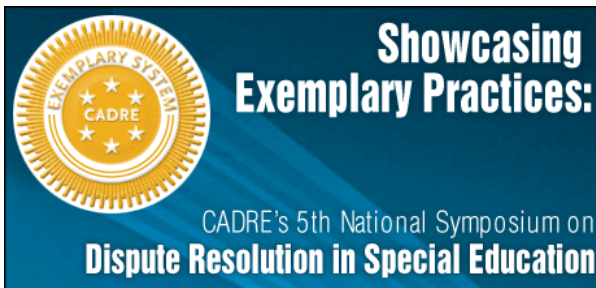


Ensuring Self-determination throughout Mediation

Ethical and effective practices in
screening cases, preparing clients, and
avoiding coercion



Workshop description, 1 of 2

Disputants and mediators together determine a mediation's success, sometimes only in retrospect. This interactive plenary will explore opportunities **prior to** and **during** a session, when the mediator may support—even enhance—parties' abilities to make the most of their mediation experience.

Workshop description, 2 of 2

Drawing on the academic and professional literature as well as extensive experience across civil, community, restorative justice, and public policy contexts, this plenary will consider promising practices regarding **case screening** and **client preparation** before mediation.

The thorny ethical issues of **pressure** and **coercion** during mediation will also be examined through case studies, theoretical bases, and their practical implications.

Today's agenda

- Screening cases for mediation
- Preparing participants for mediation
- Supporting effective decision-making
- Recognizing pressure and coercion

A quick reflection

Think of a mediation...

... in which one (or more) clients had a difficult time participating in mediation.

Let's set aside those clients for whom the content was hard to handle; I'm seeking any experiences with clients for whom the **process** itself was problematic.

Readiness, capacity, competence

A modest literature has emerged: 1984

Davis and Salem argued that mediators should terminate a mediation when:

1. when a party does not fully understand the mediation process, or
2. when a party lacks the ability to identify his or her interests and to weigh the consequences of an agreement.

Readiness, capacity, competence

ADA Mediation Guidelines, 2000

The ADA mediation working group provided a useful guideline regarding capacity to mediate:

“In order for the mediation process to work, the parties must be able to understand the process and the options under discussion and to give voluntary and informed consent to any agreement reached. Mediators and provider organizations therefore should determine whether the parties in a mediation have the capacity to do so...” (I.D.1)

Readiness, capacity, competence

ADA Mediation Guidelines, 2000, cont'd

“This evaluation should be **based on several factors**. The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties’ relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement.” (I.D.2)

Readiness, capacity, competence

“Facilitating competencies,” 2003

Crawford and colleagues at Keybridge argue that ‘determining capacity’ oversimplifies a complex set of factors:

“Capacity connotes a fundamental one-dimensional ability or failure to measure up to a particular norm, while *competencies* immediately suggests a variety of proficiencies with respect to the norm. Competencies may shift over time.

Readiness, capacity, competence

“Facilitating competencies,” 2003, cont’d

“Facilitating competencies requires constant and ongoing engagement on the part of the mediator. Facilitating competencies results in exposing a variety of opportunities that parties (including the mediator) can consider in order to meet their needs in the problem-solving process. The mediator has a choice, and every party has a choice.”

Readiness, capacity, competence

Beck and Frost's 2006 proposed rule

A person is **incompetent to participate** in mediation if s/he [has] functional impairments that severely limit...

1. A rational, factual **understanding of the situation**;
2. An ability to **consider options**, appreciate the impact of decisions, and **make decisions** consistent with his or her own priorities; or
3. An ability to **conform his or her behavior** to the ground rules of mediation.

Implications for practice

A broad screen of “Minimal criteria”

1. See how specific **issues are related** and connected to each other.
2. **Focus** on one issue at a time.
3. Understand **cause and effect**, match events and their consequences, and tie behavior to its effects on others.
4. **Take responsibility** for one’s own actions.

(Coy and Hedeem, *Mediation Quarterly*, 1998)

Implications for practice

“Minimal criteria,” continued

5. Conceive of, use, and respond to formal, businesslike, **common measures of time** re scheduling and deadlines.
6. Comprehend the nature of a **behavioral commitment**.
7. Identify **desired outcomes**.
8. Understand the **mediator’s role**, distinguish it from that of a judge or a police officer.

How to proceed?

The ADA Mediation Guidelines advise:

“If a party appears to have diminished capacity or if a party’s capacity to mediate is unclear, the provider organization or the mediator should determine whether a disability is interfering with the capacity to mediate and **whether an accommodation will enable the party to participate effectively**. If so, the provider organization or the mediator should offer such an accommodation.” (I.D.4)

Turn to a partner

And consider, What might a mediator do?

In such cases a number of responses may be appropriate:

What about ethics?

What are the mediator's responsibilities?

The next slides address the second question in the last section, namely: what **should** a mediator do?

