

SHOULD MEDIATORS IN WORKPLACE DISPUTES BE LAWYERS?

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 INTRODUCTION

Due to the increased interest in the possible applications of alternative dispute resolution (ADR) processes in the past ten years, the term mediation has become a permanent part of legal terminology.^[1] Mediation is also a significant dispute resolution method that is practised by lawyers, non-lawyers and is closely associated with workplace disputes.^[2] Currently, a hotly-debated issue is whether mediators should be lawyers or non-lawyers. This is because most lawyer mediators and experts believe that lawyers have more mediating skills than non-lawyer mediators with which to analyze and evaluate the current legal positions of the disputants.^[3] Furthermore, some mediation experts claim that using an evaluative approach is an indispensable part of effective, successful mediation; because non-lawyers cannot inform the parties about their legal rights and obligations^[4] they should not be allowed to mediate.^[5] However, others assert that non-lawyers contribute their own specialized knowledge and attributes to the mediation process, and that many of these attributes are not shared by their lawyer counterparts.^[6]

Although this argument extends to every area of mediation, it is particularly important in family and workplace disputes.^[7] This is owing to the fact that there are certain similarities between the resolution of family disputes and employment disputes, such as that both may involve a high degree of personal feeling.^[8] In addition, the remedies available in the courts may not achieve the final resolution of a dispute that may include non-legal questions as well.^[9] In terms of employment dispute resolution (EDR), this is particularly the case where the individual is still working for the employer.^[10] Parties to labour and employment disputes typically have long-term and ongoing relationships that can be damaged by miscommunication over issues, for instance, job standards

[1] Karen A. Zerhusen, 'Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator' (1993) 81 *KyLJ* 1165

[2] Jacqueline M. Nolan-Haley, 'Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective' (2002) 7 *HNLJ* 235

[3] Matthew Daiker, 'No J.D. Required: The Critical Role and Contributions of Non-Lawyer Mediators' (2005) 24 *RL* 499

[4] *ibid* at 500

[5] *ibid* at 501

[6] Daiker (n 3) 501.

[7] Cheryl Dolder, 'The Contribution of Mediation to Workplace Justice' (2004) 33 *ILJ* 320

[8] *ibid* at 321

[9] The Report of the Employment Tribunal System Taskforce (London: HMSO, July 2002) 7.25

[10] *ibid*

and expectations or an employee's perception.^[11] To resolve these conflicts, the parties may need a neutral third party who knows the relationship between both disputing parties and workplace conditions, such as human resources practitioners. Therefore, it should not be compulsory for a lawyer mediator to resolve workplace conflicts.

Mediation is a voluntary dispute resolution process and nobody, other than the parties involved,^[12] should be able to decide whether their mediator is a lawyer or not. This approach comes from the self-determination principle in ADR.^[13] Indeed, being a lawyer might not be necessary to mediate a dispute effectively because mediation is not composed of an evaluative approach, for instance, giving legal information to the parties.^[14] Mediators should be more able to provide the disputing parties with an atmosphere conducive to communication. If parties wish to understand legal process and rights, they have a chance to consult a lawyer. Notwithstanding, non-lawyer mediators may face challenges when they mediate employee conflicts but they also have a considerable amount to contribute to this process.

In this paper, not all challenges and contributions of non-lawyer mediators in EDR can be discussed thoroughly so the focus will be on the compatible mediation method. It will then be shown that it is not necessary to choose lawyer mediators, although there are challenges of being non-lawyer mediators, such as giving legal advice to the parties, being manipulated by attorneys representing the parties and power imbalances between disputing parties.^[15]

DIFFERENT MEDIATION METHODS IN WORKPLACE DISPUTES

Choosing the type of mediator is an essential stage in deciding about the mediation approach. This is due to the fact that the chosen method has a bearing on the mediation process and the mediator may be able to use some tactics in the approach, such as using an evaluative method which would need legal knowledge. Therefore, in this case, it may be beneficial and effective for the mediator to be a lawyer. However, different mediation approaches may be used in different types of disputes with successful outcomes. The three mediation approaches commonly used: facilitative, transformative and evaluative, will be discussed in the first part of this essay, and it will be argued that one of these is particularly useful for workplace conflicts.

