

Columbia Law School  
**Scholarship Archive**

---

Faculty Scholarship

Faculty Publications

---


2016

## The Role of Language Interpretation in Providing a Quality Mediation Process

Alexandra Carter  
*Columbia Law School*, [abc26@columbia.edu](mailto:abc26@columbia.edu)

Shawn Watts  
[swatts1@law.columbia.edu](mailto:swatts1@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)

 Part of the [Dispute Resolution and Arbitration Commons](#), [Legal Profession Commons](#), and the [Legal Remedies Commons](#)

---

### Recommended Citation

Alexandra Carter & Shawn Watts, *The Role of Language Interpretation in Providing a Quality Mediation Process*, CONTEMPORARY ASIA ARBITRATION JOURNAL, VOL. 9, P. 301, 2016 (2016).  
Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/2014](https://scholarship.law.columbia.edu/faculty_scholarship/2014)

This Working Paper is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [cls2184@columbia.edu](mailto:cls2184@columbia.edu).

# THE ROLE OF LANGUAGE INTERPRETATION IN PROVIDING A QUALITY MEDIATION PROCESS

*Alexandra Carter*<sup>\*</sup> & *Shawn Watts*<sup>\*\*</sup>

## ABSTRACT

*This paper focuses on the role of language in mediation and the challenges multiple language fluencies bring to the practice. Beginning with a discussion of the process and ethics of mediation as a form of alternative dispute resolution, as distinct from other forms of dispute resolution including arbitration, the paper shifts to consider the importance of language. Language, and more specifically interpretation, plays a central role in the integrity of the mediation process and the quality of its outcomes. Each stage of mediation requires the participants and the mediator understand one another to ensure effective communication and a quality process. The most essential principles of mediation: self-determination, impartiality, and confidentiality, cannot be upheld when participants are unable to understand one another. Addressing language interpretation issues in mediation requires ensuring that interpreters with proper training and expertise are hired to assist in mediations. The interpreter should be a neutral and impartial third party. The mediator should be allotted additional time in a session for thorough and accurate language interpretation to ensure satisfying and sustainable solutions for participants.*

---

<sup>\*</sup> Professor of Law, Columbia Law School, New York, United States. The idea for this article grew out of the 2016 Taipei Arbitration and Mediation Conference. The authors would like to thank research assistants, Rachel Shapiro and Kristen Ferguson, for their work on this article. The author can be reached at: [acartel@law.columbia.edu](mailto:acartel@law.columbia.edu).

<sup>\*\*</sup> Lecturer in Law, Columbia Law School, New York, United States. The author can be reached at: [swatts1@law.columbia.edu](mailto:swatts1@law.columbia.edu).

**KEYWORDS:** *mediation, language, culture, translation, interpretation, alternative dispute resolution, arbitration, ethics, self-determination, impartiality, confidentiality, gender equity, process supports*

## I. INTRODUCTION

At its heart, mediation is assisted negotiation—with that assistance being provided by a neutral, impartial third party who upholds the privacy of the parties' information. In mediation, the parties, not the third-party neutral, make critical decisions with regard to process and outcome. It is a forward-looking process that helps parties—whether individuals, corporations or governments—design their futures rather than adjudicate the past.

A quality mediation process includes strict adherence to its fundamental tenets and flexible adherence to its procedural stages. The fundamental tenets, set forth by many ethical standards commonly invoked by mediators the world over,<sup>1</sup> include and are not limited to self-determination, impartiality, and confidentiality. In other words, what sets mediation apart from other dispute resolution processes is (1) the party as decision-maker; (2) the mediator as an intervener whose role is to assist the parties without personal bias or a stake in the outcome; and (3) the privacy of the process (the degree to which may be delineated by agreement of the parties and/or applicable law).

Mediation's procedural stages include (1) case development, in which the mediator works with the parties in preparation for the first session; (2) opening statements, which allow the mediator to introduce the mediation process and the parties to provide their perspectives on the situation; (3) information gathering, during which the mediator assists the parties to surface and consider all necessary information that might assist them in making decisions; (4) agenda setting and issue processing, in which the parties and mediator decide on a list of issues to be tackled, and proceed toward empowering the parties' efforts to solve them; (5) agreement writing, or memorialization of the parties' decisions with an eye toward maximizing their clarity and durability; and (6) post-conflict follow-up and relationship building.