Ethical dimensions of capacity

Radford (2002) recognizes the difficulty

Writing on adult guardianship mediation, she observes, “The self-determination principle places a number of requirements on a mediator. Among these is the requirement *that the mediator ensure* that **all parties have the capacity to participate in the process.**”

A mediator is required either not to commence or to terminate ... if [a party] does not have the capacity to participate. However, a determination of capacity is **not an easy one to make**, and the consequences of finding that a party is incapacitated are serious.”

Ethical approaches...

... to engage the topic of capacity

- ✓ employ **respectful screening processes** and instruments
- ✓ work *with* the disputant(s) to seek to **develop a mediation process that fits** the dispute and the parties
- ✓ bear in mind that **mediation is not a panacea**; there may be disputants for whom—and disputes for which—mediation is not a fitting process

My recommendations

Modest, affordable (I hope)

1. Guidance to (training of) mediators re **ongoing assessment of disputants' ability** to participate
2. A suggestion that disputants consider bringing a **support person**
3. An **enhanced preparation process**, including screening and expectations
4. [(Re-)Clarification of **communication guidelines** between mediators and others]

(from "Mediation as Contact Sport?" in *ABA Dispute Resolution Magazine*)

Implications for practice

What insights will we take away?

Please take a few minutes to do a rough sketch of a mediation screening process (or checklist) that might fit your typical case.

**Facilitating Effective
Decision-making
(*before and during* mediation)**

Another quick reflection

Think of a mediation you conducted...

... in which you worked with a disputant
who was very **well-prepared**.

How did you know they were prepared?

[Please jot these down]

One more quick reflection

Think of a past negotiation...

... for which you felt well-prepared.

How did you prepare?

[Please jot these down]

Best practices in negotiation, 1 of 2

As outlined by Lewicki and friends

1. Be prepared
2. Diagnose the fundamental structure of the negotiation (distributive, integrative)
3. Identify and work the BATNA (yours, theirs)
4. Be willing to walk away
5. Master the paradoxes of negotiation (claim or create value, principled or pragmatic, honest/open or opaque/closed, game plan or 'flow')

Best practices in negotiation, 2 of 2

6. **Remember the intangibles** (winning, not losing, looking tough, being fair)
7. **Actively manage coalitions** (communicate!)
8. **Savor and protect your reputation**
9. **Remember that rationality and fairness are relative** (and are defined self-servingly)
10. **Continue to learn from the experience**

Preparation is key, 1 of 2

One of many planning guides...

1. What are the issues in the upcoming negotiation?
2. What's the "bargaining mix"? How are issues related?
3. What are my interests?
4. What are my limits? My alternatives?
5. Where will I start/open? What is my goal?

Preparation is key, 2 of 2

6. Who are my constituents? What are their interests?
7. Who are my counterparts, and what are their interests?
8. What overall strategy do I wish to use?
9. What protocols/norms will facilitate this negotiation?

Lewicki et alii, *Neg. Readings, Exercises, and Cases* , 5/e, 2006

Implications for practice

What insights will we take away?

Please take a few minutes to do a rough sketch of a **mediation prep guide** (or checklist) that fits *your* typical clients.

Note that you could provide this to clients on paper, in person, via the web...

Implications for practice

Exchange your working drafts...

...with a partner, and review each other's work. This is a safe context in which to beg, borrow, and steal...

Yet another quick reflection

Think of a mediation you conducted...

**... in which you observed a disputant
making a bad decision (or two, or three).**

**This decision might relate to an offer
tendered, a counter-offer declined, a
justification offered, an accusation
made, or otherwise.**

[Please jot these down]

Tendencies toward poor d-m

Did any of our experiences reflect these?

- ✓ Endowment effect
- ✓ The power of free
- ✓ Overconfidence
- ✓ Confirmation bias
- ✓ Reactive devaluation
- ✓ Anchoring, priming
- ✓ Prospect theory
- ✓ Inequity aversion
- ✓ Argument dilution
- ✓ Irrational escalation of commitment, sunk costs
- ✓ Crisis framing [*next*]

“Anatomy of a Crisis”

(Ury & Smoke, Neg J, 1(1) 1985)

Where have you seen or felt these pressures?

\$ **High stakes**

🕒 **Little time**

? **High uncertainty**

✖ **Narrowing options**

“Anatomy of a Crisis” continued

Crises may be defused or avoided through...

- ✓ Controlling the stakes
- ✓ Providing adequate time
- ✓ Resolving uncertainty through info
- ✓ Identifying a range of options

NB: “Crises rarely just occur; they occur because people want them to occur.” (p.53)

Crisis framing

Know anyone prone to feeling in crisis?

Take a moment to revisit our experiences in mediation or negotiation. Can you chalk up any of those less-than-effective decisions to **perceptions of crisis?**

If a party presents this way in a mediation tomorrow, how might you respond?

The behavior of successful neg'rs

A study 48 negotiators over 10 years...

The skilled negotiators considered an average 5.1 **options** during planning stages, while others considered an average of only 2.6.

The former spent 38% of planning time **focusing on areas of common ground**, compared to only 11%.

During negotiation, the skilled set used fewer **irritators** (“generous offer,” “fair”, “reasonable”) per hour than did average negotiators (2.3 to 10.8).

