

**ESSENCE OF MEDIATION**

Sparking a capability to mediate

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**A MEDIATOR'S OPPORTUNITY**

The role is a gift...

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**PRESENTATION PURPOSE**

**GOAL:** To expand our awareness of what we are doing in the mediation room

**WHY:** To offer better service to our clients

**HOW:** To have an additional framework for exploring what is happening during mediation

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**MEDIATORS**

*We are privileged. People open their hearts and minds to us, their hopes and fears.*

*We are invited to sit within their conflict, to work with them to find a way out. We are asked to help where people have been stuck, to provide the means to move forward.*

*We are offered a sacred role.*

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**"ALSO KNOWN AS..."**

Unpacking 40+ years of lawyering,  
30+ years of mediating and of  
working with mediation programs,  
to find what worked and what did not.

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**CAPABILITY TO MEDIATE**

For a participant to meaningfully mediate...

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**ROLE FOR THE MEDIATOR**

- Sparking the capability to mediate
- Providing a meaningful opportunity to exercise the capability to mediate
- Being aware of how the power of the mediator influences capability to mediate

*For each participant*

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**CAPABILITY, CONTINUED**

Ability to:

- Take responsibility
- Consider others
- Be open to all the possibilities
- Be willing to move on, *and more...*

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**CAPABILITY TO MEDIATE**

- An open, flexible, and creative state of mind
- An awareness of one's own needs, interests, values, and goals
- A sense of self-preservation and integrity
- An appreciation for practical reality, *and...*

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**CHALLENGE**

- ➔ • To support participants to acquire and to exercise the capability to mediate
- ➔ • To use mediator power to empower the participants

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**CAPABILITY, CONTINUED**

Ability to:

- Participate in the mediation process
- Know what needs to be decided
- Make informed and voluntary agreements
- Understand consequences, *and...*

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**MEDIATOR POWER**

Identifying mediator influence...

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**MEDIATOR POWER**

- Is not to determine the outcome of the conflict.
- Is the ability to influence a party's state of mind and behavior.
- Is the ability to influence what happens in the room.

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**MEDIATOR PRESENCE**

- Mediator presence is a model for party behavior.

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**SOURCES OF MEDIATOR POWER**

- Mediator Behavior
- Mediator Presence
- Mediator Knowledge
- Mediator Guidance

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**MEDIATOR KNOWLEDGE**

- How the mediator uses knowledge of the mediation process, the subject matter of the dispute, and the legal process

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**MEDIATOR BEHAVIOR**

- Mediator behavior creates a powerful environment in the room and influences the parties' state of mind.

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**MEDIATOR GUIDANCE**

- How the mediator guides the process and manages the work flow

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### EXERCISING MEDIATOR POWER

- How the mediator participates is not neutral.
- A mediator's participation in the process has consequences for the parties.
- A mediator needs to be level handed and needs to maintain the integrity of the process.
- How a mediator uses power needs to be as intentional as possible.

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### MEDIATION IS

- A method of dispute resolution intended to provide parties with an opportunity to exercise self-determination in the resolution of their dispute.

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### NATURE OF THE SERVICE

Boundaries for the mediator's role...

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### CORE VALUE OF SELF-DETERMINATION

More than just determining the outcome, and includes:

- Choice of method of dispute resolution
- Deciding what to do during mediation
- Defining positions, needs, interests, values, and
- Finding options for agreements...
- See materials, page 26

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### MEDIATION IS NOT

- A determinative process where someone tells the parties what to do, such as trial and arbitration.
- An advisory process where someone recommends what parties should do, such as a lawyer or consultant.
- A therapeutic process where someone treats party personality and behavior, such as counseling and coaching.

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### SELF DETERMINATION IN ACTION

For example:

- Do not tell a participant that they cannot afford an option for resolution
- Help them explore their own budget and economics
- Provide an opportunity for them to draw their own conclusion.

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WHAT IF OTHER SERVICES ARE NEEDED?

- Whether the parties should be referred to another type of service provider, or
- Whether the mediator may shift roles...

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**MEDIATOR BEHAVIOR**

Creating a good environment

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**THRESHOLD CONSIDERATION**

- • Understanding the baseline foundation for a mediator's role
- • The starting point for this presentation

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**HOW PEOPLE ARRIVE**  
*Elevated Stress Response*

- ★ • Prepared to advocate and to defend
- ★ • Anticipating a hostile response
- ★ • On high alert for danger
- ★ • Locked down

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**MATERIALS**

Available at [www.nmadr.org](http://www.nmadr.org):

- Model Standards of Conduct for Mediators
- New Mexico Statewide Guidelines For Court-Connected Mediation Services
- Model Standards of Practice for Family and Divorce



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WHAT PEOPLE NEED TO MEDIATE  
And May Be Compromised

- • Ability to speak so that they can be heard
- • Ability to listen so that they can understand
- • Ability to think openly, flexibly and creatively

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TO SHIFT FROM AGGRESSIVE DEFENSIVENESS  
To an Increased Capability to Mediate

Parties need to:

- Be heard
- Be understood
- Be respected

*To experience a safe and receptive environment*

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**MATERIALS**

- See "Acknowledgement, a Dispute Resolution Basic Skill."



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ROLE OF THE MEDIATOR  
Stimulate A Relief Response

- Provide an environment where each person will feel incrementally safer to lower:
  - Wall of defenses
  - Clinging to positions
  - Fear
- Provide support for an increase capability to mediate

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**ACKNOWLEDGMENT REFRESHER**

An essential tool

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IF A MEDIATOR DOES NOTHING ELSE...

These mediator behaviors matter:

- ➔ • Listen to understand
- ➔ • Respect and acknowledge
- ➔ • Ask to know more

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**Looping**

Participant	Mediator
●	→ Tells Story
●	← You said... Did I get it? Is there more?
●	→ Yes, you got it, except ____
●	← You said... Did I get it? Is there more?
← Repeat - "Tell me more about your story?"	

**OVERHEARD CONVERSATION**

Hidden impact...

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RELIEF REACTIONS

- As each participant sees the mediator give even handed, authentic attention to all,
- They learn the mediation environment may be safer than initially experienced,
- Their defenses can begin to lower, and they can feel safe enough to listen more openly.

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WHILE THE OTHER PARTICIPANT WATCHES...

- ★ While the mediator works with one participant,
- ★ What is the impact on the other participant?

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LONG TERM REACTIONS

There may be no outward clues,

- That the listening participant is taking in what the other participant is expressing...
- That listening brings new understandings...
- That the listener's state of mind may become more open and flexible...

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INITIAL REACTIONS  
Particularly when waiting to go second...

- Is the mediator becoming aligned? Am I at risk?
- Needs the mediator to acknowledge that fear
- Needs to be appreciated for waiting
- Needs to be know mediator wants to know them.

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UNEXPECTED SHIFTS

- ➔ With time, the hidden learning is ready to surface, to the surprise of everyone else
  - A position may shift...
  - A new idea may be offered...
  - An apology may be given...
- ➔ The overheard conversation can be powerful.

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**MEDIATOR PRESENCE**

If a mediator is present...

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USEFUL MEDIATOR ATTRIBUTES

- **Even handed** treatment of all
- Realistic optimism
- Willingness to:
  - Work hard
  - Stay the course
  - Work with heat
  - Know when to stop

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**HOW PEOPLE ARRIVE**

Unfamiliar with

- ★ • How to behave during mediation
- ★ • What attitudes will be useful
- ★ • How to respond effectively
- ★ • What interactions will be safe & beneficial

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MORE USEFUL MEDIATOR ATTRIBUTES

Assumes nothing about:

- Anything, *including*
- Who the participants are;
- What happened;
- What is important;
- What might work.

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MEDIATOR AS A MODEL

- where the mediator embodies the conduct and state of mind conducive for a meaningful mediation,
- where mediator presence is a model of behavior for the parties, and
- where mediator bias and baggage are acknowledged to be inherently present and the mediator works not to allow them to contaminate the process.

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MORE USEFUL MEDIATOR ATTRIBUTES

Authentically is interested and wants to:

- Learn about the situation,
- Understand everyone, and
- Respect & acknowledge each participant.

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AND MORE USEFUL ATTRIBUTES

- Conflict as an opportunity
- Calm and steady in the heat of conflict
- Aware of own reactions, opinions, and beliefs
- Open to possibilities without premature judgment

*Remembers the puzzle is for the participants to solve, not for the mediator to work out.*

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**MEDIATOR UNDOING**

Holes I have fallen in...

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BOTTOMLINE  
Mediation as attitude & interactions

- • The qualities needed for a participant to meaningfully mediate, and
- • The attributes needed for a mediator to provide a helpful process, are sufficiently similar
- • For the mediator to be a critical model of behavior for the participants.

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**WANTING TO**

- Resolve the conflict myself
- Be faultless (perfect)
- Show off my expertise
- Know what is best for them
- Tell them what to do

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INFLUENCE OF PRESENCE

- ★ • Beyond being a model,
- ★ • Presence influences
- ★ • How people relate to their conflict, themselves, and each other.

