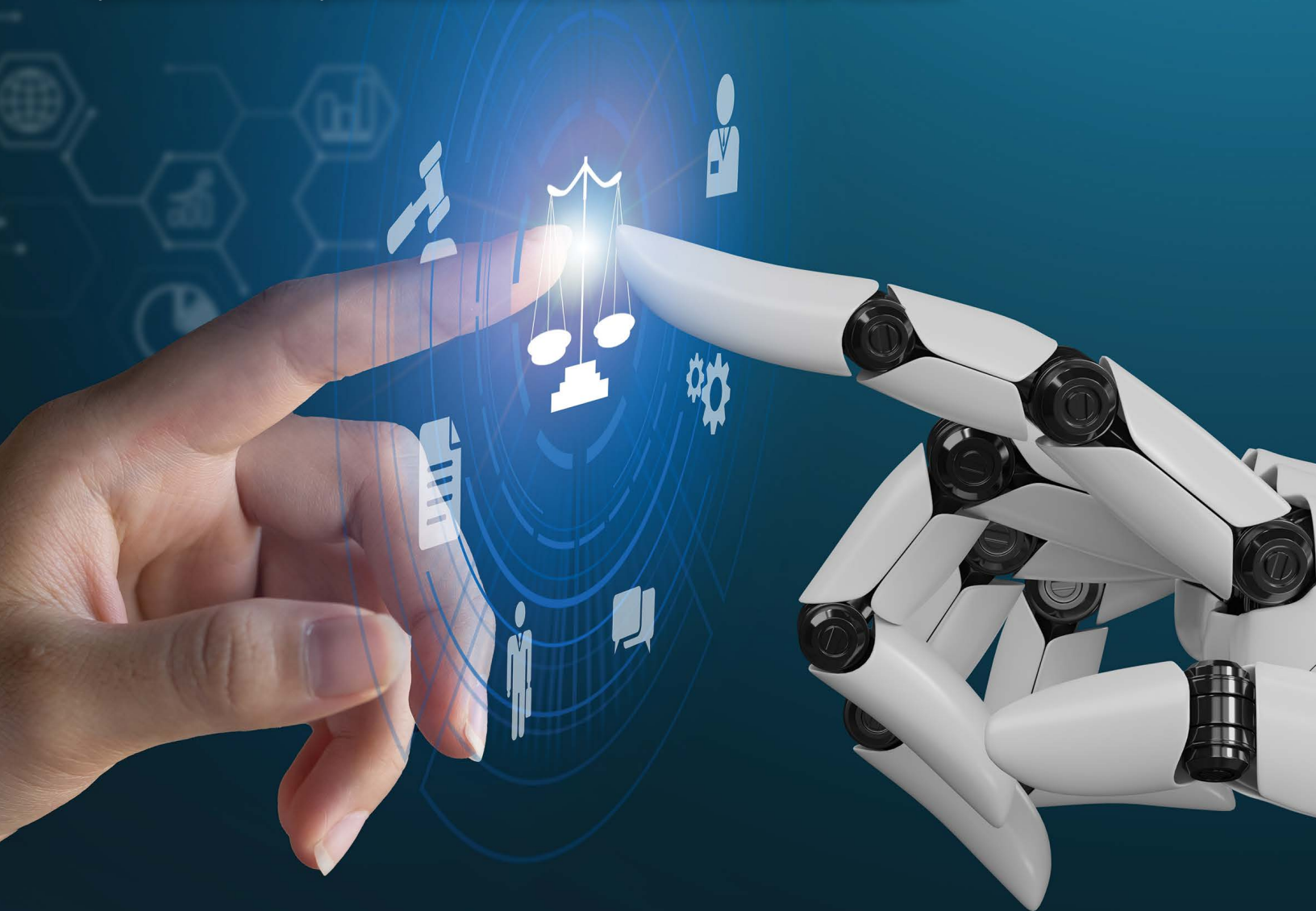




2023 | VOL. 16 | NO. 2

New York Dispute Resolution Lawyer

A publication of the Dispute Resolution Section of the New York State Bar Association



