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## So You Want to Be a Mediator: Realistic Considerations for Attorneys Considering Becoming Mediators

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# PRACTITIONER'S GUIDE

## SO YOU WANT TO BE A MEDIATOR? REALISTIC CONSIDERATIONS FOR ATTORNEYS CONSIDER- ING BECOMING MEDIATORS

Joseph H. Paulk<sup>†</sup>

### I. INTRODUCTION

So you want to be a mediator? The future trend in the legal community is away from traditional litigation and toward alternative dispute resolution (ADR). As a whole, Americans are increasingly dissatisfied with the adversarial legal system for resolving disputes between parties.<sup>1</sup> Time and money is saved by resolving disputes outside the procedure of the courtroom. The list of persons who consider themselves "mediators" or "ADR Specialists" is growing longer by the day. Before incorporating mediation into a successful law practice, there are many obvious as well as unanticipated considerations for the sole practitioner, as well as, the member of the law firm to consider before launching a successful mediation practice and becoming active as a neutral. Ethical considerations, conflict of interest inquiries, appropriate training and experience and confidentiality issues merely scratch the surface of relevant concerns for attorneys who are contemplating practicing mediation. These issues not only apply to the attorney, but also the law firm in which the attorney is associated. Not only must firms consider the ethical and conflict questions, but also the financial and economic effects of mediation on current and future transactions of the firm. This article will examine the critical issues that attorneys, whether sole practitioners or members of a full-service law firm, should consider before entering into this alternative dispute resolution field. Mediation is a unique proceeding with

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1. See Frank Evans, *The Lawyer's Duties and Responsibilities in Dispute Resolution*, 38 S. TEX. L. REV. 375, 375 (1997).

its own rules and ethics; therefore, one must have insight into the ramifications of engaging in these types of endeavors.

## II. OKLAHOMA MEDIATOR QUALIFICATIONS

Because alternative dispute resolution plays an important role in court administration, many states promulgate minimum standards and expectations for mediators and the mediation process. Recently, the Oklahoma Legislature attempted to promulgate adequate guidelines necessary to govern mediation programs implemented in state courts.<sup>2</sup> This attempt, while setting a so-called "standard" for mediators, in a sense established no standard at all. Oklahoma does not require any formal minimum educational criteria in order for a person to hang out a shingle as a mediator. The only criteria required to begin a civil mediation practice is twenty-four hours of mediation training.<sup>3</sup> Thus, an individual with an eighth grade education or a successful trial attorney would both meet Oklahoma's standard for qualification as a mediator. Persons who understand the mediation process, but not how mediation fits within the legal spectrum of judicial proceedings, may not appreciate the process in which they are actively participating. Because of these standards, currently the majority of "certified" mediators are not attorneys.

In 1985, Oklahoma developed mediation programs through the State of Oklahoma's Alternative Dispute Resolution System. As a result, of this initiative, Oklahoma currently has twelve Early Settlement Centers that provide mediation services through volunteer mediators. This volunteer program provides mediation training to persons accepted by the Center. The minimum training of twenty-four hours is required for mediator certification (or forty hours for family dispute mediation training). Mediating parties who take advantage of this system are charged a minimal administrative fee of five dollars.

Facilitating communication and convincing parties to understand one another and focusing on the relevant issues requires skillful discussion leadership.<sup>4</sup> Practical experience, while undoubtedly advantageous in the mediation proceeding, does not guarantee that the mediator will be successful in facilitating the communication between the disputing parties. Likewise, successful trial attorneys or noted judges would experience a vast transition from the decision making of the courtroom, to the conference rooms in which mediations are conducted. In the role of zealous advocate or judge, the attorney is familiar with making decisions and evaluations in the legal process through intuition and experience. However, as a mediator, attorneys do not render legal advice to the parties or help decide the case, making the transition from attorney to mediator somewhat unnatural. The mediator's role is to facilitate the

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2. OKLA. STAT. tit. 12, § 1824 (1998).

