

# What Is a Lawyer’s ‘Role’ When They Are the Mediator? It’s Complicated!

by Sam Imperati



Sam Imperati, J.D., is the executive director of ICMresolutions (www.ICMresolutions.com), a Northwest-based national provider of dispute resolution and training services. His legal background includes plaintiff and defense work, management, and labor, and litigation and appeals. © 2019 Sam Imperati. All rights reserved.

The answer seems instinctively clear, but is it? Do parties and their lawyers really know, or do they just assume they know? Do all mediators define their role the same way? Do mediators generally assume the specific parties and their attorneys know the mediator’s role definition and what that means as a practical matter? Think of two parties and their mediator, each with a potentially different definition. For example, here are some of the options surrounding what style/approach underlies the mediator’s role.

		Party A Assumption (A)		
		Transformative	Facilitative	Evaluative
Mediator Assumption (M)	Transformative	M, A, B		
	Facilitative		M, A, B	
	Evaluative			M, A, B
		Party B Assumption (B)		

There is only a 33 percent chance that everyone makes the same assumption ... not good odds. If the mediator implements his or her assumption without getting a pre-session agreement, there are three possible outcomes, all of which are negative: (1) Party A is unhappy, (2) Party B is unhappy, or (3) both are unhappy.<sup>1</sup>

## Rules and Standards

The ABA lists various ADR policies and standards that guide mediator roles and behaviors.<sup>2</sup> To answer, “What is the ‘role’ of a lawyer when they are the mediator?” this article focuses on:

- the ABA’s Model Rules of Professional Conduct,<sup>3</sup> and
- the Model Standards of Conduct for Mediators.<sup>4</sup>

## Lawyer Conduct—ABA

Rule 2.4 of the ABA’s Model Rules of Professional Conduct, Lawyer Serving as Third-Party Neutral, states:

- (a) ... Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. *When the lawyer knows or reasonably should know that a party does not understand the lawyer’s role in the matter, the lawyer shall explain the difference between the lawyer’s role as a third-party neutral and a lawyer’s role as one who represents a client.*<sup>5</sup>

The obligation is clear, so how does a lawyer mediator comply? What are the necessary elements of the “explanation” surrounding “the lawyer’s role as a third party neutral”? It is probably not enough just to say, “I’m not your lawyer,” but how many of us leave it at that? What other topics should be covered?

The Model Rule Comments provide some guidance. Comment 2 suggests:

Lawyer-neutrals may also be subject to various codes of ethics, such as ... the *Model Standards of Conduct for Mediators* jointly prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution. (Emphasis added.)

Comment 3 discusses the extent of the “explanation”:

Paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer’s role as third-party neutral and a lawyer’s role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject

matter of the proceeding, as well as the particular features of the dispute-resolution process selected....<sup>6</sup>

## Mediator Conduct—ABA

Beyond the “I’m not your attorney” discussion, what are the issues the mediator should discuss when explaining their role? The *Model Standards of Conduct* provide additional guidance. The relevant sections, with emphasis added, state:

### Preamble

They serve three primary goals: to guide the conduct of mediators; to *inform the mediating parties*; and to promote public confidence in mediation as a process for resolving disputes.

### Note on Construction

Various aspects of a mediation, including some matters covered by these standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed, and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these standards ... the standards might be viewed as establishing a standard of care for mediators.

### Standard I. Self-Determination

A. 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....

### Standard IV. Competence

A. A mediator shall mediate only when the mediator has the *necessary competence* to satisfy the reasonable expectations of the parties.

... A person who offers to serve as a mediator *creates the expectation that the person is competent to mediate effectively*....

### Standard VI. Quality of the Process

A. 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*....

5. The *role of a mediator differs substantially from other professional roles*. Mixing the role of a mediator and the role of another profession is problematic and thus, *a mediator should distinguish between the roles*....

