2000

Can Informed Consent Preserve the Integrity of Mediation?

Maureen Laflin
University of Idaho College of Law, mlaflin@uidaho.edu

Can Informed Consent Preserve the Integrity of Mediation?

by Maureen E. Laflin[1]

Some erroneously view the ADR spectrum as a number line where each form of ADR occupies a clearly marked independent position. A better analogy is that of the lines of a color spectrum, such that every ADR method can be understood only in relation to the others into which it blends and fades. Mediation is one form of ADR. At its core, "mediation" has been defined as "a voluntary process in which a neutral third party, who lacks authority to impose a solution, helps the participants reach their own agreement for resolving a dispute or planning a transaction."[2] By contrast, "neutral evaluation" is a separate ADR "process in which the parties present their dispute before a neutral expert and receive an unprejudiced assessment of their case."[3] Yet there are those who describe themselves as "evaluative mediators." We err, and we disserve the entire spectrum of ADR processes, if we come to view the whole spectrum as merely mediation in a variety of forms and orientations.

Mediation is paradigmatically a facilitative process, whereby the parties strive to achieve a voluntary agreement that resolves the dispute to at least the partial satisfaction of all. Law is an adversarial process that by design creates winners and losers by imposing outcomes upon the parties. Skills as advocates and problem-solvers which well serve lawyers and their clients in the traditional legal system have the potential to alter and perhaps co-opt the more facilitative process of classic mediation. Parties to a mediation, consciously or unconsciously, may attribute a special competence or status to a lawyer-mediator, notwithstanding the respect they hold for their own counsel. These tendencies vest dual professionals, such as attorney-mediators, with the power to dominate and control the parties and the ultimate resolution of the dispute.

While bright-line distinctions between the various ADR processes are difficult, some boundaries are needed if the integrity of each process is to be protected. The focus of the debate about whether a practice properly constitutes mediation, or some other form of ADR, should be directed, explicitly and narrowly, toward the two basic premises of mediation: participant self-determination and mediator impartiality. Once a third party neutral advocates that the parties see the dispute in a particular light, that light becomes the beacon that directs the pathway through the remainder of the mediation, compromising both the parties' self-determination and the mediator's impartiality. If the mediator's conduct gives him or her power and control over the outcome, then he or she is actually doing that which he or she has been given no authority to do, and the dispute resolution process at issue is no longer mediation but something much more akin to neutral evaluation or settlement conferencing. If the mediator allows him- or herself to become the central character, participant self-determination is subverted and an essential characteristic of mediation is lost.

I do not mean to suggest that evaluation should be prohibited; nor, in fact, do I regard all evaluative or directive techniques as "bad." In many situations, a third party neutral with an evaluative orientation will be more effective and more to the parties' liking than a strictly facilitative neutral. But any sound dispute resolution program must include assurances that the parties involved in each matter share a common understanding about the nature of the process they are purchasing, and assurances that they will actually receive the product they have purchased. Properly labeling the process and clearly communicating its parameters to the parties helps ensure mutual understanding, for both the parties and practitioners.

Effective January 1, 2000, Virginia became the first state to adopt Rules of Professional Conduct for lawyers that unequivocally and specifically address the conduct of lawyers acting as third party neutrals and mediators.[4] The Virginia rules are significant not only because they mark the first attempt by a state to specifically address the practice of mediation by lawyers, but also because they confront head-on the divisive issue of "evaluation" in the mediation context. The drafters of the Virginia rules thoroughly debated the issue of evaluation. The drafters wanted to provide guidelines or boundaries without tying the hands of mediation practitioners. Viewing mediation as an evolving profession that requires flexibility, they declined to require mediation practitioners to strictly adhere to a facilitative model. Virginia crafted a "delicate compromise" in order to reconcile consumer demand with the available spectrum of ADR processes. The goal was to better serve the consumers.

Virginia did not emphasize "labeling" the processes, as such, and adopted a pragmatic, rather than theory-bound, approach. Acknowledging that many parties do want evaluation and that many lawyer-mediators give them what they want, the Virginia rules assert that while facilitation lies at the core, and is the preferred mode of mediation, the practice allows for a good measure of evaluative activity. Thus Virginia conceptualizes "evaluation" as a tool that can be deployed during mediation, rather than a separate process. While Virginia gives a decided preference to the facilitative mode, and requires the identification to the consumer of the pitfalls associated with evaluations, its "delicate compromise" seeks to buttress the integrity of such mediation by requiring a foundation of informed consent.

Virginia places restrictions on evaluative techniques designed to protect the essential, facilitative purpose of the mediation process. Under Virginia Rules of Professional Conduct Rule 2.11(d), evaluation may play only a supportive, secondary role:

A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is

incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.

The comment to Rule 2.11(d) explains that lawyer-mediators are prohibited from offering legal advice to any of the parties (noting that this is a function of the lawyer who is representing a client), or from using coercive techniques.[5] The rule does authorize lawyer-mediators to give legal information on the ground that doing so "is an educational function which aids the parties in making informed decisions."[6] The rule also permits the mediator to dispense legal information on the notion of "informed consent." The hope is that, so educated, the principle of self-determination is advanced rather than compromised if the parties decide to have the mediator use a more evaluative style.

Prior to commencing a mediation, lawyer-mediators in Virginia must discuss with prospective parties the general nature of mediation. They must divulge their personal style, approach, and subject-matter expertise, while eliciting the parties' expectations about the mediation process. Furthermore, they must explain the limitations that are inherent in the use of evaluation. The parties' expectations and understandings must be memorialized in writing in the agreement to mediate. The rule concludes emphasizing party choice—"A lawyer-mediator shall conduct the mediation in a manner that is consistent with the parties'-choice and expectations."[9]

The comment section to the Virginia rule further stresses disclosure and the importance of the parties' full understanding as to the risks associated with evaluation. Comment Three stipulates that: "If the parties request an evaluative approach, the lawyer-mediator shall explain the risk that evaluation might interfere with mediator impartiality and party self-determination."[10] Moreover, before actually giving an evaluation or engaging in evaluative techniques, Comment Four instructs the lawyer-mediator to consult with the parties and independently consider whether the evaluation is appropriate under the circumstances, especially as to whether it presents a threat to the mediator's impartiality or the ability of the parties to retain control over fashioning their own agreement. The mediator must also assess whether the evaluation contemplated appears likely to detract from the parties' willingness to participate openly and meaningfully in the mediation process.

Thus, Virginia clearly does not prohibit outright the use of evaluative techniques in mediation. It does, however, place unprecedented hurdles in the path of evaluation. The question is whether the Virginia approach goes far enough. I do not think so.

Lawyer-mediators in Virginia have no ethical duty to insure that mediation remains purely facilitative. They may ethically participate in the transition of a mediation process into something else—an evaluative process—provided the consumer gives informed consent. Since lawyer-mediators in Virginia must inform all parties to a mediation that evaluative techniques have significant drawbacks and will only be used if requested by all sides,[11] the Virginia rules may work to ensure that evaluation will be employed sparingly, and under the guise of a supplement to the facilitative process.

Under Virginia's approach, the integrity of the ADR process depends on the sufficiency of the consent. Unfortunately, numerous questions surround the workability of the State's "informed consent" requirement.

The firm demand set forth in the Virginia rules that a mediator secure in writing the informed consent of all parties before commencing any evaluative activities represents a fair start, for it ostensibly curtails the mediator's power by ensuring that the parties are not taken unawares by a shift in orientation in a mediation. Yet, it belies experience to think that most parties to mediation will readily understand the differences, especially when they learn of them in the charged atmosphere of an ongoing process. Thus, here is a danger that the transition into evaluative mode represents a "bait and switch" for the mediation consumer. Far less of a risk exists if the informed consent is obtained prior to beginning mediation, but injecting evaluation

into the process at the outset may conflict with the rule's stated preference for facilitation.

