MEDIATION PREPARATION

I. BENEFITS OF PREPARATION

A. Amount of attorney and client preparation directly correlates with increased lawyer and client satisfaction with mediation.

(1) Wissler Study (2010), an empirical study on 644 mediated cases found the more prepared the lawyer and client were before mediation resulted in:

(a) Increases in client's and lawyer's perceived fairness
(b) Increases in client's perceived mediator impartiality
(c) Increases in client's perceived lack of coercion
(d) Increases in client's perceived party involvement and self-determination
(e) Increases in lawyer's perceived fairness
(f) Increases in lawyer's ability to evaluate case from both sides of the dispute

(2) Less client and lawyer preparation consistently correlated with less favorable assessments of the mediation process.

B. A systematic approach to mediation preparation results in better client outcomes in mediation.

C. Mediation preparation increases trial readiness should mediation result in impasse.

II. PREPARING FOR MEDIATION

A. Meet with your client before mediation, *more than once if necessary*

B. Provide litigation risk assessment (*i.e.* why mediation is worth a shot)
(1) Reality check
(2) Limitations on evidence/testimony
(3) Time needed for trial

C. Explain the mediation process

(1) Discuss that mediation is voluntary and confidential
(2) Discuss caucusing
(3) Discuss mediator role, attorney role, and client role
(4) Discuss differences between the adversarial process and mediation
(5) Educate the client about the mediator
(6) Review mediation fees

D. Develop an interest-based central theme of the case from your client's perspective

(1) The central theme should arise from the core issue of the dispute
(2) Use the central theme to assist your client in focusing on assigned tasks during the mediation

E. Discuss your client's goals and underlying interests

(1) Determine what your client wants to get out of the mediation
(2) Consider if there are outside interests that could impact settlement such as protecting reputation/settlement confidentiality, future personal or business relations, minimizing legal costs, time savings, etc.

F. Discuss any impediments to settlement that may arise during the mediation

(1) Ensure all stakeholders with settlement/decision-making authority will be present
    (a) Identify the right participants
    (b) Step outside the four-corners of the case
    (c) Consider Co-Defendant or Co-Plaintiff positions

(2) Discuss impediments from opposing party's perspective

(3) Consider interpersonal dynamics

G. Develop negotiating aspiration and reservation points, that are reasonable

(1) Ask, "Why is this reasonable?"
(2) Discuss with your client the pros and cons of lessening extreme anchor points/reservation points

H. Prepare an offer and concession plan

(1) Discuss timing of presenting offers/concessions
(2) Determine your client's BATNA
(3) Explain to your client that these parameters can be fluid and change during the mediation

I. Prepare exhibits that support your position

(1) Consider demonstrative exhibits that reduce volume
(2) Consider objective criteria, such as case law with similar facts or expert opinions based on similar facts, to support your position

J. Review your clients' legal rights

(1) Analyze whether the offer and concession plan comport with your client's legal rights
(2) Counsel your client on any rights may be waived
(3) Educate the client regarding the difference between a memorandum of understanding and a settlement agreement
(4) Educate the client regarding how any memorialized settlement will be binding contractually, and when the agreement will become a court order

K. Prepare opening statement

(1) Attorney shall communicate the main factual and legal arguments using persuasion
(2) Client shall communicate central theme and goals of the mediation

L. Discuss task sharing with client

(1) Attorney shall continue to persuade the mediator that his or her view of the legal merits is correct
(2) Client shall communicate underlying interests and emphasize importance of meaning settlement discussions

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PRE-MEDIATION STATEMENT, MEMORANDUM, OR BRIEF

I. INITIAL MATTERS TO CONSIDER

A. What law applies to the pre-mediation statement/memo/brief?

(1) § 13-22-307(2), C.R.S. protects "any communication provided in confidence to the mediator or a mediation organization."
(2) Local rules;
(3) Rule 408, C.R.E. unless used for bias, prejudice, or negating contention of undue delay;
(4) Uniform Mediation Act
    a. Passed: D.C.; HI; ID; IL; IA; NE; NJ; OH; SD; UT; VT; WA; MA; NY
    b. Pending: GA (introduced 2021)
(5) 28 U.S.C. § 652, Alternative Dispute Resolution Act for federal courts; and/or
(6) Other administrative or regulatory law

B. What does the mediator want to review before the session?

(1) Current disposition of the underlying court case
(2) Facts about the underlying dispute
(3) Law supporting disputants' positions
(4) Impediments to settlement
(5) Initial settlement offer