Rackham in Lewicki et alii, *Neg: Readings, Cases, Exercises* (2007)

The behavior of successful neg'rs

The skilled negotiators disagree differently: instead of opening with “I disagree with that because...” the skilled group opened with their reason/s for disagreeing before stating their disagreement.

And re the number of reasons given to support each argument or case advanced: skilled negotiators offered an average of 1.8 reasons to average negotiators' 3.0 reasons.

(One plausible explanation is that more reasons provide offer more to disagree with.)

Implications for preparation

Given these eleven common phenomena...

**Would you revise your preparation
document?**

[If so, edit away]

Avoiding our own traps

Rubin counsels (in *Negotiation: Readings*)

- Set limits on your involvement and commitment in advance
- Once you set a limit, stick to it
- Avoid looking to others to see what you should do
- Beware of your need to impress others
- Remind yourself of the costs involved
- Remain vigilant

Ethical bounds (prohibition?) of mediator pressure

A starting point

You *can* recite the Model Standards, can't you?

- I. Self-determination**
- II. Impartiality**
- III. Conflicts of interest**
- IV. Competence**
- V. Confidentiality**
- VI. Quality of the Process**
- VII. Advertising and Solicitation**
- VIII. Fees**
- IX. Obligations to the Mediation Process**



Mel Brooks with the fifteen... oy!... nine, nine model standards.

Difficult definitions

Self-determination *in mediation*

As Justice Potter Stewart famously said in 1964,
“I shall not attempt to define pornography...
but **I know it when I see it.**”

Ethical guidelines are framed similarly; from the
Model Standards of Conduct for Mediators:
“Self-Determination: A mediator shall
recognize that mediation is based on the
principle of self-determination by the
parties.”

Difficult definitions, cont'd

Self-determination is...

The *Model Standards* go on to explain,

“Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.”

Reflections on practice

Please recall a few of your recent mediations

Did you witness any pressure tactics?

... by a disputant?

... by an attorney?

... *by a mediator?*

To be clear, did you employ any coercive actions?

Reflections on practice, continued

In those same mediations, did you...

- ✓ exert some influence?
- ✓ predict how a judge would rule in the case?
- ✓ provide some information?
- ✓ engage in arm-twisting?
- ✓ threaten to declare impasse?
- ✓ offer some suggestions for outcomes?
- ✓ point out the negative consequences of not resolving the case in mediation?

A simple definition, (maybe)

The term 'coercion' has Latin roots...

coercēre, “to surround, control, or restrain;”
from *arcēre*, “to enclose, confine;” from
arca, “box, coffin.”

Coercion is generally considered ‘the act of compelling another through pressure or intimidation.’

The literature distinguishes between coercion
into mediation and within mediation.

Coercion in the DR literature

Various conceptions include...

- ✓ Pressure to **enter/accept** mediation
- ✓ Pressure to **continue** with mediation
- ✓ Pressure to **settle** in mediation

Down in Georgia...

Chapter 1, Ethical Standards for Neutrals

I.D. The mediator must guard against any coercion of parties in obtaining a settlement.

Commentary: ... At some point, however, persistence becomes coercion.

Notes: While mediation techniques and practice styles may vary... a line is crossed and ethical standards are violated when any conduct of the mediator serves to compromise the parties' basic right to agree or not to agree.

“A line is crossed”

Matz observed in *Negotiation Journal*...

“... Some scholarship on mediation presents [the following] picture. The mediator is someone with the potential to do all kinds of bad things to parties—coercing them, manipulating them, and generally taking advantage of the [parties]...”

“Mediator Pressure and Party Autonomy: Are They Consistent with Each Other?” 10(4), Oct 1994, p.359