3. OKLA. STAT. tit. 12, § 1801 (1998).

4. See Sandra E. Purnell, *The Attorney as Mediator - Inherent Conflict of Interest?*, 32 UCLAL. REV. 986, 1006 (1985).

development of information needed to arrive at a meaningful settlement.<sup>5</sup> The experience and educational background of an attorney can convolute the intuitive behavior of the mediator. Thus, in order to adapt to a mediator role, the attorney-mediator must be willing to unlearn the role of a contentious advocate.<sup>6</sup> As a result, this transition may not equate to success for the experienced trial attorney or judge.

### III. IS MEDIATION THE PRACTICE OF LAW?

A paramount question surrounding the ethical issues guiding attorneys is whether mediation is indeed considered the practice of law. Are attorneys, who mediate, bound by their code of professional conduct? The practice of law and ADR may appear to be a harmonious duet; however, an analysis of the difference in the respective professions may cause ethical responsibility problems in all directions.

Proponents who support the contention that mediation is indeed the practice of law present strong arguments to support their case. These arguments refer to the ABA Model Rules of Professional Conduct which address services performed by attorneys. ABA Model Rule of Professional Conduct Rule 5.7 articulates a standard for ancillary or law related services provided by attorneys.<sup>7</sup> This rule defines the term "law-related service" as services which might reasonably be performed in conjunction with or in relation to legal services, but are not prohibited as the unauthorized practice of law when conducted by a non-lawyer.<sup>8</sup> Attorneys who render ancillary services that on the surface appear outside the legal definition of the practice of law must address any potential ethical problems associated with the service. This rule addresses activities in which the attorney is not formally practicing law, but is conducting an activity so closely related to the practice of law that a client may believe he is represented by the attorney.<sup>9</sup> Applying this standard to mediation proceedings determines the level of ethical responsibility of the attorney; however, whether mediation is indeed the practice of law is a controversy that continues to be disputed.

Additionally, ABA Model Rules of Professional Conduct Rule 2.2 addresses the applicability of the ABA Model Rules of Professional Conduct, when the attorney is acting in the role of the intermediary.<sup>10</sup> The application of this rule appears on the surface to apply to attorney-mediators; however, the comments to this rule specifically state its inapplicability to attorneys acting as arbitrator or mediator when the mediating parties are not clients of the attorney.<sup>11</sup> This comment concludes by directing attorneys acting in the role of mediator to apply the Code of Ethics for

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5. See Fiona Furlan, et al., *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?* 14 J. AM. ACAD. MATRIM. LAW 267, 269 (1997).

6. See Alison Smiley, *Professional Codes and Neutral Lawyering: An Emerging Standard Governing Nonrepresentational Attorney Mediation*, 7 GEO. J. LEGAL ETHICS 213, 213 (1993).

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.7 (1998).

8. *Id.*

9. *See id.*

10. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1998).

11. *Id.* at cmt.

Arbitration.<sup>12</sup> Is this conclusion in the comments directly referring to the contention that attorney-mediators are not practicing law?

The perception of the client or mediating party may be the ultimate question in the determination of an ethical duty. Does the client or party believe that the attorney-mediator is representing his/her best interest? The answer to this question is relevant and can be potentially eliminated by the mediator defining the boundaries of the proceedings to the mediating parties in order to eliminate any misunderstanding and expectations of the mediation process and the mediator's role.

If mediation is indeed the practice of law, then are non-attorney mediators participating in the unauthorized practice of law? It is in this context that an attorney's ethical obligation may arise simply out of the virtue of their status as attorneys.<sup>13</sup> This contention arguably sets a higher standard of conduct for attorney-mediators than non-attorney mediators by policing the conduct of attorney-mediators through the ABA Model Rules of Professional Conduct which do not apply to the non-attorney mediator. When a mediation is properly conducted the task of a neutral does not involve the application of legal rules to confidential information.<sup>14</sup> Mediators do not integrate rules of law to confidential client information in order to offer legal advice, thus distinguishing the role of the attorney and mediator. Any advice given to the parties is articulated to both parties as suggestions to facilitate settlement. Mediation has been argued to be mere facilitation, which does not involve law, but communication and other skills.<sup>15</sup>

Courts have attempted to define the practice of law on a case by case basis. Articulating a definition which can be applied across the board, courts have been consistent in their inconsistency when attempting to fashion a universal standard for the practice of law.<sup>16</sup> Deciding whether an attorney-mediator is practicing law, one should evaluate the mediator's recommendations in the overall context with the parties.<sup>17</sup> Unfortunately, the answer to whether mediation is the practice of law is not black and white.

