

**STRAIGHT FROM
THE SOURCE:
MEDIATION DO'S
AND DON'T'S –
FROM THE PARTY'S
AND LITIGATOR'S
PERSPECTIVES!**

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

- Anonymous

Faculty



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OBJECTIVES

- ✓ Provide an interactive panel discussion by researchers and practitioners with practical take-aways from research of the ADR user community and mediators.
- ✓ New understanding of parties' perspectives regarding ethical and effective mediation processes. Increase awareness of the ethical implications of how the future of ADR is guided by the user community, business, technology, and social norms.
- ✓ Improve understanding of critical incidents when mediators breach ethics and explore how to replace unethical with ethical practices to enhance mediator trustworthiness and effectiveness.

SEGMENT 1:

**FOCUS ON PROCESS -- LESSONS LEARNED FROM
RECENT RESEARCH IN THE FIELD --
2018 AAA-ICDR MEDIATION USER SURVEY**

Mediator Selection Survey 2018 (PDF)

State where you typically select mediators

| | Response percent | Response total |
|----|------------------|----------------|
| AK | 0% | 0 |
| AL | 2.08% | 5 |
| AR | 0% | 0 |
| AS | 0% | 0 |
| AZ | 1.25% | 3 |
| CA | 14.58% | 35 |
| CO | 1.67% | 4 |
| CT | 2.08% | 5 |
| DC | 2.5% | 6 |
| DE | 0% | 0 |
| FL | 4.17% | 10 |
| GA | 0.83% | 2 |
| GU | 0% | 0 |
| HI | 0% | 0 |
| IA | 1.25% | 3 |
| ID | 0% | 0 |
| IL | 5.42% | 13 |
| IN | 0% | 0 |
| KS | 0.42% | 1 |
| KY | 1.67% | 4 |
| LA | 0.42% | 1 |
| MA | 0.83% | 2 |
| MD | 1.25% | 3 |
| ME | 0% | 0 |
| MI | 3.33% | 8 |
| MN | 0.83% | 2 |
| MO | 2.08% | 5 |
| MP | 0% | 0 |
| MS | 0.83% | 2 |
| MT | 0% | 0 |
| NC | 1.67% | 4 |
| ND | 0% | 0 |
| NE | 0% | 0 |
| NH | 0% | 0 |
| NJ | 5.42% | 13 |
| NM | 0.83% | 2 |
| NV | 0.83% | 2 |
| NY | 11.67% | 28 |
| OH | 3.75% | 9 |
| OK | 0.83% | 2 |
| OR | 0% | 0 |

| | Response percent | Response total |
|--------|------------------|----------------|
| PA | 5.42% | 13 |
| PR | 0% | 0 |
| RI | 0.83% | 2 |
| SC | 0.42% | 1 |
| SD | 0% | 0 |
| TN | 2.5% | 6 |
| TX | 14.17% | 34 |
| UT | 0% | 0 |
| VA | 2.08% | 5 |
| VI | 0% | 0 |
| VT | 0% | 0 |
| WA | 1.67% | 4 |
| WI | 0% | 0 |
| WV | 0.42% | 1 |
| WY | 0% | 0 |
| Non-US | 0% | 0 |

Statistics based on 240 respondents;

Law Firm Size (Select Not Applicable if you are not with a firm)

| | Response percent | Response total |
|----------------|------------------|----------------|
| 1-10 | 49.58% | 119 |
| 11-50 | 20.42% | 49 |
| 51-100 | 5.83% | 14 |
| More than 100 | 17.08% | 41 |
| Not Applicable | 7.08% | 17 |

Statistics based on 240 respondents;

Are you a mediator?

| | Response percent | Response total |
|-----|------------------|----------------|
| Yes | 16.25% | 39 |
| No | 83.75% | 201 |

Statistics based on 240 respondents;

Do you represent parties in mediation?

| | Response percent | Response total |
|-----|------------------|----------------|
| Yes | 98.75% | 237 |
| No | 1.25% | 3 |

Statistics based on 240 respondents;