“A line is crossed,” continued

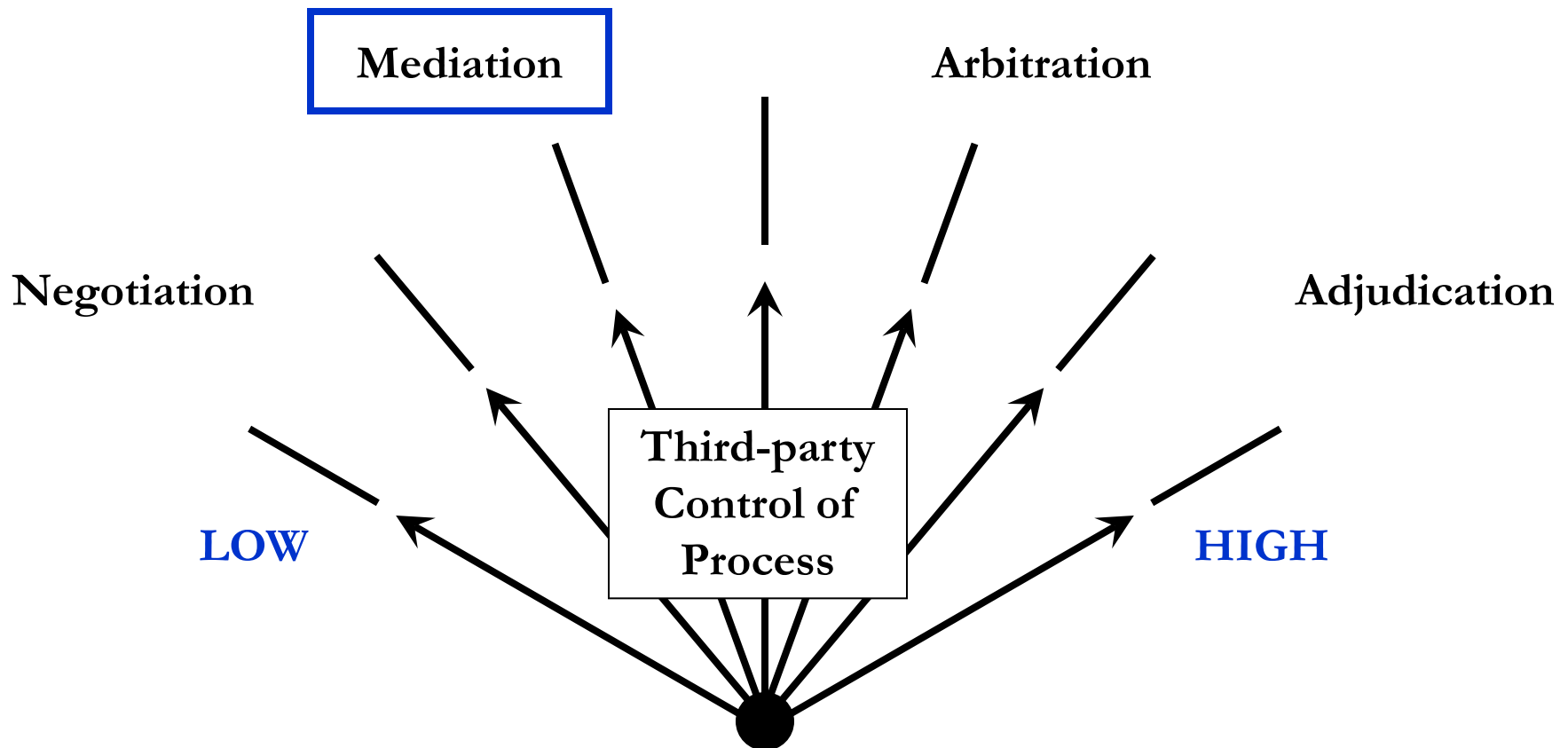
“An underlying fear... is that a mediator can become the tool of the dominant party, ... pushing the weaker party into an agreement;

... or the mediator, out of an excessive zeal for putting another notch in her settlement belt, pushes a hapless party into accepting an agreement.

In either of these, the concern is that **a line has been crossed**, that the party’s autonomy has been violated.”

