Educating Today’s and Tomorrow’s Lawyers to Advocate Effectively in Mediation

Abstract

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Mediation, best understood as assisted and enhanced negotiation, has grown rapidly in recent decades as it has become increasingly annexed to court systems around the world. Court-connected mediation programs started in the United States in the 1980s and quickly spread to the United Kingdom and former commonwealth countries like Australia and Canada in the 1990s. Although it started later in Europe and Asia, court-connected mediation is now growing exponentially in those regions. Growth has been slower in Africa and South America. Argentina led the way in the mid-1990s and Brazil, Chile, Peru, and countries are beginning to encourage or require mediation for conflicts and disputes that otherwise would receive adjudication.

Mediation provides a simple, flexible, relatively informal process that allows people to negotiate in the presence, and with the assistance of, third persons trained in enhancing consensual dispute resolution. Mediators help participants better understand each other, frame problems in ways that transcend selective and partisan perceptions, explore shared and independent interests, and discuss solutions that promote mutual gain. Confidential caucuses enable mediation to generate more and different information than typically occurs in when participants negotiate themselves. This assistance often produces outcomes that exceed the narrower, usually win-lose legal remedies which judges and arbitrators employ.

While not a panacea for resolving commercial and other disputes, mediation provides a valuable, different process and task set. Its value ultimately depends upon how disputants and their lawyers use it. When used effectively as an opportunity to embrace interest-based negotiation, it often produces quick, inexpensive, and contextually appropriate solutions. These resolutions allow participants to avoid the additional time, expense, and uncertainty attendant to adjudicating.

Representing clients before and during mediation has become an increasingly common part of law practice around the globe. Performing necessary tasks in these contexts effectively presents many new and important roles for lawyers that differ dramatically from what they do when adjudicating. Providing structurally flexible, variable, often non-linear approaches, mediation uses informal norms, embraces ambiguities, and tolerates differences. Mediating typically integrates consideration of non-monetary and other interests outside legal rights frames, de-emphasizes future determinations about applicable law, and pursues accurate estimates of costs, benefits, and risks. Finally, mediating challenges lawyers to navigate unpredictable and occasionally volatile emotional dynamics skillfully.
Many lawyers in the United States and around the world have had little experience, education, or practice performing these tasks. Adjudicating lets lawyers exercise control, play dominant roles, and remain central until external decision-makers act. Mediating, in contrast, changes resolution process dynamics and gives lawyers less control, leadership, and opportunities to display legal knowledge and rights-linked advocacy based on their expertise.

While lawyers in the United States typically play central roles in the facilitated discourse of mediating, these conversations do not involve interpreting and applying law directly. They seldom require making legal arguments to persuade neutral decision-makers since mediators do not decide outcomes. Reliance on documents, evidentiary presentations, and witness examinations occurs rarely. Lawyers’ hard-earned expertise in translating complex, multi-factor situations into narrower frames for adjudicating often conflicts directly with mediation’s opportunities to expand agendas and think outside legal rights perspectives. Facts that prove or disprove rights claims seldom are dispositive in mediation. Non-legally relevant interests, relational issues, and non-monetary factors that lawyers have been trained to discount in adjudication are often critically important in mediating. Satisfying participants’ deep emotional needs and reorienting them to each other, factors typically having little significance when adjudicating, often are central to reaching mediation agreements.

Many, if not most, lawyers in the United States find that representing clients before and during mediation effectively challenges them to learn new attitudes and skills. Many find it difficult to acknowledge and adapt their win-lose biases and tendencies to view negotiating as requiring gain maximizing exclusively to advocate for agreements rather than victories. Not surprisingly, many lawyers tend to bring their rights-based perspectives and adjudication skills to mediating without modification. This often produces counterproductive actions that ignore or respond ineffectively to emotions, jealously guard information against disclosure even in confidential caucuses where it might be converted to possible solutions, resist broadening agendas and perspectives, and criticize excessively. Clients frequently express concern about how often their lawyers’ adversarial posturing and excessively competitive communications interfere with mediation’s opportunities to explore creative, interest-based resolutions.

