

NEW MEXICO Lawyer

March 2010 Volume 5, No. 1

www.nmbar.org



Dispute Resolution & Prevention in New Mexico

Alternative Methods of Dispute Resolution (ADR) Committee
State Bar of New Mexico



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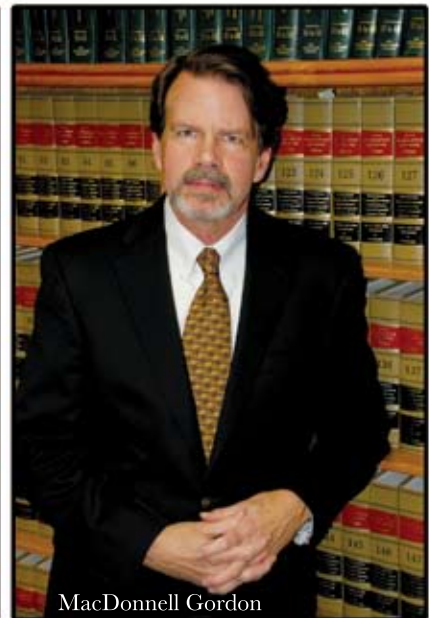
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ADR *in New Mexico State Courts*

By Celia A. Ludi and David P. Levin



Alternative methods of dispute resolution (ADR) are being used increasingly by courts and lawyers to supplement traditional resolution by litigation. Although court caseload numbers are rising, there are, paradoxically, fewer trials—for many reasons outside the scope of this article. As trial practice shrinks, mediation representation as a practice area is growing. Study after study has shown that cases resolve faster and less expensively when ADR is employed. Even cases that don't settle are better prepared for trial, reducing the time and cost both in and out of court. Competent lawyers must learn what ADR methods are being used, what court programs exist and how they operate, and how to effectively participate in ADR.

What is ADR? When a client engages an attorney for legal representation in a litigated dispute, the attorney becomes the guide, advisor, and active advocate to protect client rights and advance client interests. For the client, litigation is a guided decision-making process, led by the professional expertise and skills of the attorney. The client and lawyer may confer on the strategic decisions, but the lawyer makes the tactical decisions.

The paradigm shifts in ADR. Instead of being mostly bystanders, parties directly participate as players. The intent is less to attack and beat the other side than to work together to craft a mutually acceptable resolution of the case. ADR is less structured than litigation and depends on multi-dimensional discussion. Likewise, the role of the attorney changes from that of champion to that of coach and cheerleader.

ADR and litigation are complementary processes. A legal conflict may be resolved by trial or by agreement. ADR facilitates both. Use ADR to resolve as many issues as possible by agreement and to narrow the issues which remain unresolved. Then use litigation to more efficiently dispose of remaining issues.

ADR Processes. Mediation, settlement facilitation, mandatory non-binding arbitration—these are some of the ADR approaches that are available to litigants in New Mexico state courts. They are similar in that they employ a neutral third party (often, but not always, a lawyer) to help litigants resolve their differences. Exactly how the process unfolds in any particular case varies considerably depending on its purpose. This article focuses on mediation and settlement facilitation.

Mediation is probably the best-known ADR approach. It's also a label commonly used to describe a multitude of dispute resolution styles and processes. In mediation, a person trained in communication techniques, who may or may not be a lawyer, facilitates confidential settlement discussions among disputants and their attorneys (although litigants are increasingly self-represented).

There are two basic styles of mediation, often referred to as *facilitative* and *evaluative*.

A facilitative mediator helps the parties listen and talk to each other so they can come up with their own solutions. The mediator does not evaluate the legal positions or strategies of either party and does not offer recommendations or possible solutions. The mediator guides discussion, supports each party's ability to acquire an understanding of the dispute, and provides the parties with opportunities to discover their own options for a mutually agreeable resolution. Mediators who favor a facilitative style tend to emphasize joint sessions with all of the parties present and may occasionally use a private meeting with each side, commonly called a *caucus*. A question asked by a facilitative mediator might be, "Tell us more about what might work for you to satisfy your needs."

An evaluative mediator not only uses all the techniques of a facilitative mediator but also evaluates the strengths and weaknesses of each side, may offer opinions and recommendations, and even propose solutions. A statement made by an evaluative mediator might be, "I believe your position will not be accepted by a judge. I recommend that you consider this option..."