All of these components, ethical and procedural, rely upon clear communication between parties and mediators. As such, language plays a central role in mediation and when participants speak different languages, it

---

<sup>1</sup> Model Standards of Conduct for Mediators, 1998 WL 1527127 (1998); *Mediators Ethics Guidelines*, JAMS, <https://www.jamsadr.com/mediators-ethics/>; The Mediation Center of the Chinese Arbitration Association Code of Ethics for Mediators (2009), <http://www.arbitration.org.tw/english/image/Mediation/CAA%20Mediator%20Code%20of%20Ethics.pdf>; LCA (The Law Council of Australia) Ethical Guidelines for Mediators (2011), [http://www.lawcouncil.asn.au/FEDLIT/images/Ethical\\_guidelines\\_for\\_mediators.pdf](http://www.lawcouncil.asn.au/FEDLIT/images/Ethical_guidelines_for_mediators.pdf); European Code of Conduct for Mediators, [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf); see generally Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 19 GEO. L.J. 1355 (1991) (In addition, many legal scholars note mediation can satisfy important rule of law values such as participation, impartiality, and reasoned decision-making.).

becomes more difficult to uphold a quality process. When language presents a barrier in mediation, the mediator's role becomes even more important toward ensuring an ethical and effective process.

Mediation's problem solving focus can involve translation or interpretation, which normally is provided not by the mediator, but by other professionals like translators.<sup>2</sup> While translation can occur verbally or in writing, interpretation is limited to the real-time verbal transfer of ideas from one language to another.<sup>3</sup> Both translation and interpretation are important in mediation but interpretation takes primary importance in mediation, as the process is itself a conversation happening in real time between parties—parties who themselves determine the outcome—with comparatively little emphasis on physical documentation.<sup>4</sup> Given the primacy of interpretation in mediation, this paper takes a narrow focus to discuss its importance and make recommendations for its inclusion.<sup>5</sup>

Part I of this paper provides a fuller overview of mediation, its ethical principles, and its distinctive features from other methods of dispute resolution. Part II details the centrality that language plays in the procedural stages of mediation, in upholding its fundamental tenets, and special considerations regarding language in transnational disputes. Having acknowledged the integral role of language in the communicative process of mediation, Part III of this paper outlines normative recommendations for how mediators ought to proceed with interpretative services when it becomes clear that multiple languages are at play in a dispute. Language support is ultimately an investment towards party satisfaction and a more durable agreement—as well as the reduction of future disputes and a more harmonious society.

## II. OVERVIEW OF MEDIATION

This section provides an introduction to mediation as a form of dispute resolution. Section A provides a definition of mediation in our purview as well as definitions provided by other institutions. Section B discusses ethical principles of the process. And Section C distinguishes mediation from other process of dispute resolution.

---

<sup>2</sup> See generally Angela McCaffrey, *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL L. REV. 347 (2000); Eric M. Bernal, *A Dual-role Bilingual Mediator Is Inefficient and Unethical*, 13 SCHOLAR 529 (2011).

<sup>3</sup> See Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997(1) J. DISP. RESOL. 1, 4 (1997), construed in WILLIAM E. HEWITT, COURT INTERPRETATION: MODEL GUIDES FOR POLICY AND PRACTICE IN THE STATE COURTS 11-13 (1995).

<sup>4</sup> Bernal, *supra* note 2, at 541.

<sup>5</sup> Groups like the American Arbitration Association currently offer online mediation for certain classes of cases. As online mediation expands, translation will become increasingly important.

### *A. Mediation Defined*

Many institutions provide definitions for mediation; these definitions cohere around certain common themes while providing for some local flexibility of interpretation and practice. New York State describes the process as:

A neutral person called a “mediator” helps the parties try to reach a mutually acceptable resolution of the dispute. The mediator does not decide the case, but helps the parties communicate so they can try to settle the dispute themselves. Mediation may be particularly useful when family members, neighbors, or business partners have a dispute. Mediation may be inappropriate if a party has a significant advantage in power or control over the other.<sup>6</sup>

The American Arbitration Association (AAA), the American Bar Association’s Section of Dispute Resolution, and the Association for Conflict Resolution define mediation in *The Model Standards of Conduct* as:

A process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute.

Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.<sup>7</sup>

The Chinese Arbitration Association (CAA) describes an evaluative form of mediation:

Mediation is a voluntary, non-binding and private ADR process in which a neutral mediator assists the parties to reach a negotiated settlement. A mediator is a trained neutral third party who will evaluate strengths and weaknesses of the parties’ legal positions and will offer options for settlement leading the parties

---

<sup>6</sup> *What Is ADR?*, NYCOURTS.GOV, [http://www.nycourts.gov/ip/adr/What\\_Is\\_ADR.shtml#mediation](http://www.nycourts.gov/ip/adr/What_Is_ADR.shtml#mediation) (last visited Nov. 3, 2016).

<sup>7</sup> *The Model Standards of Conduct for Mediators* of AAA (American Arbitration Association), ABA (American Bar Association) & ACR (Association for Conflict Resolution), pmb. (2005), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf) [hereinafter *The Model Standards*].

to use their best efforts to reach a mutually agreed upon solution. Still, the mediator has no power to impose a settlement. Instead, parties must agree to reach an agreement themselves. Once the parties agree to settle, the settlement agreement is a legally enforceable contract.<sup>8</sup>

And the International Chamber of Commerce (ICC) describes mediation as a:

Flexible settlement technique, conducted privately and confidentially, in which a mediator acts as a neutral facilitator to help the parties try to arrive at a negotiated settlement of their dispute. The parties have control over both the decision to settle and the terms of any settlement agreement.<sup>9</sup>

Mediation is a unique method of dispute resolution that offers parties to a conflict the opportunity to sit with another and communicate about their unresolved issues. The mediator is there to facilitate this conversation and protect the quality of the process. Mediation may be an evaluative or facilitative process. In evaluative mediation, the mediator uses their judgment to assess the strengths and weaknesses of the parties' respective cases and provides guidance on the possible remedies a judge may award were the case to go to court.<sup>10</sup> In contrast, in facilitative mediation the mediator is an impartial and neutral facilitator, and does not act as a judge or a decision maker.<sup>11</sup> This paper will focus solely on facilitative mediation, which in the authors' view is the most effective form of mediation for durable dispute resolution.

Mediation promotes the self-determination of parties and is voluntary. Mediation is also a confidential process. Neither the parties nor the mediator may repeat anything that is said during the mediation process outside of the mediation itself, including in court before a judge. With these principles underlying the process, parties in mediation can feel free to communicate

---

<sup>8</sup> *Mediation*, CAA, <http://www.arbitration.org.tw/english/mediation.htm> (last visited Nov. 3, 2016).

<sup>9</sup> *Mediation Guidance Notes*, ICC, <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Rules/Mediation-Guidance-Notes/> (last visited Nov. 3, 2016).

<sup>10</sup> DOUGLAS N. FRENKEL & JAMES H. STARK, *THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT* 76 (2d ed. 2012) ("In evaluative mediation . . . the mediator assumes (or determines) that the parties want her to assist in obtaining a settlement by providing feedback on their viewpoints and positions and/or offering help or direction as to possible agreement terms.").

<sup>11</sup> *Id.* ("In the classic facilitative model of mediation, the mediator moderates a structured process of communication aimed at generating a negotiated outcome of the parties' own creation. In this model, the mediator studiously avoids interjecting her own opinions or ideas for solutions. Instead, facilitative mediators assume that, because the parties know their situation better than anyone else, they can create better solutions themselves than an outsider can propose, or impose.")

honestly with one another and with the mediator, which in turn facilitates more constructive resolutions to their conflict.

### ***B. Ethical Principles of Mediation***

Mediation is a largely unregulated field, meaning that while it may be populated by credentialing bodies such as individual courts, the Southern District of New York, or private mediation organizations like the American Arbitration Association or International Mediation Association (IMI), there is no licensing scheme or uniform set of rules by which all mediators must abide or risk consequences. The most widely cited set of ethical standards for mediators are the Model Standards of Conduct for Mediators, drafted in 1994 and revised in 2005 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution (hereinafter "the Model Standards"). The Model Standards assist mediators in navigating ethical issues during their cases.<sup>12</sup> These guidelines cover how mediators can prepare for mediation both in the broader sense by maintaining their skills and in specific cases. The guidelines are comprehensive as they also equip mediators to maintain the quality of mediations by protecting parties' self-determination in high-tension environments while maintaining their own impartiality and neutrality throughout. The guidelines caution mediators against conducting mediations in which they have a pre-existing relationship with one or more of the parties. Moreover, while mediators may want to help the parties brainstorm different outcomes to their dispute, they should not press parties to agree to a particular resolution.

