LAWYERING IN MEDIATION: MAXIMIZING THE BENEFITS

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Who Participates in Mediation (AND HOW) Matters: Session Agenda

- Define mediation in contrast to litigation
- Distinguish mediation ‘parties’ from ‘parties’ to the court proceeding
- Examine child protection mediation (CPM) nationally and locally
- Reflect on array of ethics (and other) principles applicable to CPM
- Review core mediation principles – e.g., confidentiality, self-determination
- Probe various attorney roles in mediation; look at ‘zealous representation’ in mediation
- Explore the attorney role from attorney and mediator perspectives
- Expand definition of mediation ‘success’
Mediation – What is it?

- Generally, mediation* means any negotiation with the assistance of a 3rd party neutral where the neutral does not have the authority to impose a resolution.
- Under the New Mexico Mediation Procedures Act (MPA) “‘mediation’ means a process in which a mediator: (1) facilitates communication and negotiation between mediation parties to assist them in reaching an agreement regarding their dispute; or (2) promotes reconciliation, settlement or understanding between and among parties.” §44-7B-2, NMSA
- Under the MPA (§§44-7B-1 to 44-7B-6, NMSA), mediation communications are confidential. There are a number of exceptions to confidentiality. See also, Evidence Rule 11-408 re: admissibility of offers to compromise.

* Includes what is often also called settlement facilitation in New Mexico.

Mediation vs. Litigation

**Mediation Session**
- Third party neutral = mediator
- Decision maker = parties (not the mediator)
- Party Role = Advocate (for themselves)
- Lawyer Role = Advisor/Negotiator (Advocate?) [Counselor at Law]
- Primary speaker = Parties speak directly about issues that are important to them
- Pro/Con = Parties speak ‘face to face’
- Other participants?

**Courtroom**
- Third party neutral = judge
- Decision maker = judge
- Party Role = Witness
- Lawyer Role = Advocate
- Primary speaker = Lawyers speak on behalf of their clients; parties have little opportunity to speak in court
- Pro/Con: Lawyers stand between parties
- Other participants?
Who participates in mediation?

- **Mediation Parties** - “Mediation party’ means a person who participates in a mediation and whose agreement is necessary to resolve the dispute.” (MPA, §§44-7B-2 (C), NMSA) [Food for thought: Are mediation parties necessarily the same people as the parties to the court case?]

- **Other Participants** - “Nonparty participant’ means a person, other than a mediation party or mediator, who participates in, is present during the mediation or is a mediation program administrator, including a person consulted by a mediation party to assist the mediation party with evaluating, considering or generating offers of settlement...” (MPA, §§44-7B-2 (F), NMSA)

An Array of Possible Nonparty Participants

- Lawyer
- Advocate (disability rights, domestic violence, etc.)
- Support person
- Personal assistant
- Interpreter
- Family member
- Foster parent
- Other....

**Question:** Which of these people might in some cases be mediation parties?
Possible Functions of Nonparty Participants

- Surrogate
- Representative
- Advocate
- Support
- Access
- Assistance
- Information/resources
- Other....

Resolution Options

- Kitchen Table
  - More Personal Power
- Mediation
  - Work to Enhance Self-Determination
- Arbitration
  - Much less Self-Determination
- Trial
  - Less Personal Power
Child Protection Mediation – What is it?

- “Child protection mediation (CPM) is a collaborative problem solving process involving an impartial and neutral person who facilitates constructive negotiation and communication among parents, lawyers, child protection professionals, and possibly others, in an effort to reach a consensus regarding how to resolve issues of concern when children are alleged to be abused, neglected or abandoned. The child’s voice in the decision making process is essential and is typically presented either directly by the child or by other means, such as by an advocate for the child.”

- “CPM encourages constructive communication and information sharing and fosters an environment where genuine engagement and agreement is possible. As a consensual decision making process, no agreement can be reached unless all the involved parties agree. In addition to reaching important decisions regarding children and families, CPM can lead to a greater sense of teamwork and a greater understanding and ownership of resulting agreements.”

Guidelines for Child Protection Mediation (2012)-

CPM - Nationally and Internationally

- Guidelines for Child Protection Mediation (2012)-Approved and adopted by the Association of Family and Conciliation Courts Board of Directors

- In addition to NM, many other jurisdictions (counties, courts, states, Canadian provinces, other countries) have well-developed CPM programs. The first recorded efforts to mediate these cases began in the 1980s, with more programs being established in the 1990s. NM CPM services began in about 2000.


