# Mediation – The Basics and Beyond[1]

Despite alternatives to dispute resolution (ADR) being available in multiple forms for decades, practitioners and their clients continue to find such alternatives, especially mediation, confusing and frustrating. Understanding the source of such confusion and frustration may stem in part from differences in ADR programs or uncertainty regarding self-determination in mediation or the mediator's role as a "neutral". This article addresses such issues with a focus on mediation basics and broader factors, including three essential considerations for mediation: 1) preparation; 2) mindset; and 3) recognition of cognitive bias and implicit bias.[2]

Not everyone is suited to the mediator role nor is mediation easy. Like litigators, estate planning attorneys, corporate attorneys and others, mediators need their own skillset and each mediation requires its own analysis. Some matters are easier to resolve than others, but whether resolution comes easily or is more difficult is rarely associated with the amount in controversy or the primary legal issues. Participants may wrongly perceive that some mediators unnecessarily prolong the mediation process.

Mediators are sometimes perceived as prolonging the process because of tendencies to share "war stories" or discuss world events, children, the legal system, hobbies, or other matters. To better understand the complexity of mediation, the Model Standards of Conduct for Mediators (hereafter referred to as "Model Standards") are informative. The Model Standards provide mediators with a framework for mediation and offer guidance for attorneys seeking to enhance their approach to mediation. The Preamble to the Model Standards states that "Mediation is a **process** in which an **impartial** third-party **facilitates** communications and negotiation…."[3] Section I of the Model Standards provides in part: "Self-determination is the

fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary uncoerced agreement."

Because mediation is a process, it can create tension for litigators who are used to having control and telling their clients what to do. The mediation process requires patience and self-determination, factors that are often counter-intuitive to litigation. The mindset that mediation is "a waste of time," or "we're only here because the court ordered it" can be problematic as can viewing a successful mediation as only one which results in resolution. Mediation may be time-consuming because of the need to build rapport or navigate the ever-changing dynamics throughout most mediations. There may be a need for frequent or prolonged breaks or other avenues to move through an impasse. That it takes one mediator five hours to "get to the first number" or "first real demand" and another does it in half the time is often not representative of the mediator's qualities, but usually indicative of the participants and the nature of the dispute.

**Considerations of ADR at the Outset of Representation**

One way to develop the necessary mindset for mediation is to shift the focus at time of client engagement from the perspective of what is necessary to "win" to examining strengths and weaknesses and continue that examination on a regular basis. Indeed, Rule 4-2.1 of the Model Rules of Professional Conduct (MRPC) specifies that the role of the "Lawyer as an advisor" is one who ""[**S]hall** exercise independent professional judgment **and** render candid advice." Comment 5 to MRPC 4-2.1 specifies,"[W]hen a matter is likely to involve litigation, **it may be necessary** under Rule 4-1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."

For those in private practice, consider the last time you advised a client early on of reasonable alternatives to litigation when there is the prospect of litigation or you have been

retained for litigation. One way to ensure that such advice occurs is to include ADR on an initial meeting checklist or a thirty-day or quarterly client follow-up, especially in those jurisdictions where mediation is not court ordered. Part of an attorney's early analysis should also include identifying any potential applicable insurance coverage. Early identification of insurance coverage can ensure the carrier has information necessary for a claim evaluation,[4] may afford protection for a client, and may alleviate litigation regarding coverage, including payment of attorney fees which are available under certain policies.[5] Likewise, identifying potential liens before mediation and making efforts to negotiate such liens can be critical to dispute resolution.

**Considerations in Mediation Preparation**

In addition to appropriately informing a client about ADR and identifying potential insurance coverage and liens, mediation preparation with a client should include a discussion of effective communication in mediation, including possibly addressing cognitive bias and/or implicit bias. Rule 4-1.4, MRPC specifies that "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions." The manner in which an attorney approaches a deposition, an opening statement, or a dispositive motion hearing should necessarily differ from the approach an attorney takes in mediation. It is not a matter of dispensing with the advocacy role nor giving in or giving up. Instead, recognizing the tenor, tone and words used to strike the necessary balance is essential for the advocate and the counselor to assist the client with self-determination necessary for resolution. As attorneys who may need to address the provision in Comment 5 to MRPC 4-2.1 to communicate to the "extent reasonably necessary to permit the client to make an informed decision", consider whether the spirit of such Comment is met when the attorney states to a client and/or mediator: "I have always won dispositive motions in these kinds of cases" or "the judge will never rule against me." Successful

motion practice in one case or in several cases is not determinative of an outcome in a particular case. Such statements can also confuse clients or dissuade them from considering "essential" or "material" terms needed for resolution.[6] If the client sat through several depositions in which the attorney was very aggressive, explaining to the client why such an approach during mediation is adverse to their interests reinforces that a different approach in mediation is not a sign of weakness nor a lack of belief in the client's position.