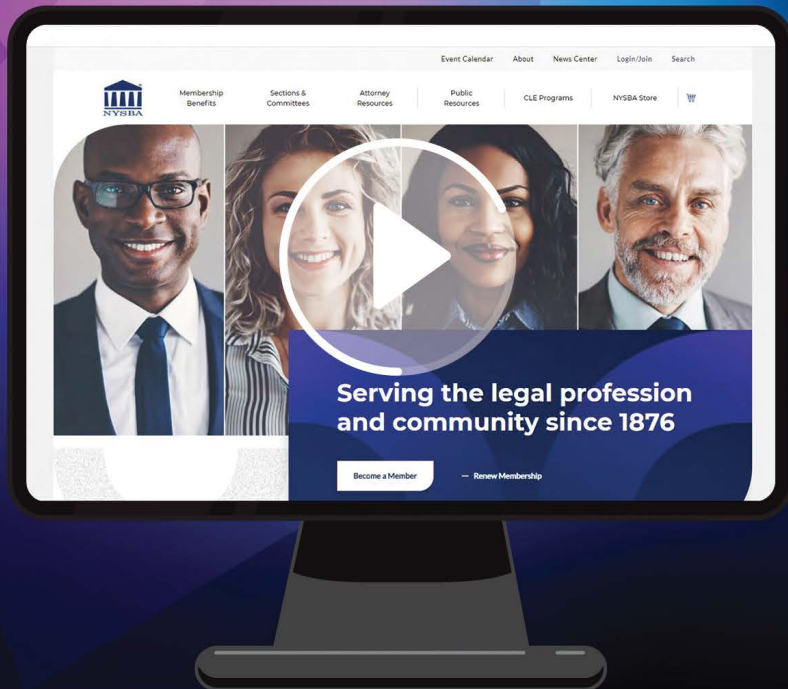
Artificial Intelligence Is Here To Stay—
Human Mediators Need To Learn the Lingo

COVID-Related Disputes Before the Court of
Arbitration for Sport: Opening Pandora's Box?

The Case for Mediator Immunity in New York

All Access Pass

Maximize Your Time and Earn CLE Credits with On-Demand Learning



**Access hundreds of programs
online and satisfy your MCLE
requirement for one low price.**

- > Gain access to all CLE Online video programs and course materials for one year
- > New programs added each month
- > Monthly billing option

**\$495 for
NYSBA Members**

For more information visit **[NYSBA.ORG/ALLACCESSPASS](https://www.nysba.org/allaccesspass)**

Contents



Special Section – The Future of ADR

- 13** Artificial Intelligence Is Here To Stay—Human Mediators Need To Learn the Lingo
Hana Glasberg
- 17** After All, “AI” Means Love in Chinese
Dean W. M. Leslie

Arbitration

- 21** The AAA’s Amended “Modification of Award” Rule
Chris McDonald
- 24** Resolving a Circuit Split: Heavyweights Arbitration and Litigation Have Another Round on Appeal
Kayla Joyce
- 26** Interim Awards, Interlocutory Decisions and Modification of Awards
Edward Lozowicki
- 30** COVID-Related Disputes Before the Court of Arbitration for Sport: Opening Pandora’s Box?
Dmitry A. Pentsov

Mediation

- 34** Awakening *La Sonnambula*: The Matrimonial and Family Mediation Renaissance in New York State
Lara Traum
- 38** Advancing Mediator Skills Through Self Awareness and Creating Space for Resolution
Anthony DiCaprio
- 41** The Case for Mediator Immunity in New York
Tyler Meade



New York Dispute Resolution Lawyer

2023 | Vol. 16 | No. 2

- 3** Message From the Chair
Jeffrey K. Anderson
- 5** Special Message From the Founding Chair: The Passing of the *Hossu*
Simeon H. Baum
- 9** Message From the Co-Editors-in-Chief
Edna Sussman, Laura A. Kaster and Sherman Kahn
- 10** **Ethical Compass:** Humanizing Virtual Dispute Resolution
Professor Elayne E. Greenberg
- 44** Case Summaries
Alfred Felio
- 52** Section Committees and Chairs

Advancing Mediator Skills Through Self Awareness and Creating Space for Resolution

By Anthony DiCaprio

Unlike litigation or arbitration, there are no formalized rules of procedure in mediation. Mediators, therefore, have a broad range of process choices and minimal guidance on how to make those choices.