- Resources – See bibliography.
Child Protection Mediation Benefits*

A recent review of the research in the field indicates that CPM:

- Is highly rated by participants, with both families and professionals perceiving the process to be fair and believing they had an opportunity to have their concerns heard by others;
- Produces a high level of settlements, with 60 to 80% of mediated cases reaching full agreements and another 10 to 20% reaching partial agreements;
- Is effective at all stages of case processing from the filing of the petition through an adoption;
- Helps to engage parents, with 70 to 80% of the professionals who work with families in the child protection system reporting that parents were more involved in case planning when mediation was used;
- Helps to engage extended families, with studies showing that programs typically invite extended family and friends to participate whenever the parties believe their participation would be useful;

Child Protection Mediation Benefits* - continued

- Effectively addresses communication issues among the parties and other types of problems that are rarely dealt with in a court hearing;
- Reduces case processing time, with a number of studies suggesting that mediation helps families achieve permanency in less time;
- Encourages greater parental compliance, as shown by reduced number of contested review hearings, and generally better performance on the treatment plan;
- Saves courts and agencies money and staff time, with evidence that mediation can help the system to meet legislated time frames for case processing and to reduce the length of time a child spends in foster care;
- Often results in mediated treatment plans that contain more services for children than do non-mediated plans;
- Results in greater use of kinship care than in non-mediated cases in some studies.

Goals of Child Protection Mediation

- Help children achieve timely permanence through well tailored case plans and individualized attention to particular family situations.
- Provide a forum for all participants to have a voice in decision making.
- Other goals on a case-by-case basis.

A Judicial Perspective on CPM Goals

“CPM should be an integral part of every juvenile dependency court in the nation. From a judicial perspective it accomplishes a number of goals.
- Mediation saves court time;
- it produces better, more detailed, nuanced, and longer-lasting results than litigated cases;
- it creates a problem-solving atmosphere in the court environment (an atmosphere that better serves all parties);
- it engages the parents in the decision-making process, thus making it more likely that they will follow any plan that they have helped draft;
- it reduces the time children remain in temporary care;
- and, finally, it shortens the time to permanency.”

Child Protection Mediation Challenges/Barriers

- Power imbalances
  - Between individual and agency
  - Due to domestic violence
  - Etc.
- Possible limited competence of a party or parties
  - Mental health issues
  - Substance abuse issues
  - Etc.
- Concern about confidentiality issues
- Financial resource constraints
- Lack of understanding of mediation process

NM Children’s Court Mediation Program - Referrals

![Graph showing referrals over fiscal years FY05 to FY11]
Children's Court Mediation Program
Referrals FY12 compared to FY11

# of Referrals

Type of Referral

Children’s Court Mediation Program - Referrals

Judicial District | Open Adoption | Legal (TLR) | Pre-Legal (TLR) | Total | % of Total
--- | --- | --- | --- | --- | ---
Second | 21 | 149 | 3 | 173 | 25%
Third | 17 | 127 | 0 | 144 | 21%
Fourth | 10 | 2 | 21 | 33 | 5%
Fifth | 16 | 22 | 3 | 41 | 6%
Sixth | 6 | 72 | 0 | 78 | 11%
Seventh | 3 | 31 | 0 | 34 | 5%
Eighth | 6 | 3 | 17 | 26 | 4%
Ninth | 11 | 2 | 17 | 19 | 3%
Tenth | 0 | 3 | 2 | 5 | 1%
Eleventh | 6 | 31 | 6 | 43 | 6%
Twelfth | 7 | 39 | 0 | 46 | 7%
Thirteenth | 5 | 39 | 8 | 52 | 7%
TOTAL | 108 | 520 | 66 | 694 | 100%
% of TOTAL | 16% | 75% | 10% | 100%
National Mediation Program Example
Cook County, Illinois (Chicago Area)

http://www.cookcountycourt.org/tabid/219/default.aspx
New Mexico: Possible issues for mediation* ....

