

Keeping Mediation an Alternative Dispute Resolution Process

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"Should our models conform to what lawyers and teachers can expect to find 'out there' or should we continue to hope that we can inoculate a new generation of lawyers to behave better, by which I mean more effectively, compassionately and efficiently, both for themselves and their clients."

Carrie Menkel-Meadow

I. Introduction

In 1861, at the outset of the American civil war, General George McClellan was assumed the savior of the North. He had been trained at West Point, had learned theories of military warfare and was popular with the people. With no hesitation, Abraham Lincoln appointed him army commander. As the war progressed, however, it became clear that McClellan was not the best candidate to lead the Union army. He would not advance at the requests of the President, he lacked inspiration and exposed his soldiers to unnecessary danger. Fortunately for the United States, Ulysses S. Grant, a forty-year-old farmer working in the leather business, emerged as a qualified leader. He possessed the intelligence and practical experience necessary to win the civil war.

General McClellan's failure as a Union leader demonstrates how the crowd favorite is not always the most suitable candidate for a position. Today, mediation is at a stage where lawyers are assumed the most qualified people to mediate. This assumption is both hasty and unwarranted. It is premised on the notion that lawyers' legal training and education qualifies them to mediate. To be sure, legal skills and a legal education are useful for mediation. They can allow a mediator to identify issues, clarify facts and understand complex material. But these alone are not sufficient qualifications for a successful mediator.

This paper explores the reasons to be cautious about unequivocally embracing lawyers into the mediation profession. A lawyer-mediator's legal attitude and education have already begun to change the mediation landscape. Legal concepts and rules have become more popular. Evaluative behaviour is becoming more prevalent. And the process is looking more adversarial. Mediation began as an alternative dispute resolution process aiming to empower parties, focus on their interests and achieve a mutually beneficial resolution. Prematurely admitting lawyers into the mediation process threatens this process and its goals.

II. Problems: Drifting to the Norm

The process of mediation is unique from litigation and other forms of alternative dispute resolution. Mediation is not performed in an adversarial setting. It is not an evidentiary process where the parties try to "win". There are no external criteria to assess the strengths and weaknesses of the parties' cases. Nor is there judge or jury. Rather mediation is "a dialogue process designed to capture the parties' insights, imagination and ideas that help them participate in identifying and shaping their preferred outcomes. As a unique alternative dispute process, mediation focuses on parties' interests, not their rights. A lawyer-mediator does not easily fit into this process. His attitude, education and environment prevent him from successfully participating, contributing and succeeding in mediation.

A. Legal Attitude

Lawyers approach problems in a logical, straightforward manner. Legal thinking entails category thinking or labeling. It involves either/or formulations and affords for cause and effect, single dimension thinking. Students and practitioners of law strive to make sense and create order out of confusing information, without considering that they themselves shape that information by the very process of collection and organization. It is this legal mindset which prohibits a lawyer from mediating successfully as a third party neutral. A mediator must have an open mind when listening to disputing parties. A mediator must think out of the box and generate creative options. When faced with conflicting stories, lawyers instinctively try to surface a version that makes sense, often by identifying the one most worthy of belief. The notion that competing versions may be equally true is possible but inconvenient for the lawyer-mediator because he seeks a pragmatic result. It is this evaluative mindset of a lawyer that prevents him from being a third party neutral.

B. Legal Education:

Equipped with knowledge of substantive law and advocacy skills, a recent graduate of law school has only limited exposure to alternative dispute resolution. The few ADR courses available are generally optional and presented as an alternative to the substantive law courses. Most of these courses include little or no reflection about dispute resolution. They merely teach students legal rules and their relevance within specific areas of law. Students learn the legal skills to understand these rules and how to apply them. There is no evidence to suggest that simply because a conflict may involve issues of law, that legal skills are more relevant to facilitating its resolution than human relations and negotiation skills. And it is these latter skills which are rarely taught in the law school curriculum. Moreover, the structure of these courses does not educate a student about party behavior. Generally, courses involve a lecture, assigned readings and a 100% exam. This format does not prepare a law student how to react to a hostile party nor does it help a student to understand facial expressions and body language.

