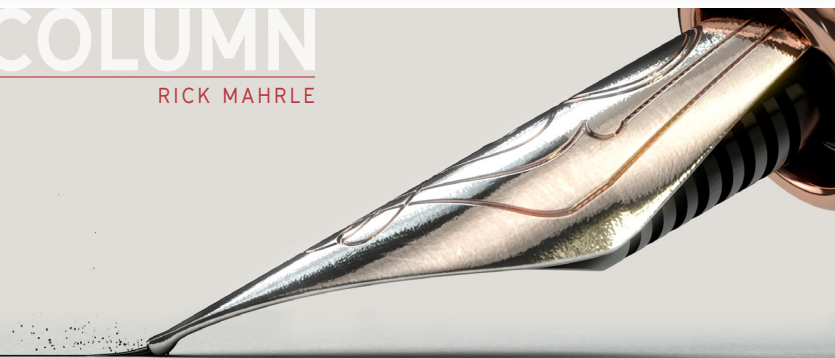




ARIZONA ADR FORUM

THE CHAIR'S COLUMN

RICK MAHRLE



RICK MAHRLE

brings more than 45 years of trial experience to his transition as a full-time mediator and arbitrator. He has conducted more than 200 mediations and arbitrations through the American Arbitration Association in construction, commercial, and employment matters. Rick also is an arbitrator for FINRA, a mediator for federal government entities, and a hearing officer for the State Personnel Board. Rick has served on the Executive Council for the ADR Section of the State Bar of Arizona and chaired the Section's CLE presentations at the State Bar Convention. Rick received his J.D. from ASU in 1977 and has been a litigation partner at Gammage & Burnham since shortly after the firm's founding in 1983.

THANK YOU

I will soon be ending my term as chairman of the Executive Council for the Alternative Dispute Resolution Section of the State Bar. It has been an honor to be able to serve the ADR Section, and the ADR community, in this role.

The Executive Council for the ADR Section is made up of extremely dedicated, responsible, excellent mediators and arbitrators who devote a substantial amount of their time and effort assisting parties to resolve their disputes promptly and efficiently so that they can put their controversies behind them and move on with their lives. For those of us who have been trial attorneys for most of our careers, the opportunity to put on a different hat as a neutral, for either an arbitrated or mediated dispute, is, for some of us, the culmination of our careers and an effective experience. I am truly grateful to have this opportunity.

My goal for this past year as Chairman of the Section was to make sure that we had great kick-ass CLE programs. I think we have met, or exceeded, my expectations.

I look forward to working with the incoming chairman of the Executive Council, Nick Enoch, as he moves the Section on to even greater heights.

Rick Mahrle
Chair – ADR Section



NICK J. ENOCH

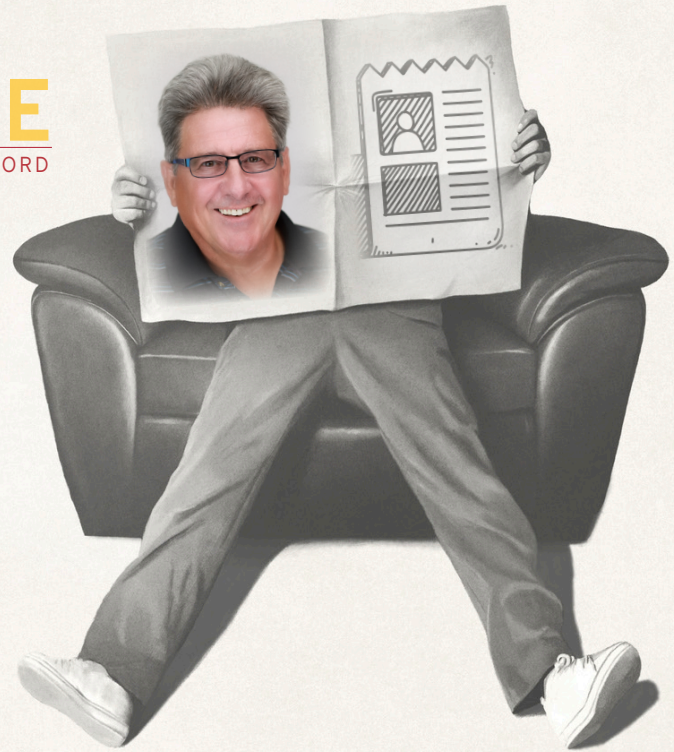
EDITOR | DENNY ESFORD

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration.