- Whether the complaint of abuse and neglect should be dismissed.
- The plea (prior to adjudication).
- Children’s issues (e.g., safety, behavioral, education, medical, psychological).
- Services for children (e.g., counseling, medical services, mentoring).
- Services for parents (e.g., counseling, drug or alcohol assessment/treatment, parenting classes, employment/housing referrals, financial assistance, transportation).
- Temporary and permanent placement of the children.
- Visitation by parents, siblings, and other relatives and arrangements for supervision and transportation.
- Goals for children (e.g., reunification, adoption, independence).
- Change of plan (e.g., from reunification to adoption).
- Guardianship.
- Post adoption contact terms between birth and prospective adoptive parents.


New Mexico: Steps in the Mediation Process

- Pre-mediation.
- Opening statement and introduction.
- Mediators help parties set an agenda.
- Participants discuss issues, typically one at a time.
- Mediator may meet with parties individually (caucuses) to discuss issues.
- Parties reach agreement one issue at a time, though some issues are linked.
- Mediator will reality test, check for accuracy, etc.
- An agreement is drafted by the mediator or attorneys for review, signatures and submission to the court.

New Mexico: Who participates in mediation*

- CYFD workers and CCA
- Parents and attorneys
- Guardian ad litem and/or youth attorney
- Child, if they are 14 years or older or as appropriate
- Sometimes:
  - CASAs
  - Foster parents
  - Service providers
  - Other family members
  - Others

*Not everyone is necessarily there for all parts of every mediation.

Ethics Codes – Mediation Context

Specifically for mediators/mediation:


- **Model Standards of Practice for Family and Divorce Mediation** (2000), [www.afcnet.org/ResourceCenter/PracticeGuidelinesandStandards](http://www.afcnet.org/ResourceCenter/PracticeGuidelinesandStandards)

Ethics Codes – Mediation Context

Specifically for lawyers:
- **NM Rules of Professional Conduct** [http://nmcompcomm.us/](http://nmcompcomm.us/)
  - As attorney
  - As mediator – Rule 16-204
- **Scrupulous Fairness Standard** – CYFD in a termination proceeding “must seek not only to protect the children involved; they must see to it also that the parents are dealt with in **scrupulous fairness**.” Ronald A., 110 NM 454, 456 (1990).
- **Mediator Standards** (if lawyer is serving as mediator, see previous slide)

Other requirements impact ethical issues*

--Multiple Complementary (or Competing) Provisions re: for example Confidentiality
- **Mediation Procedures Act**, 44-7B-1 to 6 – Mediation communications are confidential subject to various exceptions.
- **Evidence Rule 11-408** – Evidence re: settlement negotiations inadmissible for specified purposes.
- **Report of Mediation Form 10-471** – “...purpose ... to candidly discuss and attempt to resolve outstanding issues.... Pursuant to ... 11-408 ..., any opinions, admissions and comments ... are confidential. Except as otherwise provided by the Rules of Evidence o[r] Children’s Code, these opinions, admissions and comments are not subject to discovery, and cannot be used as an admission or for any other purpose by any party in any proceeding governing this action. New information of abuse or neglect is subject to being reported....”

*Note: Performance standards state that attorneys represent the client “in accordance with the Code of Professional Responsibility ... and all other applicable laws.”
Other requirements impact ethical issues

--Multiple Complementary (or Competing) Provisions re: for example Confidentiality (continued)

- **Children’s Code 32A-4-33** – “All records or information concerning a party to a neglect or abuse proceeding, including ... shall be confidential and closed to the public,” followed by a long list of who can see the records.

- **Model Standards of Conduct for Mediators, Standard V** – “A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.... [and] shall promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.”

- **Rules of Professional Conduct, Rule 16-106** – “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by Paragraph B....”

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**Fundamental Mediation Principles**

“If confidentiality is the heart of mediation, self-determination is its soul.”

Mediation Party Self-Determination

“A mediator shall conduct a mediation based on the principle of party self-determination. 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....” *Model Standards of Conduct for Mediators, Standard I (2005)*

Self-Determination About What?

- “....Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.” *Model Standards of Conduct for Mediators, Standard I (2005)*
- And even more ...
- What about things like confidentiality (the heart of mediation...)?
New Mexico Self-Determination Examples...

- **Magistrate Court** Mediation Rule 2-805: “...Nothing in the rules governing the mediation programs shall be construed to require settlement....”