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**BEING INATTENTIVE TO**

- My own bias, reactions, baggage, and power
- When I get triggered by someone or something
- Nature of the service
- Boundaries of the role
- Self-Determination

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**FALLING VICTIM TO**

- My own discomfort, fear, and avoidance of heat
- Emotions as the enemy
- Anger as threatening
- Loss of control as devastating
- Judging people

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**HOW PEOPLE ARRIVE**

Lacking information of:

- ★ • Process of Mediation
- ★ • Subject Matter of the Conflict
- ★ • Legal Context

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**HOLES HAPPEN**

- ➔ • Be aware
- ➔ • Be transparent and responsible
- ➔ • “It is not what you have done, but what you do next”  
Jonathan Bolton, MD
- ➔ • Everything is an opportunity

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**ECONOMIC REALITY**

Participants may not have:

- Access to information
- Money to acquire information
- Educational background to use information

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**MEDIATOR KNOWLEDGE**

The power of information...

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**LACK OF INFORMATION**

- Creates fear, false assumptions, and unrealistic expectations
- Creates power imbalances
- Decreases capability to mediate
- Decreases realistic options for resolution
- Creates Vulnerability

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### CHALLENGE

- Mediator may have the knowledge
- Mediator and participants will want to access mediator knowledge
- Risk of dependency upon mediator knowledge
- Dependency can be disempowering for participants
- ➔ How to inform parties while preserving self-determination

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### A QUESTION OF BALANCE

**It depends:**

In summary, the mediator who is an attorney may provide additional services so long as the core values of the mediation process are preserved. A similar analysis would apply to providing legal information. This is a "facts and circumstances" test. There is no bright line. The ABA Section of Dispute Resolution acknowledges that a mediator who is an attorney may offer additional services beyond facilitating the process. Some of these services may look like "the practice of law." There are risks and benefits. The question is to strike an appropriate balance. See "What's a Mediator to Do?"

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### TRADITIONAL MEDIATOR APPROACHES

<p><b>Ask questions:</b></p> <ul style="list-style-type: none"> <li>• Open areas for discussion</li> <li>• Draw out what they already know</li> <li>• Identify needed information</li> <li>• Understand how information might be useful</li> <li>• Identify how to get the information</li> </ul>	<p><b>Refer participants to:</b></p> <ul style="list-style-type: none"> <li>• Reading materials</li> <li>• Websites</li> <li>• Advisors</li> <li>• Organizations</li> <li>• Workshops</li> <li>• Etc.</li> </ul>
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### THE "HOW" MATTERS

**Factors to balance:**

- ➔ 1. General information v. interpreting the information
- ➔ 2. Preserve even handedness and self-determination
- ➔ 3. Protect the nature of the service
- ➔ 4. Be transparent regarding any shift in mediator role
- ➔ 5. Venture no further than necessary and safe

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### CONTINUUM OF MEDIATOR ADVICE

From Acceptable to Beyond Role

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### MATERIALS

- See "What is a Mediator to Do?"

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**MEDIATOR GUIDANCE**

The power of leading the process...

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MEDIATOR AS GUIDE

- Leads the process:
  - Set agenda
  - What to do
  - How to do it
  - How long to do it
  - What to do next
- Leadership decisions matter

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HOW PEOPLE ARRIVE

- ★ • Stuck
- ★ • Strangers in a strange land
- ★ • Unable to navigate what to do

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RIGID OR RESPONSIVE

For example, while detailing a particular and promising option, a previously unstated strong emotion bursts out...

- Set aside emotion and stay on task?
- Set aside task and work with emotion?

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WHAT NEEDS TO BE DONE

- Who is in the room?
  - Identify positions, perceptions, emotions, history, facts, needs, interests, values, preferred outcomes...
- What is possible?
  - Discover and evaluate every available option...
- What is next?
  - Identify what is mutually workable, detail and reality test the option, create a written document, and make any agreements...

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DIRECTIVE OR EMPOWERING

Another example, when a task appears finished...

- Tell the participants what is next?
- Suggest what might be next?
- Ask what the participants would like to do next?

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MANAGEMENT OF STYLES

And further, how does the mediator pace the process when:

- One is a quick thinker and is ready to make a final decision, and
- The other is a slower thinker and needs to ponder what is best?

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MATERIALS

- See "A Mediation Work Flow."



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WHAT DO PARTICIPANTS NEED TO TRUST THE PROCESS?

To believe that the mediation process is

- Helpful
- Fair
- Worth doing

And, that the mediator is a trustworthy leader.

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MEDIATOR AS LEADER

- ➔ • The mediator embodies the process.
- ➔ • To trust the process, one must trust the mediator.
- ➔ • The mediator needs to be a creditable guide.
- ➔ • To be creditable, a guide needs to be flexible to the needs of the participants,
- ➔ • While knowing how to manage the work flow to get somewhere.

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