my data, I have found that engaging in a mediation means entering into a secondary rhetorical situation. The new rhetorical situation is a dynamic combination of the primary situation and a secondary situation. Both work in concert to produce a rhetorical discourse different from the kind that escalated the dispute. The secondary situation is defined by the original constraints of the dispute plus eleven rhetorical constraints attributable to either the mediators or the mediation structure. Besides the additional constraints, the new rhetorical situation is different because it gives “presence” (as defined by Perelman) to a secondary exigence based on issues of communication and empowerment. Resolutions made in this secondary rhetorical situation require changing the disputants’ current communication style for their future interactions.

1 Transcripts from my research indicate spoken information using the protocol in the appendix to Schenken, J ed. Studies in the Organization of Conversational Interactions. NY: Academic P., 1978. Empty parentheses () indicate an inaudible or unintelligible utterance. Parentheses with a dot (.) indicate a brief pause. Double parentheses (()) contain descriptive material. Brackets [ ] indicate points of interruption and overlap. Equal signs == mark a continuous stream of talk between two or more speakers. Underlining indicates vocal stress. Indentation marks >> indicate rushed speaking. Hyphens – indicate cut-offs. Excerpts have sometimes been edited to promote readability mainly by eliminating grammar errors where such are not pertinent to the point being made.
The primary rhetorical situation provides the content for the rhetorical discourse, and the secondary rhetorical situation provides new constraints and privileges a second exigence. In this system of situations the first situation may anticipate the second and the second may recall the first. That is, disputants' discourse may be influenced by merely planning for a mediation. Likewise, during a mediation, discourse may be influenced by disputants recalling the primary situation. In the system the situations are so interconnected that once the conflict defined in the secondary situation is resolved, the conflict of the primary situation is also resolved. In other words, once the communication issues are addressed, the dispute over a dog barking or a tree dropping leaves over a fence will also be resolved.

Each of the eleven constraints to be discussed in this chapter gives presence to the secondary exigence, namely communication between the disputants. The disputants may be arguing about a barking dog, but the influence of the secondary rhetorical situation within the rhetorical system will privilege discourse that repairs the disputants' communication. Furthermore, the constraints of the secondary rhetorical situation define good communication. Through my research I define "good communication" as active listening, listening for information, withholding judgment, speaking honestly, and valuing emotional motivations.

The standard mediation process as described by Christopher Moore in *The Mediation Process* involves eleven stages. Each stage is determined by a particular mediator "move." A mediator move is an action or comment from the mediator that is intended to affect the progress of the session. The first five of these eleven stages
occur before the disputants speak to each other. They include elements that prepare
disputants for the mediation, by establishing a relationship with them and selecting a
mediation strategy. In the community mediation setting, the stages that prepare
disputants for the mediation are done by the intake personnel, determined by
institutional guidelines, or compressed into the opening introductions of the
mediation session.

Moore’s stages six through eleven are (6) beginning the mediation session,
(7) defining issues, (8) uncovering hidden interests, (9) generating options, (10)
assessing options, (11) final bargaining, and (12) achieving formal resolution (66-7).
Each of these stages has one or more sub-stages. For example, under stage six,
beginning the mediation, the mediator makes moves that establish an open and
positive tone, establish ground rules, and delineate topic areas. The process is not
entirely linear or necessarily progressive. Moore reminds his readers that, “the stages
of mediation are often difficult to identify and frequently vary across cultures in
sequence, emphasis, and approach . . . Activities seem to blend together into an
undifferentiated continuum of interaction” (63).

The process at the mediation center that trained my respondents resembles in
spirit Moore’s eleven stage process. My comparison of Moore’s work and the
process at Our Town indicates that the elements of Moore’s eleven stages are
condensed into four stages at Our Town. First is an introduction from the mediators.
That takes five to ten minutes and includes the elements from Moore’s first six
stages: building credibility, promoting rapport, educating the parties about the
process, and building trust and cooperation. During the second stage of the community mediation process, the disputants each take turns explaining how they understand what brought them to mediation. This phase correlates to Moore’s stages six, seven and eight and includes such objectives as establishing an open and positive tone, assisting the parties vent emotions, identifying topic areas of concern, and educating the parties about each other’s interests. Next, in the community mediation, the disputants list what they want. This stage correlates to Moore’s stages nine and ten, which include such activities as generating options and assessing how the disputants’ interests can be met by the available options. And finally, in the fourth stage of the community mediation program model, the disputants discuss what they are willing to do to achieve what they want. This correlates to Moore’s final two stages in which the disputants develop a consensual resolution, identify the steps necessary to make the agreement operational, and formalize the agreement in writing if that is what the disputants choose. The respondents participating in my research abbreviate this whole process using the terms, “introduction,” “situation,” “wants,” and “willing to do.” These are the stages they have in mind as they answered my questions in their interviews and as they participate in the mock mediation.

In its ideal form, the transformative style of mediation requires a different process from the standard model as described by Moore. Mediators taught transformative mediation use the transformative philosophy within the standard model’s process. When mediators use the spirit of transformative mediation within the standard model, the philosophy is separated from the process. The extent to
which this may corrupt the spirit of transformative mediation is an important question, but beyond the scope of this project. The transformative model as described by Robert Baruch Bush and Joseph Folger in The Promise of Mediation, is considerably more circular than the standard process, and it seems to be more client based. After the parties arrive, they themselves are expected to “offer comments, ask questions, and face decisions” (202) as compared to the standard model in which mediators offer comments and ask questions. In the transformative process, mediators work to empower the parties, recognize opportunities, and broaden the discussion until such a time when all the empowerment and recognition opportunities are exhausted and it becomes appropriate for the mediator to summarize the commitments and accomplishments (203).

In a sense, there is really only one step to the transformative “process”: to empower the disputants so that they will recognize and maximize opportunities. Every comment spoken by the disputants is seen as an opportunity to make a choice and therefore to be empowered through that choice (203). Empowering disputants by encouraging them to make their own decisions helps them to feel less helpless, less defensive, and more positive about the possibility of a resolution to their conflict. Any kind of snag, disagreement, impasse, new piece of information, or personal revelation is euphemistically called “an opportunity.” The respondents in my research have in mind the structure of the standard model and the spirit of the transformative model. Although seemingly incompatible, this hybrid is typical of community mediation centers.
RE-DEFINING THE SITUATION: WHAT IT MEANS TO BE THERE

I videotaped a mock mediation in order to create a transcript that represented a typical mediation from start to finish. As part of their information sharing process before the mediation, one of the mediators made the statement used as the epigraph for this chapter. I have chosen his statement to begin this chapter because it exemplifies a core concept of transformative mediation. The mediator says he creates an atmosphere that helps disputants “focus on being there as opposed to ‘what am I going to say?’” This raises two questions. First, what does it mean to “be there” and second, why shouldn’t the disputants be focused on what they are going to say? The eleven constraints that I will identify shape what being part of a mediation means for the disputants. The secondary rhetorical situation results in a different rhetoric from the one disputants believe they “are going to say.” The data from my research will explain Tom’s observation that simply “being there” will have a significant effect on what will be said.

In order to analyze a mediation, one must first define the parameters of a mediation session. In this study, I am claiming that the mediation session begins when the disputants meet the mediators conducting their mediation on the day of their mediation. In the pre-mediation discussion of the mock mediation, one mediator explains that he likes to talk to the disputants before the mediation session gets underway. He explains, “In the process before the mediation, I just sort of like to talk to the person [sic] and get to know them” (F 268). This mediator’s
description of what he would like to do "before the mediation" suggests that some
discussion between disputants and mediators happens outside of the mediation. The
respondent's choice of words assumes that at some later point, perhaps after
introductions and ground rules, the mediation session begins. I have limited my
study of the rhetorical situation in mediation to the mediation session itself and to the
mediators participating in the session. The disputants' experiences of contacting the
mediation center, the center's presence in a community, as well as the effect of any
other institution the disputant may have gone through to get to mediation, such as the
county animal control or the courts, are part of the larger social context that frames
the mediation session and beyond the scope of this project.

I refer to the conversations before the mediation session as pre-mediation
discourse. Pre-mediation discourse includes the scheduling of the mediation by the
intake personnel and the pre-mediation processing between the co-mediators. The
discourse before the disputants begin to talk about their dispute is significant and will
be considered in my study. For mediator quoted above, the conversation that
happens before the disputants make their opening statements is a chance for
mediators to make disputants feel comfortable and to begin to help them re-assess
what they might have thought was important before they entered the room.

Through an examination of each constraint, I will show how rhetorical
situation is used as a rhetorical device in a mediation to promote peaceful
resolutions. The eleven constraints identify from my research are the pre-mediation
processing; advocating for the process; seating; introducing the process; stating the
ground rules; listening; questioning/summarizing/validating emotions/re-framing; allowing disputants to interact; using impasse strategies; trouble shooting the agreement; and writing/closing. Each constraint has a slightly different effect on the rhetorical situation of the mediation experience, but some are closely related enough to be grouped together in their explanation.

RE-AFFIRMING THE SITUATION IN PRE-MEDIATION PROCESSING: REHEARSING THE SECONDARY SITUATION

As I have explained in the previous chapter, this study has allowed me to revise the concept of rhetorical situation in ways I think are useful. As a constraint, the pre-mediation process re-affirms the framework for the secondary rhetorical situation in the minds of the mediators. Before the disputants arrive, the mediators prepare the arena for them, in part by preparing themselves. Even mediators who work alone spend time familiarizing themselves with the intake information, reminding themselves of their role, and creating strategies for the particular case. The half hour pre-mediation processing conversation between the mediators participating in the mock mediation provides some good examples of how mediators prepare for the secondary situation. They spend most of the time making their personal mediation strategies clear to each other. Within the simple four-stage mediation process, there can be many variations in emphasis. Going over their methods and preferences gives both of them a chance to focus on the upcoming mediation, assume a particular frame of mind, remind themselves of what they want to improve, and find out if they disagree about anything.
One mediator begins describing his preferences by talking about the attitude he takes with the disputants. He says, "I just sort of like to talk to the person and get to know them" (F 268). He also goes over the opening remarks he will say to the disputants to give the other a chance to hear an example of what he'll be saying. He explains,

"[T]ypically, what I like to do is basically say something like ‘Hi, welcome. This is who we are. Have you done this before? No? There are basically three parts to it. You’ll probably tell us how you see the situation and what brought you here, about what you want to have happen to make it better between you and then what you want to do to get what you want. Does that seem like a process you’d like to go through?’" (F 269)

This mediator has been mediating for over ten years and is extremely familiar with the four-stage process. His repetition of the steps, therefore, is not helping him remember the steps the way a student might repeat facts to himself before a test, but serves as a way to get him into the appropriate frame of mind, or perhaps to make sure his co-mediator is aware of his stance on the basic principles. Running through examples of what they plan to say or what they’ve said in the past was also a common way for the respondents in the interviews to describe their preferences.

This same mediator goes over and over the basics in his conversation with the other mediator. Later, he pretends to be speaking to the disputants when he says, "We’re not here to judge you or whatever. We’re here to help with the communication process" (F 270). In this way he lets the other mediator know what is most important to him, the assumption being that if they know each other’s preferences, they will be able to work better as a team and be less likely to surprise each other with conflicting styles that could interfere with the mediation.
Still, both mediators are aware that they may disagree about the progress of the mediation. Disagreements between mediators is typically interpreted as an opportunity for the mediators to model communication techniques that they want disputants to learn. Part of the conversation between them is therefore to build rapport, affirm that they agree on the basics, and plan a strategy for a possible disagreement during the mediation. During the pre-mock mediation discussion, the respondents determine which one of them will give the introduction and which one will go over the ground rules. One mediator suggests that the other one does the introduction. Then they decide how they will handle any potential conflicts between them:

M1: Then I’ll do the ground rules, get them started. Then, this is what I normally do is make room for elaboration on the ground rules.

M2: Sure.

M1: Let’s work that way if you’d like to. I would rather work more fluidly, and if you feel the need to interrupt me do so ( ) communication with each other, real key thing.

M2: Agreed. Yeah, model that behavior.

M1: Yeah. So even if we get into a disagreement –

M2: Agreed. Yeah, yeah, yeah, yeah, yeah . . . . (F 273)

The second mediator continues with a story about a mediation he participated in the week before with a mediator who did not understand his line of questioning. In his case, they were able to work out some of the misunderstanding during the mediation, but he found he had to continue to explain his decision to the other mediator after the mediation to help his co-mediator understand him completely. In
the exchange above, M1 suggests that, even though he will be responsible for explaining the ground rules, he will defer to M2, "make room for elaboration," if M2 wants to add anything. M1 invites M2 to interrupt him if the need arises, noting that their own communication with each other is "key." M2 agrees, confirming that they share the traditional protocols for handling disagreements as opportunities to model good communication.

Both mediators confirm the importance of communication many times in their pre-mediation conversation. One explains, "What I mean by engaged is being engaged in terms of good active listening... (F 269). It's our job to facilitate effective communication... (F 269). We're here to help with the communication process... (F 269). The job of the mediator to my mind is to ( ) help to have a more complete communication process" (F 270). His co-mediator never disagrees with these statements.

The details of the actual case are given very little consideration compared to the mediators' commitment to encouraging the right kind of communication. In fact they only look at the intake sheet in the final few minutes of their conversation. Near the end of their time I enter the room and ask, "Did you look at this intake information?" (F 275). A mediator replies, "No, I didn't even look at that yet" (F 275). Once they have read the brief description of the case, they joke that it sounds like cases they have mediated in the past, but they do not decide on any special strategies particular to this case. Another respondent who was interviewed confirmed that approach. He says about the intake information, "I read it for content
to try to understand what the basic ideas are . . . [T]hat's what I try to get out of it, and not be too tied to any of the particular issues . . .” (C 215). The sense is that the details of the case are important, but they will not ultimately determine the process or factor significantly in the possibility of a creating a resolution.

RE-DEFINING NEUTRALITY: ADVOCATING FOR THE PROCESS

The data from my interviews with mediators revealed this second constraint influencing the secondary rhetorical situation. When challenged to define neutrality, respondents tended to arrive at a compromise between neutrality and impartiality on the one hand and control, influence, and interference on the other hand. The compromise is to advocate for the mediation process rather than for either disputant's position. It can be a difficult position for the mediator to maintain throughout a mediation. This constraint often depends on the mediator's intention rather than her or his behavior. That is, the constraint's effect is due to an overall philosophy rather than a consistent behavior. The defining characteristic of mediation whether transformative or evaluative is that the mediator is an impartial and neutral third party. Other conflict resolution processes like arbitration, conciliation, and adjudication also require an impartial third party. In mediation, however, the mediator is also neutral. Compare this position for example with a judge who is obligated to make decisions that are just according to law.

But there is a considerable amount of tension for the mediator concerning her neutrality. A mediator is obliged to be neutral and, at the same time, she is obliged
to conduct the mediation as if a mutually satisfactory resolution is possible and beneficial. In order to maintain a sense of neutrality, mediators champion the stages of mediation and the assumptions of mediation and do not favor any particulars of the resolutions. One assumption, for example, is that open and honest communication that honors emotional states will result in resolutions with integrity. Another is that poor communication is at the heart of conflicts. The solution to advocate for the process is another way of saying mediators stand behind the assumptions on which mediation is built.

When I asked one respondent about whether or not he felt he was influencing the disputants, he said he struggled with the issue and settled, as most mediators will, on the position that he was an advocate for the process:

I mean, to even say we’re neutral or impartial when everything we’re doing is based on our own perceptions and influencing them ... how can you even say that really? At the same time, that is what we strive for to the extent that it can be accomplished. I mean, so I’m sure every question I choose to ask, the way I choose to work it is influential ... because if you go down this road versus this road, facts versus feelings or the history versus the future, everything you do you’re influencing where they go. So I think you just try to do what you can to follow their lead, so you’re trying to go where they go or where it seems to be important to them ... I’m not an advocate for one party or the other but I’m an advocate for mediation and an advocate for the process. So I believe the process works. So I do believe strongly that mediation is a good thing in almost every case. And I do believe strongly that if people really sit down and, you know, really try, within that context within the structure and the ground rules, to work something out, that that can usually be very helpful. I believe that and I fight for that. So people are influenced however subtly. (B 207)

In this excerpt, the mediator begins by admitting that the terms “neutral” and “impartial” do not describe the mediator’s role sufficiently. He asks, “how can you even say that really?” But neutrality and impartiality are the ideal and the mediator’s
intention. Then in a move that could be described as “win-win,” the respondent satisfies the need to be impartial while recognizing that some kind of influence is certainly taking place. He re-defines his role as “an advocate for mediation and an advocate for the process.” In order to advocate for a process that works on the assumption that good communication can resolve most conflicts, mediators must believe that it is ethically sound to give more presence to communication than to the primary exigence of the mediation. In other words, the situation influences disputants so that they focus on improving their communication.

The mock mediation provides examples of mediators advocating for the process rather than for either party’s position or for a particular settlement. A secondary rhetorical situation is created in which it is appropriate to dwell on the personal details of the disputants’ lives that would not seem to have bearing on the facts of their case. Making personal details present in the discourse represents part of the value system guiding mediation. The details of each person’s story, especially the details that reveal their humanity and their emotional states, are valued above incriminating facts.

The mock mediation case was between two neighbors, Mr. Carl Baker, a retired army sergeant who had recently survived a heart attack and surgery, and Mrs. Betty O’Connel, a registered nurse recently divorced. Betty owns a dog whose barking disturbs Carl. Although Carl complained to Betty about the barking, he was not satisfied with her response. He contacted the County Animal Control, who then referred them to mediation. After the introductory remarks from the mediators, the
disputants were asked to tell their stories. Carl begins at Betty's request. He explains that he has "a small house on about an acre worth of property" (G 281). He continues to explain that he is retired and "just ready to relax for awhile." He says he's had some heart problems and "needs to sleep a full night's sleep" (G 281). Several times in his opening statement Carl repeats his complaint, "Sometimes it gets a bit stressful because of the dog barking a lot, and I'm trying to resolve the problem, but I don't know how to resolve the problem" (G 281). Carl is allowed to speak uninterrupted until he indicates through tone and body language that he is finished.

After Carl's opening statement, one of the mediator's recaps Carl's situation. He says, "So if you don't mind, I'm just going to recapture what I heard you say. You're retired, and you live in the house that you've lived in for about twenty-five years, did I hear you say?" (G 281). As an advocate for the process, this mediator's first response to Carl's opening statement does not make any suggestions to help Carl with his problem, even though Carl himself has indicated more than once that he does not know what to do. The session is in its first phase when disputants relate their situation. The mediator's responsibility is to see this step through as thoroughly as possible before moving on to seek solutions. The mediator works to honor the process by keeping his comments directed toward clarifying Carl's reported situation. In this example, as an advocate for the process, the mediator takes time to value the details of Carl's situation. The assumption here is that careful listening is essential to improved communication.
RE-DEFINING RHETORICAL SPACE

Before the mediation session begins, care is taken to arrange the seating in the mediation room to affect the discourse positively and create a rhetorical situation that promotes good communication. The respondents in my study confirm the importance of physical and metaphorical space discussed in the mediation literature. The special emphasis on positioning disputants in ways that will affect better communication gives presence to the secondary exigence. One interview respondent notes that the space “helps to set a tone, you know, to have a certain arrangement of chairs so everyone can see everyone clearly, there’s no problem with hearing or seeing . . . The room can be a distraction, or it can be a help if it’s done properly” (C 220). While there is the practical consideration of making sure everyone can see and hear each other, it is also somehow possible to “set a tone” through the room arrangement. Will this be a friendly meeting? Will it be casual or formal? Will there be enough space, both physical and emotional, for everyone to feel comfortable?

The seating is arranged so that each of the disputants will be able to direct their speech either to the mediators or to the other disputing party. The assumption guiding the seating arrangement is that in the beginning of a mediation the disputants are emotionally distraught and unable to speak to each other effectively. As the mediation progresses, ideally the disputants’ emotional needs will get met, and they will learn effective communication. Eventually they will be able to speak to each other more freely. One respondent interviewed commented, “The introduction is
critical... I know they're nervous because at that point they're disputing, so that, for me is the most difficult part" (E 248). The mediator would not want to aggravate their situation by seating the disputants so that they feel they are in a face to face confrontation.

Directing disputants’ attention either to each other or to the mediators promotes effective communication. It is assumed that at least in the beginning of the session the disputants will direct their speech toward the mediators, who will act as a kind of buffer between them. The disputant not speaking is allowed to overhear the conversation between the disputant who is speaking and the mediator. This strategy protects the parties listening from having to defend themselves against accusations so that they can be free to accumulate information. In the post-mock mediation debriefing, the respondent acting as the disputant Carl, comments on this mediation strategy:

M1: It depends on what’s happening whether we would stop that or not. There’s plenty of times when they’ll start ((indicating disputants are talking to each other)) and it’s a counter-productive sort of thing. And I will ask, ‘Will you please direct your remarks to me?’

Carl: See, that was helpful at first to have you to focus on or you to focus on ((indicating both mediators)) to kind of put you ((indicating the other disputant)) by the wayside for awhile. And then gradually realize you’re ((to Betty)) there. (G 311).

When the communication between the disputants seems effective, the mediators allow it to continue. When it becomes counter productive, they draw the focus back to themselves. The assumption here is that it is ultimately better for the disputants to
talk to each other because eventually they will have to speak to each other without the intervention of mediators.

At the community center where the respondents for my research have been trained, the mediation rooms are fairly small, 11’ x 12’. There are windows in each of the rooms, but they are decorated with either curtains or blinds so that the view is obscured, but some natural light comes through. The lighting provides warmth with minimum distraction. This helps to focus the conversation and intensify listening.

On one wall there is a white board for writing down information to clarify the disputants’ positions. For seating there are comfortable swivel chairs on coasters, and no tables except for an end table or two in the corners. This arrangement combines optimum flexibility but sets a strong tone of informality. The disputants’ chairs are arranged so that they face the mediators’ chairs, but the disputants can easily swivel or roll themselves to any other position that seems appropriate as the mediation progresses. Although a table may help to indicate a more structured atmosphere, adding some formality and business-like quality, the community center is better served by the flexibility afforded by not having a table. More disputants can be seated comfortably in the relatively small room, and the majority of cases heard at the community mediation center are between neighbors or family members who, it is assumed, will be more comfortable in a less formal setting.

Another popular arrangement for mediations is a rectangular table, where the disputants are seated side by side along one of the long sides. Although this can mean that disputants will have to turn their chairs to angle themselves toward each
other once they are talking to one another, the disputants are protected from confronting each other directly when their emotions are too raw. Disputants are temporarily separated and yet encouraged to connect and communicate. An interviewed respondent described the seating arrangement this way for a particular mediation session that took place in a location different from the community center: “We were at a conference table. It was rectangular. We sat around it. I was positioned more like in the middle, you know. There were three couples, so I tried to position myself not at the head of the table. They were dispersed in between” (D232). This mediation session was more formal than a typical community mediation session. There were several couples, and although they were neighbors, they had never met before the mediation. They lived outside of the city, and their dispute was over how to share a limited water supply. The respondent who mediated this session described himself as more evaluative than transformative, even though he was trained at the same community center as the other respondents. The more formal business-like setting created by a rectangular table is better suited to an evaluative style. The mediator is more likely to be concerned with the factual details of a particular case and more actively hoping to reach a working resolution.

It would be misleading, however, to say that the distinction between evaluative and transformative styles of mediation is as clear cut as that. A transformative mediation can be held at a table and vice versa. The distinction being made here is one of tone. This respondent notes, “I tried to position myself not at the head of the table,” indicating that he did not want to position himself as the “head” or
most important person at that meeting. Rather, he sat between the disputants so that
his "position," physically and metaphorically would be, at least symbolically, equal
to the others. That is, his intention is to facilitate rather than lead the discussion. He
intends that evaluative opinions he may offer be given the same value as the
disputants' views and not more. The purpose of this seating arrangement further
supports the secondary rhetorical situation so that abrasive comments are directed to
the mediator to be overheard by the other party, and only a specific kind of
reconciliatory discourse is spoken directly to the opposing disputant.

RE-DEFINING AGENCY AS EMPOWERMENT

During the introduction to the mediation process, the mediators set the tone
for the mediation and give the disputants information about what to expect in their
session. Although research has not been done to determine how influential the
introduction is, mediators tend to think of it as one of their more significant
contributions to the mediation. In terms of my research, introductory remarks locate
the disputants as the source of whatever resolution may come from the session.
Specifically, the secondary rhetorical situation will require disputants to resolve their
own dispute, rely on them to be honest and acknowledge their emotions, and to
repair their communication. During the introduction, the mediator begins the process
of empowering disputants so that they will be capable of resolving their conflict on
their own.
One strategy for empowering disputants is to explain the process so that they might own it. One respondent describes this as helping them know what is expected of them:

RES: That's kind of a minor thing really. Yeah, to inform them of what, so they have some sort of an idea of what will be going on. I think, then they will also know what's expected of them.

INT: Well, that's interesting. Can you tell me more about that?

RES: They'll know that they're supposed to sit quietly and listen to the other person and not interrupt. Because there is a very definitive process. And if you explain, then they'll know where it's going as well in terms of how they relate to the other person and, and how they relate to the mediator. And it's important that they know all those things. () so they kind of know what's expected of them. (E 255)

Her observation suggests that, when the mediation is de-mystified, the disputants are able to feel more in control of their experience.

As empowered people, it is reasoned, disputants will have the courage and the appropriate state of mind to work out a resolution, whereas if they remain in their "disempowered," defensive positions, they will not be able to move toward resolution. Professional mediator Andrew Ivy explains, "But when you feel powerful, you're more apt to listen to the other side . . . . So I always try and give, to empower people, to say, 'You're in charge here. You're not powerless.' Because I know from conflicts that people, whether they know it intellectually or not, they feel powerless or they wouldn't be in conflict. They'd solve it." Empowering disputants is a key component in most of the eleven constraints. Each mediator I interviewed understands the introductory remarks as an opportunity to focus on that goal:
At that point I don’t know how much people are hearing, you know, while we’re doing that because lots of times they’re nervous, and lot’s of times some of them are not really wanting to be there it seems like. There are issue and tensions. So I don’t know how much they’re hearing or how much they’re sort of posturing, anticipating what’s ahead. But it seems like at that point, if there’s a good introduction you can put people at ease. What I’ve seen happen, and kind of let everybody know, let’s just relax (. ) Take a deep breath, and we can get through this (. ) I think if there’s a lot of (. ) anger or anxiety. It’s harder for them to communicate. It’s definitely harder for them to listen. (E 253)

The mediator’s desire to calm the disputants is especially evident in this excerpt. The respondent assumes that the disputants will probably be nervous when they arrive. This respondent is not sure “how much they’re hearing” when they arrive. She is hoping that her early remarks will help to get everyone settled into the process. The tone of her introductory remarks seems at least as important as the content. Later, this respondent explains that part of her purpose is “to get them in the right frame of mind . . . . This is not adversarial, real casual, real casual, comfortable tone . . . . I don’t know if cooperative is the right word, but non-adversarial” (B 199). Another respondent said, “I like to set up a mood for the clients to tell them this is their opportunity to talk about what’s been bothering them” (C 221).

The respondent hopes to change the adversarial relationship between the disputants into a relationship that is more cooperative. Mediation theory assumes that the adversarial relationship between disputants results from such emotional factors as fear, frustration, anger, and hurt. Through her introductory remarks, this respondent hopes to begin to address those emotional concerns and nurture a safe atmosphere to build confidence and empower the disputants.
Empowerment is especially necessary for a transformative experience to take place. A person must have an improved position to have the confidence to make lasting change. At least part of the experience of conflict is feeling powerless, gridlocked, out of options, and backed into a corner. Mediation theory maintains that people feeling powerless can be persuaded they have options. The ability to choose an alternative option, and the power to carry out one of those choices frees them and transforms them. Mediators work to persuade disputants that they are not only responsible for their own solution but capable of creating it. Through that realization, they are transformed so that, in their new state of mind, they can conceive of possible resolutions. This next excerpt takes a more evaluative approach toward the same ends:

I took more of the evaluative stance, I guess, at least letting the parties know what my background was, that I had a background in law, that, while I couldn’t tell them what a judge and jury would do, I could share with them from my experiences seeing similar cases. I was not there to make them settle, that if they didn’t settle, that was fine. (D 232)

This respondent’s decision to share his background conflicts with a transformative style because it sets the mediator up as an authority that disputants can use to help them with their resolution. This move could divert power away from the disputants, who would otherwise be the “experts” on their conflict in the mediation. Even this respondent’s choice of the word “settlement” rather than resolution betrays his evaluative tendency. A *settlement* is a legal term, as in “settling” out of court or participating in a “settlement” hearing. A *resolution*, on the other hand, is an end to a non-negotiable conflict, that is, a conflict in which a compromise will not settle the
issue. This respondent reveals, however, that he is aware that his strategy might be misconstrued as somehow less than the neutral one required by a mediator. He adds, "I was not there to make them settle" in order to re-affirm his commitment to the mediation process as he understands it. By permitting the disputants the freedom not to settle, this mediator believes he is giving them the responsibility for their resolution.

The mediators' commitment to neutrality and disputant self-determination are other aspects of empowerment. This respondent is adamant about his commitment:

I wanted to make sure that they understood that we were, you know, completely neutral. That we were not there to judge either one of them or tell them at all what to do, that, you know, they were the ones with the situation, that they were the experts. We weren't in any way trying to tell them what to do or resolve this for them . . . . I really stressed that, and I really stressed that empowering them, that it was their problem and their solution. I really pushed on that. (B 196)

Here the mediator seems determined to persuade disputants he is neutral. It is obviously a critical point for him.

Although researchers are ultimately skeptical that mediators do, in fact, maintain the level of impartiality and neutrality expressed by the last respondent's statements, the intention to be neutral affects mediator discourse. Disputant discourse under this constraint will necessarily have to change from defending oneself to problem solving. In the secondary rhetorical situation, disputants argue from a position of power. The constraint creates an atmosphere in which disputants are left

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2 See John Burton, "Conflict Resolution as a Political Philosophy," *Journal of Negotiation* 2.4 (1986): 55-64 for a definition of the terms *dispute settlement* and *conflict resolution.*
in charge. During the mock mediation, Betty, the disputant with the barking dachshund, reviews the cumulative effect of simply sitting down with her neighbor in a mediation. Well into the mediation, Betty came to understand that she really was going to be able to have some control in her conflict. The ramifications of that realization were that she felt safe enough to show vulnerability:

Anyway, I was really annoyed and really frustrated thinking that I had rearranged my entire schedule to satisfy you. And then once I got in here and you explained the process, ((looks at M2)) and we're speaking to each other, ((looks to Carl)) I think it's really helpful. Um, thanks for not suing me.” ((smiles/everyone laughs)) (G 289)

Ironically, disputants can become vulnerable once they have a position of power. Once they can be honest about their emotional motivations, they can hammer out resolutions that will address their particular situation.

RE-DEFINING SELF-DETERMINATION

An agreement to the ground rules is a symbolic gesture that indicates an agreement to proceed with the mediation. As part of the introduction, the ground rules create the boundaries for a safe and fair process. Disputants begin their process with a mutually agreeing to ground rules. They assure each other that they will be reasonable and will commit to a level of decorum that will affect their discourse. More than the others, this constraint spells out the parameters of the secondary rhetorical situation in plain English. They define what is meant by good communication.
Community mediation centers mediate a wide variety of cases. It is not uncommon for there to have been some violence or vandalism preceding a mediation. Although it is controversial within the mediation community, some cases involving domestic abuse come to mediation. A mediation is a kind of controlled confrontation where disputants are asked to listen to complaints that they believe are untrue and even cruel. Understandably emotions can run high. Even cases in which disputants initially seem quite calm and controlled sometimes erupt into screaming matches without warning. One of the functions of agreeing to the ground rules is to pre-empt those kinds of outbursts so that, if they occur, the mediator only needs to refer to the agreed upon rules to regain an acceptable level of safety for all participants. After the welcome and the explanation of mediation, the mediators read over the rules. At that point they can ask the disputants if they have questions about the rules and if they will agree to the rules during the mediation session.

In the mock mediation session, one mediator begins the introductions, “I’d like to give you a little bit of an orientation to see if this is something you’d actually like to go through with” (G 277). In other words, once the disputants have heard an explanation of mediation, they are asked to agree to try working through their conflict. With that agreement, they are also in a sense acknowledging that a resolution is possible and worth their effort. This almost ceremonial moment in a mediation has a significant psychological effect on the disputants. In the mock mediation, the mediators ask for a commitment to the process several times asking, “Does that sound like something you want to go through?” (G 278). “Are these rules
that you would be willing to agree to?” (G 279) and again later, “Is that workable?” (G 280). The disputants agree to mediate three times.

The ground rules familiar to the mediators in my study are numbered and printed on a sheet of paper posted on the wall of the mediation room: 1) Work hard to solve the problem. 2) Talk honestly and openly. 3) Focus on the future rather than past events. 4) Show respect for each other—no name calling, shouting, put-downs, or violence. 5) Avoid interrupting each other. 6) Everyone will stay in the room until the meeting is over. 7) Mediators will be neutral and non judgmental. 8) Mediators will direct the flow of the meeting.

Ultimately, each ground rule is intended to effect an appropriate form of discourse thought to be most conducive to building a mutually satisfactory resolution. But going over the ground rules goes beyond conveying information. The symbolic importance of the ground rules is not lost on most mediators. One of the mediators in the mock mediation explains, “When I go over the ground rules, I like to go over them one by one and let people focus in on them as opposed to looking at the rules and saying, you know, do you agree with them? Most people say, ‘yeah’ whether they heard them or understood them or not” (F 257). What is the purpose of taking the time necessary to make sure the disputants will focus on the rules? He continues, “I try to create that atmosphere that I feel is really important, which is one of comfort early on . . .” (F 268). Going over the rules “one by one” is a way to slow down the pace of conversation. Qualities of poor communication include careless listening, and rushing to judgement. Every constraint, including the
ground rules, works to improve poor communication between the disputants. The respondent continues, “If they say, 'yes' this is all towards building atmosphere, making sure they’re going to be comfortable, safe, fair, so [they] can feel free to express [themselves] . . .” (F 269).

Each of the eight rules used by the community center in my research also constrains the session, by defining what will be considered appropriate communication, and establishing what kind of discourse will be valued. The first rule, “Work hard to solve the problem,” governs attitude. Whatever the previous rhetorical situation was, in this secondary situation both parties agree to work toward resolution. At this early stage in the mediation, resolution might still be interpreted as retribution by one or both parties. But the agreement to work toward resolution puts the conflict in positive terms, and means that the disputants will be taking a hopeful posture. The second rule, “Talk honestly and openly,” distinguishes mediation from more adversarial forms of conflict resolution. In the introduction, most mediators make a point of saying that they will not judge the case. In this situation the disputants do not need to defend the choices they made in the past. In fact, they will find that they do not need to persuade the mediators of anything, and they will not need to supply any evidence for their claims. Defensive strategies are not valued because there is no useful response possible from the mediator and no required response from the other party. For example, in the mock mediation, Carl mentions that he has been advised to keep a record of when his neighbor’s dog barks
The mediators do not ask him if he has begun keeping that record or if he has brought it with him.

The rule to talk honestly and openly highlights one of the places in a mediation where the distance between what disputants think they are going to do and what they are actually going to do is greatest. Adversaries typically want to keep their cards close to their chest. They are going to want to hide what they believe makes them vulnerable to attack and try to make their position look strong. Those behaviors may have helped them to bluff or intimidate the other party into submission in past dialogs, but at least for the people who choose mediation, those behaviors have not led them to a mutually satisfactory resolution. Bluffing, intimidation, defensive posturing, and making oneself look as blameless as possible may also protect defendants pleading cases before judges, but in a mediation, there is no judge to move. There is only the other disputant, and that person will have to agree that the proposed resolution satisfies his or her particular needs. In the rhetorical situation of mediation, admitting vulnerability and sharing hidden agendas are more appropriate and effective rhetorical strategies.

The third rule advises disputants to focus on their future. It might surprise disputants to know that it is not necessary to establish a common history for there to be a resolution. Because proofs and evidence have so little value in a mediation, discrepancies about past events are usually not solved. If the parties disagree about the facts of a past event, the mediator is not in a position to decide who is telling the truth. Even if disputants cannot convince each other that some past event took place,
the mediation must be able to proceed. One mediator respondent described how she worked through this kind of impasse during a mediation. The disputants could not agree on who said what to whom in the past. The respondent recalls how she responded to disputants who insisted on going over and over the same disputed details in their history. She remembers saying to them,

> Do you all feel like you can reach an agreement on who said what to who when? Because that’s where we’ve spent now twenty minutes discussing that. Is that something that is important to you to reach an understanding and agreement on? Do you really want to spend more time talking about that? Because we can still continue going with that. And if you do, we’ll spend time on that. I’m hearing that that’s something you may never agree on. You may never see who really said what to who when and I’m not sure it is something you need to be discussing in order to get closure on this, the issues you brought up that you want to get closure on. I’m afraid that you’re going to get stuck in and then not be able to move on. (B 201).

In her response, the mediator does not attempt to sort through the details of the disagreement or guess at what most likely happened. Instead she questions how important it is for them to agree about these details. The rhetorical situation is such that past events do not have to be established.

Of course, much more is going on in this respondent’s recounting of what she said during the mediation. Her question, “Do you really want to spend more time talking about that?” is rhetorical. She is devaluing that line of discussion even if in her next statement she agrees to continue along those lines at their insistence.

At several points in the mock mediation, Betty questions whether or not a “seven pound” dachshund on an acre of land could really be as irritating as Carl claims (G 298, 302, 303). She reasons that there are many other larger dogs nearby who would seem to be much more of a problem than her dog. She says, “I mean,
there's dogs all over the neighborhood. They're always barking either side of me, neighbors with dogs. Big German Shepherd over here. ((gestures to the left)) Golden Retriever over here ((gestures to the right)) barking, barking, barking" (G 290). But proof that her dog barks as much or more is not given and is not necessary. Betty and Carl do not have to agree on how much the dog barks, when it barks, or if it barks at all. In the mediation it is enough that Carl says he is annoyed by her dog. Even if it could be proven that Betty's dog does not bark at all, the conflict would not necessarily be resolved as long as Carl did not feel his needs were being met. Carl could continue to record the times he believed the dog barked, and he could try to sue Betty for disturbing his peace. Or he could simply hold a grudge against Betty that would manifest itself in another complaint. The nature of the facts in the conflict are not ultimately important because the situation recasts the conflict as not actually about whether Betty's dog barks too much or barks at all. The conflict is about a problem with the way Betty and Carl communicate.

Details of past events are not, however, entirely beside the point in a mediation. The disputants are asked to relate their situation in the first stage of the mediation. Their stories may be expressed in great detail. Recounting past events is used for three purposes: to develop rapport among all the participants, to allow disputants the opportunity to vent emotions, and to exchange information. The past is not primarily used to support claims and bolster arguments.

The fourth, fifth and sixth ground rules limit the kind of discourse that will be acceptable in the mediation. These rules ask disputants to show respect for each
other and to avoid interrupting each other. For disputants with a history of
aggressive or violent communication, these rules will be especially significant, but
any disputant dreading the confrontation of a mediation might be comforted hearing
the other disputant agree to these guidelines. These rules help to provide a safe
atmosphere for discourse that will ideally be honest and open. Although it is not
uncommon for mediators to have to remind disputants of these rules during a
mediation, it was not necessary during the mock mediation in my study. Mediators
take on the role of referee to enforce the rules, and when there is an infringement, the
mediator can determine whether or not it is ultimately best for the process to call the
disputants on the violation.