Clearly though a legal education can be useful in many mediation circumstances. The more familiar the mediator is with the legal precedent and procedures to the case, the easier it will be for him to help parties understand their legal options and responsibilities. This legal knowledge, however, can still narrow a

lawyer's perspective. One study found that lawyer-mediators tend to stress legal knowledge and skills, such as drawing out the facts of the case, while social workers tend to emphasize conflict resolution theory, interviewing and problem-solving even when both groups were exposed to both types of content in their mediation training. When lawyer-mediators emphasize clarifying the facts at the expense of the relationship and communication issues, they may be inclined to see their subject-matter expertise as the key to settlement. When this happens, creative and more complete resolutions are frequently missed.

Even though it is invaluable for litigation, a legal education does not qualify someone to mediate. Equipped with only the legal skills learned through law school, a lawyer-mediator is a threat to the goals of mediation. These skills can inhibit creative options, discourage neutrality and increase mediator partiality.

C. Legal Environment:

Both a legal attitude and legal curriculum can also foster an adversarial atmosphere. This is particularly true in law school. Riskin states that "Ninety percent of what goes on in law school is based upon a model of a lawyer working in or against a background of litigation of disputes that can be resolved by the application of a rule by a third party". Within this environment, it is practically impossible for students to accept ideas of neutrality and collaboration. Moreover, the competitive nature of getting articling positions forces law students to focus solely on grades. Jonette Hamilton's study of students at the University of Calgary Law School found that "the individualistic competition engendered by grading on a curve, which forced winners and losers in the competition for 'A's', perpetuated an adversarial environment". In addition to grades, the mooted competitions in which one side loses and the other side wins also underscores the adversarial context of law school. In such an environment, there are few reasons for law students to take ADR courses. ADR scholarship and research is, generally speaking, still on the margins of university and government funding and other support. Moreover, the few ADR courses in law schools are reserved for law students, ensuring that the dominant culture of the class is largely the same as the dominant culture of the law school and the legal profession.

The adversarial, competitive nature of law schools is generally carried forward to law firms. Those practicing lawyers who have just begun mediation pose a greater threat to the process than the individual right out of law school. Lawyers who have been practicing for years have been schooled in legal reasoning and assessment and are comfortable with the adversarial process of litigation. Lawyer-mediators who are comfortable with the legal approach to facts, often transplant the legal approach into mediation so that it becomes an adaptation of the adversarial process. Person one speaks and then person two responds with the result that the discussion reverts fairly predictably and quickly into tit-for-tat talk. Imposing this adversarial atmosphere onto the mediation process can increase party tension. Such an environment can only stand to increase the barriers to a mutually beneficial resolution.

III. Application: Understanding the Problem

A. Narrow Perspective:

The Society of Professionals in Dispute Resolution (SPIDR) Commission issued a report in 1995 demonstrating how the process of mediation cannot be solved because someone has legal training. In order to determine the influence of lawyers on the mediation process, two researchers compared divorce mediation in Georgia with that in other parts of the US. In Georgia, divorce mediation is performed and accepted by those from the legal profession. There, mediation and settlement tends to occur more frequently because there is a greater emphasis on outcome rather than on process concerns. Lawyer-mediators focused on monetary results, not on the depth to which the dispute is resolved or party satisfaction. For example, when presented with a hypothetical case involving a party with a "bad temper",

very few Georgia mediators suspected a possible battering relationship. While some lawyer-mediators did help their parties define their own issues, it was more common for the Georgia mediators to take the lead in defining the relevant issues for the parties. Some mediation sessions were actually structured more like litigation. The researchers attributed these differences to the fact that the vast majority of divorce mediators in Georgia are lawyers and a great many are simultaneously engaged in the practice of law.

The mediations performed in Georgia by lawyer-mediators underscore how the adversarial legal attitude can pervade the mediation process. Because lawyers are schooled in and acculturated to the adversarial approach, it is very difficult for them to be equally accomplished in a more collaborative approach to settling disputes. Legal education fails to sensitize, and may even desensitize, lawyers to the emotional dimensions and hidden agendas involved in clients' seeking adversarial solutions to their problems. The environment in law school encourages students to look at legal problems abstractly, separate from reality and human nature. Few problems however, are void of emotional content.

B. Fiduciary Duty and Confidentiality:

With the increased number of lawyer-mediators, there has come an increased use of legal concepts into the process of mediation. Lawyer-mediators have attempted to preserve the legal meaning of these concepts. The problem with blurring these legal concepts into mediation is that the process loses its alternative nature and merely drifts back to the prevailing norm of litigation.