[11] R. B. Jacobs, 'Resolving Workplace Disputes Through Mediation' NJLJ <[http:// www.law.com/jsp/](http://www.law.com/jsp/)> accessed date 5.3.2013

[12] Jacob Bercovitch and Allison Houston, 'Resolving International Conflicts the Theory and Practise of Mediation' in Jacob Bercovitch (eds), *The Study of International Mediation: Theoretical Issues and Empirical Evidence* (LRP, 1996)

[13] Robert A. Baruch Bush, 'Efficiency And Protection, Or Empowerment And Recognition?: The Mediator's Role And Ethical Standards In Mediation' (1989) 41 Fla. L. Rev. 253

[14] Daiker (n 3) 499

[15] *ibid*

a) Facilitative Approach

The facilitative approach helps the disputing parties to resolve their dispute in a mutually-beneficial and agreeable manner.^[16] In other words, when a dispute occurs, the parties may feel emotional and aggrieved so a facilitative mediator will try to normalize the atmosphere and provide the parties with a peaceful environment to communicate with each other.^[17] A facilitative mediator does not offer any solution or recommendation to parties either individually or as a group.^[18] Additionally, the mediator does not share his or her ideas with disputants regarding any possible solution to the case.^[19]

b) Transformative Approach

The transformative mediator is more neutral than a facilitative mediator^[20] and tries to mediate by guiding the parties to come to an agreement through empowerment and recognition.^[21] This is done by creating an opportunity for the parties to consider the other party's interests, needs and value.^[22] This approach has an incomparable potential for transforming people's moral growth by helping them with difficult circumstances.^[23]

c) Evaluative Approach

The third approach concerns the evaluative mediator who helps the parties to reach an agreement by emphasizing the strong and weak arguments of either side.^[24] The mediator will also give an opinion and some advice; these recommendations may also include the use of legal knowledge.^[25]

SUITABLE APPROACH IN EDR

After explaining the three main mediation approaches, it is now possible to determine which approach provides the most effective mediation process and outcome for workplace cases using either a lawyer or a non-lawyer mediator. Most mediation experts claim that the transformative approach is suitable for

[16] *ibid* at 508

[17] Zena Zumeta, 'Styles of Mediation: Facilitative, Evaluative and Transformative Mediation' (2002) 1 NACM <<http://www.mediate.com/articles/zumeta.cfm>> accessed 26 March 2013

[18] Kovach, K. and Love, L., "Mapping mediation: the risks of Riskin's grid", (1998) 3 HNL, 71–110

[19] *Ibid* at 510

[20] Zumeta (n 17) 2

[21] Tina Nabatchi and Lisa B. Bingham, 'Transformative Mediation in the USPS REDRESSTM Programme: Observations of ADR Specialists' (2001) 18 HL& ELJ 399

[22] Bush (n 13) 253

[23] Nabatchi and Bingham (n 21) 402

[24] Daiker (n 3) 510

[25] Carolyn Chalmers, 'Danger Ahead: Ethics Guidelines for Lawyer Mediators' [2006] MSBA 1

EDR.^[26] This is because workplace disputes are made up of different conditions from other disputes. The relationship between an employee and his employer is particular in that it is neither close nor distant. The hierarchical structure is a barrier between them. When they have a dispute, the employee will usually continue to work for the employer. Although the employee may be in the right and may have a strong case, in reality he or she is in the weaker position due to the fact that he or she will be open to different pressures, such as mobbing, from the employer or supervisor at work. In workplace disputes, the employee may continue to work in the same work area but his or her work standards should be more qualified and he should be treated fairly. Regarding employers, it is a changeable situation according to their purpose. If they want to reduce their workforce, they may not care about a future work relationship. They may be more ready to break the relationship, hoping to do so at the smallest cost to the company. However, they may be more willing to resolve the dispute if the company has benefited from the employee's skills and knowledge for a long time. In other words, disputing parties' interests and value will be different depending on the dispute.

