

Reflective Mediation Practice

Presented by Howard Herman

*The Integrated Lawyer – A Symposium on Wellbeing
and the Practice of Law*

*U.C. Hastings College of the Law
Center for Negotiation and Dispute Resolution
January 11, 2019*

Some Principles for Successful Group Discussion of Mediation Cases

by Howard Herman¹

1. A reflective practice group provides mediators with an opportunity to improve as practitioners by delving more deeply into our experiences in mediation. In a reflective practice group we serve as mirrors for one another. Talking about what happened in a mediation - our own mediation or that of a colleague - allows us to see ourselves more clearly. Over time, a shared practice of self reflection can enhance our awareness of subtle cues and dynamics and allow us to do our work as mediators with greater facility.
2. We can often learn more deeply by discussing particular cases than by discussing general topics. Discussion of topics tends to stay in the intellectual realm while discussion of our individual mediation experiences can open the door to more personally meaningful and more powerful learning.
3. The presenter should tell the whole story of the case with some detail, including the legal issues, the procedural posture, the players, what happened at the mediation, etc. Often the key to answering thorny questions lies in details the presenter might not initially perceive to be important.
4. The person who is presenting is vulnerable. Allow that person to set the tone. The facilitator and other group members should follow the presenter's lead, asking him or her to lay out what questions he or she would like to address, and then making sure the questions get answered.

At the same time, if the facilitator or group members see other issues not raised by the presenter, they may consider raising them, so long as they do so with respect and sensitivity to the needs of the presenter. The focus should always be on the needs of the presenter.

5. There are three levels of learning:
 - a. Skills, e.g., listening, reflecting, analyzing
 - b. Theory, e.g., negotiation theory, conflict theory, mediation theory

¹ Howard Herman is the Director of the ADR Program for the U.S. District Court, Northern District of California. He has been leading Practice Groups through the District Court ADR Program since 2004.

- C. Artistry, e.g., what's happening to the mediator internally, the mediator's connection to others, the overall meaning of the case.**

Discussion can and does flow between all three levels. It can be helpful for the facilitator to know at which level any given discussion is occurring and to attend to what is happening on the other levels, even when they are not being discussed.

It is important for the facilitator not to push the deep artistry piece. This discussion occurs best when it rises organically from the presenter.

Different Lenses for Analyzing Problems Encountered in Mediation Sessions

The following materials set forth a variety of approaches, or lenses, through which one might consider what happened in a mediation. Each lens provides useful questions one might ask when reflecting on a past mediation and allows us to see different aspects of what might have been going on. Different lenses may prove useful at different times and in different circumstances.

Developed by:

**Claudia Bernard, Chief Circuit Mediator, 9th Circuit Court of Appeals
Howard Herman, Director, ADR Program, U.S. District Court, N.D. California**

The Reflective Practice Lens²

1. What happened?
2. How did what happened effect the participants?
3. How did what happened effect the dynamics of the mediation?
4. How did what happened effect you?
5. What was going on for you at the time?
 - A. On what were you focused?
 - B. How did you feel?
6. Do you believe you were effective?
 - A. If not, what in you kept you from being effective?
 - B. If so, what in you enabled you to be effective?
7. Think of someone you truly admire, perhaps another mediator, a teacher, or a mentor. What would this person say to you in this situation?
8. Given the opportunity to repeat the situation, what would you do differently?
9. What is the deepest potential for this situation?
10. What is your highest wish for this situation?

² The concept of reflective practice as applied to mediation is discussed in Daniel Bowling & David Hoffman, *Bringing Peace Into the Room*, Jossey-Bass (2003), and Michael Lang & Allison Taylor, *The Making of a Mediator, Developing Artistry in Practice*, Jossey-Bass (2000).

