

Class 11

Alternative Dispute Resolution

Choosing a Mediator

- **There are no specific requirements that allow a person to offer services as a mediator.**
- **Some of the factors involved in choosing a mediator include:**
 - **Many mediators are attorneys, though this is not usually required.**
 - **Experts in the field of the dispute are, of course, better candidates for mediation positions.**
 - **Mediators should also have a familiarity of the litigation system, so as to understand what the parties' alternatives to settlement are.**
 - **A variety of educational programs, certifications, and degrees are available that train mediators in tactics as well as applicable law.**
 - **Be careful about the unauthorized practice of law rules for non-lawyer mediators.**

Who can be a Mediator? Regulation and Training*

1. No state yet has enacted laws regulating the private practice of mediation or establishing state-wide requirements for mediators as they do for other professions.
2. A number of court systems have established rules governing mediators in court-connected ADR programs. A handful of these actually certify mediators, although even there the qualifications for certification vary from one state to another.
3. Some private organizations which provide mediation training offer what they designate as "certification" for those who successfully complete their programs of study.
4. In addition, some private professional associations for mediators also certify certain classes of members.
5. Mediators themselves add to the confusion because they often mistake the completion of mediation training and receipt of a certificate of attendance for certification itself.

* Source: "Online Guide to Mediation" by Diane Levin

Mediation and the Unauthorized Practice of Law

■ Non-Lawyers:

- Some states (e.g., Virginia and North Carolina) have rules that specifically prevent non-lawyer mediators from engaging in activities that are equivalent to practicing law, such as:
 - giving opinions as to the state of the law in an area
 - applying the law to the facts involved in the dispute
 - drafting (or helping to draft) the settlement agreement
- Other states may simply not define mediators as being engaged in the practice of law since they don't purport to represent either side.

■ Lawyers:

- The rules above apply to lawyers in jurisdictions in which they are not licensed.
- Lawyers must make sure that both parties understand that the lawyer represents neither and has no "lawyer" duties to either party.



QUIZ TIME!

Facilitative vs. Evaluative Mediation

- **Facilitative Mediation** (“traditional mediation”)
 - Mediator structures the process only; it is up to the parties to arrive at the resolution
 - Mediator asks questions, promotes respect of each side’s case
 - Mediator suggests common ground and/or compromises
 - The mediator does NOT
 - take sides
 - give advice or legal opinions to the parties
- **Evaluative Mediation**
 - Modeled on settlement conferences held by judges
 - Mediator analyses the parties’ strengths and weaknesses
 - Mediators sometimes predict what a judge or jury will do in an effort to get the parties to settle
 - A mediator is generally chosen who has legal expertise and perhaps technical expertise in the area of the dispute as well
 - Almost all evaluative mediators are attorneys or judge