Contact the Editor, Denny Esford at denny@windycitytrialgroup.com.

THE EDITOR'S MESSAGE

DENNY ESFORD



Welcome to our 2025 Pre-Convention issue.

Outgoing ADR Section Chair Richard Mahrle reflects on his year guiding the Section. Steve Kramer provides an overview of the upcoming ADR Sessions. You will enjoy sessions that are full of practical advice and insights for ADR practitioners and make the Convention a must-attend event. Then Lee Blackman takes a deep dive into a mediator's duties and ethical responsibilities to the unrepresented party. Lee will also be presenting on this subject in our Tuesday afternoon ADR Talks, so you have a chance to pose questions to this highly experienced mediator.

As always, it is my goal that you find these articles both interesting and useful in your ADR practice. Feedback is welcome and I will be available at the convention to discuss your ideas to keep improving the quality of the content in *Arizona ADR Forum*. See you at the Convention!

Denny Esford

Editor – ADR Section Newsletter



2025 CONVENTION

Sheraton Grand at Wild Horse Pass | Phoenix | June 23-25, 2025



BY STEVE KRAMER

Useful and Informative CLE Presentations on ADR at 2025 State Bar Convention

On Tuesday, June 24, the ADR Section will be presenting two 3-hour CLE programs at the State Bar of Arizona Convention. We have worked hard to bring you interesting and diverse speakers and topics. Both programs qualify for ethics credits, and either will fulfill your 2024-25 ethics CLE requirement.

Continue reading for more information and details.



2025 CONVENTION



The morning session – T-22: *Mediating and Negotiating Through Different Lenses* – will be presented by LEE JAY BERMAN, founder of the American Institute of Mediation. Mr. Berman has been mediating for over 30 years, and has settled more than 2,700 civil cases. From 2002-2009, he directed Pepperdine Law School’s “Mediating the Litigated Case” program.

In *Mediating and Negotiating Through Different Lenses*, Mr. Berman will lead the audience through a fact pattern (a business partnership dispute made to be easily accessible and translatable to other types of disputes). Attendees will be given a 2-page handout, explaining the nature of the dispute, and together we will work out ways of resolving it. During the presentation, Berman will walk you through how to mediate or negotiate that dispute through the four distinct lenses:

- ❶ the evaluative, legal, risk analysis lens;
- ❷ the psychological and relationship lens;
- ❸ the practical, business lens; and
- ❹ the creative problem-solving lens.

The workshop will help participants view any dispute or negotiation through different lenses, allowing them to access more of their creativity, and expand the possibilities for potential resolutions.

For the afternoon session – T-37: *ADR Talks*, experienced Arizona mediators and arbitrators will each present 10- to 20-minute talks on topics of interest to attorneys and ADR professionals who work to resolve disputes through arbitration or mediation. Following the presentations, faculty will sit on a panel and answer your questions.

The speakers/topics are:

RENEE GERSTMANN, of Gerstman Law will discuss “What you need to know about the limits of confidentiality in mediation and in arbitration.”

KATHI SANDWEISS, of Jaburg & Wilk PC will address “Arbitrations involving Pro Se Participants.” This ADR TALK will explore the legal, ethical and practical obligations in conducting an arbitration with a self-represented party.

On a related note, LEE BLACKMAN of Blackman ADR Services will talk about “Rules and Practical Insights for Mediators in Matters With Unrepresented Parties.”

Lee will discuss rules and other ethical guidance on mediator responsibilities in cases where participants are unrepresented, ineffectively represented, may not be fully competent, or may be subject to undue influence. The discussion will include practical guidance on how and when mediators must or should clarify the difference between the mediator’s role and the role of an attorney acting for a participant; when and how a mediator may provide permissible opinions or recommend that parties consult experts; the difference between giving legal information and giving legal advice; the relationship between the mediator’s obligation of impartiality and the mediator’s duty to assure a fair process that respects each party’s right to self-determination; and factors to be assessed in judging when a party’s questionable ability to act autonomously and competently may require the mediator’s withdrawal from the process.

RICK MAHRLE, of Gammage & Burnham will present a timely topic: “Timing your Mediation for Maximum Success.” This ADR TALK will explore proper timing for mediation and explore the factors and conditions that determine when parties are (or are not) ready to resolve their dispute with the help of a mediator.

DENNY ESFORD, of Esford ADR will discuss “Resolving Manufacturer Supply Chain Disputes Through Virtual Arbitration.” This ADR TALK will highlight the typical disputes faced by manufacturer general counsel and their C-Suite team, including the typical disputes they face, and how a streamlined, fixed-cost remote arbitration approach can be a key upfront issue in contracts. Arbitration can save time, money, and in some cases, critical supplier or sales relationships.

CLARA BUSTAMANTE, of Lubin, Enoch & Bustamante P.C. will provide tips and pointers for “Preparing for and Navigating Labor Arbitrations.”

PAUL E. BURNS, of Burns Legal will advise practitioners on “How to Get the Best Settlement in Mediation of Intellectual Property Cases.” Paul will outline the five best practices for attorneys to employ when seeking to achieve favorable mediated settlements in Intellectual Property Cases.

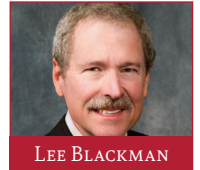
SAM BARAKAT, of Rider Levett Bucknall will address the “Value of Expert Witnesses in ADR – Often Underestimated.” Using real world examples, Sam will explain how impartial experts can help resolve complex disputes by providing a bridge between legal principles and technical issues, and how their expertise can help build trust and strengthen the integrity of the ADR process in disputes involving technical issues. Experts can help both sides’ attorneys and



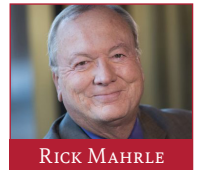
RENEE GERSTMANN



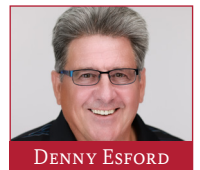
KATHI SANDWEISS



LEE BLACKMAN



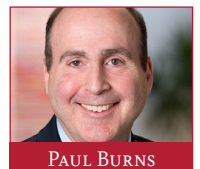
RICK MAHRLE



DENNY ESFORD



CLARA BUSTAMANTE



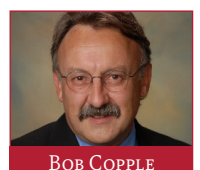
PAUL BURNS



SAM BARAKAT



STEVE KRAMER



BOB COPPLE

clients better understand technical issues, which can drive faster, fairer settlements.

And finally, a presentation that will be especially helpful for lawyers who are called upon by the Superior Court to arbitrate civil cases, or who arbitrate cases before a court-appointed attorney, three experienced arbitrators will present “Arbitrating or Representing Parties in Rule 72 Arbitrations.” DENNY ESFORD, Esford ADR; STEVE KRAMER, Law Office of Steven P. Kramer; BOB COPPLE, Copple & Associates PC and RICK MARHLE, Gammage & Burnham will discuss pointers and things to consider as an advocate or arbitrator in Rule 72 arbitrations, motion practice, prehearing statements, conducting or participating in the hearing and rendering the decision.

Time permitting, the panel will answer your questions.

If you are interested in attending, register for the second day of the State Bar Convention, June 24, 2025, which will be held at the at the Sheraton Grand Hotel at Wild Horse Pass, near Chandler.

You can register on line at: www.azbar.org/for-legal-professionals/cle/convention.

We hope to see you there!



Mediating and Negotiating Through Different Lenses

Mediators and negotiators can reach better-tailored and more informed outcomes by viewing issues through several different lenses. Renowned mediator Lee Jay Berman will take you through a fact pattern (a business partnership dispute that is easily accessible and translatable to other areas of practice) and walk you through how to mediate or negotiate that dispute through the four distinct lenses: 1. the evaluative, legal, risk analysis lens, 2. the psychological and relationship lens, 3. the practical, business lens, and 4. the creative problem-solving lens. This workshop will help participants view any dispute or negotiation through different lenses, allowing them to access more of their creativity, and expand the possibilities for potential resolutions.