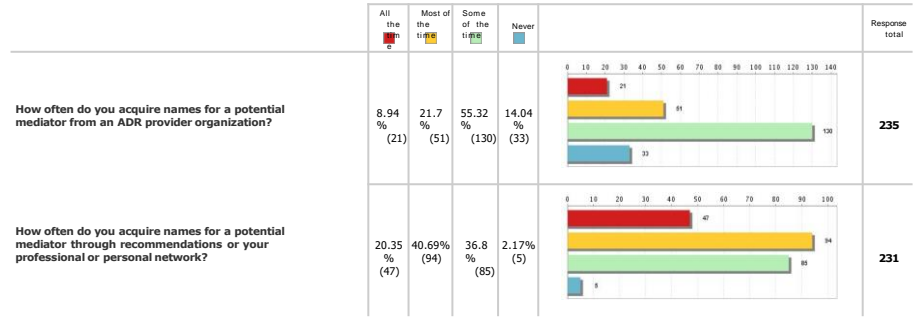
| | Frequently | Occasionally | Rarely | Response total |
|--|-----------------|----------------|---------------|----------------|
| How often do you represent parties in mediation? | 60.61% (140) | 33.77% (78) | 5.63% (13) | 231 |

Statistics based on 231 respondents;

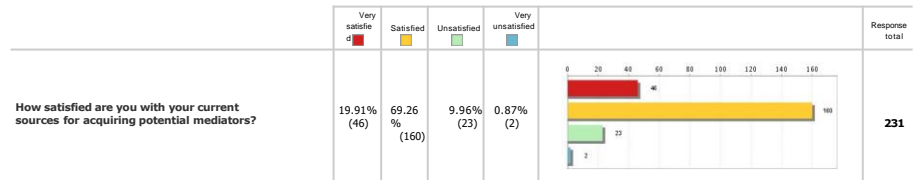
What is the primary nature of your practice?



Statistics based on 237 respondents;



Statistics based on 237 respondents;

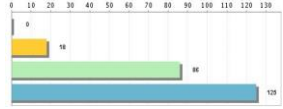
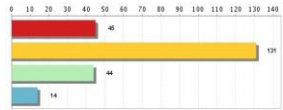


Statistics based on 231 respondents;


Is there a shortage of mediators that you are willing to use?



Statistics based on 234 respondents;

| | A Lot | Somewhat | Very Little | Not at all | | Response total |
|---|----------------|-----------------|----------------|-----------------|---|----------------|
| To what extent does advertising influence your selection of a mediator? | 0% (0) | 7.86% (18) | 37.56% (86) | 54.59% (125) |  | 229 |
| To what extent does cost influence your selection of a mediator? | 19.23% (45) | 55.98% (131) | 18.8% (44) | 5.98% (14) |  | 234 |

Statistics based on 235 respondents;

| | Very Valuable | Valuable | Somewhat Valuable | Not Valuable | | Response total |
|---|----------------|----------------|-------------------|---------------|---|----------------|
| How valuable is it for a provider organization to send a list of prospective mediators and assist with mediator search and selection? | 21.55% (50) | 39.22% (91) | 29.31% (68) | 9.91% (23) |  | 232 |

Statistics based on 232 respondents;

| | Very Important | Important | Somewhat Important | Not Important | | Response total |
|---|-----------------|----------------|--------------------|----------------|---|----------------|
| How important is mediator credentialing or certification to your selection of a mediator? | 17.09% (40) | 30.34% (71) | 35.47% (83) | 17.09% (40) |  | 234 |
| How important is it that a panel of potential mediators feature expertise related to the subject matter of the dispute? | 56.78% (134) | 30.51% (72) | 11.44% (27) | 1.27% (3) |  | 236 |

Statistics based on 237 respondents;

Do you prefer for your mediator to be a former judge?

| | Response percent | Response total |
|-----|------------------|----------------|
| Yes | 27% | 64 |
| No | 73% | 173 |

Statistics based on 237 respondents;

SEGMENT 2:

**FOCUS ON CORE MEDIATOR
COMPETENCIES -- LESSONS LEARNED FROM
OTHER RECENT RESEARCH IN THE FIELD –
2017 ABA TASK DR SECTION FORCE STUDY
(AND OTHER STUDIES)**

LESSONS LEARNED FROM OTHER CURRENT RESEARCH IN THE FIELD

3 Studies: *The Secrets of Successful and Unsuccessful Mediators*

(Goldberg, Steven B.; Shaw, Margaret L.)