As mediators gain experience, they may develop a deeper appreciation of the subtleties and complexities of the mediation process and their role as a mediator in that process, furthering their ability to make appropriate decisions that support the parties, the process and their capacity for creative problem solving. This article provides insight on how mediators can advance these skills and improve the quality of their mediations.

Reflect Upon and Be Clear About the Mediator's Role

In her Senate confirmation hearings, Associate Supreme Court Justice Ketanji Brown Jackson described the deliberate process she follows to prepare herself to render a decision. First, she clears her mind of preconceived notions, conclusions, and impulses. Next, she hears party inputs. Then she evaluates facts and communications with a clear “deck.” Finally, she interprets and applies the law.

Having a deliberate process as a mediator is equally important. Basic preparation, such as being familiar with the parties, the attorneys, important facts, and significant issues at the start of a mediation, communicates an immediate sense of competency and commitment to the participants.¹ Of course, as a mediator prepares, they also develop assumptions, conclusions, and even views about what how a dispute should be resolved. Thus, it is equally important to set time aside before a mediation starts to identify predispositions that the mediator may have formed.²

Judges, arbitrators, and mediators are obligated to remain neutral and objective in these roles. However, mediators are also expected to be empathetic to the parties' needs and to their subjective experience. This relationship between a mediator and the parties is complex; unlike judges and arbitrators, who have clear boundaries between themselves and those who appear before them, a mediator's boundaries are less distinct. For example, *ex parte* communications between parties and mediator are both permitted and encouraged, as determined by the mediator's interpretation of the circumstances. Mediators must therefore purposefully monitor and

calibrate their interactions before and during a mediation to stay balanced.

A mediator's fundamental role is to help parties reach a self-determined resolution of their dispute, act in the interests of all parties, and remain objective and neutral. Nevertheless, mediators have personalities, experiences, and blind spots that influence and shape them that cannot simply be suspended during a mediation.³ This means that mediators can be relatively, but not absolutely, impartial, obligating them to make a purposeful effort to be aware of and try to mitigate their biases and predispositions. While this process may seem complex or burdensome, it is attainable with practice as part of a mediator's regular preparation.

There are common issues for mediators to consider. These include whether the mediator has developed an agenda around the dispute, such as whether a settlement would advance the mediator's career or increase their visibility. If one party's premeditation submissions are more credible or more reasonable, it is important to think through how to begin the first mediation session without favoring that party. Mediators may develop feelings about a dispute, such as whether one party is more sympathetic than the other or whether something about the parties or the issues resonates because of a mediator's personal experiences.

Self-reflection helps a mediator to identify feelings, thoughts, and assumptions they may otherwise be unaware of and can be surprisingly liberating because the mediator can fulfill their role with a clear sense of what they are bringing to the mediation.

Anthony DiCaprio is a mediator and founding member of DiCaprio ADR. His mediation practice focuses on international, commercial, real estate development, civil rights, labor, and employment disputes. He devotes substantial time to training and mentoring mediators.

Many thanks to Laura Kaster (laura.kaster@kasteradr.com), arbitrator, mediator, and friend. Laura's knowledge, expertise, input, and encouragement were invaluable, without which this article would have never come to fruition.

“[M]ediators are sentient beings with preconceptions, biases, emotion, and impulses that must be managed.”