Mostly, EDR might be more effective for improving future relationships that have been in conflict. The facilitative method, on the other hand, may be adequate to fix relations but not to transform these into better relations. In terms of the evaluative method, this approach may not be seen as an effective one owing to the fact that it may show one party in a stronger position,^[27] meaning that the stronger party may be less inclined to negotiate in this situation. Also, some experts are against using evaluative methods in mediation. They have given ten reasons why the evaluative method may hinder negotiations, and not serve the mediation purpose.^[28]

The transformative approach is seen as the most effective one in workplace disputes because, as mentioned above, it gives the disputing parties the opportunity to manage their own conflicts by using empowerment and recognition.^[29] Empowerment provides a calming effect and makes parties more confident and open.^[30] As for recognition, parties are more frank, mindful and try to empathize with the opposing party's current situation.^[31] In this way, parties may change their perspective and accommodate their differences. In other words, they may try to be constructive instead of destructive.^[32] This method may improve the

[26] Nabatchi and Bingham (n 21) 423

[27] Lela P. Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24 FSULR 937

[28] *ibid* at 945

[29] Nabatchi and Bingham (n 21) 422

[30] *ibid* at 402

[31] *ibid* at 403

[32] Dorothy J. Della Noce, Robert A. Baruch Bush, and Joseph P. Folger, 'Clarifying the

parties' problem-solving ability and guide them towards solving their future disputes.^[33] According to Bush and Folger, transformative mediation works in improving employees, workplaces and society.^[34] This belief led them to creating the Training Design Consultation Project (TDC).^[35]

One of the members of the TDC, Cynthia Hallberlin (then Alternative Dispute Resolution Counsel for the United States Postal Service (USPS)), was given the task of developing the Equal Employment Opportunity (EEO) mediation programme for the USPS, the largest civilian employer in the US.^[36] She observed the importance of the objectives and value of EDR and selected the transformative method.^[37] This is because the USPS was interested in improving the quality of workplace conflict relations. This was the first time a mediation programme was created for a specific dispute. 'Training programmes and materials, trainer development programmes, research protocols, and mediator evaluations' were all made specifically to support the aims and values of the dispute framework.^[38] Research on the mediation programme has illustrated the fact that the transformative approach has accomplished many things on many different levels.^[39]

However, this method takes a long time to work because disputing parties can struggle to recognize each other's value and interests.^[40] It can be seen from the USPS example that mediators may turn to other methods when they cannot apply the transformative process.^[41] In light of the effective methods, it can be pointed out that mediators do not have to be lawyers because they do not need to use any legal knowledge and evaluative approaches. They need to be more neutral and create an environment where the parties can express themselves. After choosing the type of workplace mediation approach, it is now possible to show why mediators do not have to be lawyers by explaining the challenges and contributions of non-lawyer mediators in EDR.

Theoretical Underpinnings of Mediation: Implications for Practice and Policy' (2003) 3 PDRLJ 39

[33] Nabatchi and Bingham (n 21) 331

[34] *ibid*

[35] Noce, Bush, and Folger (n 32) 50

[36] *ibid* at 51

[37] *ibid* at 52

[38] *ibid* at 53

[39] *ibid*

[40] Nabatchi and Bingham (n 21) 413

[41] *ibid* at 404

CHALLENGES OF BEING A NON-LAWYER MEDIATOR IN EDR

1- Giving Legal Advice to the Parties

This challenge generally appears in the evaluative mediation process. Non-lawyer mediators might face this difficulty in spite of receiving the compulsory mediator training. Mediation training differs depending on the country but in common mediation training, mediator candidates are given enough legal information to use in the mediation process.^[42] The disputing parties might be satisfied with the legal knowledge of non-lawyer mediators,^[43] but some experts believe that mediation training is not adequate enough for mediators to advise on specific, individual cases that the mediator will have to deal with.^[44]

Even if a non-lawyer mediator has sufficient training to inform disputants of their legal rights and obligations, there is another problem—the unauthorized practice of law.^[45] The solution for a non-lawyer mediator should be to advise them to seek legal advice.^[46] This may allow non-lawyer mediators to remain as a neutral third party and may also prevent the unauthorized practice of law by providing communication between the disputing parties.^[47] However, it should be noted that encouraging attorney participation within the mediation process may mean that it is impossible to arrive at an agreement and will increase the cost of mediation.^[48]

Depending on the case, an effective EDR mediation process may not need an evaluative method. If the case is about terminating the relationship between employer and employee, then evaluative mediation might be beneficial. However, if the grievance is about promotion, salary increase or harassment, using evaluative methods may not be beneficial for their future relations because it may force the weaker party to accept the stronger party's every offer. This might create greater inequality between the parties and the mediator may have one more problem to overcome in the process.