Ground rules seven and eight are rules that ask the mediators to be neutral
and remind disputants that the mediators will direct the flow of the meeting. Posting
rules for both the mediators and disputants helps to equalize the status between them.
The rhetorical situation of mediation values equality. These last rules establish that
everyone who participates in the mediation has to respect some limitations in order
to strengthen the possibility of a resolution. But the final rule, “mediators will direct
the flow of the meeting,” is rather curious. It reads like a loop hole that gives
mediators free reign to make any number of decisions for the disputants’ own good.
A tension is evident in this last rule between the mediator’s obligation to follow
where the disputants lead, and her obligation to persuade disputants to come to a
resolution for their own good. It is interesting to note that there was very little or no
discussion of the ramifications of this last rule by any of the respondents.
interviewed, nor by the mediators or disputants in the mock mediation. The mediator explaining the eighth ground rule in the mock mediation session says, “And finally, mediators will direct the flow of the meeting. Sometimes that looks like us interrupting. Our job is to keep the process moving forward, keep the communication happening, so that’s what we do” (G 279). 3 Predictably, everyone nods their consent. The expectation of typical disputants is that the mediators will play even more of a leadership role in the session than they actually do. This last rule would merely seem to confirm their assumption and so it is not usually questioned. I have never had or heard of a disputant asking for clarification of that rule or hesitating in any way. In fact, the rule seems to comfort disputants and to assure them that the session will not be a free for all. When it feels safe enough to reveal one’s own fears, those fears can be addressed and comforted. Otherwise, if fears stay hidden, they can sabotage possible resolutions. Creating a level of safety makes mediation a significantly different rhetorical situation from the situation that originally produced the conflict.

The rhetorical situation that resulted in “poor” communication, whether that communication was too aggressive or non-existent, is over-laid with a secondary rhetorical situation that is more likely to produce a resolution. The transformation of the rhetorical situation begins from the first contact with the mediation center and proceeds through the introduction of the process and the statement of the ground.

3 Lisa O’Laughlin, the director of the mediation program for Our Town and a reader for this dissertation, commented that rule eight might just refer to the seven previous rules. This rule does not necessarily refer to improving communication between disputants, however, the mediators in the mock mediation interpreted the rule so that it included good communication.
rules. Each ground rule affects the rhetorical situation in its own way, but the overall effect is to help disputants feel as though they are going to share the responsibility for making the process work. In that way, the rules are empowering.

The rules also outline the limitations and strengths of mediation. The process works best if disputants can eventually focus on future changes and use a more polite form of communication. Finally, the ground rules provide a level of safety in the mediation that will make talking honestly and openly easier. These small practical considerations give concrete definition to the secondary rhetorical situation.

The next seven constraints have their foundations in the first five constraints. They work to support and develop the principles laid out in the pre-processing, the structure of the process, the seating, the introduction, and the ground rules. The following constraints are created through the mediator's moves, but they occur in response to the disputants' discourse. These constraints, therefore, are a part of the give and take of conversation.

RE-DEFINING ARGUMENT: LISTENING WITHOUT INTERRUPTION

Ground rule number five, "Avoid interrupting each other," defines a major shift between the primary and secondary rhetorical situation. It has an enormous effect on the pace and thoroughness of the discourse in a mediation. Imagine the discourse produced in a rhetorical situation when the rhetor is only allowed a few words or a brief sentence or two before she is interrupted. Compare that situation to the discourse produced by a rhetor who knows she will have unlimited time to
expound and explore. Likewise, the rhetorical situation is different for listeners when, instead of giving a rebuttal when it occurs to them, they are forced to hold their thoughts for a much longer time, until all the information has been carefully gathered and laid out. The rebuttal will most likely be altered from the form it might have taken once all the questionable details have been settled and the emotional motivations have been divulged.

The admonition to listen is taken very seriously in a mediation because exchanging information can have a powerful impact on the proceedings. Mediators teach disputants good communication skills by instructing them to listen for new information from the other disputants. Listening to what may sound like accusations and lies is difficult for disputants. When one party has trouble sitting patiently through the other party's complaints, the mediator tries to validate his or her emotions. Usually, the party who speaks second is complimented for being patient. Struggling through the task of listening is strongly encouraged. In the pre-mock mediation discussion, one of the mediators explains the importance of listening:

It's been my experience, at least, that in conflict, one of the first things that goes out the window is to communicate effectively. So it's our job to facilitate effective communication . . . . But when you're listening, and I go over this with them in the ground rules, especially the no interrupting ground rule comes up, I say, "You know what we'd like to have happen here is, when one person is speaking, for the other side to listen with the intent of trying to understand what the speaker is saying . . . . Your role is to be a good listener with the intent to understand, not to refute or avenge yourself, but to understand what the other person is saying." (F 269).

In this response, the mediator begins by pointing out his role as a communication facilitator. In the twenty-five minute pre-mock mediation session, some reference to
improving or facilitating communication, or clarifying information, was made eighteen times by the two mediators. Their style preferences and their theoretical views all referred in some way to that primary role. Next, this quote shows the mediator relating how he might word advice about listening during a mediation. He emphasizes understanding over "refuting" what the other disputant is saying. This does not guarantee that the disputant will be able to follow his advice. It can be extremely disturbing to hear what seem like false accusations and not immediately form a defensive rebuttal. Again, the intention is important. When disputants understand that they will have to wait their turn to speak, they listen long enough to hear the reasoning or the misunderstanding that has caused the accusation.

Disputants are able to speak uninterrupted for the longest periods of time in the first stage of a mediation, when they are describing their situation as they see it. In these opening statements, disputants are encouraged to go on for as long as they wish, sometimes taking twenty or even thirty minutes to explain their histories. In the mock mediation, Carl described his situation first. The mediators asked questions, and when he finished, they turned to Betty. A mediator encourages Betty to begin speaking from her own point of view. He says, "Now you don’t have to respond to what he said. You can just tell us how you saw it. You don’t have to say, ‘yeah but’ or whatever. Just tell us how you see the situation, and we’ll go from there" (G 286). These instructions are consistent with the mediator’s intention to encourage listening for information rather than listening in order to build a defense.
Even if Betty imagined defending herself while she listened to Carl, here she is reminded that it is not necessary for her to defend herself.

By this point we are beginning to get a strange picture of what we assume is an argument. By definition, an argument is a persuasive discourse that depends on claims and evidence to move an audience either to adopt a new position. One presumes disputants arriving at a mediation are prepared to argue. They are in conflict. Each disputant expects to persuade the other that that he is "right." Each disputant expects the other to change in some way that will end their conflict. In the mock mediation, for example, Carl believes that if he can get Betty to quiet her dog, he will be satisfied. Likewise, Betty has come to the mediation hoping that she can convince Carl to be satisfied with what she has already done to quiet her dog and agree to leave her alone. Both disputants have their arguments and their evidence. The logical next step would be to hear Carl’s complaint and determine if it is reasonable and to hear Betty’s defense to determine her responsibility.

However, in the rhetorical situation of mediation the "facts" take on another kind of value. Facts may be used to redefined the original exigence. If that happens, many of the possible resolutions that the neighbors might have originally brought with them to the mediation become unnecessary or inappropriate. For example, in previous unmediated discussions between neighbors a broken promise was at issue. Was it a promise? Was it broken? The facts of the situation were very important in determining these answers. What day did you say you would clean the pool? Who said they would do it? Who was supposed to trim the tree? Who was supposed to
remind that person? How much trimming? Which branches? But in a mediation, the facts aren't given presence. They are marginalized. As explained by Jacobs, they are used to determine how committed each neighbor is to their position. The "facts" will be used to help each disputant feel recognized and empowered. Instead, the mediation process values sharing openly and honestly, building trust and establishing a deeper and more realistic relationship between the disputants. Besides the value of argument, the analysis of my data shows how the constraints I identify re-define notions such as neutrality, agency, and conflict.

RE-DEFINING GOOD COMMUNICATION

A mediator influences discourse through her responses to disputants. A significant part of mediator training is spent teaching mediators to respond in very specific and deliberate ways to disputants in order to help draw out details of their story and uncover underlying emotional motivations for disputants' behaviors, wants, and needs. My research also indicates that mediators' responses give presence to the secondary exigence, by modeling and promoting good communication. These responses are intended to limit if not eliminate the tendency for mediators to make statements that judge, advise, or sympathize. Any of those responses disempower disputants and hamper their ability to make uncompromised decisions. Instead, the mediator's responses model good communication practices: turn taking, listening thoroughly and patiently, digging for more information, respecting emotional motivations for behaviors, allowing oneself to be transformed
by the experience, and finally, successfully resolving conflicts to the mutual satisfaction of all the parties without resorting to compromises. Mediators hope that they will encourage a specific kind of rhetoric that values this definition of good communication by practicing it themselves during the mediation. Mediators want disputants to listen without interruption, for example, so they themselves listen without interruption. They want disputants to gather new information without feeling defensive, so they respond to the disputants in neutral language that is neither accusatory nor defensive. At times the mediators may teach specific behaviors directly through references to the ground rules, or they may "teach" good communication indirectly through modeling.

At one point in the pre-mock mediation, one mediator seems to be explaining how he likes to teach disputants the importance of communication, but when the other mediator asks if he is doing that directly, his answer is "no":

M1: The communication breakdown is affecting the both of [you], not just this issue [you're] talking about. And the more I can make that visible to the [other disputant] there's a communication breakdown going on here, [I would say.] "So what were you thinking when he said this? Oh? What assumptions were you making?"

M2: So let me make an assumption here. Sounds like one of your approaches to getting that is like talking about communication –

M1: No.

M2: Or, you're like reviewing it yourself and making sure –

M1: Right. My process of communication is just to initially orient them to what this process is and to what their roles are. (F 271)
M1 makes the communication breakdown "visible," but he does not want to lecture the disputants about communication. The suggestion being made here is that while mediators believe that conflicts are ultimately due to poor communication, pointing that out to the disputants will not be an effective way to address the problem. Convincing disputants that their conflict is actually due to a communication breakdown could become distracting, confusing, or frustrating for disputants. A disputant prepared to confront his neighbor about her barking dog needs to be heard and have his emotional needs addressed. A digression pointing out the benefits of good communication would slow down or sabotage the real communication that needs to happen. Good communication behavior is called "active listening." Active listening means looking at the disputant who is talking, using body language to show that his or her words are being understood, and responding with a particular array of comments and questions that will assure the speaker she has been heard. One mediator described active listening as being engaged with the disputants: "And what I mean by engaged, is being engaged in terms of good active listening. So, asking questions. Letting them talk, and asking questions to make sure you understand what they've just said" (F 269). Active listening requires a high level of commitment to the conversation and an earnest desire to understand. The same mediator gives an example of trying to understand a disputant who does not seem to be making sense: "When it becomes obvious, you know, that something's going on, [I say] 'What am I missing here? . . . . I'm not hearing what you're saying. So tell me in another way. Tell me again. Let's go back
and track it. Say what’s important to you here, and let me see if I can catch that. If I can’t, then we need to go back and find out why’”’ (F 272). The mediator is assuming that the other disputant is overhearing him insist on being able to understand what is being said. Besides gathering information that may be critical to a resolution, the mediator is modeling the importance of understanding the speaker.

The least obtrusive, but no less influential, response a mediator gives is to summarize what a disputant has just said. Summarizing is thought to be a neutral form of validating and re-framing. Mediators ask disputants if their summary is accurate. Disputants are encouraged to correct mediators who have misunderstood them and to add as much new information as they like to their original statement. The summary accomplishes several goals. One is to establish a few undisputed facts. Another is to confirm that the disputant was understood. A third is to allow disputants another chance to add to their statement. Exchange of information is highly valued in mediation discourse. The processes of giving and receiving information is artificially slowed down so that new information can be fully absorbed by the listener. When mediators summarize, the party listening has a second opportunity to hear information that could help him or her appreciate the humanity or the complexity of the other person better.

When summarizing, the mediator’s primary intention is to help the participants keep track of relevant facts. Of course, a mediator’s decision about what facts are relevant is not a neutral assessment, but it is still a relatively neutral response compared to other types of responses. For example, in the mock mediation,
one mediator’s response to Carl’s opening statement is, “So, if you don’t mind, I’m just going to recapture what I heard you say. You’re retired, and you live in the house that you’ve lived in for about 25 years, did I hear you say?” (G 281). Carl’s response is simply to nod and say “Yeah” (G 281). This is an example of a rather brief summary of an opening statement. The mediator might have mentioned several other points Carl made, but the mediator goes on to ask a probing question next. The other mediator does a more thorough job of summarizing Betty’s opening statement:

M2: O.K. so, just to make sure we’re on the same page here, you’re single, or divorced. You’re a nurse, so you work long hours. When Carl came over, or called you about the dog, your perception was that he was really angry about the situation. ((Betty nods)) You responded to the situation by trying to feed the dog early. You also got a kennel for your dog, a carrying case ((gestures indicating a carrying case/Betty nods, small laugh)) for your house to keep the dog in with the intent of (.)

Betty: [keeping him quiet.]

M2: You also mention that you used to have more dogs and that when your husband and you divorced, he took two of the dogs with him. ((Betty nods)) (G 287)

In both examples of summarizing the disputants’ opening statements, the mediators list what they believe are the disputants’ main points.

The rhetorical situation in mediation values gathering information before jumping to conclusions. Mediators use direct questions to gather more information. The theory is that disputes are often created because one party will jump to a conclusion before having all the information. The mock mediation provided a typical example. The complainant, Carl, proceeded to file a complaint with Animal Control after his phone call to Betty because he assumed she had ignored his
complaint. Actually, Betty had taken Carl’s complaint very seriously and made several changes that she hoped would quiet her dog. Betty fed her dog earlier in the morning, and she put him in a kennel in the house after work before she went out for the night. She did not tell Carl about these changes. While these changes did not take care of the problem to Carl’s satisfaction, when this information was revealed in the mediation, it went a long way toward helping Carl feel more patient and forgiving about the barking.

Once Carl finished his opening statement and the mediator briefly summarized his position, the mediators began asking questions to draw out more information. These questions are intended to “follow Carl’s lead.” That is, they develop organically from information Carl provides. The mediator asked, “And, uh, how long, did I hear you say, how long this problem’s been going on?” (G 281). In his opening statement, Carl had mentioned how long he had lived in his house. When Carl responds, “It’s been about, uh, I guess, good question. I’d say, six to eight months now I think, I think, when I kinda let it ride for a couple of months . . .” (G 281), the mediator decides to pick up on the fact that Carl originally decided to “let it ride.” The mediator’s next question is, “So you put off doing something about it?” (G 270), which prompts Carl to say, “Then I think I’ve been trying to do something about it for the past four months or so, three or four months” (G 281). Even though Carl does not answer the mediator’s question in his response, the mediator’s next question abandons that issue to follow Carl’s lead. The mediator asks, “And what sorts of things have you been trying to do about it?” (G 282). This
line of questioning successfully uncovers what will be the most crucial piece of the story for the mediators. Carl’s response, reveals that he had left a message on Betty’s answering machine (G 282). His call was not returned. When Carl phoned again, their conversation was unpleasant and ineffective.

Although Carl and Betty do not realize it, the attempts at conversation that went awry is of critical importance to the mediators and will be the focus of most their questions. Though the primary exigence is what the disputants believe caused their dispute, a barking dog, the secondary exigence, miscommunication in a phone conversation, will take precedence in the mediation. If Carl and Betty had been able to engage in effective communication over the phone, mediation theory maintains they probably would have been able to work through their conflict and the mediation session would be unnecessary. But because their attempt at communication not only failed to resolve their issue but created hurt feelings and confusion, the mediators know that they will have to delve into what took place during their phone conversation and help the disputants apologize and forgive each other for the miscommunication. The primary exigence, Betty’s barking dog, has less value than the secondary exigence, an unsuccessful attempt at communication, in the rhetorical system of situations.

Carl describes his attempt at communication this way:

Originally I was, I left a message on Betty’s answering machine and we talked about the dog. ((gestures to Betty/ Betty folds her hands in her lap)) Tried to find a way, but we didn’t really come to any agreement about anything. I just tried to let her know that the dog was bothering me. And my son, who is a lawyer, gave me some advice about ways I could proceed . . . .” (G 282)
One of the mediators responds by re-framing and summarizing in order to clarify this new important piece of information. Carl’s statement makes several points that could prompt logical questions from the mediators, he left a message. Was it returned? He “tried to find a way.” What were his suggestions? He let her know the dog was a bother. How so? He asked his son for advice. What was the advice? Out of these possible choices, the mediator responds, “So you’ve talked to Betty on the phone about it?” (G 282). This quintessential mediator response is a neutral prompt for Carl to give more information on the one issue of importance in a mediation, the exigence with real precedence, their communication. The mediator is asking, what has your communication with Betty been like? In other words, how did that attempt at communication go wrong? The mediator’s response re-frames Carl’s statement. It summarizes and at the same time neutralizes Carl’s description. Although Carl seems to be suggesting that something didn’t work in that conversation when he says, “we really didn’t come to any agreement about anything,” the mediator chooses to ignore the negative outcome for the moment in order to give Carl the chance to restate the event in as positive light as possible if he wants to.

The mediator moves Carl through his explanation slowly, careful to re-frame where possible. The mediator’s questions stick very close to the information Carl has already given.

M1: Ok, and did that have any kind of, was there any adjustment made after that time? ((Carl moves his head to indicate he’s not so sure)) or any difference in your experience of [the situation.]
Carl: [I don't know, actually] from my perspective at any rate, I don't think it did anything. I don't think we came to any conclusion or decided to do anything [or anything changed.]

M1: [I see. OK, so you talked]

Carl: () ((gestures to Betty to ask, "right?")

M1: But there wasn't a decision to do anything, and so nothing changed.

Carl: Yeah. (G 282)

The mediator already knows from Carl's statement that Carl does not think anything changed, but he chooses to go over this point again carefully because it shows that, for Carl at least, the communication was unsuccessful. This strategy is not being employed to gather new information, it is employed to emphasize Carl's emotional state, which is presumably at some level of frustration or confusion.

Carl's nonverbal query toward Betty further emphasizes his confusion. He looks at her as if to ask, "Am I right? Did you hear me?" or perhaps in a more general way, "What is going on with you?" The mediator continues to try to validate Carl's emotional state with a few more prompts that ask Carl to explain again how difficult it is for him to sleep with the barking. But Carl chooses instead to describe why he imagines the dog barks, and why it's so particularly disturbing. The mediator decides not to try to address Carl's emotions directly at that point.

Consequently, the mediator does not get much more information about how Carl feels. Instead, the mediator turns the conversation back to the phone conversation.

M1: Well, you said earlier that you'd actually spoken to Betty about it about four months ago or so, or about two months ago?
Carl: Yeah. ((nods))

M1: And that nothing resulted. How was your conversation? A pleasant conversation? Was there a problem? Did she admit her dogs were barking? Can you tell me more about that? (G 284)

Here I would guess that the mediator is a little frustrated that he has not been able to get Carl to admit what the mediator suspects, that the conversation was in some way frustrating or unpleasant enough to cause a break down in their communication so that, instead of feeling able to call Betty again, Carl decided to contact the Animal Control. The mediator’s questions are much more aggressive at this point. The mediator can’t seem to avoid making some guesses about what took place during that conversation. These are not ideal mediation questions. They are not summarizing statements, emotional validations, or re-framing statements. The mediator risks contaminating Carl’s memory of the conversation, sounding like Carl’s advocate, or taking on too much responsibility for the direction of the conversation and therefore disempowering Carl. However, in this instance, it was not a very big risk. The mediator’s instincts are right. Carl reluctantly admits that maybe the conversation was not as pleasant as he might have lead everyone to believe. The other mediator presses more.

M2: So when the problem continued you didn’t go back to her ((gestures toward Betty)) to say ((gestures to indicate Carl can fill in the blank)) (. )

Carl: No. ((rubs his leg)) I tried to. I, I don’t think we talked after that. Our conversation might not have been as pleasant as ((laughs)) I’m making it out. Maybe it was less pleasant. It was more (. ) Maybe we got to the point were I realized there wasn’t an option to talk to her, or I thought there wasn’t an option to talk to her. Maybe that was more to the point. ((sips water))
M2: ((smiles)) And this resulted in you calling animal control as per advice from your son?

Carl: From my son, yeah.

M2: And how are you feeling about this situation now? (G 285)

This mediator is able to make it safe for Carl to admit that something went wrong with the phone conversation by summarizing Carl's own description of events. Carl feels uncomfortable when he admits that the conversation was, in fact, not so pleasant. He chooses his words carefully and drinks a little water. The mediator might interpret Carl's behavior as being ashamed. He tries to help Carl save face by re-framing the next part of Carl's narrative to emphasize that the call to animal control was Carl's son's idea. Carl also chooses to emphasize that point in his response. Now at this much more vulnerable moment, the mediator asks Carl how he feels, and Carl then offers a more personal and heartfelt response that will go a long way to make Betty feel sympathetic to him. Carl is given the chance to re-characterize himself in Betty's eyes from an irate neighbor who makes threatening phone calls and has threatening letters sent from animal control to a more gentle person who is frustrated but "wants to be neighborly." This move helps begin to repair the damage done by the phone conversation.

PRACTICING GOOD COMMUNICATION

Unless proven otherwise in the course of a mediation, mediators assume that the disputants have been practicing ineffective communication. To keep confrontations that escalate conflicts to a minimum, they direct the flow of
conversation. At least in the beginning, disputants are guided through questioning and body language to direct their comments to the mediators. The other disputants can “overhear” new information or inflammatory comments without having to defend themselves. Meanwhile, mediators model respect and active listening. The listening disputant has to absorb the whole story before she is allowed to respond. The theory is that this method gives the listener time to form thoughtful responses rather than defensive reactions. Later in the process, once some common ground has been established and sympathy has been developed, the disputants are better able to speak to each other and to listen to each other more effectively. This is the ideal. But it is possible for whole mediations to be held without the disputants speaking directly to each other.

During the post-processing of the mock mediation, the mediators reflected on their role as communication facilitators. One mediator explained, “I think what we do is supply a, is to create an atmosphere for that to happen. By people being able to talk and to hear each other. And as I was saying to Tom earlier, I think our function is to facilitate effective communication . . . ” (G 310). The second mediator responded, “You ((meaning the disputants)) were initially talking to us, but when you started talking to each other we didn’t stop that. We wanted that to happen because that’s part of the process” (G 310). And later, this same mediator remarked, “It depends on what’s happening whether we would stop [disputants talking to each other] or not. There’s plenty of times when they’ll start ((indicates disputants are talking to each other)) and it’s a counter-productive sort of thing. And I will ask,
‘Will you please direct your remarks to me?’ (G 311). The respondent playing Carl agrees, “See, that was helpful at first to have you to focus on or you to focus on ((indicates the mediators)) to kind of put you by the wayside for awhile. ((indicates Betty)) and then gradually realize you’re there” (G 311).

Deliberately directing the flow of conversation this way is a powerful constraint defining the rhetorical situation in a mediation. This constraint is often overlooked by mediators as a source of their influence. For example, it was not mentioned by any of the mediators in my interviews. When I questioned the mediators about the ways they felt they might influence a mediation, they always thought about their influence in terms of maintaining an impartial and neutral position in the session. In the mock mediation, the disputants talked to each other relatively little and only after the possible solution of installing a dog door has been settled:

Carl: I’m happy to help you with the door because I have time and I can install it if you want so you don’t have to pay somebody to do something as simple as that. It’s almost the weekend so I could look for something this week, [give you some process if you’re interested.]

Betty: [That would be great.]

Carl: In terms of the doggy door and I’ll be happy to put it in for you. That’s not a problem.

Betty: That would be great because I really don’t have time until the weekend. I’ve got to work. I’m missing work right now, so, it’s Tuesday. [So yeah, by the weekend.]

Carl: [I can look for a doggy door] over the next few days and give you some prices. (G 300)
Only this very amicable kind of dialog is allowed to progress uninterrupted. After a
few more questions from the mediators that press for more details about how the
work will get done, the disputants are again allowed to continue an even longer
cconversation as they work out a back up plan if the first plan doesn’t work. At one
point the mediators exchange glances to indicate to each other that they will allow
the disputants to continue talking. When their conversation seems to end of its own
accord, one mediator enters the conversation to sum up their progress.

Just as the mediators are confirming the resolution, Betty gives some
indication that she is not completely ready to end the discussion. The mediators
redirect her comments back to themselves:

M2: Is there anything we’re missing?

Betty: No, I’m just thinking. O.K., we’ve solved this problem, fabulous,
great, and that’s what I want but I’m going to have to work awfully hard
because I’ve got to re-train the dog (.) ((M2 nods)) unless I can do the
laundry room thing. I feel, still, just the tiniest bit of resentment that I have to
go through all of this for a seven pound dog. But, you know, it’s probably
not going to be so bad, especially, you know, if you ((indicating Carl)) help
me out with the dog door and stuff like that.

M2: ((waving hands to indicate ‘wait a minute’)) Just so I’m clear on this,
((to Carl)) When she says she feels resentment because of the dog situation,
how does that make you feel? (G 303)

The mediator has picked up on Betty’s reluctance to go through with the resolution.
Even though she seems to settle it for herself, “It’s probably not going to be so bad . .
. .,” he recognizes an emotional need that has not been addressed, namely, Betty still
wants her efforts to be appreciated by Carl. The mediator doesn’t let Carl respond
to Betty directly. Instead he re-establishes himself as a buffer and asks Carl to
describe his feelings to him, giving Carl an opportunity to be appreciative while
Betty overhears their conversation.

As it turns out, Carl does not do a particularly sensitive job of complimenting
Betty but instead offers a rather inadequate understanding of her situation. Carl’s
response does not acknowledge the work Betty has already done to quiet her dog.
He offers:

I can understand that. I mean when you have a dog it’s hard to, you know.
You have a dog for company. You said that. And I know what that’s like.
So it’s difficult to think of the dog, you know, it becomes a part of your
family. So I understand it’s kind of like if your child were running around.
It’s difficult to just lock them up in a room and that’s the end of the problem.
(G 303)

Betty seems mildly satisfied that he understands her. She tries to comfort herself in
her response, “And really reasonable, we’re only talking about a couple hours that
are a problem, right?” (G 303). The mediator is not convinced that Carl’s response
has been validating enough so he presses Betty, “How does what he said affect or to
affect your resentment?” (G 303). Betty concedes, “It makes me feel better. You’re
definitely not the hardened army dude that I thought you were . . .” (G 304). This
potentially dramatic transformational moment may not be as complete or as fulfilling
as it could have been, but the mediators decide not to press any further.

A rhetorical situation in which the disputants are kept from confronting each
other directly with potentially inflammatory accusations is different from a situation
in which the disputants must take on their opponent’s full force. The listener has less
need to act defensively. The experience for the speaker is also quiet different.
Disputants choose their words more carefully when they are speaking to a mediator.
The unfortunate phone conversation between Carl and Betty is a good example.

Over the phone, Carl was presumably accusatory and threatening. Whatever was said left Betty feeling threatened and left Carl unwilling to call again.

When the mediators ask the disputants about their phone conversation during the mediation, they re-frame their experience so that their reactions sound reasonable. Betty describes the phone conversation this way: "I guess I was really surprised when he called and sort of taken aback because my perception was that he was very angry . . . . The phone conversation to me was really uncomfortable . . . ." (G 289). Carl can overhear her discomfort, creating a much different rhetorical situation for Carl then if Betty had spoken bluntly and directly saying something like, "You were rude to me on the phone." When Betty directs her observation to the mediator, Carl is motivated to respond less defensively. Later he admits,

Oh well, it might be years in the army maybe. I'm a retired sergeant, so I'm used to, yeah, that, that might be the case. I'm used to being assertive and just saying what's on my mind rather than trying to beat around the bush. So, yeah, I've been told in the past that sometimes I come off as a bit aggressive or at least assertive so that might be the case. Yeah, I might've come off as sounding more angry than I actually was. (G 289)

Choosing when disputants are allowed to speak directly to each other creates a rhetorical situation protecting the listener from a reactionary defensive response. It allows the listener the time and emotional space to hear the speaker, and also give the speaker a chance to voice complaints he might otherwise hesitate to reveal. All these mediator moves promote better listening, more honest and deliberate speaking, and are more productive communication toward a resolution on the part of the disputants.
USING IMPASSE STRATEGIES

The rhetorical situation created in a mediation only promotes conciliatory discourse; it doesn’t guarantee it. Even when all the other constraints are functioning, a mediation may stall. Impasse strategies are techniques that mediators pull out when questioning, summarizing, validating and re-framing fail to constrain the situation enough to produce discourse that leads to a mutually satisfactory resolution. Impasse strategies include but are not limited to caucusing, role playing, communication instruction, and brainstorming. Communicating effectively under the best of circumstances can be difficult. The process of repairing miscommunication between people who are often emotionally distraught usually runs aground at some point. Impasses are typical (“stalling” is actually a step in transformational mediation), and they do not indicate a flaw in the process. The disputants arrive at a mediation already at an impasse. In the mock mediation both disputants express feelings of hopelessness: Carl admits that he doesn’t know what to do (G 285), and Betty says in frustration, “I thought about boarding it [her dog] on the way over here for when I’m gone, but I really don’t know what else to do, and getting rid of him is just not something I want to do” (G 287). As the mediation progresses and the most difficult issues are broached, the original sense of hopelessness reemerges.

One effective impasse strategy is caucusing. In caucusing, the disputants are separated and spoken to individually, in order to determine if they are holding back

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some information. Mediations often stall when one disputant refuses to budge from his position but doesn’t explain why or gives a reason that doesn’t make sense. In these cases the other participants in the mediation are faced with a clear position but no way to negotiate it. Caucuses provide a safe place for disputants to explain their positions away from the other parties.

Another impasse strategy is role playing, which serves as communication instruction. In it, the mediators ask the disputants to pretend to be each other and speak from the other’s position. The assumption behind this technique is that the speaker will, in a Rogerian fashion, come to understand the other’s position better, while the listener can be assured that he has been understood. Other communication instruction may include, for example, asking the disputants what a respectful request sounds like to them, or what a pleasant greeting looks like to them.

In brainstorming, the mediators step out of their roles to join the disputants in making suggestions. This impasse strategy risks mediator’s impartiality and neutrality, as well as potentially disempowering the disputants by giving advice.

After the disputants in the mock mediation make their opening statements, a mediator asks Carl to be as specific as possible about what he would like from Betty. After the mediator determines that Carl would like Betty’s dog to be quiet from 5:30 to 7:00 every morning, the mediation stalls. Betty has difficulty imagining how to fulfill that request. One mediator asks, “O.K., so, let’s see how many ways we can think of affecting the dog barking in that hour and half . . .” (G 292). The second mediator chimes in with the suggestion, “Brainstorming?” and Betty immediately
replies, "Oh good, you’re going to help ((smiles)) cause I just don’t know" (G 292).

Carl adds his agreement, "That would be great" (G 292) and the second mediator goes on to explain what is meant by "brainstorming:"

M2: Brainstorming is a process we like to utilize when people have agreed to solve a problem but they haven’t exactly keyed on that exact process they’re going to use. So we’d sort of like to get involved as this point and have us all sort of generate ideas for about a minute or two without evaluating the. Just think, how many ways can we deal with this? And just list them, ((Betty nods)) and then sort of go back and look at those ways and see what might work for you. (G 292)

In order to limit the risks to mediator neutrality and impartiality associated with advice giving, brainstorming is separated from the regular mediation discourse. It has a beginning and an ending. Brainstorming is introduced once the disputants have agreed on the definition of their problem and the need to resolve it. During the brainstorming, everyone’s suggestions are given equal weight. The suggestions are not evaluated as they are given. Also, as was the case in the mock mediation, the mediators actually offer very few suggestions. One mediator begins the brainstorm by restating the issue at hand and repeating the suggestions that have already been made by the disputants without adding any of his own:

M2: O.k. so the situation is how do we stop the dog from barking between 5:30 and 7:00 in the morning, right? ((Carl and Betty nod)) And one of the things you’ve ((to Betty)) already done is to feed the dog [and water it. and that didn’t work.]

Betty: [mmm,hmmm. Apparently not.]

M2: So, ((looking all around)) somebody give me a word, give me a solution (.) (G 293)
As the brainstorming session progresses, Betty and Carl make all the suggestions except in two instances. One mediator adds to Carl’s suggestion to install a dog door saying, “The only idea I had was on the doggy door was to put a timer on the doggy door [so that it couldn’t get out of the house until 7:00]” (G 294). The second mediator’s suggestion is for Betty to buy more toys for the dog (G 295). This suggestion is quickly dismissed by Betty. Betty’s reaction is common. Advice from mediators is not only contrary to the values of mediation, but advice from mediators is almost always dismissed by the disputants, regardless of when or how it is inserted. Meanwhile one mediator writes down all the suggestions. He keeps everyone apprised of their progress saying, “So we’ve got four ((looks down at his pad of paper))” (G 294).

The brainstorming session works to get the mock mediation moving forward again, even though no new ideas are actually presented. Installing a dog door, using a kennel in the house, and asking another person to bring the dog in at night were all suggestions made by the disputants earlier in the regular mediation. In the brainstorming session these ideas are merely refined. For example, Carl volunteers to help install the door, and Betty realizes she can have the door installed so that her dog will enter the locked laundry room rather than the whole house. The brainstorming session worked on a more emotional level than practical. It changed the pace and the mood of the mediation. Whereas beforehand the disputants were becoming convinced that they had few options and that none of their solutions would work, the attitude in the brainstorming session was more positive, hopeful and
energetic. The mediator could list their solutions and report that they had “four,” and later “five,” suggesting that there were five new viable solutions they could choose from. The five “solutions” were 1) “keep the dog inside and have somebody let the dog out in the morning and the evening,” 2) “limit the dog’s running space in the yard,” 3) “get a doggy door and perhaps use a timer on the door,” 4) “have Carl and Carl’s wife meet the dog,” and 5) “get another dog” (G 296).

The actual solutions themselves are not as important as the experience of creating them. By the end of the brainstorming session, Betty and Carl feel more positive about eventually coming to a resolution because their communication during the brainstorming was positive. The solutions sound more promising than they are. Betty had already employed the first solution, and it had not satisfied Carl. Second, Betty is only guessing that Carl would be less annoyed if her dog barked further away from her fence. Third, the dog door had already been mentioned before the brainstorming session. Number four is not a “solution” to the barking at all. Rather it would supplement any solution and aid in reestablishing their communication. And the fifth solution is questionable at best. The aim of the brainstorming session is not to create viable solutions, although that can happen, but it helps to keep the conversation flowing in a hopeful direction.

RE-DEFINING CONFLICT

Mediators troubleshoot by asking questions that ferret out flaws in agreements. The mediation process is designed to resolve conflicts, but mediation theory assumes that conflict is a necessary, inevitable and ongoing part of human
interaction. The resolution is not the end of conflict for the disputants. Rather, one aim of mediation is to help disputants understand conflict differently so that they can use their new communication skills to address their next dispute. The resolution of the current dispute must be tested for practicality and integrity even if that means it must be discarded. Troubleshooting the agreement re-defines the concept of conflict, and challenges disputants to approach their current conflict with a fresh perspective.

A fundamental tension in mediation is the struggle between striving for a resolution and guarding against coercion. In this rhetorical situation, all parties should feel they have not merely gotten the best deal they could, but they have both “won.” Compare this situation to one in which the best argument wins. In the case of the mock mediation, Carl wins because his complaint is being addressed seriously, and he feels Betty respects his position. Betty wins because she does not have to worry about being taken to court. She also learns that her neighbor is not as cold hearted as she once feared. Carl will install her dog door for her, and Carl will help her with her dog walking chore.

It seems ironic, but just as the agreement appears imminent, mediators are obligated to see if it is possible to poke holes in it, to test whether the disputants are being sincere and realistic, and to press them for back-up plans. The question is, once the disputants find themselves back in their original rhetorical situation, where the dog barking is the primary exigence and not their ability to communicate, will the terms of the agreement suffice? If the disputants are going to continue some kind of relationship as neighbors or friends or family members after the mediation,
mediators know that realistically, the two hour or more mediation session is only a small step in a much longer process the disputants will have to go through.

Since mediation theory maintains that conflict is inevitable and even desirable, part of most mediation agreements includes some reference to a new way to communicate, such as how to call, when and where to leave notes, how to phrase complaints, or what it means to act neighborly. These parts of a resolution attempt to provide some tools for the next inevitable conflict disputants will face.

Transformational mediators hope that new communication skills will do more than address the particular conflict at issue. They hope that the mediation experience will transform the participants so that they understand all their relationships in a new light and understand conflict as an opportunity for growth.

In the mock mediation, one of the mediators introduces the troubleshooting phase this way:

M2: Now for us, as part of our job at this point, is to make sure that we’ve dotted all the i’s and crossed the t’s, so in that process we’d just sort of like to make sure, like when is this going to happen? Who’s going to do what? That sort of thing, so we’re all clear and nobody’s assuming. So when are we talking about this process starting and you ((to Betty)) getting a door? (G 299)

Betty and Carl decide when Carl will come over to install the dog door. During their discussion, the mediator repeats their decisions and writes them down. Then the mediators press further:

M1: What if?

M2: What if?

M1: What if this doesn’t work?
Betty: What if none of this works?

M2: We just like to have a fall back plan because you know sometimes the best laid plans of mice and men may not happen.

M1: There’s some fall back built into the brainstorming. ([refers to what is written on the pad of paper]) If the dog door doesn’t work, you have the timer. I mean, I don’t want to be Mr. Negative, but just sort of devil’s advocate. (G 301)

Before this point, the mediation was moving along quickly. Both disputants had felt as though they were very close to ending the mediation, and their agreements were coming easily. The mediator’s questions slow down the pace. Betty is incredulous when she asks, “What if none of this works?” She is confident or at least very hopeful that something they’ve agreed to will “work,” that is, the solutions will satisfy Carl, even if they do not keep her dog perfectly quiet. Betty has come a long way from her position at the beginning of the mediation when she was skeptical that anything would “work.” Now it is hard for her to believe it’s possible nothing will work. The mediators’ role would seem to have changed as they all hammer out the details of the agreement. In fact, the mediator’s role has stayed the same, while the relationship between the disputants has changed. The mediator is still advocating for a resolution that will be effective and mutually satisfactory.

One mediator asks Carl, “How will she ([referring to Betty]) know if that’s working?” (G 301). This is how the mediator attempts to insert some provision for improved communication into their agreement. Carl catches on easily, “Well, I can tell you. ([to Betty]) I can give you a call and let you know . . .” (G 301). The mediator does not need to help them sort out how they will communicate. He simply
writes down Carl’s willingness to call in the agreement. In this particular case, there
doesn’t seem to be a need for any more qualifications on that point. The disputants
are already speaking amicably. This is also the point when the mediators allow Carl
and Betty to chat casually without interruption. This allows them some time to get to
know each other on their new, friendlier terms.

RE-DEFINING RESOLUTION

This constraint is closely related to the previous one. Both constraints make
appropriate a discourse that assumes conflicts will recur in the lives of the disputants.
Both acknowledge future conflicts. The closing phase of mediation is the first chance
the parties have to practice what will hopefully become their new way of
communicating. Mediation is an alternative dispute resolution technique specifically
designed for people who will have to continue their relationships as neighbors,
employees, tenants, relatives, or friends after the mediation session concludes.
Resolutions made in mediations rarely mark the end of a relationship. If the parties
have built a little trust during the session, they will be able to give each other the
benefit of the doubt in future encounters. They will be able to listen more openly,
and they will feel able to speak more honestly. As each party observes the other
sticking to their mediated agreement, it is assumed that they will trust each other
more and feel less vulnerable. Their dispute will not only be resolved, but their
relationship will be restored, and they will actually have been transformed by the
mediation experience. Once the parties have been successful at resolving a
seemingly hopeless situation, theoretically, they should be able to face new conflicts with more courage. They will have learned about their own power to solve conflicts.

At the community mediation center where my respondents were trained, the disputants decide whether or not they would like their agreement written. If they do not come to an agreement, of course the issue is not raised. In many cases, mediators encourage disputants to have their agreements written as a record of their work. Mediators write down the agreement, copy it, and give each participant a copy. It is the practice of the particular mediation center in this study to have the mediators write the agreement as it is being hammered out. The written agreement is then passed around and edited as necessary before it is signed by all the participants. The process for writing the agreement can begin early in the session.

Writing helps to pin down complex or contested points, acknowledge concerns and interests, and keep track of possible solutions. Writing influences the rhetorical situation because it captures claims and desires. It has a way of formalizing the process and reminding disputants that the decisions they make will carry into their future. It cuts down on repetition too. Writing, like other constraints, also slows down the discourse, making it possible for longer and more thoughtful consideration of the arguments, wants and needs.