Notice from the examples that the facilitative question focuses on obtaining information from *the party* and that the evaluative statement focuses on giving information from *the neutral*.

Settlement facilitation, also sometimes referred to as mediation, is an evaluative approach. The settlement facilitator is generally a lawyer trained in mediation techniques who has experience and expertise in the subject matter area. The facilitator is often expected to employ an evaluative style of mediation

Mediators who favor an evaluative style tend to employ shuttle diplomacy where the mediator carries information and offers between the parties who are in separate rooms. They may occasionally

use a joint session. Evaluative mediators control the process by controlling the flow of information.

There is no bright line between the styles. A mediator may use either style at different times or may have a blended style. There is no single “right” way to mediate.

Typically, programs referred to as “mediation” are more facilitative, and programs referred to as “settlement facilitation” are more evaluative.

Lawyer’s Role. Effective representation begins with preparation. A lawyer must prepare the case for ADR with the same care and thoroughness as for trial. Further, the lawyer must prepare the client. A client must know the character of the ADR process, have realistic expectations about what will happen, and understand how they will be expected to participate.

During the ADR process, the effective lawyer operates in several dimensions: protecting and advocating for the client, talking and acting in a manner conducive to collaborating to help the process work, and being a creative problem solver to address the needs of all the participants.

ADR advocacy is the subject of the ADR CLE track at the State Bar annual meeting. See also, e.g. Abramson, Harold, *Mediation Representation: Advocating in a Problem-Solving Process*, (NITA, 2004).

Court-Connected ADR Programs. New Mexico court-connected ADR programs have developed on a district-by-district basis. Program characteristics vary by district and by each program within a district. The localized development of court-connected ADR programs has important implications. After acquiring an understanding of the general types of ADR, attorneys need to determine the characteristics and accessibility of programs in their particular district. While there is not sufficient space here to describe every court program in detail, below is a summary of some court programs around the state. More information is usually available on each court’s website.

Summary. Our constitutional judicial system faces tremendous challenges. There is no money to increase the number of judges, courtrooms and supporting resources, even as the number of litigated cases is rising. Courts are becoming more creative in finding ways to meet their constitutional mandates. As competence in ADR becomes a standard of care and ADR becomes routine, today the best practice for lawyers is to have a deep understanding of the skills and culture of both litigation and ADR.

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David Levin is the director of Court Alternatives for the 2nd Judicial District Court and is co-chair of the ADR Committee .

Court-Connected ADR Programs

Metropolitan and Magistrate Courts

Metropolitan Court in Albuquerque and magistrate courts in seven counties (Curry, Eddy, Grant, Otero, Sandoval, Santa Fe, and Taos) offer free *facilitative* mediation programs staffed by trained volunteers for civil cases.

Domestic Mediation

Almost every district court has some kind of mediation program for divorces and parentage actions to help parents develop or modify parenting plans. Program structures vary on whether staff or outside contractors serve as mediators, whether issues are limited to custody and time-sharing, whether the mediator is paid, and whether the program is facilitative or evaluative.

Settlement Facilitation

The 1st, 2nd, 3rd, and 13th districts offer civil and domestic settlement facilitation programs. Facilitators may be assigned by the court or selected by the parties. Some programs have pools of facilitators; others operate on an ad hoc basis. Facilitators must be attorneys in some districts; in other districts accountants, counselors and other professionals may be facilitators. Qualifications and fees vary.

Mortgage Foreclosure Mediation

Courts across the nation are establishing mortgage foreclosure mediation programs. In New Mexico, the 1st district has a pilot project that is an option under the established ADR program. A foreclosure mediation project has also been initiated in the 13th district.

Children’s Court

The Administrative Office of the Courts (AOC) collaborates with the Children, Youth and Families Department to offer mediation of child abuse and neglect and open adoption cases in all the districts except the 1st, which has an in-house child welfare mediation program.

Water Law

The 3rd and 12th districts have water rights mediation programs established in conjunction with the Office of the State Engineer to resolve water rights issues outside of court when possible.

Criminal Matters

The 2nd district has initiated a Criminal Settlement Conference Pilot Project. The assigned judge refers the case to the program, and a different judicial officer or retired judge serves as settlement judge. After meeting with the attorneys, the settlement judge holds a conference with counsel, the defendant, and the victim. The discussion focuses upon the right to trial, possible sentences, and plea agreement options.