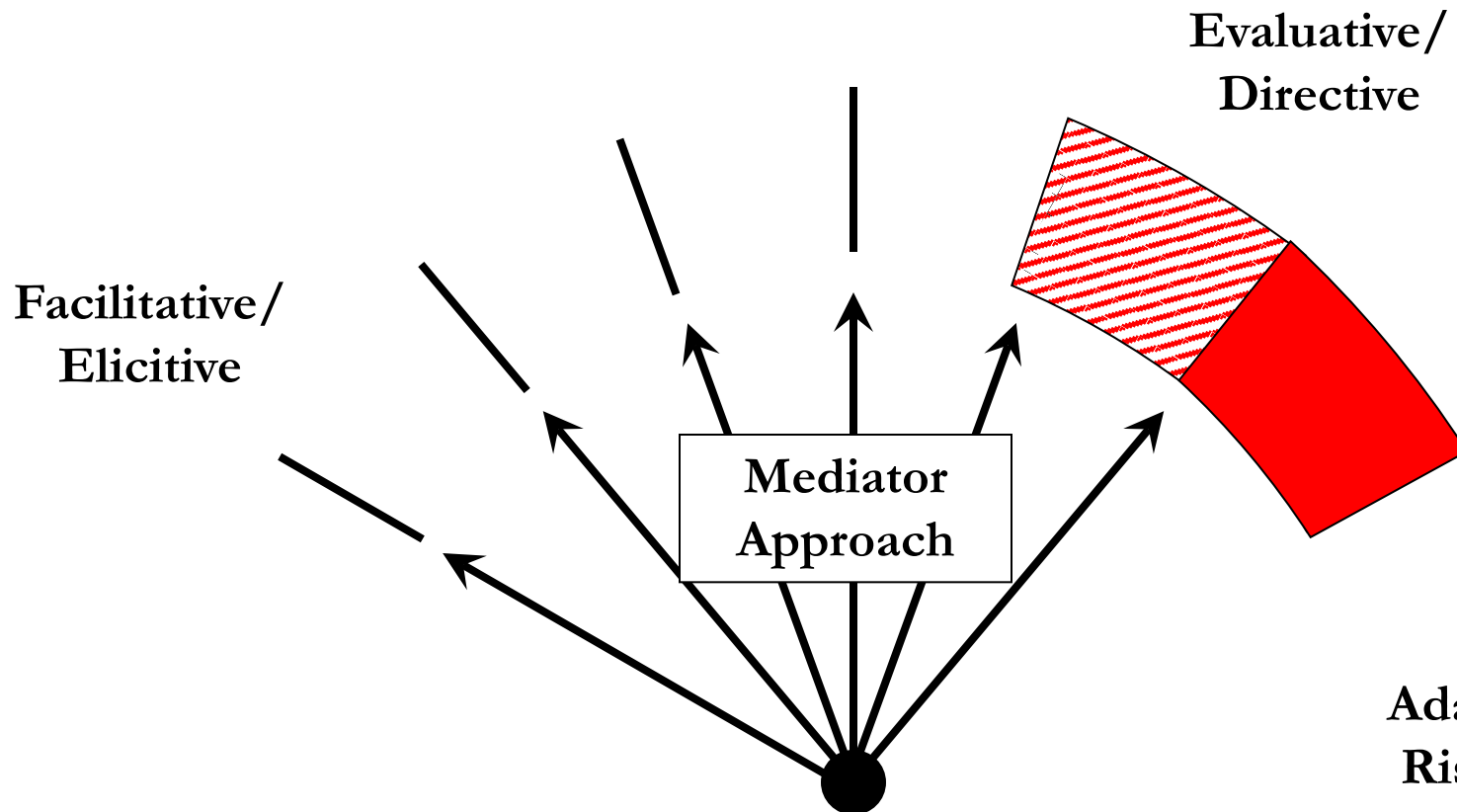
Lines facilitate distinction

Consider the ADR continuum...



Riskin's mediator orientations

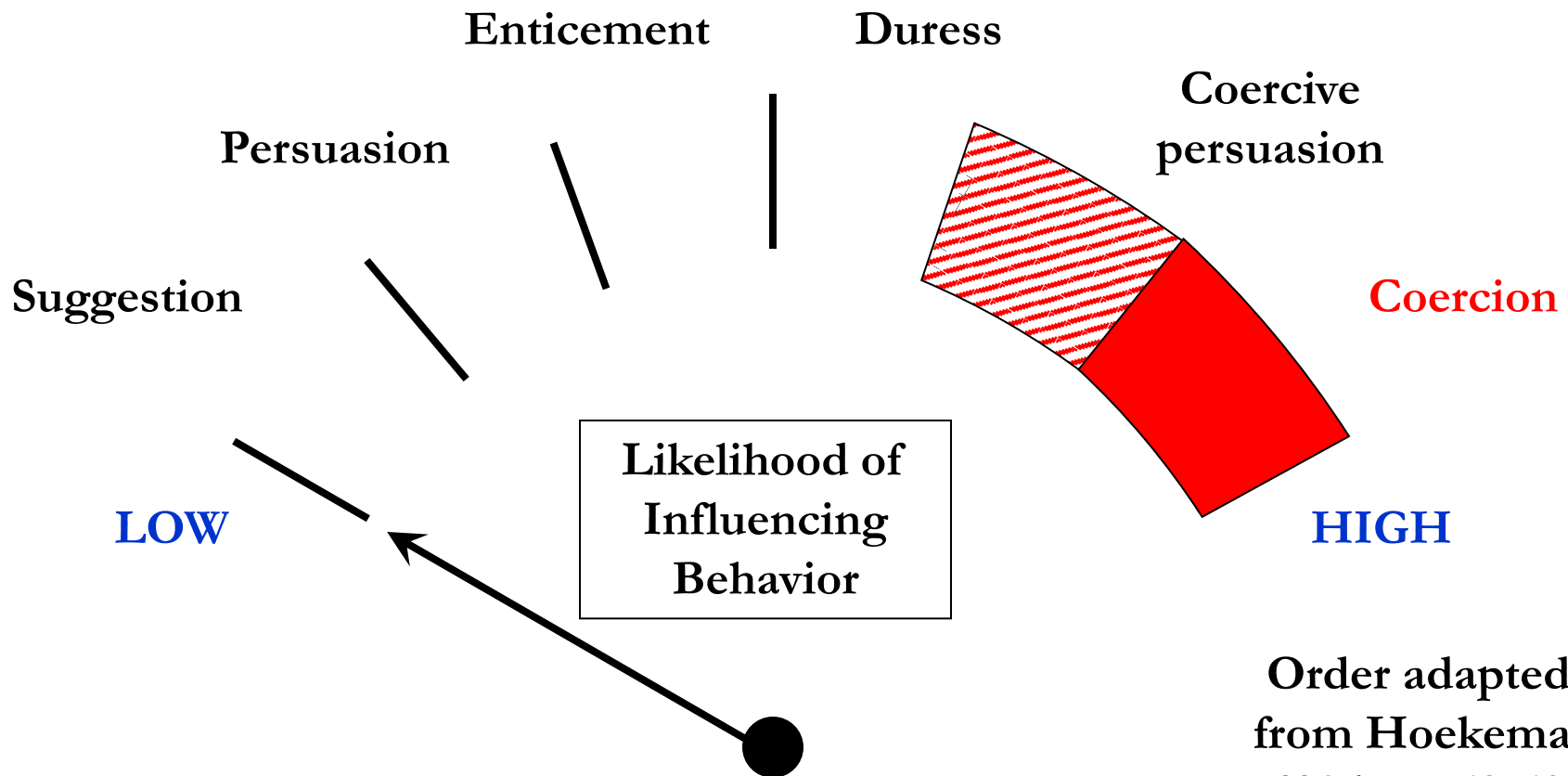
Along the axis of "mediator approach"...