From my experience, the decision to write or not is generally a matter of the mediator’s taste or style. In the pre-mock mediation processing, one mediator’s view of writing suggests that he believes the mediator who is writing diverts his attention away from the disputants (F 274). Although writing down the disputants’ interests is
encouraged in mediation training, experienced mediators from Our Town tend to use less writing during the session. In the pre-mock mediation processing, the two mediators work out how they will use writing:

M2: In terms of writing on the board or whatever, my preference is I sorta like to stay engaged with the disputants. If there’s something they’re talking that’s very confusing like a diagram or whatever, I’ll get up and I’ll try to stay with them while they do that. Beyond that, I don’t want to. If they get to wants, where they want something then we can actually delineate and they want to have it written out, then I’ll do that. Then, of course, if they want a written agreement, and I always ask them because some people don’t, and some people do, then we’ll write out the agreement.

M2: Yeah, I never push for the written agreement.

M1: You know it used to be when I first took training they () everything. When people started talking, they’d get up and start writing. They’d do it almost verbatim. You’d have reams and reams of writing. And what happened was people stopped being engaged, and they started watching what was going on up here.

M2: Yeah. I’m very flexible about that. Of course, I work with new mediators occasionally, and of course they want to go by the book, and I find that a lot of times the writing is useful when you get into listing what it is you want. Sometimes it can be very balancing. Sometimes it can (.) it can also be revealing that this person wants a lot; this person really doesn’t want much. (F 274)

In my experience, this conversation is typical of the attitude toward writing.

Although there are benefits to writing because it enables participants to keep track of details or visually compare the disputants’ interests, it is generally considered to distract from the emotional intensity of the moment. M2 adds, “I don’t want it to be a place to go and hide” (F 274). As one mediator maintains eye contact with the disputer speaking, the other has to stand, turn her back to the disputants, and write. This asks the speaker to divide her attention between the two mediators. The
disputant is often distracted by watching her words transcribed. As mediators gain more experience, they experiment with ways to get the benefits of writing and decrease the disadvantages. As a constraint, however, the act of writing has a lot of potential to alter the rhetorical situation, not just as a tool to organize points, but as a therapeutic technique. Written comments acknowledge points and solidify promises for future behavior.

The constraints produce a deliberately different rhetorical situation from the one which the disputants have known. They are based on a different exigence than the one the disputants have identified as the source of their conflict. Their rhetorical discourse will, by definition, need to be different for them to proceed through the mediation process. The respondent acting as Carl in the mock mediation commented during the post-mock mediation discussion that, as Carl, he had come prepared with a detailed list of when Betty's dog barked and for how long, but that the "rug was taken out from under" him (G 311). His list "did not seem to matter" during the mediation (G 311). He never found an appropriate opportunity to read his list because the evidence wasn't necessary. He was never called on to defend himself in a way that would make that kind of evidence necessary. The rhetorical situation that would require such a defense had been supplanted in the mediation by a rhetorical situation in which the disputants were not required to create arguments with defenses and evidence. Instead, the rhetorical system of situations in mediation values emotions and disputant's particular views of reality more highly than a public legal standard of justice.
The rhetorical system in mediation also suits the logistical reality of mediation. A focus on communication as exigence allows the disputants to author their own resolution without a judge or arbitrator present. A higher authority may need to determine whether or not a promise was made and broken, but a judge does not need to be present to determine if there was a communication problem. If the experience is transformative, then the secondary exigence will also allow opportunity for a more profound moral and ethical change to take place too. The nature of a conflict about a broken promise is different from the nature of a conflict about a promise that should not have been made. One difference is that the “facts” of the conflict are less useful for proving who is at fault, and more useful as information for constructing a new resolution. If the promise should not have been made, it doesn’t matter if it can be proven that it was broken. There is no judge present at a mediation to determine who is to blame, who should be punished, or what a fair settlement should be. Instead, the facts, such as who did what when, can be used to author a new resolution that provides a realistic plan of action for the future. Transformative mediation makes sense for practical/legal reasons as well as for ideological reasons. Community centers provide free services by volunteer mediators. The injunction to be impartial, neutral and non-judgmental is even more critical because community centers cannot be held liable for resolutions. Statements from mediators in my research confirms these guidelines are important at Our Town. Respondents in individual interviews and data from the mock mediation show a dedication to transformative principles. In the next chapter I will review my conclusions and
consider the usefulness of those conclusions as they might be applied in contexts outside of mediation.
CHAPTER FIVE
CONCLUSION: IMPLICATIONS OF A SYSTEM OF RHETORICAL SITUATIONS

*Le gente Chicana tiene tres madres. All three are mediators: Guadalupe, the virgin mother who has not abandoned us, la Chingada (Malinche), the raped mother whom we have abandoned, and la Llorona, the mother who seeks her lost children and is a combination of the other two.*

-Gloria Anzaldua, *Borderlands La Frontera*

In my analysis of the rhetoric of mediation, I have argued that a system of rhetorical situations provides disputants the best possible means for authoring their own resolution. My study indicates that rhetoricians might consider the role of rhetorical situation as a persuasive device. For example, when peace talks move to Camp David, or when congressional debates go to committee, or even when family and friends decide to perform an intervention in order to persuade a loved one to get medical attention for an addiction, new rhetorical situations are built around the conflict. In these scenarios, audiences experience new sets of constraints, creating a system of situations in which they may be more likely to resolve their conflict or become persuaded to take a particular action. Imagine how the rhetoric in an intervention for an alcoholic spouse is different from the years of unsuccessful arguing and pleading. The rules for acceptable discourse are different. The exigence given presence is different. The family's choice to move their conflict into a new situation is a rhetorical decision.

In Chapter One of this dissertation I emphasized rhetoric's inherent potential to create peaceful resolutions to potentially violent conflicts using examples from ancient and modern rhetoricians. I argued that theorists such as Chaim Perelman and
Kenneth Burke share a vision of rhetoric as useful communication that is practiced in community mediation. In their theories, the best kind of rhetorical discourse is anti-foundationalist, anti-relativist, and open-ended. Also in that chapter I examine theories of rhetorical situation beginning with the work done by Lloyd Bitzer. I argue that situation theory is a useful way to describe persuasive discourse in community mediation because it is a contained and contrived situation, but that current theories do not yet take into consideration the possibility of multiple situations, as I argue is found in mediation.

In Chapter Two I argue that a study of the rhetorical situation in mediation requires the investigation of mediation and a survey of perspectives from practicing mediators. I described my research in which I interviewed four volunteer mediators and video taped a mock mediation session. The data from this study was transcribed and analyzed in order to explore the structure and role of rhetorical situation.

In Chapter Three I moved from an analysis of rhetorical situation to an analysis of the rhetoric of mediation from four perspectives. Each view pointed out the unique qualities of mediation. The analysis of perspectives surveyed how mediation discourse is currently understood in such fields as speech communication, mediation, and rhetoric. From this survey I located guiding principles important to mediation such as neutrality, impartiality, empowerment, intention, atmosphere, good communication, and conflict, which I revise in Chapter Four.

Through an analysis of the transcripts from my research, I identified a secondary exigence and eleven constraints of a secondary situation explored in
Chapter Four. The constraints re-define the mediation experience in terms of a rhetorical system of situations. I found that the rhetorical system of situations in mediation dictates that good communication is appropriate discourse while arguments and evidence are valued only in as much as they indicate commitment to a position. As stated, this conclusion supports Lloyd Bitzer's claim that a rhetor's discourse is determined by the rhetorical situation. However, my analysis also has shown that at least part of the rhetorical system, the secondary situation, is co-created by mediators and disputants who negotiate the parameters of the mediation process. The observation that agency is at least in part divided between the situation and the rhetor(s) is similar to situation theory as described by Scott Consigny and William Benoit, who argue that, while the rhetor is influenced by the situation, he or she chooses to give presence to certain features, to re-order, prioritize, and in general, to interpret the situation.

On another level of analysis, I argued that the appropriate rhetorical response to the co-created secondary situation is for disputants to be the exclusive authors of their resolutions, thus making them the agents of their agreement. This conclusion echoes Vatz's view, that the rhetor is the principal creator of his or her discourse. The situation has some influence on the rhetorical discourse in mediation, but, because the situation is negotiated, and because the appropriate rhetorical response to the situation is self-determination, the resulting resolutions are the disputants' own choice. In as much as the disputants are able to enjoy freedom to resolve their conflict in this forum, and in as much as it accomplishes creating a community of
minds, mediation can be a useful model for democratic and free speech as described by Perelman. Mediation theory protects the will of the individual. It is a forum that not only encourages dialog, but encourages interested and challenging communication, even beyond the scope of the dispute in question.

Mediation is a form of rhetoric that realizes the theories of Burke, Perelman, and others like them who have called for a system of public discourse that can challenge the status quo in open-ended dialog. Citizens in an ideal democracy must be educated about the rhetorical responsibility that goes with the freedom to self-govern. They have an obligation to use rhetoric responsibly, and the right to have their claims heard completely, and to understand opposing views thoroughly in order to create laws and endoxa that are just. Mediation not only provides a forum where disputants can collaborate on new agreements, but it also teaches disputants about the potential of rhetoric, and teaches them how to capitalize on that power.

Mediation teaches disputants that they have the power to change from victims to decision makers. It is a form of dispute resolution that champions an individual’s authority over her own destiny like no other form of justice. In mediation, there is

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2 Perelman writes, “Democratic ideology is opposed to the idea that objectively valid rules exist in matters of conduct . . .” (142). And also that, “scientific procedures which try to establish the true or the false, the probable or improbable, are not those which permit us to justify our decisions, or which give us reasons to act, or choose” (143). In other words, in a democracy, matters of conduct and of truth must be defined through rhetoric that permits/encourages discussion of these issues.
no disinterested discourse. Decisions are perpetually debated, and justice is situationally specific.

As a model for social and political discourse, mediation theory is in line with the highest democratic ideals. Mediation theory assumes that as long as good communication is being practiced, open and honest conversation is being encouraged. Good communication provides a safe atmosphere in which criticism can be openly spoken and genuinely considered without defensiveness. Honest listening and real choices make change an ongoing possibility. A political Idealist orientation assumes that people can change (Sandole 4). Mediation, and transformative mediation in particular, is also based on the assumption that people can learn and people can change through dialog. But change, as it has already been noted, is an idealist concept. Sometimes, some people can change. And what does one mean by “change?” Does rhetoric aim to change people’s minds, or to have a more profound effect than that? Perhaps, as Corder would suggest, changing a person’s mind is more profound. Researchers in the field of social cognition argue that learning and “changing one’s mind,” is a deeply profound effort, effecting the

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very structure of our personalities. Changing a person's mind, or rather persuading them to change their own mind, is akin to experiencing a transformation.

Mediation theory has documented the conditions for the likelihood of transformation. We know, for example, that people tend to change their minds when they have participated in the decision to change, or when they are convinced that the rewards exceed the pain involved in changing (Our Town 35). Likewise, change is less likely when a person feels afraid or has low self-esteem (Our Town 36). An implication of the conciliatory rhetoric in mediation is that it enhances the conditions for transformation.

Transformative mediation, in particular, focuses on the possibility of changing people profoundly. The rhetoric of mediation can be described as transformative in that it ultimately accomplishes transformative goals. Successful mediation, and the ethics of pursuing it, rely on a transformative ideal. The goal of transformative mediation is to create the possibility for disputants to change their perception of conflict beyond the immediate conflict. The desired effect is that disputants no longer to dread conflict, because they learn that with the appropriate communication skills, they can benefit from conflict. Their transformation is achieved through rhetoric. The rhetoric of mediation allows disenfranchised citizens in the U.S. to have their disputes heard in a forum where they feel they are represented on their own terms. For example, gay couples who are not considered

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married under the law can represent themselves as a married couple in mediation. Their empowerment is an epiphany in which they recognize themselves as authors of justice.

Conciliatory and cooperative discourse is essential to transformative rhetoric, but agonistic discourse is not de-valued. Instead, its role is transformed so that agonistic arguments are valued for their ability to help the participants determine the speakers' emotional states and commitment to their positions. This role contrasts with most other rhetorical situations in which agonistic discourse is used to determine the value of a particular position. So for example, when disputing neighbors are talking over their fence, one's claim that the other's dog is too noisy is supported if other neighbors have also been disturbed. However, in a mediation the same evidence from additional witnesses is not useful. Instead, the assertion that other neighbors are also disturbed has value because it shows the speaker's emotional commitment to his claim. The speaker's assertion reveals that he has gone to some trouble to find out what his other neighbors think. It is assumed that his effort has bolstered his commitment to his position.

The secondary situation acts as a protective fence between the mediators' obligations and the responsibility of the disputants to arrive at their own agreement. The secondary rhetorical situation settles inherent tensions between neutrality and bias, impartiality and favoritism, and empowerment and disempowerment. In shifting the exigence to be addressed from the conflict to miscommunication, the secondary situation places the emphasis squarely on teaching rhetorical
responsibility. The secondary rhetorical situation protects disputants who use poor communication skills from becoming disempowered. Jonathan Shailor's work on defining empowerment in mediation is an example of how a commitment to a secondary rhetorical situation might make the difference between a mediation in which disputants are empowered and one in which they are not. His study shows that without a strong and consistent secondary exigence, mediators working with disputants who do not already know how to communicate effectively, may find it difficult to promote their empowerment.

Shailor's book, *Empowerment in Dispute Mediation* uses three case studies of actual mediations to test his definition of empowerment. He finds that in two of the three cases, the disputants were not effectively empowered. Shailor concludes that mediator neutrality can either hinder or promote empowerment depending on the specifics of the case, and the personalities of the disputants. Mediator neutrality interferes with empowerment when disputants expect and need mediators to break them out of their dysfunctional patterns of interaction but aids empowerment when it allows disputants to elaborate on their positive stories (132). In other words, when disputants are communicating in positive ways, encouraging them to elaborate helps them progress "naturally" to a mutually satisfactory resolution.

However, there is a dilemma. When disputants are communicating in negative ways and mediator neutrality allows their ineffective communication to continue, it is not empowering. If instead, mediators were focused on the secondary rhetorical situation which addresses how the disputants communicated, and pushed
them to understand each other instead of pushing them to come to agreement, disputants' discourse would be heard, acknowledged, and validated. Validation would, theoretically, empower disputants to change their dysfunctional communication style.

CONTROVERSIES: PROBLEMS WITH THE MODEL

A system of rhetorical situations may have applications as a model in other discourses, however, mediation discourse cannot simply be lifted whole cloth out of community mediation centers and used as the structure for political debates or other public discourse. The tensions and uncertainties inherent in the mediation process make it unsuitable for some contexts. For example, mediation's definition of "good communication" is debatable. What kinds of people speak in even tones and consider opposing opinion stoically? One might argue that mediation's privileged communication is a naïve classist/racist generalization that privileges some disputants over others.5

Another road block to its wider application is that the field of mediation has not yet been able to settle on a common definition for a successful mediation. The process is not accountable to the public. Ironically, the transformation experience renders the primary exigence invalid, which makes documenting success completely

subjective. This is a considerable problem since it becomes nearly impossible to
determine the effectiveness of any one element of mediation under consideration
when the concept of "effectiveness" is itself in question. For example, researchers
cannot determine which constraints are most effective. They cannot answer
questions such as, "Is a transformative style better than an evaluative style?" or "Is
mediation successful often enough to be worthwhile?" Although mediation holds
out the hope of resolution, a resolution is, on the one hand, very difficult to define,
and on the other hand, not ultimately the philosophical goal of a mediation. In fact,
in transformative mediation, empowerment, and not resolution, is the goal.

If resolution is a determiner for success, then the problem is that resolution is
difficult to define. For example, if the disputants are transformed by the experience
of mediation, then a "resolution" of their primary exigence will be inappropriate or
beside the point. That exigence will have lost its value. The mediation will not
resolve how to keep the dog quiet because the dog will no longer need to be quiet to
satisfy the complainant. One might argue that that is the same thing as a resolution.
The problem is that such resolutions are difficult to document. In some cases, the
disputants will not produce a written agreement. It will be left up to the mediators to
declare a resolution when they fill out paper work for the case. No nationwide
standard for those cases has been agreed upon. Conversely, it is depressingly
common for disputants to leave with written agreements that would seem to resolve
their conflicts, but actually do not resolve it, or only stay in effect for a short period
of time. Should the disputants resume their old conflict or decide against going back to mediation, the mediators will never know that the resolution fell apart.

Still more crucial to the definition of success is the widespread assumption in mediation theory that a written agreement does not constitute success anyway. And for these mediators, no standard, recognizable determiner is offered in place of a written agreement. None of the transformative mediators I interviewed used a written agreement as a determiner for success, nor did they offer any other standard method to determine success. In short, whether or not the mediation was successful is a subjective opinion made by the co-mediators after the mediation; the co-mediators themselves may very likely disagree with each other.

I asked mediators what success meant to them in my interviews. If I played devil’s advocate and challenged them, most respondents revised their original answer. When asked what a successful mediation meant to her, one mediator’s response exemplifies the struggle most mediators have with the definition. In her answer, the respondent works to broaden the definition of success so that it might simply stand for successful communication. At this point in the interview the respondent has just finished describing the role of the mediator, saying that it is primarily to facilitate a discussion between the disputants. I ask her if that facilitation has a goal:

INT: So towards, what, a solution?

RES: Hopefully. Or even a solution to not have a solution. I mean an agreement not to have a solution. Just some kind of agreement. A meeting of the minds.
INT: Then how would you describe a successful mediation?

RES: Where both parties are happy with the outcome.

INT: So if people aren’t having an agreement, but they understood each other, and that doesn’t make them happy ((laugh)), then that wouldn’t be such a successful mediation?

RES: Um, no, if they (.). If they came to an agreement on what their future dealings would be, because I think mediation really has to do with the future, right? I mean, where they carry on from this point. So if they can know that the person feels and thinks a certain way, and totally disagree with that, but if they have come to an agreed behavior or a path for the future, then I think that’s successful. (E 256)

When this respondent answers that a mediation is successful when the disputants are “happy,” I ask her if she would consider a mediation successful in which there is no agreement, and the disputants aren’t “happy,” but they have understood each other. In her response she rethinks her original definition. She broadens her definition of success so that, regardless of whether or not the disputants are happy or in agreement, the mediation is successful if they can come to understand each other and sense how to deal with each other in the future. It’s difficult to imagine what kind of real situation this scenario might describe. A hypothetical example might be that two disputants did not agree on how best to resolve their problem, but they came away from the mediation knowing how to avoid future conflicts just the same. The struggle exhibited in this respondent’s answer reveals the tension between her sense that success means all parties feel as though they have accomplished something beneficial, and the broader transformative sense of the word, which recognizes self awareness as “success.” A transformative success means that while the parties may not agree to an action that will resolve their dispute,
they become aware of their obligation to negotiate in good faith and to use rhetoric responsibly.

Another respondent understands success even more broadly. For him, a mediation is successful if "one person looks at the other one and maybe acknowledges what they're saying by shaking his head, or something more subtle, where they're discussing a point, and they may bring up a point that the other person may be making and state it really clearly... There is some sort of (. ) contact between the two" (C 222). For this respondent even the most subtle form of "contact," constitutes effective communication, which is at the heart of what he is trying to accomplish. He looks for a variety of clues to indicate that contact is being made. A third respondent offers yet a broader definition:

Like I said, I don't' really care if they walk out with a written agreement. I would like them to walk out with more than they walked in with, if that makes sense. And that means different things for each case. For one party, it might mean a better understanding of themselves, for one it might mean a better understanding of the other party. It might just be an understanding that mediation didn't work. I mean if I have two people that might end up in court about something, and they both agree to come to mediation to me, that's a success. They agreed to come, you know. Only a quarter of our people agree to come (. ) So just that they came through the door means a lot to me. That's already a success (. ) The only failure I think is just the failure to open doors or pushing them into an agreement that they weren't comfortable, that they weren't ready for. Those are equal failures to me. (B 205)

This respondent recognizes the attempt to mediate as a success in itself. Her thinking here may be that because mediation is still unfamiliar to most people, every mediation educates another small portion of the population. Her reasoning seems to be that as more people come to understand mediation, which advocates for non-
contentious dispute resolution, society as a whole will benefit. It follows that a person who believes it is possible to resolve her own conflicts is more apt to take responsibility for her part in disputes.

Failure is not providing the disputants every opportunity to resolve their problem. Giving disputants an opportunity to resolve their own problem always involves helping them communicate better. Other mediators concur that providing an opportunity is not only the definition of success, but it is a mediator’s only responsibility. The respondent above described conciliatory discourse:

> The bottom line is you want them to talk and open up and feel comfortable. That’s the way you’re going to get it done. So whatever way they think they want, you go with that. I don’t know if cooperative is the right word, but non-adversarial. What I want is for them to be talking, at least increasing their chances that they’re going to come up with something or hear each other, even if they don’t reach an agreement. (B 199)

In this transcription, the respondent mentions both points: improving disputants’ communication as the key to resolving their conflict and success being some evidence of that improvement.

Sometimes disputants do not follow their agreements, but they take some other action that solves the conflict, like moving away or making some other adjustment. It is difficult to determine if the mediation experience was a part of their decision to move. If it were, does that make a successful mediation? Some disputants leave with an agreement that “works,” but they complain that the mediation did not go well because they left feeling misunderstood. Or, circumstances may change for the disputants so that their agreement is no longer appropriate. If they are incapable of resolving a new conflict that arises, does that mean the
mediation was unsuccessful? Does that mean they were not transformed enough? These questions can only be answered by further research studies.

Mediation is not standardized across the country, and mediators are not yet certified by a national governing body. Because each mediation program is slightly different, it is difficult to determine if a failure results from the mediation process, or the practice in a particular community. For example, community mediation centers do not agree on how many sessions to offer. In many mediation programs, the disputants are limited to one or two hours a session. Furthermore, if they cannot resolve their conflict during one session, they may be only allowed to schedule one other mediation appointment. Failure is difficult to determine under these conditions. If one mediation session does not end in a resolution, is that because mediation failed, or could it be because the disputants needed more time? Some may argue that needing more time amounts to the same thing as failure. But, if we agree that mediation is always just a first step and that disputants must work from the point at which the mediation leaves off regardless of whether they come to a resolution during the mediation or not, then every mediation session ends "early." Every mediation ends before the resolution is put into practice.

Also, if the disputants exchange information, come to understand each other's point of view, and still decide to pursue their conflict in court, is that a failed mediation? Most mediators would answer "no." The mediation did not fail because every avenue for a possible resolution was explored, and the disputants were either empowered to feel they would do better for themselves under the law or empowered
to feel more comfortable keeping their distance from the other disputant. Mediation teaches people how to analyze their own and other’s discourse for the purpose of identifying and communicating. If this lesson is absorbed, there has been some benefit.

A society which employed such rhetorical analysis would be a society that does not change by revolution or social upheaval, but holds out the promise that factions can change willingly and peacefully. If this vision sounds utopic, perhaps it is. A political realist ideology claims that it is not possible to sustain conciliatory discourse. The oppressed will eventually lose patience with a privileged class who refuses to give up power. History has shown us that peace treaties are difficult to negotiate and even more difficult to maintain. The rhetorical system at work in a mediation is perhaps too unusual. The system is so unlike the primary situation that resolutions made in a mediation may not seem realistic once disputants leave.

An even harsher criticism against the ideal and potential of mediation is an argument that looks at the kind of justice mediated discourse can provide. Justice in a mediation is socially constructed. Agreements that satisfy the disputants in one mediation may be ethically unsound or even illegal according to the general public. Citizens of the United States have agreed that some crimes must be punished whether or not the victims of the crime agree. Domestic violence is a good example. The victim of an abusive spouse does not need to press charges for the spouse to be arrested. Likewise, victims of car accidents do not need to press charges. Police officers determine if a crime has been committed against the public in those cases.
One assumes that the public does not want victims to mediate with criminals in these kinds of cases. The general public has agreed that some types of crimes are beyond the jurisdiction of individual citizens. Barbara Hill, a professor of political science writes, “This is essentially a recognition of the fact that parties to a conflict do not exist in isolation from the general international community. Thus, resolution must be compatible with the wider community’s interests” (115).

Some conflicts, however, are particularly suited to mediation. Resolutions that define ongoing relationships, and conflicts that stem from complex dissatisfactions are dealt with inadequately in the justice system. I agree with ADR specialist, John Burton that disputes over non-negotiable interest are best served with mediation. He writes,

There are such conflicts at all societal levels, that is situations in which ontological needs of identity and recognition, and associated human developmental needs, are frustrated. These conflicts cannot long be contained, controlled or suppressed, but can be resolved and prevented by the satisfaction of such needs. (Burton 55)

Burton sees the greatest potential for mediation in disputes involving non-negotiable human needs. Conflicts arise from issues of deep importance to people and their societies. The resolution process must take into consideration the roots of these conflicts to effect a true paradigm shift, or they will appear again and again. Burton cites racism and drug addiction as examples of social problems that result in crimes that cannot be simply squashed or “controlled” with laws and prisons. He claims that our system of government, which assumes “that the person is wholly malleable and can be socialized or coerced into required behaviors” has failed us (62). Only a
dispute resolution process that goes to the heart of conflicts will make a safe and profound change possible.

Even if we limit the use of mediation to those conflicts that are within an individual citizen’s jurisdiction, and even if we deal with non-negotiable interests, we are still faced with a cultural resistance to mediation. Robert Benjamin claims that an “antipathy to negotiation and mediation is deeply ingrained in our culture” (245). Benjamin surmises that for the general public, the rhetoric of mediation is simply not rational, and the general public still prizes rational analysis to obtain the truth (247). Furthermore, he claims that negotiation is associated with evil. Negotiation “encourages a kind of relativistic thinking that leads to heresy” (249). It is also associated with spurious business dealings, and because it “involves the manipulation of one’s own and the other parties’ perspectives . . . [it is] only one step away from the practice of deceit, if not outright deceitful” (249). Benjamin’s observations echo Greek philosophers misgivings about the sophists. The same criticism heaped on sophistic rhetoric keeps mediators and the mediation process suspected of exploitation and deception.

My purpose has been to help clarify the role of rhetorical situation in mediation and, in doing so, explore its potential as a rhetorical device. I have concluded rhetoricians might employ whole rhetorical situations purposefully, and that one can describe the situation in mediation as a system of situations. The rhetorical system in a mediation is influenced by constraints that are so specific to the mediation experience that mediation discourse may not be applicable to other
forms of public discourse. Still, the major attributes of the rhetorical situation in mediation as described in this dissertation, such as an emphasis on repairing communication and, through that, empowering individuals to author their own resolutions, could very well be expanded in other public discourse. Also, the notion of a system of rhetorical situations, wherein the secondary situation defines and promotes conciliatory discourse, might be used to explain other persuasive situations. Each new application of the system of rhetorical situations is a potential research site. For example, in the epigraph heading this chapter, Anzaldua represents her Chicana heritage as a complex combination of three mediating mothers. Might rhetorical systems explain the construction of rhetorical discourse in the competing and collaborating cultural situations Anzaldua describes? The notion of systems of rhetorical situations may be a useful model to help rhetoricians navigate situations with multiple rhetorics.
APPENDIX A
INTERVIEW GUIDE

Data gathered from these interviews is meant to provide the basis for discussing the meaning and nature of the mediator's role in mediation. The mediator's role in a mediation is a critical factor in determining the constraints of the rhetorical situation in mediation.

Tape ____, Side ____ , Respondent # ____

One
Preparation for a mediation -- With this first set of questions I begin to gather information about how the respondent understands his role. Here I want to know the degree to which he feels it is necessary to prepare for a mediation.

I'm looking for information about how much the respondent likes to know about the mediation before it begins. I want to hear how the respondent plans for mediations. This goes to the question, how do these respondents conceive mediation?

a. Ask the respondent to walk me through a specific time they were called to mediate.

"Think of the a time you were called to do a mediation. Walk me through what happened when Our Town called you to do a mediation in the past."

Ask, who called them? What did they talk about over the phone? What kind of information, if any, did they ask to know? What did they do between the phone call and the time to go and mediate?

Jump to the day of mediation. Ask the respondent to walk me through the last time he arrived to mediate. How important was the intake sheet? What kinds of information did he look for? How important was it to prepare the room, talk to his co-mediator? How did he use the time before the mediation?

b. Ask the respondent to develop explanations of preparation and planning, any hopes or fears about the mediation.

Two
The mediation itself -- In this section I want to know what the respondents say and do in their opening statements. I will keep the conversation focused on a description of an actual mediation case.

I am looking for what the respondent said during his opening statements and
why. What was he hoping to achieve? What were his favorite strategies and why? What seemed to work well for him during the mediation in general?

a. Ask the respondent to walk me through what it was like for him to begin his last mediation. Did he give the opening statement? What did the respondent hope to be doing in his opening statement? What was he trying to achieve the last time he mediated? What strategies does he remember trying during his last mediation? What worked for him?

b. Develop explanations of why the respondent prefers certain strategies. Ask the respondent what feels or looks like success to him?

Three
Influencing mediation—These questions ask the respondent to explore how he feels he might be guiding the mediation process or influencing the disputants.

a. Ask the respondent to talk about what kind of influence he feels he had during his last mediation. The respondent should specify at what points in the mediation he felt most directive – during the introduction, when he asked questions? during a caucus? as he was writing the agreement?

b. Explain my dissertation. “How do you feel about the suggestion that at least part of your role is to create a kind of atmosphere or "space" that increases the probability of a mutually agreeable resolution? What do you think that means?”

Four
Survey Questions

1. “Do you think your opinions are typical of most other mediators?”

2. “Why did you become a mediator?”

Five
Statistics

1. How long have you been mediating?
2. Are you a primary or a secondary? If you are a primary, how long have you been a primary?
3. Age?
4. Profession?
5. Ethnicity/Race? (optional)
RESPONDENT: Are you transcribing this yourself?

INTERVIEWER: Yes, everything, word for word.

RES: I thought there was a transcribing office at the U of A.

INT: Wouldn’t that be great. It’s about one hour of talking to 3 and a half hours of typing. It’s not so awful. OK, first off, what I’m going to ask you to do is to get in mind some mediation that you mostly want to talk about. Some actual mediation you were involved in. It could be your latest one (. ) or one that stands out to you . . .?

RES: I’m trying to think of a good juicy one.

INT: You can pick a normal one. Your memory of it is the most important thing. . . You have one in mind? We won’t talk about just that one but I’m going to ask you to . . . we’ll start there, ok?Alrighty.

RES: Okey Dokey ((laughs))

INT: Think of this time when you mediated and walk me through what happened when you first learned about this mediation. In your case, were you the person who did the intake? Or, how were you told about this mediation? That’s what I want to know.

RES: OK. I did not do the intake on this case. And we even had another volunteer that couldn’t do it, that cancelled, or we couldn’t find anyone to do it. So I ended up filling in at the last minute. Um, so I ended up just reading the case file right before like anyone else. I was kind of a last minute fill in.

INT: And so someone like Kris called you over and said, “Could you do this?” Is that what happened?

RES: Yes.

INT: Do you remember how she described the case to you?

RES: She said, “This is that case with that one woman that walked in the office that day.” cause we don’t get walk-ins that often. So I remembered the case that someone else had done the intake on. They were a walk in. So I knew it was related
to that. And I remember thinking that the lady who was a walk in had a little bit of a language issue. She had quite an accent. So I remember that was an issue. I remember a little bit, a little bit of trepidation because for one of our clients there might be a language barrier going on.

INT: So how did you try to take care of that language barrier? Did your other co-mediator know the language that might be the primary language of this person walking in?

RES: I'm not 100% sure what the primary language was of this person. She spoke English fine. They just had a very heavy accent. You had to listen two or three times to make sure you understood what they said. But it wasn't a matter of finding a mediator that spoke her native language. It was just a matter of trying to attune yourself to their accent so you understood what they were trying to say. So I was just a little nervous. It just always adds that added dimension to a mediation if you not sure if people are going to physically understand each other at all.

INT: That would seem to be a very important element ((laughs)).

RES: But I don't even know language it was, Russian or what, I don't know.

INT: So you didn't have much time between when you knew about the mediation and when they actually came in?

RES: 'Bout a half hour to an hour, maybe.

INT: You said you spent that time looking over the case. What did you look for?

RES: I try to get a sense of what the issues are that they are here to mediate. Although it changes in the mediation session. What they said wasn't exactly what they need to talk about (.) but, I think it's helpful to get a feel ahead of time for what the main issues are that might come up. But I want to get a feeling for where the parties are mentally. Are they, some people are really into mediation, they're really excited about having a chance to work this out. Some people are fearful. They're very afraid of conflict, afraid of confronting their neighbor or whoever it might be (.). Some people are very argumentative. And from reading through the case files you can get a sense, although it's not always accurate, about how they're going to be. You can get a sense for where these parties are at. Not necessarily that it's going to be an easy or a hard mediation because sometimes the easy ones are the hard ones and the hard ones are the easy ones. But you get (.) um, you get a better feeling for um, where to meet them at, where you think they're going to be, what level of readiness they're at. To really go through the process.
INT: How do you prepare depending on the level of readiness, that you get a sense from reading the case studies? How does that make you (. ) What does that do to your behavior to get a sense of their level of preparedness?

RES: I don’t know that (. ) I think I know what you’re asking (. ) I think I do (. )

INT: What am I asking? (((laughs)))

RES: I don’t know that I do anything more ahead of time. I think it’s just that when I’m aware ahead of time that, I can, when I’m in a mediation session, I can work things in a certain way. So if it seems like they already know about mediation and they’re all ready gung ho and they’re almost, you know, ready to start to talk to each other and working it out, I might not do quite as much of a setting the stage. Whereas if I can tell there is a lot of hostility here, a lot of background, if they’re very hesitant to come in, then I may spend a little bit more time setting the stage and kind of create a comfortable atmosphere (. ) a lot of safety. So it’s just a matter of knowing how much to prep the parties I think, more than anything.

INT: OK

RES: And to be with your co-mediator (. ) When you’re processing with your co-mediator ahead of time () you’re on the same page with each other about, you know, how much we need to hand hold maybe?

INT: mmm, hmmm.

RES: ‘Course that’s not the right word for it but you know what I mean. (((interviewer checks to see if the tape is recording.))) If I have poppy seeds in my teeth tell me? Cause that means I have poppy seeds in my teeth. These black things in my teeth and that’s really embarrassing, I’d rather know.

INT: OK, I kinda want to lift it up (((refers to the tape recorder)), you know. I’ll put it on your coffee cup. There. OK, I don’t see any poppy seeds in your teeth.

RES: Now my mouth is full. (((speaks with mouth full of sandwich)))

INT: OK, so we’re at the part where we’re talking about preparation for the mediation. And you said that you like to go over your sense of where the clients are at with your co-mediator. How about that time you’re thinking of with that woman who walked in. What was that like? What kind of sense did you get (. ) and how did you go over it with your co-mediator?

RES: I’d have to say that there was a lot of history between the parties and this might be one of those mediations where you have a hard time keeping people on
track. And there did seem to be some hostility. And I was a little concerned with the language, so I discussed all of that with my co-mediator. Um, really just to try and keep it focused. We discussed that. To make sure we keep them focused and bring them back to keep them back on track and just checking in if the language seems to be an issue. Checking in with each other, you know, “Did I hear you say?” Doing more restating than usual to make sure we really had heard her. And the possibility of caucus, if we needed to. If the hostilities got too high. Because there did seem to be a lot of baggage and a lot of history.

INT: Um, How did you decide who would do the opening statement and who would do the ground rules. And what was that decision?

RES: I’m not sure I remember who did the opening statement and who did the ground rules. Um, I don’t know. It probably didn’t matter that much. I think when it matters is when for example you have a new mediator and they’re scared to do the opening statement and they really want to stick with the rules. We let them do that so they can hear another example of how the opening statement is done. Or they might prefer to do the opening statement for the first time so they can get feedback on that. This wasn’t one of those cases. This was me and another old timer. So it almost didn’t matter. I don’t remember. We played off each other. I really don’t remember who did what.

INT: So you didn’t divide it up?

RES: We probably did. I’m sure we did. I would never not divide it up because it doesn’t go then you end up just staring at each other ((laughs)) and it doesn’t work that well. So I’m sure we did divide it up, but I’m sure the other one jumped in, and I don’t know how it went. I don’t remember who did what.

INT: Well, um, can you tell me in some more detail then, what were some of the things you really wanted to say in the opening statement for this mediation. Do you remember any of that?

RES: I wanted to make sure that they understood that we were, you know, completely neutral. That we were not there to judge either one of them or tell them at all what to do. That, you know, they were the ones with the situation. That they were the experts. We weren’t in any way trying to tell them what to do or resolve this for them. We were there to assist them in talking about what happened, talking about how their neighborhood could be better, what they’d like to see things happen differently, what they’d like from each other to help that happen, and to move forward. So I wanted that future focus. I really stressed that. And I really stressed that empowering them, that it was their problem and their solution. I really pushed on that.
And no interrupting (.) did their ground rules. I think I really pushed those. I was afraid we'd get into, you know, a little bit of a shouting match or talking over each other type of thing. So I went over that.

Um, I didn't go much into mediation theory or anything like that with these particular clients. I sensed that wasn't something that was going to (.) you're looking at me like you want me to explain it more (.) ((laughs)) Um, how do I put this into words that aren't going to sound horrible? But -

INT: I don't know. ((laughs))

RES: Um, bare with me. These were not very well educated professional people at all. These were, um, I mean, they lived in a mobile home park, bad part of town. More worried about drive by shootings and everybody in their little mobile home park on drugs (.) I mean that wasn't one of the issues we talked about. It was just (.) not to go too much into the case, but what I'm trying to describe is these weren't people, and I know I'm stereotyping to some degree, but these weren't people that I didn't think I needed to go into a real professional description, of, you know, theories behind mediation. I wanted to keep it real laymen. You know real just basic every day language.

INT: Do you think mediation works about the same whether people understand their process or not?

RES: Yeah, I think it just depends on the people how far you go with it. I mean some people (.) I mean if I was walking into mediation I would really want to understand what I was there for and really why we were doing things a certain way cause I'm real interested in that kind of stuff and I've studied that kind of stuff. I've done research on that kind of stuff and I'm really curious about that. I didn't get the idea from reading the case (.) from doing the intro, that these types of things would just gone into areas they didn't want to know. Not over their heads, but just that's not something they would've related to. It was a snap judgment, maybe, but I was wanting to keep things simple. I mean let's keep this, you know, "We're here to talk. We're here to be neutral. We're not going to interrupt each other. We're going to help you talk about what happened. We're going to help you move forward." That's about it. And I don't use the word "empower" in there, you know? ((laughs))

INT: I get the sense from what you're saying there that, um, you feel like, mediation, the mediation process works for people on a really basic level. And that some people out of curiosity might feel more comfortable if they knew what was going to happen, but it's not actually necessary for the process.

RES: That's correct.
INT: So when you meet people who you think might not be interested in the process, it won’t hurt the process.

RES: I’m actually more comfortable doing it that way. You get these people in their suit and tie, or whatever, where there’s an expectation that you’re going to be this expert, knowledgeable, whatever, you’d better throw some jargon in there and you’d better come off with a 10 minute lecture about why this is a great idea or their disappointed that you have nothing to offer them. For these people there’s really two different ways to go, on a continuum. But there’s two different ways to go, and this was one of those cases that was on the extreme of the one way. You know, keep it real simple, keep real. You know. Let’s not get technical at all here because that’s not something they’re going to relate to and I don’t want to lose them.

INT: You know it’s just like teaching to a class versus teaching the material. Some people have this idea that they’re teaching the material regardless of who their students are. And, you know, my theory is that you’re always teaching to the students regardless of what the material is. You’re teaching to the students because if you’re not teaching to them you’re not getting everything across and then what’s the point? It’s the same thing in mediation. I’m not here to do a static process regardless of who the clientele is. I’m here to do a process that’s changeable depending on who the clientele is and what their needs are.

RES: Right. So it just depends on your, on your own common knowledge to judge how much this person is interested in or will stand for or will wait through your explanation.

It sounds bad when you say it that way, a very stereotypical thing. I really don’t mean it that way. I suppose I make some snap judgements ahead of time. Um, but when you get in there you really have a sense, when you start talking, are they keeping eye contact with you? Are they relating to what you’re saying? or do you need to change it around a little bit to keep their attention?

INT: What’s your purpose in giving the opening statement?

