What Is a Mediator to Do?

Mediation is challenged by the unmet needs of the participants who seek mediation services. This issue has escalated in light of present economic circumstances. How mediators will respond to the challenge may determine the future for mediation in New Mexico. This essay seeks to illuminate the challenge and to inspire a meaningful dialogue for finding solutions. I look forward to the discussion.

An Example – Alimony

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.

1. **Alimony is not discussed.** If the parties are happy with their discussions and proposed settlement, then the mediator should be happy. The mediator should not interject a potentially divisive issue which the parties have not considered.
2. **Alimony is raised and determined is to be awarded.** The Mediator raises the issue of alimony, explains the law, and authoritatively states that high dollar, permanent alimony would be awarded by a judge.
3. **Alimony awareness is questioned.** The mediator identifies alimony which is generally a topic for divorce mediation. The mediator asks each party what they know about alimony. The mediator acknowledges the imbalance of information.
4. **Alimony general information is offered.** The mediator explains that there is an alimony statute, which describes the factors a court should consider in determining the issue. The mediator offers a copy of the statute to the parties. The mediator explains that there are also alimony guidelines, which are only used as a starting point for settlement purposes. The mediator offers a copy of the alimony guidelines. The mediator recommends that each party might want to consult an attorney, a legal clinic, and/or other legal resources, including books, articles, and websites, to learn how the law applies to their case.
5. **Alimony general information is discussed.** The mediator, after providing an opportunity for the parties to consult other resources even if mediation is delayed in order for them to do so, facilitates a discussion between the parties of what they would like to do based upon their respective understandings of alimony.
6. **Alimony general information is explained.** The mediator goes through the statute and the guidelines provision by provision. The mediator shows how the circumstances of the parties apply to each provision. The mediator offers how application of the provisions may lead to a result or a range of results, including the amount, purpose, payment terms and duration of alimony.

7. **Alimony agreement documents.** The parties have reached an agreement. They have agreed to a dollar amount and a time. For the payments. The parties have asked the mediator to write up their agreement. Should the mediator only use the language of the parties? Should the mediator add the required language, "subject to the death of the recipient," which is necessary to make alimony deductible to the payor and reportable to the recipient? Should the mediator explain the difference between including and excluding the required language?
8. **Alimony agreement documents, again.** The parties have reached an agreement. They agreed to no alimony. Assume the marriage is only 15 years in duration. Should the mediator raise the issue that unless alimony is awarded as zero per month, then the ability to later modify alimony is forever waived?

Self-Determination & the Uninformed Participant

Mediation is built upon a core value of self-determination. The process of mediation is intended to impact the dynamics of conflict. The parties are presumed to be locked into positions, which compromise their ability to think open and flexibly and to work towards mutual solutions. The art of mediation is to provide the opportunity for the parties to shift. Active listening and acknowledgment are the primary tools. The goal is to allow parties to transition from aggressive defensiveness to a more balanced and well-grounded posture. The essential transitional tool is for the parties to experience being heard. Assuming that if the parties are able to shift the dynamics of the conflict, then they will be able to exercise self-determination. However, there may be other problems to overcome.

The subject matter of the dispute may also pose a barrier to exercising self-determination. Sufficient *subject matter expertise* may be lacking. There are multiple dimensions to consider. *Subject matter knowledge* means the ability to understand the issues which may underlie the dispute. *Subject matter skill* means the ability to effectuate an agreement. For example, the parties may not understand that a tax issue underlies the dispute, and the parties, even if they understand the tax issue, may not have the skill to craft a legal document which addresses the tax issue. This dilemma is further complicated by a power imbalance between the people in the room.

Mediators may have the subject matter expertise that the parties lack. By experience, education and/or training, the mediator may have acquired the ability to understand the issues and the ability to effectuate an agreement. Even if the parties are able to address the dysfunctional attributes of their dispute, they may still lack the competency that the mediator may have.

One solution is to help the parties acquire subject matter expertise. A traditional technique is to recommend that the parties consult with a subject matter expert, such as an attorney. Another technique is to recommend resources from which the parties may become more educated. These techniques are not always possible. Economics and other forces may constrain the parties from consulting with a subject matter expert. Access to resources and a lack of experience with learning, such as the experience offered by formal education, may render becoming more educated as unrealistic. Therefore, the parties may be left with the mediator is their only resource.

Mediators are not traditionally supposed to exercise subject matter expertise. To do so would shift the role of the mediator, and would have the mediator cross potentially prohibited boundaries. For example, the mediator might use evaluative subject matter expertise to identify and to understand the issues. Further, the mediator might use subject matter skill to craft an enforceable, effective, and legal agreement. These additional roles have long been viewed as potentially undermining self-determination, because the well of understanding to resolve the dispute shifts from the parties to the mediator. This dependency May be debilitating to self-determination.