Outside of the Model Ethical Guidelines, there are several private associations across the globe, including, for example, the Chinese Arbitration Association and Judicial Arbitration and Mediation Services (hereinafter "JAMS") that develop their own ethical and professional standards. The JAMS standards resemble the Model Standards discussed above<sup>13</sup> and the Code of Ethics passed by the Mediation Center of the Chinese Arbitration Association is primarily concerned with protecting impartiality.<sup>14</sup>

---

<sup>12</sup> The Model Standards, *supra* note 7.

<sup>13</sup> Mediators Ethics Guidelines, *supra* note 1.

<sup>14</sup> The Mediation Center of the Chinese Arbitration Association Code of Ethics for Mediators, *supra* note 1.



### ***C. Mediation Distinguished from Other Methods of Dispute Resolution***

Mediation puts parties in the strongest position to determine the outcome of their own dispute. Unlike court trials and arbitration, mediation is not burdened by evidentiary rules, procedural minutiae, or authoritative precedent. As court rules and legal subject matter grow increasingly complex, both court and arbitration place a premium on knowledge of procedural rules, statutes or case law. In arbitration and in litigation, where the parties make adversarial presentations and submit to the authority of a fact-finder, oral interpretation of proceedings will be needed but written translation—of exhibits and legal briefs—may assume much greater importance than in mediation, where the parties' word may speak for itself.

Mediation shifts this premium to place a higher value on knowledge of the conflict at hand and employs a more flexible process. As a result, attorneys generally play a more minor role in mediation. Mediation can also be distinguished from court and from arbitration because the mediator, unlike a judge or arbitrator, cannot make binding decisions on the merits of the case. Finally, parties in mediation have the ability to arrive at more creative resolutions to their conflict. Where courts and arbitrators are generally bound to a finite set of outcomes—typically, damages, injunctive relief, and specific performance—parties in mediation can think outside of the box and create resolutions that get out of the “win-lose”, zero-sum paradigm. As a result, these resolutions may involve steps that address parties' emotional and reputational concerns, in addition to any fiscal concerns.

## **III. CENTRALITY OF LANGUAGE TO MEDIATION**

At its core, mediation involves parties making themselves intelligible to one another. With a process rooted in communication, the importance of language comes to the fore in nearly every element of the process. When parties and/or mediators speak different languages without intervening translation or interpretation, the process suffers. Section A provides an overview of the centrality of language in the procedural stages of mediation. Section B discusses the role language plays in upholding the fundamental tenets of mediation. And Section C discusses the interaction of language and culture, specifically in transnational disputes.

### ***A. The Centrality of Language in the Procedural Stages of Mediation***

Before the mediation even begins, parties will communicate with one another during case development. Parties send supporting documentation to

one another and often will have communicated with the mediator to discuss scheduling and review the underlying issues. Mediators and participants may need written translation for these documents and interpretation in these communications.

The mediation itself will begin with an introduction by the mediator explaining their role and the process, which will lead into each party explaining the conflict from their perspective. All of these steps involve language. The mediator's explanation of the process will not be very helpful if a party cannot understand it. The process continues through this cycle of communication as parties respond to one another and make additional disclosures. The mediator will step in to summarize what has been said, ask questions, and generate forward movement—all of which is only useful if understood.

When it comes time for agreement writing, communication is involved two-fold. The mediator must ensure that the agreement reflects both parties' spoken wishes and that these wishes are accurately reflected in accessible writing. When participants are not comfortable in a common language, interpretation and translation are required in this stage. Clear communication is also vital post-mediation as the parties continue to build or re-build their relationships with one another.

### ***B. The Centrality of Language in Upholding the Fundamental Tenets of Mediation***

Three fundamental tenets of mediation include self-determination, impartiality, and confidentiality. These tenets not only distinguish mediation from other forms of dispute resolution, but tie back to the most critical ethical requirements imposed upon mediators, as discussed above. All of these tenets are threatened when participants are unable to understand one another. Self-determination requires that parties make informed consent to the process and outcome. This extends to their decision to participate in the first place as mediation is a voluntary process. If language barriers are present, the parties' ability to consent and therefore self-determine is compromised.

