**THE CONSTITUTIONAL CONVENTION**

**THROUGH THE EYES OF THE MEDIATOR**

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**The Use of Current Conflict Resolution Techniques**

**to Arrive at Agreement in 1787**

**Introduction**

This three hour seminar is intended to deepen participants’ understand of fundamental techniques and tools utilized by facilitative mediators in arriving at agreement. The Agenda will be as follows:

1**. Facilitative and Evaluative Mediation Described and Distinguished (5 minutes)**

Attorneys conventionally use the term “mediation” to describe a specific process which differs significantly from “mediation” as it is commonly understood in the conflict resolution community. To lawyers, “mediation” refers to a process in which the parties are separated and the mediator (or settlement conference official) shuttles between parties (who are generally represented) and provides input from experience about how any particular position or argument will fare before a judge/jury. They *evaluate* each side’s position in an effort to move them closer together. Facilitative mediation involves a very different dynamic in which the parties may or may not have representation; they generally sit together and communicate during the process and often engage in creative brainstorming to arrive at an outcome that will come closest to satisfying the needs of the participants. This fundamental difference, together with definitions and insights of masters of the craft such as Bush and Folger (*The Promise of Mediation)* will be introduced.

**2. The Tools of Facilitative Mediation (45 minutes)**

Facilitative Mediators engage in a number of fundamental moves that support the disputants in arriving at a mutually satisfying (or at least *acceptable*) outcome. These include:

a) Facilitation of Dialogue. Creating an environment in which participants are encouraged to, and supported in, the expression of their concerns and interests.

b) Serving as an Anchor. Underscoring by one’s presence and conduct that what is happening has significance and deserves the parties’ full attention and efforts.

c) Creating a Clear and Useful Process. Effective dispute resolution cannot be a haphazard affair, in which the mediator “plays it by ear” completely. While, assuredly, the effective mediator must be nimble as circumstances demand, she must also have a clear “roadmap” to guide both her conduct and the expectations of the participants.

d) Creating a “Safe Container”. Participants in mediation need to know that what is said in the process will stay within the process. No party should fear that any disclosures or concessions will be revealed through compulsion outside of the mediation process. Thus, Washington’s clear statement of privilege to disclosure made within this process.

e) Effective Brainstorming. The creative part of any mediation process occurs when participants are supported in brainstorming solutions to their mutual problems.

f) Narrowing of Issues. In order for mediation to be effective in arriving at agreement, the issues for determination must be clearly delineated, so that the participants do not waste an inordinate amount of time and energy chasing down relatively inconsequential issues, leaving them frustrated and enervated.

g) Driving to Resolution. As the process reaches its conclusion, the mediator needs to keep the parties working toward conclusion. This is particularly true as the process draws to a close and the most difficult or intractable issues remain unresolved.

3**. The Lead-Up to the Constitutional Convention of 1787 (30 minutes)**

To understand just how remarkable the efforts of the framers were during those four months in the summer of 1787, it is critical to appreciate just how intense the conflicts were, as representatives of 12 of the 13 states met. Deep and often passionate divisions split the delegates on a number of vital issues, including the relative representation and power of large and small states in the new government; the treatment of slavery; the selection and composition of the executive and the inclusion of a Bill of Rights in the document. This brief, but critical dive into history, helps participants understand the intensity of the issues to be resolved.

4. **The People Who Participated (15 minutes)**

Just as an understanding of the issues confronting the delegates that summer is essential to appreciate the power of the facilitative tools utilized, the personalities who were present in Philadelphia must be understood. These were, to a large degree, accomplished, thoughtful, self assured men who came to the convention with their own histories, which informed their conduct and positions in the debates that unfolded. Getting these diverse men to reach a nearly unanimous agreement on the framework of the new government is also a testament to the effectiveness of the tools employed.

5. **The Use of Facilitative Mediation Tools at the Constitutional Convention (60 minutes)**

This is the nub of the presentation. As the attached materials will demonstrate, each of the six facilitative mediation tools which are described in Section 2, above, were exercised in Philadelphia in 1787. It is the intention of this entire presentation to reinforce the importance of these mediation tool by hooking them into the remarkable story of the four month process of framing the U.S. Constitution.

6. **Participatory Conclusion (25 minutes)**

So that participants may gain a deeper understanding of the accomplishment of the 1787 Constitutional Convention, they will be separated into groups of approximately 6 people and will be asked to consider the following question: If we were to convene a new Constitutional Convention to reconsider and, where necessary, draft a new national charter, what kinds of people would you want to have participate. Let’s assume that, like the founders, we had a group of 55 men (and, now, women) – what backgrounds would you want to have in that convention. Also, if there are any specific individuals you would want named to that group, who would that be? The first 15 minutes would involve the small group discussions, concluding with return to the larger group to share their insights and conclusions.