The care, depth, and subtlety with which the mediation parties will be "informed" is likely to vary by mediator. Neither the parties nor the mediator may comprehend fully the impact evaluation will have on the process at the time consent is sought. Where mediation proceeds by caucus, the evaluative data provided to each party may vary widely. Virginia's rule is silent as to the mediator's duty to obtain explicit consent to give different evaluative content to each litigant. It is doubtful that the consumer litigant understands that the evaluative mediator may selectively dole out legal advice and legal information to one side or the other in an attempt to get the case settled. Few mediators are this candid with the parties. Parties to such a "mediation" should question whether they purchased the same product — one side received the benefit of the mediator's expertise while the other received a settlement. Maybe that is what each side wanted, but shouldn't the parties be allowed to make that decision? Labeling the process and clearly communicating its parameters to the parties helps ensure mutual understanding and increases the likelihood that the parties and the mediator are buying and selling the same product.

Finally, we must acknowledge that as mediation becomes more and more commonplace, and the parties to mediation and their lawyers increasingly sophisticated about the process, evaluative techniques may well come back to haunt the unwary mediator who finds him- or herself prey to the skilled lawyer or astute party. An experienced litigator who regularly refers and represents his clients in mediations not long ago confided in me that he plays "spin the mediator" whenever a mediator begins to exhibit directive, evaluative tendencies. His game of spinning the mediator has as its goal convincing the evaluative mediator of the correctness of his client's position, and then sitting back as the mediator advocates on his client's behalf. In this scenario, the focus of the mediation shifts away from the parties, and the energy of the mediation is misdirected. The unwary mediator, the other parties, and impartiality itself, are the likely victims.

Judges evaluate, and then enter orders. Mediation is a developing alternative dispute resolution process. The "activist," directive evaluator is not a mediator, at least not in the traditional sense. And while tradition alone may not be a good reason to curb the evaluative temptation in mediation practice, the fact that professional habit inclines attorney-mediators toward an evaluative orientation is not a sound reason for giving evaluation a foothold within the true mediation process.

I am reminded of the introduction of kudzu in the Southern states during the first part of the twentieth century. Brought in from Asia to curtail erosion, the hairy kudzu vines have taken over much of the rural landscape. Likewise, importing evaluative techniques into the traditionally facilitative process of mediation may well lead to those techniques coming to dominate the process, contributing to the demise of purely facilitative mediation as an alternative to other dispute resolution processes. While Virginia and others argue that it is too late to rein in evaluative techniques employed in mediation, I disagree. And while Virginia has tried to pave an ethical way for lawyer-mediators who engage in hybrid processes, a better path must be found.

Endnotes

1. Professor Maureen Laflin is the Director of Clinical Programs at the University of Idaho College of Law and directs the College's Northwest Institute for Dispute Resolution. She recently published an in-depth article on ethical rules for lawyer-mediators, *Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators*, 14 NOTRE DAME J.L. ETHICS & PUBLIC POL'Y 479 (2000).
2. Leonard L. Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 FLA. L. REV. 19, 24 (1985). Under the Idaho Rules of Civil Procedure, general civil mediation is defined as "the process by which a neutral mediator appointed by the Court or agreed to by the parties assists the parties in reaching a mutually acceptable agreement. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and finding points of agreement. An agreement reached by the parties is to be based on the decisions of the parties, and not the decisions of the mediator." I.R.C.P. 16(k).
3. U.S.D.C. D.C. app. B (1996) (Dispute Resolution Programs, at 847).
4. *See* VIRGINIA RULES OF PROFESSIONAL CONDUCT Rules 2.10 and 2.11 (1999). The new Rules of Professional Conduct replace the Virginia Code of Professional Responsibility.
5. *Id.* Rule 2.11 cmt. 7 & 8.
6. *Id.* Rule 2.11 cmt. 7.
9. *Id.* Rule 2.11(f)
10. *Id.* Rule 2.11 cmt. 3.
11. VIRGINIA STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS D.2.c (1997) (encouraging neutral third parties to properly label mixed processes).
7. *Id.* Rule 2.11 cmt. 7 & 8.
7. *Id.* Rule 2.11 cmt. 7.
9. *Id.* Rule 2.11(f)
10. *Id.* Rule 2.11 cmt. 3.
11. VIRGINIA STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS D.2.c (1997) (encouraging neutral third parties to properly label mixed processes).