C. How should the document be formatted?

(1) Mediator preferences on style and/or length (usually 5-10 pages)
(2) Professional letter
(3) Memorandum
(4) Brief

D. What should be included as attachments?

(1) Exhibits
(2) Pleadings

(3) Other objective criteria supporting your client's position

E. Who will receive the document?

(1) The mediator only
(2) The parties and the mediator
(3) Also consider how recipients may impact content

F. What is the deadline for submission?

(1) Mediator deadlines
(2) Court deadlines
(3) Also consider early submission in complex matters
(4) Submit no later than one week before mediation, preferably two weeks before mediation

II. CONTENT OF PRE-MEDIATION STATEMENT, MEMORANDUM, OR BRIEF

A. Summary of facts

(1) Tell a story with the facts from a central theme
(2) Describe the parties
(3) Describe the dispute
(4) Emphasize facts that support your client's interest-based central theme

B. Description of stakeholders

(1) Provide the a list of persons or entities who have a stake in the outcome of the case
(2) Provide names and contact information
(3) Describe each player's position within the dispute
(4) Provide information regarding who will attend the mediation
(5) Provide names and contact information of legal counsel or other representatives who will be present at the mediation

C. Procedural history

(1) Provide a brief synopsis of the case history

(2) Provide a brief synopsis of the current status of the case
(3) Provide any information that may affect timing of settlement
(4) Provide any information regarding availability of necessary information needed for settlement

D. Core Legal Matters

(1) Describe the core legal matters central to the dispute
(2) Explain how your client's facts support a specific legal conclusion, in general terms
(3) Provide a summary of the evidence that supports your legal conclusion
(4) Not necessary to provide detailed legal analysis

E. History of settlement exploration

(1) Inform the mediator of any partial agreements
(2) Inform the mediator of past settlement discussions between the parties and/or counsel
(3) Inform the mediator of current or ongoing settlement discussions between the parties and/or counsel
(4) Provide reasons, if known, as to why the parties were unable to settle the dispute themselves

F. Impediments to settlement

(1) Consider impediments from both sides
(2) Consider personalities and/or health of disputants
(3) Consider underlying conflicting interest
(4) Consider whether all stakeholders will be present
(5) Any other issues that may lead to impasse

G. Strengths and weaknesses of opposing party's case

(1) Emphasize facts that support your client's strengths that also show the opposing party's weakness
(2) Do not overlook the opposing party's strengths

H. Strengths and weaknesses of your client's case

(1) Consider a telephone call to mediator to discuss the weakness of your client's case if there are issues with you sharing this with the opposing party and/or your client
(2) Discuss you client's weakness with your client to determine what, if anything, your client is willing to disclose in writing

I. Underlying interests

(1) Discuss your client's need-based interests
    a. Basic needs: security/safety
    b. Psychological needs: relationships, prestige, self-esteem
    c. Self-fulfillment: achieving potential, future success
(2) Assess whether there are outside interests that may influence the outcome of the mediation
(3) Inform the mediation of common interests between parties that may facilitate settlement

J. Settlement Proposal

(1) Establish negotiating aspiration points and reservation points for each issue with your client
(2) Formulate a reasonable settlement proposal within the spectrum of your aspiration points and reservation points for every issue
(3) Support the reasonableness of your initial settlement proposal with objective criteria
(4) Consider a settlement proposal that is not your "best case scenario" to show good faith

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From Gladiators to Counselors

The Mediator's Role in Encouraging Attorneys to Problem-Solve

BY WESLEY PARKS

This article discusses the mediator's role in ensuring process fairness. It focuses on how mediators may help shift attorneys from negotiating competitively to collaborating to improve mediation outcomes.

Ensuring process fairness is central to the mediator's role,[1] but mediators are often challenged with ensuring fairness in the presence of gladiatorial lawyers trained to defend and protect their clients' best interests. Mediators who are not sufficiently prepared to counterbalance lawyers' adversarial behavior in mediation inevitably place the fairness of the mediation process at risk.

This article reviews generally accepted negotiation tactics that lawyers employ and the mediator's ethical duties in addressing them. It offers recommendations for mediators and the larger profession to promote fairness in mediation proceedings.

Generally Accepted Negotiation Conventions

Lawyers are portrayed primarily as advocates in popular culture and as described and prescribed in the Model Rules of Professional Conduct (Model Rules).[2] They may be viewed as gladiators fighting the good fight and defending their clients' rights, a role underpinned by the advocate's duty to keep client information confidential, even if confidentiality may be detrimental to others.[3] This function serves well the adversary system, which "is best designed to produce truth and justice by providing for the presentation of two opposing arguments—the evidentiary presentations of 'facts,' and the highly contested and partisan claims of right, truth, and desert."[4] While this focus on an adversarial model works in litigation, it may lead to challenges in mediation, given that the "candor to the tribunal" truthfulness standard applicable in proceedings before the court does not apply in mediation.[5]

Model Rule 4.1 allows for a certain level of dishonesty in negotiations, so long as the statement does not concern a material fact. The rule's comments provide:

> [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. . . .
>
> [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. . . .

Based on Rule 4.1, lawyers may ethically avoid disclosing relevant facts unknown to the other party and make immaterial false statements under the premise that such statements fall under the auspices of generally accepted negotiation conventions.[6] Thus, lawyers may bend the truth or omit information to gain a tactical advantage in mediated negotiations.

A prime example of a generally accepted negotiation convention is the use of puffery. In first-year contracts courses, law students are taught that puffery is an exaggeration, often vague, used to boost the appeal of an offer.[7] "Legally, the most significant characteristic of 'puffery' is that it is a *defense* to a charge of misleading purchasers of goods, investments, or services . . . ."[8] *Black's Law Dictionary* defines "puffing" as "[t]he expression of an exaggerated opinion—as opposed to a factual misrepresentation—with the intent to sell a good or service."[9] The line between a puff and a factual misrepresentation is measured from the perspective of the ordinary consumer of the goods and services. In other words, would

ordinary consumers of goods and services take the statement seriously?[10]

Mediators must be on high alert for less-than-honest negotiation tactics directed at other parties and at mediators themselves, who are owed a standard of truthfulness lower than the candor owed to a judge or arbitrator. The point at which tactics such as puffery become unacceptable depends on the context of the negotiation, and the culture and experience of the negotiation participants.[11]

Mediation participants are often court-ordered to attend mediation as part of the litigation process, so they frequently do not understand that facts discussed in mediation may not be the same as those presented at trial. The context for exaggeration or the use of non-material untruthful statements, such as opening with an extreme anchor point, is central to determining whether the statement may be perceived as unethical. For instance, most consumers are aware that a used car salesman may use puffery to persuade a prospective buyer to purchase a car. But pro se litigants participating in court-ordered mediation may not understand that puffery is allowed in court-ordered mediated negotiations.

Culture also affects whether a generally accepted negotiation tactic is perceived as an unethical trick. Cultural differences may affect how authority, autonomy, gender, risk, and long-term gain is perceived and acted upon during mediation.[12] For example, some countries require the "candor to the tribunal" standard of truthfulness during mediations.[13] Lawyers in these countries are "prohibited from providing mediators with inaccurate information about any matter."[14] Thus, cultural perspectives on mediation may result in the misperception of otherwise conventional norms. Research has also shown that experience influences whether a mere puff is taken as true. Young adults, for instance, have been found to misinterpret puffery in advertising as factual "55 to 80 percent of the time."[15]

Generally accepted, customary conventions used by lawyers during negotiations under the guise of mere puffery include exaggerated proposals, the distortion of reservation points, threats, false demands, and the exploitation of reciprocity norms.[16] Mediation, however, often includes unrepresented parties who have little knowledge or experience with the process, especially when mediation is incorporated into case management by court order. If a participant does not understand generally accepted negotiation conventions, is stretching the truth to get a favorable outcome during mediation ethical? What standard of truthfulness should mediators require to ensure a fair process?

Mediators must grapple with these types of questions and be comfortable exploring whether a negotiation tactic is fair, given the context, culture, and experience of the participants. The fairness question is informed by the mediator's ethical duties related to a lawyer's use of negotiation strategies during mediation.

The Duty to Assess Appropriateness

Few lawyers are trained in mediation as part of their legal education, so as part of the mediator's ethical duty to ensure a fair process, mediators will at times have to coach lawyers on the founding principles of mediation practice.[17] These principles are enshrined in the Model Standards of Conduct for Mediators (Model Standards) and include, but are not limited to, fairness of process, party self-determination, confidentiality, and competence.[18] The Model Standards provide the authority, and arguably require, mediators to coach attorneys in their roles as mediation advocates, as opposed to litigation advocates. In this regard, mediators should be mindful that the Model Rules for lawyers—drafted as ethical guidance for gladiators battling for clients in litigation—do not provide adequate guidance for lawyers advocating for clients in mediation.[19] However, the Model Rules are not the only source of guidance for ethical behavior for attorneys. The Model Rules "presuppose a larger legal context shaping the lawyer's role" and "do not, however, exhaust the moral and ethical considerations that should inform a lawyer. . . ."[20] In addition to coaching lawyers on the benefits of legal problem-solving, mediators play a significant role in informing lawyers of the moral and ethical considerations of using negotiating tactics and tricks in mediation.