The Skills Lens

1. Did you set the mediation up well?
 - A. Were the right people at the table?
 1. Was everyone with an interest in the dispute present?
 2. Was everyone with authority to settle present?
 - B. Were you, counsel, and the parties sufficiently prepared?
 1. Were there adequate mediation statements/
 2. Were necessary information and documents gathered and exchanged?
 3. Were clients and lawyers adequately educated about the mediation process?
2. Did you use good communication skills?
 - A. Did you elicit the whole story from all present?
 - B. Did you practice empathy?
 - C. Did you practice reframing?
 - D. Did you ask questions that helped participants see the conflict in new ways?
3. Were you able to help the participants, including lawyers, identify their underlying interests?
4. Were you able to make continuing reference to these interests to develop solutions and avoid impasse?
5. Were you able to help the participants better understand the legal framework in which their dispute resides?
6. Were you able to help the participants develop solutions that met their underlying interests?
7. Were you able to be caring, patient, optimistic, and persistent throughout the mediation?
8. Were you able to establish rapport with all of the participants?

The Critical Moments Lens³

A critical moment is a point at which something significant happened – a puzzling event, a reaction, a time when the mediator had the opportunity to intervene (e.g., call a caucus, remain silent, or otherwise employ a technique to help the parties reach their desired goal). A critical moment is where the direction, focus, or tone of the mediation changes.

1. What was the critical moment?
2. What was going on at that moment?
3. What were you thinking at the time about the conflict and your intervention?
4. Describe the intervention. A. What did you do?
B. Were there alternatives you considered?
5. Explain your thinking. What was your intention in taking this step?
6. Identify the goal of the intervention. What did you anticipate would happen?
7. How did this intervention fit with your beliefs about the role of a mediator and the goals of mediation? Was the intervention consistent with those beliefs?
8. Did the intervention have its intended effect? Did the participants respond as you predicted?
9. What have you learned from this critical moment?

³ The concept of a critical moment in mediation practice is discussed in Michael Lang & Allison Taylor, *The Making of a Mediator: Developing Artistry in Practice*, Jossey-Bass (2000).

The Mediator Style Lens⁴

1. Role of the Mediator

- A. How directive were you?
- B. How elicitive were you?
- C. When discussing the law, how evaluative were you?
- D. Are you comfortable with the balance you struck?
- E. Was it effective?

2. Problem Definition

- A. How much did you focus narrowly on the legal problem?
- B. How much did you focus more broadly on the parties' underlying needs and interests?
- C. Are you comfortable with the balance you struck?
- D. Was it effective?

⁴ See Leonard Riskin, "Understanding Mediator's Orientation, Strategies, and Techniques: A Grid for the Perplexed," 1 *Harvard Negotiation Law Review* 7 (Spring, 1996); Leonard Riskin, "Decision Making in Mediation: The New Old Grid and the New New Grid System" *Notre Dame Law Review* (December, 2003).

The Difficult Conversations Lens⁵

1. The “What Happened Conversation”

- A. Was each participant’s story fully explored?
- B. Were you able to hold both stories at once?
- C. Were you able to weave their separate stories into a new narrative told from a new perspective?
- D. Did the participants express:
Blame?
Judgment?
Accusation?
- E. Would it have helped if you had shown (or helped the participants show) more:
Understanding?
Curiosity?
Empathy?

2. The “Feelings Conversation”

- A. How was each party feeling?
- B. What was the feeling between them?
- C. How did you feel?
- D. What was the feeling between you and the participants?
- E. What might the participants say was the feeling between you and them?
- F. How might the participants have liked to have felt?
- G. How might you liked to have felt?
- H. How might you have helped yourself and the participants get the the feeling you and they would like to have experienced?

3. The “Identity Conversation”

- A. Did the dispute threaten a participant’s sense of:
Competence?
Integrity?
Worthiness?

⁵ See Douglas Stone, Bruce Patton, & Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most*, Viking Penguin (1999).

B. Did something happen in the mediation to threaten a participant's sense of:

Competence?

Integrity?

Worthiness?

C. Did something happen in the mediation to threaten your sense of:

Competence?

Integrity?

Worthiness?

The Default Conflict Style Lens⁶

1. What do you think were the default conflict styles of the participants?
2. Did the conflict styles of the participants create problems? For example:
 - A. Two competitors fought to win
 - B. An accommodator gave in to a competitor
 - C. An avoider refused to engage
 - D. A collaborator became frustrated with a competitor
3. Did your conflict style come into play? For example:
 - A. By competing with a competitor
 - B. By getting angry with an avoider
 - C. By protecting an accommodator
4. What could you have done to address these problems?