It is also crucial that mediators are impartial towards the parties and the outcome as they facilitate their conversation. If parties are not comfortable in a common language, the mediator may be tempted to serve as an interpreter if they have that capacity.<sup>15</sup> While this would create movement within the discussion, it puts the mediator in a dual role, and one that involves aligning with one party and aiding another.

Understanding one another is also particularly important when it comes to the tenet of confidentiality. It is important that all participants feel secure

---

<sup>15</sup> Bernal, *supra* note 2, at 557.

that confidentiality is upheld, which requires all to fully understand what falls in its realm.

### ***C. Language and Culture: Special Considerations for Transnational or Intercultural Disputes***

Language in mediation is more than just words, written or spoken; it “mediates the collective and personal dimensions of individual identity.”<sup>16</sup> It implicates and intersects with multiple cultural identifiers including national origin, gender, socioeconomic class, race and gender.<sup>17</sup> Language affects not only the parties’ ability to understand one another, but their power to advocate for themselves and make decisions, which takes on added importance when the mediation involves one or more parties from a traditionally underrepresented or disadvantaged group.<sup>18</sup> While the mediator must remain impartial between the parties, and neutral as to the outcome of the mediation, acknowledging and accommodating language differences are important procedural tools that mediators can use to foster self-determination and a quality mediation process.

These considerations may also be important in cross-Strait mediation, where parties speak the same language but hail from different legal, political and social regimes.<sup>19</sup> Because language is shaped by the community in which one lives, parties hailing from Beijing and Taipei, for example, might need interpretive services in making sure detailed contractual provisions, or colloquialisms, are understood across all sides.

Together, these concerns highlight the importance of language as an important, transformative tool not only in reaching mediation agreements, but making individuals from various cultures to one another, and establishing inter-cultural norms of open dialogue, understanding, and peace.

## **IV. NORMATIVE RECOMMENDATIONS FOR INTERPRETATION IN MEDIATION**

Considering the integrality of common language to mediation, as discussed above, here we provide recommendations for mediators to work towards clear communication. Section A will define interpretive services and

---

<sup>16</sup> Christina M. Rodriguez, *Language and Participation*, 94(3) CAL. L. REV. 687, 735 (2006).

<sup>17</sup> See generally Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995(1) J. DISP. RESOL. 55 (1995).

<sup>18</sup> Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1390 (1985).

<sup>19</sup> See Susan Bryant, *The Five Habits: Building Cross-cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 40 (2001) (“Culture is like the air we breathe—it is largely invisible and yet we are dependent on it for our very being. Culture is the logic by which we give order to the world.”).

consider complications that arise in its delivery. Section B will offer recommendations for mediators to pursue when language barriers present themselves in mediation. And Section C considers funding for these services, reminding all that language services are ultimately an investment towards a more durable agreement.

### *A. Interpretive Services Defined and Considered*

Language interpretation is the conversion of a spoken message from one language to another.<sup>20</sup> Unlike translators who are usually working with written documents and access to time and dictionaries, interpreters are working in real time.<sup>21</sup> Two common modes of interpretation include simultaneous and consecutive interpretation.<sup>22</sup> In simultaneous interpretation, the interpreter is speaking while the party is speaking, slightly lagging behind. Simultaneous interpretation requires the interpreter to listen and speak simultaneously.<sup>23</sup> In consecutive interpretation, the interpreter waits for the party to finish their thought or pause, and then transfers the meaning.<sup>24</sup> Consecutive interpretation allows the interpreter the opportunity to ask for clarification and hear the entirety of a thought before communicating it, but requires heightened memory skills and additional time.<sup>25</sup>

It is often assumed in the judicial system that any bilingual person can serve as an interpreter; however, an interpreter has to perform several cognitive tasks simultaneously in order to accurately interpret the words of a party.<sup>26</sup> It is imperative that the interpreter is qualified in these skills, as well as knowledgeable about the process of mediation, to accurately convey the thoughts and feelings of a party.

In addition to these cognitive tasks, the interpreter also needs to have an appropriate level of distance from the conflict. This premise disqualifies both family members and mediators from serving in an interpretive role. Family members may be too close to the conflict to interpret without contributing their own thoughts, mediators need to be both focused on the task of

---

<sup>20</sup> Dominguez-Urban, *supra* note 3, at 13.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Hewitt, *supra* note 3, at 5. See also Beth Gottesman Lindie, *Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations*, 48 U. MIAMI L. REV. 399, 410 (1993) (“In 1985, a New Jersey Task force reported that state and municipal court judges had allowed friends, neighbors, and young children of litigants to interpret court proceedings. . . . Yet the task force often found the civil servants who were official interpreters to be less competent than the lay interpreters.”).

facilitating and impartiality towards both parties. Serving as an interpreter compromises both of these responsibilities for mediators.

