

The Importance of Intake in Mediation

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What is Intake? “Intake” is a word used to describe that first meaningful communication between a mediator and a potential mediation client. It’s defined as “...the act of taking in; something, especially energy, taken in. (American Heritage Dictionary)

It’s the last piece of this definition – “energy taken in” – that is at the core of mediation intake. We often describe mediation in terms of energy, asking: What is the chemistry in the room? Is the energy right for settlement? Are the dynamics positive and are they enabling resolution? When they’re not working, we take a break, caucus or shift direction with our questions in the hopes of infusing positive energy into the process.

Intake is often the first moment at which we are able to begin to create that positive energy. When someone reaches out to you as a mediator, you begin to share with them information about yourself, your practice and the process. In exchange they share with you information about who they are, what they’re experiencing in their lives at that moment and what they hope, expect or possibly fear will happen in mediation. When this first exchange is positive, you begin laying the foundation for what will hopefully be a successful mediation. Recognizing the importance of intake helps you lay this foundation.

Intake gives you an opportunity to identify potential conflicts of interest. During that first interaction with a potential client, you are learning not only about their situation but also about who they are, what they do and whom they’re relying on for support in connection with their dispute, if anyone. Layers of interactions with those not directly involved in the mediation itself present the potential for conflicts of interest. We’ve all encountered the “obvious conflict” – when you or someone you know is involved in the mediation; or when you or someone you know is related to the subject matter of the dispute. Chances are, you’ll recognize a name – of an individual, a company, a professional involved – and it will trigger you to make an appropriate disclosure.

It’s the “not-so-obvious conflict” that poses potential problems in mediation. By carefully asking questions at intake and getting beyond the basic information, we become able to identify less obvious but no less important potential conflicts of interest.

Potentially the most challenging kind of conflict is the “conflict-that-becomes-obvious-during-the-mediation.” By its very definition, it is not a potential conflict that is discoverable by asking questions at the point of intake.

The bottom line is that neutrality is perhaps a mediator’s greatest asset. If a client finds out about a potential conflict of interest once the process has started, particularly if they find out about it from someone other than the mediator, the mediator’s neutrality can be called into question and the mediation irretrievably derailed. The more time you spend asking questions of clients during intake, the more information you get from them and the more likely you are to identify and disclose early on any potential conflicts of interest.

Intake gives you an opportunity to get a sense of the clients, their style and demeanor before you start the mediation. As in mediation, listening to the intonation

and words chosen by potential clients during intake can provide you with insight into what to expect from them when they are in a room with you and with each other.

Is the client using “loaded” words like “scared” or “nervous” that may refer to safety or abuse issues; or “able” or “capable” that could signal issues of mental capacity or readiness to engage in mediation or simply indicate a need for physical accommodations during the mediation? To avoid surprise during or after the mediation – ask the questions at intake and be prepared (to the extent that you can be) – before walking into the room.

Getting a sense of the clients’ demeanor can also alert you to whether the clients might be people that you cannot or might not want to work with. Are these the type of clients that push your personal buttons? Are they giving you an indication that they don’t feel there is a lot of value in the process or are they underestimating the value of your time? You want to know this sooner rather than later and intake is the perfect opportunity to find out before you’re in too far.

Intake gives you an opportunity to assess the clients’ willingness, ability or competence to engage in the mediation process. If possible, isn’t it better to find out that a potential mediation client suffers from rapid-cycling bi-polar disorder *before* you’re in the room with them? Equally important: finding out that someone *thinks* the other party has rapid-cycling bi-polar disorder before you’re in the room with them. If someone doesn’t have the capacity to participate in mediation, the best chance you may have to figure that out (and figuring it out does not mean diagnosing them) is to spend time talking with them. Trust your instincts and don’t go down the road with someone you think might not be capable of decision-making.

True story. Every year or so my firm gets a call from a woman who describes an awful situation she believes herself to be in. She explains that she was forcibly divorced from her husband, not only without her consent but also without her knowledge or presence, by a judge who was in collusion with her husband, the Bar Association, the Board of Bar Overseers and the Attorney General. When you ask why this might have happened to her she cycles into a discussion of a conspiracy to ruin her life and shame her as a “divorced woman.” The remedy she seeks is to be re-married to her former husband and to expose the conspiracy to the public to save others from suffering the same fate she believes she suffered.

It’s incredibly sad and I’m struck by how exhausting it must be to be this woman and to feel that you’re at the center of a conspiracy and that no one is listening. But if I’m not qualified to help this woman, this is a far better discussion for me to have with her by phone than in person. Only by spending time talking with someone like this can you realize that a person who initially comes across as well-spoken and lucid (as this woman does at first) may be in need of very different help than the average mediator can offer.

Intake allows you to begin to understand the clients’ expectations and set appropriate expectations for the process. As much as many of us hate to admit it, mediation does have its limitations: among them that it will not punish someone who has, in the eyes of one of the parties, done “wrong,” it will not completely undo a harm that has been done, and it will not necessarily vindicate someone who feels that they are completely in the right. (Quite to the contrary: the old saying goes that a good settlement is one in which the parties are equally unhappy and perhaps we should

reframe that to say instead that after a successful mediation both parties are equally happy.)

It's important in any case to set appropriate expectations with the clients, determine what they want, tell them what they can and shouldn't expect and ultimately help them decide if mediation or another process is suitable for them. This will minimize unrealistic expectations and hopefully avoid disappointment – with both you and the process itself.

Intake gives you an opportunity to educate clients. I know a lot of mediators don't like to use this terminology (but I'll say it anyway) intake gives you an opportunity to "sell your practice." It never ceases to amaze me how few people – clients and attorneys alike – know what a mediator does and fewer still know how the mediator's role differs from that of an arbitrator. Intake is the perfect time to educate the potential client about DR processes, the differences between them and when they might be appropriate. Since during this first interaction it's impossible to give potential clients all of the knowledge they need, it is also a good time to direct them to informational web sites or other resources that can help them get educated about mediation.

Intake is also the time for you to explain to a client your background and experience. In doing so, it is important to be completely honest about your level of expertise because the parties often look for someone with subject matter expertise in the area of their conflict.

As Benjamin Franklin said: "It takes many good deeds to build a good reputation, and only one bad one to lose it." Take the time during intake to educate clients about what you can and can't do for them. Never underestimate the power of word of mouth in the community and don't miss an opportunity to introduce yourself in a positive way – intake gives you just such an opportunity.

Intake gives you an opportunity to begin to understand the issues and the dynamics that will impact the mediation process. This is the energy we talked about - you are sharing yours with the potential clients, and they are taking a step towards sharing theirs with you. It's important to remember that when a potential client reaches out to us, they have taken a momentous step: they have shifted from being resigned to the situation they are in to considering that there may be an alternative; they are signaling that they may be ready to make a change in their lives and acknowledging that they need help to make that change; and they are letting us – asking us – to come into their lives to help them make that change. At the first moment you connect with someone who is in this position, you begin to create the energy needed to help them make that change. Don't let that moment go unnoticed because amazing things can happen.

Never underestimate what can happen during the course of an intake. Indeed, the mediation often begins at that first point of contact; and what energy you are able to exchange with the clients can and will be carried over into the mediation itself.

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