In addition to appropriate client communication before mediation, identifying key documents and reviewing those documents with the client prior to mediation can be beneficial. How an attorney views certain information is often different than the way the client views that same information. Understanding such differences can be essential to a positive mediation experience.

Early mediations can be an impediment to having documents necessary for resolution. To help overcome impediments, consider discussing the issues with the client, opposing counsel and even in advance with the mediator. Facilitating the discussions before mediation can often resolve the issues with an agreed upon exchange of documents or provide the necessary groundwork for how such issues will be resolved.

Proper mediation preparation also requires consideration of the necessary participants, and when possible, knowledge of the background of the participants sufficiently in advance of mediation. Such individuals include the mediator, your opponent, and any insurance or other representatives necessary for informed discussions toward resolution. Consider in advance how certain backgrounds and personalities may change the course of mediation, whether the representative may have other cases or disputes like yours, and other factors that may bear on the willingness and ability of participants to resolve the dispute.

Be cognizant of racial, gender, socio-economic[7] and other issues that may impact mediation. Although some believe that an African American mediator can better mediate a racial discrimination suit brought by an African American, such belief may be misguided. Consider whether the mediator's background and experience might give them a level of "cultural competency" or emotional intelligence which is essential to sound dialogue instead of insisting that the mediator's race or gender match that of the client. Likewise, that the mediator has never handled a particular type of dispute is not automatic grounds for disqualification. While some class actions, insurance matters, and other disputes may dictate specialized experience, not all cases require a particular level of expertise. The skills and insights mediators bring to the table may extend beyond their day to day mediation practice and include their community service, prior or current law practice, or family background which can enhance mediation even when they lack dispute-specific experience. Some disputes may lend themselves to the use of a co-mediator, either as someone who takes an active role in pre-mediation communications and/or mediation, or whose role may be more limited.[8]

**Pre-Mediation Communications with the Mediator[9]**

If you have not mediated with a particular mediator before, consider speaking with the mediator in advance to learn more about their background and their preferred approach to mediation. If you expect such communications to be confidential, ensure that the mediator has that same expectation. With the movement toward virtual mediations, be aware of limitations on the mediation mode, such as bandwidth and other accessibility issues. To the extent the mediation will be confidential, address the mediator's knowledge of technology to ensure that the attorney and client can have separate and confidential communications protected from the mediator and other parties.

Even if you have mediated with a mediator previously, mediations tend to move more smoothly if attorneys or unrepresented parties have some form of pre-mediation communication with the mediator. This can often be via a phone call, although e-mail communications may be appropriate if the attorney has an established relationship with the mediator and there is an understanding about confidentiality. Pre-mediation communications can help highlight particular issues or address dynamics that are better addressed on the phone rather than in writing.

If you provide the mediator with anything written – electronic or otherwise – ensure there is an understanding regarding whether the client is aware of such writing. Attorneys do not always share written pre-mediation communications with their clients, sometimes for good reason. However, to avoid the client losing trust in the attorney or mediator, ensure the mediator knows whether it is appropriate to mention written communications you have not previously shared with the client. That said, it is not the mediator's role to do the attorney's "dirty work." Most disputes have elements or issues that are unpleasant for a client. Avoiding such unpleasantries can result in both a breach of trust and an ethical violation. Although mediations are usually handled in confidence, attorneys are still subject to the Rules of Professional Conduct if they are acting in the role of an attorney. The client should be informed of the extent to which the communications are confidential and take steps to protect confidentiality. Allowing clients to tweet, record, e-mail, text, instant message, or engage in any number of other modes of communication which may breach confidentiality should be addressed in advance of mediation and reinforced during and after mediation.[10]

**Understanding Neutrality in Mediation**

Many scholars have debated what is meant by a mediator's need to be "neutral" and some organizations and authors have suggested eliminating the reference to a mediator as a neutral.[11]

Any effort to reconcile that debate is beyond the scope of this article, but a solid understanding of the issues can be gleaned from certain rules and standards. Model Standard 2(B) provides that a mediator must: 1) be impartial; and 2) appear impartial. In certain contexts, it may be improper for a mediator who is a close social friend of an attorney or a party to mediate a dispute. On the other hand, mediation often lends itself to long-term, honest and trusting relationships between attorneys and mediators and even between mediators and "repeat participants" such as insurance representatives and corporate representatives. Rule 4-2.4, MRPC, specifies that a lawyer who serves as a neutral "[A]ssists two or more persons who are not clients of the lawyer to reach a resolution of a dispute…." An individual who is a trusted mediator may be able to assist the parties more than one who has never previously mediated with the participants.

A 2019 article, "What is Meant by Neutrality in Mediation" provides an abbreviated and reasoned perspective of the challenges facing mediators. The author notes that "The mediator's role must thus coincide with the core goals of mediation which is to encourage the disputing parties to arrive at a consensual compromise which accounts for the relationship and also their 'shifting contingencies.'"[12] The author goes on to state that "Neutrality does not require that the mediator exert no power over the mediator process. Clearly, different stages of mediation process necessitate different degrees of mediator intervention."[13] Those stages of intervention may include constructive challenges to the facts or the law; breaking down emotional barriers between the attorney and the client or one party or another; discussing legal issues; and/or breaking for an extended time but setting parameters for appropriate follow-up.