It has been argued that the concept of fiduciary duty exists in mediation because the mediator acts for the benefit of the client and there exists a relationship implying and necessitating great reliance, confidence and trust on the part of the client. A mediator's role, however, varies considerably from that of the practicing lawyer because a mediator does not represent parties; rather he has a duty to mediate between two parties. In other words, mediators are facilitators, not advocates. A lawyer who has been trained to understand a fiduciary duty in a representative capacity is more susceptible to taking sides in mediation and acting like counsel. In mediation, however, it is the parties themselves that make the final decisions as to the disposition of their case. Therefore the legal concept of fiduciary duty does not apply in the same way in mediation as it does in the traditional litigation model.

Another legal concept associated with mediation is confidentiality. In mediation, most parties tend to go to great lengths to ensure that certain confidential information is not disclosed to opposing parties. While confidentiality is necessary to the mediation process, not all communications made during the mediation are automatically considered privileged communications, like the legal solicitor-client privilege. Under legal representational confidentiality rules, by definition, anything said in a mediation would not be confidential (at least in joint sessions) because adverse parties are revealing information to each other and in the presence of a third party and are thus, outside the protected zone of solicitor-client privilege. Therefore, confidentiality in mediation takes a different shape.

Caucusing in mediation also challenges the traditional legal concept of confidentiality. Some mediators reserve the right to share information between caucuses where it is "their" judgment that such disclosure will serve the settlement well; others promise never to disclose unless authorized to do so by the parties. This is problematic because a mediator's settlement option may implicitly contain messages about the preferences or facts of one party without actual disclosure of these preferences or facts. Therefore in mediation it is difficult to characterize what is and what is not, confidential.

Indeed, fiduciary duty and confidentiality are relevant to mediation, but do not take the same meaning as in litigation. Blindly incorporating these legal concepts and their legal definition into mediation undermines mediation's role as an alternative to litigation. Having the process defined by legal concepts of confidentiality and fiduciary duty allows lawyers to shape mediation in the same adversarial manner as

litigation.

C. Using the Same Rules:

Having lawyer-mediators involved in an alternative dispute resolution process has also influenced the development of mediation standards. The problem with having lawyers play such a fundamental role in the drafting of a mediation code of conduct is that these rules become too similar to those in the legal profession. Given that mediation is at an early stage, it is vulnerable to move closer towards the norm of litigation. Mediation began as an alternative process and should be governed by an alternative set of rules.

The Law Society of Upper Canada's Code of Conduct is based on an adversarial conception of the advocate's role. It is not responsive to the needs, duties and responsibilities of one seeking to be a non-adversarial problem-solver. While it may be helpful to litigators and arbitrators, it is not responsive to the needs of mediators. Rules premised on adversarial and advocacy systems do not respond to a process that focuses on parties' interests and encourages disputants to reach their own resolution. Mediation involves different forms of communication, sharing of information, and creative problem analysis and resolution. It attempts to produce different outcomes, not necessarily the win-lose result of the adversary system, but complex creative solutions to legal and social problems.

In light of its facilitative nature, certain rules from the legal profession cannot apply to a mediator who is acting in a facilitator capacity. For example, a mediator cannot find himself in a conflict of interest as defined by the ethical rules, since he is not representing a client with whom a prior interest can conflict. Similarly a mediator cannot violate his duty of confidentiality by revealing information relating to the representation of a client — without clients there are no secrets to betray. The affirmative duty to zealously advocate a client's position is equally meaningless to a mediator. Prohibitions on asserting frivolous positions are also inapplicable. Without a "client" to "represent", many ethical rules do not apply. These rules highlight the differences between mediation and the legal profession.

The goals of mediation deviate from those in the legal profession. The process is distinct from litigation and a mediator's role is different from the traditional lawyer. Because of these differences, mediation should not be governed by a set of rules that are tailored to an adversarial process. To do so, would move mediation closer to the prevailing norms of litigation.

D. Comparison to Arbitration:

The concern about having lawyers dominant in an ADR process is not unprecedented. The impact of lawyers and the legal attitude on arbitration should send warning signals to the mediation community about the impact of lawyer-mediators on an alternative dispute resolution process.

