Summarizing and Writing Agreements

(Written by Ann McBroom and Stephanie Bell)

When the participants have reached agreements on all of the agenda items, it is time to review notes and any interim agreements made in order to summarize the information from earlier in the sessions. At this point the mediator's role is to help participants add specificity, test for durability, resolve any additional issues that surface during this time, and **act as scribe.** In the InterLocal Conflict Resolution program, mediators do not compose agreements, but rather, assist the parties in crafting and writing their own agreements. This supports our philosophy of the parties' self-determination, as well as protecting mediators from potential claims down the road of "forcing agreements." If it is the parties' agreement, there are fewer chances of perceived or real coercion.

Some pointers for an orderly process:

- Check the accuracy of each agenda item agreement with the participants.
- Make sure the agreements are realistic and durable.
- Take the necessary time - do not rush.
- Do the participants believe the agreements are "fair?"

If "something doesn't feel right," take the time to explore underlying feelings with the participants. Otherwise good agreements on their face can be sabotaged if the feelings emerge after the mediation session.

Agreements reached in mediation are not "legally binding." Binding is something a judge or arbitrator can impose on an agreement. Agreements written in mediation are contracts, and enforceable under contract law. The more specific the terms of the agreement, the more likely they are to be enforceable.

Agreements written in mediation are intended to remind the participants of their ongoing responsibilities to each other. Because of the nature of employment disputes, which are often more relational than contractual, some agreements may not be enforceable. Agreements about how and when the participants will communicate in the future, or how they will treat each other, may be written for the participants' benefit only.

Mediation agreements should spell out decisions, intentions and future behavior so participants leave with a clear understanding of each other's expectations. Written agreements have a psychological effect, and increase the likelihood that the settlement will be adhered to over time. This permanent reminder tends to hold people to their word.

The agreement is the product of the work between the participants and the mediator, and participants are responsible for the phrasing and terms of settlement. Mediators write down the agreement and read it out loud for the participants' consideration. Some considerations mediators may want to suggestion include:

Use Plain English. Match the formality of the language to the setting. For the most part, use plain simple English. Avoid legal terms. Legal gobbledygook has no place in a mediation agreement. Vague words and dense prose will only serve to confuse the participants later on, when they are trying to remember what they agreed to.

Here are some examples of formal, legalistic terms often used in mediation agreements that can be replaced by simpler words that are easier to understand.
(Adapted from Henry Weihofen, Legal Writing Style. West Publishing Co., St. Paul, Minn. 1980. P. 64)

Instead of	**Use**
apprise	inform
cease	stop
commitment	promise
communicate	write, telephone
demonstrate	show
desire	wish
effectuate	bring about
eliminate	remove
employment	work
endeavor	try
expiration	end
locality, location	place
locate	find
objective	aim
prior to	before
remuneration	pay, wages, fee
reside	live
utilize	use
afford an opportunity	allow

Identify People by Full Names. Always use full names rather than a salutation and a last name. Identify Sarah Smith rather than Ms. Smith, or "the claimant." Use the full name of a business, and specify the branch if the business has multiple branches. Identify each action with the name of the person or business who is performing the action. In this way, each provision will be understandable, even if it is separated from the other provisions.

Specify Dates and Times. Be sure agreements have precise dates and, if necessary, times, for each expected action.

Specify Method of Payment. Many agreements call for one person to pay money to another person. Do not allow anything about monetary transactions to be vague. Mediation agreements should state exactly who is to pay how much to whom, when and in what form. Certified check or money order leaves a record of payment, and avoids the potential of bounced checks.

Answer Who, What, When, Where, How and What if. S-P-E-L-L it out! Each provision should include all of the above components. Include the name of the person or business who is to perform the action (who), what precisely they are to do (what), the date and time they are to perform the action (when), the location, with address (where), and the method they are to use (how). Including a consequence, or alternative for failure to perform can be difficult to discuss, but is an important factor in durable agreements. *Include even small, "assumed" agreements in written form.*

Whenever possible, include the intentions behind the agreement or behind the provision. For example, "In order to provide regular and consistent forum for communication, Sally Smith and Bob Brown agree to set aside 1 hour to meet together on Tuesday mornings at 9:00 a.m. These meetings will begin the week of October 1, 2003, and continue as long as the two work together in the same unit." This way, participants can evaluate whether or not the agreement is achieving the intended result.

List Each Provision Separately. Agreements will probably require certain actions by each participant. To keep the agreement clear and understandable, state each requirement in a separate, numbered paragraph. An agreement organized in this way can be managed and discussed more easily if questions of compliance and interpretation later arise.

Be explicit about whether the terms of one agreement are tied to the terms of another agreement. I.e., "Bill will write Sharon a letter of apology. Kathy will remove her letter from Bill's file," may be more clearly stated as, "After Bill writes a letter of apology to Sharon, and Kathy receives confirmation of this from Sharon, Kathy will remove her letter from Bill's file."

Omit Blame, Fault and Guilt. A mediation agreement should be devoid of any faultfinding. By omitting statements of fault or blame, the participants save face, and can move ahead without the burden of a past wrongdoing.
Agreements are written with a future focus.

Balance the Agreement. Agreements should include some future or current obligation of all participants, even if one person has most of the obligation. Look for opportunities to include both participants in the agreement.

Do Not Include Absent Third Parties in the Agreement. Avoid the complication of including any actions, passive or active, by someone who is not present at the mediation or signing the agreement. Even simple inclusions can result in failed agreements if the third person does not want to participate.

Spell out specifically the consequences for failure to perform a duty or non-monetary agreement. "Failure to keep the agreement as outline above will result in _____."

Include a date by which the terms of the agreement must be completed, otherwise it is not enforceable. I.e., "Carla will write a letter to our supervisor by November 1, 2002,

explaining the 'shoe incident.'" Encourage the parties to set attainable dates; allow for a couple of sick days, or a computer breakdown when setting dates.

Include a full and final settlement clause in mediations where there is a lawsuit, grievance, or complaint filed. I.e., "Performance of this agreement constitutes full and final settlement of all claims arising from grievance # 213 (or whatever set of circumstances are on the table)…" Be sure to designate a party to officially file that paperwork. I.e. "The City Law Department, attorney X, agrees to contact the Civil Service Commission, with a copy of the settlement agreement which dismisses case number XXX by October 3, 2002." If it is a more informal mediation, you might want to use language to reflect the informal setting. I.e., "This mediation agreement settles all issues between us."

Durable and enforceable

While mediators must be clear that their job is not to practice law or give legal advice, the following guidelines will help to form agreements that are enforceable. Although laws vary from state to state, it is generally accepted that agreements are enforceable if:

- **The parties have legal capacity.**
  - Are not minors (under age 18)
  - Are not mentally impaired to the extent they do not understand the agreement is binding.
- **The subject matter is legal.**
  - Terms cannot include the performance of of an illegal act.
- **The terms are definite and complete.**
  - Cannot be vague.
- **There is an exchange.**
  - One party offers.
  - The other accepts.
- **There is evidence of mutual agreement.**
  - Signatures of both parties on the agreement.

Participants may want their attorneys to review the agreement before signing. The participants may wish to add a statement to that effect, "The terms of this agreement will be effective five days after signature, unless the attorney for either person notifies the mediator in writing of any objections."