⁶ See Thomas-Kilmann Conflict Mode Instrument, developed by Kenneth W. Thomas and Ralph H. Kilmann, copyright 1974, 2002 by Xicom, Inc.

TRAINING OUTSIDE THE CLASSROOM

Peer Consultation Groups

BY HOWARD HERMAN AND JEANNETTE P. TWOMEY

ADVANCED MEDIATION TRAINING isn't found only in classrooms. Programs in Virginia and California use a less formal approach—peer consultation groups—to improve mediator practice skills, deepen conceptual knowledge and enhance self-awareness. The groups are built on the idea that mediators will develop greater professional competence by deliberately reflecting on what happens in their cases.¹

In a recent article in this magazine, Craig McEwen challenged mediators to build “active communities of practice” to cultivate a deeper sense of professionalism.² Peer consultation groups that engage practitioners in ongoing reflection about the values, principles and challenges of mediation are an important aspect of building such communities.

Virginia's peer consultation groups

Since 2003, Virginia's major mediation organizations, The Virginia Mediation Network and the Virginia Association for Community Conflict Resolution, have co-sponsored Mediator Peer Consultation (MPC) groups at six locations throughout the state. Community mediation centers serve as the program's delivery system. Small groups of mediators meet three to four times a year with a trained facilitator who guides a two-hour discussion of critical moments—or turning points—voluntarily shared from actual cases.

MPC is not storytelling, but a focused examination of what was going on with the parties and the mediator, what the mediator did or

did not do and why. By accessing the collective knowledge of their peers and getting feedback, mediators begin to recognize their own assumptions and routines and consider new approaches.

More than 140 mediators have participated in the Virginia program, which provides continuing education credit in the state's mediator certification process. Results, measured through surveys and interviews, have indicated great satisfaction with this method of advanced training. In the words of one mediator: “It really fills a niche. It has restored my enthusiasm for the practice.”

California's advanced practice groups

The ADR Program of the U.S. District Court for the Northern District of California operates a similar program. Since January 2004, the Northern District has sponsored five ongoing Advanced Mediation Practice Groups. Each group consists of six to twelve mediators who meet for two hours once a month. All of the groups are facilitated by the court's ADR Program Counsel, who is an experienced mediator and mediation trainer. Upon joining a group, mediators commit to participate for at least six months.

The practice groups provide a forum for mediators to learn from each other by reflecting on the actual experiences they are having in mediation. The goals of the practice groups include: providing a deeper learning experience than “one shot” continuing education programs can provide; combating isolation; promoting collegiality among mediators; developing enhanced mediation skills; applying negotiation and mediation theory to the issues confronted; and promoting a reflective approach to mediation practice.

Although peer consultation as

an element of continuing training is nothing new—variations on the concept are found in medicine, psychology, coaching, and higher education—it does not appear to have been widely adopted in the mediation field.³ Yet learning from one's peers is a simple, straightforward concept with rich rewards, as the Virginia and California experiences are demonstrating. Mediators who regularly meet face-to-face develop a familiarity that makes it more comfortable for them to discuss ethical dilemmas and problems that arise in daily practice.

No one size fits all

Like mediation itself, peer consultation groups do not lend themselves to a one-size-fits-all approach. Programs should demonstrate variety and experimentation. For example, the Virginia and California programs take different approaches to several key issues.

Nature of group process. Virginia's MPC project adopted a standardized, well structured model used in all of the groups across the state. Participants arrive with a critical moment that they want to share. This is a point at which the direction, focus or tone of an actual mediation changed. A trained facilitator oversees the discussion, giving individuals time to share critical moments and giving their colleagues time to offer feedback and alternative approaches. Participants pledge to maintain confidentiality with regard to what they hear about cases and about a mediator's performance.

California's process is somewhat more fluid. Three groups primarily use a case study method in which mediators take turns presenting a recent case they mediated. A short case summary is ordinarily distributed before the meeting, along with the presenter's identification of issues

Howard Herman is ADR program counsel for the U.S. District Court in the Northern District of California. He can be reached at howard_herman@cand.uscourts.gov.