## Mediator Conduct—Oregon

Is this sufficient guidance? The Oregon Mediation Association (OMA) did not think so when it adopted its Core Standards of Mediation Practice.<sup>7</sup> Among other changes to the *Model Standards of Conduct for Mediators*, it added the following section, largely to address the “role” issue. It states in relevant part, with emphasis added:

## II. Informed Consent

*To fully support self-determination, mediators’ respect, value, and encourage participants to exercise informed consent throughout the mediation process. This involves making decisions about process, as well as substance, including possible options for resolution*....

### Comments

1. Informed consent is a critical part of a participant’s ability to exercise self-determination.
2. Mediators should disclose or offer to disclose the information reasonably necessary for each participant to make informed decisions about whether to use the mediator and whether to participate in a specific mediation process and approach. *Mediators should explain their approach, along with the roles of the mediator, participants, representatives, and others in attendance*....
3. Mediators should disclose information regarding conflicts of OMA Core Standards interest, fees, relevant relationships, *process competency, and substantive knowledge of the subject matter in dispute*. Mediator disclosures should be truthful and not misleading by omission.

## Other Factors Impacting Role

There are many additional issues facing the mediator when they explain their role and there is a disagreement between mediators and their party advocates. My senior associate, Devin Howington, Ph.D., and I sent a summary to the ADR and Litigation sections of the Oregon and Washington State Bar Associations.<sup>8</sup> In all, 128 people responded to the survey (79 mediators and 49 advocates). Highlights of the results follow:<sup>9</sup>

- Both mediators and advocates prefer a mediation style that is between evaluative and facilitative (mediators 43 percent and advocates 45.7 percent). Interestingly, 17.4 percent of advocates were unsure of the differences between the approaches. What does this say about the mediator’s obligations of full disclosure and informed consent?
- When it came to the quantum of process and subject matter knowledge, 56 percent of the mediators say they should have “*expertise*” in both, while 35 percent of advocates believe that is needed. Rather, 48 percent of advocates want the mediator to have process “*expertise*” and *subject matter “familiarity.”* Does this mean that advocates are less interested in mediators predicting the likely outcome than they are in having us be process guides?
- When it came to mediator behavior during the session, the results were mixed. One of the largest differences in opinion was the use of joint sessions. Mediators were typically open to using joint sessions, with 58.3 percent of mediators reporting they either occasionally, frequently, or always used them. A total of 41.8 percent reported they rarely or never used them. Advocates, however, overwhelmingly fell in the “never” and “rarely” categories when asked about their preference for joint sessions (78.2 percent). Future surveys will ask why that is the case.
- Some mediators and advocates agreed that mediator proposals were an appropriate tool, but mediators (31.7 percent) were more likely than advocates (13.1 percent) to disagree or strongly disagree with their use. If the matter didn’t settle, advocates wanted mediators to offer an opinion about the likely outcome

of the case either “frequently” (37 percent) or “occasionally” (28 percent), whereas mediators were most likely to say they “rarely” (34.2 percent) or “never” (25.3 percent) provided an opinion.

- When asked if they agree that sharing information should be at the mediator’s discretion, 60 percent of mediators did not agree while 43 percent of advocates did.
- A total of 52 percent of advocates agree that mediators should point out mistakes of law, but only 14 percent of mediators do it.
- A majority (59 percent) of advocates agree that mediators should emphasize weaknesses and diminish strengths compared with 39 percent of mediators.

Perhaps the most interesting difference came from examining client satisfaction. Almost all mediators thought clients were typically either “satisfied” or “very satisfied” (97.5 percent), whereas only 60.9 percent of advocates said their clients were typically “satisfied.” No advocate reported their clients typically being “very satisfied.” This difference should alarm mediators and should prompt us to reflect on our effectiveness.

## Discussion and Recommendation

Would a more fully disclosing explanation of the mediator’s role improve the satisfaction results? Probably, especially if what advocates and parties want is at odds with our ethical standards. For example, advocates want more mediator opinions and more mediator proposals than mediators typically say they offer. To what extent can mediators provide proposals and opinions and still be impartial? Is obtaining informed consent from the parties sufficient to overcome that obstacle? If we do offer opinions, do parties understand the difference between general impressions about outcomes possible and legal advice?