- **Domestic Relations** Mediation Act Programs Rule 1-125 “...sanctions shall not be imposed for failure to settle ... any claim or defense.”

- **Mediation Procedures Act** -- 44-7B-3, NMSA: “.... Act does not apply to a mediation ... agreed to in writing by the mediation parties and the mediator prior to the mediation not to be covered by the ... Act....”

Self-Determination – A Parent’s Perspective

Self-Determination: A Child Welfare Example

“... empowering parents to actively participate in mediation does not mean that parents should be required to actively participate. There may be cases where the parents prefer to let their attorneys take the lead in negotiations and cases where attorneys representing parents are concerned that active participation by the parents could be problematic based upon the circumstances of the case. For example, when criminal charges are pending, it may be more risky for parents to speak freely in mediation as confidentiality protections may not adequately protect parents in subsequent criminal proceedings. For example ... a parent might disclose a fact that, if independently verified, could be admissible into a court proceeding even though the mediation communication might be inadmissible. ... Empowering parents involves giving them the opportunity to actively participate in mediation with their attorneys, while at the same time respecting their right to listen to the advice of counsel and make their own decision regarding their role in mediation.”


The Multi-Faceted Role of Attorneys

New Mexico Rules of Professional Conduct – Preamble: “... As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client’s legal affairs and reporting about them to the client or to others...”
The Attorney as Advisor

- **Rule 16-201 -- Advisor:** “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”

- **Commentary:** “....Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 16-104 NMRA of the Rules of Professional Conduct to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation....”

The Attorney as ‘Zealous’ Advocate

- **Rule 16-103 – Diligence:** “A lawyer shall act with reasonable diligence and promptness in representing a client.”

- **Commentary:** (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. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.... The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” (emphasis added)
Role of Attorneys in Mediation

“In general ... the attorney’s role tends more to legal advice before and after the mediation session, to advice and coaching during the mediation, and less to advocacy than the attorney’s traditional role in trial-type proceedings.”

National Standards for Court Connected Mediation Programs (1993)
courtsadr.org/files/NationalStandardsADR.pdf

Role of Attorneys in Mediation

- Prepare yourself and your client for mediation
- Help develop information and identify issues and potential solutions
- Counsel client toward non-adversarial behavior/manner
- Help process move forward effectively
- Be open to creative problem solving
- Help your client be realistic
- Promote dialogue and negotiation
- Understand that mediation outcomes may differ from litigation results
- Advocate, advise and negotiate as problem-solver for your client
Attorney Preparation for Mediation

- Set aside the entire time needed for mediation so that you can focus 100% on mediation during the mediation session.
- Think about the ‘frame’ of the case.
- Think about client’s goals and how mediation can help fulfill those goals.
- Communicate well; good communication forms the basis of successful mediation.
- Good communication starts before mediation:
  - From the start of every case think about how you communicate with others involved in the case.
  - Do you need to communicate specifically with other participants prior to mediation?
  - How will your first words (or anyone's first words) in mediation impact the potential for success in mediation?
  - What example does your behavior, communication style, etc. set for your client?
  - Consider what’s even more important than the words you say.....

Role of Mediation Parties

- Exercise self-determination
- Play an active role
- Openly talk about the issues
- Be as realistic as possible about outcomes
- Be part of the creative problem-solving
- Be a key decision maker
- Follow any ground rules established at the beginning of the mediation session
Prepare Your Client for Mediation

- Explain mediation, especially in contrast to court; talk with mediator ahead so that your explanations correspond to what will actually happen in this mediation.
- Discuss mediation benefits and challenges.
- Describe role of mediator in contrast to a judge.
- Talk about joint and separate sessions (caucus).
- Explain client's role in mediation in contrast to court; help client practice what they might say.
- Discuss client’s needs/interests and those of other mediation participants.
- Discuss strengths and weaknesses of your case.
- Help client see big picture, e.g., what typically might happen with this judge or with these issues in court.
- Brainstorm creative options and solutions with client.
- For young people, discuss whether or not and how they may want to participate.

As an attorney, it matters ....

- ...what you say as mediation starts
- ...what you say throughout mediation
- ...how you say everything you say (including nonverbal)
- ...even more that you let others speak (particularly your client)
- ...even more that you be your client’s voice if they are not present (if they are a young child) or otherwise unable to participate
- ...the most that you LISTEN with your head and your heart
  - to what is said
  - to what is NOT said
  - to nonverbals
- ....that you understand that stress impacts communication
- ....that you understand that this is not solely a legal proceeding; other issues are important particularly in mediation
As a mediator, it matters ....