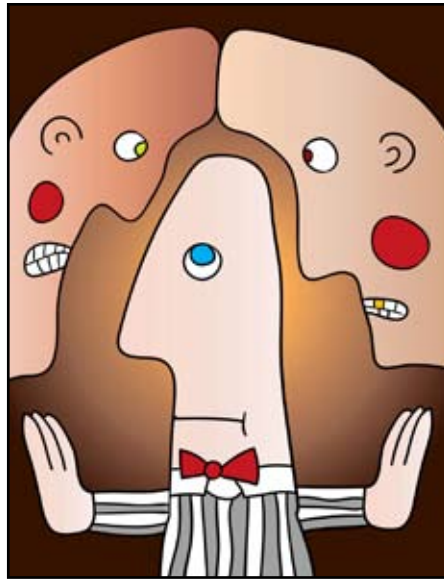
Appellate Mediation

ADR isn’t only available at the trial court level. New Mexico is one of a few states that offer mediation at the appellate level. Any civil matter pending before the Court of Appeals is eligible, with a few exceptions.

Representing Your Client in Mediation

By Nicholas R. Gentry

In the “old days,” attorneys used to talk with each other and, believe it or not, settle cases without the assistance of a mediator. That willingness to communicate, or perhaps the skill of communicating, seems to be disappearing, replaced by the phenomenon of mediation. Since it appears that mediation will be with us for awhile (it is, after all, enconced in our local rules), attorneys should develop adequate skills to appropriately represent their clients in the mediation process. However, based on my involvement in hundreds of mediations as a mediator and as an attorney representing a party, I have been impressed by the lack of skills deployed by many attorneys on behalf of their clients. And, of course, it is the client that suffers. Many of these attorneys are competent, or even quite skilled, while operating as litigators in the litigation process. However, litigation is not mediation. Mediation involves a different mindset and some different skills.



Certainly there are some basic skills that are crucial for both litigation and mediation: knowing the facts, pro/con; knowing the law, pro/con; understanding the other party’s position; and communicating with your client about the case and the nature of the process. In addition, skills involved in representing your client in mediation are different from skills involved in being a good litigator. The process is different, and the goals are often different.

Mediation involves negotiating a settlement for your client on the best terms that can be achieved under the circumstances. Some of those key circumstances are the ever-present risk of trial; the time, expense and stress of going to trial; and the finality and certainty of settlement. Finality and certainty are often not achieved at the conclusion of a trial, even when there is a successful outcome. Mediation presents the opportunity to craft imaginative and innovative terms which are impossible to achieve at trial. Mediation also allows the client the opportunity to offer input and to assist in fashioning an acceptable outcome. If the attorney is ill-prepared and does not have the skills appropriate for mediation, the chance to achieve a good settlement through mediation is squandered and the client bears the consequences.

A crucial step in the process, at least in state court, is selecting a skilled mediator in whom you have confidence. There is no reason why you cannot end up with a skilled mediator—either an experienced attorney or a former trial judge. It might cost more in the short term but is usually worth it in the long term.

Although many lawyers now act as if there is some rule forbidding settlement discussions prior to mediation, there really is no such rule. Initiate settlement discussions before mediation! You might be surprised that you can actually settle a case without the mediator and without paying half of a \$3,000 fee. Initiating settlement discussions is not a sign of weakness; it is a part of doing a good job for your client.

Prior to mediation, sit down with your client and discuss the case—the good and the bad, possible trial outcomes, post-trial motions and the appellate process. Discuss the mediation process and the role of the mediator, and how it is different from trial and how the mediator is different from a trial judge. (I have mediated several cases where one of the parties thought that I could decide issues or enter orders, or the client did not understand the confidential nature of the process.) This will help put the client at ease and know what to expect, avoiding irritation or frustration with the process. The mediation process can also provide the client with the opportunity to explain him/herself, to vent, and to talk with an independent, knowledgeable third person.

Your credibility with the mediator is also key. This begins with a pre-mediation letter that accurately and succinctly sets out the relevant facts

and law with all the pertinent factors, emphasizing the favorable factors, but also acknowledging the unfavorable ones where necessary. A follow-up discussion with the mediator may also be helpful. There is nothing unethical or unprofessional about doing this; after all, the entire mediation process is an ex parte process. By establishing your credibility with the mediator, you have that much more leverage toward achieving a good settlement. Many lawyers abdicate their responsibility and place all the burden of settling the case on the shoulders of the mediator, without bothering to give the mediator the information that he/she needs.