What You'll Learn:

- The evaluative, legal, risk analysis lens
- The psychological and relationship lens
- The practical, business lens, and the creative problem-solving lens

Presented By: Alternative Dispute Resolution Law Section

Chair: Steven Kramer,
Law Office of Steven P. Kramer

Faculty: Lee Jay Berman,
American Institute of Mediation

3 CLE
Credit Hours

3 CLE Ethics
Credit Hours



ADR Talks

Experienced Arizona mediators and arbitrators will each present 10- to 20-minute talks on topics of interest to attorneys and ADR professionals who work to resolve disputes through arbitration or mediation. Following the presentations, faculty will sit on a panel and answer your questions.

What You'll Learn:

- What you should know about the limits of confidentiality in mediation and in arbitration
- Arbitrations involving *pro se* participants – this talk will explore the legal, ethical, and practical obligations in conducting an arbitration with a self-represented party
- Mediator duties and ethical challenges, when participants are unrepresented, underrepresented, unsophisticated, or of questionable competence
- Timing your mediation for maximum success
- Resolving manufacturer supply chain disputes through virtual arbitration
- Preparing for and navigating labor arbitrations
- How to get the best settlement in mediation of intellectual property cases
- Value of expert witnesses in ADR
- Tips for Attorneys appointed by the Superior Court to arbitrate civil cases

Presented By: Alternative Dispute Resolution Section

Chair: Steven Kramer,
Law Office of Steven P. Kramer

Faculty: Renee Gerstman,
Gerstman Law
Kathi M. Sandweiss,
Jaburg Wilk
Lee Blackman,
Blackman ADR Services
Denny Esford,
Esford ADR
Clara Bustamante,
Lubin & Enoch PC
Paul E. Burns,
Burns Legal
Sam Barakat,
Rider Levett Bucknall
Robert F. Copple
Copple & Associates
Steven Kramer
Law Office of Steven P. Kramer
Richard K. Mahrl
Gammage & Burnham

3 CLE
Credit Hours

3 CLE Ethics
Credit Hours

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ules and Practical Insights for Mediators in Matters with Unrepresented Parties

BY LEE BLACKMAN



LEE BLACKMAN Blackman ADR's Principal, is an experienced litigator, mediator, and arbitrator with a broad and sophisticated background in a wide range of legal areas, including simple and complicated business, regulatory, employment, negligence, civil rights, and environmental disputes. In mediations, his strength are case analysis, thoughtfulness, creativity, persistence, and respectful risk assessment. He searches for ways to protect and advance core interests through effective settlement discussions. For more information, visit www.blackmanadr.com.

Introduction – Applicable Rules and Formal Guidance

The Arizona Rules of Professional Conduct

The Arizona Rules of Professional Conduct provide some explicit guidance for lawyers acting as third-party neutrals in alternative dispute resolution processes. Ethical Rule 2.4.¹ Mediations are one of the forms of dispute resolution in which neutrals play an essential role and unrepresented parties are often participants. The clearest language of the Rule, as it bears on the mediator's duty when unrepresented parties participate, states that the lawyer-mediator:

“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.” Ethical Rule 2.4(b).

In the second Comment to Ethical Rule 2.4, the Authors of the Rule note that third-party neutrals may also be subject to other 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 (the Model Standards).² We will discuss the guidance in these Model Standards after describing the Arizona Rules applicable to mediations in family law matters.

