SPECIAL TOPIC
FOR LAWYERS

Lawyers participate in and interact with court ADR programs from a variety of perspectives, such as advocates in the ADR process, stakeholders during program design and educators conducting outreach regarding court ADR programs. Other areas of the RSI Resource Center provide information for lawyers and others who want to be mediators and for legal aid lawyers who want to use court ADR.

LAWYERS AS ADVOCATES IN COURT ADR PROCESSES

Lawyers have a responsibility to understand and skillfully advocate for their clients in ADR processes. This responsibility ranges from educating and advising their clients about the use of ADR to knowing how to advocate for their client in an ADR process.

Although some of the information below is general to ADR, some focuses on non-adversarial processes, primarily mediation, which require substantially different knowledge and skills from litigation.

LAWYERS’ RESPONSIBILITIES TO CLIENTS PRIOR TO ADR

As with many endeavors in law and in life, much of the success of participation in ADR lies in preparation.

EDUCATE CLIENTS ABOUT ADR OPTIONS

As is true for legal representation more generally, lawyers are responsible for enabling their clients to make informed decisions when it comes to participation in ADR. Those decisions exist in the context of any requirements of the court.

For example, some courts require that lawyers discuss ADR with their clients – with some requiring certification that this has been done – but do not require participation in ADR. Sometimes a court may have very specific requirements, such as California’s requirement that lawyers discuss confidentiality with clients prior to mediation.

Others courts offer optional ADR programs, and yet other programs are mandatory. Whether the court program is optional or mandatory, lawyers should help their clients to understand their rights and responsibilities under the program; how the ADR process works; pros and cons of participation; and details such as what it costs, whether parties can request ADR, when they have the responsibility to try ADR, and when and how they would use those programs.
One resource that can help lawyers explain ADR processes to clients is "Alternative Dispute Resolution: Options for Resolving Your Dispute" from the California Judicial Council, which includes information on major dispute resolution processes and when they are most appropriate.

DETERMINE THE BEST TIMING FOR ADR

The timing of mediation has been found to affect outcomes as well as affect the costs of litigation to clients. Lawyers should consider the benefits of early mediation when determining the best time to participate in the process.

- **Court-Related Mediation – Early and Flexible Leads to Success** – Using empirical research, RSI Director of Research Jennifer Shack makes the case that lawyers may do well to become more flexible in determining whether and when to mediate. Perhaps most of all, lawyers should become proactive in deciding early what is best for each particular case.

- **Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better** – The lawyers interviewed for this article, who were selected because of their good reputations, described how they prepare for both litigation and negotiation.

PREPARE FOR THE MEDIATION

To be an effective advocate in mediation, lawyers need to prepare for it. In civil cases, mediators generally expect to receive mediation statements before the first mediation session. The content, length and confidentiality of these submissions depends on the mediator and the complexity of the case. Lawyers should be clear with the mediator about what are confidential communications with the mediator and what will be shared with the other side.

Some mediators also have conversations with counsel for each side. These conversations vary considerably from mediator to mediator and depending on the local legal culture, but generally the mediators discuss their approach to the mediation and explain their expectations of counsel and the parties. Mediators also tend to use these conversations to begin to establish rapport with the lawyers. Some mediators ask counsel about concerns and ask if there is anything they did not say in their pre-mediation statement that is important. Again, depending on the mediator, they may have more extensive discussions about existing offers, demands and, likely, zone of agreement. An effective advocate uses these opportunities to set up their approach to the mediation. Some good resources to help with preparation are:

- **First Impressions: Drafting Effective Mediation Statements** – This article guides lawyers in writing effective pre-mediation statements.

- **Preparing for Mediation** – This guide steps lawyers through everything they need to do to prepare for mediation.

