The Critical Importance of Pre-Session Preparation in Mediation

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It's indisputable that preparation before mediation sessions is very important – both for the participants and the mediators - because it can make a huge difference in the process and outcome.

In mediation, parties (and their lawyers, if any) need to be prepared to discuss the facts, law, interests, and/or negotiation approaches etc. This is hard enough when they are well prepared. It is **so much harder** when they are not. By the same token, mediators can perform much better when they prepare before mediation sessions.

Two things recently prompted me to write this article about the critical importance of pre-session preparation.

Art Hinshaw gave a presentation to the AALS Mediation Clinic Think Tank about the excellent empirical study that he and Roselle Wissler published about pre-session activities. In my Real Mediation Systems Project, I analyzed the systems of ten thoughtful mediators, which discussed pre-session activities (among many other things).

This article discusses three issues. First, why pre-session preparation is so important. Second, why we should use the term "pre-session" instead of "pre-mediation." Third, why faculty and trainers teaching mediation should cover pre-session preparation – even though it's hard to fit into the limited time they have to teach mediation.

The Critical Importance of Pre-Session Preparation in Mediation

This section explains why I believe that pre-session activities are so important and should be considered as the "initial phase" of mediation (when these activities occur).

Here are excerpts from Roselle and Art's article (footnotes omitted):

> The most common goals for pre-session communications are for: (1) the mediator to develop a basic understanding of the dispute; (2) the mediation participants to gain an understanding of the mediator's approach and the mediation process; (3) the mediator and the mediation participants to discuss how to structure the mediation process for the particular dispute; and (4) the mediator and the mediation participants to begin to build rapport and trust. Accomplishing these goals would enable the mediator and the mediation participants to plan how they can most

productively approach the first mediation session and would also help reduce the parties' stress before and during the mediation.

To help accomplish these goals, mediators and lawyers generally recommend the following topics be discussed or explored during pre-session communications: (1) the mediation process, the role of the participants, and the mediator's approach; (2) the background of the dispute, the main issues to be addressed, the parties' interests, and any non-legal issues; (3) the status of settlement negotiations and the offers that have been exchanged, the obstacles to settlement, whether the parties need additional information, and possible settlement options; (4) the procedural status of the case; (5) the parties' personalities and emotional dynamics, issues of violence or coercion, who should or should not attend the mediation, and the specifics of how the mediation process should proceed in this case (e.g., opening presentations, the role the parties will play, or topics to be avoided in joint sessions); (6) giving the parties a chance to vent and work through emotions before the formal mediation session; (7) establishing the ground rules, encouraging a civil tone, and coaching on more productive opening presentations and communications; and (8) the particular documents that should be submitted to the mediator before the first session and whether these documents should be exchanged between the parties.

They conducted a survey of civil and family mediators in eight states, receiving more than 1000 responses. Here are the top-line findings:

> Overall, 66% of the mediators in civil cases and 39% in family cases held pre-session discussions about non-administrative matters with the parties and/or their lawyers in their most recent case. As to the timing of these discussions, around half of the mediators in both civil and family cases (54% and 47%, respectively) held pre-session communications both prior to and on the same day as (but before) the first mediation session; over one-third held discussions only prior to the day of the first session (37% and 35%, respectively); and the rest had pre-session communications only on the same day as the first session (9% and 18%, respectively).
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> Some mediators had no feasible opportunity to hold pre-session discussions with the parties and/or their lawyers (9% in civil cases and 24% in family cases) and a few were prohibited from doing so (2% and 7%, respectively) . . ..
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> In civil cases, over three-fourths of the mediators had party mediation statements or memos, around half had the pleadings and/or motions, and almost one-fourth had other case documents (e.g., financial statements, medical records, or contracts). In family cases, almost one-third of the mediators had the pleadings and/or motions; fewer than one-fifth had

> either mediation statements or other case documents. Few civil or family mediators had access to the results of intimate partner violence screenings before the first mediation session.

