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National Association of Regulatory Utility Commissioners



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Alternative Dispute Resolution

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Goals of the Presentation

- Give Basic Introduction to Alternative Dispute Resolution and Mediation
 - Overview of Skills to Use in Mediation
 - Mediation Issues to Consider
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Presentation Topics

- Defining Alternative Dispute Resolution and Mediation
 - The Mediation Process
 - Mediation Skills
 - Mediation Issues to Consider
-

Alternative Dispute Resolution

- A procedure for settling a dispute by means other than litigation, such as arbitration, mediation or minitrial.



Garner, Bryan A. Black's Law Dictionary. 7th ed.

Mediation

- A method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.



Garner, Bryan A. Black's Law Dictionary. 7th ed.

Arbitration

- A method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.



Garner, Bryan A. Black's Law Dictionary.
7th ed.

Mediation vs. Arbitration

Mediation:

- Non-binding decision
- Mediator helps parties negotiate to reach a decision
- Mutually agreeable decision
- Negotiations may continue after decision is made
- Helpful tool at any time in litigation process

Arbitration:

- Decision is binding
- Arbitrator makes final decision for parties
- Decision is not necessarily based on rules, procedures, or law
- Limited grounds for appeal
- Most helpful in the beginning of litigation process

Why use Mediation?

- Private Process
- Reduces need for litigation
- More flexible to parties' interests and needs
- Lower cost and less formal alternative
- Parties work together to find a solution
- More successful for future interaction

Using Mediation

- Best Situations for Mediation
 - Two-party disputes
 - Parties will have future interaction
 - Parties are looking for mutual agreement
 - Disputing particular issues

Using Mediation

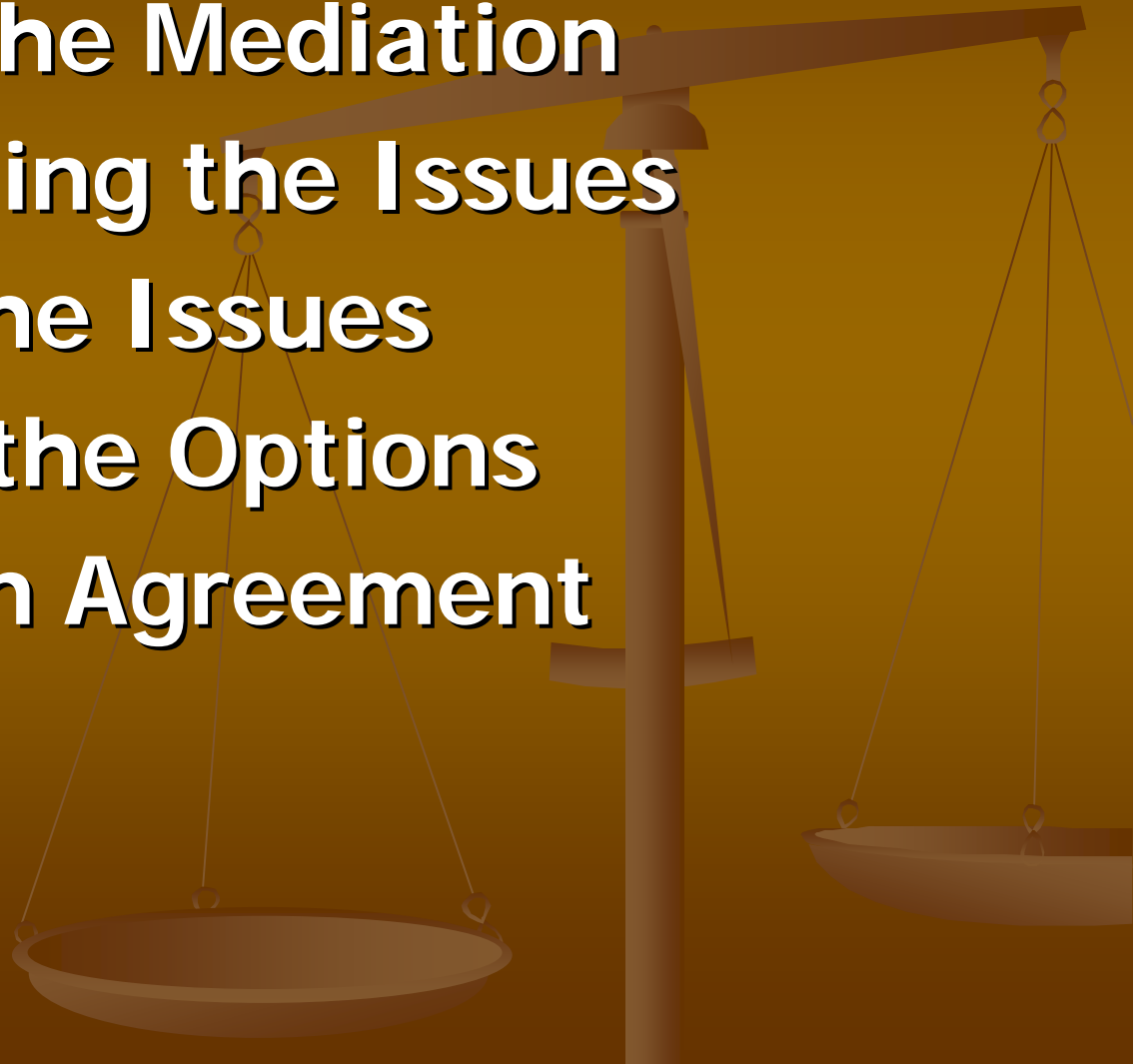
- Less Favorable Situations for Mediation
 - Multi-party disputes
 - Cases involving complex issues
 - Multi-issue cases
 - Parties focused on legal or financial outcome
 - Parties wanting a definite solution
 - Parties seek a declaration to improve future disputes
 - Parties seek authoritative interpretations of public policy