Model Standard VI: Quality of Process

As stated above, ensuring process fairness is a mediator's central role. Whether a process is fair involves the participant's subjective experience as much as the objective outcomes of the mediation, referred to, respectively, as procedural fairness and substantive fairness. Participants evaluate their mediation experiences and mediation outcomes based on the rules, standards, and guiding norms of the mediation process to determine whether justice has been served through their mediated agreements.[21]

Procedural fairness. Procedural fairness refers to a participant's perception of whether the processes employed to arrive at outcomes are fair. Participants assess procedural fairness according to whether (1) there was an opportunity to tell a story, (2) the participant felt heard, (3) the participant was treated fairly, and (4) the participant was treated with dignity and respect.[22] "[P]arties' assessments of process fairness are considered important measures of the quality of dispute resolution procedures and are related to parties' compliance with agreements as well as their views of the legal system and its legitimacy."[23] Thus, ensuring procedural fairness promotes longer lasting settlements that are less likely to lead to disputes over mediated settlement agreements.[24] In other words, procedural fairness is a major factor participants use to weigh whether substantive outcomes are fair.

Substantive fairness. Substantive fairness refers to whether the participant perceives that he or she has received a fair distribution or equitable value of the bargaining surplus or available benefits. Whether the outcome is deemed substantively fair usually depends on principles of equality, need, equity, and generosity.[25] Equality espouses the idea that everyone should receive the same or comparable benefits. Need, also referred to as the "compensatory" or "redistributive" principle, assumes that the needier should receive more of the benefits. The equity principle ties distribution to contribution; it is the notion that resources should be distributed pro rata based on relative contributions.[26] The generosity principle holds that the outcome achieved by one party should

not surpass the outcome achieved by others.[27]

Effect of perceptions of fairness. As part of ensuring a fair process, mediators must understand the participants' perceptions of fairness. This requires knowledge of power dynamics and social inequities that may be at play. A participant's place within a social hierarchy has been shown to affect perceptions of procedural fairness, and these perceptions, in turn, affect the judgment of substantive fairness. For example, procedural fairness is more important and influential for those who are vulnerable and have a perceived lower social status. Such participants attend to procedural cues as a coping mechanism to help them deal with uncertainty regarding outcome fairness; for these people, strong procedural fairness reduces the influence of outcome favorability on their perceptions of substantive fairness and whether justice has been served.[28]

Mediators should assess both procedural and substantive fairness throughout the mediation process, being mindful of how power and social status may affect perceptions of fairness. Ensuring a fair process enhances participants' abilities to make rational and informed decisions, particularly for vulnerable populations.[29]

Promoting honesty and candor. The quality of process fairness increases through transparency. Thus, the Model Standards provide that a "mediator should promote honesty and candor between and among all participants."[30] As part of ensuring process fairness, mediators must identify conduct that may jeopardize process fairness and take actions to intervene, "including, if necessary, [by] postponing, withdrawing from or terminating the mediation."[31]

The mediator's duty to promote honesty and candor may be at odds with the strategies of competitive lawyers representing clients in mediated negotiations. There is an inherent conflict between Model Standard VI.A., which extols the mediator to promote honesty and candor, and Model Rule 4.1, which allows lawyers to use generally accepted negotiation conventions. Lawyers may strategically time disclosures, make non-material misrepresentations, and intentionally not disclose relevant facts during negotiations. Without the mediator gatekeeping procedural fairness, the protections of confidential mediation communications could easily allow a lawyer to use unethical negotiation tricks that would otherwise remain undiscoverable.[32] How, then, should a mediator resolve the dissonance between the standards of truthfulness in the Model Rules guiding lawyers and the Model Standards guiding mediators?

The answer is that the mediator must exercise her or his gatekeeping authority before and during mediation to ensure a fair process, including requiring candor when necessary. For example, the mediator may require candor where there are power imbalances, such as a pro se party negotiating against a skilled attorney advocate, or when the nondisclosure of a material fact would make an otherwise fair process unobtainable.[33] Whether the mediator should emphasize the higher standard of candor should be driven by the mediator's duty to provide a fair process.

> "Mediators should assess both procedural and substantive fairness throughout the mediation process, being mindful of how power and social status may affect perceptions of fairness. Ensuring a fair process enhances participants' abilities to make rational and informed decisions, particularly for vulnerable populations."

The term "candor" in the mediation context is used to connote a degree of full and forthright disclosure that extends beyond the mere obligation to tell the "literal truth," and it encompasses an ethical duty to ensure that the other parties to a mediation are suitably appraised of the facts and interests at play.[34] As discussed above, attorneys representing clients in mediation are not obliged to act with candor toward the mediator or other participants. Unrepresented parties pose heightened duties for mediators, given their lack of knowledge about court and mediation processes, lack of knowledge of substantive law and procedure, and lack of negotiation skills.[35] Thus, in advance of the mediation, the mediator should inquire about potential negotiating tactics that may be employed and emphasize a collaborative, problem-solving approach. When deciding which negotiation tactics to allow, a mediator should carefully consider the context, culture, and experience of the mediation participants and the degree to which the parties are aware of the facts and interests at play. However, even if the participants understand that generally accepted negotiation conventions may be at play, the mediator should still assess whether those conventions will impede a fair process.

Model Standard I: Self-Determination

In addition to ensuring a fair process, mediators have the duty to provide a process that promotes party self-determination and informed consent of mediated outcomes. Process fairness and self-determination are interrelated because individuals tend to perceive a process as fair when they participate in decision-making, are not coerced into making a decision, and have knowledge of the relevant information necessary to make a decision.[36] "Self-determination is the

act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."[37] Self-determination allows parties to problem-solve and resolve disputes on their own terms, based on their own values and interests. Dispute resolution in mediation should occur "only if the people involved in the dispute choose resolution on their own and without anyone forcing their hands."[38]

Too often mediations are not conducted with party self-determination at the core. Lawyers speak on behalf of their clients. Participants do not see each other because lawyers request caucuses, so the mediation is conducted via shuttle diplomacy. To address this situation, evaluative mediators with legal expertise can reality check participants based on predicted court outcomes.[39] But adversarial mediation advocacy practices and overly evaluative modes of mediation reduce party self-determination, resulting in a process that is more like arbitration, without the due process protections.[40]

Self-determination is best viewed in degrees, on a spectrum from conceptual (also known as "formal") to actual (also known as "substantive").[41] Self-determination requires (1) competency in decision-making, (2) lack of coercion or voluntary decision-making, and (3) informational knowledge. A mediation participant may make decisions with self-determination, clarity of mind, and voluntarily, yet still lack a true understanding of all relevant information needed to make a fully informed decision. Decisions based on inadequate information have been termed "autonomous," are of low quality, and are closer to the conceptual side of the self-determination spectrum. Decisions made with all three components, including full awareness of all relevant information, fall on the side of the actual self-determination spectrum and are of a higher quality.[42]

Generally accepted negotiation conventions chip away at the quality of self-determination, especially in the presence of power imbalances. Mediators should promote honesty and candor in mediations because transparent information exchanges result in increased self-determination, which in turn influences perceptions of procedural and substantive fairness.

Model Standard V: Confidentiality

In addition to promoting party self-determination and fairness of process, mediators must also ensure the confidentiality of the process. Confidentiality is a foundational principle of mediation. It encourages parties to problem-solve without fear that their communications will later be used as evidence against them in court. "The assumption is that when parties' communications are protected from public disclosure, they are more willing to engage in open discussions that will lead to the settlement of their disputes."[43] Pursuant to the Model Standards, a mediator must ensure that participants understand the scope of confidentiality and its limits.[44] The Colorado Dispute Resolution Act, CRS §§ 13-22-307 et seq., allows disclosure of confidential mediation communications only for specific, narrowly defined exceptions. CRS § 13-22-307(2) lists exceptions for disclosure where all parties consent in writing and for communications that (1) reveal the intent to commit crimes or threaten child safety, (2) are required to be disclosed by statute, or (3) are relevant to prove the mediator's willful or wanton misconduct.[45]

> "With mediation increasingly incorporated into the litigation process, either voluntarily or by court mandate, the time seems right to reconsider the standard of truthfulness in mediation. Is fairness better served by maintaining the Model Rule 4.1 standard of truthfulness, or should the candor to the tribunal standard be adopted for mediation?"

Mediators should be particularly concerned when confidentiality is used in mediation to exploit participants or to gain a tactical advantage at trial.[46] If the mediator is not diligent in assessing fairness and self-determination, mediation could be used as a discovery tool or an opportunity for a fishing expedition. Mediators should act as gatekeepers of unethical negotiating tactics, as confidentiality protections make proving unscrupulous lawyer behaviors extremely difficult, if not impossible.[47] Leonard Riskin once observed that lawyers typically act in accordance with "the lawyer's standard philosophical map" rather than the "mediator's philosophical map."[48] Therefore, mediators must remind lawyers which map will be used to guide participants through the mediation process.

Model Standard IV: Competence

Mediators may hesitate to address generally accepted negotiating maneuvers for fear that they may face the gladiator's wrath. However, competent mediation practice requires an assessment of how such tactics influence the fairness of the process and party self-determination. Mediators must conduct the mediation with "the necessary competence to satisfy the reasonable expectations of the parties."[49] Competent mediators must have required training and experience, including competence in "cultural understandings and other qualities."[50] Thus, to meet competency standards, a mediator must understand power imbalances and cultural differences and be able to counterbalance

negotiating tactics to ensure a fair process and party self-determination. If the mediator cannot competently address such matters, the Model Standards require mediators to take appropriate steps to address the situation, "including, but not limited to, withdrawing or requesting appropriate assistance."[51]

Recommendations for Promoting Fairness

The following recommendations are offered to promote fairness in the mediation process. Some are directed at individual mediators, and some are aimed at the profession at large.

For Mediators

Mediators may be able to mitigate the negative effects of puffery and similar tactics by caucusing with participants before mediation to develop trust and assess participants' knowledge of problem-solving negotiations and ability to empathize with their counterparts.[52] Coaching sometimes takes time. "[C]ourts encouraging or ordering parties' use of mediation should institutionalize sufficient time for pre-mediation caucuses as well as systems that provide for feedback and quality assurance."[53] Mediators should watch for competitive cues during the initial intake and discuss the differences between litigation and mediation and the benefits of a problem-solving approach before mediation. A simple telephone call before mediation to discuss the parties' view of the dispute and their goals for mediation may reveal abundant information regarding negotiation strategies. With this information, the mediator could suggest interventions to promote a fair process and self-determination.

For instance, if a represented party intends to use a competitive negotiation style and a pro se party is unfamiliar with generally accepted negotiation conventions, the mediator might suggest that the pro se party consult with an attorney to prepare a strategy for the mediation. "[T]he use of pre-mediation and early caucusing [may] enhance parties' trust in the mediator and the process, affirm that each party is a valued member of the group engaged in mediation, and help parties prepare for their participation."[54]

For Law Schools

Lawyer training should start well before a pre-mediation caucus. Law schools should mandate mediation or mediation advocacy courses because lawyers often must represent clients in mediation as part of representing clients in court proceedings. Such courses should cover skills outside the traditional law school curriculum. For example, mediators possess the skill of conflict diagnosis and have knowledge of "strategic, structural, cultural, psychological, and cognitive barriers to resolution," in addition to being skilled in applying appropriate interventions to overcome these barriers.[55] Law school education typically does not teach lawyers these skills but focuses instead on one-sided representation of clients and zealous advocacy. Lawyers are also not typically trained to develop empathy for the opposing position's side of the dispute.[56] Law schools might take a lesson from mediation training, which has been shown to have a "de-biasing" effect on lawyers by training them to view a dispute from all sides and develop empathy. Further, lawyers with mediation training have been found to make fewer errors in advising clients on when they should settle.[57] Empathy training may be exactly what lawyers need in this current era of social-political fragmentation.

For the Profession

Process fairness necessitates that the mediation profession be diverse. A mediation roster that reflects the population it serves will result in more marginalized voices being heard and more people who are willing to tell their stories during mediation. From the perspective of the procedural justice literature,

> increasing the diversity of the pool of mediators should enhance marginalized parties' willingness to perceive that they will be, and were, heard and understood, therefore increasing marginalized parties' willingness to exercise voice and increasing the likelihood of actual understanding and trustworthy consideration—which may then reduce the likelihood of unjustifiably disparate outcomes.[58]

A New Standard?