- ...what you say as mediation starts
- ...what you say throughout mediation
- ...how you say everything you say (including nonverbals)
- ...that every person in the room is treated as a human being
- ...that every person in the room is validated/acknowledged
- ...that every person in the room is allowed space to save face
- ...the most that you LISTEN with your head and your heart
  - to what is said
  - to what is NOT said
  - to nonverbals
- ...that you understand that stress impacts communication
- ...that you understand that while many issues are important, the situation before you is part of or may lead to legal proceedings

The end is as important as the beginning....

- Once mediation nears completion, points of agreement should be clarified and documented; without documentation the accomplishments of mediation can more easily be lost.
- Mediators can draft an informal agreement with the assistance of the parties and attorneys; attorneys can draft formal documents later.
- A written agreement assures that the group has a clear understanding of the mediation results.
- Attorneys, and other representatives, often help their clients maintain the staying power for this last bit of the mediation.
- **IMPORTANT**: Many mediations are successful even without a written agreement; issues are clarified, parties have a voice (both speak and listen), communication improves, etc.
How to avoid trouble....

• Prepare yourself (as mediator or as attorney) well for mediation.
• As an attorney, prepare your client well for mediation.
• Participate in pre-mediation sessions among parties, attorneys, mediators, and others.
• Set a problem-solving tone from the beginning, for the general benefit of the entire mediation and as a specific model for others in the room.
• Ask for breaks as needed.
• Ask for a separate meeting (caucus) as needed.
• Trust in the process.
• Know each specific case well.

Expect the unexpected....

• Significant shifts of many kinds can take place in mediation – be aware of shifting party alliances throughout mediation.
• Be aware of the impact of persons who are not present at the mediation (in preparing for mediation, it’s important to consider who should be present).
• Be ready for impact of information that has not been shared ahead of mediation:
  • Among parties; and/or
  • Between attorneys and clients.
• Power dynamics may not be as originally anticipated.
• Despite the unexpected which will usually arise, maintain your collaborative spirit.
• Unexpected does not necessarily = negative.
• Know that fears about what may spill out of a party’s or attorney’s mouth before or at the beginning of mediation often do not come true.
Who Participates in Mediation Matters:

Who decides? How decided?

‘Party self-determination’ revisited....

- Who needs to agree about who participates in mediation?
- Who decides? – the parties (with their ‘advisors’), the mediator, the mediation program....

‘Court ordered or otherwise required’ ....

- Does the setting matter? The point in the process? What did the judge have to say?

‘Particular case or party characteristics’ ..... 

- Does it matter who the participant is? Does it matter what stage of the case it is? What about the nature of this specific case?

IMPORTANT: Make a case-by-case determination. Think ‘outside the box.’

How Each Person Participates Matters

- **Confidentiality** – Everyone in the room signs the confidentiality agreement.
- **Maintaining Roles** – Everyone in the room understands everyone’s roles and each person maintains their role throughout the mediation. Discussion of roles may include identifying who talks or not, and when/how.
- **Agreements** – Anyone who has an obligation under an agreement must agree (sign) or there is no agreement (generally mediation parties); anyone who does not have an obligation under the agreement does not need to (but may) agree/sign (often nonparty participants).

- Know this case....
- Know mediator/program *practices*.....
### Attorney toolkit for mediation...

**In the toolkit....**
- Flexibility
- Patience
- Creativity
- Ears to listen
- Ability to counsel client to participate as fully as possible
- A keen and open mind
- A compassionate heart
- Problem-solving mode
- An appropriate sense of humor
- A collaborative spirit
- A new definition of success
- Etc., etc., etc.

**Leave at the office....**
- Ego
- A need to be the one talking
- Aggressiveness
- Adversarial mindset
- The need to win
- Ridity
- Win-lose mentality
- Double-booked schedules
- Etc., etc., etc.

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### Attorney-Mediator toolkit for mediation...

**In the toolkit....**
- Flexibility
- Patience
- Creativity
- Ears to listen
- Ability to counsel client to encourage parties to participate as fully as possible
- A keen and open mind
- A compassionate heart
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