Goals of Mediation

- Understand underlying issues that need to be addressed
- Focus on exploring everyone's interests
- Define interests rather than assume
- See conflicting interests as shared problem to solve mutually
- Recognize & understand differences between parties

The Mediation Process

1. Beginning the Mediation
2. Understanding the Issues
3. Clarifying the Issues
4. Evaluating the Options
5. Reaching an Agreement



1. Beginning a Mediation

- Mediator explains the mediation process
- Parties sign an Agreement to Mediate
- Mediator answers questions



Beginning a Mediation

Goals for the Beginning of Mediation

- Parties understand the mediation process
- Parties know what to expect
- Parties build trust in the process and in the mediator
- Create a positive tone



2. Understanding the Issues

Steps in Understanding the Issues

- Identify the issues & interests for each party
- Mediator neutrally paraphrases and reframes key elements of the issues
- Determine if parties agree on any issues



3. Clarifying the Issues

- Issues

Items to discuss

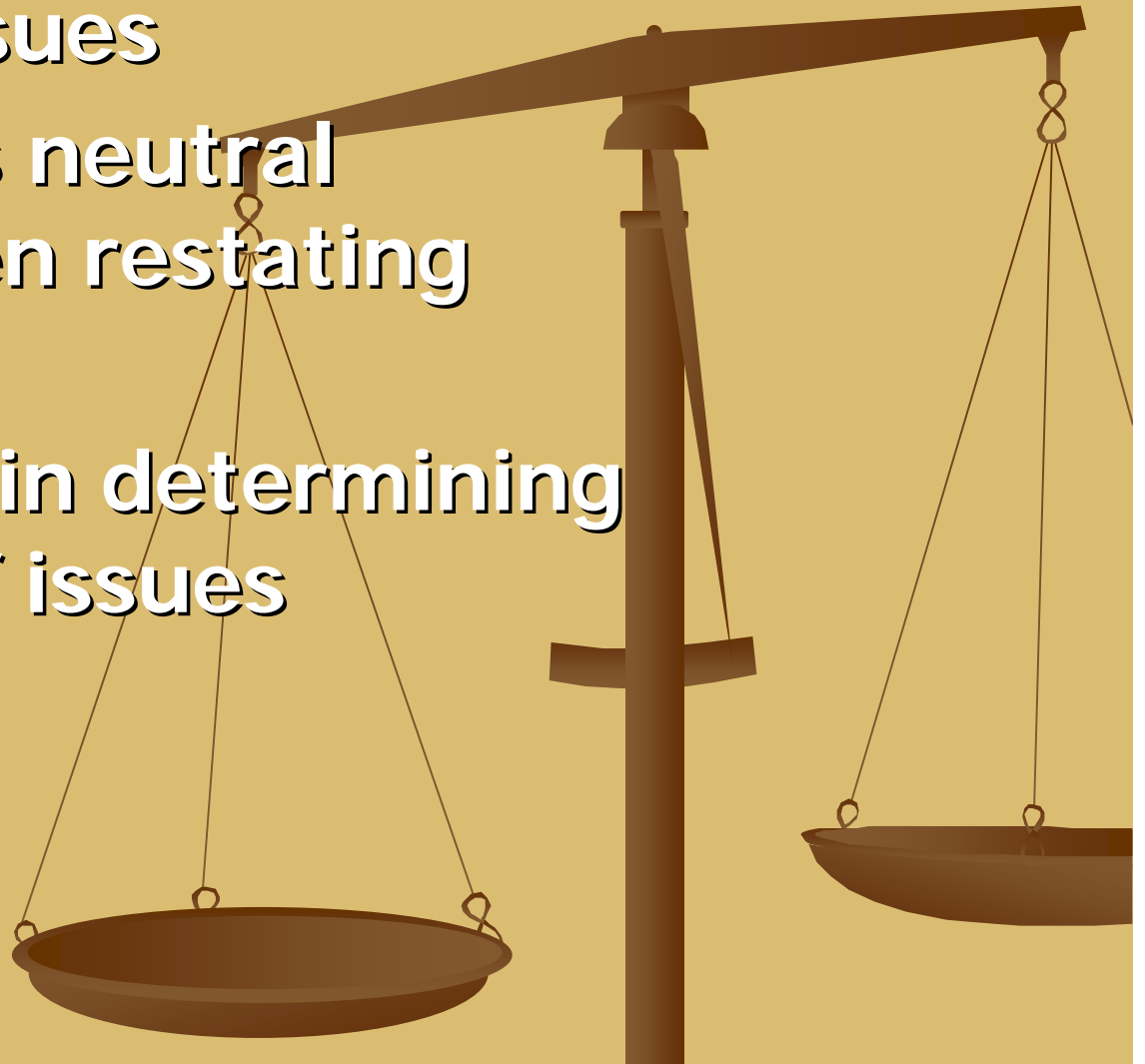
- Interests

The needs the parties are attempting to fulfill