RES: To prepare them. To get them in the right frame of mind and go from there. Er, you know, give them an idea of what’s going to happen in that room for the next couple of hours. Um, get them in the right frame of mind as far as, this is not adversarial, real casual, real casual comfortable tone. If they have the need to feel that we’re really professional and really know what we’re doing then I’m going to make a more professional sort of talk. And if there are people that seem to want a more laid back, chat across the fence here sort of speech then we’ll do that too. So whatever they seem to be comfortable with. The bottom line is you want them to talk and open up and feel comfortable. That’s the way you’re going to get it done. So whatever way they think they want you go with that.
INT: So when you say, in the right frame of mind, you mean in a frame of mind where they feel comfortable talking to each other? I that what you mean? Kinda?

RES: Partially. Hopefully, a little more (.). I don’t know if cooperative is the right word, but non-adversarial. You know, being there is more of an opportunity, rather than a challenge. Rather than (.) seeing it as an opportunity for change. It can be a good thing rather than a scary thing where they’re going to fight with each other. So, trying to create a positive, future focussed, collaborative, comfortable rather than (.) like you’re going into court and sitting all stiff and you know. Then I’m not going to get what I want that way. What I want is for them to be talking, at least increasing their chances that they’re going to come up with something or hear each other even if they don’t reach an agreement. I don’t care whether they reach an agreement.

INT: Yeah, ok, we’ll talk more about that later too. ((stretches)) OK, um, good, well then, that’s the beginning part. I have four little sections. We’ll go on to section two now, about this mediation itself. Um, I’d like you to walk me through what it was like for you to be a part of this particular mediation. How did it go?

RES: It was challenging. Lot of history like I said, lot of “he says, she says that you said that when I saw you I thought that (.). yes you where,” just stuff. Most of which wasn’t related to the issues that had brought them there that day at all. So I had a hard time keeping them on track, focussing on the presenting issue and where they needed to go from there. I had a hard time keeping them from not interrupting each other, keeping it future focused. It was all this interrupted talk about, “what you said, no I didn’t, yes I did, no he said that you didn’t (.).” I mean just on to the point you just want to tear your hair out because it was. “OK guys.” ((pushes hands out to indicate “stop”))

I also had to () with my co-mediator in the case, that I felt was not doing some appropriate things and that was an added frustration. Um, I could go into that some more if you wanted to talk about that?

INT: Sure.

RES: Um, my co-mediator was jumping to (.). we were in the storytelling phase, the situation and what happened, and she was jumping to solutions already. “I hear you saying you want to be a good neighbor, do you want to be a good neighbor too? Do you want to communicate directly? Great! Let’s communicate directly. Good. We’re only three minutes into the mediation and we already have an agreement worked out.” First of all she just worked the agreement out. Second of all, we shouldn’t be there yet. You know, we haven’t heard (.). I was getting real frustrated with her. So I was with the parties with one hand, you know, this motion ((indicates “come forward”)), and another one to her doing this motion ((indicates “stop”)). You know like a traffic cop almost between them. Because you know, she was trying to run them forward a little bit too much.
INT: Well, how did you do that? What strategy did you use?

RES: Sometimes she said appropriate things to them, but when I felt she wasn’t, um (. ) I would use her name and say, “I’m not feeling very comfortable going there right now. Can I explore this a little bit more first?” Or something like that so that ( . ) and she got the message that I was trying to pull the reins in on her a little bit. So I was very honest with her in front of the parties that way I think. Not to the point of being rude at all but, um, “Can I just ask a question please?” or “I’m not comfortable going there yet, can we wait a little bit?” “It sounds like they are discussing some agreements but let’s go through the process first and see what we get at the end.” so I would say things like that to her and she was good about sitting back and kinda realizing what was going on. That was just her natural tendency to dive into that.

INT: It sounds like she was looking for common ground but phrasing it like it was a solution.

RES: Yeah, that’s probably a very good (. ) but part of it was her own issues too. She heard one thing from one person and it triggered to her what a great idea was going to be and so she said it to them and they kind of half heartedly nodded, it was like, “Oh! we have a great agreement!” (laughs) But whose issue was this here? It was very frustrating for me. I don’t believe in that at all. I think our tendency in society in general is to jump to solutions without really hearing the problem first. So if somebody comes to you and says, “I’m frustrated about this” and you say, “Oh great, well we’ll just take care of that!” And you haven’t really understood why they were concerned. You haven’t gotten to the interest. So, it’s frustrating for me, for a mediator to do that because I think that’s what all of our training is, is wait a minute, let’s make sure we hear each other out. Let’s make sure we get to the interests so that way when we start talking about solutions we really are making up ones that are meeting peoples’ needs. So to hear a mediator do the opposite of that was very frustrating for me. At least that’s what I see my role as being.

So what else did I do in the mediation? Or what was it like to be in the mediation with those parties? Um, well it was as I said before, it was more of a keeping them on track sort of thing. I did a lot of (. ) what I had to do finally at one point was, I kind of stopped both of them. You know hands up, halt, stop sort of thing and I said, “You know I’m hearing a lot of ‘he said, she said’ um you know it sounds like there’s a lot of rumors flying around in a close knit park where everyone knows what everyone else is doing. You all know people and you hear things and (. ) Do you all feel like you can reach an agreement on who said what to who when? Because that’s where we’ve spent now 20 minutes discussing that. Is that something that is important to you to reach an understanding and agreement on? Do you really want to spend more time talking about that? Because we can still continue going with that. And if you do, we’ll spend time on that. I’m hearing that that’s something you may never agree on. You may never see who really said what to who when and
I'm not sure it is something you need to be discussing in order to get closure on this the issues you brought up that you want to get closure on. I'm afraid that you're going to get stuck in that and then not be able to move on.” Let them talk about that. So instead of just fighting with them about it, I just threw that right out on the table. And they both said “By the way, no I don’t think we’ll ever agree on that. You know I don’t think that, you I say I didn’t do this, I say he saw her do that (.) it doesn’t sound like we’re ever going to reach an agreement on it.”

INT: Do you think there’s a need for people (.) because I often see people where they feel like they want to prove that something happened in the past and if they can’t get that proved (.) What is the other need they want there? Do they want to be believed? or do they want to be thought of as not a liar? Or something like that? If they couldn’t agree on it (.) maybe you could say at least, maybe it happened for you. What do they want?

RES: What need are they trying to get met? Yeah, because it is something in mediation that people do a lot.

INT: People feel they’re being accused?-

RES: “But no you said this to me!” “No I didn’t!” And they’ll keep going back to that. And so it has something to do with honesty and lying -

INT: Is it who they are? You aren’t thinking of me like a person who is trying to be good. I don’t know.

RES: A lot of the things they’re arguing about aren’t even clear cut things. You know we all have our view of the world, our perception of how a situation took place. So you and I can be arguing with each other about it and the reality is we’re both right because from our perception that’s exactly what happened. So it’s almost like wanting the view of the world, the view of the things that you personally experience to be known as the one right way because somehow that’s validating for your personal perception and experience.

INT: It’s just it works so well when you do something like you did and you say, “Hey, do you really think we’ll agree on this? Is there some other issue we’re here for?” So I’m thinking, you’re right and it’s not really that point.

RES: It’s like, can you agree to disagree and move on? Because when I put it to them that way they said, “No I don’t think we’ll ever reach an agreement on this. And yet I think we can still reach an agreement on other issues without even having to know this.” Now did it still come up during the mediation? Yeah. It was hard. They could not just put it behind them. They (.) with one of them in particular, it
just never went away. It kept going in certain directions but at least the other one
didn’t buy into it anymore. So it didn’t spiral anymore. So I was able to say, “OK,
again that’s that point we talked about before. How about another question?” And I
was able to move past it.

Because it was clear (. . ) and I don’t mean to say by that that I’m setting their
agenda for them and deciding that that’s not what they want to talk about. It was
important for me to throw that out to them and say, you know, “That wasn’t really
my understanding of what you wanted to talk about but I understand you needed to
vent. I don’t see you getting anywhere, you know, I just see you going in circles
with it. If you do want to talk about it and that’s how you want to spend the next
hour and 40 minutes let me know. I’ll help however I can, but I don’t know, you
know, that’s where you want to go. And I left it up to them.

So I tried not to do something that I see too many mediators do that where
they walk in and say, “That was not on the intake. We’re not here to discuss that
today.” And that really bothers me because, you know, just because they mention
one thing in the intake, that’s their agenda? I don’t agree with that. You know just
because it’s a dog barking case, does that mean they can’t mention the fence? I’ve
had mediators say that to people. “We’re not here to discuss that.” And that angers
me because we’re here for them to discuss what they need to discuss, we’re not there
to set their agenda.

INT: It also sounds like you’re saying that it’s part of the job of the mediator to
separate out agendas and help clarify people (. . ) keep track of things they want to get
done.

RES: You see them going off here and either you didn’t think that was going to be
part of the agenda, or you don’t see it being productive, then I think you have a
responsibility to say, “Hey, this is what I’m noticing right now.” To be that
observant third party. You know, “It sounds like this is a cycle you get into when
you start talking which is why you haven’t been able to resolve these issues. Do you
want to try something different today and try talking about these other things? Like I
said, if they really did want to discuss that for a few hours, ok, what the hell (. . ) I’d a
gone along and maybe we’d have sorted out who said what to who on last Tuesday,
but (. . ) I didn’t get the sense that they felt that was productive either. It was almost
like it was a cycle they were in that they couldn’t get out of.

INT: It sounds like something that’s attached to an emotion rather than to a goal
they really want. Like I was saying before, it’s something else attached to an
emotional need to be validated rather then to decided on a truth. (respondent
agrees)) It’s like when people come back to things. They come back to things when
they feel like they haven’t been heard.

RES: I didn’t go there. I mean, I finally got the folks to drop it but I don’t know
what there was (. . ) I mean it seemed they were never going to (. . ) One was accusing
the other of doing something that someone said they saw but they didn’t do it and it was like, where are you going to go with this? I don’t know. And I asked at that point blank, “Is it your need to discern the truth about this incident or do you want to discuss other things?” And they said they wanted to discuss other things and then I tried to stay true to them, to pull them back on track to help them do that.

INT: Did you use any other strategies that stand out in that particular mediation, for example did you end up in a caucus?

RES: I didn’t use any other additional impasse strategy. I didn’t caucus (.). I don’t think I did at least (.). I think I thought at one point that I was going to have to but I didn’t end up needing to because it started to fall together. What worked was helping them to keep on track and helping them hear, even though they didn’t agree with the other one and their story. Helping them feel and understand the pain that the other one was experiencing. And that’s what worked. And it was like, the one that couldn’t get off the path? They kept telling their story again and again and I kept trying to pull it back on track, I kinda stopped fighting with it for a minute. You know you can feel in a mediation when you’re fighting to get a party back.

And one of the things I’ve realized is that if you feel like you’re fighting maybe you can slide into that energy instead of fighting with it and maybe there’s a way to come in and pull them out of it. So I kinda slid into it and instead of fighting with that person to get them back on track. It was very frustrating that they kept going off on these tangents that just didn’t. we’d agreed not to go there. They didn’t have anything to do with anything. And I started to do some completely emotional reflecting with them. It was really grasping at straws because they weren’t discussing emotions, it was the “he said, she said, who saw (.).” And I said, “you know it sounds like?” (.). And I had to interrupt them too. I had to put my hand up in the air. ((waves hand in the air)) And I said, “it sounds like you keep coming back to this issue I’m wondering if what you’re trying to let us understand is that you were really hurt? It feels to me like several of the neighbors are kind of against you? What you feel is that they’re making up stories that aren’t true and you are really, really wanting her to understand that even if you all have decided not to talk about not to go there and talk about what the truth is. That you’re really wanting her to understand that this is very hurtful to you. And you really feel like maybe everybody is against you here? So by bringing up all these names and who said, what you’re just trying to mention that there’s this number of people involved and it kinda seems like a number of your neighbors are kind of against you?” And she started crying, “yes, yes, that’s exactly what I meant, that’s exactly what’s bothering me.” It was like, “oh gosh, thanks, I just won, cool.” ((laughs)) Because you know, I just stopped trying to fight it. I stopped doing the tug a war just for a minute and just did that. And I had really no idea that’s what she was trying to say but um -

INT: But your clue was that a person who is hammering on something probably has an emotional attachment?
RES: Oh yeah, absolutely. Absolutely. Yeah, so like I said, I just kinda reached in there and said that. Not that she completely let it go after that but she showed a lot of emotion. But I was able to turn to the other party and say, "Now again, I know you aren’t going to necessarily be able to agree on who said what to who or that sort of things but you know it sounds like, um, but I’m hearing her say now that this has been a very emotional experience. How do you feel about that? or how is that for you?" And the other party was like, "Gosh I’m sorry that that’s been that hurtful for her. And I didn’t realize it was that bad. I didn’t realize she felt that way." It was the total turning point in the mediation that they were able to let go of that point of who was telling the truth and just really see the other person as kind of put, be empathetic. Put themselves in the other’s shoes and see how it was. Um, I’m not saying it went perfectly after that but that was a real turning point for moving forward. But yeah you’re right, it was all about pin pointing and acknowledging whatever that thing is that need that emotion that’s not coming out real clearly on its own.

INT: It sounds like your purpose for helping a person get their emotions acknowledged is to move them forward, help move things forward. Is that part of why you do that?

RES: In a really technical sense I guess. That makes it sound so cold. That makes me sound like I don’t care if they personally got their issue met. Do I care? It’s very gratifying as a mediator to hit that button. To see that you’ve hit it. First of all you’re supposed to check your ego at the door as a mediator and I try to always, but there’s something about, you just want to stand up and go, "Yeah! I just got it." There’s just something about it. But also because, you know, you’ve just helped that person. They were able to pin point something for the first time. And if they ever have any chance of being able to move forward, get this dispute resolved, get closure on an incident, I know that that’s how it needs to go.

Whether it happens in that mediation or not? I don’t know if that’s as much of an interest for me. I guess it depends on how you word it. Is it that I know that that’s what it’s going to take to move forward? Yeah that’s true. But is it because I hope I’m going to end up with an agreement when they walk out the door? Is that what I mean by moving forward? No, not necessarily. It may be so fresh for them they’re not able to reach an agreement that day. But it certainly opened the door for them a month from now to get that taken care of. So I know that I’ve opened that door for them. Or helped them to open that door.

INT: Well, that’s the next thing I usually ask. What does success mean to you in a mediation? And you can think of that in two ways (Tangent as the interviewer notices that she always asks more than one question at a time. The respondent comments that interviewing would be difficult for him/her)
RES: Like I said, I don’t really care if they walk out with a written agreement. I would like them to walk out with more than they walked in with. If that makes sense. And that means different things for each case. For one party it might mean a better understanding of themselves. For one it might mean a better understanding of the other party. It might just be an understanding that mediation didn’t work. I mean, if I have two people that might end up in court about something and they both agree to come to mediation, to me that’s a success. They agreed to come, you know, only a quarter of our people agree to come.

INT: Really?

RES: Oh yeah. So just that they came through the door means a lot tome. That’s already a success. If we can get them not to walk out of the door, hey, there’s another success.

INT: Three fourths of the people who originally contact us somehow don’t end up actually coming?

RES: Several times the other party, the second party won’t respond, either will refuse to mediate or won’t respond and a lot of time (%) so it doesn’t come to that point. So for whatever reason, probably 30–40% are resolved on the phone.

INT: So intake mediation is a whole other -

RES: A whole different kind. A whole other set of skills (%) I mean it’s the same skills. So the people that even get through the door, I mean, wow, the fact that they’re already there (%) I don’t think it’s a failure of mediation if people come in. You do your best as a mediator. They try hard. And they come out of it with the realization that they’ve now tried one more thing that didn’t work which brings them that much closer to understanding what they do need to do. And I don’t think that’s a failure. It’s frustrating. You’d like to think we are there to help everybody. But I don’t think mediation is a panacea. I think it’s much more frustrating if you as the mediator know or learn later or somehow feel that you didn’t serve them right, that you didn’t do the best you could. You missed something, you could’ve gotten there. That’s the worst thing I think. That’s what is discouraging. If the parties don’t reach an agreement, that’s up to them. I could care less. They do whatever they need to do to get their needs met. But I as a mediator need to make sure I open every door. I’m probably going to miss one every now and then, but open every door I can to help them get their needs met. And I’m not there to push them through any door and I’m not there to (%) and I want to open as many as I can think of without pushing them through any and what they do from there is their choice. If their interests were to get out of there with a written agreement in hand, then I’m sure they’re going to get there and I’ll help them do whatever I can. A lot of people it’s not. At least they got
to meet each other. They got to understand a little bit better. Maybe they got to understand that that didn’t work, which is ok. The only failure I think is just the failure to open doors or pushing them into an agreement that they weren’t comfortable, that they weren’t ready for. Those are equal failures to me. They’re frustrating to see or to be a part of.

INT: I had an interesting follow up the other day, I don’t know whether you were there or not. The man said he had a great mediation and he’s been through several and he spoke really eloquently about all the greatest things that mediation does. “You know I came in with an agenda but when I listened to the other person there I changed my agenda and I guess that’s what mediation does so well and I like it.” The I called the person who he mediated with, did you see this follow up? And she said, “It sucked, it sucked. He was crummy, he was (.) I agreed to stuff I do not believe in. I agreed to stuff just to get out of there.” It was awful. She wasn’t heard at all. He must’ve just bamboozled everybody.

RES: I think you hit it. It wasn’t that it worked for him or her or not, it was that she wasn’t heard or related to. And the reality is because there was a mediation he’s not pursuing it, the complaint has been dropped in some ways she should be happy. You would think she would say, “gosh, you know it wasn’t a great mediation for me but he leaves me alone and I’m not getting citations and (.) But no, she’s pissed, she’s pissed. It’s not that they walked out of there with an agreement. She’s still pissed. It totally took care of the problem for her. They walked out of there with an agreement, it’s been totally dropped and yet she’s pissed.

INT: People, what they really want is to have their needs met than to agree on things.

RES: Very profound.

INT: Um, let’s go to part three now. This is the part where (. ) I’m going to skip part three. Three was asking you how you feel you might be influencing the disputes.

RES: It’s a good question.

INT: You said you open doors but you don’t push them through.

RES: Oh but I screw up.

INT: OK we can talk about this.

RES: Maybe I have opinions on this matter. Um, alright influence the disputant -
INT: It's not necessarily negative. I think I asked you the question really quickly. I mean, what are you doing in there if you're not influencing them?

RES: That's actually a very deep question. Very deep. Very profound. It is. Because you're right. I mean, to even say we're neutral or impartial when everything we're doing is based on our own perceptions and influencing them. How can you even say that really? At the same time, that is what we strive for to the extent that it can be accomplished. I mean so I'm sure every question I choose to ask, the way I choose to word it, is influential. If I'm good enough to really word everything carefully. Because if you go down this road versus this road, facts versus feelings or the history versus the future, everything you do you're influencing where they go. So I think you just try to do what you can to follow their lead so you're trying to go where they go or where it seems to be important to them. I think that's important.

INT: Some people would say that if your goal for your influence is for them to find their best resolution, then you're still being impartial.

RES: I'm not an advocate for one party or the other but I'm an advocate for mediation and an advocate for the process. So I believe the process works. So I do believe strongly that mediation is a good thing in almost every case. And I do believe strongly that if people really sit down and, you know, really try, within that context, within the structure and the ground rules to work something out, that that can usually be very helpful. I believe that and I fight for that. So I am advocating the process and I am advocating mediation. So people are influenced, however, subtly by my not agenda, but my morals or my values. Maybe my values about what it means to be a good neighbor are going to force me to ask questions that other people who have different values from a different country or a different part of the United States or whatever, that really have different meanings of what it means to be a good neighbor, wouldn't ask. It wouldn't even occur to them. So everything, you can't help but influence it. What you can explore, you try to keep your influence to a minimum. You try to word things carefully so they're not leading or suggestive. It's self awareness, a huge piece of that. Just being able to admit that you influence that and trying to be aware of that. And trying to keep everything exactly like you said, I liked that, trying to help them get their needs met basically so everything you're influencing is along those lines. We're just advocating for the process, for the structure of the mediation.

INT: It sounds like those are ways around it but you are admitting to some just actual -

RES: I don't know how you could not.
INT: Some people are very reluctant to admit though that they just might be influencing-

RES: And I think they’re the scariest mediators. I mean that. I mean that. My experience is that people won’t even give (. . .) that (. . .) they have agendas (. . .) that they have personal agendas, that they have cultures and morals and values that impact the mediation session whether they like it or not. Then the people who say how neutral and impartial they are and won’t even discuss it further than that. And I’ve observed some of those mediators. They tend to be, I don’t want to generalize too much, the scariest group of mediators because there’s no self-awareness of how it’s happening and you see it happen. I’ve watched mediations with these people. They do it. I’ve seen it happen. I’ve seen the influence, how they word the questions to try to (. . .) a certain response and yet they deny (. . .) the lack of self awareness. I think is the scariest characteristic.

INT: Yeah, ‘cause at least if a person could say, “I know this might just be my idea (. . .) I could be wrong but, are you interested in (. . .) being friends with each other later?” If you could word it that way then -

RES: I’ve seen mediators that (. . .) they were lacking in some skills but they were so honestly trying to work on it and they phrased everything in certain ways as to be self-deprecating because they knew these were issues for them that they came across great. You know is was, “I’m not sure if I’m wording this right, work with me here, I’m having some problems wording this but (. . .)” And then they’ll say it the wrong way but at least the parties knew what they meant. Whereas you get Mr. or Mrs. Joe arrogant mediator who never of course influences anybody who just jumps right in asking questions and they come across as so professional and so (. . .) whatever, that the parties aren’t even aware that they’re being hornswaggled. how will you spell that word? I think two “g’s.” ((laughs))

INT: OK good. That was interesting. You did it girlfriend. OK, my idea is that one of the things we do, my point is that one of the most important things we do as mediators is give people an opportunity to work their problems together by creating a certain place and a certain kind of situation for them to be talking to each other in so that they are (. . .) we’re taking them off their front yard, where they’ve been screaming at each other, and we move them into a room and have a certain situation for them to be discussing in. Right. That whatever we say, whatever questions we ask, that that’s one of the most important things we do. What do you think about that idea?

RES: Well, I think that’s very true. I think that our main thing above all else is that we’re taking them out of the situation, putting them in a neutral environment with a structure and a process where it’s safe and comfortable and try something different and discuss things in a more civilized and humane way, and have that opportunity for them to feel it out and reach an agreement. I think that’s completely true. That’s
completely what we do and everything else, how you do it and how you word it is incredibly important but it’s secondary to what we’re providing for them. I think that’s totally true. There are things about that that scare me (.)

INT: How do you mean?

RES: Well, for example, like you said, taking the neighbors out of the yard where they’ve been fighting and putting them in the mediation in this false environment. False safe security blanket environment to resolve it. And then throwing them back onto their front lawn and expecting it to work. I mean I think there’s (.) some of that scares me although I’m not exactly sure (.) I don’t know how that fits. I don’t really care to go to the lawn and do it so -

INT: Some places do, some people do. I’ve heard that uh (.)

RES: More cops die in domestic disturbances than in any other call, you know, in the world. So as mediators we’re going to run right out there when they’re experiencing conflict on their front lawn? Do you know how many volunteers I’d have dead by the end of the year? I don’t think so. So what do you do? We can’t. There’s almost an acknowledgment that there’s a false environment. And then when you’re wrapping it up, I say this in training, instead of falling into that, the warm fuzzies of reaching an agreement, the warm fuzzies sort of feeling, “oh, great, everyone’s friends now let’s all go home happy.” There’s such a tendency as a mediator to feel really good and just so proud of yourself and the parties and fall into that, and in reality that’s the time they need you the most. That’s the time they need you to start pounding on that agreement and say, “How are you going to do this? How are you going to that? When you’re back home and you’re not in this environment, how are you going to communicate about that?” So that you’re setting them back up. You’re playing on the warm fuzzies of this world you created for them but saying, you know, now you’re sending them back out into the real world. How are you going to make sure that what you’ve created really works?

The thing I hear most on follow up in cases where the mediators thought it went great are, “two months later, they didn’t follow their agreement” They didn’t follow their half of the agreement either. Neither one of them felt comfortable communicating with each other, which was often times the mediator’s idea in the first place, and two months later they’re back to pursue it in court or whatever. They were mad that the other party didn’t follow through and they didn’t because they were mad that the other party didn’t follow through and they never bothered to contact each other, so it didn’t translate to the real world, even though in the room it was this warm fuzzy mediation. How do you fit that reality piece in there too? I don’t think we do as good a job of that as mediators as we could. If it’s just a clear cut court case or something. You pay us an amount of money you walk out of the room we don’t deal with each other. That would be easy. You’re not dealing with that problem. But when you’re dealing with family members and neighbors or
co-workers in this ongoing environment I think we need to address it more than we do because I see ( ) it's so frustrating with follow ups, I see that same thing expressed.

INT: Yeah, I suppose the habit that you can let go of for a half hour in mediation are way too strong to give up later.

RES: Yeah, when you’re not understanding. Or when you go home. Let’s say um, you were the wife attending a mediation, you’re husband wasn’t with you. Well then he sabotages it when you walk home because he wasn’t there to go through that experience and he doesn’t understand why you made the agreement that you made. So there’s a sabotage to it right there. And then you said you could control what the kids do but you really can’t in reality. You know, you talk to them but they don’t really do it. And then you said you and your neighbor would talk if there were any problems but they felt uncomfortable calling you because they were mad that you didn’t follow through with theirs and the whole thing spirals and the next thing you know it’s “oh mediation is a piece of shit, it doesn’t work.” I don’t know what to do about that though. And it might not be the mediator’s fault.

INT: Some people say that we might need more than one mediation.

RES: That there is a follow up mediation.

INT: Some people say that it’s absurd to only have one mediation.

RES: Their standard practice is to have a second mediation scheduled before they leave. To schedule a second mediation within the next month? A commitment. If both parties and the mediators could actually agree on it while they were there ( ) and then if they felt that they really didn’t need it because everything was going great they could cancel it ( ) then we’d have to ( ) policy some real cut and dry things ( ).

INT: A real cut and dry thing where it took three quarters into the mediation for the person to admit that they were building a big block wall. And the other person ( ) “does that satisfy you, did you know they were building a big block wall? will that satisfy you?” And the person said, “yeah, I think that would probably take care of the problem.” And there’s another example of how the problem wasn’t really the issue because we talked for a half hour about things.

RES: Even with these dog cases where people make an agreement and they don’t know if it’s going to work. They don’t know if it’s going to solve the problem. They can buy a barking collar. You can spend 200 bucks on a barking collar and there ain’t no guarantee that that’s going to work. So, we have a lot of times people walk out with these great agreements and the dog owner is going to do this and this and that and the complainant says “that’s great and I’ll call them if it’s a problem” and a month later Mr. complainer is calling animal control to get a hearing set up and
the dog owner receives a citation and says, “What’s the problem? I did what I said I was (.) I bought the dog collar. He never called me and I assumed everything was fine.” And the complainant says, “I never called him because he never bothered doing anything – he didn’t follow the agreement.” You know, they never did talk. In reality the collar didn’t work. I mean and now they’re in court. I mean that’s frustrating. It’s just that lack of (.) It’s what happens so often. The dog owner either doesn’t follow through or it doesn’t work or it takes longer then they thought it would. The complainant never bothers to check in with them or they never bother to inform the complainant and they’re back at animal control. I hate it. It’s so frustrating.

INT: Hmmm. We should talk about that communication thing more in a mediation.

RES: I like that follow up idea. I’m going to think about that more.

INT: OK now I have a series of short answer questions, but you can take as long to answer them as you like. ((laughs)) First off, do you think your answers are typical of most other mediators?

RES: Most mediators that believe in a transformational style, yes. Well, I mean you get your attorney mediators that are more into settlement conference evaluative mediation they would not necessarily agree with the focusing on emotions type of stuff. But I would think that as far as community mediators in general it should be.((laughs))

INT: Why did you become a mediator?

RES: Because the training class was open. OK, why did I become a mediator? It’s a natural tendency. I fell into mediation. Truly. I um, was in school and I was looking for an internship because I didn’t know if anyone would hire me to do anything unless I had some actual experience besides ()so I looked in the I and R book (.) I called Our Town because I was interested in the crisis program. I wanted to be like a rape counselor. Now I can’t imagine doing that. And they didn’t have a crisis training coming up but they did for mediation next months and they talked about the dogs and stuff and I just laughed and I called it meditation by the way. ((laughs)) Yeah I did that, I did that. So anyway, I interviewed for the training and I was immediately fascinated and I volunteered for a year and a half and a job opened and I graduated and that was it. I totally fell into it.

INT: You said earlier that people who have a natural tendency end up staying with it for a long time. What kind of natural tendency are you talking about?
RES: I'd have to qualify that because some people think they have it and they do not. They think they have a natural tendency. Um, I believe this, that you can't train someone completely to be a good listener. You have a natural tendency to do it. It's just instilled. You're not going to be able to take someone who is a bad listener and teach them to be a good listener if they're not. It's the same with neutrality, the ability to see both sides of an issue and to truly not come to jump to a conclusion to be able to see both sides and see why they feel that way and how it's important to them. You can't teach that. You can teach getting better at it. You can hone their skill and wording in certain ways that show them that, but I don't think you can teach that. You can't teach the patience the gentleness, the caring, you can't teach that. You can take people who have natural tendencies, you can hone them, you can give them tools but I don't think you can teach that.

INT: I'd like to talk to you about that some day because I think that's what we're trying to do with a liberal education, to teach people to see both sides -

RES: Political, analytical, those types of things in general.

INT: OK now I have some really quick questions. How long have you been mediating?

RES: Let me think about that. In March of '90. So 8 and a half years.

INT: How long have you been a primary?

RES: I've never officially primaried. I primaried myself when I became the boss about a year and a half ago. I think I went through an evaluation once and the client walked out and we had to. I don't think I was ever evaluated again. You know 30 mediations later it was just kind of assumed that I was a primary.

INT: These questions at the end are not things I'm going to use for actual quotes. These are questions that I satisfy my committee that I'm getting a range of respondents. So I have to ask you your age.

RES: 29

INT: And your profession? What's the title of your job here?

RES: Half the time I say mediator, and half the time I say I manage a service program.

INT: And how would you describe your ethnicity or race?

RES: I'm white, anglo, Caucasian.
APPENDIX C
INTERVIEW TRANSCRIPT TWO

INTERVIEWER: Thanks so much for being here and helping me out.

RESPONDENT: Sure.

INT: O.K. What I want you to do, what I’m doing here is asking you to talk about, basically how mediation works for you. I’m just asking you to give me information about that and I’m going to start with the idea of when you get a call for mediation. I want you to think of the last time you were called to mediate and tell me what happened when you were called to your last mediation and walk me through how that worked for you.

RES: Starting with the phone call?

INT: Yeah.

RES: Well usually I get a phone call at work. If I’m at my desk I take the phone call immediately, or I’ll get paged to a phone. The person at the office is very apologetic, “Oh I’m sorry.” My job is not that kind of job so I don’t worry. If I have any question about the date or the time I’ll check my calendar to make sure I’m available and check with my wife to make sure she doesn’t have anything else planned for that evening and then I’ll usually say, “Yeah, I can do it.” (.) say we’ll call you back and confirm and that’s pretty much the end . . . setting up the appointment.

The day before I usually get a phone call from Our Town and, “You’re going to make the mediation, right?” to make me aware of it.

INT: So, did (name omitted) call you the last time?

RES: Yeah, I believe it was (name omitted).

INT: What did you talk about when you were on the phone with (name omitted)?

RES: Umm (.) just some general stuff. If I hadn’t seen (name omitted) in awhile, what she’s doing, what she’s been doing, if anything interesting. Usually by the time I hang up the phone with (name omitted) I’m laughing. I’m sitting there in my office and I’m laughing hysterically and they just look at me. It always happens when my boss is in my office, he’s talking to other people and maybe their talking and they look at me.

INT: Is that because of how you and (name omitted) get along?
RES: I think so. I think (name omitted) is like that with most people though. She'll call you up and you'll end up laughing by the time she (.) or she'll end up laughing hysterically.

INT: Are you laughing about the case? ((laughs))

RES: No, no, something else entirely. Some situation (name omitted) is in or some story she relates.

INT: So you spend some of that time just getting to -

RES: Oh socializing, you know.

INT: Um tell me about, if you remember, your last mediation. When was that? Was that a long time ago?

RES: It was I think two weeks ago. It was with someone I had met through Our Town. Here at Our Town. It was at one of the Public Libraries up in Catalina.

INT: Is that where you mediated?

RES: Yes.

INT: Oh that's interesting. I want to ask you more about that later but right now I still want know how much you discussed the case with (name omitted). How much you discussed that case with (name omitted).

RES: Sometimes she'll mention, if there's something particularly difficult about the case she'll mention that. Like one of the people seems like they might be a hard person to deal with. If I have any problem with that, but normally it's a (.) I don't usually inquire about what the case is. It doesn't really matter to me. Um (.) the only thing it might do is prejudice you, you know, if you're (.)" oh, ok, it's not going to be any big deal." But that's not always true. Sometimes a dog case can be very deeply felt and a lot of personal issues involved.

INT: So on this last one now, was a case where you preferred not to know the details really.

RES: Yeah really, it's really not that big of an issue for me. You're getting the opportunity to use the skills of a mediator so that's what's more important, I think.

INT: What else is on my list here (.) umm. Can you walk me through what you do, or what you did the last time between the time you were finished talking to (name
omitted) and before you got the reminder call. Did you do anything to prepare for
the mediation? Or think about it, or anything like that?

RES: No, sometimes it helps me if it is a particularly difficult case, and they say
what kind of case it is, sometimes I'll review the other cases I've done like it. What
worked, sort of thing and what kind of difficulties I'll have to work with. But
usually it's not even an issue. I get the call, I write it on my calendar and I don't
even worry about it. It's not a very strong issue for me.

INT: Uh let's see now. OK, now I'm going to jump to the day of the mediation. And
ask you to walk me through the last time you arrived to mediate. When you got
there to mediate, what did you do?

RES: Well, usually I come to the door. If it's after five I get rung into the door. I
press the bell, they let you in and I come into the office and they have the cases
stacked up that I will mediate. They usually have the preparation. The names of the
participants, what kind of case it is right on the front. And then you get an
opportunity to read the case, what it is supposed to be dealt with the issue.
Sometimes it's misleading, sometimes it's real straight forward. Not intentionally
misleading. I should clarify that. But sometimes the case just (.) it'll be written out
by interviewing two participants and each of them has there own idea but sometimes
when they get here it's not really what the mediation is about. So I tend to read it
with a grain of salt, not necessarily believing everything that's there but waiting to
see what's going to happen at the mediation.

And then I have the opportunity to discuss it with the other mediator, talk to
them about what they think about the case, if they've read it and that's basically the
pre-process. Just working on what the other mediator wants to do.

INT: But the first thing you said you like to do is read the case. How important is
that to you? You say you like to read it with a grain of salt. It sounds to me like you
are saying that you get a version of the story and you want to take that into
consideration but how important is that to you to read the case? How closely do you
read the case?

RES: I read it for content to try to understand what the basic ideas are. If it's a dog
case maybe there are two or three dogs. Maybe both neighbors have dogs and one of
them sets the other one off. There dog's always barking, their dog's always in the
yard ... sort of get a gist of the needs, of what's being presented as an issue. That's
what I try to get out of it, and not be too tied to any of the particular issues.
Sometimes in a write up there'll be a sentiment expressed more than once like, "I'm
afraid that he's going to hurt me, I'm afraid that he's going to hurt my dog." That
sort of thing. So there's a safety consideration so that's very important to me.
INT: Oh that's interesting. So this last time you came in, you said it was somebody you knew? From somewhere else? Did you notice that when you read -

RES: Oh, no, no, I meant, the case, the other mediator contacted me and said “I had this case I want to mediate, would you be willing to mediate it with me in Catalina?”

INT: Oh so you didn't get contacted last time by Our Town at all. You got contacted by some other mediator?

RES: Mmmm Hmmm.

INT: Oh, so have you done that before?

RES: Um, I've mediated at other places but not with this individual.

INT: You've mediated with other mediators before that have called you?

RES: Not, not necessarily. I've mediated at the AG's office.

INT: What is the A.G.'s?

RES: The Attorney General's. I've done cases there but not for quite a few years.

INT: Was this case for pay or was it also a volunteer case?

RES: It was presented as if you're interested in this case these people would be willing to pay, but the other mediator and I determined that we didn't want to be paid for it. They offered to pay at the end of the mediation. We said, “Well, if you want to donate something to a charity, in your name or whatever, you know, in payment for this mediation that would be acceptable to us.”

INT: There wasn't a case to read the last time then?

RES: No, there was just a discussion with the other mediator, so she explained to me what she understood about the situation and what the people were looking for. It was her perception of what she heard from both of them. She had talked to both of them.

INT: Ohhhh. So when did you have that conversation with her?

RES: It was about a month, month and a half prior to the mediation. We were having problems scheduling, because it was sort of far flung and the space for the mediation wasn't available all the time and we had to work around that schedule. She was out of town and I was out of town -
INT: So you talked about the case even a month before you actually had it. And did you talk again closer to the case?

RES: A little bit, but not much. What had happened was the mediation was scheduled and we both started out to discuss the case pretty thoroughly at that point, prior to the mediation and then they called and cancelled. And the other mediator was a little bit miffed, right. She said, "I don't know if I really want to do this case now." And I said, "well, I'm, I'm not, it doesn't really matter to me if you want to do this." So she contacted them and said, "Listen, if you want to do this you have to show up next time." Everything worked out real good.

INT: Without breaching the confidentiality of the case, do you think you can explain to me what you two talked together to prepare yourself for the case?

RES: We were talking about strategies. It was a relationship case where there were two individuals who had lived together and they had some very strong disagreements and then they had split up, they had separated, lived in different places. And what they were trying to do was get back together. They wanted to work on their relationship and they wanted to be together. And they wanted someone to act as a moderator in their communication with each other and help them get the tools they needed. They have good communication back and forth, and internalize the tools, say, "Am I doing this right? Is this right? Am I going in the right direction?"

I don't know, mediation was kind of a strong work for it. It seemed like a mediation when we started but when we were done it seemed more like, "Well, yeah, it looks like you've got the tools you need. We were just kinda giving positive feedback, encouraging them, some communication stuff.

INT: That's not what you expected when you spoke to her and talked about your strategy?

RES: No, not at all. We were expecting that there would be difficulty and maybe a lot of anger to deal with. We discussed what we would do in the mediation to make it work better. Caucuses with the individuals to try to work them through issues that they hadn't already worked through.

INT: How do you mean, "work better?" as in thinking of strategies to make it work better.

RES: To help it go more smoothly. Say you have a really difficult mediation, you help the parties move from where they are, say they're stuck. So one of the strategies you would use is to meet with the parties separately to have them discuss their point of view. And that was the strategy that was discussed, was meeting
separately with each of the parties. In the case where someone is really angry they may not be able to vent all their frustration in front of this other individual without being even more frustrated. So you give them the opportunity away from the individual and that was the primary mode, I guess, we would use in this particular mediation. I guess we would expect them to be... in the kind of situation where someone would be, um, a little less able to express themselves or be angry or that's the kind of thing we were expecting just from hearing what the case was.

INT: OK good, good. That helped me a lot. Let's see. I'm looking at my sheet here. I'd like to be more smooth -

RES: You're doing fine.

INT: Thank you. You're doing well too. Let's see. I want to ask you, a little bit more. Just sticking to this same topic about before the mediation. Um, how, where did you meet? Where did you say you met and how did you pick that place?

RES: Um, in this particular instance the other mediator lives in Oracle, actually beyond Oracle. She was looking for something that was convenient for her and for the client. And she asked if that would be a problem and if I could get there, and I said, "Well, it's sort of on the way home from work, just a little detour." And she was concerned that I was driving a lot further then the other parties but that's not really an issue for me. And she said, "Well, this is the location we could use." It turned out to be a county library that had hours in the evening. They had an extra room we could use but it was only available like, three nights out of the week or something, so we had to work around that.

INT: So you had to reserve the room? (.)

RES: Mmmm, Hmmmm.

INT: What did the room look like?