My analysis of the real mediations systems of ten mediators provides concrete illustrations of the variation of pre-session activities. All these mediators routinely arrange for certain pre-session activities, which vary widely based on the type of case and context. In my child protection cases, a case coordinator contacted the participants to provide logistical information and to answer questions for people who were not familiar with mediation. We produced a short video explaining the mediation process that we distributed on VHS cassettes. (Hey, it was the 1990s. Search the internet if you haven't heard of this exotic technology.) In the day-of-hearing cases, all the litigants in the courtroom generally receive the same, brief description of the process.

When mediations are scheduled in advance, the mediators' accounts describe individual pre-session contacts with parties and/or lawyers tailored to the type of case and the mediators' general approach. For example, in Alex Carter's cases, mediators have conversations with the parties to secure their agreement to mediate, explain confidentiality, start to build trust and connection, ask who might be necessary to have in the room, nail down process arrangements, identify current barriers to settlement, figure out how best to use the time before the mediation session, and get information, settlement authority, and anything else that might be needed. Fran Tetunic has phone calls asking about any special needs, safety concerns, expectations, or requests. In Ron Kelly's large business cases, he uses elaborate procedures in this initial stage in which he substantially engages the parties as well as the lawyers.

Here is the conclusion from Roselle and Art's study:

> The findings show that, before the first mediation session, a sizeable number of mediators do not have communications with the mediation participants or do not have case documents, and many disputants themselves do not participate in pre-session discussions. Accordingly, mediators often do not begin the first formal mediation session informed about the disputants or the dispute, and disputants do not necessarily enter the first session with an understanding of the mediation process. This is contrary to conventional mediation thinking and advice that stresses the importance of preparing for mediation. In addition, the lack of pre-session information negatively impacts the ability of mediators and mediation participants to customize the mediation process to the needs of the individual case, which is considered to be one of mediation's advantages.

This assessment is consistent with the conclusions of the ABA Section of Dispute Resolution's Task Force on Improving Mediation Quality, which relied on a survey and focus groups. I summarized the findings in *Doing the Best Mediation You Can*.

The vast majority of the survey respondents said that preparation by the mediator and mediation participants is very important. Indeed, it helps to consider that "mediation" really begins during the preparation phase – not when everyone convenes at a mediation session. Some subjects emphasized that it is critical for a mediator to personally "be there" from the beginning.

Most of the respondents said that lawyers should send a mediation memo to mediators and that it is essential for mediators to read everything they receive (which may include additional documents such as pleadings, legal memos, or expert reports). They also generally said that mediators and lawyers should talk before the mediation session to discuss procedural and substantive issues, including the "real issues" and potential stumbling blocks. They overwhelmingly said that mediators should discuss who will attend the mediation session and confirm the participation of individuals with appropriate settlement authority. They also generally said that it is very helpful for mediators to encourage people to take a constructive approach in mediation.

These discussions can prompt the lawyers to prepare themselves and their clients, which can make a big difference in the success of mediation. The parties should have an appropriate understanding of the process, the issues, and their real interests. They should expect to hear things that they will disagree with, and they will probably be asked challenging questions. Parties should be open to reconsidering their positions based on the discussions in mediation.

The Task Force research suggests that mediators should use the preparation process to help identify the parties' goals. Not surprisingly, the vast majority of survey respondents said that in most cases, settling the case and minimizing the time, cost, and risk are important goals. Almost as many respondents said that satisfying the parties' underlying interests is also an important goal in most cases. Substantial proportions of respondents identified additional goals, such as giving parties a chance to tell their stories and feel heard, having parties reach closure, promoting communication between parties, and preserving relationships. So it would be a mistake for mediators to assume that "it's just about the money" or that the only goal is to settle the case. Instead, mediators should be attentive to the parties' goals, starting before the first mediation session.

Standard 3.2(b) of the National Standards for Court-Connected Mediation Programs specifies 24 types of information that courts should provide to parties and attorneys before mediation sessions. I discussed courts' obligations to educate parties in *Charting a Middle Course for Court-Connected Mediation*.

There are readily-available resources to promote preparation for mediation sessions. The ABA Section of Dispute Resolution developed excellent mediation guides to help parties prepare for mediation. In addition to a general guide, it published versions for

family cases and complex civil cases. In *Litigation Interest and Risk Assessment: Helping Your Clients Make Good Litigation Decisions*, Michaela Keet, Heather Heavin, and I included this appendix with guidance to help parties and lawyers prepare for mediation. Also see the great article by Brian Farkas and Donna Erez Navot, *First Impressions: Drafting Effective Mediation Statements*.

We Should Use the Term "Pre-Session" Instead of "Pre-Mediation"

Roselle and Art's footnote 3 points out that mediation often is considered to begin with the first contact between the mediator and the parties or their lawyers, and thus it is more accurate to use the term "pre-session" than "pre-mediation."

"Pre-meditation" is problematic for several reasons. First, it implies that the activities before the first mediation session are not part of the mediation process. After a moment's reflection, it should be clear that this is not so.

It also implies that the real work in mediation is getting resolution, not the whole process of working through the issues. Moreover, it implies that the pre-session work isn't very important, perhaps just administrative stuff.

As a technical matter, it could imply that confidentiality protections don't take effect until a mediation session starts. Some statutes and rules provide that confidentiality protections begin with the first contact with the mediator. For example, Section 2(1) of the Uniform Mediation Act defines a protected "mediation communication" as a statement "that occurs during a mediation or is made for purposes of **considering**, conducting, participating in, **initiating**, continuing, or reconvening a mediation or **retaining a mediator**." (Emphasis added.)

While we are on the subject of (un)helpful language, I suggest that we generally use the term "self-represented" parties rather than "unrepresented," "pro se," or "pro per." "Unrepresented" is particularly problematic because it implies that legal representation should be the norm and that parties are incompetent to represent themselves. Although "pro se" and "pro per" indicate that parties are representing themselves, it's **so** much better to use commonly-understood language instead of legal jargon in Latin.

Faculty and Trainers Should Cover Pre-Session Activities

Because pre-session activities are so important, faculty and trainers should cover them in their mediation courses and trainings. This is hard because they generally don't have enough time to cover everything they want, as one colleague mentioned during Art's presentation.

But it's really important. So I suggest that teachers and trainers consider how they might include some coverage, even if it means omitting something else.

Many mediations involve family cases, and given the sadly high prevalence of intimate partner violence (IPV), it's important to routinely screen for this. Ideally, courts referring family cases would do good screening, but mediators can't count on that. So mediators handling family cases should routinely do some screening. This is much easier said than done, in part because of the variety of patterns of violence and the fact that parties, including victims, often don't want to talk about it.

So I think that mediation courses should include readings about this important issue and discuss it in class. Ideally, students should do simulations of screenings. I wrote this simulation, which I encourage faculty and trainers to use. It involves only screening – the simulation ends after the mediator interviews both parties.

I wrote this simulation to be a close case. It involves a middle-class couple, reflecting the fact that IPV occurs in every socio-economic level. The behaviors in this case were not coercively controlling violence and the wife was somewhat assertive, so mediation might be appropriate, particularly with certain safeguards. Not surprisingly, various students played the roles differently and thus students had different views about the appropriateness of mediation. Although I wrote this simulation in the last century and there has been a lot of work on these issues since then, I think that the simulation still should provide a good learning experience.

I encouraged students to focus on the parties' ability to mediate effectively and their interest in doing so – not act like CSI investigators trying to determine the exact sequence of events.

Mediating with self-represented parties often presents challenges. Working with them before the first mediation session can make a big difference. Students and practitioners should learn how to address these parties' special needs.

In Conclusion

The Real Mediation Systems Project grew out of my forthcoming article in the Cardozo Journal of Conflict Resolution, *Real Mediation Systems to Help Parties and Mediators Achieve Their Goals*. That article critiques the traditional system of mediation models, arguing that they are inadequate to help mediators, lawyers, and especially parties understand what to expect from mediation and how they can act most productively in mediation. There are just too many variations in mediation for any theoretical model to provide realistic expectations and guidance. Instead of relying solely or primarily on cryptic theoretical characterizations, mediation programs and mediators should arrange for whatever pre-session activities they reasonably can before the first mediation session in each case and use clear language to make the process as productive as possible.