Hence, it might be enough to learn legal knowledge during the training as the mediator's effectiveness is related to their experience more than the fact of

[42] Daiker (n 3) 511

[43] *ibid* at 512

[44] Love (n 27) 943

[45] John D. Feerick, 'Toward Uniform Standards Of Conduct For Mediators' (1997) 38 STLR 455

[46] Jacqueline M. Nolan-Haley, 'Informed Consent in Mediation: A Guiding Principle For Truly Educated Decision making' (1999) 74 NDLR 775

[47] Joshua R. Schwartz, Note, Laymen Cannot Lawyer, But Is Mediation the Practice of Law?, 20 CARDOZO L. REV. 1715, 1730-31 (1999)

[48] Daiker (n 3) 513

a legal degree.^[49] A law degree should not be equated with effectiveness;^[50] in fact, a law degree might be a hindrance for mediators.^[51] Some studies have found that lawyers are worse mediators than non-lawyers.^[52] This is because lawyer-mediators believe every issue can be solved thanks to their legal knowledge and they might have difficulties in finding a balance between providing legal information and using soft skills to bring the disputants together.^[53] Conversely, non-lawyer mediators may be able to find out the objectives of the parties instead of merely informing them of their legal positions.^[54] Thus, the disputing parties have a chance to reach a ‘win-win agreement, where both parties reach their desired result, as opposed to a “split-the-differences” compromise’^[55] which may mean that relations between the parties may be damaged although they have reached a workplace agreement.

2- Manipulation by the Parties’ Attorney

There is an essential challenge which occurs when one party is represented by counsel in the mediation process.^[56] There is no problem with this in itself; however, some lawyers may try to manipulate the mediation process in their client’s favour.^[57] This manipulation normally occurs by not allowing non-lawyer mediators to communicate directly with the party or only allowing ineffective communication.^[58] Sometimes the objective of these representing lawyers is to take the case to court where they can charge much more money. In a study carried out in Minnesota, lawyers were asked how frequently their clients requested that they look into using ADR for a particular dispute.^[59] The lawyers were instructed to rate their clients’ requests based on choices of “never,” “rarely,” “sometimes,” “usually,” or “always.”^[60] The lawyers reported that 79% of the time, their individual clients “never” or “rarely,” requested the use of ADR.^[61] Additionally, according to a different survey, attorney-represented

[49] Roselle L. Wissler, ‘Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research’ (2002) 17 OSJDR 641

[50] Zerhusen (n 1) 1168

[51] Daiker (n 3) 526

[52] Matt Wise, ‘Separation Between the Cross-Practice of Law and Mediation: Emergence of Proposed Model Rule 2.4’ (2000) 22 JPL & Pol’y 383

[53] Daiker (n 3) 513

[54] *ibid*

[55] *ibid* at 523

[56] *ibid* at 513

[57] John Lande, ‘How Will Lawyering and Mediation Practices Transform Each Other’ (1996) 24 FSUR 839

[58] Marsha B. Freeman, ‘Divorce Mediation: Sweeping Conflicts Under the Rug, Time to Clean House.’ (2000) 78 UDMLR 67

[59] J. Brad Reich, ‘Attorney V. Client: Creating A Mechanism To Address Competing Process Interest in Lawyer-Driven Mediation’ (2002) 26 ULJ 183

[60] *ibid* at 189

[61] *ibid*

disputants reported lower satisfaction levels with the skills of mediators.^[62] However, it is very difficult to recognize these types of lawyers.^[63] It may be better for the dispute to remain unresolved than allow the parties to reach a potentially one-sided agreement.^[64]

According to EDR researchers, employees being represented by a third person may be useful to resolve disputes in EDR.^[65] Bingham, Kim, and Raines examined the USPS mediation programme which permits employees to bring any representative, such as lawyers, union representatives, professional association representatives, and friends or family.^[66] Some employees do not ask for a representative.^[67] The study was carried out on 7,651 mediators, 7,989 complaints and 6,794 respondents. The settlement rate for mediations was 55 percent for those not using representatives and 61 percent where both parties were represented, so there was a statistical difference of 6 percent. Additionally, the research also compared resolution rates: those represented by unions or a professional association representative had the highest rate (65 percent), those represented by fellow employees was 60 percent and those by lawyers was the lowest rate at 50 percent. This may be a reason why more effort is required when dealing with lawyers as they make non-monetary resolutions more difficult to achieve. Lawyers may also try to recover monetary damages in the process. Moreover, attorneys may have a limit to accepting offers and reaching an agreement may also be difficult. In fact, if the parties participate in the discussion, they may reduce their demands related to the opposing party's approach and offers. Furthermore, the research showed the satisfaction rates of parties based on fairness. Ninety-one percent of those represented by unions or professional associations considered the outcome fair. The figure for those represented by fellow employees was 88 percent and only 76 percent for those with lawyers.^[68]