Arbitration has been used for years before mediation. It parallels mediation in that it occurs outside of court and there is no judge and no jury. It is different in that there is an expert who does make a decision. Having arbitration as a pre-existing dispute resolution process affords mediation the opportunity to learn from its successes and failures. Arbitration, like mediation began as an alternative to litigation and then gradually migrated towards the prevailing norm. It developed as an informal, fast, commercially-oriented means of resolving matters in particular fields by appealing to experts in those areas. But, as lawyers have been more integrated into arbitration proceedings and as transactions have become more complicated the process has become more complex, lengthy and rule-driven. Arbitration has become so cumbersome that many lawyers find it easier and less risky to go to trial. The influx of legal concepts, legal professionals and legal thinking into arbitration has stripped the process of the goals it sought to achieve. Allowing such a dominant legal culture into mediation may lead to the same results. If mediation becomes like

arbitration, it becomes riskier and more unpredictable, making the rules, procedures and safeguards of court more attractive.

Despite these warning signs about having lawyers in the mediation profession, it is clear that the legal environment has had its impact on mediation. The ADR ideas dominant among professional mediators, arbitrators and other ADR professionals are being squeezed into the mould of traditional legal paradigms of justice, advocacy and dispute resolution. Category thinking stifles creative options. Advocacy skills prevent neutrality. And an adversarial attitude threatens collaboration. This is a problem. Mediation began as an alternative dispute resolution process, and lawyer-mediators are driving it back into an adversarial model.

III. Solution: Keeping an Alternative

The initial goals of mediation — parties' interests, facilitative process and mutually beneficial resolutions-- cannot easily be achieved by lawyer-mediators. To solve this discrepancy, there must be a change. Either the process must be changed to accommodate the lawyer-mediators, or the lawyers must change to accommodate the process.

A. Evaluative Mediator

An easy solution to the divergence between lawyer-mediator and the goals of mediation would be to transform mediation into a more evaluative process. This has been the current trend in mediation today. Creeping into the discourse of ADR, which in the 1980s and early 1990s was dominated by "interest-based" negotiation, is the idea of "rights-based or "evaluative mediation" which may more strongly resemble what lawyers have been accustomed to — an evaluative process including recommendation of a solution based on legal rights. This type of mediation allows lawyers to easily transfer their advocacy skills and adversarial attitude from law school and the legal profession to the mediation process.

As an evaluative process, mediation can be performed in either a narrow or broad manner. A narrow-evaluative mediator tries to help parties understand the strengths and weaknesses of their position and the likely outcome of litigation or whatever other process they will use if they do not reach a resolution in mediation. A legal education is useful in this process because the narrow-evaluative mediator studies the relevant documents, such as pleadings, depositions, reports and briefs before the mediation.

A broad-evaluative mediator generally learns about the circumstances and underlying interests of the parties and other affected individuals or groups, and then uses that knowledge to direct the parties toward an outcome that responds to such interests. To implement this strategy, the broad-evaluative mediator educates himself about the interest, predicts the impact of not settling, offers proposals and urges parties to accept either the mediator's or another proposal.

Indeed, as an evaluative process, mediation is befitting for a lawyer. His skills, training and attitude make him well qualified. But evaluative mediation does not necessarily foster party resolution. An evaluative mediator tends to tailor the mediation to an adversarial process and places the parties in an adversarial mode. The resulting defensive and offensive postures of the parties inhibit collaboration. Moreover, an evaluative mediation stifles creative options. While it is obvious that parties must evaluate the options they developed in the mediation, any type of premature evaluation by the mediator interferes with the creative process.

Another problem with an evaluative mediator is the legitimacy and quality of the decisions he is making. Judges' decisions have legitimacy because of their stature as elected or appointed officials and because their decisions are subject to the steadying influence of appeals. They must also obey rules of procedure

that guarantee the presentation of pertinent evidence and arguments while systematically excluding unreliable information. Evaluative mediators do not have the legal expertise of a judge or the backup scrutiny of appellate review. Lawyer-mediator skills and qualifications do not involve decision-maker training. Their qualifications do not involve instruction on assessing credibility, weighing evidence, assigning the proper burden of proof, or conducting appropriate research. Neither their training nor the structure of the process makes lawyer-mediators ideal decision-makers.