With mediation increasingly incorporated into the litigation process, either voluntarily or by court mandate, the time seems right to reconsider the standard of truthfulness in mediation. Is fairness better served by maintaining the Model Rule 4.1 standard of truthfulness, or should the candor to the tribunal standard be adopted for mediation? Given the central role that mediation now plays in the justice system, it is difficult to find any basis in principle for distinguishing between the duties owed by lawyers engaged in mediation and those involved in adjudicative forms of dispute resolution.[59] Perhaps "it is time (especially in this era of 'alternative facts') to revisit lawyers' duties to be more truthful in negotiations (Rule 4.1) generally, as in court (Rule 3.3)."[60]

Conclusion

When facing the wrath of the gladiator, a competent mediator must take care to assess how generally accepted negotiation conventions may influence the fairness of the process and party self-determination. Mediators should begin this assessment at the intake phase; carefully assess power imbalances and the effect of social inequality during the mediation process; and intervene as necessary, "including postponing, withdrawing from or terminating the mediation."[61] CL

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NOTES

1. Model Standard IV. The Model Standards were adopted by the American Arbitration Association (Sept. 8, 2005), American Bar Association (Aug. 9, 2005), and Association for Conflict Resolution (Aug. 22, 2005).

2. Menkel-Meadow, "The Evolving Complexity of Dispute Resolution Ethics," 30 *Geo. J. Legal Ethics* 389 (2017).

3. *Id.* at 396. *See also* Model Rule 1.6(b)(1)–(3) (a lawyer may only reveal confidential information to prevent reasonably certain death or substantial bodily harm, to prevent the client from committing a crime or fraud, or to prevent, mitigate, or rectify substantial financial injury to another).

4. Menkel-Meadow, *supra* note 2 at 397.

5. Model Rule 3.3. A higher standard of truthfulness applies when a lawyer is in front of a tribunal. "'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." Model Rule 1.0(m).

6. *See Ausherman v. Bank of America Corp.*, 212 F.Supp.2d 435, 449 (2002) ("A fact is material to a negotiation if it reasonably may be viewed as important to a fair understanding of what is being given up and, in return, gained by the settlement.").

7. Hoffman, "The Best Puffery Article Ever," 91 *Iowa L. Rev.* 1395, 1397 (2006).

8. *Id.* at 1400 (emphasis added).

9. *Black's Law Dictionary* at 1061 (9th ed. 2010).

10. Hoffman, *supra* note 7 at 1403.

11. Abramson, "Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics, and Tricks," 23 *Harvard L. Rev.* 319, 328 (2018).

12. Lee, "Culture and Its Importance in Mediation," 16 *Pepp. Disp. Resol. L.J.* 317 (2016). The author identifies "four cultural dimensions . . . (1) power distance; (2) individualism/collectivism; (3) masculinity/femininity; and (4) and uncertainty avoidance." *Id.* at 321–22.

13. Wolski, "On Mediation, Legal Representatives, and Advocates," 38 *U. New South Wales L.J.* 5, 24–25 (2015). Canada and Australia require a standard of truthfulness similar to Model Rule 3.3.

14. Wolski, "The Truth about Honesty and Candour in Mediation: What the Tribunal Left Unsaid in Mullins' Case," 36 *Melb. U. L. Rev.* 706 (2012).

15. Gaeth and Heath, "The Cognitive Processing of Misleading Advertising in Young and Old Adults: Assessment and Training," 14 *J. Consumer Res.* 43, 43–44 (1987) (internal citations omitted).

16. *See* Abramson, *supra* note 11 at 326.

17. Stamatelos, "Lawyers of the Future: Is Legal Education Doing Its Part?" 66 *Drake L. Rev.* 101, 107 (Jan. 2017). Law schools historically offer few courses in negotiation and mediation, and when they do, they are not typically required.

18. *See supra* note 1. In examining the quality of the mediation process, this article focuses on Model Standards I, II, IV, V, and VI because these standards are the most likely to be triggered when a mediator is facing generally accepted negotiation conventions. Other ethical standards may also be implicated.

19. Menkel-Meadow, *supra* note 2 at 391. The author argues for more context-based rules that contemplate the many different roles of a lawyer, including the lawyer as problem-solver.

20. Model Rules, Preamble cmts. 15–16.

21. Hyman and Love, "If Portia Were a Mediator: An Inquiry into Justice in Mediation," 9 *Clinical L. Rev.* 157, 161–162 (2002). Mediation justice is referred to as "justice-from-below," as opposed to justice delivered from the bench or "justice-from-above."

