From the Chair

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Partnerships and Facilitation
Mediators develop new skills for complex cases

By Lela P. Love and Joseph B. Stulberg

ADR PRACTICE

A mediator’s basic performance skills are the foundation for his or her success in all contexts. The successful practitioner hones these skills with an intensity comparable to that of a concert violinist who daily practices scales, the martial artist who repeats simple “kadas,” or the Olympic equestrian who reinforces the “heels down and eyes up” principle with every move.

These ingrained foundational skills should ensure for all mediation participants that the mediator: establishes an environment that is conducive to communication and collaboration; executes an opening statement that establishes trust and engagement; captures parties’ references to interests, issues, proposals, feelings and principles even as they hurl insults and ultimatums at one another; deploys a repertoire of moves to pierce potential impasses; crystallizes agreement terms; and fashions closing ceremonies.

But some disputes contain levels of complexity that require complementary skills. In such complex cases, one or more factors are present with a salience or intensity not typically encountered in a traditional case.

Such factors may include multiple parties, multiple issues, multiple persons or groups, multiple forms of “remedies” for various issues, multiple languages and ethnicities, unusual levels of mental or emotional anguish or high public visibility. When faced with these cases, mediators are more likely to use facilitation techniques and to seek partners who can supply additional, complementary skills.

Case studies

To provide a context for analysis and application, imagine the following scenarios:

Case A: Tenants and Landlords. A large group of residential and commercial tenants who live in a building in a large urban setting are threatening both rent strikes and lawsuits against the landlord. The issues include: asbestos and lead paint in the building; the adequacy of windows and ventilation; the ovens used by commercial tenants as part of a restaurant and bakery business and the timing, safety and legality of baking-related activities; the parking of commercial vehicles; the payment of both overdue and future rent.

The parties’ impasse on various issues has been exacerbated by ethnic divisions and tensions. The building manager is from South America, the landlord is Jewish and the tenants are from mixed ethnic backgrounds, including African-American.

Racial slurs have encouraged polarized and positional approaches. The situation has been reported in the press. The parties agree to participate in mediation.

Case B: The Suicide. A mother, father and son arrive at their home in a suburban community to discover that their daughter (and sister) has committed suicide by shooting herself in the head. The family is distraught, and the brother calls 911.

Instead of an ambulance, a SWAT team arrives on the scene and mistakes the family members for perpetrators. The grief-stricken family members, trying to get medical attention for their loved one, are thrown on the ground and handcuffed. As a result, they suffer multiple injuries, both physical and psychological.

The family brings a civil action against the police department and the town. The case is referred to mediation.

What partnering and facilitation skills are relevant to intervening in such situations?

Partnering skills

A mediator may choose to use partners in multiple ways. Some common partnerships involve co-mediators, interpreters and resource experts. Whoever the partner, several principles must guide these partnering relationships:

1. To the extent possible, the team must be neutral. That is, the mediator’s partner must not have a partisan affiliation with any party. Put another way, all partners must be acceptable to all parties.

2. The team must share a similar goal or vision of the task.
3. There should be no more partners than are necessary to perform the tasks.

4. Partners should reflect diverse, complementary and relevant resources for the situation.

5. Partners must develop and follow a plan.

How do these principles apply to the cases described above? In Case A, the mediator is undertaking a significant challenge in simply managing the conversational project in a manner that is both efficient and responsive to stakeholder needs.

The diversity of the parties' interests and backgrounds would prompt the prudent mediator to be cautious in assuming that his or her knowledge of the legal, business and cultural/religious norms are sufficiently comprehensive to service the participants. Hence, in order to promote efficiency, as well as match expertise to the challenge, a mediator might consider working with a partner.

Minimally, he or she would consider using a resource team of language translators (assuming one or more of the many parties did not speak English), and credible professionals (in this case, for example, architects were very useful) whose expertise might help provide all participants with a common understanding of the various norms and requirements that might impact resolution of the conflict. A co-mediator whose professional background, language ability or ethnicity might balance the team should also be considered.

Case B's challenges are more nuanced. The family's psychological trauma is significant and sustained. A mediator who pays no attention to those matters in the discussion would disserve the parties. Most lawyer-mediators, though, are not trained professionally in the helping professions.

Therefore, a mediator who partners with a trained psychologist would send an immediate signal to all participants that the appropriate discussion range for this situation could be more extensive than simply venting and translating all concerns into money damages.

It is important for partners to work collaboratively, but collaboration is not accomplished by accident. Partners must confirm they have a shared vision of the goals of the mediation process and the strategies they will use, assign specific tasks in a manner designed to make the mediation efficient and productive, act in a supportive, noncompetitive manner and develop fail-safe plans and "exit strategies" to ensure that an ineffective partnership does not sabotage the parties' well-being.

Considerations with respect to neutrality and optimal performance are important for anyone on the mediation team or assisting in the mediation effort. An interpreter, for example, must be physically positioned to reinforce a neutral role, must develop a plan with the mediator to ensure adequate breaks so that the interpreter can function at maximum capacity, and must alternate between simultaneous and consecutive translation, depending on whether speed or accuracy is most critical at that precise moment.

These features of a successful collaboration do not happen by accident. They require attentive discussion by both the mediator and her partner.