PREPARE CLIENTS TO PARTICIPATE EFFECTIVELY

Research indicates that when parties enter mediation prepared, they are more able to negotiate and to know what they want in terms of settlement, making the mediation more efficient and effective.
Preparation should include:

- Explanation of the mediator’s role, their own role, what is confidential and how the mediation will proceed
- Exploration of their clients' needs and interests
- Discussion of the strengths and weaknesses of their case and that of the other party
- Setting realistic expectations regarding what a settlement might look like and what might happen at trial, along with the costs associated with moving forward with litigation

**LAWYERS ADVOCATING DURING MEDIATION**

The skills required to be a good and ethical advocate during mediation are different from standard lawyering skills. Lawyers entering mediation with their clients need to know how to be effective advocates in this different setting. To do so, lawyers need to have a good grasp of the following aspects of mediation.

**ETHICAL OBLIGATIONS**

Lawyers who participate in mediation and other non-adversarial procedures have particular responsibilities:

- ABA Model Rule of Professional Conduct Rule 3.9 – This rule binds lawyers involved in non-adversarial proceedings to certain ethical obligations.
- ABA Advisory Opinion 06-439 – This opinion discusses the lawyer’s responsibility to be truthful in mediation caucuses.

**UNDERLYING TENANTS OF MEDIATION**

Understanding underlying tenets of mediation, including confidentiality, self-determination and informed consent, is essential for an effective advocate in mediation, as is understanding the role of the mediator. These not only makes lawyers more effective advocates, but also helps them to avoid making errors or not recognize mediator errors that may harm their client. The following provide information and insights on these topics:

- Confidentiality in Mediation: An Application of the Right to Privacy – This discusses the limits to confidentiality in mediation.
- Model Standards of Conduct for Mediators – The widely accepted standards developed by the American Bar Association, the Association for Conflict Resolution and the American Arbitration Association, revised in 2005, can be found here.
- The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary – Mediator evaluations have the potential to bolster party self-determination by leading to better-informed decision-making, but they can also give one party more leverage in the negotiation. This article explores the dimensions of harm and benefit that can result from mediator opinion.
SKILLS NEEDED TO BE EFFECTIVE IN MEDIATION

Advocating for one’s client in mediation takes a different skillset and mindset than traditional advocacy used during trial or settlement discussions. Effective advocates shift their communication style during mediation, help their clients use the mediation process to negotiate effectively, work strategically with the mediator to accomplish their client’s goals, and understand what their clients want – particularly if they want something more than, or in place of, monetary compensation.

- **Shift communication style:** In mediation, lawyers must communicate effectively with the other party and that party’s lawyer, not a judge or jury. A party who is angered or insulted by the opposing lawyer’s zealous advocacy is likely to dig in their heels and refuse to settle. Taking into consideration a possible negative emotional response by the opposing party can be a challenge for even the most experienced lawyers until they adapt to using a nuanced communication style that avoids angering the other side while also not ceding ground in the argument for their client’s position.

- **Effective counseling of clients during the negotiations that take place within a mediation:** Decisions about moves to make during mediation usually occur during separate meetings with the mediator or just between the lawyer and client. Lawyers can help their clients make moves that will maximize outcomes at each stage of the negotiations and avoid those moves that are too big or too small.

- **Work with the mediator:** Lawyers should also know how to work with the mediator to use the steps in the mediation process creatively. For example, lawyers can be strategic about requesting a separate meeting with their clients to consider what offer or demand to make. Similarly, a lawyer needs to know when bringing the actual parties at interest together for a face-to-face conversation could help mend a rift.

- **Address client’s needs and interests:** Lawyers need to know how to ensure that their clients’ non-monetary needs and interests are addressed in mediation to the extent possible. The lawyer must be perceptive about how – or whether – to weave non-monetary issues into the mediation. If non-monetary needs are not acknowledged, they can lurk beneath the surface of the mediation and hinder resolution. For example, in an employment discrimination mediation, an employee may want an opportunity to explain the emotional impact of a supervisor’s actions. This may help the employee feel their concerns have been heard and may even lead to a genuine conversation between employee and supervisor, opening both to reaching agreement. There are certainly limits to the effectiveness of this approach. The supervisor who took the actions may not be present or may not be able to respond to the employee’s explanation in a way that would move the parties toward resolution. Lawyers for both sides need to know their clients well enough to gauge when it is advisable to include non-monetary issues and when it is not.
Helpful resources include:

- **Mediation Representation: Advocating in a Problem-Solving Process** by Harold Abramson – This book guides lawyers in mediation advocacy and representation in mediation.
- "Mediation Advocacy: Partnering with the Mediator" – This discusses the need for lawyers to adopt a new mindset when in mediation.
- "Representing Clients in Mediation: A Mediator's Perspective" – This provides instruction in mediation advocacy.
- "Riding High With Your Mediator: The Do's and Don'ts of Effective Mediation Advocacy" – This article highlights several important do's and don'ts for effective mediation advocacy.
- "Selling Your Case a Different Way: Effective Mediation Calls for Advocacy Skills, Even if They're Not the Kind Litigators Use in Court" – This provides instruction to litigators on how to modify their litigation skills for effective mediation advocacy.
- "Some Do's and Don'ts of Mediation Advocacy" – This includes several important do's and don'ts for litigators on how to approach mediation.

For more information, RSI's Research Library has numerous resources for lawyers as advocates in mediation.

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**LAWYERS AS NEUTRALS**

Lawyers are responsible for understanding their obligations when acting as neutrals. RSI's Special Topic for Mediators provides a wealth of information for lawyers who act as mediators, including ethical responsibilities for neutrals, whether or not they are lawyers. Some states also have their own standards for neutrals. Be sure to check with your state ADR office, if there is one, to find out what the standards are in your state.

- Links to organizations and court offices of court ADR across the country can be found on our [Court ADR Across the U.S.](#) page.

Lawyers acting as neutrals (e.g., mediators, arbitrators, early neutral evaluators) must abide by ethics for each neutral role, plus they have ethical responsibilities that are specific to lawyers. Ethical responsibilities for lawyers acting as neutrals are described in the following:

- **Model Rule for the Lawyer as Third-Party Neutral** by the CPR-Georgetown Commission on Ethics – This addresses both ethical and professional responsibility issues faced by lawyers who serve as third-party neutrals.
- **ABA Model Rule of Professional Conduct Rule 2.4** – This short rule discusses a lawyer’s duty to inform parties as to their role in the process when serving as a neutral.
- **The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary** – This article examines the question of what mediators should tell parties by way of informed consent before providing an evaluation on the merits of a legal situation.
LAWYERS AS STAKEHOLDERS IN COURT ADR PROGRAMS

Lawyers are critical participants when courts design or improve their ADR programs. Lawyers’ perspectives can help to ensure the ADR program structure is workable. Information on how to do this can be found in our Guide to Program Success, which steps through each aspect of the program development process, including standards, funding, neutrals, and rules.

The National Standards for Court-Connected Mediation Programs are also valuable. These annotated standards cover every aspect of mediation programs.

LAWYERS EDUCATING ABOUT ADR

Lawyers can play an important role in educating judges, other lawyers and the community about ADR. They might make presentations on court ADR programs at bar functions, community meetings, law firm gatherings, etc. Lawyers are in a unique position to promote the use of alternatives because they can tell stories about how mediation and other processes were effective (assuming appropriate confidentiality protections) and also describe how the processes work.

Following are some resources that may be suitable for this type of presentation:

- Court ADR Basics – This provides a quick tour through the what, how and why of court ADR
- "What You Need to Know about Dispute Resolution: The Guide to Dispute Resolution Processes" by the American Bar Association – This gives short explanations of the many dispute resolution processes available through court programs and private entities
- "Alternative Dispute Resolution: Options for Resolving Your Dispute" from the California Judicial Council – A guide for those new to ADR, it includes information on major dispute resolution processes and when they are most appropriate.

Lawyers may also want to consult RSI’s Court ADR Across the U.S. page for reports and evaluations of programs and for links to organizations and court offices of ADR across the country.