#### IV. CONFIDENTIALITY

The cornerstone of a successful mediator in the eyes of the parties can best be summarized as trust. This trust is largely dependent on the willingness of the parties to freely share private information related to the settlement of their case. The linchpin of parties' trust is that a neutral mediator will maintain the confidentiality of the parties both before, during, and after the mediation proceeding. When an attorney

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12. *See id.*

13. *See Furlan, supra* note 5, at 293.

14. *See Purnell, supra* note 4, at 1005.

15. *See Carrie Menkel-Meadow, Is Mediation the Practice of Law*, 14 ALTERNATIVES TO HIGH COST LITIG. 57, 60 (1996).

16. *See, e.g., State Bar of Michigan v. Cramer*, 249 N.W.2d 1, 7 (Mich. 1976).

17. *See Purnell, supra* note 4, at 1013.

acts as a mediator he/she may become privy to exceedingly confidential information and certain proprietary information as a part of the mediation process. Any breach of confidentiality could subject the mediator to civil liability and certainly cause the market to eliminate a mediator from a landscape that is becoming more and more crowded.

While the unauthorized disclosure of information is prohibited, attorney-mediators may find themselves in circumstances during the session that to continue the process could actually harm the interests of justice. For example, during the course of mediating a domestic dispute, attorneys may become aware of information regarding child abuse. These circumstances clearly alter the role of the mediator and trigger the role of the attorney because he or she is bound to disclose information of child abuse allegations to the appropriate state authorities. Alternatively, the ABA Model Rules of Professional Conduct addresses transactions with persons that would apply to the attorney acting in the role of mediator. The comments of ABA Model Rules of Professional Conduct Rule 4.1 recognize that substantive law may require the attorney to disclose certain information which may assist in preventing crimes or fraud.<sup>18</sup> Of course, ABA Model Rules of Professional Conduct Rule 4.1 is subject to ABA Model Rules of Professional Conduct Rule 1.6 in which the attorney is bound not to disclose confidential information.<sup>19</sup> Applying the ABA Model Rules of Professional Conduct, it is evident that attorneys, acting in the role of the mediator, are not immune from potential sanctions for failing to report such activities.

Parties to the mediation may question whether the information shared in the mediation proceedings is immune from discovery in subsequent legal proceedings. As a general rule, information obtained in mediation proceedings is not discoverable or admissible in future proceedings.<sup>20</sup> This privilege has been criticized because it may potentially restrict public access to information which is necessary to a democratic society.<sup>21</sup> In mediation confidentiality is two-fold. A confidentiality standard attempts to protect the evidence during the mediation proceedings, as well as after the mediation proceedings.

## V. CONFLICT OF INTERESTS

The role of the mediator is fundamentally incompatible with an attorney's role in representing a client.<sup>22</sup> This dichotomy has also been addressed by case law, which attempts to define the boundaries of balancing dispute resolution with the ethical concerns of attorneys.

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18. MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1998)

19. *Id.*

20. See OKLA. STAT. tit. 12, § 2408 (1998); see also FED. R. EVID. 408.

21. See Scott H. Hughes, *A Closer Look: The Case for a Mediation Confidentiality Privilege Still Has Not Been Made*, DISPUTE RESOLUTION MAGAZINE, Winter 1998, at 15.