Tips for Working with an Interpreter

- Ensure that the seating arrangement allows the interpreter to have a clear line of vision to parties for whom she must translate.
- Position the interpreter so that parties' eye contact naturally flows to the mediator and the other parties to enhance communication and connection.
- Use consecutive translation, in which each sentence or idea is translated after it is spoken, when accuracy is critical (e.g., the opening statement or reviewing the final agreement). Use simultaneous translation, in which the interpreter speaks a beat behind the speaker for whom she is translating, when a natural flow of conversation is most important (e.g., when parties are telling their stories).
- Orient the interpreter to the mediation process by providing her with copies of relevant documents.
- Develop an understanding about accuracy versus diplomacy. Generally, the interpreter should not soften or reframe harsh language, but rather give an accurate summary of what is said.
- If resources allow, use two interpreters who can help each other when it is clear that translation will be needed throughout the process. If using only one interpreter, ensure the interpreter receives adequate breaks.
- Ensure that the interpreter remains neutral and does not become partisan for the party who is most dependent on translation.
- Minimize or eliminate cross-talk or interruptions, as translating more than one person at a time is too difficult.

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Facilitation skills

The conventional facilitation process involves two significant roles, a facilitator and a recorder, although in many practical contexts one person serves both roles. Typical facilitation settings have the following features: 1) multiple stakeholders, but not crystallized "parties"; 2) fluid agenda of issues and concerns; 3) multiple relationships among the stakeholders, with some being hierarchical and others horizontal; and 4) decision-making time frames that may vary significantly by particular topic. Given this context, the facilitator's role is to enhance discussion, promote clarity and keep the group on track toward reaching its goals.

In traditional intervener roles, the facilitator focuses primarily on process matters. The facilitator highlights for groups the different ways in which group members might discuss a given topic.
generate options, rank preferences and make decisions.

The recording function is a critical component for advancing discussion. Contrary to a dispute setting in which each party is taking its own notes, the recorder produces a public, visible memory of the group’s discussion, ideas and proposals.

The recorder captures the dialogue in language that is accurate but neutral,

writes in a quick, legible style and keeps the medium on which the notes are recorded in a place that is easily and readily visible to all participants. Doing all this effectively requires significant multitasking skills.

The facilitator contributes both a focus on process issues and a public memory of the discussion. Together, these tools produce a constructive tone and organized analysis in situations otherwise ripe for dissension and wasted effort.

Applying facilitation skills

How might these skills help a mediator service the cases noted above?

In Case B (the Suicide), the parties frame the legal issues when filing their lawsuit. But this appears to be a situation in which the intervener, when inviting the plaintiffs to describe their concerns, should explicitly encourage them to discuss their plight in a manner that illuminates the multi-layered drama of this tragic human situation.

One can imagine the plaintiffs’ lawyer wanting to be the sole spokesperson for the family’s concerns. Instead of that potentially adversarial format, the mediator should encourage a rich description of the family’s plight by inviting all family members (and any support personnel) to actively participate.

Similarly, the defendant should be invited and encouraged to communicate with the plaintiffs in unconventional ways. Various officials, both elected and appointed, might constructively be present to express both concern for the plaintiffs’ well-being and support for the officials’ employees. Such officials may well be open to hearing the plaintiffs’ ideas about how such occurrences could be prevented in the future.

How would the mediator invite the participation of each of these persons? This is a significant challenge. If the mediator treats some or all of these participants as witnesses, or wants to have the parties’ attorneys focus sharply on exchanging and bargaining over positional monetary demands, then she is imposing a rigid, insensitive box on each person’s participation.

The challenge must be met instead by leading a discussion among all participants targeted on gaining agreement about appropriate methods for sharing narratives and identifying concerns. That is, the intervener must explicitly facilitate a discussion among the participants that focuses on who should talk, in what sequence, for how long, under what circumstances, with what goals and with what (if any) recording mechanism. The process that the parties agreed on might (predictably) look considerably different from what has become a very conventional courtroom presentation of opening mediation statements made exclusively by lawyers.

In Case A (tenants and landlords), while various persons have agreed to participate in what was labeled a “mediation,” the situation is, in fact, much more fluid. Getting the appropriate stakeholders together for discussion — not simply those initially identified — is the intervener’s first task. By facilitating and recording this important dialogue, the intervener helps the participants construct an effective problem-solving framework to address the situation’s multiple ambiguities and to provide a mechanism for ongoing relationships.

Once the appropriate parties convene, one can imagine a series of monthly meetings in which parties identify concerns, make provisional agreements and return to examine the success and challenges in the last month. In fact, the case upon which this hypothetical is based involved many meetings over the course of nine months.

There, the mediators gradually worked themselves out of a job by demonstrating the structure of an effective problem-solving process and generating experiences of success, month by month, so that parties could identify issues, develop proposed solutions and garner a variety of commitments to move forward within targeted time frames.

Success created goodwill, and ultimately the meetings had a social, as well as a business, component. The most important tool the mediators conveyed to the parties was the ability to facilitate their own meetings.

Every mediator wants to improve his or her performance skills; advanced seminars, conferences and mediator-training programs are designed to sharpen those broad-based, fundamental skills. But some conflict situations require more of the intervener than even the most creative use of those fundamental skills.

Two complementary skill-sets—partnering and facilitation—enhance the mediator’s capacity to effectively serve these complex controversies. These constitute only two elements of a large universe of complementary skill sets.

The mediator who expands her repertoire to become proficient in these related practices reflects a professional’s commitment to continuous learning; or, put less charitably but with obvious bite, she at least avoids the fate that Bob Dylan so eloquently noted: “he who isn’t busy being born, is busy dying.”

Endnote

1 We use the term “facilitation skills,” not in the context of the facilitative/evaluative mediation debate, but in the sense in which facilitators, in contrast to mediators, conduct the strategic planning conference of a business or service organization, for example.