There is a harsh reality to confront. There may be no other resource than the mediator for the parties in the present environment. What is a mediator to do? How can a mediator enable the parties to use the mediator's subject matter expertise without contaminating self-determination? How can the mediator be the subject matter expert without usurping the active role of dispute resolver? How can the mediator rightfully resist helping those in need? *If the mediator does say "no," then are the parties left being lost?*

This inquiry goes to the heart of what is the service to be provided. Each professional role, such as attorney, accountant, real estate expert, family counselor, and others, provides a distinct service. The service of mediation has been primarily to provide a process for dispute resolution. The parties are assumed to obtain other services from other providers. Now, there may be no other providers. Is the mediator to expand his/her services to include dual or multiple roles? How is this possible without diminishing the original core values for mediation services?

This is a major challenge for contemporary mediation. There are no immediate answers. There are many avenues to explore to this multidimensional problem. However, there is an imperative for mediators to be aware and to explore how to approach these issues in a manner which will reserve the spirit and substance of self-determination. Since the resolution of a dispute often requires creative and flexible thinking. To find appropriate paths for addressing this conundrum will require no less for mediators. Mediators will need to explore this frontier with the same courage and open-mindedness that they wish for the parties before them. It is a paradoxical responsibility. Mediators are intended to support self-discovery in others. Here, mediators will need to self-discover the understandings and abilities needed to evolve mediation to meet present needs. How this challenge is handled may impact the future of whether mediation is viable.

In conclusion, one purpose for this Advanced Mediation Practicum is to raise and to explore these frontier issues - to begin the dialogue towards evolving mediation to address emerging contemporary needs in a healthy and effective manner.

Note: This discussion focuses upon a party's capacity and competency to mediate based upon subject matter expertise. There are other issues which impact capacity and competency, such as substance abuse, domestic abuse, mental or physical impairments, etc. This discussion also focuses upon a core value of self-determination. There are also other core values to consider, such as impartiality, confidentiality, and safety.

What is the Attorney/Mediator Warranting?

Document Preparation & What Are You Warranting? When considering to perform a particular task during mediation, I ask myself, "What service am I warranting?" A mediator is to provide a process, which adheres to the core values of mediation. An attorney is to provide a legal service, which is to be legally correct, durable, and enforceable. A mediator warrants the process. An attorney warrants an opinion that a particular service is legally sufficient.

Consider the example of drafting a document. On one hand, a mediator may be called upon to prepare a document which memorializes the agreement of the parties in their own words. Here, the mediator is simply being a scribe.

On the other hand, a mediator may be called upon to prepare a document which will be acceptable to a court and be enforceable. This task may call upon the mediator to add provisions and/or craft how

provisions are stated. Here, the mediator arguably is warranting an opinion that the document is legally sufficient. Is this second role the practice of law? And if it is, does it matter?

Legal Information & Applying Law to Facts. Is there a difference between providing general legal information and applying law to the circumstances of the dispute? On one hand, general legal information can be generic and neutral. For example, a mediator might describe that child support in New Mexico must consider the child support guidelines and a final decree/court order must include a child support worksheet as an attachment.

On the other hand, beyond referencing the general area of law which might be considered, a mediator might describe how the law might apply to the circumstances of the dispute in question. For example, the child support guidelines provide specific and potentially complex requirements for how the respective income of a parent is to be treated. A mediator could be called upon to interpret how these requirements could apply to the circumstances of the parties. Is this the practice of law, where the mediator is warranting an opinion that a particular application of law to the facts of the dispute is appropriate?

New Mexico's Unique History

New Mexico is unique. New Mexico has two labels, "mediation" and "settlement facilitation." The rest of the nation uses only one label for both services, and that label is "mediation." National standards and advisory opinions use only the label "mediation." The scope of these documents plainly cover the entire range of mediation methods, including those associated with each of New Mexico's labels. However, New Mexico's history is helpful to this discussion. Each label has acquired a larger than life ideological meaning. Each label sometimes gives rise to dogmatic followers, who insist that their respective method is the only acceptable way to mediate. Nevertheless, the labels provide a useful way to discuss these issues.

Settlement Facilitation. In the 1980s**,** Chief Judge W. John Brennan brought Settlement Week to the Second Judicial District Court. Districts around the state adapted this pioneer program for their own courts. The model was inspired by either the state of Arizona or the state of Ohio or both, depending on the story. Settlement facilitators were used to help the parties evaluate the case and to design settlements. The settlement facilitators were generally attorneys, although accountants, psychologists, and the other professionals were included in the pool of settlement facilitators.

Mediation. In the 1980s, community organizations, such as the Mediation Alliance and the New Mexico Center for Dispute Resolution, were offering mediation services. The model was inspired by the tradition of facilitative mediation. In other words, the mediators helped the parties discover their own solutions, and the mediators did not evaluate the case, make resolution recommendations, or provide legal information/analysis. The mediators were primarily non-attorneys, although attorneys were included in the pool of mediators.