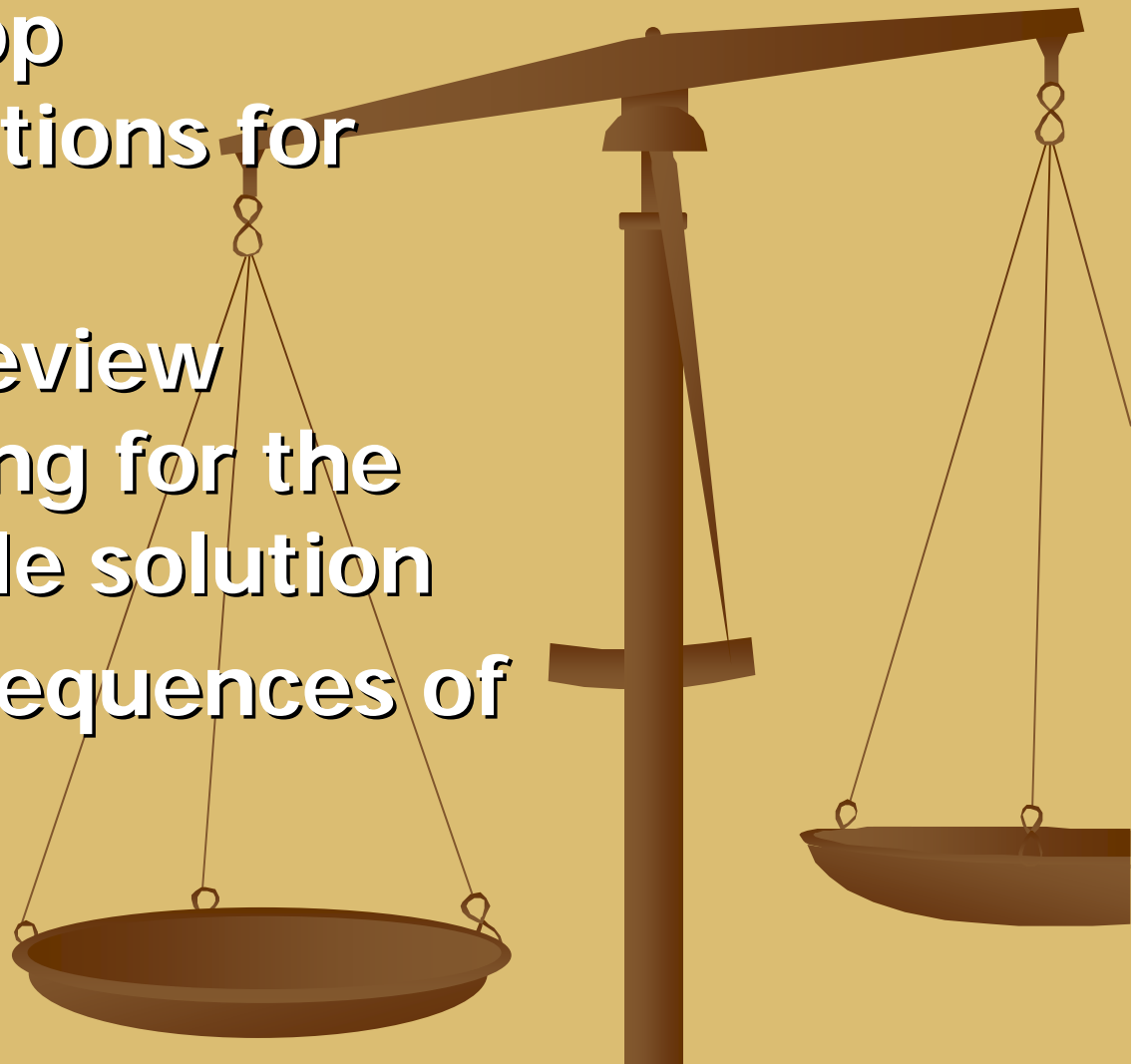
Clarifying the Issues

- Identify all issues
- Mediator uses neutral language when restating positions
- Parties assist in determining importance of issues



4. Evaluating the Options

- Parties develop agreement options for each issue
- Discuss and review options, looking for the most agreeable solution
- Evaluate consequences of the options



5. Reaching an Agreement

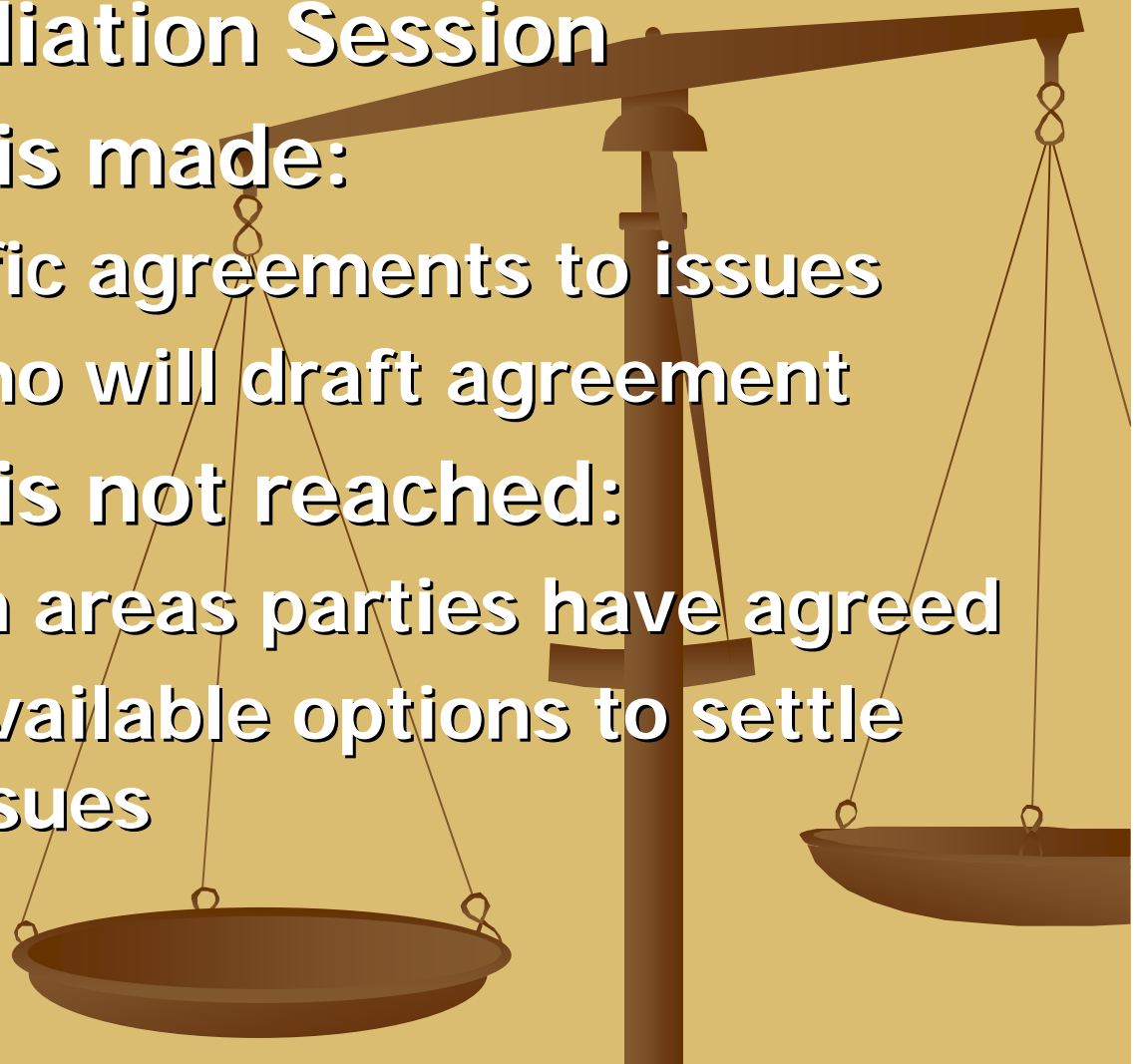
- Determine that parties' interests are met
- Hold joint or caucus sessions to clarify the agreement
- Modifying options
- Reaching the final agreement