A skillful mediation attorney is patient, willing to endure the oftentimes painfully tedious nature of mediation, and ignore the ubiquitous assertion that “you are not negotiating in good faith.” My experience is that mediations seem to have a life of their own that cannot and should not be forced or rushed. On more than a few occasions, I have struggled all day making very little progress, only to be amazed by a flurry of negotiations and an ultimate settlement at the end of the day.

The attorney’s goal is not to antagonize the other side but to impress and communicate with professional self-assuredness the strengths of the client’s case. Be confident but not arrogant or unrealistic. Your credibility with the other side, as with the mediator, is extremely important. Even skillfully conceding a weakness in your case or a strength of the other side can enhance your credibility.

Mediation is not the forum or stage that many trial lawyers seek. It is private and confidential. It is not about the attorney’s ego; it is all about working for the client, which is your job after all. So develop your skills and be prepared.

Nicholas R. Gentry is a sole practitioner in Albuquerque. He is AV rated by Martindale Hubbell, has been involved in civil trial litigation for 35 years and serves as a mediator, now and then.

Don't Let Your Bias **RUIN** the Mediation!

By Norm Gagne and Jocelyn M. Torres

“Hey, wait a minute,” you say. “I’m not biased. I’m a very fair person. I’m not prejudiced and what’s more...”

OK, OK. Calm down. We’re not questioning your integrity. The bias we talk about here is one from which most of us suffer to some degree. It is the very human trait that makes it difficult for us to admit that we are wrong. This bias may cause us to ignore or rationalize all evidence which is contrary to what we believe, to hear only confirming evidence and not conflicting evidence, to argue against contrary evidence, to change the subject and to engage in all sorts of other behavior rather than face the fact that we may be wrong. This bias even has a name, several in fact. Those who study human behavior call it variously, “cognitive bias,” “confirmation bias,” “decision bias” and “motivated reasoning.”¹ The theory of heuristics holds that individuals are particularly likely to make judgments concerning existing facts and future probabilities in ways that confirm pre-existing beliefs. “This tendency will often result in judgments compromised by what is also called the “self-serving” or “egocentric” bias.”² It all boils down to a very human tendency to stick to our guns even in the face of very compelling evidence that we may be wrong or that others may have differing points of view. We’ll call it “evaluation bias” here.

Letting evaluation bias get the best of you may scuttle any chance of settlement at mediation. If you stick to a flawed evaluation, you will be unable to perform necessary reality checks with your clients, and it is unlikely that even the best mediator can bend the other side to your mistaken will. Worse, your case may not be resolved short of a trial, perhaps with an unhappy result.

How can you avoid a failed mediation caused by evaluation bias? As with most things in the law, good preparation will go a long way to avoid this pitfall. You must prepare yourself and your clients, who are just as prone to evaluation bias as their lawyers, maybe even more so.

Good preparation includes careful analysis of the facts and the law, not just the favorable facts and law but the unfavorable ones too. Some pretty good lawyers claim that one key to success is to know your weaknesses better than your opponent knows them.

Try to have a certain humility about the evaluation. Remember that you are making a guess, albeit an educated one, about what might happen in the future. Also, your guesses won’t be tested at trial nearly as often as lawyers of previous generations.

Couch your evaluation in terms of ranges of risk—low, medium and high—that you might do better or worse at trial. Give yourself plenty of wiggle room.

Test your evaluation well before mediation by having a trusted colleague—or better, several—review your case and give you an



independent evaluation. Make sure your reviewers have the bad information along with the good. Let them come to their own conclusions independent of yours.

Jury verdict research is okay but usually does not yield many results from New Mexico. Be skeptical about whether a very high verdict from south Texas or a low one from Omaha is really relevant to a case being tried in Farmington or Las Vegas.

After you have carefully prepared yourself, prepare your client. Emphasize the uncertainty in predicting a future result. Counsel flexibility. Speak of mediation as an opportunity to test your ideas about the case against both the views of the other side and of the mediator. Sure, the other side is biased. So is the mediator. An experienced mediator would have to be a mindless zombie not to have an opinion. Some mediators may feel that their reputation for settling cases is at stake, thus introducing another bias. Yet the reasoned opinions of both your opponent and the mediator are worth listening to and carefully comparing with your own.