RES: It was quite large actually, it was about 5 or 6 times as large as this mediation room which is what? 11 and a half by 14? So it was more like a meeting room that we used. It had a large table in there and a lot of chairs. It was calming, you know, it had very muted tones on the floors and walls. So it was, you know an ideal meeting room but it was also good for mediation. Nothing to distract someone's attention from what you were trying to say.

INT: So did it have a bit table in it? You said it was a meeting room, did you mediate at a table?
RES: Yes we did. I know that’s not the model that Our Town uses but I’ve used it before here when you have large groups. It works much better, you know, for everyone to sit down at a table and feel like they’re part of the process.

INT: Was there a large group?

RES: No just two people, in addition to the mediators.

INT: Thank you for letting me do that. Um, let me see (.) I guess we can move to the next, section two here. Section two is talking, questions about the mediation itself. I still want us to think about this last mediation you had, then I get actual details, even though it wasn’t here at Our Town.

RES: Sure.

INT: What I’d like to ask you to do is just sort of walk me through what it was like for you to begin you last mediation.

RES: Um, for me it was, I guess I was a little bit concerned because it was a strange location for me. Um, the other mediator, I was very familiar with, I had worked with her before, no problems with that part of it. I didn’t know what to expect from the clients but then you never know what to expect from the clients, you don’t know how they’re going to react so I’m always a little bit, you know, on edge. Um, as far as the beginning of mediation, it was pretty much the same process that you’re familiar with here where you do introductions say, “I am K,” or whoever, and then you explain a little bit about the mediation and what you’re there to do. In our case A. just did a sort of welcoming, “Thanks for coming, we realize you couldn’t make it last time. We appreciate it that you showed up this time.” We had a very brief ground rules. We reviewed the ground rules. I asked if they had any questions. If they could deal with the ground rules (.) the structure we’re trying to use for the mediation. Both of them were agreeable. Then we went on to the mediation.

The one client explained what she was trying to get from the mediation. What the problem (.) there was a little bit of prodding, “well what are the problem areas? what do you have difficulty with? do you think there are problems in terms of trying to come to some sort of agreement? It sort of went on from there. After she had an opportunity to speak for awhile the other individual was asked the same sort of questions. It was interesting. Usually one party is stand offish, er (.) they don’t want to give as much information, the other is really forthcoming. In this case there was a little of that imbalance but it wasn’t that bad. One individual was more expansive and the other one was real precise, you know, “this is it” and sort of left it like that and on prodding it was (.) the clarifications were real brief, there weren’t long involved discussions.
INT: ()

RES: One of the things was the duration of time from when we had scheduled the first mediation until when the mediation actually took place. They had done a lot of discussion between themselves trying to work out the issues and that’s the reason for them the mediation was more a validation of their communication styles and going in the right direction, “Are we doing this the right way?” So that was part of the reason. They were both very clear on that, it was important they were processing during the mediation.

INT: I’d like to go back to something you said a little earlier, um, you said you were a little unfamiliar with the space, I’m not exactly sure the word you used, but how important is the place you mediate in?

RES: I don’t necessarily think it’s that big of a deal but, when you’re used to doing something in a certain way and it’s much easier for you to go into it? We shared an experience when we went to a community center. We sat down with all these people.

INT: Yeah, weren’t they Russian?

RES: Well, one of the people was Russian and they needed a translator, and that was a little uncomfortable. There were other people that were involved and once we got going the space didn’t matter. You know, it was communication that was important. And that’s what I usually find too, the space isn’t really an issue. It helps to set a tone, you know, to have a certain arrangement of chairs so everyone can see everyone clearly, there’s no problem with hearing or seeing. I think that helps a lot but once we get started the skills are all the same and what’s really important is communication. The room can be a distraction or it can be a help if it’s done properly.

INT: So you were just describing the fact that you hadn’t been there before and you kinda wanted to feel you way around?

RES: Mmmm hmmm.

INT: O.K. ummm, you mentioned your opening statement, you said that, did you call them the “client”?

RES: I just said, “party.”
INT: One party started talking about what she thought she would get out of mediation. Did you invite that kind of opening stuff? Do you remember how you put that?

RES: We were, well, I didn’t give the introduction so it’s harder for me but, um, if I remember right the other mediator phrased it sort of as, “What is it we can help you with? What is it that you’re having trouble with?” And, “Well, we’re really not having trouble but this is what we’re trying to do.” And it was actually the other party who solicited, “Do you think we’re doing this well?” And he was very concerned about whether what he was doing was being communicative or was being negative, negative communication. He wanted to know if he was doing the right thing. And it looked like it, you know? And we were trying to model it back to them too. “Well what do you think? Does it feel like it’s effective for you?” “Well, yeah sure, cause we’re getting, we’re feeling happier”.

INT: You could validate their progress and that was important?

RES: Sure.

INT: Oh, O.K. this is a small point. You said you went over ground rules. Did you bring a copy of the ground rules with you?

RES: The other mediator, the lady who was responsible for setting it up, she had a brief set of ground rules, she had a set of four of them. And it wasn’t a really really long. There was, I think, “Working hard” was the first one, “Being honest and open,” and “Focusing on the future” as opposed to dwelling on the past. I think there was four of them but those are the three I remember.

INT: O.K. that’s fine. Um, let me ask you, this last time you mediated, what were you hoping to achieve? Did you read off the ground rules? Did you share any of the opening statements? You said she began?

RES: She did the opening statements.

INT: I was going to ask what were you hoping to do with the opening statements? But you didn’t do them.

RES: I can give you a generality of what I like to do?

INT: Fine.

RES: I like to set up a mood for the clients to tell them this is their opportunity to talk about what’s been bothering them. Um, that’s pretty much the line that I use. In some cases I’ll say, you know, if you have an idea about what you want, you may
want to think about what you want to come out of the mediation. That’s another standard one for me. I think it’s really important to have people think about what it is that brought them there, what it is that they want to get out of the meeting. “Do you just want peace and quiet from you neighbor? Do you want them to be your friend for the rest of your life? Do you want them to come over for a bar-b-que? What is it that you want?”

INT: You help them clarify what they want?

RES: Sure. Yeah, and I think that doing it as part of the introduction it gives them the opportunity to say, “Why am I hear? Am I hear just to get them to get this dog to shut up? Am I going to do more than that? or less than that? I don’t know.

INT: What are you hoping to achieve by getting people to clarify their wants?

RES: The big thing for me is that each of the parties hear the other one and understand what they’re looking for. Whether they agree or not that’s really up to them then it is for anyone else. If they actually hear them and understand what it is they’re looking for, whether they decide to do anything about it or not is not really the issue but getting it heard, I think that’s probably the biggest hope of mediation.

INT: That’s interesting. ((child sings in the background)) I wonder if that’ll come out on the tape? Ok here we’re moving right along. We’re getting through really well, not that that was a goal, but um, I don’t think we’ll need the whole hour. I just didn’t know how long this would need to go.

RES: Oh sure.

INT: Let’s see (.) where are we at here? OK I guess I want to ask a little more, you kinda did just answer this but I guess I want you to answer it a little more. You said, “What I really want to do is have them hear each other, that’s what I’m hoping to do.” So one of my questions here on this paper is, “What looks like, what feels like success? Can you add anything to what you were saying earlier?

RES: Yeah. What is success (.) success is if one person looks at the other one and maybe acknowledges what they’re saying by shaking his head, or something more subtle where they’re discussing a point and they may bring up a point that the other person may be making and state it really clearly. Not agreeing with what they’re saying, or saying their point is all wrong, but they’re still stating the other person’s point. And if that happens then you know, “OK there is some sort of an issue here, a contact between the two.”

INT: So you’re looking for a sign of contact. A sign that they have -
RES: Some sort of acknowledgement. Not that they have necessarily agreement but definitely acknowledgement. I can think of an example from another case. It wasn’t a barking dog case, it was a noisy peacock case.

INT: Oh, I know how those sound ((makes the sound)).

RES: Yeah, the guy didn’t want to give up his peacock. But the lady was really bothered by it, it would keep them awake, her and her housemates. And the peacock was an issue to her and he understood the peacock was an issue to her and he stated that to her. But in stating that the peacock was an issue, the lady also stated that there was a guy who built race cars on the street and would run them up and down the street without the mufflers or anything ((interviewer laughs)). And she stated that as bad as the peacock was the guy with the cars was worse. And he said, “I agree the guy with the car is worse.” So these two people were listening to one another and there was a good communication going back and forth and they were acknowledging each other’s feelings and even agreeing that maybe my peacock is not as much a problem for me as it is for you but the guy with the car is definitely a problem. The guy with the car was a problem too.

INT: Good example. Ok I see what you mean. Ok what I was going to ask you to do (.)if you can’t answer this right now it’s ok. You might be able to think of something later. I don’t want to put you on the spot, but, I’d like to get (.) it’s good sometimes if you can think of an analogy of what you think you’re doing as a mediator, when you mediate. If you can think of one now or later(.)

RES: I’d like to give that some thought.

INT: Yeah, that’s a tough one to give somebody (. ) um, you said that (. ) you feel like you’re helping them make contact?

RES: At some level I think it’s a help, but I think what you’re doing more is putting things in terms that a person can understand more easily. Not simplification necessarily but shading it in a different light, so they have a different perspective of what the other person is saying. You know, maybe someone’s words are getting in the way of what they are trying to say? I, I, I think that’s a really important concept in mediation. Because I think it’s what happens when things fail because you’re not ready to hear something from your neighbor who’s obnoxious, “Well, this guy who’s the mediator doesn’t seem to care, is expressing it differently and what he’s saying it yeah, I think I understand it.

INT: OK, so what if I say, “translating?”

RES: That would be a good interpretation, that wouldn’t be a bad one. Pretty accurate.
INT: Close to kinda what you’re talking about?

RES: Yeah.

INT: Although, that was may word (.)

RES: But it’s a good analogy. I don’t know it’s one that I would’ve thought of (.)
((laughs))

INT: OK, we talk about this idea of people filtering, of people hearing things through their own filters (. ) we’ll we can come back to that later. Moving right along.
There’s five little sections and we’re on section three, the last two are very short. I’m going to ask you to talk about what kind of influence you feel you may have had during your last mediation. I’m trying to get at that point, what do you think you’re doing when you’re there? Would you have used that word, “influence?” How do you feel about that?

RES: I would prefer not to call it influence. I don’t think it’s really what’s happening. I think more bridging is what you’d be doing as opposed to saying (. )you see when you say “influencing.” I think of it as you’re trying to change a person, you know trying to change them from one thing to another like a transformative thing. What I see is you’re trying to help them bridge from one level of communication to another of communication you know where they may be talking on the surface and not really able to get down to the issues. You’re helping them weed out all the chaff and get to the kernel that’s there.

INT: I can see that. That’s a good analogy. ((laughs)) So what kind of “bridging” do you think you did in the last mediation?

RES: Well (.)

INT: Well, you weren’t really teaching them (.)

RES: Well, we weren’t really teaching them, we were doing more of positive reinforcement kinds of things. Like I said, to call it a mediation I think would be a little strong, it was organized and set up as a mediation but I think it was more of a, “Yeah, your communication skills are good. You might want to see if this works for you” (. ) and present a model, that sort of thing. Um, in terms of what we were doing, I don’t know, uh (. ) I don’t know because as I was sitting there going through this mediation I was thinking, “Well, this really isn’t mediation, but it is because we’re talking about communication and we’re trying to help them understand what direction to go in even though they’re already going in the right direction, sort of
thing. They were looking for, you know, “Are we doing this right?” Sort of coaching scenario for the people who were there, you know, as impartial observers.

INT: Do you think coaching might be a legitimate role for a mediator at times?

RES: I think so, yeah, because we were talking about communication. Because some people have very poorly developed communication skills. But they’re real interested in trying to improve them, so you say, “What can I help you with?”

At this point the tape recorder stopped recording. The rest of the interview did not get recorded. The rest of the interview lasted for approximately twenty more minutes. Another interview was scheduled. The second interview took place at a public library from 6:00 p.m. until 6:35 p.m. The interviewer took notes. What follows is a combination of paraphrases and quotes from a 35 minute conversation. The interviewer begins by explaining her project.)

INT: I understand that mediators are not invested in the outcome, the resolution in a mediation but we know that the two disputing parties were not able to talk together. When they come to a mediation they can talk. I believe we must are obviously doing something to make that possible. We are providing the situation, the opportunity, for them to talk. so while we are not influencing what they will decide, we are in some way having an influence. What do you think about that idea?

RES: I think that is happening. We are creating a neutral and comfortable situation for them. I think what’s happening is that we’re showing them that it is possible for them to discuss an emotional issue. Through modeling, setting a tone (.)And we’re also focusing them on one issue. They were thinking of a lot of different things, we keep them from thinking of the whole issue, we focus them on one kernel.

We make it possible for them to talk by creating a comfortable place and by helping them focus on what they want.

INT: Do you think you’re opinions are typical?

RES: Not necessarily but there are more similarities between me and other mediators than me and the population in general. I have more in common politically and socially with other mediators than I do with the people I work with. I have similar approaches to social issues with mediators, there is a striking difference in attitudes between me and people I work with.

INT: I think I’ve already recorded some of this before but could you give me a typical example of an opening statement?

RES: I thank them for being there, people don’t always show up, they made an effort. I explain the process, you will talk about your situation, the other person will
have a chance to say how they see the situation, think about what you are willing to do, what you want to come out of the meeting, and I ask them if they need any clarification.

INT: Do you ever ask if they've been in a mediation before? I've tried asking that but I'm not sure what good it does.

RES: No, I never ask. I suppose if they have been they might've experience something different and have questions, or if they've never been they might have questions.

INT: Do you tell them about confidentiality?

RES: I ask them if they write anything or whatever they say, it should be left in the mediation.

((Interviewer admits that even though other mediators had made claims about confidentiality she usually didn't because she knows that as soon as the mediation is over the mediators process it over with each other and then we processes with the staff and then she goes home and talks about the mediation went with her significant other. And then some day later she uses what she's learned about people in mediations in other kinds of conversations too. The respondent agrees. The interviewer feels the respondent might not have spoken about confidentiality in this way or admitted that he was not entirely confidential if she hadn't shared this experience. At this point the interviewer interrupts the respondent to say that she will not write any of his responses to this subject if he doesn't want her to because the interviewer feels she might have gotten him to admit he wasn't confidential by admitting that she wasn't and that seems a little smarmy. The respondent assures the interviewer that she can continue to take notes even though she repeats the offer to talk "off record" two more times. The respondent replies that he doesn't mind if his thoughts are recorded on this subject.))

RES: I would find it hard to say no one talks about the mediation. I don't tell their names, just generalities. The more controversial the more it will be talked about. I could imagine a writer suing their experience in mediation, they could write that some people do this, some people do that -

INT: I have learned a lot about abusive relationships for example. I couldn't understand them before but now that I've seen some I understand how passionate they seem to be. The people are very enmeshed, very dramatic. I've learned that from mediation and I bring it up in conversations about abusive relationships.

RES: For me seeing abusive relationships in mediation made me questions relationships in my relatives. ((interviewer offers not to record his responses but
respondent says it is fine)) siblings, grandparents, I found out dark family secrets, my father opened up to me because I came to him with some knowledge about how abusive relationships work.

INT: How long have you been mediating?

RES: 8 or 9 years

INT: How long have you been a primary?

RES: 6 or 7 years

INT: Age?

RES: 39

INT: Profession?

RES: Ceramic Engineer

INT: Ethnic?

RES: German-American
APPENDIX D
INTERVIEW TRANSCRIPT THREE

INTERVIEWER: We have an hour, an hour and 15 minutes for this. It shouldn’t take us longer.

RESPONDENT: Ok because my next appointment is at 10:30.

INT: What I’m asking you to do is to think of a specific time you mediated. It might help you to think of the last time you mediated, or some time that stands out. I’m just going to ask you about your experiences in that mediation. I’m not asking you to break confidentiality of (.) you don’t have to mention the topic necessarily of the mediation -

RES: Right.

INT: I’ll ask you about your experiences in that mediation. Do you have one in mind? I can give you a minute to kind of capture one?

RES: Yeah, I have a few in mind. Does it have to be all from one? All your questions will be?-

INT: For example, my first question is to ask you to walk me through some specific time you mediated from the very beginning when you got the call. I’ll listen to you talk to me about it.

RES: ‘K.

INT: So, later on, we’ll do some more reflecting and you can talk about other mediations.

RES: I’ve got one in mind.

INT: Alright. Then think of the mediation you have in mind and walk me through the time you were called, that’s were I want to start.

RES: Well, this one is when I was still working at the ADR at superior court, and I got a call (.) um, it was also when I was running the Justice Court mediation program, and we were given a referral from one of the city court judges who had this case and thought this case shouldn’t go to trial, it should be mediated and I agreed to take it into my program even though it was a justice court case and, uh, and that’s how I got it. Well, what do you want to know from there?
INT: ((laughs)) Who called you exactly?

RES: Well it wasn't an actual call, one of the judges over at city court told the parties to go to mediation and they were sent to the justice court program that I was running. I screened those cases and so I selected this case to go ahead and I decided I would do it.

INT: You were contacted by the (. ) disputants? No?

RES: They were referred by the court.

INT: On a piece of paper? It wasn't a call?

RES: Right.

INT: So you looked it over and you thought it would be a good case for mediation.

RES: Right.

INT: Ok, what made you think that?

RES: It was a dispute over water rights. There was a well, a common well in a neighborhood and they were fighting over the honor (. ) how to portion. They were fighting about whether or not the well was healthy enough, or rejuvenated enough and they were pursuing it in court and actually the parties had gotten to such an extent that they were filing orders of protection against each other. So that's when the judge said, "This isn't about orders of protection. This isn't about harassment. This is about water rights in your neighborhood and it should mediated." And I agreed with the judge who you know thought it should be settled.

INT: And (. ) when you got that piece of paper, it was up to you to contact all the parties that were listed?

RES: Right. Actually, now that I think about what happened, it's been a little while, the judge referred the parties to mediation and requested that justice court do it but also told the parties, and gave them my name and number, and the parties actually started contacting me, at least a couple did. I interviewed them and I got the names and numbers of everybody involved and started the process of setting up the mediation which was an ordeal in itself.

INT: What happened that made it an ordeal? How many people were involved?

RES: There were three couples involved at this point and there was a lot of mistrust and they weren't being (. ) it wasn't court mandated. They were referred by the court.
The court sort of said, "Look, I'm not going to hear this case now. I'd like you guys to get this mediated. If you don't get it mediated fine, I'll handle it." So they didn't have to go to mediation. It took awhile to convince the parties that A) I could be trusted, and B) that was something that would be worthwhile to give it a shot. So it was a lot of (.) as a matter of fact it took me a month to set up the mediation.

INT: So you had to teach them about mediation when you were talking to them. Was that part of it?

RES: Yes, they didn't have any idea really about what mediation was. So I had to explain the process to them. I explained that I was a neutral third party that I wasn't going to make any decisions. I wasn't going to be a judge or an arbitrator and that my role is to help them come up with a solution to their problem. And uh, finally I got everybody to attend and we picked a date and uh, they came into the office and we had our first mediation. It was actually a multi session mediation. It took three sessions to come up with an agreement.

INT: I want to ask you, what did you (.) how did you phrase it to convince these people that mediation would be a good idea for them? Do you remember how you sold it to them?

RES: Yeah, I sold it to them sort of on a risk/cost benefit scenario. That if they didn't mediate it, it was going back to a judge who referred them to mediation so he was less likely to be patient with them. It would be out of their hands. It would be a legal issue. And that what they were in court for to begin with, it would not solve that problem. Even if they got the order of protection to keep the parties separated, that their real problem was still out there and that the only way they could solve it was in a costly lawsuit based on breach of contract 'cause there was already a water agreement, um, other issues. It would be very costly, very time consuming. And in the long run they'd probably hurt themselves because the water they were fighting about would continue to be wasted by one of the parties and there wouldn't be anything they could do about it.

INT: That sounds really convincing to me. Why did that take them a month?

RES: There was a lot of emotional distrust between the parties. That "even if we go and make and agreement, you know, will the other side abide by it? We don't think they will, so why bother. It's just wasting our time," at that point.

INT: When you were talking to the, trying to get them to mediate, were you carrying messages from one party to the other over the phone? Like, "Mrs. A says she will if you will (.)" Were you acting like a mediator that way, talking between the parties?
RES: I tried to avoid that situation. I didn't want to lose my neutrality that way, by carrying messages, or by taking sides. Um, but, if there were something that the parties agreed to (.) between three neighbors, um, there were six people involved, and spouses often times didn’t agree. Well they weren’t all married actually, significant others, but the spouses didn’t always agree. So it was very difficult to get everybody together especially for scheduling.

INT: Yeah.

RES: But to answer your question, no I tried no to do that. You know, of course there was, you know, “so and so they all can meet on Saturday if you can” (.). But I didn’t try to (.). You know they all wanted to give me ammunition to show why they were right, and they, I didn’t ever use that information. As a matter of fact, I tried to get them not to tell me that. I explained to them that wasn’t my role. That it didn’t matter whether I believed them or not, um, and tried to keep moving forward. You know, get out of the past. They had to vent. And I guess it was probably good that they did a lot of venting over the phone ahead of time.

INT: Yeah, well, some of that reminds me of (..) a professor of mine is writing a handbook about lawyers and writing and things like that and he said to me that when he was speaking to some attorneys they said, “yeah, they were doing mediation.” When two parties can’t get together to talk, they do something where they speak to one and they speak to the other person (..) and I thought, “wow, what is that? They’re using the word mediation to describe something else.” And I said to him, “No, we want to get them talking to each other. We don’t want to be talking between them.”

RES: A lot of lawyers don’t understand mediation still. And for them, if they can settle the case by whatever means then for them that’s mediation. And you know that’s incorrect. I guess it would be termed alternative dispute resolution maybe because it’s alternative to going to court. But that may not be mediation as we know it.

INT: I think it’s unfortunate that we’re all using the same word, “mediation.” True, he’s “mediating” between people but it’s not the way we use it -

RES: The problem is semantics. And there’s a real rift in the ADR community among mediators. What is mediation and what isn’t. You’ve got a spectrum. And I’m sure you’re aware of it. On one end of the spectrum facilitive mediation, transformative mediation, touchy feely if you will, on the far left. On the far right is your evaluative mediation, which can be very directive. The facilitative end of the spectrum disagrees that the right side should even be called mediation. You find a lot of lawyers who practice evaluative mediation. It’s very similar to a settlement conference where a judge presides over. To me, I think they’re both legitimate
forms of ADR. Both legitimate forms of mediation. But they're very different. And a good mediator can use skills from both ends, you know, depending on the situation. But I think we need to get together. I think we need to label things better and agree on terms so we all know what we're talking about when we say ( ) if we have to put a front end on it and say it's facilitative mediation or evaluative mediation then so be it. Being involved with the Arizona Dispute Resolution Association, ADRA, that's something I'd like to see us tackle in a conference or workshop are those differences.

INT: I could even ask you more about that because I'm thinking that even if an organization makes up some labels, how do you make that catch on? You know, that's hard. Ok, well back to this mediation about the water rights. So you were not acting as a volunteer for Our Town at this mediation?

RES: No.

INT: Ok that's fine. I want to move to part 2, um, the mediation itself. Can you walk me through what it was like when you got all the schedules set? First off, were you alone, or were you with someone?

RES: I was by myself. It was not a co-mediation. I can talk about a co-mediation if you want?

INT: Nope. We don’t have to do that.

RES: OK. I could talk about community mediation if you want too?

INT: Yeah, maybe we will at the end ( ) this is fine. Um, so, where did you meet?

RES: Um, at my office at the Center for Dispute Resolution ( ) is was my office at the time. Downtown. And the parties showed up. We started at 9 in the morning, I believe. And it was a multi-party mediation with six people.

INT: How did you have them all seated?

RES: We were at a conference table. It was rectangular. We sat around it. I was positioned more like in the middle, you know. There were three couples so I tried to position myself not at the head of the table. They were dispersed in between ( ) and uh, they all sat together pretty much ( ) And then I started with the introduction explaining to the parties ( ) uh, you know ( ) I couldn’t tell what a judge or jury would do ( ) That I wasn’t a mind reader. That I didn’t have a crystal ball. But that I would be sharing with them my experiences and giving them information that may help them. That I wouldn’t tell them what to do. I took more of the evaluative, stance, I guess. At least letting the parties know what my background was. That I
had a background in law. That um, while I couldn’t tell them what a judge and jury would do, I could share with them from my experiences seeing similar cases. I was not there to make them settle. That if they didn’t settle that was fine. I told them the confidentiality of the process. I asked if they had any questions, and explained to them the process and then everybody would have a chance to talk about why they were there. I set some ground rules. I told them that this was an emotional topic. I asked them, you know, to try and control themselves and try not to interrupt other people, to write down anything that they, you know, wanted to say. That they would get a chance. That we had all day. They would have a chance to say, you know, what was on their minds. And then we got going from there.

((interviewer checks the tape))

INT: You said a lot of things in there that I’d like you to fill out a little more. Um, one is that you said that at least in the beginning you decided to take a more evaluative approach. It sounded like you described that by saying, “I told them that I would share experiences from similar cases” (. .) What does that mean to you to take an evaluative approach?

RES: Well an evaluative approach means that I’m not going to be shy about putting in my two cents worth. If I think that somebody had the stronger argument, for example, I will point that out to the other side. I might not do that in front of the other people. I might do that in a caucus. I’m more apt to be more evaluative in a caucus then I am when all the parties are there. So I don’t want anybody to lose face. Um, but that’s what I do. If I have a suggestion I’ll throw it out there. Where in a facilitative mediation, the mediators would rarely if ever, you know, it’s usually considered a “no-no” to throw out any suggestions or a possible solution. In an evaluative mediation it’s almost expected that the mediator will do that.

INT: But when you’re doing that you’re trying not to make it sound like you’re “for” one side or the other so you’re able to balance that

RES: [That’s right.]

INT: Where you’re giving an opinion but you don’t seem to be rooting for anybody (. .) How do you handle that?

RES: Uh (. .) that’s a good question. I guess it’s just a matter of perception on the other side of how you frame things. What types of preparation work you do in your introduction. Letting the parties know from the set up that I’ll be giving, that I may give them suggestions. That I may be sharing with them experiences. That I’ve had working through the courts. And let them know that it’s coming form my experience. A lot of times, not necessarily in (. .) cases, in a personal injury case for example, a lot of times the plaintiff sitting across from me, I’m going to tell them up front that I
understand that they’ve been injured, I feel for them, but that the reality is we’re going to be talking a lot in dollars here and not about their pain and suffering, not about their injuries. I don’t want them to think that I’m taking the other side, the defenses side, for example. The sort of cold reality is that we’re dealing in money here and I want them to know up front that I understand and that I feel for them that they’ve been injured but you know. It’s tough. And you have to let them know that, “Hey, I’m playing more or less the devil’s advocate, giving you arguments that you will hear in trial, so you might as well get used to hearing them now and not to think that they’re coming from me or that I share those feelings,” you know?

INT: Has that been successful for you?

RES: Yeah, very successful. I mean as a matter of fact, that’s more like in an evaluative mediation using your skills as a facilitative mediator to tap in to the touch feely. It makes it a lot easier for them to accept things you say later on in mediation and that’s a big deal. That’s why I said earlier on good mediators can use skill from both depending on the mediation, so.

INT: Another thing that you mentioned in your opening statement, that you mentioned was something about confidentiality and I wanted you to expand on that too. What do you tell them about confidentiality?

RES: That everything in the room is confidential, will remain confidential. I won’t be sharing anything that I learned there with anybody, including my wife, and I ask them to do the same thing. Uh and then I also mention, especially in cases where the reality is that they’ll probably go on to court if they don’t reach a resolution, I mention to them that there’s a statute that says that I can’t be subpoenaed. That nothing mentioned within the mediation including offers to settle the case can be brought in. So they have an understanding that, uh, you know, confidentiality goes beyond just not telling their neighbors about what they talked about, but that in a court setting they can’t talk about this stuff either.

INT: But we’re talking about it?

RES: But I haven’t mentioned any names, have I? ((laughs))

INT: No, so what you mean is, “I won’t associate your name with what we’re talking about”?

RES: Right.

INT: Because, we process we process after we do a mediation.

RES: Yeah, in co-mediation you process.
INT: Yes, and you talk with other people to work through what happened sometimes.

RES: Well, you have to be careful about that. Even if you’re not associating names. If it’s something that will get a lot of press, and then you know people will put one and one together (. . .) you have to be careful about that as a mediator. I mean it’s an ethical duty. You have to be careful about that.

INT: Um, yeah, I agree. OK, let’s see what’s on my little agenda here. Um (. . .) I guess I want you to think still about that same mediation and tell me how you think it went (. . .) It was in three different sessions? (. . .)

RES: I guess it was two actual sessions with them together and individual. I guess you could call it a session on the phone. Um, how did it go?

INT: Yeah, how did you decide (. . .) Did you think you were going to get it done in one session or from the get go?

RES: I went in there with very low expectations of them reaching a settlement because of the emotion involved and a couple parties were very difficult. And um, I wasn’t sure they were able to reach an agreement.

INT: Did you let them know that you weren’t -

RES: No. ((laughs)) (. . .) I told them that whether or not they resolved this case it was up to them. That it would take a lot of work no matter what and uh (. . .) That there was a lot of emotion involved. I addressed that. And the first two hours was just a lot of venting as well as gathering information. And as always in these cases, there’s a lot of miscommunication going on. We exchanged information and uh (. . .) It was hard because so many of the parties were spending so much time in the past, um, that whenever I did get something out of them that could be used to moved forward and clarified things for the other parties, you know, it was a real battle of stopping someone and trying to move them forward without alienating them myself, you know, getting them angry at me. That was really the trick. There was keeping the neutrality, and battle my frustrations with a couple of the parties. That was difficult. That’s why it sticks in my mind so much. Because it was really difficult to keep the neutrality, to keep impartial and uh, and help these people reach an agreement. What I really wanted to do was take a couple of these parties aside and just tell them what’s happening ((laughs)).

INT: ((laughs)) So you could see where it might go to be successful. And you could see how people were blocking that forward movement. But you felt like pointing that out would compromise your neutrality?
RES: Well, not so much that, because that’s what I did, I mean that’s what I had to do to keep people focused on moving forward and interrupting, you know, when I could. But there were a particular two that were so irrational. She had so much anger and venom built up in her, so much distrust built up in the other parties, um, that like I said a lot of it tended to be real irrational. And um, I would find myself siding with other parties and getting angry at her and I had to tap into that or else I would’ve had to cancel the mediation. I wasn’t so much pointing a finger and getting them to go where I thought they needed to go. I was just keeping my neutrality.

INT: OK, I’m full of all kinds of questions. I have to pick out a question. ((laughs)) I guess I want to narrow down what you did. What your strategy was when these parties seemed irrational. I mean how did you get the process to move on?

RES: Well, that’s were I had to balance letting her vent and getting it all out there, and at the same time realizing that we had to move forward. Her significant other showed up a little late and he was a calming influence on her. But a lot of what happened in the mediation with her anyway were we started making forward progress. When suggestions were made by the other parties and there would be agreement by vote and if she wasn’t really one hundred percent into it, I made notes to myself on paper that we would have to come back and I would have to bring this back to her and really make sure that this was something that she could live with. And um, I did it after lunch. After a period where she had time to soak it up a little bit more, to calm down. And then I came back to it. I kind of recapped some of the things that we had discussed where agreements had been made. Then I touched base with her again and I said, “you know, earlier this morning I got the feeling that while you said you agreed to do certain things you weren’t really, you just said, you know and I want to see, you know, how you feel about that. Because if you’re not sincere about the agreement, if you really don’t want to this isn’t going to work. It may work for a week, or a month but then eventually it’ll probably fall apart. We all have to, you know, agree that this is something you believe in and will try to do.” And um, I won her back there. You know, before lunch at that point she was thinking that I wasn’t that I was taking other sides. That I wasn’t exactly fair and suddenly we were at the table another time where she really thought about it. There was some information that needed to be gathered before she would really be comfortable. So we agreed that some things would be settled another time, that we’d look at later on. So does that answer your question?

INT: Yeah, yeah. Did you feel that the other parties recognized that she was holding back this agreement? Did they help her?

RES: No, they didn’t so much help her. They recognized after I, you know, I said what I said, that yeah, she does need to buy into this. You know they didn’t trust that
she would do it anyhow and uh, so by me saying what I said after that lunch it helped clarify for everybody and bring out some of the concerns that some of the parties had that she wasn't going to follow it anyway. And it brought her back too and it was good, it was one of the better moves of the mediation. ((laughs))

INT: ((laughs)) Good job! OK so you decided one meeting wasn't enough (.). How long did you meet that time? You said from 9 o'clock -

RES: Till 5 o'clock -

INT: You met all day. And then another all day?

RES: They, um, they were out with jobs to do. They were gathering information. And then they either report back to me, and I did a little bit of shuttle telephone mediation, information gathering. During that period the one party (.). I was sitting on the phone with her for hours while she would vent, well maybe not hours, but you know. There was one time that went an hour, and another when we talked for thirty-five minutes and most of it was her venting. But um, you know, I thought it was something she needed to do, and I let her do it. And she seemed to be getting over some of her emotions as we progressed. So I thought it was worthwhile. Then we met again, uh. We set up another meeting at their property so I could see the property and um. We put together a contract out there. I drafted it and they all (.). We had a contract. But the groundwork was done in the first mediation and the phone calls so the third meeting most of the issues had been resolved it was about us typing them up and pretty much then looking at all of them. And then having them take the agreement home and look it over and make sure that they were happy with everything in it. I told them that if they wanted to have attorneys look it over that was fine. And, uh, and uh then they signed it.

INT: The first meeting was in your office?

RES: Uh huh.

INT: The second meeting was the phone -

RES: [the phone calls]

INT: And the third was at their property?

RES: Uh huh.

INT: And when they signed that, was that a legal agreement?

RES: A legal contract.
INT: A legal contract. OK, do you feel like that mediation was what you’d call, successful?

RES: You know, yeah, at the time. You know, I never did the follow up. A lot happened at the court house and I wasn’t able to do a follow up. I would like to know if that lasted. Whether the relationship that seemed (.) at the third meeting, the second meeting when we were all together at their houses. I mean, before our first meeting there was no way in hell that we would have ever gotten all these parties together under one roof. I mean, you know, they had a little potluck gathering. They all brought food. There seemed to be relationships developing again and it was, you know, it was kind of a neat thing. Whether or not that lasted or whether the contract held for them, the agreement held for them, whether the things they said they were going to do, actually I’d like to follow up with it and see.

INT: How long do you wait before you follow up?

RES: Um, you know, it depends on the case. A lot of the cases were actually lawsuits that were never actually settled. The justice court cases we were going to follow up on and the program was cancelled so we didn’t have a chance to do that. So to answer your question I think we probably would’ve waited about six months.

INT: So you feel like if people were still abiding by the contract after six months you would consider that pretty darn good.

RES: Yeah. I mean we were exploring the idea of, do you follow up one month after, do you do it three months, six months, and then do you follow up a couple years later? We just weren’t able to get that far in the program it was cancelled (.) so basically if it had lasted six months it would’ve lasted forever, I think.

INT: What’s your definition of successful? Let’s say if after a month they weren’t using the contract anymore but they had this potluck together (.) that you considered you did a good job.

RES: If in this case they worked side by side and shared this water, without killing each other or going to court, that would be a successful mediation. If they ended up fighting over water then I’d say, no, it wasn’t a successful mediation. Whether or not they talked to each other as neighbors or not, that’s an added bonus but the real issue to me was keeping them out of the courts and allowing them to use this water in a way that they wouldn’t waste it and that they everybody would have an equal portion of it. That to me was the important thing.
INT: Some people say that, well because I gave them a chance to talk to each other I feel like I did a good job. Some people take that kind of approach. (respondent shakes head to indicate "no"). That doesn’t wash with you?

RES: For me to think I did a good job, that’s a different story. There’s a difference between having a successful mediation and doing a good job as a mediator. To me, if I stay neutral, I allow the parties to share all their information, I ask good questions, I bring issues out on the table so it’s out there for everybody to see, for me I did a good job. And if they don’t settle it’s not my fault. You know it’s not my fault, I did a good job. On the other hand, a successful mediation to me is when the people resolve their problem, you know? To me that’s the best. If I do a good job I’m happy. I’m happier if the people leave there with some sort of resolution, you know. And a lot of mediators say that’s not it. If you do the process well you have a successful mediation. That’s great for them if they believe that. I don’t believe that. ((laughs))

INT: I think some people want to believe that. They ask themselves to believe it but -

RES: Yeah. And like I said, it’s not like, for example, I did a mediation with someone, with you, and we didn’t settle the case and I thought we did a pretty good job. I thought we did all we could do. I mean maybe we could’ve done a little better but I wasn’t disappointed in us. I was disappointed that they didn’t settle, that they walked out without a resolution, you know, so, it wasn’t a successful mediation in that aspect. But I don’t think, you know, it was that caused them not to settle.

INT: OK, I like that distinction. We’re doing just fine on time. Let me see if there’s anything out of part two I still want to ask you. I guess I just want to get your full statement about the strategies you were using in that mediation to help it move forward. What do you think you are doing when you are thinking up strategies to get things to move. What’s your intentions, your goals?

RES: Well, my intentions is that if I keep them moving forward, thinking forward, thinking of solutions, we’re not going to dwell in the past. If we dwell in the past we’re not going to go anywhere. If I keep them thinking forward we can keep a positive energy toward a mutual solution. Keeping them going that way then we’re more apt to find a solution, they’re more apt to find a solution. Whereas if you stay stuck in the future you sort of sit there and stew in your emotions and the anger and all the things you’re upset about and you’re not going to be creative and come up with solutions. So my goals are to keep people looking forward and ideally they come up with their own solutions. But when I don’t see them doing that? Then I’ll give them my two cents worth in a mediation where it’s not a co-mediation. It’s just me and it’s not in a (.) for example in Our Town I’m much less likely to do that. In Our Town Community mediations they don’t want you to do that. It’s not part of
their process. So I try to abide by their rules. But in this setting it was my rules. I
could do whatever I wanted. And so if I saw an area that I thought would help, I
would give information that I thought would help. I would fill that out.

INT: Do you think it’s a mistake not to give advice sometimes? Do you think Our
Town uses a process that should be modified when it’s necessary?

RES: I don’t know if it’s a mistake. I just don’t. I guess, what is the goal? Is the
goal to help the parties reach a resolution to their dispute? If that’s the goal then
where’s the harm in giving the parties some information that would help them? And
I guess the other side to that is if it doesn’t come from them then they’re less likely
to, uh, follow through with it maybe, or buy into it. uh, or believe in it. That’s the
argument for not doing it. You know.

INT: Yeah.

RES: To me, I don’t see the problem. I think if people, you know, they’ve come to
us because they’re not able to resolve it on their own and if I have some information
in my background that will help them. I don’t see the problem with sharing.

INT: Do you feel like there’s um, by the time you sit down to do a mediation they
all at least agree that they would like to resolve it? Or are there people who come to
mediation not necessarily wanting to resolve? Can you count on that?

RES: You can’t. You can’t ever know. Sometimes they all really want to resolve
the problem. When you get a case like that, that’s beautiful. That’s a great thing
cause it’s a lot easier. But oftentimes you’ll get one side who may be open to it but
the other side whose doing it because they’re being made to do it or it’s one step
in the process. They’ve been made to do it, or they’ll begrudgingly do it because
maybe you know, their spouse wants them to go, you know?

INT: Or they feel like it’s a chance to get to yell at somebody? ((laughs))

RES: Yeah. They get a chance to yell at someone and they think it’s going
to be a safe environment for them to do that. And that’s ok too you know, I guess.

INT: But there are cases were both the parties aren’t necessarily interested in
resolving then. Then your goals to get them to resolve aren’t their goals.

RES: Well, it’s not so much that they don’t want it resolved. They just don’t think
mediation is the way they can get it resolved. You know, maybe their orientation is,
“I want my day in court, I have rights.” You know? And maybe that takes that type
of case out of the community mediation setting, maybe they have to go to
mediation first before they can get their case about the barking dog. To me, if I, I think both cases should be settled in mediation. They may have to be more evaluative.

