

2019 NM ADR SYMPOSIUM

Mediation & Settlement Facilitation: Warring Siblings or BFFs?

New Mexico has two powerful dispute resolution traditions: Mediation & Settlement Facilitation. What are their origin stories, differences, and similarities? How does each address mediator power, process design, and self-determination? How may practitioners use the best of both? This presentation will explore both traditions and will address how practitioners may take advantage of the best of each. The take aways will include both theory and practice tips.

Topics

1. Introduction
2. Two Traditions
3. Another View
4. Mediation Defined
5. Use of Mediator Knowledge
6. Best Practices
7. Tips, Traps, Tools, and Take Aways

Materials

Printed:

1. Workshop Handout

Available on www.nmadr.org:

2. New Mexico Statewide Guidelines for Court-Connected Mediation Services
3. National Standards for Court Connected Mediation Programs
4. Second Judicial District Local Rules - Settlement Facilitation
5. What is Settlement Facilitation?
6. Anatomy of Settlement Facilitation
7. Mediation Meets Settlement Facilitation - Flow Chart
8. Mediation Meets Settlement Facilitation - Evaluative Skills for Mediation
9. Power of Mediator Expertise - What is a Mediator to Do?
10. Acknowledgement, a Dispute Resolution Basic Skill
11. Power of Mediator Guidance - A Mediation Work Flow

Presenter

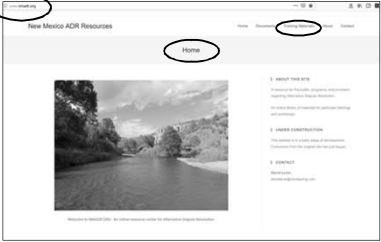
David Levin graduated from the UNM School of Law in 1977 and has been a trained mediator since 1987. David began his legal career as a civil litigator and general practitioner, later becoming a Board Recognized Specialist in Family Law and establishing a general private mediation practice. David has served as a court administrator of local and statewide alternative methods of dispute resolution programs, and has taught basic, family, magistrate court, and advanced mediation, as well as settlement facilitation.

Mediation & Settlement Facilitation: Warring Siblings or BFFs?

New Mexico has two powerful dispute resolution traditions
How to take advantage of the best of both

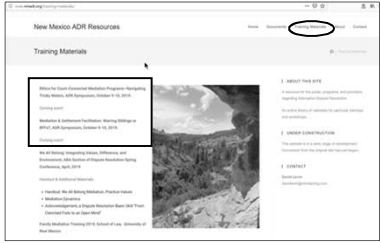
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Materials on NMADR.ORG



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Training Materials



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Part I – Introduction

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Mediation & Settlement Facilitation

1. What is mediation/settlement facilitation?
2. What are the differences/similarities?
3. What are the strengths/weaknesses?
4. What type of cases?
5. Who gets to do it?
6. What is the compensation?

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What if

1. They are really not so different?
2. They are really the same but with different styles and formats?
3. It does not really matter?

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Part II – Two Traditions

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- ## Origin Story - Mediation
- Metropolitan Court Mediation Program
 - NM Center for Dispute Resolution, Mediation Alliance
 - Joint sessions
 - Caucus as needed
 - Facilitative Process

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- ## Origin Story – Settlement Facilitation
- W. John Brennan, Chief Judge, Second Judicial District Court
 - Problem: To talk settlement was a sign of weakness
 - Settlement Week
 - Written submissions
 - Joint session for opening statements
 - Shuttle
 - Separate discussions of strengths & weakness
 - Exchange of offers
 - Evaluative Process

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- ## Origin Story – Settlement Facilitation
- Year-round program
 - Adopted statewide
 - Private settlement facilitation services

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Local Rule



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What is Settlement Facilitation?



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Anatomy of Settlement Facilitation

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Two Traditions Simplified

<p style="text-align: center;">Settlement Facilitation</p> <ul style="list-style-type: none"> • District court origins • Attorneys • Evaluative style 	<p style="text-align: center;">Mediation</p> <ul style="list-style-type: none"> • Community mediation organizations origins • Non-Attorney • Facilitative Style
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Two Traditions Simplified

<p style="text-align: center;">Settlement Facilitation</p> <ul style="list-style-type: none"> • Just the facts and the law • Shuttle format • Positions • Strengths and weaknesses • Cost benefit • Result focused 	<p style="text-align: center;">Mediation</p> <ul style="list-style-type: none"> • Facts and emotions • Joint session format • Positions • Needs and interests • Mutual solutions • Process focused
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Two Traditions Simplified

<p style="text-align: center;">Settlement Facilitation</p> <ul style="list-style-type: none"> • Reality requests by attorneys: <ul style="list-style-type: none"> • Please help my client be realistic! • Please give my client the bad news! 	<p style="text-align: center;">Mediation</p> <ul style="list-style-type: none"> • Reality checks by mediators: <ul style="list-style-type: none"> • Is this a promise that you can keep? • How will this work?
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Two Traditions Simplified

<p style="text-align: center;">Settlement Facilitation</p> <ul style="list-style-type: none"> • Rules and statutes with "settlement facilitation" label • District court family and civil cases • Private attorney services • "I am a mediator" • "This is the right way" 	<p style="text-align: center;">Mediation</p> <ul style="list-style-type: none"> • Rules and statutes with "mediation" label • Magistrate Court, Metropolitan Court, ADR Bureau • "Pure mediation" • "I am a mediator" • "This is the right way"
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Two Traditions Simplified

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Part III – Another View

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Practice Methods & Purpose

Practice Methods	Purpose
<ul style="list-style-type: none"> • Styles, such as facilitative and evaluative • Formats, such as joint sessions, individual sessions, and shuttle 	<ul style="list-style-type: none"> • Nature of the Service • Core Values • Role of Mediator

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Practice Methods & Purpose

How are the perceived differences between “mediation” and “settlement facilitation” to be viewed in broader context of the definition and purpose of mediation and the role of the mediator?

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Part IV – Mediation Defined

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WHAT IS MEDIATION?

One label encompassing both “mediation” and “settlement facilitation.”

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What is Mediation?

- Mediation definitions do not distinguish between “pure mediation” and “settlement facilitation.”
- Nationwide both “pure mediation” and “settlement facilitation” are known as “mediation.”

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National Standards for Court-Connected Mediation Programs

DEFINITIONS - Mediation

Mediation is a term that has been used to describe a range of practices designed to help parties in conflict. In these Standards, the term is used to describe a process in which an impartial person helps those parties to communicate and to make voluntary, informed choices in an effort to resolve their dispute.

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Guideline II

GUIDELINE II. Definitions...

B. "Mediation" means a process in which a mediator:

1. facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute; or
2. promotes reconciliation, settlement, or understanding between and among parties.

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Guideline II

Comment
General...

- The term "mediation" is broad.
- Throughout the nation the term encompasses many methods, sometimes known as styles, for the practice of mediation. The range of methodology includes facilitative, evaluative, transformative, and other approaches, as well as combinations of approaches.
- The format for mediation also has a wide range of possibilities, including joint session based mediation, shuttle diplomacy, time limited dispute resolution sessions, and many more. [bullet points added for clarity]

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Guideline II

Comment
General...

The definition of "mediation" in these Guidelines encompasses both mediation and settlement facilitation, the terms commonly used in New Mexico to describe mediation services. Although some view mediation and settlement facilitation as different processes and formats, the national consensus is that they both fall within the single term of "mediation."

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NATURE OF THE SERVICE

Boundaries for the mediator's role...

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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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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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CORE VALUE OF SELF-DETERMINATION

Boundaries for the mediator's role...

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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...

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NEW MEXICO GUIDELINES FOR COURT-CONNECTED MEDIATION SERVICES

GUIDELINE III. General principles.

C. Self-determination. In self-determination, the decision-making authority rests with the mediation parties themselves. Self-determination is the core value of court-connected mediation services.

(1) Courts may mandate referral to mediation, but should not require mediation parties to settle. There should be no adverse response by courts to non-settlement by the mediation parties. For that reason, mediation parties should be permitted to opt out of mediation at any time.

(2) A mediator should facilitate negotiations between mediation parties and assist them in trying to reach a settlement, but should not have the authority to impose a settlement on the mediation parties or to coerce them into settlement.

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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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THRESHOLD CONSIDERATION

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

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Part V – Use of Mediator Knowledge

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Mediator Knowledge

- A core and influential component of the role of the mediator
- How to use mediator knowledge is a core contention between "facilitative mediators" and "evaluative settlement facilitators"

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Mediator Knowledge

- How is mediator knowledge viewed from the perspective of the nature of the service and the core values of mediation?
- What issues transcend the differences between "mediators" and "settlement facilitators?"
- What matters and makes a difference?

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MEDIATOR KNOWLEDGE

The power of information...

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HOW PEOPLE ARRIVE

Lacking information of:

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

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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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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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TRADITIONAL MEDIATOR APPROACHES

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

From Acceptable to Beyond Role

General Information

Range of possible implications

Apply expertise to facts and tell what to do

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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. 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 challenge is to strike an appropriate balance.

See NMADR.ORG, "Power of Mediator Expertise: What Is a Mediator to Do?"

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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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POWER OF MEDIATOR KNOWLEDGE



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POWER OF MEDIATOR KNOWLEDGE

A family law example illustrates the issue:

- Imagine that a couple comes in for mediation. They have had a long-term marriage, over 30 years. Husband, who is well-educated, is a high-flying international corporate executive, with a very large income. He also has substantial employment benefits. Wife, only has a high school education, is a part-time librarian working for an hourly wage. She has no benefits from her employment;
- The parties appear amiable. They report having productive settlement discussions. As they report what they have done, it is clear that the issue of alimony has never been discussed;
- The mediator is a family law attorney. The parties have deliberately selected the mediator because he or she is a respected expert in the field.

Here are several options for how the mediator might proceed. The examples are exaggerated to illustrate the options and are only an initial sampling of problematic areas.

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Part VI – Best Practices

How to bring mediator techniques and styles to be consistent with nature of the service, core values, and role of mediator

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A Civil Case

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Revolutionary People by MACRO

Produced by MACRO,
Maryland's Mediation
and Conflict Resolution Office

Rachel Wohl, Esq., Executive Director
Lou Gieszl, Deputy Executive Director

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Resolutionary People by MACRO

The following documentary depicts actual mediation sessions. Mediation is a voluntary, confidential process that helps people resolve conflicts. A trained neutral person called a mediator, helps participants in a conflict understand one another, clarify issues and reach voluntary and often creative solutions.

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A Civil Case



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A Continuum of Methods & Common Skills

- Process design – strategic use of joint and shuttle
- Common skills – match to the moment
- Mediator knowledge – ethical use

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A Continuum of Methods & Common Skills

- Nature of the service & core values:
A thoughtful selection of methods and skills intended to provide a beneficial opportunity for parties to exercise self-determination regarding the resolution of their dispute.

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Traps

- Avoiding a technique due to fear
- Avoiding a technique due to stigma
- Getting in a rut
- Making one size fit all


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Benefits

- | | |
|---|--|
| <p>Joint Session</p> <ul style="list-style-type: none"> • Working with the heat of the conflict • Power of the overheard conversation • Common experience and language | <p>Shuttle</p> <ul style="list-style-type: none"> • Safety • Party openness in private • Mediator assisted framing of the message |
|---|--|

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Acknowledgement



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Bottom Line

- There are variations in style and format between the origins of “mediation” and “settlement facilitation” in New Mexico.
- Both practices are within the national standards for mediation.

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Bottom Line

- Style and format need to be:
 - Selected to fit the needs of the parties, the moment in mediation, the ability of the mediator, and the context of the program;
 - Practiced in a manner consistent with the nature of the service, the core values of mediation, and ethical standards;
 - Understood beyond the labels ascribed to historical circumstance; and
 - The subject of lifelong learning for mediators.

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Part VII – Tips, Traps, Tools, and Take Aways

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How to take advantage of the best of both?

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