Today's Confusion and Conflict. Today, mediators and settlement facilitators in New Mexico both often call their service "mediation." Further, mediators and settlement facilitators both often believe their respective historical roots - facilitative mediation or evaluative settlement facilitation - are the only correct way. These common beliefs complicate consideration of these issues.

A Question of Balance and Boundaries

What may a mediator who is an attorney do? Where is the boundary between "mediating" and "practicing law?" Does the distinction even make a difference? If the distinction is relevant, then how does a mediator who is an attorney navigate the boundaries?

The two advisory opinions included in the materials provide a provocative discussion of these issues. Training participants are also recommended to review the other documents in the materials as well, including the national standards, the Resolution on Mediation and the Authorized Practice of Law, and New Mexico Rule of Professional Responsibility regarding lawyers serving as third-party neutrals. Please note that this essay is not a substitute for comprehensive research. The essay is intended to frame the issues for further consideration.

Definitions and a Spectrum of Services. Mediation is discussed as a dispute resolution process. The New Mexico Mediation Procedures Act has a similar approach, as provided in §44-7B-2.

> **§ 44-7B-2. Definitions** As used in the Mediation Procedures Act:
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> A. "mediation" means a process in which a mediator:
>
> (1) facilitates communication and negotiation between mediation parties to assist them in reaching an agreement regarding their dispute; or
>
> (2) promotes reconciliation, settlement or understanding between and among parties;

The practice of law is broader. Attorneys may give legal advice, render legal opinions, advocate for clients, and draft legal documents. As a practical matter, providing legal information and preparing documents may be a part of both services. As a mediator offers additional services beyond simply facilitating the dispute resolution process, such as providing legal information and drafting legal documents, the question is how far to go. For mediators who are attorneys, the applicable boundaries may be obscure. However, there are factors to balance which do provide guidance.

Factors and Alternatives. The ABA Section of Dispute Resolution materials indicate several considerations for the mediator who is an attorney:

- **Other Resources.** The mediator should recommend that the parties consult other resources to provide legal information and to perform legal services;
- **Competency.** A mediator should consider providing additional services only if the mediator is competent to do so;
- **Self-determination.** A mediator should avoid undermining the parties' self-determination when providing additional services;
- **Impartiality.** A mediator should avoid undermining his or her impartiality, as perceived by the parties, when providing additional services;
- **Disclosure.** If a mediator offers to provide additional services beyond facilitating the process, then the mediator should disclose that a role boundary is being crossed and the parties should consent to the additional services.

What Does This Mean? Consider the example of having the mediator who is an attorney prepare documents. Beyond a mere recitation of the agreement in the parties own words, the mediator is to prepare documents for submission to the court. The mediator may be using court-approved forms or may be preparing his or her own form. While this distinction may be important, the threshold considerations may be the same.

1. First, the mediator at the onset should disclose that he or she is an attorney, but is acting as a mediator during the mediation. The mediator should explain the difference between mediation and legal services.

2. Second, the mediator should recommend that the parties consult attorneys. Even if the consultation causes a delay in the mediation, the opportunity to pursue this option should be given.

3. Third, the mediator should be competent to prepare the document. This is a determination to be made by the mediator.

4. Fourth, the mediator should be transparent with the parties regarding what is going to happen. If a court form is going to be used, or generic provisions are going to be added, then the parties should know that.

5. Fifth, the mediator should protect self-determination. For example, a mediator should not allow a "standard provision" to impose an unknown consequence on the parties or to impose an "outcome" on a part of the dispute.

6. Sixth, the mediator should protect impartiality. For example, the mediator should avoid the appearance that how he or she drafts a provision is perceived to favor one party or the other.

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.

A Personal Comment - Why Mediation is an Art Form. There is a spectrum. On one end, mediation is a process to make people happy. On the other end, mediation is a kinder and gentler process for people to have decisions made for them. Loosely stated, one end is "therapy" and the other end is "arbitration." The "sweet spot" is in the middle. Rigid rules to determine whether a particular service is appropriate are not helpful. In mediation, the underlying needs, interests and values are teased out. Then, creative mutual solutions are designed. There is no "cookie-cutter" approach for mediation. The same is true for the expanded services to be rendered by the mediator who is an attorney.

One day case law, regulations, rules, and other authority in New Mexico may illuminate what is acceptable. Until then, mediators are left with a lifelong learning situation to learn (1) the core values of mediation, (2) what additional services may be provided within the scope of the core values, (3) how to be self-aware regarding the boundaries for wanting to help, and (4) how to continuously monitor the ever-changing texture of a mediation to know what may be appropriate in the moment. Thus, while mediation is a toolbox of techniques, skills, and processes, mediation is truly a form of art.