Finally, the best protection against being controlled by evaluation bias is to own up to having one. Just understanding the nature of the beast may help tame it a bit. Ironically, by acknowledging the inherent danger of evaluation bias you may become a more effective advocate for your client by being better prepared throughout the mediation process.

Endnotes

¹See, e.g., D. Kahneman & A. Tversky, On The Psychology of Prediction, 80 Psychological Review 4, 237-251, July 1973 (Cognitive Bias); R. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 Review of General Psychology 2, 175-220, 1998 (Confirmation Bias); M-C. Sung, J. Johnson, I. Dror, Complexity as a Guide to Understanding Decision Bias: A Contribution to the Favorite-Longshot Bias Debate, 22 Journal of Behavioral Decision Making, 318-337, 2009 (Decision Bias); Z. Kunda, The Case For Motivated Reasoning, 108 Psychological Bulletin 3, 480-498, 1990. (Motivated Reasoning).

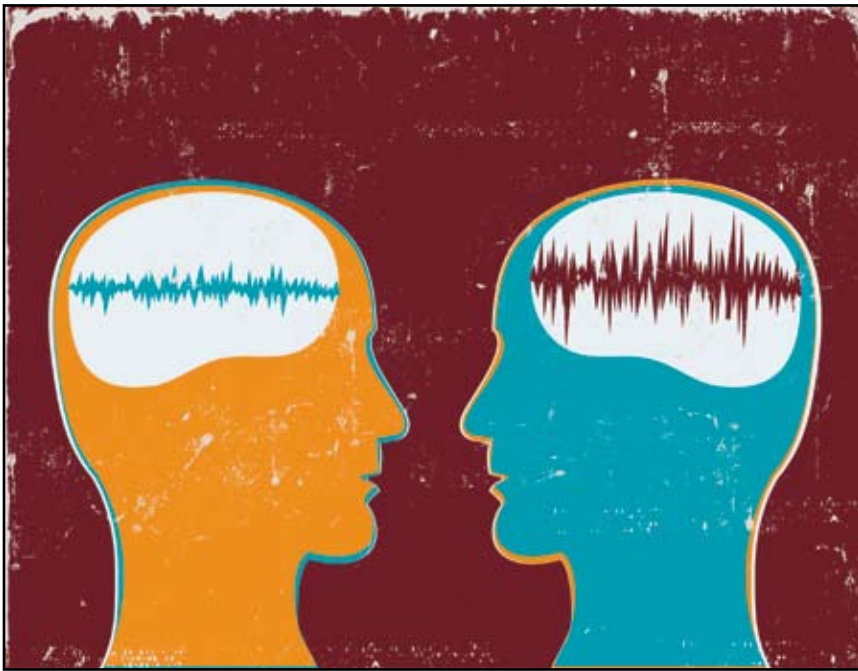
² Russell Korobkin & Chris Guthrie, “Heuristics and Biases at the Bargaining Table,” 87 Marq. L. Rev. 795-808 (2004).

Norm Gagne is of counsel to Butt, Thornton & Baehr PC, where he was a shareholder and director and served as president and chairman of the board of directors. He was a civil litigation and trial lawyer for 35 years and now limits his practice primarily to mediation, arbitration and enjoying the pleasures of his semi-retirement.

Jocelyn M. Torres is a native New Mexican who received her B.A., M.A. and J.D. degrees from UNM. She has practiced law for 27 years, primarily as a civil litigator and a trained mediator.

The Other ADR: **A SHORT** Introduction to Conflict Literacy

By Barry Simon, MA



Helping people address differences effectively before they escalate and require third-party intervention is the primary goal of conflict literacy (CL). How might CL apply to an attorney's practice? Given the number of angry clients who walk through their doors, attorneys would be well positioned if they not only educated their clients about the law but also about how the five core principles of CL play out in their situation. These principles, including perception, emotions, communication, compassion, and decision-making, are more thoroughly discussed below. Clients who understand the dynamics of conflict will be better prepared to make effective rather than emotional decisions regarding their case. Once a person begins to discern how conflict arises, their role in creating and sustaining it, and how they can manage it successfully and creatively, they are on the path to creating a more peaceful world. And that's a good thing.

