



NORTH CAROLINA
**COUNCIL OF
COMMUNITY
PROGRAMS**

“Successful” Mediations 101: Negotiating Win-Win Solutions

**November 15, 2016
Charity Bridges, UM/Appeals
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Overview

- I. What is Mediation?
- II. Types & Parts of Mediation
 - A. “Traditional” Mediation
 - B. MCO Consumer Medicaid Mediation
 - C. Provider Dispute Mediation
- III. Tips, Tricks & Traps



I.

What is Mediation? (and Why Use It?)



Mediation is a Type of ADR

► **A**lternative **D**ispute **R**esolution (“ADR”)

? Alternative to what?

? Going to “court!”

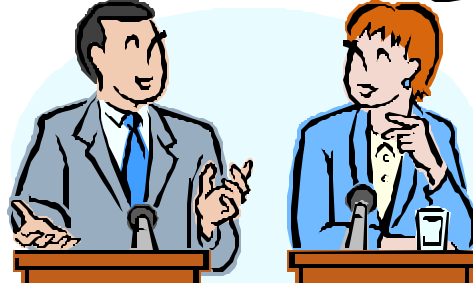
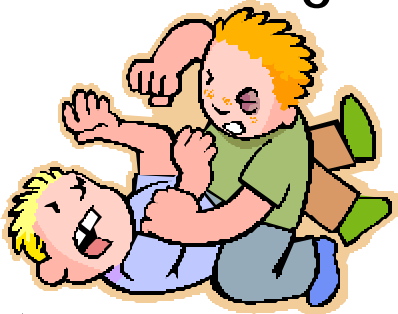
- – including North Carolina’s Office of Administrative Hearings (OAH) for a Medicaid “State Fair Hearing”



Ways to Resolve Disputes

- ▶ Sue
- ▶ Fight
- ▶ Argue
- ▶ Negotiate

- ▶ Get Even
- ▶ Ignore
- ▶ Mediate, Arbitrate, "ADR"



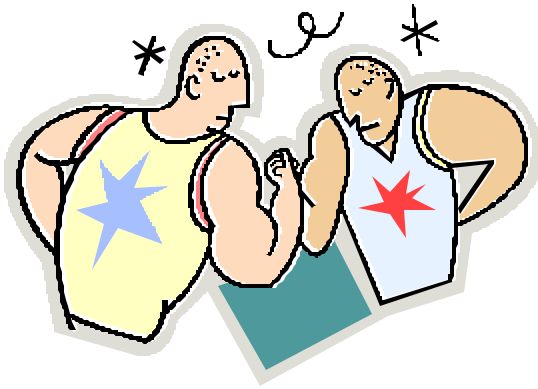
The ADR Spectrum

- ▶ Mediation
- ▶ Arbitration
- ▶ Med-Arb or Arb-Med
- ▶ Early Neutral Evaluation (ENE)
- ▶ Summary or “Mini” Trial
- ▶ Collaborative Law

“Mediation is an informal process in which a third-party mediator facilitates settlement discussions between parties. Any settlement is voluntary and decided in the absence of controversy. The award may be binding or non-binding. If the parties lose none of their rights to trial by judge or jury.”



Let's Play a Game!



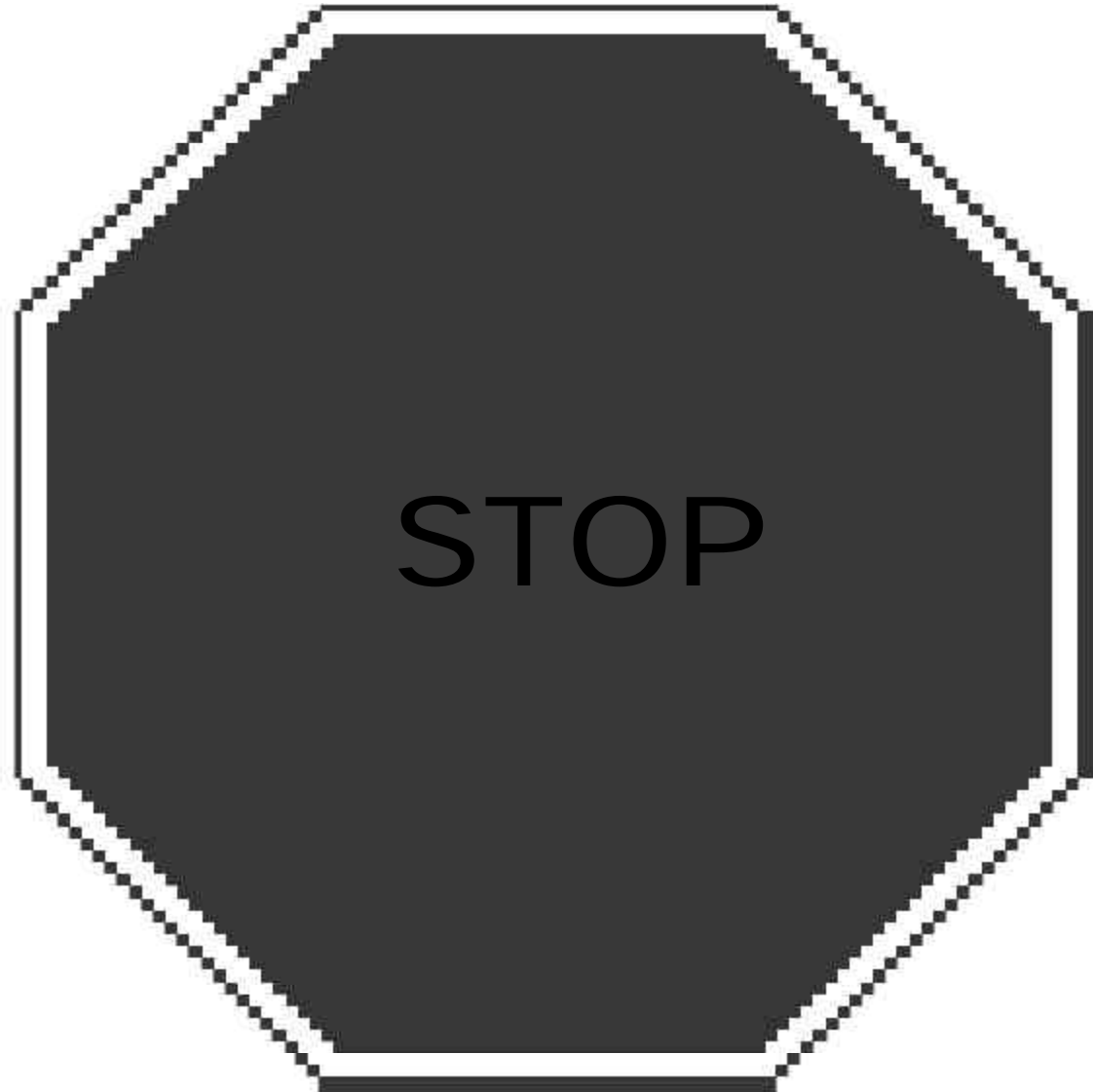
- 1-Minute Thumb Wrestling
- Pair up-- teams of 2
- Prize for most pins
 - ▶ Ready
 - ▶ Set
 - ▶ Go!



00:00



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How'd you do?!

- ▶ No pins?
- ▶ 1-5 pins?
- ▶ 6-10 pins?
- ▶ 11-25 pins?
- ▶ Over 26 pins?



Why the Differences?

1. How'd "winner" get the most pins?
 - ❖ **Mediation is merely facilitated negotiation**
 - ❖ **Did you need a Referee?**
 - ❖ **Mediation helps the process of communication**



Why the Differences?

2. “Principled” vs. “Positional” negotiation

- ❖ Avoid the Blame Game
 - but let vent & trust the process
- ❖ GETTING TO YES:
 - Separate the people from the problem
 - Focus on interests, not positions
 - Insist on using objective criteria
 - Invent options for mutual gain



Why the Differences?

3. Ideas for “real” disputes?
 - Money not always the answer
 - “Out of the Box” thinking
 - Apologies/Empathy
 - Sharing/Schedules



II.

Types & Parts of Mediation

A. “Traditional Mediation”



Traditional Mediation Format

- I. Opening Statements
 - by Mediator: Confidentiality & Process
 - by Each Party (plaintiff normally 1st)
- II. Plenary Sessions & Caucuses
- III. Declare Impasse &/or Memorialize Agreement(s)



Let's go to the Movies!

ABA Video Contest:

Consider Mediation [job issue]:

<http://www.youtube.com/watch?v=vusZamARvVA>

Honorable Mention:

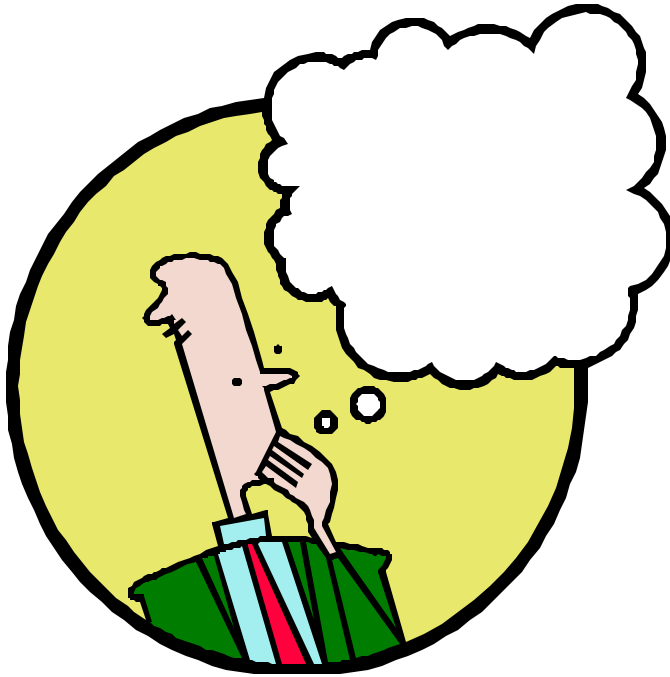
Elder mediation [family re aging Dad]:

<http://www.youtube.com/watch?v=DSLx9JwDK-M&fmt=18>



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What do you think?



Did you notice the ...

- ▶ Informality?
- ▶ Privacy?
- ▶ Venting?
- ▶ Caucuses?
- ▶ Other?

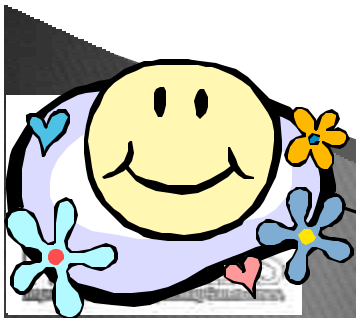
Pros & Cons of Mediation

Pros/Advantages

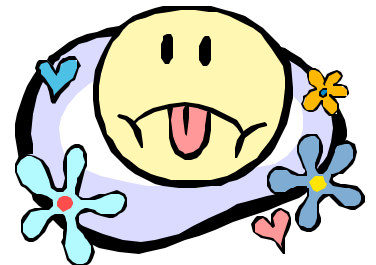
- ▶ Control Process & Solution (incl'g neutral)
- ▶ Faster, Cheaper
- ▶ Venting
- ▶ Clarification
- ▶ On-going relations/ Cooperation
- ▶ Confidentiality/Privacy
- ▶ Flexible

Cons/Disadvantages

- ▶ Enforceability
- ▶ "Victory"
 - ? Right-Wrong
 - ? "Principle"
- ▶ Precedent
- ▶ Publicity
- ▶ No Agenda



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Mediation Styles

- ▶ Evaluative
- ▶ Facilitative
- ▶ Transformative



II. Types & Parts of Mediation

B. LME-MCO Consumer Medicaid Mediation



NC OAH Mediation Format (MCO Consumers)

- I. OAH orders Mediation; mediator schedules
- II. MCO and Petitioner decide who to invite
 - i. Providers, Advocates
 - ii. UM, CC, Attorneys?
- III. Mediator Conferences In All Participants



NC OAH Mediation Format

IV. Introductions

v. Opening Statements by:

- Mediator: Confidentiality & Process—Agreement to Mediate
- Each Party (MCO normally 1st)



NC OAH Mediation Format

- vi. Plenary Session (Caucuses rare)
- vii. Memorialize Agreement(s) &/or
Declare Impasse
- viii. File Report of the Mediator(ROM)
with OAH

<http://www.ncoah.com/hearings/medicaid.html>



III.

Tips, Tricks & Traps



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Tips & Tricks

- ▶ Goal is to Foster an Agreement
- ▶ Avoid moving to a Formal Hearing
- ▶ HOW?

?Setting a Warm Tone

- Venting & Problem Solving
- Empathy vs. Blame Game

?Us vs The Problem

?Questions (facilitate) vs Statements (evaluative)

?Solution Focused &/or Criteria Driven



Tips & Tricks

- ▶ BATNA: Best Alternative to No Agreement
?Partial Agreements, Stipulations &
Issue Narrowing
- ▶ Reciprocal Concessions
- ▶ Education & persuasion
?Visuals: Paint a picture, exhibits, charts
- ▶ Others?



Limits of Positional Negotiation

P's Opening Offer: 40h/w	P's Target Point: 30h/w	R's Resistance Point: 25h/w	P's Resistance Point: 20h/w	R's Target Point: 15h/w	R's Opening Offer: 5 h/w
P's Opening Offer: 40h/w	P's Target Point: 30h/w	P's Resistance Point: 25h/w	R's Resistance Point: 20h/w	R's Target Point: 15h/w	R's Opening Offer: 5 h/w



Avoid Traps

- ▶ Remember the BIG PICTURE!
- ▶ Consider Bundled Offers
- ▶ Attorneys can be helpful—or not
- ▶ Ensure balance of expertise
- ▶ Remember the importance of the decision for all parties



Questions?



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