- ✓ 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 the 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 law

ABA LESSONS LEARNED: *CONFIDENCE-BUILDING ATTRIBUTES*

| | % |
|--|----|
| Friendly, empathic, likable, relates to all, respectful, conveys sense of caring, wants to find solutions | 60 |
| High integrity, honest, neutral, trustworthy, respects/guards confidences, nonjudgmental, credible, professional | 53 |
| Smart, quick study, educates self on dispute, well prepared, knows contract/law | 47 |

ABA LESSONS LEARNED: *PROCESS SKILLS*

| | % |
|--|----|
| Patient, persistent, never quits | 35 |
| Asks good questions, listens carefully to responses | 28 |
| Diplomatic, makes both sides feel they are winning | 21 |
| Proposes solutions, creative | 18 |
| Candid, firm as necessary (other than in pointing out legal/contractual strength/weakness) | 17 |
| Keeps parties focused on issues; manages issue ordering | 16 |
| Understands people, relational dynamics | 13 |

ABA LESSONS LEARNED: *PROCESS SKILLS* (Continued)

| | % |
|--|----|
| Understands people, relational dynamics | 13 |
| Calm, deliberate | 12 |
| Flexible, capable of varying process to fit situation | 10 |
| Understands organizational culture(s) | 9 |
| Good sense of timing, knows when to set deadlines/apply pressure | 8 |
| Uses humor | 8 |
| Allows venting, manages emotion | 8 |

ABA LESSONS LEARNED: *MORE PROCESS SKILL*

| | % |
|---|-----------|
| Understands people, relational dynamics | 13 |
| Calm, deliberate | 12 |
| Flexible, capable of varying process to fit situation | 10 |
| Understands organizational culture(s) | 9 |
| Good sense of timing; knows when to set deadlines/apply pressure | 8 |
| Uses humor | 8 |
| Allows venting, manages emotion | 8 |

ABA LESSONS LEARNED: *EVALUATIVE SKILLS*

Does useful reality testing regarding legal/contractual weaknesses, evaluates likely outcome in court/arbitration, candid regarding same
33%

ABA LESSONS LEARNED: *CRITICISMS OF UNSUCCESSFUL MEDIATORS*

- ✓ Lack of integrity; disclosing confidential information; dishonesty in reporting positions 48%
- ✓ Not being forceful and persistent in seeking settlement; merely carrying messages back and forth 24%
- ✓ Lack of empathy; more interested in self than parties 20%
- ✓ Did not understand issues/applicable law; not well prepared 16%
- ✓ Lack of patience and persistence 11%

ABA LESSONS LEARNED: *REPORT OF THE TASK FORCE ON RESEARCH ON MEDIATOR TECHNIQUES* (ABA-DR Section, 2017)

Review of 47 Empirical Studies -- Analyzed 7 Categories of Mediator Styles and Actions:

- (1) pressing or directive actions or approaches;
- (2) offering recommendations, suggestions, evaluations, or opinions;
- (3) eliciting disputants' suggestions or solutions;
- (4) addressing disputants' emotions, relationships, or hostility;
- (5) working to build rapport and trust, expressing empathy, structuring the agenda, or other "process" styles and actions;
- (6) using pre-mediation caucuses; and
- (7) using caucuses during mediation

ABA LESSONS LEARNED: *PRESSING OR DIRECTIVE ACTIONS*

- ✓ Pressing or directive actions either (1) increased occurrence of settlement, or (2) had no effect on settlement.
- ✓ Was associated with more negative views of mediator, mediation process, the outcome, and party's ability to work with other parties
- ✓ **Conclusion**: Pressing/directive actions potentially increase settlement, but: (1) also have potential for negative effects on settlement, other outcomes; and (2) impose potential negative impacts on disputants' perceptions, relationships