To this end, CL turns to the wealth of knowledge created by philosophers, scientists, sociologists, therapists, jurists, and researchers. This information addresses what conflict is, how it arises, what happens if allowed to go unchecked, and how to manage it effectively. It views conflict from various perspectives, such as psychology, sociology, neuroscience, evolution, peace studies, economics, and international relations. Since much of this knowledge has remained in the domain of academic study and professional journals, a primary goal of CL is to make this information more accessible to the general public. To accomplish this, CL organizes this wealth of information into five general baskets, if you will: perception, emotions, communication, compassion, and decision making. These make up the five core principles of CL. However, instead of being clearly stated theories like Newtonian Physics, these principles are generalized areas of information, the mastery of which helps one become conflict literate.

With an eye to applying these principles, the Conflict Literacy in the Schools Working Group of the ADR Committee is developing a CL curriculum for middle and senior high school students. As of this writing, Tom Swisstack, the executive director of the Bernalillo County Juvenile Detention and Youth Services Center, has invited us to conduct a pilot project utilizing this curriculum. Specifically, the pilot program is working with high-risk young men ages 15–18 in the Center's Community Custody Program (CCP). The primary objective of the CCP is to provide an alternative to detention. A participant is made eligible for the CCP by an officer of the court or referral from the Juvenile Probation and Parole Department working in collaboration with the CCP staff.

At its heart, CL is a balancing act among thinking, feeling, and doing. Each impacts the other in an on-going symbiotic relationship.

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In 1976, 270 legal experts convened in St. Paul, Minnesota, for the Roscoe Pound Conference to address "Causes of Popular Dissatisfaction with the Administration of Justice." As a result, the legal community adapted a centuries-old dispute resolution process called mediation. This interest in mediation eventually filtered down into law schools as well as into elementary, middle and high schools in the form of peer mediation programs. Simultaneously, a new field of academic study began: conflict resolution education (CRE). Programs sprang up on college and university campuses offering advanced degrees in dispute resolution, negotiation and peace building.

While advancing the understanding and practice of mediation, the State Bar's Alternative Methods of Dispute Resolution Committee has embraced an approach to conflict resolution that grew out of CRE—conflict literacy (CL)—which places less emphasis on process and more on awareness and skills building. CL grew out of health literacy, defined as *the degree to which individuals have the capacity to obtain, process, and understand basic health information and services needed to make appropriate health decisions*. Health literacy is about people making appropriate choices regarding health issues while they are well rather than waiting until they are sick. In the same way, CL's goal is helping people address differences effectively before they escalate into issues and require third party interventions. CL is defined as *the degree to which individuals have the capacity to obtain, process, and utilize basic conflict resolution theories and skills needed to make appropriate conflict management choices*.

WHEN ADR BECOMES THE LAW:

Creating Better Solutions in State Government

By Mary Jo Lujan and Josh Pando



The 2007 Governmental Dispute Prevention and Resolution Act requires that state agencies provide access to a broad range of alternative dispute resolution (ADR) procedures so that anyone having a dispute of virtually any kind with almost any state agency has an opportunity to resolve the dispute without recourse to more formal procedures such as litigation. What does this mean to New Mexicans?

For state agencies (i.e., public entities insured by the state Risk Management Division), it means providing access to ADR to resolve problems between members of the public and agencies as well as between agency employees. The Act also establishes a state interagency Advisory Council and creates the Office of Alternative Dispute Prevention and Resolution (“the Office”) as a bureau of the General Services Department, Risk Management Division. The three-person Santa Fe Office promotes early dispute resolution and positive collaboration among state agencies, employees and the public through services including centralized information and resources; a network of mediators to respond to requests for direct assistance; presentations and consultation on ADR program design; outreach and public education; skills training; and assistance to other state ADR efforts. Simply put, the Office seeks to expand the range of possible dispute resolution processes available to disputants by offering proven alternatives to traditional grievances and contested legal proceedings in a fiscally responsible way.

State agencies are also subject to the Regional Universal Agreement to Mediate with the U. S. Equal Employment Opportunity Commission (EEOC), which establishes the presumption that state agencies will engage in voluntary mediation to resolve EEOC complaints filed by employees against the state. This agreement is the first between EEOC and a state government and expresses the

agencies’ shared goals to improve operational efficiency, cost-effectiveness, and accountability by increasing the state’s participation as an employer in mediation. In the first year of this initiative, the state’s participation rate increased 17 percent—from 27 percent to 44 percent. Given the EEOC’s historically successful settlement rate, the state’s improved participation rate represents a real opportunity to mitigate damages in personnel issues.