Adapted from
Riskin, 1994,
1996, 2003

Consider this progression

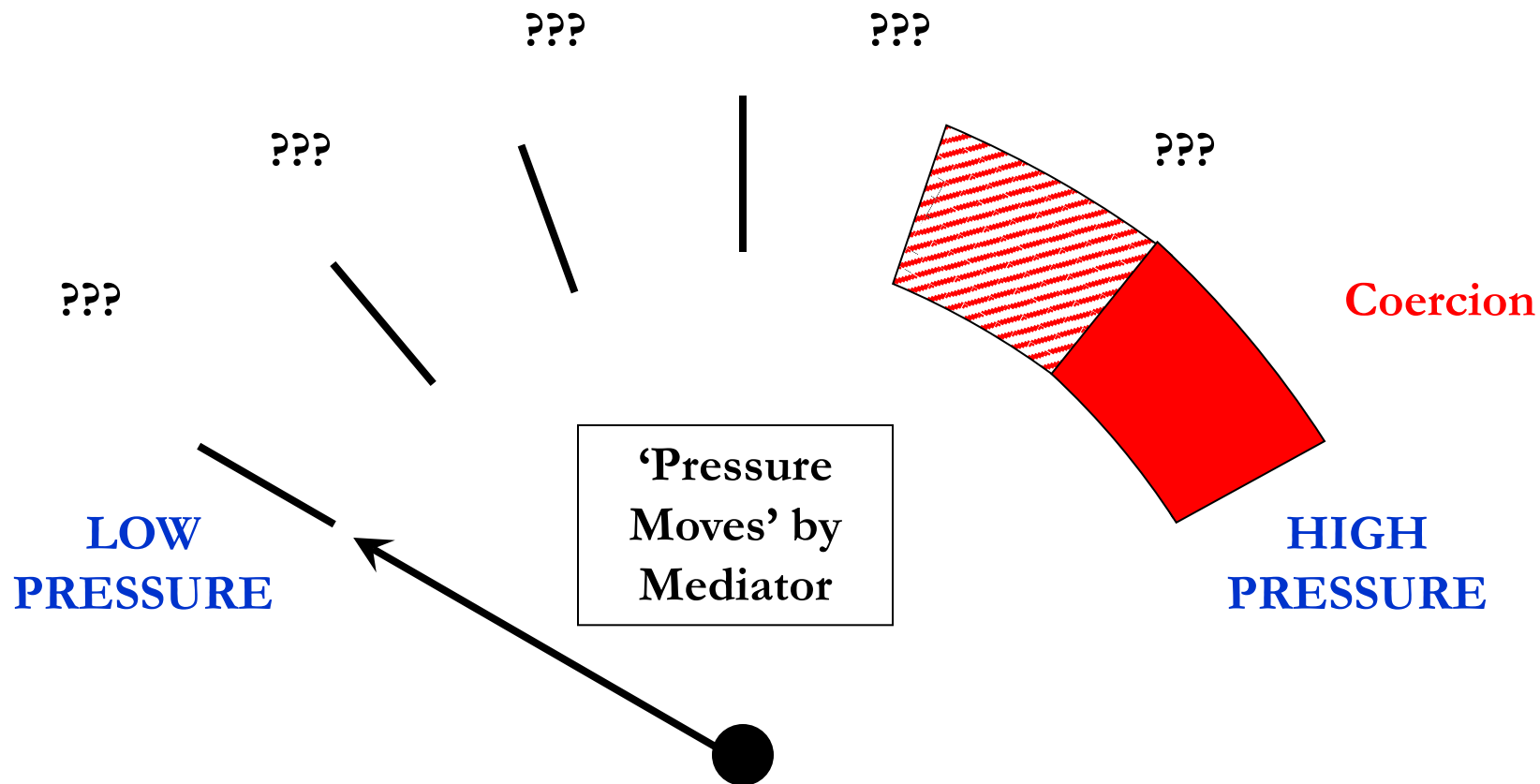
From philosophers and psychologists...



Order adapted from Hoekema, 1986, pp.52-53

Application to mediation (1 of 2)

We'll use this gauge to locate our work



Application to mediation (2 of 2)

1. Review this list of interventions and feel free to add others that you have employed or observed.
2. Place the interventions in order from least- to most-pressuring.
3. Indicate with a line where you believe the level of pressure reaches coercion.
4. Gather with colleagues to review your ordering and your 'coercion line.'

Solo
efforts



Group
effort

Debrief...

How did we order these? Where's the line?

Which of your interventions were missing?

Which interventions are most common in your practice? Where do they fall?

Are any of the listed interventions 'outside' of your practice?

Where's your individual line? What about your partners' lines?

“Fair use” of mediator power

Boskey responded to Matz...

“What does all of this imply about the propriety of the use of mediator power?”

It suggests first that **there is no single or simple solution to the question** of to what extent it is appropriate for a mediator to influence a party or what techniques may be appropriate.”

“The Proper Role of the Mediator: Rational Assessment, Not Pressure,” *Negotiation Journal*, 10(4), Oct 1994, p.370

Further discussion

In a 2005 article...

I explored a few additional nuances:

- ✓ **Mediator as tattletale?** Coercion through reports and recommendations to the court
- ✓ **Party as piñata:** Does desired mediator pressure constitute coercion?

“Coercion and Self-determination in Court-Connected Mediation: All Mediations are Voluntary, But Some Mediations are More Voluntary than Others,” *Justice System Journal*, 26(3): 2005

An ethics resource

Many years in the making...

A small team has worked to compile a searchable database (“national clearinghouse”) of ethics grievances and advisory opinions:

www.abanet.org/dispute/clearinghouse.html

~330 grievances and opinions are categorized by the nine standards in the **Model Standards of Conduct for Mediators**; each of the entries has at least one model standard reference, and as many as three.

2009 Section of Dispute Resolution Spring Conference New York, NY - Mozilla Firefox

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http://www.abanet.org/dispute/clearinghouse.html

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Introduction

Whether you are looking for mediation ethics opinions in a specific jurisdiction or analysis of an ethical standard, this online resource provides opinions from 43 states to help mediators make smart choices in their practice. The database contains a short summary of each opinion with a hyperlink to the original opinion or document issued by the state or national body.

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National Clearinghouse for Mediator Ethics Opinions

This searchable database provides comprehensive coverage of mediator ethics opinions from 43 states. The database contains a short summary of each opinion with a hyperlink to the original opinion or document issued by the state or national body. Opinions are categorized by the nine standards in the Model Standard of Conduct for Mediators – adopted in 2005 by the American Bar Association, American Arbitration Association and Association for Conflict Resolution.

Keyword Search (all fields):

Opinion Category:

- Self-Determination
- Impartiality
- Conflicts of Interest
- Competence
- Confidentiality
- Quality of the Process
- Advertising and Solicitation
- Fees and Other Charges
- Advancement of Mediation Practice
- Other

State:

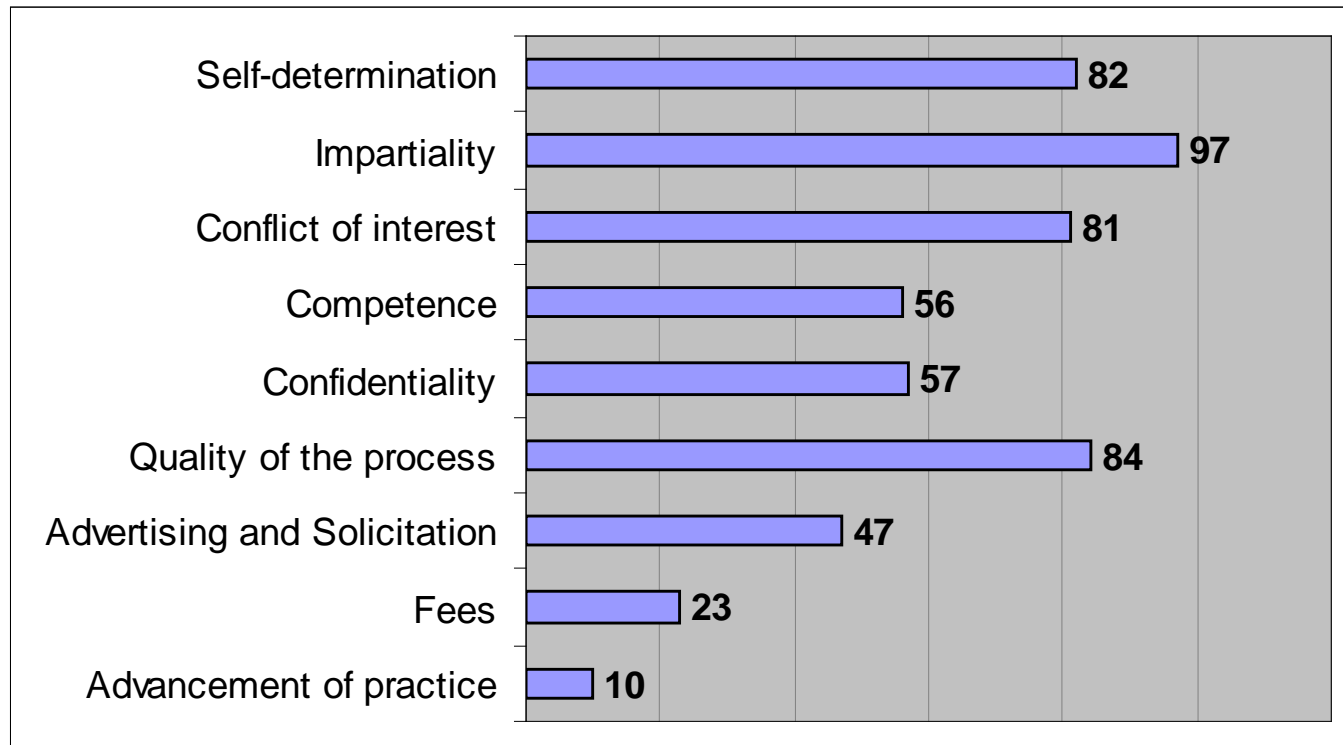
Year:

Opinion Type:

Opinion ID No.	Opinion Description	Opinion Category	Opinion Type	Hyperlink	State	Year
VA-1990-1368	Third party neutral attorney-mediators are not involved in the practice of law, but the attorney-mediator is subject to the provisions of the Code of Professional Responsibility while carrying out the tasks involved in mediation. An attorney-mediator may split fees with a corporation not engaged in the practice of law as long as the attorney-mediator's role does not extend beyond those of a scrivener of the agreement reached in the mediation process.	Competence; Fees and Other Charges	Ethics Opinion	http://www.courts.state.va.us/drs/upl/opinion_no_1368.html	VA	1990
VA-2006-1826	An attorney who is also part of a mediation firm can represent former customers of the mediation firm only where she either does not have a conflict of interest, or if she does, she has properly disclosure to the clients her role with the Mediation Firm. Similarly, this attorney can represent those clients, who are former mediation customers of fellow mediators, where she either has no conflict of interest, or if she does, where she properly disclosure her role with the Mediation Firm. One appropriate strategy for obtaining client consent may be creation of a "screen" between the two lawyers regarding a case. In addition, due care must be exercised that all memoranda, work product and other material contained in the mediator's case file remain confidential and not subject to disclosure.	Conflicts of Interest; Confidentiality	Ethics Opinion	http://www.vade.org/opinions/1826.htm	VA	2006
VA-1996-1684	A mediator who represents a client in a mediation against firm A may not represent a new client against firm A if the information disclosed during the mediation was specifically given subject to the mediator's duty to keep it confidential and that it involves the same subject matter at issue in the first case. Confidentiality is critical to maintaining a mediator's ability to work impartially and neutrally with both parties to resolve their differences.	Impartiality; Conflicts of Interest; Confidentiality	Ethics Opinion	http://www.vade.org/opinions/1684.TXT	VA	1996
VA-2002-1759	Attorney A is the sole owner of a Mediation Company and "of counsel" to a Law Firm. Attorney B, the owner and principal attorney of Law Firm, is married to Attorney A. Attorney A represents a party in a mediation where Attorney A prepared, as the mediator, a separation and property settlement agreement for the parties, which also addressed parenting and support issues, and advises the parties to have the agreement reviewed by an attorney not affiliated with Mediation Center or Law Firm prior to execution. After execution of the agreement, the parties to the mediation request that an associate of Law Firm file the divorce on behalf of one of the parties. The familial relationship does not prohibit Attorney B from representing one of the parties in the divorce as long as Attorney A solely provided mediation to the couple on issues related to the divorce but does not represent either party in the divorce action.	Impartiality; Conflicts of Interest	Ethics Opinion	http://www.vade.org/opinions/1759.htm	VA	2002
VA-1986-849	It is improper for an attorney who has served as a mediator between parties to represent either of said parties in the subject matter of the mediation.	Self-Determination	Ethics Opinion	http://www.vade.org/opinions/849.htm	VA	1986
VA-1985-590	It is proper for an attorney/employee of a corporate ADR service to provide legal information to the clients of the service as long as the clients understand that the information is being provided by the attorney as a mediator. It is also proper for an attorney to include, or allow the inclusion of, his professional status in the advertising of the services. It is improper for an attorney, who has served as a mediator between parties, to represent either of said parties in the subject matter of the mediation. It is also improper for an attorney to render legal advice to the clients of the service if the organization of the mediation service includes other professional disciplines.	Self-Determination; Conflicts of Interest; Advertising and Solicitation	Ethics Opinion	http://www.vade.org/opinions/590.htm	VA	1985
prior relationship, perceived preference	Where an attorney has acted as a mediator in a divorce matter, he is precluded from subsequently representing either party in a contested or uncontested divorce proceeding.	Impartiality; Conflicts of Interest	Ethics Opinion	http://www.vade.org/opinions/544.htm	VA	1985

A tally of which standards...

Are 'tagged' in the dataset (as of April 2009)



Day's recap

We've come a long way; have we all made it?

- ✓ **Introductions**
- ✓ **Mediation intake, screening**
- ✓ **Mediation client preparation**
- ✓ **Supporting effective decision-making**
- ✓ **Ethical dimensions of pressure**