ABA LESSONS LEARNED: *OFFERING RECOMENDATIONS, SUGGESTIONS, EVALUATIONS and OPINIONS*

- ✓ Either increased or had no effect on settlement
- ✓ Recommending a particular settlement, suggesting settlement options, or offering evaluations or opinions had mixed effects (1) on disputants' relationships/perceptions of mediation, and (2) mixed results -- some positive/negative, some no effect
- ✓ **Conclusion: Potential for positive effects on settlement and on counsels' perceptions of mediation, BUT:**
 - has potential for both negative and positive effects on disputants' relationships/perceptions of mediation

ABA LESSONS LEARNED: *ELICITING DISPUTANTS' SUGGESTIONS OR SOLUTIONS*

- ✓ Generally increased settlement
- ✓ Either had no effect on disputants' perceptions and relationships, or
 - ✓ Was associated with more favorable views of the mediator, the mediation process, the outcome, and a party's ability to work with the other disputant
- ✓ **Conclusion: Eliciting disputants' suggestions or solutions has potential to (1) increase settlement, and (2) enhance disputants' perceptions and relationships, with no reported negative effects**

ABA LESSONS LEARNED: *ADDRESSING DISPUTANTS' EMOTIONS, RELATIONSHIPS, OR HOSTILITY*

- ✓ Either increased or had no effect on settlement
- ✓ Either reduced or did not affect post-mediation court actions
- ✓ Giving more attention to disputants' emotions or relationships has potential to (1) increase settlement and enhance disputants' relationships/perceptions, and (2) reduce settlement
- ✓ **Conclusion: Addressing disputants' hostility has both potential to increase and reduce opportunities for settlement**

ABA LESSONS LEARNED: *WORKING TO BUILD RAPPORT AND TRUST, EXPRESSING EMPATHY, PRAISING DISPUTANTS, STRUCTURING OF ISSUES AND AGENDA, OR OTHER “PROCESS” ACTIONS*

- ✓ Generally (1) either had no effect on disputants’ perceptions and relationships, or (2) were associated with improved relationships and more favorable perceptions of mediator, mediation process and outcome
- ✓ **Conclusion: Working to build trust, expressing empathy or praise, and structuring an agenda have potential to increase settlement and enhance disputants’ relationships and perceptions**

ABA LESSONS LEARNED: *USING PRE-MEDIATION CAUCUSES*

✓ Effects depend on purpose:

- When used to establish trust and build relationship with parties, increased settlement and reduced disputants' post-mediation conflict
- But when used to press parties' acceptance of settlement proposals, pre-mediation caucuses either had negative or no effect on settlement and post-mediation conflict

✓ **Conclusion: Pre-mediation caucuses with a TRUST-building focus have potential for positive effects, and those with a SUBSTANTIVE focus have potential for negative effects**

ABA LESSONS LEARNED: *USING CAUCUSES DURING MEDIATION*

- ✓ Generally increased settlement in labor-management disputes, but no effect on settlement in other types of disputes (regardless of whether goal was to establish trust or discuss settlement proposals)
- ✓ Disputants spending more time in caucus are more likely to return to court to file enforcement actions
- ✓ **Conclusion: Caucuses during mediation appear to have: (1) potential to increase settlement in labor-management context, but also (2) potential for negative effects on disputants' relationships perceptions**

ABA LESSONS LEARNED: *OVERALL CONCLUSIONS -- POSITIVE*

The following mediator actions appear to have a greater *potential* for positive effects than negative effects on *both* settlement and related outcomes *and* disputants' relationships and perceptions of mediation:

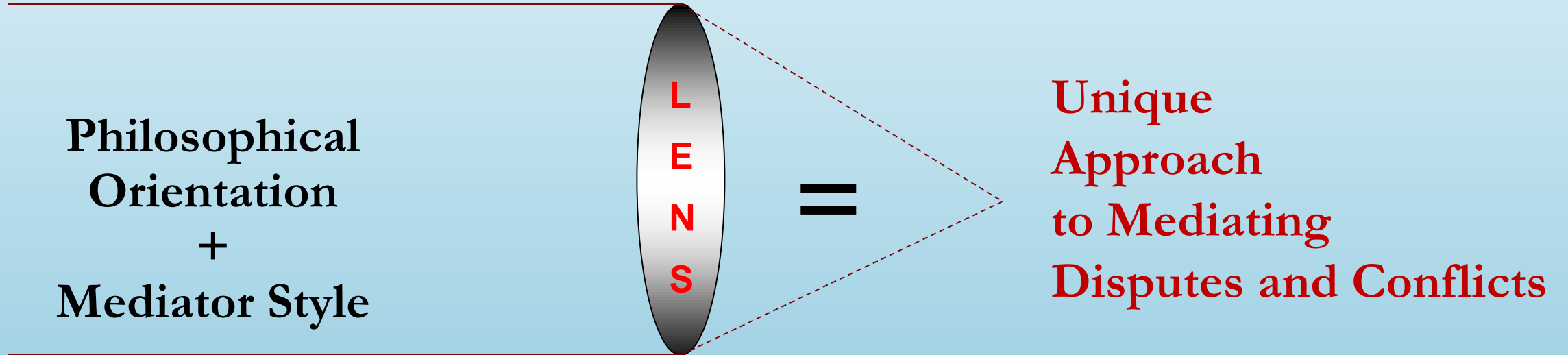
- (1) eliciting disputants' suggestions or solutions;**
- (2) giving more attention to disputants' emotions, relationship, and sources of conflict;**
- (3) working to build trust and rapport, expressing empathy or praising disputants, and structuring the agenda; and**
- (4) using pre-mediation caucuses focused on establishing trust.**

ABA 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

SEGMENT 3:
SELECTING A MEDIATION STRATEGY --
WITH STUDY FINDINGS IN MIND

MEDIATION PHILOSOPHICAL ORIENTATIONS



DISTRIBUTIVE ORIENTATION



“Directive/Authoritative” Style



**“Positional” Bargaining
Approach**

INTEGRATIVE ORIENTATION



“Facilitative”/Evaluative Styles



**“Principled” Bargaining
Approach**

Mediation strategies must:

- Be adaptable to the parties and their unique circumstances
- Be customized
- Be spontaneous and flexible

Scoping things out: “Strategy Design”

CRITICAL MEDIATOR SKILLS:

Listen completely and with
“head and heart.”

Be observant.

Do not judge.

Inspire. Expand vision,
options and openness.

Treat all with respect.

Connect with parties and
participants.

Work to earn trust.

Negotiation Tendencies

**Resist until the
time is right**

- ✓ Strong human tendency to jump into solutions and problem solving
- ✓ Tendency to press and pressure compromise
- ✓ Tendency to jump to premature conclusions
- ✓ Desire to suppress emotional dimension
- ✓ Need to address/move past from pain, anger, hurt and other negative emotions

SELECTING A MEDIATION STRATEGY

- ✓ **PREPARATION** (jointly or privately)
- ✓ **OPENING** (jointly or privately)
- ✓ **EXPLORATION** (jointly or privately...needs and concerns, issues and options)
- ✓ **BARGAINING** (jointly or privately)
- ✓ **CLOSURE** (jointly or privately...whether deal or no deal)

JUDICIAL PERSONA

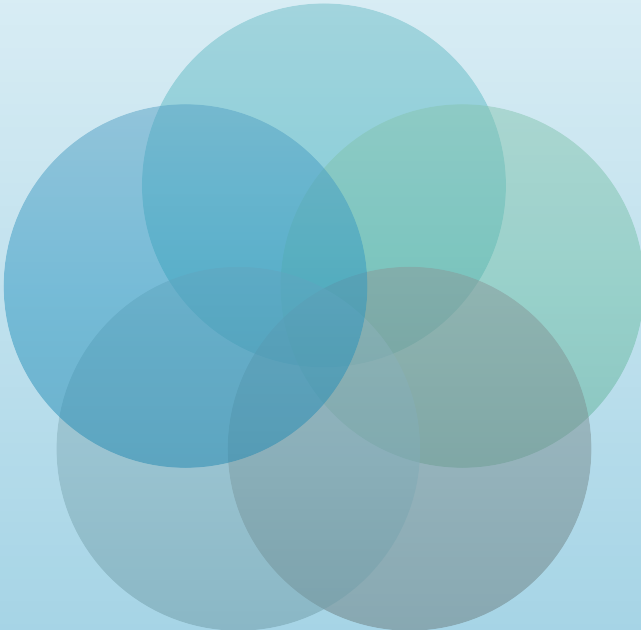
(formal, authoritative,
directive, advisory)