Arizona Rules of Family Law Procedure

Rule 67.3 of Arizona's Rules of Family Law Procedure³ contains requirements for lawyer and non-lawyer mediators assisting in family law matters such as divorce, child custody, child support, domestic violence protective orders, and juvenile cases. These Rules were crafted with the understanding that family law matters are more likely to involve parties who are unrepresented, unsophisticated, or especially susceptible to abuse or undue influence. For example, the Family Law Rules:

- allow the court to decline requests for mediation where parents are unfit, there is substance abuse, mental incapacity, or domestic violence [Rule 67.3(h)];
- preclude mediation in matters where protective orders are in place or would be appropriate unless “policies and procedures are in place that protect the victim from harm, harassment, or intimidation” [Rule 67.3(i)(1)];

- › require mediators to terminate mediations “if the mediator determines that domestic violence makes mediation inappropriate” [Rule 67.3(i)(3)]; and
- › require the parties to mediated agreements in covered matters to expressly acknowledge that each party entered the agreement voluntarily, without threat or undue influence, and after full disclosure of all relevant facts and information. Parties must also acknowledge that the agreements are fair, equitable, and in the best interests of any children. [Rule 67.3(m).]

These Rules for family law matters – where special relationships, special circumstances, and the absence of legal representation are more likely to limit the opportunity of parties to act with full autonomy – provide useful guidance for mediators in other matters where parties are unable to afford counsel or are otherwise unrepresented.

The ABA/AAA Model Standards of Conduct for Mediators

These AAA/ABA Model Standards provide background and clarification of the purposes behind rules like Arizona’s Ethical Rule for lawyer-neutrals and its Family Law Mediation Rules. According to the Model Standards, it is *the essential role of party self-determination* in the mediation process that requires the disclosures, prohibitions, and requirements in Arizona’s Ethical Rule for lawyer-mediators and Family Law Mediation Rules. As described in the Preamble to the Model Standards, it is because mediations – unlike arbitrations and another dispute resolution processes in which a neutral renders a judgment or an award determining the outcome of the parties’ dispute – involve an impartial third party who is limited to facilitating communication, negotiation, and voluntary decision making.

In furtherance of the principle of self-determination, Model Standard I:

- › requires mediators to conduct their mediations grounded on the principle of party self-determination (Model Standard I.A.);
- › advises mediators, where appropriate, to “make the parties aware of the importance of consulting other professionals to help them make informed choices” (Model Standard I.A.2.); and
- › explicitly provides that a mediator “shall not undermine party self-determination for any reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.” (Model Standard I.B.)

Neither the guidance described above, nor the principle of self-determination itself, requires mediators to assure that mediated agreements are in fact completely voluntary, equitable, fair, or in anyone’s best interests. Nevertheless, the overarching requirement that the mediator be guided by the principle of self-determination requires mediators to be sensitive to evidence that suggests that a party, especially an unrepresented party, is not capable of or is not exercising the sort of self-determination that is the centerpiece and strength of the mediation process.⁴

But the suggestion that mediators be sensitive to the participants’ capacity to exercise self-determination does not supply meaningful guidance on how to measure a party’s capacity or what action the mediator should take when an unrepresented party’s conduct or acquiescence in a resolution *may* reveal incapacity or undue influence. The most relevant guidance on options for mediators in such situations is contained in the Model Standards, at Standard I.A.2, which simply states:

“A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.”

This suggestion, combined with the guidance describing specific circumstances when a mediator *may not* intervene in a way that may undermine self-determination, counsels that mediators *are permitted* and should ask questions, make judgments, and take actions to avoid outcomes that do not reflect the parties’ “free and informed choices to reach decisions.”⁵

Given the multiplicity of unique circumstances that occur in mediations, it is impossible to provide specific guidance on when a mediator may or may not properly discourage a party from making a decision that appears incompletely informed or even indefensibly unwise. A modest proposal on how to approach this question is described at the end of the following section, which is devoted to supplying some practical advice on conducting mediations with unrepresented parties.

Practical Guidance and Practices Suggested by the Prevailing Ethical Guidance and Court Rules

① **Always advise any unrepresented parties, in writing if you are a lawyer-neutral, before or at the outset of the formal mediation session, that you are not acting as their lawyer.**

② **In circumstances where both or all parties to a mediation are unrepresented, be especially careful to be clear that you are not representing both or all parties.**

This is a situation where lawyer-mediators can forget that they are not engaged to provide advice on dispute resolutions that serve the parties’ common legal interests. Mediators can act as scribes to write down what the parties have agreed to. They can also give general information. But they cannot substitute their conclusions or legal guidance for the choices of the parties.⁶

③ **In the time between the initiation of the mediation and commencement of substantive discussions, provide advice to the unrepresented party, through emails or conversations**



that explain the nature of the mediation process, the roles of the mediator and the parties, the rules of confidentiality (including the rules for the mediator's separate discussions with parties), the objectives of any mediation statements (including the issues to be addressed), and the process to be followed at the in-person session. Solicit questions and test understanding in an effort to prepare the unrepresented party for the process.