I may have to sit down with this party and say, “Look, your best bet for justice is this process that we’re doing today, not in court. What you don’t understand is if you go to court, you know, it’s going to be up to a judge and jury or just a judge and you know it depends on who the judge is and what side of the bed they woke up on this morning and you’re not going to have a damn thing to say about it, you know? It’s out of your hands. You’ll get more justice here where you have a say in the outcome. You get to participate and explore ways to resolve this, you know, with the other side because you have a say. And if you want to gamble and you think you’d like to try the other form of justice, go ahead, you know I’m not going to make you settle.” But a lot of times when they start hearing things, when they start hearing, for example (.) um, and once again I’m taking this in a certain genre of case, in a personal injury case where we had 30% of the cases a couple years ago where the defendant got up and said, “We’re wrong, we’re at fault, we’ll pay the plaintiff X amount of dollars. We don’t think it’s more than that but at least pay this much, ok?” The jury came back and said, “Defense verdict, plaintiff gets nothing.” You know? And people hear that and they start realizing you know, “Wait a minute, maybe I don’t want to go to court. Maybe I don’t want to roll the dice. Alright let’s re-look at this” (. ) You know, and then, you get them to see that way. Am I doing them a disservice that way? No, I think I’m doing them a service. I think I’m getting more then they might get at court by allowing them to participate and giving them a chance to say what they want to say.

In the court process you don’t get a chance to say what’s on your mind. You answer questions that are directed to you by the other lawyer and your lawyer and they (.) you might not get a chance to say how you feel, that your feelings were hurt, you know? That doesn’t come up.

INT: Yeah, Ok, um, I’m going to ask you a question now that you’ve kinda answered. Can you give me a typical, let’s say we’re talking about a mediation at Our Town now, can you give me a typical kind of opening statement that you might give at a mediation?

RES: Would you like me to do one? or to throw out the things that I might say?

INT: Uh (.) either way. Some people are comfortable pretending. Or yeah, what do you like to highlight?

RES: Well, I like to commend the parties for showing up, ok. I explain to them that um, sort of what I just said, this is a process where they are going to choose, to decide their own fate. Let’s say, as a person going to court, because a lot of these cases are ( ) some sort of hearing ( . ) So I point that out to them. I explain the process. That they get a chance to talk and uh, and then look toward what they want to get out
of mediation. And if they could get whatever they wanted, what would that look like? I go through the “wants” and the “willings to do.” I go through the process, talk about confidentiality, set the ground rules, and (.)

INT: Ok, so that’s kinda what you like to hit. Good, ok. ((interviewer stops the tape to check through question sheet)) Ok, now what I have is a list of these little survey questions and these little statistics ((points to interview guide)) and that will wrap it up. Easy peasy.

RES: Easy peasy. ((laughs))

INT: Ok, I’ll share with you my hypothesis that I’m working on. My idea is that even though mediators battle with being neutral, it’s a very important element in their role, we still have to say that we see people who couldn’t talk to each other until they came to mediation and now they’re talking to each other. There are different degrees of success for that there’s something different happening that allows people who couldn’t talk to talk. And so there’s something the mediator is doing no matter how neutral the mediator is trying to be. It’s not a matter of neutrality really (.) So my idea is that maybe a part of what we’re doing is creating what in my field we might call a rhetorical situation. We’re creating a kind of space. Whatever we’re saying, we’re creating a place where people can do a different kind of discourse then they’re able to do from their front lawns. So maybe that’s one of the most important things we’re doing. Whatever the words we say are to make that space, that’s what we’re doing. So sometimes mediators talk about, “I’m making a safe place for people to talk, or I’m setting up ground rules, or I’m making them understand that this is the place for justice, like you said, rather than taking a gamble somewhere else (.) And so I wanted to ask you about how you feel about this suggestion that at least part or maybe a lot of what you’re doing is to make a place, a situation, for people to have a certain kind of communication. How do you feel about my idea?

RES: I think you’re right. I don’t know if it necessarily has to do with neutrality or not. I think you can stay neutral and do that but uh (.) yeah. The mediator controls the process, controls the flow of dialogue. Whether it’s through the mediator or the mediator directs questions and has them, you know, talk to each other. The mediator is in quote unquote, control I guess of the process. But yes, he or she sets that balance in whatever way they do it.

INT: Some people say, “I have a certain attitude or tone of voice that makes people understand how they should be talking to each other, or” (.) Some people say they model with their co-mediator how they think people should be talking to each other. Do you think you do anything that influences the kind of communication you’re trying to help these people have?
RES: You know, in fact, I've never really given it much thought from that perspective. I mean I'm always aware. I try to be aware of my own tone and my own feelings and keeping also, like I say, a neutral position, not so much to effect their communication as to uh (.) as to effect how they perceive me, how they're comfortable with me. If that's a carry over to that, that's great, I never thought about it.

INT: That's ok, that's my job here to think about it. ((laughs)) Part of what I'm doing in my interviews is allowing the people I'm talking to to kinda give me feedback on what, on how I'm going to interpret what they're talking about. I want, if you're interested, you're not obligated in any way, but if you're interested in looking over some of my early analysis of your transcript then I can get those to you and you can tell me what you think I might be missing. If you're interested in being part of that process.

RES: Sure. Yeah.

INT: Ok then I'll contact you later about that. Ok, I have a question. Do you think you're opinions are typical of most other mediators?

RES: ((laughs)) You know, I think (.) I think most of my peers know me. They'd classify me more in the directive. They'd probably be correct. I'm more towards evaluative, directive end of it. Uh, Those who are truly evaluative and directive, I don't know if they'd see someone like that (.) as more in the middle ground. I tend to be more evaluative, I think. Um, but I definitely use facilitative/transformative style in my mediation. Uh (.) so do most people agree? (.)

INT: Do you think you're kind of average? Are you doing stuff that other mediators don't do at all?

RES: Uh, I don't think so. You know. I don't know. Because there's so many different mediators and so many different styles out there. You know, if you put me in one group they'd say I'm not a mediator. If you put me in another group well, they might say I'm not a mediator too or I'm not a good mediator. Evaluatives tend to think that facilitative is not a good style, you know, it's a waste of time. The Facilitatives just don't think that what the Evaluatives are doing is mediation. I don't think they argue that they don't settle cases, you know, but they don't think it's mediation.

INT: It's just that if I'm going to generalize from other people, I want to get a sense of how generalizable they think they are. If I'm going to say, "I talked to a mediator and that's probably what other mediators think," I want to know if you think that's probably what other mediators think.
RES: I know uh and I guess it just depends on whether I've said some things that probably everyone would agree with, and I've said some things that you know that some people probably wouldn't agree with. You've, you've been talking with a lot of mediators, you tell me.

INT: I think you describe yourself on a continuum of transformative to evaluative. That you've placed yourself in a reasonable place so that we have vocabulary to talk about your style. I have a question here about why you became a mediator. You never know what someone might say.

RES: I was in law school and I really wasn't in to law and learned about mediation in law school, took a class and was trained by triple A in California.

INT: Triple A? What's that?

RES: The American Arbitration Association. They teach mediation and arbitration. I was trained in mediation by a triple A leader and trainer and she trained us. I mean that was her job and so forth. That was my first exposure. I loved it. And it was just a lot more satisfying to me. To help people with their problems. I liked it, it's a high. I get some people to settle their cases it's a high, you know? Um and when I did my last semester of law school working for Judge (name omitted), following him around and learned his style so I was kinda trained in both. And uh, I thought this is what I want to do. This is how I can help people. A great way to make a living. You know, to get to do that. It hasn't been successful yet. ((laughs))

INT: I'd like to ask you more about that, about you don't think that it's catching on. That's not really a part of this interview, but why isn't mediation catching on faster? We seem to be always teaching people what mediation is after now about 30 years or so.

RES: Yeah, some of it is you know, we're so lawsuit focused in this country and lawyers play a big part in that. Until we can get the lawyers to buy into it I don't know if the public will.

INT: Is it more popular in countries that aren't so lawyer focused?

RES: Yeah, I don't know about other countries. It's more popular in some states than others. Texas, California has pretty good mediation, Florida is a pretty good user, Oregon. Arizona we just haven't really caught on yet. I mean there's a couple people doing it, making a living doing it.
INT: I'm surprised because we're such conservatives here in Arizona, sometimes that staunch Republican stuff makes people want to handle their own business which makes them more mediator-like -

RES: I don't know, I don't know why.

INT: Ok, so how long have you been mediating?

RES: I've been mediating, I guess, seven years now. Eight years?

INT: Seven or eight years. So let's run down the places you've been mediating.

RES: Well, I guess in 91? I got my training?

INT: Who did you work for?

RES: I guess um . . . I did mediation in San Diego and then um (.) I came to work for Judge (name omitted), then (name omitted) (.)

INT: That's a private -

RES: A private mediation, mediation training school sort of (.) And then right at that time I was also trained for Our Town and started volunteering for the Attorney General's office as well. And then I started doing mediations with that job at the court. I did a couple mediation based programs and I did the one for the court.

INT: You had a job at the court as a (.)

RES: Well, I first was a law clerk and I'd sort of finish cases that (name omitted) would do (.) We'd have a few hours or a half day and we would try to settle the case (.) I would follow up with a lawyer and try to get it settled. So, um, very evaluative, directive type and a bit of nudging actually. ((laughs)) And then I started doing some other sort of uh (.) under his (.) tutelage, you know. And then lawyers started calling me a little bit on the side. And then I started the justice court mediation program and I did a number through that.

INT: Did you say you started it?

RES: Yeah, that was my pet project. We had one years ago it was never renewed so we started it up again. My job involved working with the ADR coordinator, the ADR director for superior court. We put together, set up a dispute resolution with Judge (name omitted) who was active in getting a uniform rule, involved in this battle to get an ADR rule and make it mandatory for people to go to mediation. And so we got the center and I started the justice court mediation program again and, you
know, we did it, and uh, unfortunately that’s right around the time (name omitted) go
into (.) for helping (name omitted) negotiate his contract with (name omitted) (.)
And he resigned. And as soon as he resigned, I stayed on to try to keep these things
going but the new ADR Judge came in and pretty much cut the program. And that
was that. And I started a private practice with two other lawyers and got some
divorce mediation training from AFM – Academy of Family Mediation, sort of like
the association for domestic relations.

INT: How long have you been a primary at Our Town?

RES: For about 2 years. Yeah, they just said, aren’t you a primary yet? And (name
omitted) and (name omitted) observed me and I was a primary.

INT: And how old are you?

RES: 37

INT: And what ethnicity do you call yourself?

RES: Uh, I’m an American, Jewish (.)

INT: These questions are just to make sure that I’m getting a good sample of
different kinds of people to satisfy my research requirements. Those are all my
questions and it took about an hour. I really want to thank you again for, uh, helping
me with my research.
INTERVIEWER: What we're going to do also, at some point while we're talking, is stop and make sure this thing is recording. OK, well, thank you so much for doing this for me. And it really should take less than an hour, probably. And feel free to continue to eat.

RESPONDENT: OK, thank you. ((cat meows))

INT: We're going to get that on here too. ((laughs)) That's cute. ((cat meows)) I've broken up questions into three sections. I'm going to ask you to think of a specific time you mediated. And I'm going to ask you to talk about that. Do you have something in [your mind]?

RES: [Yes.] I've already thought of one.

INT: OK. What I want to ask you in the beginning is to tell me about your preparation for the mediation. So if we could just start with (.) when you got the phone call to come in to Our Town? Or, how you heard about it? Tell me how you were contacted to do the mediation.

RES: Our Town called () I don't know how much in advance they called to schedule that particular mediation. But they typically call one to two weeks in advance. So, I would say a week.

INT: You got called a week before –

RES: I would say probably.

INT: Can you tell me who [called you and what you talked about]?

RES: [(name omitted) called.] She just asked me if I am available for a mediation. And I was. And that was that.

INT: Did you talk about the mediation when you were on the phone?

RES: Not really. I may ask her what type of case it is. Sometimes I will and sometimes I won't because, you know, it really doesn't matter. I'll mediate anyway.

INT: mmm hmmm.
RES: Um (...) So, I don’t recall whether I asked her about this case. I probably did. Or sometimes she’ll just volunteer a little bit of information about it, you know, the nature of it.

INT: So do you, um, you ask her for information about the case just to be conversational? Are you curious? Or what?

RES: It’s just curiosity. My own preparation, you know, in terms of what I’ll be walking into. You know, we get to read the case analysis prior to going into the mediation. It, it, it provides a little bit of comfort knowing what the topic will be. And also, I like to know who the co-mediator is. It’s not necessary for me to know that. I’ll ask that occasionally too. And again, not because it matters. I’ll still do it no matter who it was. It think it’s just my own preparation to have my own little bit of. ((cat meows, respondent and interviewer laugh))

INT: OK. You have a pretty tail. ((to the cat)) OK, so, I just want to ask you, I guess, I used the word “preparation,” and then you said, it’s part of my preparation. What do you do after you hang up the phone with (name omitted) for that week? [Do you think about the mediation at all?]

RES: [No.] No, I think it’s just the psychological assurance, knowing what I’m walking into, or what I’ll be doing. There is no preparation I can do other than reading the little case history, or the pre-thing that we do. Um, there’s no preparation at all other than if I were to go over my mediation training, which sometimes I do. If it’s been awhile, I’ll go over that.

INT: Why would you go over your mediation training? What might you look for? What might you be learning?

RES: Just to make sure that I remember all the aspects of mediation. Just to remind myself of things. How the, the way the process works, things that I should emphasis looking for the feelings. And particularly I’ll go over the introduction. I tend to get a little the introduction for me is probably the most difficult part because you explain the process of mediation and at that point in front of people who just have never done it before. And I know they’re nervous because, you know, at that point disputing. That for me is the most difficult part. Breaking the ice and getting them comfortable. And that’s done during the introduction. So I might make sure I know how to do that and not stumbling over things. And it just makes it flow easier.

INT: Yeah, that’s important. I want to make sure my recorder is getting it. This is that little check I warned you about. ((checks recorder)) Let me read my, um, make sure I get some questions here. We’ll get back to what you like to say in the opening because that’s what I want to go on to next. But you said there really isn’t
much preparation you do. It's kinda comforting for you to know what kind of mediation and sometimes who you might be mediating with. But besides going over your training notes, there isn't much preparation.

RES: No. Not until I actually arrive.

INT: That's just where we're going. So go ahead and walk me through this specific time you're thinking of. What did you do when you got to –

RES: We sign in. And we're given a little packet of the notes that contain, uh (.). Their notes pertaining to each contact that they've had with the disputants. There's a little bit of case history. Why the people came to them looking for mediation. And then all the follow up conversations that go on trying to actually set up the mediation. I can see how many times they've been contacted. How long they've been trying to get into mediation. If one of the parties is kinda dragging their feet. Or, in the reverse. If it happens very quickly, and both parties go, "yeah, I'll be there next Sunday, or Saturday or whatever," and boom that quickly. And that kinda indicates something to me too. And usually they'll explain why they can't make it. If it's a work issue or something. That gives you a little bit, I think, I don't make any judgement at that point. But I think it gives me kind of an idea as to how long they've been dealing with the issue. (.). history and um, that's it.

At that point we pre-process with the co-mediator, the two mediators. And we'll discuss styles, how we want to work together, how we want to approach it and agree as to who will do what [in the mediation.]

INT: [Do you remember who] you mediated with? It's ok if you don't use the person's name but (.). Is there anything in particular about that time when you processed? Was it normal?

RES: Yes, actually, every, every one has been by the book kind of stuff for me. But, um, I've done twelve of them now.

INT: Wow.

RES: And each one of them has been, in terms of that, has been, you know, flowed really well. I've worked well with everyone. It's gone just how we're supposed to do it. (.). Um, yeah. I have worked with him, I believe, one time before (.). We already had a nice level of comfort going.

INT: Do you remember how you (.). how you processed, or let me put it this way (.). no, I don't know how to put it. ((laughs)) I want to know if, I want to know how you prepare for the mediation in your processing. So you can talk specifically about this event [or if this event doesn't stick out then you can just talk generally.]
RES: [OK] Actually, it does. Because one of the, the person who brought the mediation to Our Town is disabled and he’s in a wheelchair. And so we had some discussion with the co-mediator at that point about how we would accommodate him. Would we pull up a chair for him, or would he stay in his wheelchair? And we both acknowledged that there was probably going to be, there may be some issues with that. () Do you want me to explain the case a little bit?

INT: Sure. Whatever you’re comfortable with.

RES: It was a barking dog case. The couple had two dogs. The man in the wheelchair felt that that disturbed him in the middle of the night<. And, um, there were also some racial issues there. That became apparent right from the beginning. The guy in the wheelchair, the White man, retired but going back to college. He was working on a second PhD coming back to school –

INT: Wow.

RES: Yeah. Very, obviously needs his quiet time. And the couple, probably in their mid twenties, he is Black and she is Hispanic. And they’re married. And we all kind of picked up on, my co-mediator and I, felt that there were some, you could see that there were some preconceived notions about, from the man in the wheelchair, towards the couple. And things came out and they revealed their professions. The guy in the wheelchair really responded to them so differently. I mean you could just see the whole thing turn. The way he looked at them. He respected them.

INT: Because their professions weren’t stereotypical [for their races?]

RES: [Yes.] And they had common bonds. Like the man’s profession (. ) I can’t really reveal a whole lot because of confidentiality, but what he, where he worked they happened to have bullet proof glass. The man in the wheelchair helped design that type of glass. And that was kinda his thing. So they had that. And they discussed that for awhile. And the woman was a surgical nurse, or operating nurse or whatever, and gave the type of surgery that he’s had himself –

INT: ((takes in breath))

RES: And he was really touched by and that. And he said to her, “Boy, that’s such important work. And on the receiving end of that, you’re doing beautiful stuff for people.” You know, they just, but it didn’t start out that way. They both were, the couple was (. ) they were great, but, the guy in the wheelchair, he seemed angry, and put out and kinda like, you know, “You need to control your dog.”

INT: How did that come up, their professions? Do you remember? You said –
RES: Yeah. Actually my co-mediator got up, he left the room. He had to, I don’t
know. He had to get some information? I think it might’ve had to do with barking,
with do collars-

INT: Somewhere in the middle of the mediation?

RES: Toward the end.

INT: Oh!

RES: Toward the end. Or three quarters through, probably. And he got up and left
the room. And at that point there was a little bit of small talk going on because we
couldn’t continue the mediation. So the woman had indicated, she came in a little bit
late. And she said that her work ran over. Then she said what time she had gone to
work and it ended up being like a thirteen hour day or something. And I commented
to her, boy that was really a long day. And she said, “yeah.” And then she kinda,
then she went into it. And that’s when he responded to that.

The gentleman’s profession came up during the mediation. Cause he said he
was really going to work on working with his dog, “but to be honest with you, I
 kinda have bigger things on my mind” you know. And he said what he did for a
living and how demanding it was. And the man in the wheelchair did, you know, a
double take. You know like, “Woah. You do that?” And you could tell, cause of
this stereotype he had toward him. And then uh, I mean he really did, “Wow, you do
that?!” “Yeah.” “Wow. That’s really great.” And then all of a sudden he had this
respect for him.

INT: Yeah. How did that come up that he got to mention his profession? Do you
remember?

RES: Yeah. Because he said he didn’t know how much time he’d could devote [to
his dog.]

INT: [Yeah.]

RES: Really, his work was very demanding. But that he was going to do his best.
Cause the guy in the wheelchair wanted an exact time. “How long, how many days
do you think it will take for you to resolve this?” And so he got really pinned down,
the other guy, and that’s when he said. “I’m going to do everything I can, but I can’t
give you a specific date. I wish I could, but I can’t because I got a lot of other things
kinda going on.”

INT: I guess the reason I asked that twice was because I, um, because it sounds like
both of those two really important revelations came kind of spontaneously, were
initiated by the disputants and not the mediators in this case. [It seemed to be ().]
RES: [Well I-]

INT: [It didn’t come] from questions the mediators had about their professions. They came-

RES: Well, the second one did because I asked her about the long day [and I did-]

INT: [That’s true.]

RES: I doubt that she would’ve spoken about it. Uh, it wasn’t, it was during a break, it wasn’t really on mediation time. [Um-]

INT: [That’s ok.]

RES: Well yeah, because we were saying, “Can you, can you tell this gentleman, can you commit to a time frame? Can you do that?”

INT: It prompted him to talk about why he couldn’t do that.

RES: Yeah.

INT: Ok. I want to go backwards just a little bit from that () and talk about the (. ) the mediation itself, the beginning of the mediation >we have been talking about the mediation itself, but this is now part two< the beginning of the mediation. You started to talk earlier about how important you thought the introduction was? And that’s something that may be important in my study, what mediators are doing when they are introducing the process. And you said, it think, it’s kind of an ice breaker thing too. So, uh, you can talk specifically about this case. Who gave the introduction. Do you remember whether it was you or your co-mediator?

RES: It was my co-mediator.

INT: Gave the introduction?

RES: Yes.

INT: Do you remember anything about the introduction in particular?

RES: Its just pretty standard. But I think what I meant by that is that, at that point, uh(.) I don’t know how much people are hearing? You know, because when we’re doing that because they’re nervous. Often times they’re there, someone’s there not really wanting to be there it seems like. There’re issues and tensions. So I don’t know how much they’re actually hearing or how much they’re sort of posturing, you
know, anticipating what's ahead. But it seems like if at that point, if you can, if there's a good introduction you can kinda put people at ease. What I've seen happen. And kind of let everybody know, "Let's just let everybody relax, you know. And I know you're here for a reason but, take a deep breath and we'll get through this and it's going to be ok." And if it's done properly, I can see people, literally, I can see them start to calm down a little bit.

INT: Why do you want them to relax? ()

RES: I think if there's a lot of (. ) anger or anxiety, it's harder for them to communicate. It's definitely harder for them to listen. I think (. ) get them a little more relaxed, maybe that's not the term, but they can start to open their mind and hear about, hear about what the other side is saying.

INT: What do you typically like to say in an introduction? You know, talk about it, or actually give one. ((laughs))

RES: Well, you know, Our Town has trained us to ask them if they've been in a mediation or participated in any way. If they're familiar with it before. At that point they either, yes or no. Usually it's been no. And then, I think I just explain, um, what mediation is and the various steps to it.

INT: What do you say? How do you –

RES: Um, it's a voluntary process where they are to try and work together and resolve their dispute. It's, you know, something that's going to come from them. They're going to do this. And we're there just to help facilitate. And explain that each party will have a chance to explain their side or their view of what's going on. And then at that point we'll explore what they're willing to do. >Or the next, sorry< us what they want out of the mediation. What would make them happy ( ) to resolve that conflict. And then the third step would be what they're willing to do. [And then-]

INT: What they're willing to do for the other person, or what they're willing to do to get what they want?-

RES: All, all, yeah, everything they're willing to do to help resolve the problem. (. ) And then we, I explain confidentiality and that we can do a written agreement if they'd like one but that it's not legally binding.

INT: What do you say about confidentiality?

RES: I just stress that it is a confidential meeting. Nothing will be taken out of that room. I won't discuss it with anyone. And then we ask them not to discuss it.
INT: But we're discussing it now.

RES: I haven't named any names. And I've actually protected the professions even.

INT: So confidentiality means that the people won't be identifiable in discussions that might have something to do with their case?

RES: Yes.

INT: Ok. That's another issue that sometimes comes up in what I'm studying and (.) Okey dokey. ((laughs)) I say, "Okey, dokey," and then when I'm typing I type "okey dokey" and I'll be sorry later on. ((laughs)) Ok, how about the ground rules? If your co-mediator said the introduction, sometimes we break it up so, usually we break it up so ().

RES: I did do the ground rules on that. For me that's been, you know, they're written and basically you just read them and embellish a little bit. Some things seem more pertinent than others depending on the mood, or the people's animosity toward each other. Ok, I think there's one about no violence. And sometimes that feels almost () to say that to people who already have a, I've experienced mediation where they've pretty much worked it out in the waiting room before we even get to them. So they're coming in all happy and, "we've got a solution." so it feels kind of funny to say to them, about the violence. But I'll say it, kind of in a () not an authoritative sort of thing but not jokingly either because it's serious. I think that's the only thing that really changes much in the rules.

INT: Yeah. And usually if it looks like they are, like violence is not going to be a problem, I usually say something like, "We do all kinds of mediations with people and it's sometimes very emotional and so this is here." And you know what? A lot of times, when it looks like violence is not going to be any kind of issue, it's a very emotional mediation anyway. And people are () and people are crossing their arms, when they wanted to poo poo the violence. They laughed about it when I said it. Then later on they want to cross their arms and harumf and roll their eyes and I'm glad I said it. Has that happened to you yet? ((laughs))

RES: Maybe. Yeah, maybe so.

INT: It's a good one. People don't realize how angry, how hard it's going to be to hear lies. ((both laugh)) It's going to be very hard to have to sit patiently and hear somebody say what sounds like a bold face lie to you, and an accusation. That's going to be hard. ((laughs))

RES: Yeah, that's true.
INT: So talking about the mediations. Um, let me ask you again, even though you've kind of answered this. I'll give you a chance to think about it a little more. What are you hoping to achieve by going over the introduction and ground rules. You've kind of answered that by saying that you want them to relax.

RES: What, you mean, going over them in the mediation?

INT: Yeah, yeah. By saying the introduction, going over the ground rules at the beginning of a mediation what are you hoping to achieve beyond making them relax?

RES: That's kind of a minor thing really. Yeah, to inform them of what, so they have some sort of an idea of what will be going on. I think, then they will also know what's expected of them.

INT: Well, that's interesting. Can you tell me more about that?

RES: They'll know that they're supposed to sit quietly and listen to the other person and not interrupt. Because there is a very definitive process. And if you explain, then they'll know where it's going as well in terms of how they relate to the other person and, and how they relate to the mediator. And it's important that they know all those things. ( ) so they kind of know what's expected of them.

INT: How do you mean, how they'll relate to the mediator? How they'll understand the mediator's role? How do you –

RES: ( ) if we're directing it, or if we need to interrupt. That it's ok that we interrupt. ((laughs))

INT: How do you understand the mediator's role?

RES: I think we're there to just sort of direct it, make sure that it's going along the defined process. Keep it, keep it, I mean it'll ( ) back and forth but as long as it's on that path going towards something. That's what I regard our role. And to kind of referee a little bit.

INT: Going towards, what?

RES: A solution ( .) hopefully. Or, even a solution to not have a solution. Just so there's some kind of agreement, meeting of the minds.

INT: Then how would you describe a successful mediation?

RES: Where both parties are happy with the outcome ( .)
INT: So if people aren’t having an agreement, but they understood each other, and that doesn’t make them happy, (((laughs))) Then that wouldn’t be such a successful mediation?

RES: Uh, if they, no, if they came to an agreement on what their future dealings would be. Because I think that mediation really has to do with the future, right? I mean, where they carry on from this point. So if they can know that the person feels or thinks a certain way, and totally disagree with that, but if they come to an agreed behavior in the future, or a path for the future than I think that’s successful. (.)

INT: Ok, I’m going to look through my notes to see if there are any points I didn’t hit. (.) Can I ask you to remember this particular mediation. Do you remember trying an particular strategies during that last mediation? What worked or didn’t work in that one?

RES: I think, I think in that one what helped a lot was acknowledging their feelings, type-thing. ( ) You know, “That must be very difficult for you, not getting much sleep when you’re working so hard on your education.” or whatever. “Yeah, blah, blah.” ((indicates disputant venting )) With the other people, they had just moved into their place next door to this guy and jumping into their careers, they had just moved into town. They had a lot of other things going on. Acknowledging that (.) I want to say their stresses, but you know, the challenges that they all had. I think that with the man in the wheelchair one of the things that he just said so lightly but it was a big deal was about how his chair was motorized. He’d go down the walkway and the dog would bark at him all the way down the road, or all the way down the fence. And he said it probably had a lot to do with how they bark at cars. And you know, “It’s no big deal.” But it was a big deal. He said something about, “I’ll never be like everybody else.” And comments like that and they really needed to be acknowledged. And that kind of broke through a little bit of stuff for him. And I think it was good for the other party also to hear that.

And in fact then the other party at that point said, “Please, why don’t you come over to our house and we’ll get the dog to see your chair and know that noise and maybe when you do go down the sidewalk, they’ll know it’s you.” And so things like that (.)

INT: How did you think works for that man in the wheelchair for you to acknowledge his whatever he was feeling when he said he’s not like anyone else?

RES: I think someone saw he was challenged. Someone acknowledged that he had difficulties in life, challenges in life. You know, most of us are so wrapped up in our own stuff, to actually look at a human being and say, “Wow, that must be very hard for you.”
INT: What does that do? What do you imagine, if you had to guess, what does that do to acknowledge him? You said that it broke through something.

RES: I think he became more open. He became more, he kinda, I could see some of that anger dissipate. He started becoming more communicative. Just opened up more.

INT: I just wonder why that works, to tells somebody, "I recognize you and your stresses." Why does that make them feel less, I don't know what. I'm just wondering why you think that works?

RES: I do have a theory on that, because, I don't want you to put this in the thing.

INT: Oh, I can turn this off. ((turns off recorder then on again)) Go ahead.

RES: I just think that it’s reconnecting with people. I think that sometimes people, because of what they’re dealing with, a physical thing, or whatever it is, might feel isolated and then somebody says to them, or acknowledges the difficulty of it, it kind of brings them back into humanity.

INT: Yeah, that makes a lot of sense. Thank you. I have never asked anybody that specifically yet, but it keeps coming up in interviews and I kinda wanted to push it a little further because that’s a pretty popular strategy, to acknowledge feelings but I’m not quite sure how it works. Answer a couple other questions and I can move on to part three. I’m just watching to make sure, the end of the tape doesn’t pick up. I have to stop it before it gets to the end.

The next thing I want to ask you about is (.) ((cat meows)) the idea that, you said that one of the things you do as a mediator is direct the flow. Can you remember any specific examples of where you might’ve been directing the flow in this particular mediation?

RES: Um, in the last one?

INT: No, well in this particular mediation we’ve been talking about the whole time, yeah. directing flow?

RES: I don’t know. I can’t tell you. I’m not sure I can tell you. If I think about it, I might be able to come up with an instance in that one. That one was a little while ago. But I know that after a mediation, you know how you conference with your partner and they’ll evaluate your so called performance? And one of the things that I’m often commended on is that I will go back to something that was unfinished. And what was the question you just asked me? I’m sorry.

INT: I was just talking about [directing the flow.]
RES: [Oh, directing flow, yeah]

INT: Or influencing the mediation. Moving it. Doing something in the mediation.

RES: Ok, I think I’m aware of, when I’m listening to people speak and I hear something come up, and if I think it hasn’t been addressed and we get off somewhere else, I’ll bring it back to that a lot of times and then continue on going forward. Or I’m just aware of keeping it moving in a forward way which is consistent with how we’ve been trained.

INT: What are you hoping to do by going back to things that feel unfinished, and readdressing them? What are you hoping to do?

RES: And, and I don’t do it all the time. If it was something that was a big issue, it appeared to be something that was very important to them and then somehow it wasn’t addressed, I feel that if it’s not addressed it’s going to still be there, or the mediation in the future won’t be successful. So I feel that it is something that needs to be dealt with. Other times it’s no big deal. But, if I end up going back to it, it’s because I feel that it’s a big issue.

INT: So you’re relying on your sense of how important this piece was that we-

RES: Well, based on how they described it, or how they indicated its importance. I don’t try to go beyond what they said really. You know? I mean sometimes you have to read into stuff a little bit. But if it appears to me that that’s really an important issue, and I realize later that it wasn’t dealt with then, yeah, it merits going back.

INT: How do you feel about the suggestion that mediators are influencing things that go on in mediations?

RES: I don’t think I am at all. Because of the training we get at Our Town. We’re not supposed to suggest anything. We’re not even supposed to give information. And we don’t. I don’t. So I don’t think there is any of that in the one’s that I’ve ever done. I don’t see that.

INT: How do you feel about the suggestion that that’s happening. Would you say that that would be a mistake? Or if it happened it would be wrong?

RES: Based on my understanding of mediation, again, the way I’ve been trained, that to suggest is not appropriate. But I can imagine that there would be mediators out there who would because often times there are things that are just so blatantly obvious that would be a solution. You know? ((laughs)) And it would be difficult
not to say it. That where the skill of mediation comes in where you can try and get that person to try and think of it themselves. And maybe there's a bit of manipulation that goes on with that. I don't know. But if it occurs to them and they say it, then that's ok.

INT: Why is it better if it occurs to them?

RES: Well again, back to the training, if we're not supposed to influence, then I wouldn't say that really is an influence. I think that that's just somehow, if it came from their own thoughts then.

INT: I think the reasoning behind that is supposed to be that if it comes from their thoughts then they will own it better. Isn't that they, I mean that's what I was told, that that's the.

RES: That would make sense.

INT: Alright fine. I'm just interested in making distinctions between influencing and this next idea I'm going to describe. Ok?

RES: Fine.

INT: Certainly mediators at Out Town, I mean, I concur with your interpretation of our training. That's definitely an important thing at Our Town. Next part. Oh, um, ok. This is my idea. And I did already explain it to you on the phone. And it is that maybe, I'm wondering, maybe one of the most important things that mediators do for the disputants is to create a place for them to have their discussion. To create a kind of a space to have a discussion in.

RES: Yeah.

INT: Ok. So I want to know how you feel about the suggestion that at least part of your role is to create an atmosphere or a space that increases the probability of a mutually agreeable resolution? How do you feel about that possibility?

RES: In terms of is it appropriate, or what do you mean? [I don't know what you mean.]

INT: [That's a good angle on it too.] Um. Ok go ahead, that's fine.

RES: To create an, Ok, let me make sure I understand the question. Do I think it's possible to create an environment where they feel what?
INT: Where they can have a kind of conversation that might lead to resolution. That might be something we’re doing.

RES: Oh yeah. That’s what I’m saying. In terms of the introduction, we set the stage.

INT: Yeah, I think you did kind of describe it that way. I think I’m describing something similar.

RES: Does that answer your question?

INT: Yeah.

RES: Am I understanding your question?

INT: I think so. I’m developing what I’m –

RES: Ok.

INT: I’m on the edge of developing what I think I mean. But when you described what you thought you were doing in your introduction it sounded a lot like what I’m talking about.

RES: I think it’s important to let them know that it’s not judgmental, and it’s neutral and it’s safe. What they say, they can say right there and they’ll be listened to as long as they’re not being abusive or whatever. And they comply with the rules. Yeah, I think it’s very important because resolving their dispute, especially with people who’ve known each other for awhile, you’ve got to really get to the root of stuff. And people aren’t going to discuss the emotional aspects of something unless we ( ) it’s comfortable.

INT: So that’s part of our role, part of the directing.

RES: I think it is.

INT: Providing that environment.

RES: I think so. Yeah.

INT: I think so too. I’ve just got to work out what that means. We just don’t talk about mediation that way. We talk about re-stating and we talk about re-framing (. ) So now I have three more, sort of survey little questions. Do you think your opinions are typical of most other mediators? How would you rate yourself?
RES: I think I’m typical of Our Town, at least the people I’ve gotten to know there in terms of mediators everywhere I don’t know because my experience has only been there. I don’t know. From what I’ve heard, and this has no real basis in fact, I’m sure, but, I’ve heard that Our Town has the more touchy-feely than other places like the Attorney General’s office. So I don’t know what’s typical. Because my experience (). I think I’m typical within that group though.

INT: So within the class that you graduated from, you feel like you’re (.)

RES: No, I wouldn’t say the class-

INT: No really?

RES: No one can even come near to the amount of mediations that I’ve done. There’s just been a few people that’ve been interested and they’ve just done a couple two, three.

INT: Really?

RES: Yeah. I’m like way out beyond them in terms of the numbers because I’ve shown an interest in it. And, but I think with the mediators that I’ve worked, the co-mediators, I fee like, like I know when you and I did that one. I think that was like the second one I had done. I feel like I’ve learned so much since then. I be if you’d asked me that then I’d be like, “Oh, I don’t know anything.” But I feel now I really have a good understanding how to do it. And I think that within the more experienced or some of the experienced mediators I think I’m kind of, I believe I’m fairly typical. Because I’ve worked with such a lot of different people. And I work well with everyone.

INT: Actually, I’ve already asked you the thing about the opening statement. So, this last one, I ask this because you never know what you’ll get. In a way you kind of answered this off tape. Why did you become a mediator?

RES: Well, hmmm, I think one of the things that came clear, I went through a period of time not working because of an injury, and then evaluating my life and the way I relate to people and what I’ve been through and how I’ve always been in relationships. I realized, I’ve been mediating my whole life. And uh, like, I’m a middle child of five, you know. And that’s pretty typical to be the mediator if you’re the middle kid. And I think I’ve always, I know I’ve always been doing that with siblings, friends, and in work situations, and “can’t we all get along?” ((laughs)) I think I’ve also always really been interested in psychology. I’ve just always read those books for fun. I have a real strong interest in it. I have legal background and I think the two of them were a nice mesh. And it just made perfect sense. You know, people who are lucky enough to figure out what they feel comfortable in life doing,
early on. I didn’t have that luxury. I really was convinced that I should be a lawyer. Now I’m so glad that I’m not. In reality, this is like the first time I’ve done something where I just go, “Oh my god! This is what I should be doing.” That sense of, I should be doing this.

INT: That sounds great. I hope I get that. ((laughs))

RES: I never thought it could happen to me. I was starting to give up hope. All these years, you know. And what the hell am I going to be when I grow up? Time’s marching on. ((laughs))

INT: How does it, uh, you said, I think you said earlier, “I know how it works.” I think you said it a little earlier, something like, now that I’ve done more I can see how it works.

RES: Oh. You know when you’re, when you’re (.) I have a different view of it now. Like you know, when you’re in the tall grass and all you see is, you know, what you’re looking at as you’re going through the grass but if you get up on a platform, you can see all of it? That’s how I feel. I feel like I’m, I can look at the whole thing now, the whole picture from A to Z. I know there’s a process involved where (.) We were taught that in class, but I guess I didn’t really get it until I had done it enough times. There are very definitive stuff in a mediation.

INT: You trust the process then? You find that trusting in the process and allowing it to work through works best. You mentioned the steps. You find order in it?

RES: Yeah. Most mediations that I’ve participated in, we’ve come to a really nice agreement. People walk out feeling good. There have been a few. I know you know of one. ((laughs)) That was just a nightmare.

INT: Did ours not-

RES: Do your remember that?

INT: I have such a terrible memory.

RES: ()That couple.

INT: What, that had the abusive-

RES: There was all that violence.

INT: Oh, the couple, there seemed to have been [domestic violence.]
RES: [Yeah.]

INT: Yeah, that's right. That was with you. I do remember that one.

RES: Yeah. So though I've had a couple-

INT: That was a wicked () to mediate.

RES: That () Whahh! I mean, too much. We're talking about therapy for that.

INT: ()

RES: Yeah.

INT: But what a kind of a privilege to get to sit in a little bit on these people's passion and –

RES: Another similar one that went on three mediations. Three. And then finally we all just said the same thing () didn't want to continue.

INT: I mean, we kinda came, I think we made a difference.

RES: Those were both quite similar, but not as goofed up in terms of, well I mean, I don't think there was any physical abuse. But there were kids involved and all sort of things. Complicated. Very in depth.

INT: I'm beginning to learn that mediation is good for some things and not good for other things.

RES: Yeah.

INT: Um, the last part I have is just five quickie kinds of questions. How long have you been mediating?

RES: I took the training last March.

INT: And are you still considered a secondary?

RES: Yeah. I get my first evaluation for being primary next week.

INT: That's fast, huh? You've been real busy. That's good.

RES: I've been real invested in it.
INT: Good.

RES: How many evaluations do they typically do before they –

INT: I had two. I don’t know. I think I had two. Yes, I definitely had two. I don’t know. They tried to make me feel like I was normal. I don’t know whether most people get one or ((laughs))

RES: I’m sure there’ll be more than one.

INT: That’s what they led me to believe, yeah.

RES: I’m excited. It’ll be cool.

INT: It was a little bit uncomfortable for me because that’s just how I feel about being tested.

RES: Was (name omitted) your observer?

INT: Um, she did observe. I can hardly remember. I’m sure that (name omitted) was the first one though. I don’t remember who was the second.