**PERSONALITY
PERSONA**

**AUTHORITATIVE
PERSONA**

**SPIRITUAL
PERSONA**

**FACILITATIVE
PERSONA**



Principal Mediator “Personas”

SELECTING A MEDIATION STRATEGY: CRAFTING YOUR MEDIATOR “PERSONA”

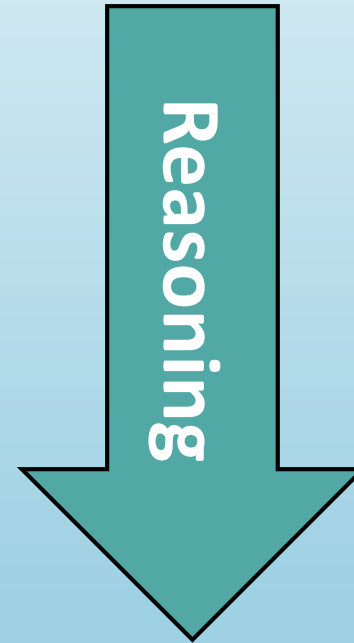
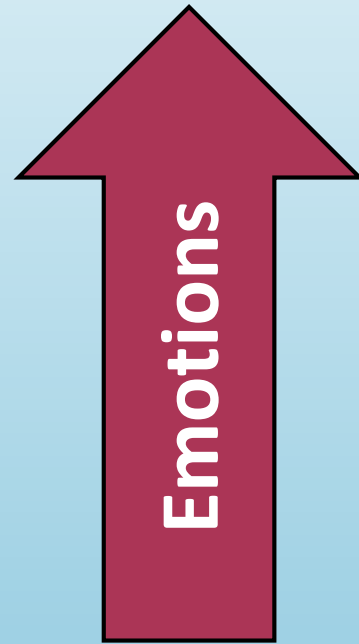
- ✓ What is your Mediator Persona?
- ✓ What do you want it to be?
- ✓ What can you do to project, establish and enhance your desired persona:
 - generally?
 - at outset of mediation engagement?
 - during mediation process?
 - post-mediation?
- ✓ What can you do to earn trust and establish rapport?

EMOTIONS AND RATIONAL THINKING



PEOPLE ARE LIMITED IN
RATIONAL THINKING AND
DECISION MAKING CAPACITY
WHEN EMOTIONS RULE THE DAY!!

AS EMOTIONS INTENSIFY, RATIONAL DECISION MAKING DIMINISHES



Also Worth Remembering...

- ✓ Settlement is not achievable when the brain's **emotional center** is in conflict with its **rational center**
 - ✓ Resolution requires human brains to shift and change
- ✓ Mediator (and Counsels') challenge – to consciously and purposefully influence this **shift and change!**

QUALITIES OF SUCCESSFUL MEDIATORS

Ethical

Deep Listening

Empathetic

Actively engaged

Trustworthy

Patient

Persistent

Nonjudgmental

Diplomatic

Respectful of all

Adaptive

Caring

Creative

Smart, quick study, well prepared

Why is All of This Important to Mediated Settlement Negotiations?

Model Standards of Conduct for Mediators (2005), Standard I ("Party Self-Determination"):

*A mediator shall conduct a mediation based on the principle of **party self-determination**. Self-Determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.*

Why is All of This Important to Mediated Settlement Negotiations?

*Model Standards of Conduct for Mediators (2005), Standard VI
("Quality of the Process"):*

*A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes **diligence**, timeliness, **safety**, presence of the appropriate participants, party participation, procedural fairness, party **competency** and **mutual respect** among all participants.*

Resource

**NATIONAL CLEARINGHOUSE FOR
MEDIATOR ETHICS OPINIONS**

**[http://www.americanbar.org/groups/dispute_resolution/resources/
mediator_ethics_opinions.html](http://www.americanbar.org/groups/dispute_resolution/resources/mediator_ethics_opinions.html)**



FINAL Q&A

Closing Thoughts, Perspectives?

THANK YOU FOR PARTICIPATING!!

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