

**TAKING YOUR
PRACTICE TO THE
NEXT LEVEL –**

**MEDIATING COMPLEX
COMMERCIAL DISPUTES
IN THE LIGHT OF
RECENT RESEARCH**

**SCMA Advanced Track Training
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AAA Mediation.org™



PRESENTERS



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**“GOOD PROCESS WON’T GUARANTEE
A GOOD OUTCOME, BUT BAD PROCESS
MOST ALWAYS ENSURES A BAD OUTCOME!”**

- Anonymous

OBJECTIVES

- ✓ **Consider Recent Research Findings in the Field**
- ✓ **Identify Core Competencies of Seasoned Mediators**
- ✓ **Explore Interplay of Specific Behaviors on Settlement Outcomes/Process Perceptions in Commercial Disputes**

**OVERVIEW OF CORE MEDIATOR COMPETENCIES
FROM RECENT RESEARCH IN THE FIELD**

OVERVIEW: REPORT OF THE TASK FORCE RESEARCH ON MEDIATOR TECHNIQUES

ABA Dispute Resolution Section, 2017

Reviewed 47 Empirical Studies;
Analyzed 7 Categories of Mediator Behaviors/Techniques:

- ✓ Pressing or directive actions or approaches
- ✓ Offering recommendations, suggestions, evaluations, or opinions
- ✓ Eliciting disputants' suggestions or solutions
- ✓ Addressing disputants' emotions, relationships, or hostility
- ✓ Working to build rapport and trust, expressing empathy, structuring agendas, or other “process” styles and actions
- ✓ Using pre-mediation caucuses
- ✓ Using caucuses during mediation

FOCUS: “CARING”

- ✓ Addressing disputants’ emotions, relationships, or hostility
- ✓ Working to build rapport and trust, expressing empathy, structuring the agenda, or other “process” styles and actions

<http://www.adrvideo.org/an-international-business-dispute-english/>

VIDEO DEMONSTRATION:

✓ WHAT DID YOU SEE??

✓ WHAT WOULD YOU DO??

✓ COMMERCIAL DISPUTE NUANCES?

STUDY CONCLUSIONS:

- ✓ *Addressing disputants' hostility has both potential to increase and reduce opportunities for settlement.*
- ✓ *Working to build trust, expressing empathy or praise, and structuring agendas have potential to increase settlement and enhance disputants' relationships and perceptions.*

PRACTICE POINTS:

- ✓ As with any mediated dispute, let the process work...don't rush it!
- ✓ People first...their needs and concerns, attitudes and emotions, priorities and pitfalls all come to play – even in commercial disputes.
- ✓ Carriers/adjusters are people first, “tacticians” second.
- ✓ Every dispute has ...“a legal case and an emotional case” (Sulmeyer); always tackle the emotional case first.

FOCUS: CAUCUSING

- ✓ Using pre-mediation caucuses
- ✓ Using caucuses during mediation
- ✓ Pressing or directive actions or approaches

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VIDEO DEMONSTRATION:

✓ WHAT DID YOU SEE??

✓ WHAT WOULD YOU DO??

✓ COMMERCIAL DISPUTE NUANCES?

STUDY CONCLUSIONS:

- ✓ *Pre-mediation caucuses with a TRUST-building focus have potential for positive effects, and those with a SUBSTANTIVE focus have potential negative effects.*
- ✓ *Caucuses during mediation and pressing/directive actions have: (1) potential to increase settlement in labor-management context, but also (2) potential for negative effects on disputants' relationship and process perceptions.*

PRACTICE POINTS:

- ✓ Resist urge to “get down to business (merits) with pre-mediation caucusing; gaining TRUST is job one!
- ✓ Caucusing must always be PURPOSEFUL.
- ✓ “Multiple stake holder theory of mediation: give all participants what they need.
- ✓ Pressing/directive actions have a time and place (counsel, adjusters).

FOCUS: CREATIVITY

- ✓ Offering recommendations, suggestions, evaluations, or opinions
 - ✓ Eliciting disputants' suggestions or solutions

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VIDEO DEMONSTRATION:

✓ WHAT DID YOU SEE??

✓ WHAT WOULD YOU DO??

✓ COMMERCIAL DISPUTE NUANCES?

STUDY CONCLUSIONS:

- ✓ *Recommending a particular settlement, suggesting settlement options, or offering evaluations or opinions have potential for positive effects on both settlement and counsel perceptions of mediation, BUT ALSO negative/mixed effects on participant perceptions of process and relationship.*
- ✓ *Eliciting disputants' suggestions or solutions has potential to increase settlement and enhance disputants' perceptions and relationships.*

PRACTICE POINTS:

- ✓ Building (and maintaining) trust is job one; easier done with participative process of inclusion
- ✓ Disputes/conflicts belong to the parties that experience it...not to judges, juries, arbitrators or indeed mediators!
- ✓ Before I tell...let me ask!
- ✓ Moving toward “assessments” in commercial disputes: “license” or “permission” (Robinson)

SUMMARY FINDINGS & CONCLUSIONS

LESSONS LEARNED:

OVERALL CONCLUSIONS -- POSITIVE

These mediator actions have greater *potential* for positive effects than negative effects on: (1) settlement, (2) related outcomes, (3) disputants' relationships, and (4) disputants' perceptions of mediation:

- ✓ Eliciting disputants' suggestions or solutions
- ✓ Giving more attention to disputants' emotions, relationship, and conflict
- ✓ Working to build trust and rapport, expressing empathy or praising disputants, and structuring the agenda
- ✓ Using pre-mediation caucuses focused on establishing trust

LESSONS LEARNED:

OVERALL CONCLUSIONS -- MIXED

- ✓ Recommending a particular settlement, **suggesting settlement options, and offering evaluations or opinions:**
 - have potential for **positive** effects on settlement and on advocates' perceptions of mediation,
 - also have potential for **negative** as well as **positive** effects on disputants' relationships and perceptions of mediation
- ✓ Both **caucusing during mediation and pressing or directive actions:**
 - have potential to increase settlement and related outcomes, especially in labor-management disputes;
 - pressing actions also have potential for **negative** effects on settlement
- ✓ Both sets of actions have potential for **negative** effects on **disputants' perceptions and relationships**

LESSONS LEARNED:

GOLDBERG STUDY (NORTHWESTERN UNIV.)

“The Secrets of Successful and Unsuccessful Mediators”

(Goldberg, Steven B.; Shaw, Margaret L.; based on other key studies)

- ✓ Key lies in developing **RAPPORT** -- relationship of understanding, **EMPATHY** and **TRUST**
- ✓ **Trust** and **confidence** encourage deeper communication with mediators, providing them with more complete information to help parties negotiate resolution

LESSONS LEARNED: **MEDIATOR** vs. **ADVOCATE** VIEWS

- ✓ **MEDIATORS** feel key lies in empathic listening, conveying *genuine caring* about party feelings, needs, concerns
- ✓ **ADVOCATES** cite genuineness, sincerity, likeability, compassion, integrity, patience and empathy
- ✓ **ADVOCATES** also value solid preparation, knowledge of contract and substantive law

IN SUM -- QUALITIES OF EFFECTIVE MEDIATORS

Ethical

Deep Listening

Empathetic

Active engagement

Trustworthy

Patient

Persistent

Humble

Nonjudgmental

Diplomatic

Respectful of all

Adaptive

Caring

Creative

Smart, quick study

Well prepared

We're only human -- it's okay at times to feel a bit confused!"



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THANK YOU, AUDIENCE, FOR PARTICIPATING

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