Create Space for the Parties

At the start of a mediation, there can be an uncomfortable and constricted quality to the parties' interactions. They, and sometimes their attorneys, may be anxious, angry, hostile, defensive, aggressive, or pessimistic about the likelihood of resolving their dispute. Parties may blame the other side for causing or intensifying the dispute and lack insight into their role in it. They may have developed positions based on unrealistic expectations, lack a clear sense of their interests, and have even less clarity about those of their counterpart.

Parties hesitate to initiate negotiations out of concern that doing so signals weakness or will disadvantage them in the future negotiations. When parties do negotiate, they may have untenable demands that they are unwilling to temper unless the other side is also seen as being reasonable, a view deeply engrained in negotiation norms, or intentionally convey positions to intimidate the other party. Such interactions can lead to a further deterioration in the parties' relationship, with both sides viewing the other as acting in bad faith, perpetuating a demonized or one-dimensional caricature of the other side.

These contentious and destructive dynamics can be restructured in mediation, which creates a place for parties to work through differences and space to explore resolution. People become frustrated, angry, and emotionally constricted when they feel misunderstood or ignored. While mediators are not psychologists or therapists, the process is based on the recognition that when people are heard and have an opportunity to process their thoughts and feelings with a relatively objective third party, they are able to see their own and the other party's circumstances differently and recognize potential solutions that may not satisfy their positions but will satisfy their needs.

As negotiations progress and both sides recognize that a resolution is reachable, they become genuinely interested in a resolution. When parties shift from being adversaries to collaborators, from a mediator's perspective, this moment feels like a magical combination of insight, skill, and art.

For example, in one mediation involving a construction dispute, the parties' relationship spanned nearly two decades. While there were disagreements that arose over the course of their relationship, the parties were always able to find a solution simply by having a conversation. When a dispute arose after there had been a change in corporate officers who

were unaware of the parties' past practice, the new officers emailed that they were withholding payment due to quality issues. The parties' interactions became so contentious that at the preliminary call with counsel, one of the attorneys stated with certainty that the case could not be settled. At the first mediation session, it appeared that this was so, with one side accusing the other of shoddy work and the other claiming that these accusations were being made for the purpose of cheating the builder out of the final payment that was due under the contract. However, when a discussion of the parties' past practice emerged during the mediation, the parties became collaborative and quickly resolved their dispute.

Make Appropriate Choices

Judges and arbitrators render decisions through a process defined by formal substantive and procedural rules that convey their authority. In contrast, because parties retain the power of self-determination in mediation, formal rules are mostly unnecessary. Moreover, because mediation is applied in a wide range of conflicts and contexts, formal rules of procedure would interfere with the mediator's discretion to adapt the process in a way that meets the parties' needs.

Although mediators do not render binding awards, they exercise judgment, make choices, and decide a wide array of issues during a mediation. For example, asking a party to travel across the country to attend a mediation is costly, time consuming and can impact the party's willingness to mediate. Likewise, mediator interactions with a party who persists in making unreasonable demands can influence whether their positions soften and whether the mediation continues or ends in impasse.

Suggesting that mediators make appropriate choices seems both obvious and impossibly vague, but the principles of mediation provide context and guidance. The parties' agreement to mediate, which can be rescinded by them, is the only basis for a mediator's authority. Despite a mediator's limited formal authority, they have moral authority arising from the parties perceiving the mediator as fair, competent, and genuinely interested in the parties' purposes. Indeed, the entire process depends on party willingness to trust the mediator: a mediator's proposal, for example, has little value if the parties do not see the mediator as being credible and trustworthy.

Although mediators have limited authority, their influence can be powerful. Maintaining an appropriate role throughout

a mediation can be challenging. Just as Justice Ketanji Brown Jackson has a process to help guide her determinations, mental or written reminders help mediators to stay focused on the task of facilitating the parties' interactions rather than on settlement. Taking a break during a mediation to consider whether adjustments to a mediator's attitude, focus, orientation to the issues or to the parties is also helpful in staying in balance during the process. Similarly, considering possible interventions that might be productive, whether additional information would help parties improve their communications or whether to evaluate interests and future opportunities, can help to maintain the structure of the process.