**Discrimination and Bias**

Understanding how bias and discrimination can impact the effectiveness of mediation is vital. Beyond the issue of whether a mediator's race or gender is appropriate for a case, attorneys

and their clients should avoid cognitive bias and implicit bias in mediation. Stereotypes or beliefs about individuals and situations – both positive and negative – can adversely impact mediations. Attorneys should challenge themselves and their clients to think critically and objectively in mediation.[14] This is not an easy task, especially in high conflict situations, but the right approach can make the difference between a positive or disastrous mediation experience.

It may be appropriate to recommend that the client watch a video about implicit bias,[15] or read an article or excerpts from articles regarding how bias can interfere with one's ability to make reasoned decisions. Most attorneys provide their clients with written materials and instructions before depositions or trial. Adopting similar approaches in advance of mediation and at mediation can facilitate informed communication and enhance the legal process.

**Conclusion**

Effective mediations require different approaches based on the disputes and the participants. The effectiveness of mediation can be enhanced with proper and thorough preparation, including appropriate pre-mediation communications with the client, and when appropriate, opposing counsel and the mediator.

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[1] By Laurel Stevenson. Copyright February 2021. Laurel became the Director of the Mediation and Assessment Program (MAP) for the United States District Court, Western District of Missouri in 2020 following more than two decades in private practice, four years as in-house counsel, and two years as a Legislative Liaison in the Wisconsin Senate. She is a 1989 graduate of the University of Missouri-Columbia School of Law where she was a member of the *Journal of Dispute Resolution*.

[2] The references herein to dispute-related organizations are neither an endorsement nor recommendation but are provided for resource purposes only. The organizations include: University of Missouri-Columbia School of Law's Center for Dispute Resolution; ABA Section of Dispute Resolution; Resolution Systems Institute; Mediate.com; Association of Missouri Mediators; and National Academy of Distinguished Neutrals.

[3] Emphasis added.

[4] That a party may have a significant self-insured retention (SIR) or a belief that excess or umbrella coverage will never be reached can be problematic to resolution and/or may impede identification of necessary carriers. *See Fireman's Fund Ins. Co. v. TIG Ins. Co*., 14 S.W.3d 230 (Mo. App. W.D. 2000).

[5] *See Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co*., 449 S.W.3d 16 (Mo. App. W.D. 2014); *Ass'n of Apt. Owners of the Morrings v. Dongbu Ins. Co*., 731 Fed. Appx. 713 (9th Cir. 2018).

[6] An awareness of problems that can arise post-mediation is critical. *See Roberson v. Norfolk Southern Ry. Co.*, No. 16-CV-16166, 20 U.S. Dist. LEXIS 146658 at *17 (E.D. Mich., Aug. 14, 2020); *Newman v. Physicians Diagnostic & Rehab Servs*., No. 18-cv-81584-D/M, 2020 U.S. Dist. LEXIS 141834 (S.D. Fla. Aug. 6, 2020). A way to reduce post-mediation disputes is to have all participants execute a "term sheet" (not a release) before mediation is adjourned which sets forth the essential or material terms agreed to during mediation.

[7] Given COVID-19, virtual mediations have largely become the norm, magnifying underlying socio-economic issues present in many disputes. Certain clients and even some attorneys may lack necessary internet and/or Zoom skills. Successful mediations are possible with proper preparation even with technological and other impediments.

[8] Lynn Duryee, *Co-Mediation: When Two Heads Are Better Than One*, Mediate.com, June 2017.

[9] This may not be an option with certain mediators such as bankruptcy or magistrate judges or those appointed for a specific mediation, but necessary information may be gained from a colleague.

[10] Such discussions also help remind attorneys of the importance of staying abreast of their client's use of social media and an attorney's ethical considerations when using social media. *See In re Sitton,* No. M2020-00401-SC-BAR-BP, 20201 Tenn. LEXIS 8*, 2021 WL 228072 (Tenn. Jan 22, 2021) (Attorney's misuse of social media which posted about the castle doctrine, including a thread that "Delete this thread and keep quiet. Your defense is that you are afraid for your life…" resulted in a four-year practice suspension with reinstatement conditioned on "nine hours of CLE focused on the ethical use of social media by attorneys.").

[11] Robert Benjamin, *The Risks of Neutrality - Reconsidering the Term and Concept*, Mediate.com (Sept. 12, 2016).

[12] Dr. Andrew Agapiou, *What is meant by neutrality in Mediation*, CIArb News, January 16, 2019.

[13] *Id.*

[14] Louis M. Marlin, *Overcoming Bias in Mediation*, The Advocate, August 2017.

[15] Procter & Gamble, Talk About Bias: The Look Video, https://us.pg.com/talkaboutbias/