Jeannette P. Twomey is director of the Virginia Mediator Peer Consultation Program. She can be reached at j.twomey@cox.net.

for consideration. The two remaining groups choose an issue for discussion rather than starting with a case, but with the understanding that the conversation will be animated by real situations that have occurred in the participants' practices. Whenever possible, a short reading addressing some aspect of mediation theory related to the issues is distributed either in advance of the meeting or following the discussion.

Sometimes the discussion focuses on skills and techniques and sometimes on relating theory to practice. Most rewarding, however, is the effort to identify what was happening for the mediator in order to build a sense of self-awareness that goes beyond an intellectual understanding of skills or theories. At their best, the groups strive to help participants become more attuned to the personal qualities of a mediator which distinguish real mastery from merely competent performance.

Facilitator's role. Virginia's MPC facilitators are trained to ask questions that elicit reflection and insight into the relationship between theory and practice. The facilitator's challenge is to function primarily as a "process person," resisting the temptation to dominate the group as an expert or trainer. The best facilitators are those with experience and insight, who can effectively summarize and synthesize what is shared.

In the California program, the facilitator's role is not as limited to process. The facilitator guides the discussion and serves as a resource, especially with regard to linking theory and practice; but, as in the Virginia program, the facilitator tries not to dominate or intervene as the "expert" too frequently. As a general practice, the facilitator asks questions rather than offering suggestions about alternative approaches.

Group composition and meeting frequency. In California, the same group meets on an ongoing basis, and this continuity is key to developing trust and rapport. Within each group there are diverse experience levels. While at first some experienced

mediators expressed reluctance to be placed in groups with less experienced mediators, almost all participants report that the energy, enthusiasm and fresh perspectives of the newer mediators help the veterans. Participants within each group also have varied subject matter backgrounds, providing diverse perspectives on the problems presented.

In Virginia, veteran and novice mediators with different styles and subject matter expertise make up MPC groups. Facilitators make an effort to "democratize" the groups by limiting introductions to first names. Program coordinators reconstitute the groups at each session to keep

value about the program and what they would like to change. All said they would participate again—and more than 95% reported that they had gained insight into how to practice and improve their mediation strategies.

Neither program has yet devised a way to track the extent to which participation in a peer consultation group affects actual mediator performance in their cases. But it is clear that those participating believe the groups are having a positive impact on their work as mediators.

Michaël Lang and Alison Taylor suggest that "mediators may have settled for less than their full potential" by merely replicating skills

By accessing the collective knowledge of their peers and getting feedback, mediators begin to recognize their own assumptions and routines and consider new approaches.

dynamics fresh. They use listserves and Web sites to advertise and offer a simple meal to attract participation after work hours.

Sharing lessons learned. Both programs are considering ways to share insights gained in the sessions with a wider audience while maintaining the confidentiality of the group process. Current plans in Virginia are to publish a quarterly electronic newsletter that highlights major topics of discussion and offers guidance in the form of references to specific articles and texts. The California program identifies themes from the group sessions that will be covered in other educational programs.

Evaluation. The California program surveyed participants after the first round of six meetings and is about to survey them again. Feedback was uniformly excellent. Participants noted the importance of the "open and safe environment" and how the focus on real situations from cases the participants were handling led to a "higher level of understanding."

Virginia's MPC Program surveys participants after each session to find out what they learned, what they

taught in training programs.³ Peer consultation looks like a sustainable method for advanced training that is readily available to court programs, state certification programs, community mediation centers and groups of private practitioners. It provides a way to guide mediators toward greater competence and self-awareness, and places substantial responsibility for quality control where it probably belongs – in the hands of the practitioners.

Endnotes

¹ MICHAEL LANG & ALISON TAYLOR, *THE MAKING OF A MEDIATOR: DEVELOPING ARTISTRY IN PRACTICE*, Jossey-Bass (2000); DANIEL BOWLING & DAVID HOFFMAN, *BRINGING PEACE INTO THE ROOM*, Jossey-Bass (2003).

² Craig McEwen, *Giving Meaning to Mediator Professionalism*, *DISP. RESOL. MAG.* 3, Spring 2005.

³ More than ten years ago, a *Mediation Quarterly* article described the value of a peer support group in a family law mediation practice: Edward Blumstein and Patricia Wisch, *Who Nurtures the Nurturer? A Model of a Peer Support Group*, 9 *MEDIATION Q.* 207 (Spring 1992).