Moreover, if mediators give their opinion on the likely court outcome or analyze the merits of claims or defenses, such activities raise questions about the liability of a mediator for erroneous conclusions. While there have been no reported cases in Canada where liability for a mediator's negligence has been found against a mediator, this does not suggest that mediators are immune from the risk of liability. The current trend of the US seems to indicate that claims against mediators have been alleged for a variety of reasons including incorrect technical advice and unauthorized practice of law. A mediation process that resembles litigation increases the chances of mediator liability. And it is the lawyer-mediator who runs the greatest risk of shaping the mediation process more like the practice of law.

By making the process more accommodating for lawyer-mediators, mediation loses its characterization as an alternative dispute process. Evaluative mediation only confuses the proper role of mediators within the dispute resolution regime. Mixing the functions traditionally associated with arbitrators, case evaluators and judges with those of mediators makes mediation significantly overlap with these other processes. Mediation, however, should be a true alternative. It should be a process "in which an impartial third party — a mediator — facilitates the resolution for a dispute by promoting a voluntary agreement (or self-determination) by the parties to the dispute". And a mediator should "facilitate communications, promote understanding, focus the parties on their interests, and seek creative problem solving to enable the parties to reach their own agreement".

Mediation is a process that facilitates. At best, it is a process that can achieve party transformation — a transformation where the parties attain some form of moral growth. At worst, it is a process that resembles the traditional adversarial model of dispute resolution. Evaluative mediation lends itself to this adversarial model. If the original goals of mediation want to be preserved, then making the process of mediation more evaluative is not a solution.

B. Relearning the Skills:

Instead of tailoring the process of mediation to lawyer-mediators, it would be more appropriate to raise lawyer-mediator awareness of the skills associated with mediation. Neutrality is probably the most difficult, but important mediation skill. Neutrality cannot be easily learned in law school especially if the culture is adversarial and advocacy is the skill most valued. While almost no one can be completely unbiased, it is the recognition of one's biases that can help a mediator steer clear of the barriers to a fair agreement. Parties that agree to mediate agree to share their dispute with a third party in the hope that he can assist them in reaching a solution. Both parties must trust the mediator in order to share sensitive information and accept the mediator's suggestions. Once the mediator has violated this trust, the process will fail. As such a critical aspect of mediation, neutrality must be discussed and taught in law school.

In addition to understanding neutrality, law students must be open to thinking out of the box and generating creative options. They must recognize that listening to a client is as important as arguing for a client. In short, if lawyers are to be a positive part of the mediation process, there must be an adjustment to the legal attitude in law school.

C. Reforming the Curriculum:

In order to adjust the attitudes of law students and lawyers who are entering mediation, there must be changes to the law school curriculum. Many schools are now in the process of reviewing their curriculum to include more focus on alternative dispute resolution. In 1989, the Canadian Bar Association Task Force Report on ADR recommended the encouragement of alternative dispute resolution education for law students, lawyers, judges and members of the public including adults and school children. Schools have taken some steps to raise student awareness of ADR. In the late 1980's several Canadian universities established conflict resolution institutions to conduct research or to teach conflict resolution theory and techniques. The challenge of incorporating ADR into the curriculum is striking an appropriate balance between the traditional study of the law and providing sufficient time for students to gain an understanding of the theory and practice of conflict resolution and collaborative problem-solving. To provide graduating students with theoretical knowledge and practical skills in conflict resolution and collaborative problem solving will require an integration of these concepts throughout the curriculum.

The University of Ottawa has taken a convincing approach in its pilot project, the "First Year Conflict Resolution Program". This program integrates dispute resolution materials into the substantive course content in all first year contracts and property classes. The program which runs all year, includes introductory overviews on the nature of conflict and alternative dispute resolution processes, "interest-oriented" client interviewing techniques, negotiation with some emphasis on applying a "principled" or "integrative" model, mediation and arbitration".

Using exercises based on contracts and property problems, the students identify and practice the skills required to participate in different forms of problem solving, dispute resolution, and transaction facilitation. The mediation unit is a week long, 35 hour intensive program, during which all first year classes are canceled so that students can fully immerse in mediation studies. The mediation week's primary focus is on the lawyer's various roles in mediation, beginning with recommending mediation, preparing and representing clients in a mediation, assessing mediated agreements acting as a mediator. In between interactive lectures, demonstrations, discussions, videos and workshops, the students rotate in the roles of lawyer, client and mediator in several mediation simulations coached by practicing lawyers and mediators.

The University of Ottawa pilot project underscores the efforts that law schools across Canada are making to incorporate ADR into the substantive law courses. While most schools do not have such an extensive program as the one in the University of Ottawa, there has been progress across the country. The law faculty at the University of Victoria has the UVic Institute for Dispute Resolution. The University of Alberta Faculty of Law houses the John V. Decore Centre for Alternative Dispute Resolution and plans are underway for a clinical legal education program with ADR as its focus. At the University of Saskatchewan College of Law, there is a 'vision for the future' which includes a 'proposed comprehensive program in Alternative Dispute Resolution'. The University of Toronto has begun to incorporate mediation into their core curriculum in such courses as 'The Anatomy of Legal Dispute Negotiating' and 'Family Mediation: Theory and Practice'. Both Osgoode Hall and Queen's University Faculty of Law have three alternative dispute resolution courses. Mediation at the University of Western Ontario Faculty of Law includes an affiliation with the Dispute Resolution Centre established and operated by the students. The University of Windsor Law School is affiliated with the Dispute Resolution Institute of North America which aims to "provide services, education and research to companies or other corporations interested in avoiding, managing or settling disputes." The increased acceptance of ADR in the law school curriculum is critical to the successful integration of lawyers into the mediation process.

Changing the curriculum in law school can only benefit students of law. For those practicing lawyers there needs to be some continuing legal education where lawyers will gain more exposure to mediation. Those who have just recently entered the legal profession have had an opportunity to view the shifts occurring and have been exposed at least in a limited fashion to the concept of ADR. Many of these

students are more comfortable with the collaborative approach than with the adversarial process. This is not the case for those who have been in the legal profession for years. They have been taught advocacy and have practiced in an adversarial environment. In order to expose these individuals to ADR, guest speakers, workshops and seminars must be offered on conflict theory, interest-based negotiation and representing a client in a mediation process. There needs to be greater awareness of the court-annexed programs that are offered in Ontario. In these programs, a skilled mediator will be able to help lawyers adjust so that they can become effective counsel in a mediation process.

Indeed, there has been a gradual acceptance of mediation in law schools and law firms. These changes need to continue in order for lawyer-mediators to be successfully integrated into the mediation process. The adversarial, category thinking must be replaced with a more collaborative, facilitative attitude.

D. Rewriting the Rules:

In addition to changes of the legal attitude, education and environment, there must also be changes to the rules that govern mediation. Even though there is no universal standard for mediation ethical rules, professional groups have adopted codes of professional responsibility similar to the Law Society of Upper Canada's code of conduct. Again, there should be caution about having mediation rules too similar to those in the legal profession. Because mediation draws from different foundational principles — problem-solving, joint rather than individual gain, and future rather than past orientation — its underlying principles must be different. For instance, mediation has to forge its own confidentiality protections so that parties may share "settlement" and other potentially compromising facts with each other without fear that such information will be used outside the mediation. The Code of Conduct should be used only as a guideline. To do more, would force mediation closer to the norms of litigation.

IV. Conclusion:

Today, mediation has the potential to serve as a viable alternative to litigation, arbitration and other types of ADR. Its facilitative process addresses parties' interests and focuses on achieving a mutually beneficial resolution. With their legal thinking and law school education, lawyers do not exactly fit within the facilitative mould of mediation. Rather, their adversarial nature fosters a more evaluative behaviour. They are advocates. They think in either/or formulations. And they are logical and straightforward.

Despite these characteristics, lawyers have been incorporated into the mediation process. They have done so, however, at the expense of mediation goals. By continuing to take an adversarial approach, lawyer-mediators have begun to strip mediation of its unique process. It is becoming more adversarial. Legal concepts and legal rules are becoming more attractive.

The mediation process can be preserved, while still admitting lawyers into mediation, if there are changes. The legal attitude, curriculum and environment must be broadened. Lawyers must learn how to generate creative options. They must understand collaboration. And they must learn how to facilitate, not just evaluate. Only with these behavioural, intellectual and educational changes, can lawyer-mediators be at the forefront of the mediation process. With these changes, lawyer-mediators can enhance communication. They can focus the parties on their interests. And they can find creative solutions to enable parties reach their own agreement. Most importantly, however, with these changes, lawyer-mediators can keep mediation an alternative dispute resolution process.