For state employees, the Office coordinates training to support better practices and procedures in handling disputes. Training activities range from brief general awareness and procedural overviews to formal, in-depth skills training, many at no or low cost. The Office partners extensively with local organizations for formal ADR training, including the Santa Fe Community College, the UNM Continuing Education Division, and the New Mexico Federal Executive Board. These trainings foster employee problem-solving proficiency and capacity, preventing the need for intervention from management or human resources personnel. Employees become proficient in resolving their own disputes and can also utilize trained and skilled neutrals from the Office’s

peer mediator program at no cost. Individual skills are further supported by regular informal training activities such as brown-bag lunch presentations on ADR-related topics by experienced subject matter experts. These regular events bring the ADR community closer together by allowing state employees to network and consult with each other, with ADR professionals, and with constituents. The monthly presentations are open to the public and are widely announced by e-mail, in the Office’s newsletter and in the state employee newspaper.

For managers and employees in union environments, dispute resolution skills have become increasingly important. The Office collaborates with the Albuquerque Area Federal Mediation and Conciliation Service and the State Personnel Office to allow state agencies to host and attend three-day labor relations training statewide. Employees from union-covered agencies learn skills to improve labor-management relationships through collaborative problem-solving approaches and create self-sufficiency in problem solving, thereby enabling participants to jointly respond to changes and make future mediation efforts more effective. Agency managers and labor representatives train together with the goal of preventing negotiation delays and legal challenges.

For New Mexico’s citizens, ADR holds promise as a fiscally responsible way to improve the way the state does business. Analysis of tort claims filed against the state (the type, number and cost of claims; cause and loss baselines; trends, etc.) is regularly conducted by Risk Management Division staff for insurance purposes, including premium calculations and the establishment of adequate reserve funds. This analysis also presents an ideal opportunity to

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Mediation BEST Practice Tips for 2010 and Beyond

By Laura Bassein

Have you heard “so-and-so” is an experienced “mediator” or “so-and-so” has an exceptional record as a “settlement facilitator”? What does that really mean? What matters about how mediators conduct themselves? Lawyers representing clients in mediation and mediators themselves will benefit from greater exploration. Begin the process with the following tips:

Recognize mediation as a separate profession with its own practice standards.

Demand adherence to practice standards applicable to the mediation process, subject matter and locale in question. Examples include: *Model Standards of Conduct for Mediators* (2005 revision approved by American Arbitration Association, American Bar Association (ABA) and Association for Conflict Resolution (ACR), www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf) and *Model Standards of Practice for Family and Divorce Mediation* (developed in 2000 by Symposium on Standards of Practice, www.afcnet.org/pdfs/mod-elstandards.pdf).

Understand many mediators come from source professions with associated ethical standards/licensing requirements. Mediators often, though not always, have another source profession; e.g., law, social work, psychology or accounting. These mediators continue to follow their professions’ mandated requirements. Mediation practice standards provide another layer of professional best practice in addition to, not instead of, other applicable rules.

Appreciate that mediators may or may not be lawyers.

The ABA Section of Dispute Resolution (SDR) clearly states, “Mediation is not the practice of law.” See ABA SDR, *Resolution on Mediation and the Unauthorized Practice of Law*, (adopted 2002 www.abanet.org/dispute/resolution2002.pdf). See also *The Authorized Practice of Mediation* (2004 proposed ACR policy statement www.acrnet.org/pdfs/upl-drafrtpt-aug04.pdf).

Avoid unauthorized practice of law. While mediation is not the practice of law, mediators’ actions potentially fly in the face of ‘unauthorized practice of law’ prohibitions. Non-lawyer mediators must not take actions constituting the practice of law. Lawyer mediators, not licensed in the jurisdiction, also must not take actions constituting the practice of law.

Distinguish mediator role from other roles. Best practice dictates that while in mediator role, mediators avoid providing legal



advice or therapy. For example, the *Model Standards of Practice for Family and Divorce Mediation, Standard VI*, states that “the mediator shall not provide therapy or legal advice.” As another example, federal *Department of Health and Human Services Standards of Practice* (www.hhs.gov/dab/divisions/adr/standards/standards.html) includes a standard titled Separation of Mediation stating, “Mediators must limit their role solely to that of mediator. They should refrain from giving legal or therapeutic information or advice.”