Research has demonstrated that parties who had more preparation for a mediation were more likely to rate the process as being fair, stated that they had a better chance to express their views and have input in the process, and considered the mediator more impartial, more understanding, and more respectful.⁷

The Model Standards also explicitly state that "Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards." Model Standard I.A.1.

This guidance makes it appropriate for the mediator, in order to conduct a quality process, to advise the parties (both represented and unrepresented), in advance of the in-person session, how they should prepare, including how to prepare submissions to the mediator and other parties, and what to expect in the in-person session.⁸

Communications regarding preparation between the mediator and the parties, especially between the mediator and unrepresented parties, will also provide the mediator important information about such parties' ability to participate effectively in the mediation process.

④ Tell unrepresented parties that when you talk about legal issues, you are speaking generally and are only providing legal information for them to consider, not legal guidance.⁹

⑤ If the discussions seem destined to reach an agreement, be inclined to remind each unrepresented party that every decision they make must be their own voluntary choice. Further:

- If circumstances suggest it is appropriate, ask an unrepresented party if there are any circumstances beyond those revealed in the mediation process that make it difficult for that party to do what they think is in their best interests.
- If circumstances suggest it is appropriate, ask an unrepresented party if there is any other person they think they need to satisfy in coming to a resolution of the dispute.¹⁰ Follow up as appropriate.

- If the parties have reached agreement, but, after all your inquiries, your instinct suggests that an unrepresented party may not fully understand their deal or appreciate all of its consequences (especially ancillary adverse consequences), consider suggesting that the party consult counsel or a knowledgeable expert on the subject at issue. Alternatively, or in addition, consider suggesting a cooling off period during which parties may reconsider their proposed agreement.

A delay for a short period will allow an unrepresented party to reflect on the agreement and consider the value of independent advice without feeling the immediate pressure to make a difficult decision. See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6 HARV. NEGOT. L. REV. 1 (2001).¹¹

⑥ If the matter progresses to a resolution and you are asked or offer to assist in the preparation of an agreement, include a recital that each unrepresented party was advised of the right to have the agreement independently reviewed by counsel prior to executing it. Also consider adding a recital that the mediator's assistance in reducing the parties' agreement to writing is for convenience only, the parties being exclusively responsible for the form and content of their agreement.¹²

⑦ Where you are satisfied that an unrepresented party is making a decision that is more than merely unwise – a decision that could be a product of diminished capacity or extrinsic influence – conduct further inquiry along the lines suggested in the articles in footnote 10. At the conclusion of any added inquiry on the issue of capacity or undue influence, evaluate each of the following factors:

- the nature of the rights and interests at issue;
- the apparent independence, education, experience, and sophistication of the unrepresented party;
- the decision maker's potential susceptibility to improper influence;
- whether the decision maker has demonstrated weakness in understanding the discussions, documents, or contentions made during the mediation;
- whether the decision maker has been able to communicate clearly;
- whether the evidence or reasons the decision maker describes in support of their apparently unwise choice may be more compelling to the decision maker than is apparent to the mediator;
- whether there are potential extrinsic (undisclosed) considerations that could legitimize an apparently unfair compromise embodied in the agreement the decision





Rules and Practical Insights for Mediators in Matters with Unrepresented Parties

maker has decided to accept;

- whether the mediator and the process of the mediation leading to the pending agreement, in hindsight, was procedurally fair and reasonable; and
- any other special circumstances that seem important to the unrepresented party.

Finally, follow your conscience in deciding whether to terminate your participation in the mediation, being careful not to give undue

weight to factors personal to the mediator or otherwise not relevant or compelling for the unrepresented party “such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.” Model Standard I.B.