RES: Well I’m really looking forward to it because I think that, um, when I have more responsibility like that I’m going to really rise to it. I have a tendency to hand back a little bit cause I know my role as secondary. So I think when I’m given that, I don’t think I’m going to dominate, I don’t mean it that way at all. I think I’m going to, I’ll become a better mediator.

INT: I like the secondary role.

RES: Do you?

INT: I do because, I’m not quieter in it, but it just allows me to relax a little bit () someone else is taking the responsibility. And I haven’t been able to do that ever since I’ve been primary now for a couple years, I’m usually teamed with a secondary. Except for those times when I’m teamed with another primary, so, I would’ve rather stayed ((laughs))

RES: But I know the one you and I did, I leaned pretty heavily on you.

INT: Did you?
RES: I think I did. I know I didn’t do a lot of emotional re-stating. At that point I was pretty uncomfortable with doing that. But I was gathering the facts. But I know that I relied on you to move it.

INT: Did I do ok? ((laughs))

RES: Yeah, you did great. I think given what we had, you did great. How complicated that case was.

INT: Yeah. You just have to give it back to them. You really just have to give it back to them and say, “Boy, this is just your time to talk here, I guess.” Because there isn’t a clear, a super clear purpose with all this mud.

RES: And that’s what it was. I think they were just both saying well you did this and you did that, that’s how I feel and that’ how I feel —

INT: ==Yeah== hurt, hurt, hurt. We couldn’t get to the bottom of all that.

RES: That was not a good mediation in terms of following the steps and doing, () [we didn’t get through the steps at all.]

INT: [Some people say] Some people say that it’s crazy to have one mediation, ever. That all mediations should be able to go over several times.

RES: I think that depends on the case, myself. I think one is sufficient in some cases. I did one a couple nights ago. There’s no reason to have another one. It’d be absurd. In fact I felt even the last little time that we were there was too much.

INT: ((refers to tap)) Let me check. Every time I’ve done this before I’ve missed the ends and I’m paranoid. Yeah. Obviously you’re right. It couldn’t be for every time. But I think the older fashioned traditional labor dispute kind of mediation stuff, () for business or diplomacy, I can’t imagine doing every thing in one night. And so from those perspectives, they can’t understand us being able to –

RES: That makes sense.

INT: And yet, we sort of because of our training, think we always have to do it in one night. There’s a whole other tradition that says, I can’t imagine doing it in one night. So I think we, maybe we ask too much of ourselves in that case where we set it up expecting, telling that couple that might expect to solve everything in one night whereas maybe ()

RES: Yeah. Well, I think what I like is knowing that we can go over in time if we want and schedule a second one and a third one. I did that once. So I don’t see any
pressure that we've got to get this agreement tonight. Cause I know they can come back in, that opportunity(.) But there are some that, you can do it in that amount of time. Everybody walks out happy. Like a barking dog case. It's be overkill to bring them back.

INT: My other questions are statistical stuff. I'd like to know your age.

RES: 44

INT: Your profession?

RES: Mediator.

INT: Describe your ethnicity or race.

RES: Caucasian

INT: These questions are not necessarily what I would put in my analysis because I would change those things. But those kinds of questions are for the people who'd like to make sure that I'm getting a range.
APPENDIX F
PROCESSING BEFORE THE MOCK MEDIATION

The following conversation took place one half hour before the video taped mock mediation. The two mediators who facilitated the mock mediation sat alone in the mediation room. They were given an intake information sheet (see Appendix B) with information about the case and asked to prepare for the mediation. The interviewer placed a tape recorder between them, turned it on and left them to talk privately. After a half hour, the video recorder was turned on and the disputants were led into the room.

INT—interviewer
M1—mediator one
M2—mediator two

INT: I just want you two to talk to each other about whatever you guys usually talk about before a mediation.

M1: Well alright.

M2: Good. Hi Alan

M1: Hi Tom, how are you?

M2: So this is the first time we’ve worked together other than that really brief ( ) at that training session.

M1: Oh yeah.

M2: And you remember, you trained me.

M1: Two years ago.

M2: Was it that long?

M1: Yeah.

M2: Time flies.

M1: Your life has changed a lot.

M2: Oh, has it ever, yes indeed.
M1: I’ve been looking forward to working with you. You know we don’t get a chance to – men don’t get a chance to work with other men too often.

M2: That’s true.

M1: And I’ve heard that you’re a very competent and well thought of mediator so –

M2: That’s good to hear. In the process before the mediation I just sort of like to talk to the person and get to know them. Find out if they have any preferences as to whether they (.) how to break up the introduction to the process and then somebody will introduce the ground rules. One person will say () will basically say, you know, have you had this process before? If you haven’t here’s a brief description of what it is. If you feel like this is something you’d like to go through (.) then the other person goes over the ground rules with them. Personally, when I go over the ground rules, I like to go over them one by one and let people focus in on them as opposed to looking at the rules and saying, you know, do you agree with them? Most people say, “yeah” whether they heard them understood them or not. So I try to create that atmosphere that I feel is really important which is one of comfort early on by the introduction and going over the ground rules one by one. I think it also helps them focus on being there as opposed to, “what am I going to say?” or “what’s going to happen here?” those sort of anxiety ridden kinds of thoughts of things that people go through.

After that, in terms of my preferences, I sort of like to engage them.

M1: How do you mean? In the beginning of the process [what’s going on with you or?]

M2: [Yeah, I mean, after-]

M1: As an introductory sort of, “here’s what’s going on with me?”

M2: Well, no. Good question. It depends on what the mediation is exactly as to how much kind of an orientation I’m going to do. Generally speaking, if the situation is such that I know there isn’t some cultural issues going on, or if it’s a relationship between two people, I tend to try and want to get a little bit more background before I actually get into the process. I’ll say something like, “You don’t know me very well, you’re just coming in here, there might be some anxiety, la dee da (.) here’s who I am, here’s why I do this, here’s how long I’ve been doing it” that sort of thing. And then I say something like, “I know a little bit about you from the intake form. Before we get started can you tell me a little bit more about you that I don’t know, something that you’d like me to know about you.” Just give them an opportunity to talk. To hear each other talk, to relax a little bit and to give me some
background that might come in handy as we go through the process. That’s along the kind of orientation. Typically, what I like to do is basically say something like “Hi, welcome. This is who we are. Have you done this before? No? There are basically three parts to it. You’ll probably tell us how you see the situation and what brought you here, about what you want to have happen to make it better between you and then what you want to do to get what you want. Does that seem like a process you’d like to go through? If they say, “no” I try to find out why not. If they say, “yes” well I tell them, you know we have some ground rules to help people go through this process and I’d like to see if they are acceptable to you. Go through the ground rules, if they say, “yes” then we basically go through the process. I’m going to say, “who wants to start?” If it’s not obvious who wants to start, if no one is chomping at the bit, um, usually one person volunteers. If no one wants to volunteer, I sort of make an assessment and say, “you go.” And what I mean by engaged, is being engaged in terms of good active listening. So, asking questions. Letting them talk, and asking questions to make sure you understand what they’ve just said.

M1: And both of us engaged? [So that it’s clear that there isn’t]

M2: [Right, I’m mediator, you’re mediator (.)]

M1: So there isn’t one advocate? Right.

M2: Back to the process, I like to focus on feelings, not just what’s going on in terms of the issues but how people are feeling about the. I like to try and keep the responsibility for (.) well actually I’d like to share the responsibility for communicating because I feel that our roles () are to facilitate communication. It’s been my experience at least that in conflict one of the first things that goes out the window is to communicate effectively. So it’s our job to facilitate effective communication. It’s your ((refers to the disputants)) to tell us how you see the situation and of course work hard to solve the problem. But when you’re listening (.) and I go over this with them in the ground rules, especially the no interrupting ground rule comes up, I say, “you know what we’d like to have happen here is when one person is speaking for the other side to listening with the intent of trying to understand what the speaker is saying () out the window, so you can communicate effectively. So in this process, when one person is speaking, or when one side, if that’s the situation, let the other side, your role is to be a good listener with the intent to understand, not to refute or avenge yourself, but to understand what it is the other person is saying. Does that sound like something you’d like to go through?” If they say, “yes (.)” This is all towards building atmosphere, making sure they’re going to be comfortable, safe, fair, so you can feel free to express yourself, and also both issue-wise and emotionally (.) and the responsibility is on you for that. Whether you follow this or not but we create the atmosphere and ask the right questions ()the process.
M1: Right, it's theirs. That's really good. I hadn't actually worked with talking to them about the communication, and communication going out the window. I think that's a really good –

M2: We're not here to judge you or whatever. We're here to help with the communication process. One of the things I find in my own life as well as in my professional life is that we don't communicate. There's an expression from one of my colleagues, I don't know if you've met her or not, her name is (name omitted) (.)

M1: Oh yes, I've worked with (name omitted).

M2: And (name omitted) said, one of the many jewels I've gotten from (name omitted) is, incomplete communication leads to unmet expectations. It's a jewel. We don't communicate fully. We may be thinking and feeling it but it doesn't come across in our communication. What comes across is what we're focused on. Now, if the other person was to hear all the other stuff too, that can affect the communication. They can understand more, but that doesn't come across [because were stuck.]

M1: [We have no choice.] It's more important.

M2: That's right. The job of the mediator to my mind is to (.) help to have a more complete communication process. I may be saying something and feeling something else but I'm not saying. It's the mediator's job to get that out too and to make the (.) to do that in such a way that I understand it and that you understand it. We provide context so that the understanding of what's going on is easier for both sides.

M1: And the understanding is really what the goal of mediation is.

M2: Right. And that's when transformation happens I think in that process, the understanding of where you're coming from. Because what typically happens I think is, and this is whether we're competent or not but it's exacerbated when we're in conflict, is that we don't have enough information and we make a judgement. Something happened between us. Now, because we didn't have a complete communication from me to you or you to me, I don't have enough information about what the intent is the context of the situation is, enough for me to understand it fully. So what happens is I make a judgement. I make up the rest.

M1: Right, fill it in.

M2: Right. And if I'm not in a good mood or something and I feel negative about you it's going to be a negative thing, right? And when I do that, that doesn't make for transformation because we're not two people in the same pod anymore, in the same situation, we're opposed to each other. And what I want to say is we're both in
the same situation. The communication breakdown is affecting the both of us. Not just this issue we’re talking about. And the more I can make that visible to the, there’s a communication breakdown going on here. “So what were you thinking when he said this? Oh? What assumptions were you making?”

M1: So let me make an assumption here. Sounds like one of your approaches to getting that is like talking about communication –

M2: No.

M1: Or, you’re like reviewing it yourself and making sure –

M2: Right. My process of communication is just to initially orient them to what this process is and to what their roles are. Most people (“You’re a mediator. What do mediators do?”) If they’re really confused –

M1: I look forward to hearing your intro there (.)

M2: Some people confuse it with arbitration, they confuse it with meditation. People don’t know what it is.

M1: Yeah, my mother did that. “Are you meditating?” No it’s (.) meditation helps the mediation but no they’re not the same thing. Well that’s great. It’s interesting because here’s the basic difference that I see. For me it’s interesting that I get asked to coach because I, the way that I tend to work. I’m not thinking so much diachronically of what’s going on, basically I’m doing the same sorts of things, or my goal is the same sort of goal as yours which is to focus on understanding and I tend to work in the moment. I think my best skill is listening and sometimes that goes out the widow, like you said, when there’s some information I don’t have, my judgement comes up and I fill it in and that’s actually part of a project I’m working on to even lessen that degree of judgement and prejudice that I come to with mediation. It comes out in slight sorts of ways that are counterproductive. I don’t think it’s a huge problem but it’s a problem that I need to work on. I wanted to make you aware of it. Sometimes my judgements come up and they might come out in the tone of my voice more than in what I’m saying. I will be looking for that, and I, you know, if you notice it you can help me by jumping in. Because what I need to do when I get into that place is to sit back and relax and listen and try to correct.

M2: Right. One of the ways I get (.) caught up in that too is I say to people, when it becomes obvious, you know, that something’s going on, “What am I missing here? It’s very obvious to me that I’m missing something because I can feel it, I can see it, I can’t put my finger on it but I noticed something’s missing, I’m missing something here, so help me. What am I missing? You’re telling me something that I’m not hearing and it’s obvious because you keep telling me this.” Right?
M1: Right.

M2: So, "I'm trying to listen but it's obvious to me that for some reason I'm not hearing what you're saying. So tell me in another way. Tell me again. Let's go back and track it. Say what's important to you here and let me see if I can catch that. If I can't then we need to go back and find out why. Maybe you're not saying it clear enough. Maybe you're saying it in a different way. Maybe I'm not hearing it. Maybe my other mediator can here it but what's not happening here?"

M1: That's a good device. Another thing that I'll do from time to time is I'll go on a fishing trip. I'll, I'm always when I'm mediating internally asking what does this mean? What's being said? What's underneath it? So I'm always listening for more than what the surface words are and sometimes I get notions or ideas and I'll check them out. You know, "I'm getting a sense of" or "What I think I hear you say is" And then I'll plant. Actually in my last mediation I was encouraged, I might have a tendency to do a little too much, "I'm not sure if what you're saying is this but here's what I think" you know, couching it a little too much which I guess is kind of a case by case basis. But I'll do that. I might plant an idea or ask a question that is relative to something that I think is going on, which might be a little sneakier than what am I missing which is more open ended. I like that idea of.

M2: I want to always give them responsibility here and not have myself. So you tell me what I'm missing instead of me guessing. Again that's all towards that transformative thing. When you're empowered One of the things that happens to people in conflict is that they feel power-less and that manifests itself in all sorts of ways. But when you feel power-full you're more apt to listen to the other side. I'm less apt to be defensive. I'm more apt to hear what you're saying but I'm not so anxious to defend myself. So I always want to try and give, to empower people.. To say, "You're in charge here. You're not power-less. Because I know from conflicts that people whether they know it intellectually or not they feel power-less or they wouldn't be in conflict, they'd solve it.

INT: OK you guys can talk some more if you like. This paper is if you want to write an agreement, it that become part of this then there's some paper. There're here and they're ready for me to bring them in when ever you guys are ready. How do you feel about that? Do you want a few more minutes?

M1: We'll just wrap up.

INT: OK then I'll just go to use the restroom.

M2: Bye.
M1: OK so just as far as roles and responsibilities, would you like to do that first part, that intro part?

M2: Sure I'll do that.

M1: Cause I'd like to see that. Then I'll do the ground rules get them started. Then, this is what I normally do is make room for elaboration on the ground rules?

M2: Sure.

M1: Let's work that way if you'd like to. I would rather work more fluidly and if you feel the need to interrupt me do so () communication with each other, real key thing.

M2: Agreed. Yeah, model that behavior.

M1: Yeah. So even if we get into a disagreement . . .

M2: Agreed. Yeah, yeah, yeah, yeah, yeah. In fact I was doing a mediation last week with a new mediator with a dog barking situation and one of the issues was the complainant was saying, "You're dog barks ( . ) unceasingly." And she's saying, "That's not so." And it went back and forth for several times for like an hour and she says, "I'm really sick of hearing that my dog barks the whole time and that's not so." OK, let's stop if that's a problem for you. "What does 'all the time' mean for you? Give me an example. Draw me a picture of that. And what does that mean to you?" And the mediator said, "(omitted) why are you doing that?" She said, "I don't understand why you're doing this, why you're going back over this." And I said, "Well, she's brought it up several times." I said, "I'm not going there, she is. She just said, 'I'm sick and tired of hearing that my dog is barking all the time and they're not.' Now if you say they are you say they're not and you're both there, do you agree that the dog barks, 'yeah,' 'nope?' 'yeah my dog does bark,' 'yes her dogs bark,' All the time? not all the time.' Obviously it has a different meaning for you and you. Now, we can get beyond this once we've worked that out. Once we have a clear understanding in your mind what that means and a clear understanding in his mind what that means. It would be helpful if we could get beyond that but until we do that we're going to keep coming back to this point because you have a different understanding of what 'all the time' means and it's a sticking point for you." And she said, "oh." And in fact when we processed afterwards, you know, it was only till afterwards that she could get the understanding of why I did that. She thought, well we keep bringing it back there and we're not getting any place. Well, this is the place we need to come back to if we're not getting any place.

M1: That's the point where something's missing.
INT: Are you done? OK. ((the recorder is turned off and turned back on)) In terms of writing?

M2: In terms of writing on the board or whatever, my preference is I sorta like to stay engaged with the disputants. If there's something they're talking that's very confusing like a diagram or whatever, I'll get up and I'll try to stay with them while they do that. Beyond that, I don't want to. If they get to wants, where they want something then we can actually delineate and they want to have it written out then I'll do that. Then of course if they want a written agreement, and I always ask them because some people don't, and some people do, then we'll write out the agreement.

M1: Yeah, I never push for the written agreement.

M2: You know it used to be when I first took training they (.) everything. When people started talking, they'd get up and start writing. They'd do it almost verbatim. You'd have reams and reams of writing. And what happened was people stopped being engaged and they started watching what was going on up here.

M1: Yeah. I'm very flexible about that. Of course I work with new mediators occasionally and of course they want to go by the book, and I find that a lot of times the writing is useful when you get into listing what it is you want. Sometimes it can be very balancing. Sometimes it can, it can also be revealing that, this person warns a lot, this person really doesn't want much.

M2: Yeah, yeah, yeah, yeah.

M1: So there's some kind of confrontation thing that's happening there. It can be revealing that way to both parties. It can also be a sticking point and it does take you away from engaging. So I'm flexible about that. I don't want it to be a place to go and hide. The other thing that sometimes works in a complicated case is to write where the house is in relation to the other house.

M2: Right. Especially if they're talking long, you know I have (.) yard here and her backyard borders (. ) sometimes I ask them, "Can you diagram that (.)?" And I always ask the other person, "Does that work for you or are there any edits you want to make to that?" Again, that also helps you how they're seeing, helps you see how people are seeing the situation and where the communication breakdown might be.

M1: Yeah, right, because sometimes, I mean, sometimes there might be a little (.)
INT: You guys are awesome. Did you look at this intake information?

M2: No, I didn’t even look at that yet.

INT: OK (.)

M1: I think I did this case. ((laughs))

M2: So have I. ((laughs))

INT: How did it turn out?

M2: You don’t want to know. ((laughs)) I don’t remember ().

INT: You can ask me any questions you have about my writing. (.)

M2: This last line here (.) this came up in a mediation. “Do you want me to shoot my dog? OK, I’ll shoot him.” “No, that’s not what I want. “I’ll just shoot him.” The only option () is to shoot the job or give him to this other guy or move him to the other side of the yard.

M1: There might be another option. Shooting the dog was not on his want list?

M2: No.
APPENDIX G
TRANSCRIPT OF THE MOCK MEDIATION

M1—mediator one, Tom
M2—mediator two, Alan
D1—disputant one, Betty
D2—disputant two, Carl
INT—interviewer

((M1 and M2 are seated at a half moon desk. D1 comes in and sits down. ))

M1: Did you have trouble finding us? -

D1: Nope. ((sits))

M1: Or, did you find us ok?

D1: ((coughs))Except for the wrong room number on the door downstairs. ((laughs, sips from a bottle of water))

M2: What got me is it's the third floor on a two story building.

D1: Yeah. (fixes her hair))

M1: The first floor is the basement.

D1: Yeah. A lot of buildings around here are like that. ((adjusts her chair)) I'm not sure why.

M2: I know. University numbering system--

M1: Academic mentality.

M2: Exactly.

((D2 walks in and sits down))

D2: How are you?

M1: Good. I'm Tom. ((extends his hand to Carl))

D2: I'm Carl. ((shakes hands))

M2: Alan. ((shakes hands)) Have you met the other disputant?
D2: Yes. Over the fence.

M2: ((laughs))

M1: It's (.) Betty?

D1: Yes, Betty.

M1: Betty and (.) Carl (.) Alan -

M2: Yes, Alan, Tom. (gestures to the other mediator and himself)) OK.

D2: ((laughs)) That'd be easy.

M2: Well, Carl, Betty, welcome to this mediation session. You've both arrived ok, if you need anything (.) you know where the bathrooms are?

D1: ((nods yes))

D2: ((nods yes))

M2: If you need to take a break (.) There's some water here for you. I'd like to start off by asking you a couple questions. Have either of you ever been to a mediation before?

D1: No.

D2: ((sips water from a bottle, shakes his head no)) First time.

M2: OK first time. Well if you wouldn't mind, I'd like to give you a little bit of an orientation to see if this is something you'd actually like to go through with.

D2: ((nods yes))

D1: ((nods yes))

M2: OK this is a mediation. It's different than an arbitration. An arbitration is where somebody listens to your situation and then tells you what the solutions going to be.

D1: ((nods yes)) mmm,hmm.

D2: ((nods yes sips water))
M2: This is different from that situation because nobody's going to tell you what to do. Basically the process has three parts to it.

D1: ((sits back, folds her hands))

D2: ((legs crossed at the knees, continues to nod))

M2: We're going to ask you what happened. Both your sides of the fence, if you will. How you see the situation. That's the first part of the process. And we're going to ask questions so we can better understand and communicate clearly. The second part of the process is to find out what you want to happen to make the situation better between you. And the third part of the process is what are you willing to do to get what you want. ((looks back and forth between the disputants/ D2 adjusts his collar)) to make the situation better between the two of you. Does that sound like something you want to go through?

((D1 and D2 nod yes))

D1: Yeah.

D2: Sounds good.

M2: OK. Well, we've allotted two hours for this process. Everything that happens in this process is confidential so we won't take anything out of this room. So feel free to say all and everything that's pertinent to the situation here without holding back anything. My partner Tom here would like at this time I think, to go over some ground rules which we find helps the situation happen more productively.

M1: OK. Well we do have some ground rules and I'm going to ask whether you'd be willing to commit to following the ground rules ((both disputants turn their chairs inward to face the ground rules printed on a sheet of paper taped behind and between the mediators)) and we'll go over them one at a time. The first is fairly obvious, it's to work hard to solve the problem. Obviously there's been something that's gone on in the past and there's a purpose for being here so we ask that we all work diligently towards that. We ask that you talk honestly and openly as () mentioned it's our purpose to create an environment where it's safe to do that. That's where the confidentiality comes in. So we ask that you work hard to be, maybe even more open than you might in an ordinary situation. We're going to focus on future events rather than past events. Obviously there have been things that have gone on in the past that have brought you here and you will, as Alan said, have a chance to talk about that and bring us up to speed but again, there's a purpose for being here and that purpose is about doing something towards doing something for the future so that's where our focus will be.
We ask that you show respect for each other, no name calling, shouting, put downs or violence. We certainly assume that you're reasonable people and we won't expect violence. Sometimes dissing or put downs can be real subtle, they can be rolling of the eyes or an attitude when someone is speaking ((D1 nods yes, shifts her chair backwards, crosses her legs at the knee, D2 nods yes, scratches his leg)) We ask that you please refrain from that and commit to refraining from that. We ask that you avoid interrupting each other. Now this can be difficult. ((D2 nods)) Sometimes when the other person is speaking and they say something that is contrary, or you're hearing it as contrary to your point of view. So each of you will be given a chance to speak so we ask that you avoid interrupting each other. We ask that everyone stay in the room till the meeting is over. And that's certainly not about imprisoning anyone here. ((M2 smiles at the disputants, D1 rubs her hands together)) We have room for taking breaks if there's a break needed. You can get a glass of water or go to the bathroom, or maybe you're angry and need to shake off some anger. ((D2 scratches his nose)) All we ask is that we agree together to go on a break. ((M2, D1, D2 all nod yes)) Does that work for you?

OK. And these last two are really for us. Alan and I are bound to be neutral and non-judgmental. That's my focus and I know that's Alan's focus. ((D2 nods)) And I'm human. I can make mistakes and I can be perceived as being non-judgmental. So if you think I'm taking sides one way or another, although I certainly have no intention to, please call me on that. ((D1 nods)) And ((looks at M2)) I would assume that you're open to that too? ((M2 nods yes and looks at both disputants))

M2: Certainly. ((smiles, D1 laughs))

M1: And finally, mediators will direct the flow of the meeting. Sometimes that looks like us interrupting. Our job is to keep the process moving forward, keep the communication happening, so that's what we do. Are these rules that you would be willing to agree to? ((gestures to the rules))

D1: mmm,hmmm ((nods yes))

D2: ((nods yes))

M1: Sounds good?

D2: Sounds good.

D1: Yep.

M2: OK. Before we get into it I'd just like to say that, make our rules a little clearer here. Our roles, Tom and I, are here to facilitate effective communication because it's been our experience that when people are in conflict one of the first abilities that
goes out the window is our ability to communicate effectively for all sorts of reasons. ((D1 and D2 nod yes)) So it's our job to facilitate that process of effective communication. It's your jobs, beyond working to solve the problem, to be good listeners. Again in communication one of the things that happens in a conflict is that we don't hear necessarily everything the other side is saying because we're caught in a moment of our own perspectives. So we'd like to ask you that one side is speaking the other side listen with the intent to understand, not to defend or refute. ((all nod)) Also not to necessarily agree with them, but to understand what they are saying.

D1: mmm, hmm. ((nods, fixes her hair))

M2: Is that workable?

D2: ((nods yes)) Sounds good.

M2: OK, well do you have any questions?

D1: ((looks towards D2, shakes her head)) [I don't thinks so]

D2: ((looks towards D1, nods)) no ().

M1: OK, I just want to interject before we get started, Alan, is something that I missed earlier is that I want to thank you for taking time out of your day to come down here for this. Sometimes when there is a dispute going on it can be extra hard to take that extra time. So I just want to compliment you and thank you for coming down here and participating in this. ((M2 sips some water))

D1: ((nods)) 'k

D2: ((nods))

M2: Well, if you don't have any questions, let's get started. ((sets his water bottle down, looks around at everyone))

D2: 'k

M2: Who'd like to go first?

D1: ((looks towards D2 and gestures toward him))

D2: ((looks towards D1 and gestures toward her)) Go ahead. ((small laugh))

D1: Well, I'd like you to go ahead, cause you're the one that is upset about my dog.
D2: OK. ((nods)) Sounds good. Well, I have a small house about an acre worth of property and our two houses are bordered by, there's a wash between us. ((gestures to indicate the separation of the houses)) We have two fences that overlook each other's back yards. ((M2 nods to indicate he understands)) And we've lived there for 25 years now. I bought that property quite some time ago and it's quiet and I'm retired. ((D1 shifts, adjusts her watch and clears her throat)) I've been in the army for a long time. I'm 55 now and I'm retired and just ready to relax for awhile. And I enjoy animals. I love animals and I've not really had any problems with animals every and (...) Betty ((gestures to D1, scratches his head)) had a dog that barks a lot and keeps me up usually late at night, sometimes early in the morning. For instance this morning about 5:45, quarter to 6 this morning the dog was barking and my, our bedroom window faces the wash and is very close to her back yard so we hear the dog very loudly at our house so it's difficult to sleep at night. ((D1 plays with her ring)) And I've had a couple of surgeries, some heart problems so I need my rest. I need to sleep a full night's sleep and it's difficult to get up in the morning and be productive all day. Sometimes it gets a bit stressful because of the dog barking a lot, and I'm trying to resolve the problem, but I don't know how to resolve the problem. The dog barks a lot and I've talked to my neighbor about it but I'm not sure how to go from there. I'm not sure what to do about it. So that's, just trying to figure out a way to deal with the dog and the barking, and see if there's some way to work this out. ((everyone nods all around))

M1: So if you don't mind, I'm just going to recapture what I heard you say. You're retired, and you live in the house that you've lived in for about 25 years? Did I hear you say?

D2: ((nods yes)) Yeah.

M1: And uh, how long, did I hear you say how long this problem's been going on?

D2: It's been about, uh, I guess, good question, I'd say, 6-8 months now I think, I think, when I first started noticing and I kinda let it ride for a couple of months. ((D1 scratches her head)) I didn't really think it was going to be a problem () many things are. Then it built up and built up. Yeah, about 6-8 months I guess.

M1: So you put off doing something about it, not sure -

D2: For the first couple of months

M1: [of months, yeah.]

D2: Then I think I've been trying to do something about it for the past 4 months or so, three or 4 months.
M1: And what sorts of things have you been trying to do about it?

D2: Originally I was, I left a message on Betty's answering machine and we talked about the dog. (gestures to D1/ D1 folds her hands in her lap) Tried to find a way but we didn't really come to any agreement about anything. I just tried to let her know that the dog was bothering me. And my son, who is a lawyer, gave me some advice about ways I could proceed, take notes about when the dog is barking, so that's what I've been trying to do. And I found out that suing isn't, you know, it seems like a really extreme option that doesn't really solve the problem so I've just tried to find some other ways to come to some conclusion about it or deal with the dog some how. ((M1 nods to indicate he is following along))

M1: So you've talked to Betty on the phone about it?

D2: [yes] ((nods))

M1: And that was one time or multiple times?

D2: Yeah, we talked once if I remember correctly. ((strokes his beard, looks toward D1/ D1 nods yes))

M1: Some time ago?

D2: It was quite, a couple of months ago, I think? ((looks to D1 for agreement/ D2 nods, clears her throat)) If I'm remembering correctly, I'm going from memory here.

M1: [Sure.]

D2: But I think it was about two months ago.

M1: Ok, and did that have any kind of, was there any adjustment made after that time? ((D2 moves his head to indicate he's not so sure)) or any difference in your experience of [the situation.]

D2: [I don't know, actually,] from my perspective at any rate, I don't think it did anything. I don't think we came to any conclusion or decided to do anything [or anything changed.]

M1: [I see. OK, so you talked]

D2: () ((gestures to D1 to indicate, "right?")

M1: But there wasn't a decision to do anything, and so nothing changed.
D2: Yeah.

M1: And so in the mean time you explored some other possibilities. You talked with your son who's a lawyer.

D2: [Right.]

M1: And so those ideas like lawsuits don't seem appealing to you.

D2: No. And basically he advised to keep track of when the dog barks. Just to kind of keep records about what I'm experiencing so that's what I'm doing. So I followed it up to this option with animal control who suggested mediation so that's how we got to this route.

M1: OK, Now I heard that the barking is a problem in the morning especially?

D2: Early in the morning especially. ((uncaps his water bottle))

M1: Early in the morning, and that's like, what's early for you? It's different for different people.

D2: Yeah, very true. Sometimes the dog will start up at 5:30, anywhere from 5:30 and 6:00. You know, I usually get up around 6:30 or 7:00. I'm used to that and I like to get up early. But you know, when you're woken up that early it's difficult to go back to sleep for 15 or 20 minutes and then wake up again at 6:30 so the dog starts barking at 5:30, I'm up. So usually between 5:30 and 6:00 is when I hear the dog most in the morning. ((M2 shifts in his chair/ D1 clears her throat))

M1: OK then does it taper off or carry on during the day? And I take it you're home all day? ((M1 puts his hand on the table for emphasis))

D2: Yeah, most of the day, yeah. And during the day it can go on. There was a weekend a couple of, I think two or maybe two and a half months back where the dog seemed to bark all weekend. I don't know if you were gone or what? ((looks toward D1/ D1 nods yes)) But the dog literally seemed to bark constantly during the day and during the evening and it would stop for maybe a few minutes or so and then it would pick up again. Something would run through the bush or he would hear a sound I guess. But for the most part it's early in the morning, late at night occasionally, mostly early in the morning. ((D1 sits forward to lean her elbows on the table and clears her throat))

M1: And I understood the part about it disturbing your sleep early in the morning, waking you up earlier than you wanted and then you can't get back to sleep.
D2: Right.

M1: When the dog barks other times in the day, what's your experience with that?

D2: It can be annoying. Usually there's traffic, kids playing in the neighborhood, things like that, there's other noise that moves around so it's kind of hard to focus in on the dog but if it's going on for a long time. If the dog's barking for a half hour or so you tend to focus in on that sound, so. ((M1 nods to indicate he is following))

But usually during the day we're gone as well so we don't hear it then () come back. So it's not as big a problem during the day. But if you want to take a nap during the day that can be a problem, during the afternoon. Usually it's the morning that's really the problem.

M1: So mostly the morning?

D2: Yeah. ((nods))

M2: Well, you said earlier that you'd actually spoken to Betty about it about four months ago or so, or about two months ago?

D2: ((nods)) Yes.

M2: And that nothing resulted. How, was your conversation a pleasant conversation, was there a problem? Did she admit her dogs were barking? Can you tell me more about that?

D2: Well, () it was somewhat pleasant, I think, if I remember correctly but I don't think ((scratches his leg)) Well I don't know if either of us admitted to anything, that I was saying the dog was barking, I think if I remember correctly Betty ((turning toward D1)) I don't want to speak too much for you, but you might've been saying that your dog wasn't barking or you weren't aware of your dog barking. ((D1 still leaning on the table, her hand up to her mouth, makes small cautious nod)) So I don't think we came ((large gestures with hands moving back and forth between D2 and D1)) I think we each stated our position and that was really the end of it. I think it was pleasant but not, wonderful. ((small laugh))

M2: And those positions were that the dog was bothering you and she did or did not acknowledge that the [dog was barking.]

D2: ((sips water)) [If I remember correctly,] I don't think she acknowledged that the dog, or didn't express awareness that the dog was barking or was causing a problem.
M2: So when the problem continued you didn't go back to her ((gestures toward D1)) to say ((gestures palms up head moves from side to side indicating D2 may fill in the blank however he wishes))

D2: No ((rubs his leg)) I tried to, I, I don't think we talked after that. Our conversation might not have been as pleasant as ((laughs)) I'm making it out. Maybe it was less pleasant. It was more, maybe we got to the point were I realized there wasn't an option to talk to her, or I thought there wasn't an option to talk to her. Maybe that was more to the point. ((sips water))

M2: ((smiles)) And this resulted in you calling animal control as per advice from your son.

D2: From my son, yeah.

M2: And how are you feeling about this situation now? ((glances over at D1/ D1 shifts in her chair)) with the dog barking and

D2: Well, it's frustrating ((rubs his leg)), I want to be neighborly, I mean I don't like walls between neighbors. I think people should work together to work these things out. That's why the lawsuit idea seemed ridiculous and wasn't really my intent but I don't know how to deal with it. ((gestures palms up)) I don't know what to say or how to, it's a dog after all, you don't just put a muzzle on it or toss it aside but at the same time if you own a pet you have to have responsibility and I've had a pet in the past that was a problem and I had to eventually get rid of the animal. You know, not kill it or anything, but find a new home for it. ((D1 sits back in her chair, hands folded in her lap)) Because it was a problem. Bothering the neighbors, digging up neighbor's yards, and it was causing a problem. I had to deal with it. But in this situation, I don't know where to go with that. ((sips water))

M2: What I'm hearing is you're here because you don't know what else to do. ((gestures palms up/ D1 leans forward to the table))

D2: Yeah.

M2: You've tried talking to her at least once and that wasn't effective, and so you're now here trying to get some remedy.

D2: Right, yeah, yeah. ((nods))

M2: ((looks at M1 indicating the question, "is there anything else?"))

M1: ((looks to D2 and back to M2)) 'k.
M2: Are we missing anything? Is there anything else you want to tell us about this at the moment?

D2: No, I think that's it. I think that covers the whole, yeah. I think that pretty much sums it up.

M2: We're going to go to Betty now. If there's something else you'd like to say later we'll give you the opportunity.

D2: That sounds great.

M2: ((looks toward D1)) Hi Betty.

D1: Hi.

M2: Now you don't have to respond to what he said. You can just tell us. You don't have to say yeah but or whatever. Just tell us how you see the situation and we'll go from there. ((D2 reaches into his brief case for mints))

D1: OK, I'm a registered nurse and my job requires me to away for long hours. ((shifts in her chair to face M2, crosses her leg, ankle to knee)) The dog used to have a partner. Actually it used to have three other dogs with it. ((gestures to indicate a circle on the table)) but I divorced my husband last year and he took two of the dogs and I had to put one to sleep so all I have left is Rufous, this little pound dachshund. ((indicates size with her hands, about two feet long)) And he is an outside dog and he does bark a lot, I think. And I put him outside at night because he just begs for attention and wants food all the time and he's annoying and I have to sleep because I get up very early to go to my job. And so (.) Rufous is really all the company I have because all the kids are in college and I'm divorced now and so I really don't want to get rid of Rufous. I would like to work something out ((gestures to D2)) with Carl.

I guess I was really surprised when he called and sort of taken aback because my perception was that he was very angry. And I apologized and told him that I would try to do something about it. And that if whatever it was that I was doing didn't work to please call me back and let me know when the dog is barking so that I can try to change to something else. So what I decided to do was get a crate, a dog crate, a carrying case ((gestures to indicate a carrying case)) I mean, it sounds funny ((small laugh)) and I put it in my laundry room. So when I get off of work, which is usually around 8:30 or 9:00, I come home, put the dog in the crate and I can go out. I get up very early, like around 4:30. So I've been getting up even earlier so I can feed the dog and then put him out thinking that if I feed the dog really early then he won't bark. ((looks toward D2)) Obviously that hasn't worked. And I went away for a weekend and had a neighbor, asked a neighbor to come over and feed Rufous, to
take care of him and asked that she please put the dog in the crate at night so that he's not out in the back yard barking. Obviously she neglected to do that.

And I'm a little worried because I'm going to be leaving for eleven days this month. And what I'm going to do is pay somebody to stay in my house and you know, put the dog in the crate and feed him early and just try to control the dog. If he wasn't an outside dog. I would consider making it an inside dog. (> I thought about boarding it on the way over here for when I'm gone but I really don't know what else to do and getting rid of him is just not something I want to do. This might sound scary, but I was thinking about even getting another dog so that the two could play together. ((looks over at D2)) I'm not sure that would decrease the barking but that's my story. ((throws her hands up))

M2: OK so, just to make sure we're on the same page here, you're single, or divorced. You're a nurse, so you work long hours. When Carl came over, or called you about the dog, you're perception was that he was really angry about the situation. ((D1 nods)) You responded to the situation by trying to feed the dog early. You also got a kennel for your dog, a carrying case ((gestures indicating carrying a case/ D1 nods yes, small laugh)) for your house to keep the dog in with the intent of (.)

D1: [keeping him quiet.]

M2: You also mentioned that you used to have more dogs and that when your husband and you divorced, he took two of the dogs with him. ((D1 nods yes)) Is that time, when did that happen? ((looks between D1 and D2)) And I'm just starting to wonder if the dog barking started around the time you got rid of your dogs?

D1: That makes sense to me. That when I had to put my other dog to sleep, and this dog, Rufous is a ((gestures to indicate a two foot long dog)) is three years old.

M2: I'm also hearing that even though Carl's contact with you seemed a little angry to you ((looks back and forth between D1 and D2)) that you're still, what you'd like to do is work the situation out, so you both want to [work this situation out]

D1: [Yes.] ((looks over at D2))

M2: OK, great, well we're on the road. ((smiles)). I've heard Carl say he's here because he can't think of anything else to do. I've heard you say that you understand the situation, you're not denying that your dog barks -

D1: Right.

M2: So you agree that that happens and you try [to effect it.]

D1: [I understand it.] ((nods))
M2: The ways you've tried to effect it haven't been successful. Is that correct?

D1: I suppose they haven't. Because I don't know. I mean I feed the dog but I don't
know if he barks in the morning and obviously you've heard him, so, yeah. (D2
crosses his legs)

M2: So you don't know if it's working. You also say you may be considering
getting some more, at least another dog.

D1: Yeah. I would consider that because before (looks at D2) when I had the dogs
altogether they didn't seem to bother you. (no movement from D2) Now I have
this single dog he's all by himself his voice, I guess, over the others is the most
annoying, I guess. (makes a facial expression asking for confirmation from D2/ D2
no response) So that's why I was thinking of going ahead and getting another dog to
keep Rufous company. (D2 sips water/ D1 turns to D2) Is that, do you remember
lots of noise when I had the four dogs?

D2: No, I don't remember that. I don't remember noise at all actually.

D1: Hmmm. Well. (turns to M2)

M2: [Well, actually]

D1: [I don't know] if that would work.

M2: Well let me just ask because I heard you say something earlier Carl, help me
out if I'm forgetting here, I heard you say that your not a dog or animal hater. That
you like dogs. That you had some of your own?

D2: Yeah, yeah, yeah.

M2: So, how's it sound that she's considering getting another animal?