Faulkner famously noted: "[t]he past is never dead, it's not even past." Indeed, none of us is free of our past. Personality and lived experiences do not disappear simply by willing them away as a mediator. Emotion, stressors, pain, and experiences can be triggered by an event in the present, leading to a reaction that may be disproportionate to the trigger and result in feeling out of balance emotionally and mentally.⁴ If this occurs during a mediation, a mediator's reaction can have a notable impact on the parties and the process that can be difficult to repair.

Being triggered can result in a mediator feeling embarrassed and uncomfortable. Fortunately, there are ways to manage the emotions that may arise. Knowing that other mediators have had similar experiences helps to normalize the feelings. Taking a break to self-reflect on feelings in a similar way that mediators use reflection with parties is also effective.⁵ Similarly, just as labeling a party's feelings, such as noting anger, frustration, or a sense of injustice, can help them work through emotions, it can also help a mediator disengage from the triggered feelings.⁶

Having strategies in reserve to address difficult situations can mitigate their impact. For example, a reaction to inappropriately aggressive behavior toward a party or the mediator which does not seem to be impacting the other party can be delayed. If some type of response is appropriate in the moment, pausing, breathing, and processing before addressing the behavior is prudent. When that does not suffice, taking a break, walking down the hall or around the room, or having a trusted colleague to confer with can be calming.

As mediators gain experience, they can develop strategies for managing difficult situations. Recording those strategies in a notebook for future use can be extremely helpful. For example, whether a party's aggressive behavior in a mediation is inappropriate depends on whether the behavior is interfering with the process. A mediator may decide to ignore the behavior or wait until there is a break in the process to explore the behavior with the party.

Conclusion

Despite her impressive professional and judicial accomplishments, the deliberate process Justice Brown Jackson undertakes before rendering a decision displays a recognition that being fair, neutral, and impartial is an active process that requires effort and humility. Similarly, mediators are sentient beings with preconceptions, biases, emotion, and impulses that must be managed. Unlike Dorothy, whose mantra, repeated while clicking her heels three times sent her back to Kansas, simply telling ourselves that we are fair and impartial as mediators is not sufficient.

Endnotes

1. One of the most common complaints parties and attorneys voice about mediators is the failure of a mediator to be appropriately prepared. In most circumstances, this is unjustifiable and can hinder a mediator's effectiveness at the start of the process.
2. Some mediators prefer to avoid substantial preparation so that they do not form preconceptions about the dispute before the mediation starts.
3. For example, building and sustaining a mediation practice requires an ability to help bring about settlements.
4. The possibility that a mediator will at some point in their practice be triggered is not implausible. Several highly regarded and experienced mediators (who asked to remain anonymous because of the personal nature of the subject matter) were interviewed about whether they experienced being triggered as a mediator. Each person immediately recalled being triggered. Some of the triggers they discussed were misogynistic, chauvinistic, sexist, imperious or abusive parties or attorneys. A Black woman described patronizing, assumptive, and condescending behavior directed at her and not the other white mediator as being a trigger. Another woman described being triggered if she is treated like a "secretary—as in the old days." One mediator described being triggered in a mediation when one of the parties described in detail their adulterous relationship with another party, reminding the mediator of their former spouse's affair. Another noted racial animus, such as referring to a woman of color as "girl," as triggering. Both men and women mediators noted being triggered by hyperaggressive, manipulative, or bullying behavior, or by counsel or participants who are intentionally obstinate or obtuse.
5. It may seem contrived to suggest such an approach, but mediation is demanding, requires focus, and the willingness to put parties' interests ahead of the mediator's interest. Checking in with oneself, processing feelings and other forms of selfcare is essential.
6. See *e.g.*, Doug Knoll's writing on emotional intelligence, which explains why labeling is particularly effective: <https://dougknoll.com/emotional-competency/emotional-awareness/> or <https://dougknoll.com/emotional-competency/emotional-intelligence-backwards/>.