Remember that this is a situation where it is particularly important to resist the urge to influence the parties toward reaching a resolution. Success in mediation is not always synonymous with achieving an agreement. **ADR**

ENDNOTES

1. www.azbar.org/for-legal-professionals/ethics/rules-of-professional-conduct/?r=Y&RuleId=39&rule=2.4%20Lawyer%20Serving%20as%20Third-Party%20Neutral.
2. https://cdn.ymaws.com/acnet.org/resource/resmgr/docs/MODEL_STANDARDS_OF_CONDUCT.pdf.
3. [https://govt.westlaw.com/azrules/Document/N75F90990D90111E8BA5DD26C9DC5154F?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/azrules/Document/N75F90990D90111E8BA5DD26C9DC5154F?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)).
4. On this issue, it is useful to note that while Model Standard I.B states that a mediator shall not undermine party self-determination in pursuit of higher settlement rates or other interests outside the interests of the parties to the mediation, the fairness of the outcome of the mediation is not a consideration that is listed as an improper basis for action by the mediator that may undermine party self-determination.
5. For further study of this question, see UNREPRESENTED PARTIES IN MEDIATION, by Cynthia E. Nash, 15 No.3 Practical Litigator 47, May 2004.
6. See New York State Bar Association Committee on Professional Ethics Opinion 1178 (12/13/2019) (<https://nysba.org/ethics-opinion-1178>).
7. Representation in Mediation: What We Know From Empirical Research, By Roselle L. Wissler, 37 Fordham Urban Law Journal, 420, 433 (2010) (<https://ir.lawnet.fordham.edu/cgi/view-content.cgi?article=2335&context=ulj>). Represented parties, of course, have a greater opportunity for preparation. Unrepresented parties have a lesser opportunity, absent action and advice on the subject from the mediator, to prepare themselves.
8. One seasoned mediator, when discussing preparation with unrepresented parties, advises such parties that there are likely to be boring periods when the mediator will be elsewhere, meeting with the other party, so the unrepresented party should consider bringing a friend. Unrepresented Parties in Mediation, by Dr. Jeanette Bicknell, October 30, 2019 (<https://bicknell-mediation.ca/2019/10/unrepresented-parties-in-mediation>).
9. A GUIDE FOR FAMILY MEDIATORS: WORKING WITH SELF-REPRESENTED LITIGANTS, by Andrea Clark and Kelly Browe Olson, Association of Family and Conciliation Courts, July 2017 (<https://www.afccnet.org/Portals/0/PDF/Guide%20for%20Mediators.pdf?ver=dGVz7dAl4nle5DqOyZmjHQ%3d%3d>).
10. For suggestions on assessing diminished capacity see A Guide To Assessing Decision-Making Capacity, by Roger C. Jones, MD and Timothy Holden, MD, Cleveland Clinic Journal of Medicine, Volume 71 December 2004, p 791 (www.ccm.org/content/ccjom/71/12/971.full.pdf). For suggestions on assessing whether a person has been or is being verbally or financially abused, been physically threatened, or lacks capacity to act in their own best interests, see How Can We Identify Undue Influence in Our Elderly Clients? By Stacey Wood, Ph.D (www.psychologytoday.com/us/blog/the-fraud-crisis/201811/how-can-we-identify-undue-influence-in-our-elderly-clients). The GUIDE FOR FAMILY MEDIATORS referred to in Endnote 9 also suggests tools for screening and assessing competency, capacity, intimate partner violence, and other issues that may impact the mediation process.
11. This Article examines several possible means to protect party self-determination in the context of what the author calls “muscle mediations” – mediations where parties feel pressured by the mediator to achieve a settlement. The author ultimately advocates for the adoption of a three-day, non-waivable, cooling-off period before mediated settlement agreements may become enforceable. (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1724967). For the author, this proposal has the potential “to return the mediation process to a vision of self-determination which is closer to that which first dominated (and inspired) the contemporary mediation movement.”
12. See Mediators Ethics Guidelines, JAMS Mediation Services, at Section VI (www.jamsadr.com/mediators-ethics).