Reaching an Agreement

Closing the Mediation Session

- If agreement is made:
 - Review specific agreements to issues
 - Determine who will draft agreement
- If agreement is not reached:
 - Take action in areas parties have agreed
 - Discuss the available options to settle unresolved issues

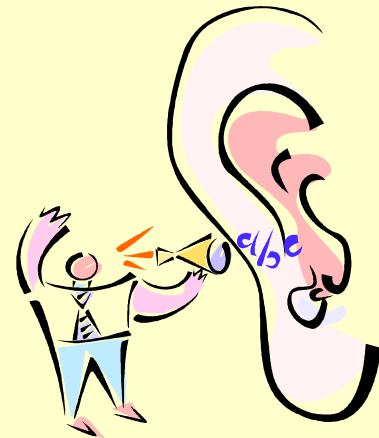


[Useful Mediation Skills]

1. Improve Your Listening
2. Determining Interest vs. Position
3. Negotiation Tactics
4. Forms of Questioning
5. Caucus

[Improving Your Listening Skills]

1. Pay Attention
2. Acknowledge
You Are
Listening
3. Respond
4. Summarize



[Improving Your Listening Skills]

- Pay Attention
 - Reduce distractions
 - Focus on discussions between parties
 - Avoid premature judgment
 - Notice non-verbal messages

[Improving Your Listening Skills]

- Acknowledge You Are Listening
 - Eye contact
 - Posture and gestures toward speaker
 - Facial Expressions
 - Take notes

[Improving Your Listening Skills]

- Respond to Speaker
 - Verbal communication
 - Non-verbal communication
 - Encourage speaker to continue

[Improving Your Listening Skills]

- Summarize
 - Neutrally identify parties' views & needs
 - Help parties see issues in a different way
 - Ask for confirmation

[Interest vs. Position]

- Interest
 - Drives the parties' position
- Position
 - What the party wants



[Negotiation Tactics]

- 2 Categories of Negotiating
 - Adversarial & Position Based
 - Problem Solving & Interest Based



[Negotiation Tactics]

- Adversarial & Position-Based Strategies
 - Role reversal
 - Decrease the parties' power to say "NO"
 - Threats & Warnings

[Negotiation Tactics]

- Problem Solving & Interest-Based Strategies
 - Use trade-offs to promote compromise
 - Focus on the future
 - Focus on underlying issues
 - Highlight what's in it for the party

[Forms of Questioning]

- Relevant Questions
- Open-Ended Questions
- Narrow Questions
- Clarifying Questions



[Caucus]

- What is Caucusing?
 - Mediator meets with parties individually
 - Tool to help parties work toward agreement
 - Take place at any time during mediation
 - Occur numerous times
 - Statements are confidential

[Caucus]

- How Can Caucusing Help Mediation?
 - Uncover and clarify details parties' more willing to reveal privately
 - Move beyond impasse
 - Reduce tension between parties
 - Help parties understand effect of options
 - Introduce variations of options already stated



Mediation Issues to Consider

- Confidentiality
- Types of Cases
- The Mediator
- Reaching Favorable Settlement Options
- A Win-Win Agreement

Confidentiality

- Laws that create evidentiary privilege
- Reporting duty required by law
- Mediators subpoenaed as a witness in cases they participated in mediation
- Limited release of information





Types of Cases

- Simple vs. complex cases
- Two-party vs. multi-party cases
- Disputes between unequal parties

The Mediator

- **Should not be a regulator, nor the eventual decision-maker**
- **Remain neutral**
- **Goal to facilitate & obtain settlement**
- **Retired judge, law professor, hired attorney**
- **Knowledgeable in the subject matter**





Favorable Settlement Agreement Options

- Allow parties to come to their own solution
- Consider the best alternative to negotiated agreement
- Focus on issues, not positions



A Win-Win Agreement

- Considered Alternatives
- Interests Addressed
- Discussed Options
- Legitimate
- Uphold Commitments
- Efficient
- Relationship



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Any Questions?



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