There is a further problem of being represented by lawyers at the beginning of the mediation process. Lawyers generally advise their clients about dispute resolution methods, either: mediation, arbitration or litigation. If they decide to go to mediation, they choose the mediator and the process.^[69] In spite of what the research has shown about party satisfaction being most strongly

[62] Lisa B. Bingham, 'Employment Dispute Resolution: The Case for Mediation' (2004) 12 CRQ 145. See also Lamont E. Stallworth, 'Find A Place For Non-Lawyer Representation In Mediation' (1998) 4 DSM 19 (The empirical evidence also suggests that such non-lawyer representation has been effective)

[63] Daiker (n 3) 514

[64] Lamont E. Stallworth, 'Find A Place For Non-Lawyer Representation in Mediation' (1998) 4 DSM 19

[65] Bingham (n 62) 147

[66] *ibid*

[67] *ibid* at 162

[68] Bingham (n 62) 163

[69] Reich (n 59) 185

related to elements of procedural justice in mediation, it may be argued that the opportunity for party self-determination significantly decreases in lawyer-driven mediation.^[70] As a general result, the mediation process provides a place for representing lawyers in order to square accounts with each other.^[71]

Despite the fact that the disputing parties are generally not represented by lawyers, they do have the possibility of being represented by lawyers in EDR. In such circumstances, non-lawyer mediators may show more sensitivity by speaking directly to the party represented by the lawyer.^[72] Also, a non-lawyer mediator may encourage the party to attempt to come to an agreement. However, the lawyer mediator might tend to talk with the representative lawyer and ignore the individual during the mediation process. In turn, the increased party participation fostered by non-lawyer mediators leads to other benefits. For example, studies have demonstrated that when given greater control over the dispute, parties are much more satisfied with the process as a whole. Furthermore, surveys have also shown that when parties participate to settle down their dispute, they are more willing to follow through with that resolution rather than a court-ordered settlement.^[73]

3- Power Imbalances between Disputing Parties

A final problem that the non-lawyer mediator may face is a power imbalance between the disputing parties.^[74] This situation may come about when one party has more mediation experience.^[75] Some experts claim that one of the disputing parties may influence or deter the opposing party by using his or her power.^[76] In EDR, employers may often try to influence or intimidate employees because they know that employees may rely on them financially. For example, if an employee is in a strong position in the mediation process and an agreement is reached in favour of the employee, the employer is able to abuse him or her in the workplace. An employee may consider this possibility and be influenced by this during the mediation process. Freeman has observed that it may not be easy to understand and find a balance between parties who have different positions.^[77] She states that a non-lawyer mediator may never 'catch on to the underlying posturing or be at a loss to significantly affect the results without totally derailing the mediation'.^[78] A lawyer mediator is better

[70] *ibid* at 186

[71] *ibid*

[72] Daiker (n 3) 520

[73] *ibid* at 520- 521

[74] Lamont E. Stallworth, 'Find A Place For Non-Lawyer Representation In Mediation' (1998) 4 DSM 19

[75] *ibid* at 20

[76] *ibid*

[77] Freeman (n 58) 69

[78] Daiker (n 3) 516

at seeing the unequal bargaining powers and can manage the level of power between parties.^[79] However, according to Lande, these power imbalances are a serious problem for all types of mediators.^[80]

There are a number of imbalanced power problems caused by represented parties. For example, the unrepresented parties might expect the mediator to “level the playing field” and give legal advice.^[81] The unrepresented disputant may also be at a disadvantage because of a lack of mediation experience and legal information. Non-lawyer mediators may not recognize either the imbalanced positions nor give legal advice to the weaker party.^[82] Finally, there might be a one-sided (stronger favour) settlement.