It is one thing to describe the mediator’s “role” generally, but the devil is in the details. A more complete role explanation is consistent with self-determination and informed consent. Here are some topics the mediator might explain to the parties and their attorneys or ask them for their preferences. Their satisfaction is likely to increase if mediators clearly define the actual behaviors behind the role explanation. If the mediator is unable to satisfy the parties’ and their attorneys’ reasonable expectations, perhaps the mediator should decline to serve.

- Which mediator approach do you prefer, and why?
- What confidentiality issues concern you?
- To whom do you prefer I talk to most, the party or attorney?
- What is more important to you, “legal rights and responsibilities” or “underlying interests”?
- What do you see as the advantages and disadvantages of caucusing versus joint session work?
- Which is most important to you: (1) process expertise, (2) subject-matter expertise, (3) process expertise and subject-matter familiarity, or (4) process familiarity and subject-matter expertise?
- Do you want “legal information”?
- Do you want “factual information”?
- To what extent, if any, do you want me to choose what information to convey to the other side?
- To what extent, if any, do you want me to help the parties understand and/or repair underlying relationships?

- What do you want me to do, if anything, when a party fails to raise a relevant factual issue or legal point?
- To what extent, if any, do you want me to offer settlement options?
- To what extent, if any, do you want me to express opinions about the likely outcome?
- What should I do when a party is about to accept a settlement that is not as good as the result they would likely get in court?
- What if you give me guidance that is different from the other side’s guidance on these issues ... are you good with that?

## Conclusion

The field would benefit from an exploration of the practical mediator behaviors flowing from the various aspects of a mediator’s “role.” The issues are more complicated than they appear. If self-determination and informed consent mean anything, mediators should spend sufficient time discussing their role in such a way that the parties actually understand and receive the mediator behaviors they want in that particular case. It seems fitting to end with a poem!

*There once was a mediator named Stan,  
Who had not an ethical plan.  
He said to his fears, move over,  
I’ll try full disclosure.  
Informed consent he found was great.  
Now, the parties can mediate! ☺*

## Endnotes

<sup>1</sup>See, Samuel J. Imperati et al., *If Freud, Jung, Rogers, and Beck Were Mediators, Who Would the Parties Pick and What Are the Mediators’ Obligations?*, 43 IDAHO L. REV. 643 (2007).

<sup>2</sup>*Policy & Standards*, AM. BAR ASS’N (May 2, 2019), [https://www.americanbar.org/groups/dispute\\_resolution/policy\\_standards](https://www.americanbar.org/groups/dispute_resolution/policy_standards).

<sup>3</sup>*Model Rules of Professional Conduct*, AM. BAR ASS’N (Apr. 2, 2019), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct).

<sup>4</sup>AM. BAR ASS’N, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Sept. 2005), [https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.pdf).

<sup>5</sup>MODEL RULES OF PROF’L CONDUCT r. 2.4 (AM. BAR ASS’N 2018) (emphasis added), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_2\\_4\\_lawyer\\_serving\\_as\\_third\\_party\\_neutral](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_4_lawyer_serving_as_third_party_neutral).

<sup>6</sup>MODEL RULES OF PROF’L CONDUCT r. 2.4 cmt. (AM. BAR ASS’N 2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_2\\_4\\_lawyer\\_serving\\_as\\_third\\_party\\_neutral/comment\\_on\\_rule\\_2\\_4](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_4_lawyer_serving_as_third_party_neutral/comment_on_rule_2_4).

<sup>7</sup>OREGON MEDIATION ASS’N, CORE STANDARDS OF MEDIATION PRACTICE (Apr. 23, 2005), [http://ormediation.org/wp-content/uploads/2016/04/CoreStandardsFina\\_2005.pdf](http://ormediation.org/wp-content/uploads/2016/04/CoreStandardsFina_2005.pdf).

<sup>8</sup>Sam Imperati & Devin Howington, *Mediation is Risky Business: Research Tells Us Where Mediators and Advocates Disagree*, JUST RESOLUTIONS (Mar. 2018), [https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/newsletter/mar2018/imperati-howington-mediation-is-risky-business.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/newsletter/mar2018/imperati-howington-mediation-is-risky-business.pdf).

<sup>9</sup>*Id.*