22. Welsh, "Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation," 70 *S.M.U. L. Rev.* 721, 733–34 (2017) ("[P]eople tend to perceive a process as fair or just if it includes the following elements: (1) 'voice' or the opportunity for people to express what is important to them; (2) 'trustworthy consideration' or a demonstration that encourages people to believe that their voice was heard by the decision-maker or authority figure; (3) a neutral forum that applies the same objective standards to all and treats the parties in an even-handed manner; and (4) treatment that is dignified.").

23. Wissler, "Representation in Mediation: What We Know from Empirical Research," 37 *Fordham Urb. L.J.* 419, 437 (2010).

24. For a study of litigation about mediation, *see* Coben and Thompson, "Disputing Irony: A Systematic Look at Litigation about Mediation," 11 *Harv. Negot. L. Rev.* 43, 56–59 (2006).

25. Albin, "The Role of Fairness in Negotiation," 9 *Negot. J.* 223, 238–39 (1993).

26. *Id.*

27. Welsh, "Perceptions of Fairness in Negotiation," 87 *Marq. L. Rev.* 753, 754 (2004).

28. Welsh, *supra* note 22 at 740–741. Welsh cites examples of studies from employment and labor disputes involving employees, supervisors, women, and minority populations.

29. *Id.*

30. Model Standard VI.A.4. (emphasis added). The "should" language is of note here, as the mediator is under no obligation to promote honesty and candor at all times and in all situations.

31. Model Standards VI.A.9. "A mediator shall conduct a mediation . . . in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants."

32. *See infra* note 45.

33. *See* Keesing, "Should Lawyers Owe a Duty of Candor in Mediation?," 11 *Am. J. Mediation* 11, 18–19 (2018). The author discusses *Spaulding v. Zimmerman*, 116 N.W.2d 704 (1962), as an example where lawyers intentionally failed to disclose a plaintiff's aortic aneurysm and obtained a larger settlement as a result.

34. *Id.* at 12.

35. *See* Wissler, *supra* note 23 at 420.

36. *See* Shapira, "A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform," 100 *Marq. L. Rev.* 81, 125–27 (2016).

37. Model Standard I. Self-Determination.

38. Welsh, *supra* note 22 at 726.

39. *Id.* at 727.

40. Nolan-Haley, "Mediation: The New Arbitration," 17 *Harv. Negot. L. Rev.* 61, 96 (2012). The author argues that the de-emphasis in party self-determination and the lawyers' presence in mediation, both as mediators and advocates, has resulted in mediation no longer being mediation, but more of a new type of arbitration.

41. Welsh, *supra* note 22 at 730 n.36. The terminology of "conceptual" to "actual" is used here to differentiate from procedural versus substantive process.

42. Shapira, *supra* note 36 at 125–27.

43. Nolan-Haley, *supra* note 40 at 82.

44. Model Standard V.C. ("A mediator shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.").

45. CRS § 13-22-307(2) provides:

> Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization, unless and to the extent that: (a) All parties to the dispute resolution proceeding and the mediator consent in writing; or (b) The mediation communication reveals the intent to commit a felony, inflict bodily harm, or threaten the safety of a child under the age of eighteen years; or (c) The mediation communication is required by statute to be made public; or (d) Disclosure of the mediation communication is necessary and relevant to an action alleging willful or wanton misconduct of the mediator or mediation organization.

46. *Id.*

47. Nolan-Haley, *supra* note 40 at 82.

48. Riskin, "Mediation and Lawyers," 43 *Ohio St. L.J.* 29, 43–48 (1982). *Cf.* Nolan-Haley, *supra* note 40 at 83.

49. Model Standard IV.A.

50. Model Standard IV.A.1.

51. Model Standard IV.B.

52. Welsh, *supra* note 22 at 761.

53. *Id.* at 756.

54. *Id.* at 755.

55. Frenkel and Stark, "Improving Lawyers' Judgment: Is Mediation Training De-Biasing?," 21 *Harv. Negot. L. Rev.* 1 (2015). The authors suggest that mediation training should teach mediators about the roots of conflict, how to assess disputant interests, and include education on cognitive and motivational biases and how these biases impact decision-making. This "training . . . is beyond what most law students or lawyers receive." *Id.* at 18.

56. Model Rule 1.3 cmt. 1. ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

57. Frenkel and Stark, *supra* note 55 at 3–4.

58. Welsh, *supra* note 22 at 751.

59. Keesing, *supra* note 33 at 21.

60. Menkel-Meadow, *supra* note 2 at 414.

61. Model Standard VI.C.