Delineate “third party neutral” role from traditional lawyer role particularly with

self-represented parties. *NM Rule of Professional Conduct 16-204* states that a lawyer serves as a “third-party neutral” “when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute... . Service as a third-party neutral may include service as...a mediator... .” This rule requires that a “lawyer serving as a [mediator] shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role..., the lawyer shall explain the difference between the lawyer’s role as a [mediator] and a lawyer’s role as one who represents a client.” Committee commentary provides further explanation, particularly identifying the “inapplicability of the attorney-client evidentiary privilege” as an important feature.

Know law applicable to mediation practice. All mediators and lawyers representing clients in mediation should understand the *Mediation Procedures Act (MPA)*, §§44-7B-1 to 44-7B-6, NMSA. Confidentiality constitutes the cornerstone of the *MPA*. Other laws also impact mediation practice, such as §40-4-8, NMSA, mandating mediation in contested custody cases, except in domestic violence/child abuse situations when mediation shall not occur unless several specified conditions for mediation are met.

Assess “good faith” participation only on objectively-determinable criteria. The ABA *Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs* (approved 2004 by ABA SDR, www.abanet.org/dispute/webpolicy.html) indicates that only objectively-determinable conduct, like failure to attend, should be sanctionable; subjective factors merely spawn further litigation. This resolution also indicates that requiring mediators to report participant behavior imperils confidentiality. In *Carlsbad Hotel Associates v. Patterson-UTI Drilling*

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Co., 2009-NMCA-005, ¶¶2-7, 145 N.M. 385, 199 P.3d 288, *cert. granted*, the Court of Appeals discusses and favors the ABA resolution's good faith analysis; however, the decision itself turns on the applicability of a local rule and court order.

Acknowledge mediation quality in addition to quantity. The ABA SDR *Task Force on Improving Mediation Quality Final Report April 2006-February 2008* (published by ABA SDR, www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf) discusses four issues impacting mediation quality: preparation for mediation by the mediator, parties, and counsel; case-by-case customization of the mediation process; "analytical" assistance from the mediator; and "persistence" by the mediator. Considerations of quantity (e.g.,

numbers of mediations conducted or agreement rates) pale in importance when compared to quality of each mediation experience.

Continue to grapple with statutes, case law, rules, ethics codes, and other mediation practice standards. You are in good company if this produces more questions than answers. The nature of best practice requires continual inquiry. Tensions abound. Concrete answers remain elusive. Thoughtful practice continues.

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The challenge for anyone attempting to become conflict literate is to stand back and observe his or her behavior, understanding how one's perceptions, emotions, communication, compassion and decision making are affecting this delicate balance—not an easy task to accomplish for adults let alone the young men in the pilot project.

To become conflict literate, these young people must learn how:

- 1) To understand how their *perceptions* and the neuroscience of their brains play a central role in creating and escalating a difference into an issue and taking responsibility for their role instead of blaming the other person.
- 2) To name and identify their *emotions* and express them calmly rather than being controlled by them.
- 3) To use effective *communication* that promotes a learning conversation to bring parties together while finding the courage to express *compassion* for the other person.

- 4) To use *decision making* based on cost/benefit analysis so that the outcomes are the ones desired.

None of these skills is part of their experience and, in some cases, goes completely against what they know about their world and their place in it. In this way, the pilot project is exposing and challenging them to explore new ways of thinking. At the same time, it speaks directly to their aspirations as expressed in a classroom contract they develop on day one: to foster appropriate behaviors, agreements, effective attitudes, quality decision making, trust, integrity, respect, good faith, and love.

Barry Simon has a master's degree in negotiation, conflict resolution and peacebuilding from California State University-Dominguez Hills. He is the founder of Mediated Solutions and the Institute for Conflict Literacy.

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evaluate situations for applicability and effectiveness of ADR as a loss prevention and control measure. The information is reviewed with RMD's Property and Casualty Bureau and the interagency Early Neutral Evaluation Committee to develop ADR strategies to prevent and mitigate losses. The information is also reviewed with designated ADR coordinators within state agencies, who serve as important liaisons with the Office and, equally important, as the agency's identified name and face to other employees and the public for dispute resolution purposes. In the coming year, the Office will construct a user-friendly website featuring ADR contact information for all state agencies along with an on-line library for forms and resources, interactive programs, and data management tools.

The Office will continue partnering with state agencies and other organizations to institutionalize ADR within all operations inside state government. Achieving meaningful change will take time; ADR is one proven way to empower individuals to communicate

and work together toward less costly, more efficient operations, and more satisfying and durable solutions in state government.

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