As can be seen from the above, non-lawyers may have a greater challenge in leveling the situation between parties. However, it should not be missed that recognizing imbalanced positions between the disputing parties is related to mediation experience. Mediators may improve their skills by analyzing the parties’ attitude and speaking style or emotion by mediating. This is due to the fact that a lawyer mediator may not have adequate experience of leveling the field if he or she is new to the area of law. Besides understanding these imbalances, it may be better for mediators to be drawn from the dispute environment; so a non-lawyer mediator who is also a builder by trade may be able to assist construction disputes adequately. This is because the non-lawyer mediator would be familiar with the work and the features of the relationship. There is, of course, a huge difference between a construction dispute and an intellectual property dispute. The best solution may be to have a non-lawyer mediator who is an expert in conflict resolution. He or she has the ability to ask the right questions and understand the interests of both parties. Thus, it is not necessary to be a lawyer to mediate workplace disputes.

[79] Freeman (n 58) 72

[80] John Lande, ‘How Will Lawyering and Mediation Practices Transfrom Each Other’ (1996) 24 FSUR 839

[81] Stallworth (n 74) 19

[82] *ibid*

CONTRIBUTIONS OF NON-LAWYER MEDIATORS

Finally, ignoring non-lawyer mediators may mean ‘turning a blind eye’ to their significant contributions.^[83] Spiegelman, a lawyer-mediator, indicates that non-lawyer mediators have solved a number of society’s daily problems for thirty years.^[84] Not surprisingly, many of these mediation processes end in a satisfactory outcome. The only difference from the current mediation process is the name of process and tactics. For example: if two workers have a dispute, their supervisor may act as a mediator as he is neutral. On the other hand, a non-lawyer mediator might provide the disputing parties with an informal atmosphere.^[85] Free communication may increase the parties’ awareness of the dispute. Spiegelman also explains that the non-lawyer mediators remove the formalities and legal rules that often hinder the mediation process and the parties can consider their conflicts.^[86] Thus, the parties may have a chance to find unique solutions which the courts cannot.^[87] Besides, this free communication may increase the possibility of current conflicts being resolved and future disputes prevented.^[88]

[83] Daiker (n 3) 521

[84] *ibid*

[85] *ibid* at 517

[86] *ibid*

[87] Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Courts: Consensual Processes and Outcomes*, in *Mediation Research: the Process and Effectiveness of Third-Party Intervention* (Jossey Bass 1989)

[88] Daiker (n 3) 518

CONCLUSION

To sum up, the mediation process was originally conceived as a voluntary dispute resolution method. In other words, disputing parties may apply for mediation and they may choose their neutral third party mutually and voluntarily. However, choosing who will be a mediator has become a controversial issue. Most mediation experts assume that lawyer-mediators may resolve disputes more successfully and effectively than non-lawyer mediators thanks to their legal knowledge and abilities. In reality, some lawyers try to monopolize the mediator occupation for themselves. This new occupation means money for some lawyers and they want to keep things that way. However, others argue that non-lawyers should also be mediators.

In particular, the parties may have a chance to choose a non-lawyer mediator for workplace disputes. It might be obvious that features of workplace disputes such as ongoing and hierarchical relationships may need a non-lawyer mediator. These models of relationships might need to be maintained when resolving the dispute at the same time. Therefore, lawyer-mediators may not be effective at maintaining these because of their attitude and characteristics. Besides this, the surveys demonstrate that non-lawyer mediators are mostly used to resolving workplace disputes. In addition, non-lawyer mediators are good at mediating between the disputing parties by using their abilities, for instance, a human resources manager is able to understand the dispute and interest of the parties better.

Although non-lawyer mediators have some drawbacks in the mediation process, such as, manipulation by lawyers representing the parties, finding a balance between the strong and weak parties, and giving legal information, they are also capable of making a number of contributions. They can create an informal meeting setting and encourage the disputants to communicate freely. Furthermore, non-lawyer mediators tend to speak with disputants instead of the representative of the party. In terms of leveling positions of strength, this depends on the mediator's experience, not whether they are a lawyer. Finally, in terms of informing parties about legal rights, mediation is not a legal service^[89] so a mediator should not use his or her legal knowledge. Legal advice might create an imbalanced position between parties depending on strength of their cases.

Therefore, there should not be a restriction on mediators. The parties should choose the neutral party voluntarily. Both types of mediators (lawyer and non-lawyer mediator) have advantages and disadvantages. Reducing these disadvantages depends on the individual cases and parties. In EDR, the parties tend to use non-lawyer mediators, so it is not necessarily the case that mediation roles are limited to lawyers.

[89] Loretta W. Moore, 'Lawyer Mediators: Meeting the Ethical Challenges' (1997) 30 FLQ 679

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