Mediating challenges many lawyers in the United States to reorient their perceptual and strategic approaches to negotiating. Most litigation-connected disputes require at least some negotiating about money, if only because most legal remedies use monetary damages as proxies for harms humans suffer. To mediate successfully, lawyers must acknowledge and move away from optimistically overconfident analysis and deal effectively with the negative emotions that positional bargaining frequently generates. They must acknowledge and avoid common but ineffective negotiating actions such as unwarranted threats, dangerous bluffs, and premature final offers. They also must avoid common negotiation failures resulting from guessing incorrectly about what they can achieve, posturing too long, hiding real top or bottom limits too tenaciously, and prematurely concluding that further movement cannot occur.

In addition to revising attitudes and actions regarding counterparts, advocating effectively before and during mediation challenges many lawyers to work with their clients in new ways. Mediating anticipates larger roles for clients than adjudicating provides. Mediations typically require client presence, through fully authorized representatives of entities and organizations,
and provide numerous opportunities for clients to listen, talk, and participate as negotiations unfold. It provides opportunities for clients to hear other perspectives without potential distortion from their lawyers, interact directly with counterparts, and make informed decisions comparing mediation options with predicted adjudicatory outcomes. For example, analysis of case strengths, weaknesses, transaction costs, and outcome forecasts typically occurs in confidential meetings with lawyers and their clients. This demands thorough preparation, by both lawyers alone and in collaboration with their clients. In addition to generating more and different information than adjudication encompasses, these conversations also often challenge lawyers to navigate unpredictable emotional dynamics skillfully.

Educating today’s lawyers starts with acknowledging that adults can learn new attitudes and skills, particularly when they see needs and rewards for doing this challenging work of identifying and revising existing habits. Mediation’s rapid growth has exposed many lawyers to needs to learn the new attitudes and skills effective mediation advocacy demands and the rewards that mastering these tasks brings. This suggests a growing need for organized bar and similar organizations to sponsor continuing education programs providing learning opportunities in mediation advocacy. Many of these programs have been developed and presented in the United States by groups such as the American Bar Association’s Section on Dispute Resolution and committees within state bar organizations. Many United States law firms are also bringing this education in house by using lawyers who specialize in mediation representation to train colleagues.

Educating tomorrow’s lawyers requires adapting existing legal education curriculums and resource allocations. Although underway in many countries, this effort needs much more progress to respond to demands for effective mediation advocacy skills in practice, a lawyering realm immune to automation and offshoring. Most American law schools currently allocate seven to nine times more resources and faculty to teaching law, adjudicatory procedures, and rule-based advocacy skills than they devote to instruction and clinical practice in mediation advocacy action theories and skills. All American law schools offer instruction and practice learning opportunities in trial advocacy skills ensuring that every interested student gets some exposure even though the percentage of non-criminal filed lawsuits reaching trial today ranges from 5% in state courts to 1.7% in federal tribunals. Resistant to fundamental change, and despite two recent, prominent reports recommending more curricular attention to non-adjudicative tasks and skills, between half and two-thirds of American law students receive no learning opportunities in these skills. A recent review showed that only 20% of American law schools provide a course in mediation advocacy action theories and skills. Former Commonwealth countries make curricular and resource commitments generally similar to that found in American legal education while legal education in Europe, Asia, Africa, and Latin America generally provide even less.

Change is a process, not an event. Educating today’s and tomorrow’s lawyers to advocate more effectively before and during mediation requires starting and sustaining a process that is only now getting underway. These educating efforts will build on and broaden existing lawyering skills needed to analyze factual situations, assess potentially applicable legal standards and likely adjudicatory outcomes, and help clients develop, compare, and then choose between best mediating option and most likely litigation result. These educational efforts also will let
lawyers satisfy human impulses for resolution and healing individuals and organizations. These educational efforts are necessary, needed, and worth the time they require.