22. See Bruce Meyerson, *Lawyers Who Mediate Are Not Practicing Law*, 14 ALTERNATIVES TO HIGH COST LITIG. 74 (1996).

Not only must the attorney consider possible disqualification from involvement in subsequent legal proceedings with prior mediating parties, the mediator must also consider the potential disqualification of the mediator's law firm in which he/she is associated. A leading case addressing questions regarding former attorney representation is *Poly Software Int'l. Inc. v. Su, et al.*<sup>23</sup> In this case an attorney who previously mediated a dispute involving two software companies later represented one of the parties against the other mediating party on a substantially related matter.<sup>24</sup> Due to this subsequent involvement, the court disqualified the attorney-mediator.<sup>25</sup> The court rationalized its decision by noting that the mediator-client relationship was closer to an attorney-client relationship than the relationship between a litigant and judge.<sup>26</sup>

Additionally, *McKenzie Construction v. St. Croix Storage Corp.*,<sup>27</sup> addressed whether an attorney-mediator's conflict could be imputed to the law firm in which the attorney is associated.<sup>28</sup> The litigation in this case involved a subject matter identical to an earlier mediation and neither side disputed that the individual attorney-mediator should be disqualified.<sup>29</sup> The attorney-mediator's law firm resisted disqualification and asserted that it had eliminated potential conflicts of interest by erecting a "cone of silence" around the attorney previously involved in the case,<sup>30</sup> the court ruled that this evidence was insufficient to protect potential conflicts of interest to the parties involved in the case.<sup>31</sup> As a result of this ruling the plaintiff retained new counsel.<sup>32</sup>

As a result of the concern to maintain confidentiality, mediators recommend developing and circulating a blanket written waiver of conflict of interest to all parties prior to the mediation proceedings.<sup>33</sup> While this procedure may initially alleviate conflicts of interest, the obvious potential hardship for attorneys and mediators cannot be ignored.

## VI. MEDIATION'S EFFECT ON FIRM LEVERAGING

Leveraging, a common practice of delegating work to various attorneys within the firm, is not a common practice in the mediation field. Leveraging is not a viable option applied to a mediation practice because mediations are not typically delegated or assigned to another attorney-mediator. Profits for many law firms rest on the pyramid of leverage.<sup>34</sup> Mediators become known personally for their unique skills in

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23. 880 F. Supp.1487 (1995).

24. *Id.* at 1489.

25. *Id.* at 1490-95.

26. *Id.* at 1491-95.

27. 961 F. Supp. 857 (1997).

28. *See id.* at 858.

29. *See id.*

30. *Id.* at 859.

31. *See id.* at 863.

32. *See McKenzie Construction*, 961 F.Supp. at 863.

33. *See* John G. Bickerman, *Leaving the Firm, Conflicts, Firm Economics and Issues of Culture Can Stifle ADR Practice*, *Dispute Resolution Magazine*, Winter 1998, at 4.

34. *See id.* at 3.

the art of facilitating communication. The skill, expertise and reputation of a mediator is the unique appeal of requesting a particular individual to facilitate the mediation proceedings. Attorneys who become mediators are unable to leverage their practice within the firm which limits the firms upside profit potential.

Many of the expenses commonly associated with a full-service law firm are not necessary for the practice of mediation. For example, law library maintenance and research costs are not necessary for the mediation practice. Furthermore, the costs of general office expenditures such as photocopying, computer software, and office space needs vary significantly between the mediation practice and the law firm. Overhead costs associated with a mediation practice are significantly less and office needs are different, thus justifying and easing the amount of attributable expenses to the firm.

## VII. CONCLUSION

The purpose of this article is not to discourage attorneys from adding the qualifications of mediator to their list of credentials, but to inform attorney-mediators of the likely obstacles they may face when they make the decision to become mediators. Mediators who succeed in this without significant training and education do so by sheer accident. As with all new ventures enthusiasm many times overwhelms ones ability to realistically assess potential concerns which may linger in the shadows. Mediation continues to address and influence a plethora of legal issues and allows parties the ability to craft their own resolution outside the courtroom setting.

Is mediation considered the practice of law? Are attorneys held to their ethical standards of the Model Rules of Professional Conduct? What confidentiality and conflicts of interest considerations must the attorney and law firm assess before becoming a mediator? How will the mediation practice effect the law firm and firm leveraging? So now do you still want to be a mediator?