Accurate interpretation also includes familiarity with the dialect and formal and informal versions of the party's language.<sup>27</sup> Even if a party and interpreter speak the same general language, words and phrases can have different meanings depending on the dialect spoken.<sup>28</sup> Interpreters must also be fluent in both the formal and informal versions of the speaker's language. Speakers may use idiomatic phrases whose meaning is "not a function of their individual component parts; rather idioms have a unitary meaning."<sup>29</sup> An interpreter who is not familiar with common idioms or expressions in the speaker's language will face difficulty interpreting these phrases, which obscures the meaning of the speaker. The mediator will also need to be familiar in the formal version of this language.<sup>30</sup> Legal jargon or technical language of any kind relevant to the dispute can result in inadequate conveyance of the meaning of the conversation.

Lastly, interpretation will inevitably require additional time to conduct a mediation. All participants will have to account for this in their scheduling and commit to investing the additional time for the sake of a quality process.

### ***B. Practice Recommendations***

It is recommended that mediators err on the side of process supports and thus have interpretation available when there is any question as to understanding. Parties may feel competent in the common language but mediation involves both conflict and real-time responses. These factors can challenge even strong fluency and so when in doubt, mediators should opt for support. Even if parties begin a mediation by expressing comfort with a non-native language, the mediator should assess the parties' comfort and understanding throughout the process, and suggest additional support if the mediator believes it would assist the process.<sup>31</sup>

If the mediator has competency in a second language, the mediator can play a role in checking the competency of the interpreter, by assessing how the party and interpreter speak with one another. However, this ability is not required of mediators, whose main role is to facilitate and not to perform interpretation. There should be additional systems in place, such as court or agency screenings, to check the qualifications of the interpreter.

---

<sup>27</sup> McCaffrey, *supra* note 2, at 352.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 351.

<sup>30</sup> *Id.* at 354.

<sup>31</sup> Model Standards of Conduct for Mediators, *supra* note 1, at 1-2 (discussing the importance of parties reaching a voluntary and uncoerced decision, and party comprehension is required in achieving this end.).

Once interpretation has been secured, mediators should check in with parties repeatedly to ask if all are feeling that their ideas are being adequately conveyed and understood. It will also be important for the mediator to stay aware of the language barriers at the table throughout the mediation. The mediator should take measures to slow down the process to allow time for comprehension. This includes suggesting breaks and speaking at a relaxed pace. The mediator should also avail herself of the opportunity for caucus, which is where the mediator will meet with each party, accompanied by their relevant interpreter, individually. This allows the mediator to check for understanding away from any tensions in the room.

One essential role of a mediator is to ask questions to solicit information from the parties. Questions will be particularly useful in a mediation with interpretive services. The mediator can ask parties to clarify previous statements to make sure that all parties understand what is trying to be communicated. The mediator can also phrase similar questions in multiple ways to give parties a chance to re-express what they've been asked, and thus double-check that their meaning has been conveyed. As the mediation progresses and mediators shift from open-ended information gathering questions to narrower questions, the mediator can use these questions or check that the nuance and detail of parties' interests are coming through.

### *C. Funding Interpretive Services*

When interpretive services are required, this raises the question of who is responsible for their funding. Parties or courts can fund the services and this will be a product of whether the mediation is occurring within or without the legal system. The particulars of funding will vary and it is anticipated that determining these financials may present a frustration and burden for participants. It is important to remember that when parties reach an agreement when they are not fully expressing nor hearing accurate viewpoints, the agreement is in peril. Self-determination is a fundamental tenet of mediation and it is incredibly difficult to self-determine without full comprehension. Mediators should always remind relevant actors that language support is ultimately an investment towards a more durable agreement.

## **V. CONCLUSION**

Language, and more specifically interpretation, plays a central role in the integrity of the mediation process and the quality of its outcomes. When mediators, lawyers and parties attend to language concerns and the challenges they present, they increase the chances that all involved will

benefit from the process—and benefit the general practice of mediation around the world.

