



A Mediator's Obligation to Memorialize the Agreement

In this feature, Sharon Press and Paul M. Lurie raise issues of professionalism and their practical applications.

The parties in a long and difficult mediation have (finally) reached agreement. Needless to say, everyone is eager to leave. What are your obligations as a mediator in terms of memorializing the parties' agreement?

As is so often the case, context matters. Are the parties represented by counsel who attended and participated in the mediation? What type of dispute was this — small claims, family, general civil, special education, or some other? What is the mediator's orientation — facilitative, evaluative, transformative, narrative ... ? Is the mediator an attorney (licensed to practice in the jurisdiction of the mediation or not) or a member of some other profession? Where does the mediation take place, and are there rules that govern this question directly or indirectly?

Whether a mediator has any responsibility for producing written documentation of the mediation is one of those questions that mediators tend to have strong feelings about — even though they do not always agree on the answer.

Benefits to the Parties

Parties often want a written agreement before they leave the mediation, for emotional and legal reasons. Parties often want the sense of closure and certainty that having a mediation agreement in hand can bring. If parties reach an oral agreement that is not memorialized at the mediation and later have a dispute about the agreement, the confidentiality provisions in many jurisdictions limit or prevent those present from testifying in a subsequent hearing about the terms of the agreement or any of the communications that led to their understanding of the agreement. Thus, the

parties may conclude that the time spent mediating will be "wasted" if they do not leave with an agreement in writing. And in cases where one (or more) of the parties is not represented at the mediation (or at all), the mediator may be the only one present who can record the agreement "neutrally."

Mediator Concerns

Drafting an agreement is not a "neutral" function. Deciding how something is worded has real consequences and has the potential to advantage or disadvantage one of the parties. The written agreement can be enforced either as a contract or directly by the court if it is the result of a court-ordered mediation. If the mediator is a lawyer, some jurisdictions may view the drafting of terms as a conflict of interest.¹ If a mediator is not licensed to practice law or is licensed in a jurisdiction other than the one where the mediation takes place, "memorializing" the agreement has the potential to be considered the practice of law and thus the Unauthorized Practice of Law (UPL).

Unauthorized Practice of Law

On February 2, 2002, the ABA Section of Dispute Resolution adopted a Resolution on Mediation and the Unauthorized Practice of Law.² An important part of this resolution was the paragraph dealing with the "drafting of settlement agreements":

When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement.

The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond

the terms specified by the parties, he or she may be engaged in the practice of law.

However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys. (*Emphasis added*)

For purposes of considering the question of UPL, the resolution attempts to make a distinction between memorializing the parties' agreement by recording the terms of settlement *specified by the parties* and going beyond those terms. Even this prohibition is tempered by an exception if the parties are represented by counsel (presumably this means that all of the parties are represented) and the mediator makes clear that she is providing information for the parties to consider in consultation with their own attorneys and is not intended to be the practice of law.³

This distinction — between “memorializing” the parties' agreement and drafting settlement terms — is responsive to the mediator concerns raised above. A mediator may appropriately prepare a memorandum of understanding or settlement agreement that incorporates the parties' terms (thus satisfying the needs of the parties), but the mediator may not “draft” the terms (make decisions for the parties, thereby crossing the line to perform a non-neutral function).

Ethical Standards

For mediators and lawyers representing clients in dispute resolution processes, there are a myriad of ethical codes that may apply, depending on the context. Interestingly, the *Model Standards of Conduct for Mediators* adopted by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution does not address this issue directly. Arguably, self-determination (Standard I), impartiality (Standard II), competence (Standard IV), confidentiality (Standard V) and quality of the process (Standard VI) all indirectly touch on this issue.

In contrast, the *Model Standards of Practice for Family and Divorce Mediation* contains the following provision:

With the agreement of the participants, the mediator may document the participants' resolution of their dispute. The mediator should inform the participants that any agreement should be reviewed by an independent attorney before it is signed.⁴

In contrast to the permissive language of the *Model Standards of Practice for Family and Divorce Mediation*, the ethical standards for mediators in Florida explicitly obligate the mediator to ensure the agreement is memorialized:

Closure. The mediator shall cause the terms of any agreement reached to be memorialized appropriately and discuss with the parties and counsel the process for formalization and implementation of the agreement.⁵

The Committee Notes to the Florida Rule provide additional context by pointing out that the procedural rules adopted by the court “require that any mediated agreement be reduced to writing.”⁶ The note continues to clarify that “[m]ediators have an obligation to ensure these rules are complied with, but are not required to write the agreement themselves.”

A few important themes emerge from this initial exploration:

In most jurisdictions, mediators are permitted to “memorialize” or “document” the terms of the parties' agreement. While some jurisdictions may go further and mandate this role, most jurisdictions consider this to be permissive.

A mediator should not go beyond memorializing or documenting the parties' terms of agreement. It is not acceptable for a mediator to “draft” or create new terms for the parties.

If the parties are represented by counsel, the parties may opt for one of the attorneys to draft the

Sharon Press is Professor of Law and Director of the Dispute Resolution Institute at Hamline University. Previously, she served for 18 years as director of the Florida Dispute Resolution Center. She can be reached at spress01@hamline.edu. **Paul M. Lurie** is a partner with Schiff Hardin LLP in Chicago. He has been legal counsel for major real estate owners, developers, and design and construction firms for more than 40 years. He now is a professional mediator and arbitrator. He can be reached at plurie@schiffhardin.com.

settlement agreement. If they do so, the mediator should facilitate a discussion by the parties of the process by which the agreement will be finalized.

If a party is not represented by counsel but intends to engage counsel to review the settlement, it is likewise helpful for the mediator to assist the parties in agreeing upon a process for such review even if the attorney is not present at the mediation.

And most important, given the range of permitted, authorized, or prohibited practices, mediators and attorney representing clients in mediation must review the rules of the jurisdiction.

Endnotes

- 1 Wash. State Bar Ass'n Rules of Prof'l Conduct Comm., Advisory Op. 2223 (2012).
- 2 A.B.A SEC. OF DISP. RES., RES. ON MEDIATION AND THE UNAUTHORIZED PRAC. OF L. (2002), available at http://www.americanbar.org/content/dam/aba/directories/dispute_resolution/0118_resolution_mediation_upl.authcheckdam.pdf.
- 3 *Id.* at cmt. 5.
- 4 MODEL STANDARDS OF PRAC. FOR FAM. AND DIVORCE MEDIATION, standard VI (e) (2001).
- 5 FLA. R. FOR CERTIFIED AND COURT-APPOINTED MEDIATORS R. 10.420(c) (2003).
- 6 *Id.* at 10.42 comm. notes; FLA. R. OF CIV. PROC. R. 1.730(b) (2015); FLA. R. OF JUV. PROC. 8.290(o) (2015); and FLA. FAM. L. R. OF PROC. 12.740(f) (2015).

Endnotes continued from *How Can We Quantify Democracy*, page 28

- 2 DEMOCRACY IN MOTION: EVALUATING THE PRACTICE AND IMPACT OF DELIBERATIVE CIVIC ENGAGEMENT (Tina Nabatchi et al. eds., 2012).
- 3 TEXT, TALK, ACT, www.creatingcommunitysolutions.org/texttalkact.
- 4 Matt Leighninger, *What We're Talking About When We Talk About the "Civic Field,"* 10 J. PUB. DELIBERATION 1-5 (2014); Tina Nabatchi, *Addressing the Citizenship and Democratic Deficits: Exploring the Potential of Deliberative Democracy for Public Administration*, AM. REV. OF PUB. ADMIN., 4, 376-399 (2010).
- 5 See HÉLÈNE LANDEMORÉ, <http://www.helenelandemore.com/research.html>.
- 6 For a review of the empirical literature on different forms of participation, see Tina Nabatchi & Lisa B. Amsler, *Direct Public Engagement in Local Government*, AM. REV. PUB. ADMIN. 1, 1-20 (2014).
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- 10 Donna M. Handley & Michael Howell-Moroney, *Ordering Stakeholder Relationships and Citizen Participation: Evidence from the Community Development Block Grant Program*, 70 PUB. ADMIN. REV. 601, 601-09 (2010).
- 11 Thomas Bogart et al., *Text Talk Act Evaluation Study Report*, UA-SIROW (2015), <http://www.creatingcommunitysolutions.org/sites/default/files/documents/Text%20Talk%20Act%20Evaluation%20Study-Final%20Report.pdf>.
- 12 Katherine A. McComas, *Citizen Satisfaction with Public Meetings Used for Risk Communication*, 31 J. APPLIED COMMUN. RES. 164, 164-84 (2003); Katherine A. McComas, *Trivial Pursuits: Participant Views on Public Meetings*, 15 J. APPLIED COMMUN. RES. 91, 91-115 (2003).

- 13 W. Barnett Pearce & Kimberly Pearce, *Aligning the Work of Government to Strengthen the Work of Citizens: A Study of Public Administrators in Local and Regional Government* (Kettering Foundation 2010).
- 14 Heather Pincock, *Does Deliberation Make Better Citizens? Examining the Case of Community Conflict Mediation* (2011) (published Ph.D. dissertation, Syracuse University) (on file with Syracuse University SURFACE).
- 15 *Supra* note 11.
- 16 Peter K. Spink & Nina J. Best, *Introduction: Local Democratic Governance. Poverty Reduction and Inequality: the Hybrid Character of Public Action*, 40 Institute of Development Studies 1, (2009).
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- 18 *Soul of the Community 2010. Why People Love Where They Live and Why it Matters: A Local Perspective*, Knight Foundation (2010).
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