D2: ((nods)) It, it sounds good, I mean if it works. It that dog just needs company
or some other animal to be around all day so it has someone to play with (D1 sips
water) that makes sense. Like I said that wasn't a problem before six or eight
months ago so it maybe that the dog just needs a playmate or someone to (.) occupy
it during the day. Yeah.

M2: Something else I want to go back to, again help me if I'm missing this. You
((looking at D2)) said you contacted her by phone when this first was a problem, and
I heard Betty say that she sort of picked up some anger from you. ((facial expression
to indicate "what's going on here?") Can you speak to that at all?
D2: Oh. Well it might be years in the army maybe. I'm a retired sergeant so I'm used to, yeah, that, that might be the case, I'm used to being assertive and just saying what's on my mind rather than trying to beat around the bush so. Yeah, I've been told in the past that sometimes I come off as a bit aggressive or at least assertive so that might be the case. Yeah, I might've come off as sounding more angry than I actually was.

M2: So, um. (looks around, gestures to M1 indicating that he may take over if he likes)

M1: I was just going to ask, are you feeling angry about it now, or, how are you feeling now?

D2: Well, worried about it. If there is another dog, I mean, that's kind of, it's an interesting theory. It sounds good. It might actually work but I'm now worried about it if now there are two dogs in the back yard that just makes the problem twice as worse because now we have two dogs to deal with. (looking at D1)

D1: [Yeah.] (nods)

D2: And again, I don't want to see animals sent to the pound. I really don't like that and I don't want that so I don't want to see you get another dog and then worry about what to do with two dogs and increase the problem. So I'm hopeful but I'm a bit worried about it. (sips water)

D1: Umm. I have to say that on the way over here, and when I got the notice from animal control I was really upset because I thought this was such a trivial, this is a pound dog. There is at least, if you think of it in terms of acres, an acre (gestures to indicate a large space) between us. But of course I'm remembering now when you were describing the fact that your bedroom window is close to the back of my yard. I can see why that might be a problem. Anyway, I was really annoyed and really frustrated thinking that I had rearranged my entire schedule to satisfy you. And then once I got in here and you explained the process (looks at M2) and we're speaking to each other (looks to D2) I think it's really helpful. Um, thanks for not suing me. (smiles/ everyone laughs) No, I just wanted to say that it's nice because the phone conversation to me was really uncomfortable, and you and I sitting down here with help (gestures to M1 and M2) makes this easier, so I just wanted to say that. Perhaps I could make the dog an inside dog. Because like you (gestures to D2) I'm worried about, if I get another dog, what if they both bark? (drums fingers on the table/ D2 sips water)

So maybe I could work it out so the dog is inside. It needs access to the outside. I could do a doggy door kind of thing, I'm just not sure how to, because I need to be at work at five o'clock in the morning. (looks to M2/ M2 nods to indicate
he understands)) That's when the dog starts up, right? ((looks to D2/ D2 nods)) .
Well, I could try and make it an inside (.) dog?

M1: Betty, if you don't mind I'm just going to back up a little bit to make sure I'm on the same page as you.

D1: [OK.]

M1: I sounds like, you said on the way over here, you were talking about feelings a little earlier, you were feeling kinda resentful?

D1: Yeah. ((nods))

M1: Is that the right word?

D1: ((nods))

M1: Now it sounds like you just said, you know, you got in here, you got a little more involved in the process. It sounds like ((D1 sips water)) you're more open to working, >you're feeling less resentful< and ready to work it out. Is that right?

D1: Yes.

M1: So now I hear you, you're into problem solving. What can I do to address to address your neighbor's needs. Is that?

D1: Yeah. (((looks to D2)) Understand, that I can silence the dog. Like you said, I'm not going to put a muzzle on it. I mean, there's dogs all over the neighborhood. They're always barking. Either side of me, neighbors with dogs. Big German Shepherd over here. ((gestures to the left)), Golden Retriever over here ((gestures to the right)) barking, barking, barking. So I suppose my dog is worse because he's the one accessing that window and that's probably (.) what if I (.) but yeah, I do want to solve the problem. I don't want to get rid of the dog. And I want you to be understanding that when it does bark ((looks to D2)), if I can keep it from barking at the annoying time, in the morning or whatever. Would that, ((D2 nods)) I mean [I'm gone all the time.]

D2: [Yeah that would help.]

D1: I work long hours and that's, you know, it's just really hard for me to (.) ((drums fingers on the table))
M2: OK, so what I'm hearing first of all is that you both want to work this problem out, and you're ((towards D1)) feeling better about it than you did before. How are you feeling at this time? ((to D2))

D2: It sounds better and I'm glad to work it out. I like to see things worked out rather than try and fight over it. And if the dog could be, you know, we could work out a way to make the dog silent in the morning that's really the problem. And if the dog barks during the day, I mean, you're ((to D1)) absolutely right. The neighborhood is filled with dogs and they bark all day and that's what dogs do during the day. So that's not a problem. So if we can figure something out in the morning, a way to deal with the dog early in the morning that would be really nice.

M2: It seems like we're narrowing the scope of it here. There was a proposal initially to get another dog and you considered that ((to D2)), you both considered that ((to both D1 and D2)) and that seemed like maybe that's not something which would be your first option. ((D1 and D2 nod)) Your second option was for you to make your outside dog and inside dog, ok?

D1: mmm, hmmm.

M2: And then your concern was that he needs access. One of your responses to that was a doggy door. ((D1 leans back in her chair)) And now you've narrowed it. You've said it's not just the dog barking, it's a particular time ((to D2)) of course you said that earlier that it was a particular time so now we're focused in on that morning time. Can we be more specific about when those hours are that we're talking about? ((looks back and forth between D1 and D2))

D1: Well, I get up anywhere around four, four fifteen, I get up.

M2: In the a.m.?

D1: Yeah, yeah. And what I've been doing is feeding the dog and then letting him out. And of course when I leave, I'm sure that's when he starts up. And I have to be at work at 5:30 so I leave at about 5:15. I mean, that sounds (. . .) [right]

D2: Yeah, that sounds, about 5:30 is usually when I hear him. ((rubs his leg)) And maybe he barks when you leave and then I wake up after a few minutes. But it sounds like 5:30 to, but I wake up at 6:30 to 7:00 every morning anyway, so it's not a big problem although if we could figure out a way to keep the dog happy from 5:30 to 7:00 [let's say.]

D1: [A couple hours.]
D2: [would be ideal.]

M2: Just to make sure we're clear here, I've also heard you say there are other dogs in
the area and the dogs bark in the daytime, but barking during the daytime is not the
problem. Those morning hours from about 5:30 to 7:00. ((D1 sips water))

D2: Yes, that's really, yeah.

M2: OK, so, let's see how many ways we can think of affecting the dog barking in
that hour and half ((to M1 and D1 and D2))

M1: [Brainstorming?]

D1: [Oh good, you're going to help ((smiles)) cause I just don't know.]

D2: [Yup.]

M2: [And I hear you ((to D2)) would like to help the situation?]

D2: [That would be great.]

M2: [yeah, yeah.] ((D1 clears her throat)) So, we can do it here ((gestures to white
board)) or we can do it here ((gestures to paper on the table))

M1: [Do you want to] (.) ((gestures to white board/D2 looks puzzled))

M2: ((to D2)) Brainstorming is a process we like to utilize when people have a
greed to solve a problem but they haven't exactly keyed on that exact process they're
going to use. So we'd sort of like to get involved at this point and have us all sort of
generate ideas for about a minute or two without evaluating them. Just think, how
many ways can we deal with this? And just list them. ((D1 nods)) And then sort of
go back and look at those ways and see what might work for you. ((looks at D1 and
D2))

D2: ((nods)) Sounds good.

D1: ((nods)) OK.

M1: And in the classic brainstorming sometimes the ideas come out don't seem like
a very good idea, but you know, in the process of saying, well this may not be a very
good idea, what we ask is that you not withhold dumb, what seem like dumb ideas
because sometimes they spark a great idea ((everyone nods)), and sometimes they're
more brilliant then they sound inside your own head. So that's what he was talking
about ((referring to M2)) when he said we don't evaluate in the process. We don't
judge the ideas. We just put them down and we see what comes up out of that. Does that sound ok?

D1: ((nods)) ok

D2: ((nods)) Sure.

M1: ((to M2)) Do you want record. Do you want me to record?

M2: [Sure.] ((D1 coughs)) OK so the situation is how do we stop the dog from barking between 5:30 a.m. until 7:00 in the morning, right. ((D1 and D2 nod)) And one of things you've already done is to feed the dog ((to D1)) [and water it and that didn't work.]

D1: [mmm,hmmm. Apparently not.]

M2: So, ((looking all around)) somebody give me a word, give me a solution (.)

D1: Um, I could keep it inside, or have a neighbor or pay somebody to come and let the dog out at 7:00 or 8:00 and then again probably around 5:00 in the afternoon because I don't get home until 9:00 or so. You know, have somebody come over and put it in the kennel. Another thing I was thinking was, you know, I've got this big square back yard and I could just limit, I wonder if that would help. Limit the space in which Rufous can run around so that he's closer to my house and can't get right up by the fence. I don't know if that's such a hot solution.

M2: No, no. We're not going to evaluate.

D1: Sorry. I forgot.

M1: OK so limit the dog's access in the yard.

D2: Well the dog door in the past, I've always used dog doors. They allowed my animals to go in and out. That might be an option if you want to install one of those. That way if maybe the dog just needs to go in and out, that sometimes works. It worked for animals of mine in the past. I'd say a dog door might be a really good idea.

M2: How about a, did you say earlier that you have animals also?

D2: Not now but (.)

M2: [Oh, you used to]
D2: [Not now.]

M2: Because I was going to suggest that you could get them together but if you
don't have animals that may not work.

D2: Yeah, yeah.

M2: Oh, let me ask, have you ((to D2)) met her dog? Went over and said hi?

D2: ((sipping water)) Not yet. Actually, that was an idea I was thinking about, I
don't know how well this would work but dogs I've had in the past have needed to be
walked or played with a bit. And that's an option. You were mentioning having
someone from the neighborhood come over. ((to D1)) We're retired, maybe there's a
way, I don't know if this would work but just walking the dog in the morning or in
the afternoon [or something like that]

D1: [hm!] ((a sound of surprise)) You'd be willing to do that?

D2: It could work. We're not home all the time, but we're home a lot. ((M2
continues to write steadily)) If we're on vacation maybe we can work out a different
way to do it. And then we're not there anyway so if the dog barks I guess it wouldn't
really matter. ((laughs))

D2: It could work. We're not home all the time, but we're home a lot. ((M2
continues to write steadily)) If we're on vacation maybe we can work out a different
way to do it. And then we're not there anyway so if the dog barks I guess it wouldn't
really matter. ((laughs))

M2: ((looks at D1 and gestures to indicate, what do you think of that?)) So we've
got four. ((looking down at the pad he's writing on)) Let's take another. ((looking to
M1))

M1: The only idea I had was on the doggy door was to put at timer on the doggy
door [so that it couldn't get out of the house until 7:00.]

D1: [Have you seen such a thing?] That would be great.

M1: I don't know. I mean that's, again, maybe it's a dumb idea but

M2: We'll evaluate it later.

M1: We'll evaluate it later (.).
M2: Oh, the other think I heard you say is you might get another dog. So we'll consider it. ((writing))

D1: mmm hmm. ()

M2: Best people in the world, in our right minds.

D1: In our right minds, right. ((small laugh)) (.)

M2: Oh, how about, does your dog like toys?

D1: Oh, he's got tons of toys.

M2: [So that doesn't really]  

D1: [The whole yard, scattered with toys.]

M2: O.k.

D1: That's one of the other things I did to try and keep him quiet. ((sips water))

M2: Is to get toys?

D1: Yeah. (.)

M1: You already talked about, keeping him inside the house.

M2: Keep the dog inside, ok. ((writing)) And somebody will let him out in the morning and the evening. So let's see what we've got and maybe it will spark something else. Let's see what we can use. ((everyone nods or murmurs in agreement)) The first one was to keep the dog inside and have somebody let the dog out in the morning and the evening, a neighbor. ((reading)) Second was to limit the dog's running space in the yard. ((reading)) The third was to get a doggy door and perhaps use a timer on the door, ((looking at D1)) if you're worried about it being able to open or not. The third one is to have Carl and Car's wife meet the dog and walk it and play with it if that works for you? ((looking back and forth between D1 and D2/ D1 and D2 nod)) And the fifth one was to get another dog. So, out of those five, what would you like to go back and look at? Well, let's go back and look at them all. How about as a possibility keeping the dog inside and getting somebody to let him in the morning and at night? And I heard you say that he ((pointing to D2)) might be one of those people? ((D1 nods yes)) OK, let's just start that as a possibility. How about the option of limiting the running space, the dog in the yard? Is that ((gestures to indicate, what do you think?))
M1: What would that take?

D1: Oh, gee, I don't know. That would take building a fence. Not a very high one cause the dog's, you know ((laughter from everyone)).

M1: Not a very high fence.

D1: Not a very high fence. I don't (. ) I don't really like that.

M2: Ok, so we'll just, this is what we used to do [when we were in school.]

D1: [Plus and minus?]

M2: No, we used to put happy faces and frowny faces. Since that's one you don't like, we'll put a frowny face.

D1: O.k.

M2: And a couple happy faces for the first one. You both like that idea. So, what do you think? ((looking at D2)) that was more for her.

D2: Yeah, I could see how that might be a problem. It would be a lot of money to build a fence and it may not work anyway.

M2: We'll make that a frowny face too. Get a doggy door and maybe use a timer?

D1: I love that idea.

M2: You love that idea. OK, we'll put a happy face by that one.

D2: Yeah, it seems like it might do a lot.

M2: And a happy face for you on that one too. ((writing)) Do either of you know anything about that? Do you have any experience with that in the past?

D2: Timers or doors?

M2: Both. Either or.

D2: Doggy doors, yeah. I've used them in the past.

M2: So maybe you could advice her?
D1: That's be great. Even though I've had four dogs, we've always kept them outside. We've never had them inside.

M1: That could even be a two step process. You could see if the door itself worked before getting into the complication of a timer. You may or may not need the timer.

D1: ((nodding)) And then if the dog still barks, leave a message on my machine. ((looking at D2))

M2: Oh, you've got an alternative too. ((looks to M1, smiling)) This is easy.

M1: ((to M2)) They're doing it for us. ((smiling))

D1: And I'm thinking that the last thing we could do is (.) if this ((pointing to the sheet of paper)) doesn't work, even with the timer, then, you know, I'll get somebody to come and let the dog out. And then perhaps you could meet the dog and if you wanted to, walk it. I mean, that'd be fabulous, if you wanted to.

D2: Well it might be a good idea to meet the dog anyway and maybe it'll recognize our voices. And if it does bark we can talk to it over the fence at the very least and see if that works. If it hears our voices, maybe it'll recognize us somehow.

D1: Oh, good. That's a good idea.

M2: Great. And the last option was to get another dog?

D1: That's a really last option. That if you really didn't like the fence. We don't know if that's really going to work. But these other things ((refers to the paper)) I think this is probably (.)these two ((points to something on the paper.))

M2: I'll just put a couple of blank faces. ((everyone laughs))

D2: That could be a risk.

M1: Looks like you're kind of figuring out a process for implementing these too. The door would come first. ((refers to the paper)) And you could advice her on that ((directed to D2)) choosing a door. And then you could address the timer, whether there's a need for a timer or not. And you've got a vehicle for communication. You (to D2) already have her telephone number, she's asked you to call. So there's that. And then (.)

M2: Carl might meet the dog. ((refers to the paper))

M1: Oh, right, yeah. Probably kind of concurrent.
M2: O.k. so we'll put two here just for numerical sake. ((writing)) So this would probably be part of it, keeping the dog inside?

D1: I think that's just going to have to happen. ((sits back))

M2: And you ((to D2)) would be one of the people to maybe let it in or let it out?

D2: Yeah, yup. ((nods)) Well and if the doggy door works and you don't mind the dog coming in at any time that might be the first place to start. I've had good success with that. Maybe the dog just needs to go in and out. So it might start there and if you need to get someone to deal with the dog after that we can figure out where to go from there.

M2: So the doggy door sounds like the thing to do first here.

D1: ((nods)) mm,hmm. mmm,hmmm. This is great because I was trying to come up with stuff on the way over here and I just really ((shakes head)) didn't see nay options.

M2: But see collectively you've worked it out. O.k. so what you're going to do, I'm just going to try and sum it up here and see if we're on the same page. What you're going to do, you're going to get a doggy door? ((to D1)) You're going to advice her or whatever on that? ((to D2)) [Your experience?]

D2: [Yeah,] I can help her with that.

M2: Now, from what I recall you said you have a dachshund?

D1: Dachshund. ((nods))

M2: So we're talking about a small doggy door.

D1: Yeah, he's seven pounds.

M2: So earlier your concerns were, my assumptions about your concerns with the door were maybe safety, but were talking about a small door, if that was your concern, I'm not sure.

D1: Well, the dog, probably because he's been outside, is dirty, and he chews on things. So I'm going to have to do some preventative, I'm going to have to put a lock on my closet door so he doesn't get at my shoes. He's going to have learn not to pee on the furniture. It's going to be a process, but I don't, you know, I want to solve the problem. I don't want the dog to bug you ((to D2)) so there's going to have to be,
maybe I can just let him in and out of the laundry room. Shut the laundry room door, have the dog in the laundry room, the doggy door to the door outside [that would be a good idea.]

M2: [I see.]

M1: Maybe put some toys in the, I'm feeding you with ideas, I don't mean to do that. M2: We're still in this brainstorming process. ((smiles at M1))

D1: So he wouldn't necessarily have to access to the whole house.

M2: Yeah, there you go. You could limit him to the laundry room.

D1: Because I've been keeping him in there in the kennel anyway. I'm not sure why I have a dachshund outside anyway. You don't have small dogs as outside dogs anyway. But whatever. Anyway. ((fixes her hair))

M2: O.k. so, we're going to get a doggy door. Carl's going to help you with that in whatever ways that is. Carl and Carl's wife are going to meet your dog and become more familiar with it. Walk it sometimes. Carl and Carl's wife might the people that you get to let your dog in and out when you're not there, if you need something more than the doggy door. ((referring to the paper/ D1 and D2 are nodding as he lists these items))

M1: And I think I heard in that too that that's not something you necessarily want to do all the time ((to D2)) but you might be part of the list if it ever gets to that point where you need more.

D2: We go away, we're retired so we like to travel but we're home a lot so it wouldn't be a big problem just to call you up and plan ahead, that wouldn't be a problem for us.

D1: O.k. that sounds perfectly reasonable.

D2: That sounds good.

M2: Now for us, as part of our job at this point is to make sure that we've dotted all the i's and crossed the t's so in that process we'd just sort of like to make sure, like when is this going to happen, who's going to do what, that sort of thing so we're all clear and nobody's assuming. So when are we talking about his process starting, and you getting a door.
D2: I'm happy to help you with the door because I have time and I can install it if you want so you don't have to pay somebody to do something as simple as that. It's almost the weekend so I could look for something this week, [give you some process if you're interested.]

D1: [That would be great.]

D2: In terms of the doggy door and I'll be happy to put it in for you. That's not a problem.

D1: That would be great because I really don't have time until the weekend. I've got to work. I'm missing work right now, so, it's Tuesday. [So yeah, by the weekend.]

D2: [I can look for a doggy door] over the next few days and give you some prices.

D1: If you can deal with the dog barking over the next few days.

M2: So you're going to actually help look for the, and price it too? ((seems mildly surprised, writing))

D2: Yeah, I can do that.

D1: Great.

D2: That sounds good. Yeah, yeah. Your dog will get used to us over there. Sounds good.

M2: Ok, we know how, you're going to meet at your house? ((to D2))

D2: Well, it might be easier at your house if we're going to do the door at your house.

D1: Yeah, yeah.
D2: It's not that hard to install the door.

M1: And Carl, you have a way of getting a hold of Betty. Betty do you have a way of getting a hold of Carl if you need to? How would that work? If you needed to reschedule let's say something came up and you had to work this weekend?

D1: I do need your phone number.

D2: O.k. that's fine. I can give you my phone number.

M2: ((writing)) O.k. let's see, who what where when how

M1: what if?

M2: what if?

M1: What if this doesn't work?

D1: What if none of this works?

M2: We just like to have a fall back plan because you know sometimes the best laid plans of mice and men may not happen.

M1: There's some fall back build in to the brainstorming. ((refers to the paper)) If the dog door doesn't work you have the timer. I mean, I don't want to be Mr. negative but just sort of devil's advocate.

D2: Right, yeah. Well, we can try the dog door for a couple of weeks and see if that works.

M1: How will she know if that's working?

D2: Well, I can tell you. I can give you a call and let you know. Maybe after awhile we can give you a call and let you know how the dog's doing. And if you want to, you had mentioned keeping the laundry room door open or closed, you could try that after a week. If it doesn't seem to be working and then after that we can try walking the dog or letting dog in and out.

D1: I think the dog is just, you know, lonely and bored. Everybody's gone now. Just me and the dog and there's not even me there because I have to work. So that may be part of the plan anyway, to keep it occupied. So, that'd be great if you could come over and play catch with it.
D1: That's probably going to be, that may be part of the plan anyway. It's just, keep it occupied so you know. That'd be great if you come over and play catch with it or whatever. (to D2)

D2: ((laughs and nods)) Yeah, that sounds good. That sounds good. Why don't we -

D1: I could probably get some of the neighborhood kids to come over too.

D2: ((nods)) The doggy door and then give that a week and if that doesn't seem to be doing anything then we can figure out a schedule for walking the dog. ((D1 nods)) And then decide after a week how that works with our schedule. ((D1 coughs, rests her chin on her hand)) I don't think that would be a problem. I think it might be a lot of fun actually.==

D1: ==hmm.==

((M1 and M2 look at each other and exchange glances which indicate they will allow the disputants to continue talking. The disputants do not notice the exchange. They are looking only at each other.))

D2: == to have a little seven feet of dachshund to walk around. They're funny dogs.

D1: They are funny dogs.

M2: Well, this seems to be a solution. ((looking at his paper)) I think we're going to fall back on plan two?

M1: Yeah, I'm hearing a lot of -

D1: If nothing works, if absolutely nothing works, then I will consider getting another home for Rufous.

M2: Oh, a fall back, fall back. ((looking all around))

D1: I can't imagine -

M2: [Things not working]

D2: [Yeah these are good ideas.]

D1: These things are going to -

M2: O.K.
M1: You've got quite a bit of an agreement going here. There's a lot of agreement and willingness to work together follow on and stay in communication about it. That sounds very positive. Getting the results that both of you are looking for.

M2: Does this solution that you've come up with solve the problem that you came in here with?

D2: Yeah, I think it dies for me. ((M2 turns to look at D1))

D1: Yeah.

M2: Is there anything we're missing?

D1: No, I'm just thinking, O.K., we've solved this problem, fabulous, great, and that's what I want but I'm going to have to work awfully hard because I've got to retrain the dog. ((M2 nods in agreement)) Unless I can do the laundry room thing. I feel, still, just the tiniest bit of resentment that I have to go through all of this for a seven pound dog. But, you know, it's probably not going to be so bad, especially, you know, if you ((indicating D2)) help me out with the dog door and stuff like that.

M2: ((waves hands to indicate, wait a minute)) Just so I'm clear on this. ((to D2)) When she says she feels resentment because of the dog situation, how does that make you feel?

D2: I can understand that. I mean when you have a dog it's hard to, you know. You have a dog for company. You said that. And I know what that's like. So it's difficult to think of the dog, you know, it becomes a part of your family. So I understand it's kind of like if your child were running around. It's difficult to just lock them up in a room and that's the end of the problem. ((D1 nods in agreement)) It isn't. So I understand that and I want to be a good neighbor so I'll work with you to figure out how we can get the dog happy and figure out, you know, how to make the dog a little more quiet. If we can do that, these ((points to the paper))seem like good ideas. If the first two don't work, we'll try and decide from there and how to deal with it.

D1: And really reasonably, we're only talking about a couple hours that are a problem, right?

D2: Yeah.

D1: So.

M2: How does what he said affect or not affect your resentment?
D1: It makes me feel better. You're definitely not the hardened army dude that I thought you were. ((everyone laughs)) Yeah, you know. Yeah, it'll be fine.

M2: Well, would you like this written up or do you want to remember it or what?

D2: Writing it up sounds good ==

D1: ==Write it up, yeah.

M2: We'll write it up for you. Make a copy for each of you and we'll keep a copy for ourselves, the other notes will be destroyed when you guys leave. And I'd like to take this time to thank you for going through the process. Sometimes it's really difficult, as Tom said earlier, for people in conflict to come out and actually sit down with people and work it out and you did. And we'd like both to thank you for that, and congratulate you for it.

M1: A lot of hard work.

M2: If you have other concerns, you know, whether it'd be dog concerns or whatever else, if you think this process would be useful to you then please feel free to [use us again.]

M1: [Use us again.]

D1: I think this was a really positive thing. I never would've thought to do this.

D2: Yeah, yeah, neither would've I. Thank you.

D1: Yeah, thank you very much. ((M2 reaches over to shake hands with M1/ M2 shakes hands with D2))

M1: And you did it all. ((D2 shakes hands with M2/ D1 shakes hands with M1 across the table)) Thanks, nice to meet you both. ((all smiling))

M2: Cut.

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PROCFSSING AFTER THF MOCK MFDIATION WITH THF INTERVIEWER

INT: Thank you guys.

D1: ((to D2)) You're so nice. I tried to be mad at you. ((D2 laughs))
INT: Right, that's exactly what I want you to do right now. ((comes over with a chair and sits at the table)) What I want to do right now, we still have a little time if you guys are still ok with this, I'd like to use a little bit of this time to kind of de-brief, how you felt your experience was. And I guess I'd like to start with the clients. So we'll just start with you. ((indicates D2))

D1: My enemy.

INT: How was this experience for you?

D2: It's um, I've been curious. I've talked to you a little bit about this, what mediation is and I'm interested in these kinds of issues so it is I think really a large part of the problem with any situation like this, and it's funny when you sent me the scenario because I've got a neighbor now whose dog is barking =

D1: =oh my god.

D2: And I've never been bothered by dogs. We have a dog, two cats, we love animals, but this dog is doing exactly, what you. ((to D1)) It was so funny. I was reading this ((holds hands to indicate holding a piece of paper/ everyone laughs)) And they're this sweet old retired couple. They're really nice and it's the same exact thing. We have like an acre of land. It's just they happen to be right in front of where our bedroom window faces. It's bizarre. I've never been woken up by a dog and now I am, so we'll figure out how to go. I don't think, they're going to. I'll just talk to them about it. They're nice people so. But it is funny. I get to see a situation like this where you are a half an acre away but it's difficult when you're in a situation like this to look them in the eye and talk to them and figure out a way to deal with it because you're used to, like, digging in your heals. You know, once you get your position you're like, I'm not budging. You're not going to go anywhere.

INT: Do you feel better, I mean does your character feel better about the possibility of having your problem solved after having this mediation?

D2: Oh yeah. I mean you're always, like you were playing up at the end. I mean it's difficult with a role play, but I can see where a natural feeling come out. There's always that doubt that creeps in at the end.

D1: Yeah.

D2: Like, is this going to work? Cause you don't know. It sounds good in theory but will it work in practice. But I think the idea is to get people talking. And at least now with these two neighbors we're talking to each other. That would probably be a large part of the battle. If the dog does start barking again, at least we know each other. ((D1 nods))
INT: So (name omitted) how was that for you? (The interviewer accidentally used the respondent's name and there is a brief discussion about confidentiality in which the interviewer promises to omit the respondents' names in the transcripts)

D1: Betty was annoyed. Betty was annoyed, and frustrated. This seemingly trivial thing was on top of the divorce and putting the dog to sleep, my kids are gone and I'm trying to have a social life and I work these hours and I love my job but I like having the dog around at night when I'm there. But his barking thing, it's like it came out of the blue. Betty is like, 'I have to take time out of my day for this?'

INT: [So even when she- ]

D1: [She felt like she was being served papers.]

INT: [So even now-]

D1: [Like, you are being served papers at court.]

INT: Even now after the mediation, she still feels a little put out?

D1: Yeah. Because now she's got to deal with the doggy door and she doesn't want the dog in the house because the dog pees on stuff and it chews the furniture and the shoes and she, yet again, has to rearrange her life for somebody else just like she did for her husband and her three kids. ((counts on her fingers/ everyone moans and laughs)) Betty is trying to become a whole person and all these little things are getting in her way. But Betty is basically happy with the solution. She really likes the idea of the doggy door as long as she can keep the dog in the utility room.

INT: So you feel hopeful.

D1: Hopeful. And at the begging of the process she was actually really hopeful because she was so annoyed on the way over here and then once she heard Carl describe his situation in a calm non-aggressive way, >which was very different from the phone call< ((everyone laughs)) She felt a lot better. Oh wow, this thing is actually going to get solved. I'm going to get some answers. And Betty also liked that you two were willing to contribute to the brainstorming because what I was thinking in the beginning was oh, they're just going to keep us from beating each other up and I have to do all the work. It was really helpful to have four of us trying to come up with solutions because I didn't think of a doggy door. And I had no idea that you were going to help at all. ((to D2)) I just expected you to be really mean.

D2: Yeah, that was hard, you know. If I could be a better actor and play a tougher sergeant I could see where that could easily get bitter because I can sense people
talking in particular tones in particular ways that could really piss people off. In
ways that sound as if you're not going to be willing to move at all. It's all your
problem and your fault.

D1: Yeah. mmm, hmm.

INT: Either one of you two. (((M1 and M2))) What was your experience?

M2: Just a little comment on that. Sometimes that will happen in reverse. You get a
situation where a guy's retired, he's been through life, la de da. He sees single
woman and you get this paternal kind of, let me help her. (((D1 and INT, "ooh.")))
Which is why he was coming across, let me help with the door. Let me do this for
you.

D1: That's nice.

M2: In fact I've seen it more than once, especially in situations like this. After you
see the person as human being as opposed to an object, which is what happens when
you don't talk, it's easy to objectify people, but once you've had an opportunity and
he sees, 'well she's not that blah, blah, blah, blah, blah. She's' and you go 'Oh, what
can I do to help.' He's retired, he's military, he's been around the world, he's seen a
little bit -

D1: He's my dad.

M2: It's happened more than one time where the guy goes, let me like take her under
my wing. Especially when you get to talk about, you know, the husband, the
divorce, la de da.

D1: Wow, cause I was really surprised.

INT: I was surprised to.

D2: I didn't know how to respond to it. It's interesting that you bring that up
because I was just trying to go with what, I was just trying to do the character as best
I could so that was interesting.

M1: And you both revealed more information that did humanize you more. You
(referring to D2)) had a couple surgeries that I forgot in my feedback to reiterate, that
you had some surgeries but I'm sure you heard that as well. (((to D1))) You know,
you talked about your divorce. That humanized yourself more than some clients do
right in the beginning that may have helped accelerate the understanding.

D1: So that's not a usual thing?
M1: Well, you know, people are different all the time but sometimes, yeah, people come in just really dug in. You know, typical dog barking cases, you know, the dog barks all the time -

INT: [Twenty-four hours a day somehow.]

M1: Well, must not be my dog because my dog doesn't bark. And so you get these diametrically opposed positions and, you know. And they're both valid for each of them. The truth is somewhere in between.

M2: The good thing is when they can both come on the same page with, yes the dog is barking and I'm not denying it. I had this just so last week. I did a mediation last Friday. And it worked. It was over in not too long a time. There was a complaint, 'Your dog is barking' and the person was, 'Yes my dog is barking. I don't deny it. Basically I haven't figured out a way of stopping it.

INT: That's a very good step.

M2: Once you get that, 'So you both want to resolve this problem?' They're not adversarial anymore. They're both in a common situation. So how can you commonly get out of this? As opposed to 'I'm fighting to get out. You're pulling me down. I'm going to get up. I'm pulling you down.' So the whole idea is to create an atmosphere where people want to solve the problem.

D1: Right.

M2: And the idea is that most people can solve their own problems given the wherewithal to do that.

D1: Sure.

M2: And what we try to do is produce the wherewithal. And that's really so you can understand each other.

INT: So how was this mediation (name omitted)? How was this mediation for you? Did it feel typical, was it atypical? Did you have any rough spots? What do you think? Your impression.

M1: It was very typical in the scenario. In fact I had trouble not going to a case I had done recently. Where there was a wash involved. He was retired. She was a nurse.

D1: Oh my god!
INT: Where we together? ((laughs))

M1: No, it was awhile ago.

INT: We can't have that on tape. You don't understand, we can't use actual mediations.

M1: No, actually I think this woman was a waitress.

INT: Oh good. ((These last six lines are said in jest.))

M1: It was a similar thing so I had to talk myself out of, listen, listen, don't fill in. 'Filling in the blanks with information from another case. But it was fairly typical in that way. It was untypical in that, the amount of openness. There was a lot of openness. You guys were both very open. That's wonderful. That's half the battle.

D1: We're rhetoric people though. We're supposed to know how to communicate.

M2: What's your point?

D1: I know.

M1: Yeah, I figured that you guys are communication majors, right?

D2: Yeah, you know, so.

INT: There are some people like that, though, once in awhile.

M1: Yeah. And I have encountered people who have been that open too.

D1: So that's atypical to have that sort of openness? Is that what you said?

M1: Yeah, for neighbors that haven't known. I mean, in my experience of mediating. It's fairly atypical. But it happens, and sometimes it happens later on. Sometimes there's a turning point where, I mean, they're sparked by all sorts of different things, But where they're in kind of position, position, position, position, ((gestures to points on the table)), you know, ((indicates a stiffness and defensiveness with his body)) and then something gets heard. Somebody, there's something that one party can relate to or something that gets said or sometimes its' just a quiet moment. And someone offers up something that's more open or warm or vulnerable and then the other party moves. It's just different from time to time. But you guys, I think you ask ((to INT)) any stumbling points. ((INT nods)) I think the closest thing to that was just that everything was progressing so nicely that it fell outside of the
model. You know, we didn't have to go into, you know, Alan described the three basic phases or sections of mediation, the story and what you want, and then what you're willing to do. And we just went seamlessly from the story to what you want and the next thing you know we're problem solving. So it was a little, everything was going so nicely, and Alan was handling it so nicely it was sort of like, well, where do I contribute? But it wasn't a real problem for me. Nothing was awkward other than going with something that's flowing so smoothly.

INT: So second mediator, and I will by the way, when I type the transcripts I will leave out the names. Smith and Jones, what was your experience with this mediation? How do you think it went? Was it strange? Am I strange?

D2: Well, that's another question, isn't it? ((laughter))

M2: To some degree it was a role play. And what I mean by that is their real emotions weren't there as if they were real people. They would have to, for the genuine emotions to be there. So from that perspective it wasn't real. But it wasn't different in that, it's been my experience that when people get to see the other person is a human being, they get to hear something about them and they start to see them different. As not necessarily a person who is a thorn in their side, or who is the realization of their assumptions about them. But, 'hmm, maybe there's something going on here that I don't know. Hey, this is a person. I'm a person. I make mistakes.' Those sorts of things start to come up and I think what we do is supply a, is to create an atmosphere for that to happen. By people being able to talk and to hear each other. And as I was saying to Tom earlier, I think our function is to facilitate effective communication. And what that means to me is that when we're in conflict, and even when we're not, but particularly when we are we don't communicate everything that's going on. We communicate part of it. And the parts that we leave out is what we need to talk about but we can't for whatever reason because we're stuck in the moment. And a good facilitator helps bring those things out. Say, if you could, all the context that goes along with the words that your saying. You would say that if you could but you can't because you're in the moment of it. It's our job to help you say that. And I think that's how we're both best used. Is to help people have a more complete communication, and to quote somebody, she's a mediator at Our Town, and an expression which she uses that I shared with Tom earlier is that incomplete communication leads to unmet expectations. ((all nod)) It was like, wow, that is just right on the head. So what our job is, is to help that communication process. Communicate all those things beyond the words that don't get said that need to be said.

M2: You were initially talking to us, but when you started talking to each other we didn't stop that. We wanted that to happen because that's part of the process.

D1: It helps to have somebody over here to look at though.
M1: It depends on what's happening whether we would stop that or not. There's plenty of times when they'll start (indicates disputants are talking to each other) and it's a counter-productive sort of thing. And I will ask, 'Will you please direct your remarks to me.'

D2: See, that was helpful at first to have you to focus on or you to focus on (indicates the mediators) to kind of put you by the wayside for awhile. (indicates D1) And then gradually realize you're there. You know, I expected, I planned on giving proof about all the times the dog barked and then it was like the rug was taken out from under me. I never got a chance. It was like my proof didn't seem to matter.

D1: Yeah, yeah. Are there usually two mediators?

M2: Depending on the style. Sometimes there are single mediators but we come from a background where we utilize two.

D1: That's a good idea.

M2: Well it helps in all sorts of way. You don't have to be the only person paying attention. He can catch things I didn't. We can make mistakes. The other person can help. You can also model effective communication behavior.

M2: I meant to ask you Betty, did it help you (to D1) when you talked about being frustrated, ( ) I allowed him to let you know that he heard that?

D1: Yes. Yes, it did.

M2: See, that's a communication thing again. He needed to hear that from you and acknowledge that, 'yeah, I'm hearing what you're saying.' Didn't necessarily have to agree with you although he was very compliant. Just having people hear you and validate that hey, you're not crazy. 'Yeah, I hear what you're saying. I can feel what you're saying.' It does so much for people. What's counter productive is to ignore that. And sometimes you get into mediations where people aren't very comfortable dealing with high emotions, with feelings. When those things come up they ignore them. (indicates wearing blinds) Hoping that if I don't look at this it'll go away. And what happens is the more you don't look at it the bigger it grows. What you need to do is to call it. Say, 'Hey, this is what's going on. Let's look at this.

D1: Yeah. You know, everything sounds like Buddhism to me. You know, [you touch the suffering and you ( ).]

M1: [Secretly everything is.]
M2: The truth is ((gestures to take off his shirt)), here is my begging bowl.

M1: Put on the saffron robes. ((laughs in jest))

D1: My dissertation sounds like the Buddha. I mean-

M1: There are a lot of mediators that have a very spiritual focus in their mediation. I'm one of them. That's my focus but not everyone does and it's not necessary but a lot of people do.

M2: I think it's a real spiritual process. It connects people in a spiritual, human sort of way.

D1: Absolutely.

D2: Yeah, you're right because when you're in a conflict, I mean, that's the most difficult part is there are so many things you want to say but you don't have a platform to say them. You always walk away from a conflict thinking, 'I should've said this, if only I, she didn't hear this.' And this is just a chance to be a little less, scripted I guess. We learn those kind of argumentative rules.
APPENDIX H
INTAKE INFORMATION FOR THE MEDIATORS IN THE MOCK MEDIATION

Client one: Mr. Carl Baker – He complains that his neighbor’s dog barks too much.

Referred to mediation by Animal Control

Carl Baker is a retired army sergeant in his late 60’s. Mr. Baker and his wife live on an acre of land on the edge of town. He has had bi-pass surgery this last year and needs his rest. His neighbor’s dog barks and it wakes him in the morning, keeps him up at night, and disturbs his naps. He would like to paint outside in his back yard but it’s too noisy.

After a phone call there was some improvement but then it got worse so he called Animal Control.

Client two: Mrs. Betty O’Connel – She is a dog owner.

Referred to mediation by Animal Control

Betty O’Connel is a Nurse Practitioner in her late 40’s. Mrs. O’Connel is recently divorced. She owns one dog who is an outside dog. Mr. Baker has been her neighbor for over 20 years and out of the blue three months ago she got a disturbing phone call from him complaining about her dog. She crates the dog in the evenings and hoped that would help. Then she got a letter from Animal Control.

She doesn’t know what else she could do short of getting rid of her dog.
APPENDIX I
GROUND RULES USED IN THE MOCK MEDIATION

GROUND RULES

1. Work hard to solve the problem.

2. Talk honestly and openly.

3. Focus on the future rather than past events.

4. Show respect for each other no name calling, shouting, put-downs, or violence.

5. Avoid interrupting each other

6. Everyone will stay in the room until the meeting is over.

7. Mediators will be neutral and non judgmental.

8. Mediators will direct the flow the meeting.
WORKS CITED