With a process rooted in communication, the importance of language comes to the fore in nearly every element of the process. When parties and/or mediators speak different languages without intervening translation or interpretation, the process suffers. Each stage of a mediation, the initial contact with the parties, all of the in-session communications, drafting an agreement, and any communications following the mediation's conclusion requires the parties and the mediator understand one another to ensure a quality process and a sustainable resolution.

The three foundational principles of mediation, self-determination, impartiality, and confidentiality cannot be upheld when participants are unable to understand one another. Participants cannot affirmatively consent to participate in a process if they cannot be certain their words and meaning can be conveyed. The mediator cannot be certain participants are making decisions that are free and informed if the mediator is not sure the parties understand what is being communicated in the session. Impartiality is compromised if participants are not certain the mediator can understand them because the participants cannot be certain the mediator is not biased for or against one party. Confidentiality is equally difficult to uphold when language barriers exist because participants may believe the mediator will have to seek assistance outside of the mediation session for their lack of understanding.

Addressing language issues in mediation requires ensuring that interpreters with proper training and expertise are hired to assist in mediations. The interpreter should be a neutral and impartial third party and the mediation should be allotted additional time in a session to allow for thorough and accurate language interpretation. Providing these resources will minimize the problems presented by mediations in which language issues present and will help ensure satisfying and sustainable solutions for participants.

## REFERENCES

Book

FRENKEL, DOUGLAS N. & JAMES H. STARK (2012), *THE PRACTICE OF MEDIATION*.

Articles

Bernal, Eric M. (2011), *A Dual-role Bilingual Mediator Is Inefficient and Unethical*, 13 SCHOLAR 529.

Bryant, Susan (2001), *The Five Habits: Building Cross-cultural Competence in Lawyers*, 8 CLINICAL LAW REVIEW 33.

Delgado, Richard et al. (1985), *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISCONSIN LAW REVIEW 1359.

Dominguez-Urban, Ileana (1997), *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997(1) JOURNAL OF DISPUTE RESOLUTION 1.

Grillo, Trina (1991), *The Mediation Alternative: Process Dangers for Women*, 100 YALE LAW JOURNAL 1545.

Gunning, Isabelle R. (1995), *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995(1) JOURNAL OF DISPUTE RESOLUTION 55.

Lindie, Beth Gottesman (1993), *Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations*, 48 UNIVERSITY OF MIAMI LAW REVIEW 399.

McCaffrey, Angela (2000), *Don't Get Lost in Translation: Teaching Law Students to Work with Language Interpreters*, 6 CLINICAL LAW REVIEW 347.

Rodriguez, Christina M. (2006), *Language and Participation*, 94(3) CALIFORNIA LAW REVIEW 687.

Sturm, Susan P. (1991), *A Normative Theory of Public Law Remedies*, 19 GEORGETOWN LAW JOURNAL 1355.

Internet Sources

*Mediation Guidance Notes*, ICC, <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Mediation/Rules/Mediation-Guidance-Notes/>.

*Mediation*, CAA, <http://www.arbitration.org.tw/english/mediation.htm>.

*What Is ADR?*, NYCOURTS.GOV, [http://www.nycourts.gov/ip/adr/What\\_Is\\_ADR.shtml#mediation](http://www.nycourts.gov/ip/adr/What_Is_ADR.shtml#mediation).



### Mediator Rules

European Code of Conduct for Mediators, [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.pdf](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf).

The Law Council of Australia (LCA) Ethical Guidelines for Mediators (2011), [http://www.lawcouncil.asn.au/FEDLIT/images/Ethical\\_guidelines\\_for\\_mediators.pdf](http://www.lawcouncil.asn.au/FEDLIT/images/Ethical_guidelines_for_mediators.pdf).

*Mediators Ethics Guidelines*, JAMS, <https://www.jamsadr.com/mediators-ethics/>.

Model Standards of Conduct for Mediators, 1998 WL 1527127 (1998).

The Mediation Center of the Chinese Arbitration Association Code of Ethics for Mediators (2009), <http://www.arbitration.org.tw/english/image/Mediation/CAA%20Mediator%20Code%20of%20Ethics.pdf>.

The Model Standards of Conduct for Mediators of AAA (American Arbitration Association), ABA (American Bar Association) & ACR (Association for Conflict Resolution) (2005), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf).