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Why litigation leaves everyone wrecked and the role of mediators after ABA Opinion 518

ABA Formal Opinion 518 reshapes but does not eliminate the ability of skilled mediators to ethically guide parties from litigation trauma to resolution.

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Many mediators quote Voltaire's famous words regarding the high cost of litigation: "I never was but twice in my life completely on the verge of ruin – first, when I lost a lawsuit, and secondly, when I won one." This insight highlights that the financial and emotional drain of lawsuits makes the winner nearly as drained as the loser. ABA Formal Opinion 518, issued on Oct. 15, 2025, seems like it may affect how mediators evaluate claims and share opinions with litigants about the perils of ongoing litigation or even issue the ubiquitous "mediator's proposal." Fear not because the advanced training many good mediators have received isn't all forbidden now.

Litigation is a lot like a car accident: nobody leaves quite the same, and everyone wishes they had avoided the collision altogether. When properly analyzed, it becomes clear that ABA Opinion 518 does not strip mediators of the ability to help drivers avoid the "collision"; it just refines how psychology and law can be used–ethically–to steer parties out of the wreckage and into a consensual resolution. When understood correctly, a skilled mediator can still use their evaluative insights, persuasive framing and behavioral science to bridge gaps without crossing the line into misleading advocacy. Here's how to do it ethically:

Opinion 518 and the "car crash" of litigation

ABA Opinion 518 focuses on one core idea: lawyermediators may not mislead parties or substitute their own judgment for the parties' decisions about what is in their best interests. The opinion emphasizes avoiding statements that a proposed deal "is in your best interest," while leaving room to provide legal information, discuss risks and offer views on likely litigation outcomes looking through the lens of years of experience.

Seen through the caraccident analogy, litigation is the multivehicle pileup everyone claims they are prepared for until metal starts twisting and airbags deploy. Trauma from litigation is real: financial strain, reputational damage and emotional exhaustion mirror the physical and psychological fallout of a serious crash. A sophisticated mediator, even after Opinion 518, functions like a neutral traffic engineer than a backseat driver–mapping the accident scene, calculating the probable damage, predicting injuries before they occur and helping all drivers see a safe exit, they had not considered for themselves.

Evaluative mediation after ABA Opinion 518

ABA Opinion 518 does not declare evaluative mediation dead; it clarifies how evaluation is communicated. The opinion permits mediators to give "truthful information," including discussion of how a tribunal might resolve legal or factual questions, provided they do not advise any party that a proposed set-

tlement is "best" for them. Good mediators do that already. This is on par with the primary rule requiring that lawyers not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement made as officers of the Court under ABA Model Rule 3.3.

Any good mediator will provide information and then enlighten the parties to come to their own decision on what's best and how to avoid more uncertainty and risk. Within that framework, a mediator can still identify legal fault lines and highlight controlling legal authority, juryappeal issues and evidentiary weaknesses, framed as "how courts have treated similar cases," not "here is what you must do." Indeed, what good mediator hasn't used a recent jury verdict or Court of Appeal decision to give examples of how similar cases have been decided? Candidly, mediators who don't do that aren't that busy.

All competent mediators are lifelong learners and continue to keep up to date with new case decisions, leveraging information and data in the work they do. Indeed, highly sought after mediators (the ones it takes six months to schedule with) know how to translate complex doctrines into practical risk bands–showing the range of verdict possibilities without prescribing a specific number as "the only answer."

Importantly, in my experience, most seasoned lawyers go to mediation for the purpose of "stresstesting" their legal and factual narratives. Most counsel at a mediation expect a good mediator to be well prepared and ready to ask each side to walk through their case as if arguing to a skeptical appellate panel, exposing gaps that advocacy in a single direction may have papered over. As both a mediator and participant in hundreds of mediations, I have used and heard many times the phrase: "What if you're wrong?" Good mediators use hypotheticals to illuminate tailrisk scenarios that lawyers and clients have cognitively discounted or never modeled due to confirmation bias.

As a mediator, you must–and the parties expect–convey evaluative impressions without usurping choice or sounding like God. One of my favorite mediators uses a phrase I have often copied when discussing the "pretty side" and "ugly side" of a case: "There's always two sides to any pancake." So, the expectation is that the mediator will offer calibrated predictions such as: "juries have tended to do X in similar fact pattern," while explicitly reminding parties that the decision to settle or try the case is theirs alone, ideally reinforced by sound independent legal advice from their respective counsel.

A good mediator will always ask permission before offering an evaluative comment, particularly with unrepresented or less sophisticated parties, as 518 counsels' clearer role-explanations. But all mediators begin each day by saying something to the effect of, "My role today is to listen and try to provide a safe space to discuss and negotiate the dispute in a confidential setting to reach a resolution that both sides can live with and which is better than the alternative of continued litigation." Opinion 518 doesn't change the expectation that mediators will nudge parties in the direction of resolution. Otherwise, why do we need human mediators? Computer AI programs can spit out the "correct" answer to any conflict, right? Wrong!

In the end, the mediator's credibility still matters enormously: when a neutral with subjectmatter expertise explains how a judge is likely to view an argument or an inflated damage theory, parties recalibrate expectations precisely because they perceive the mediator as knowledgeable and neutral. Opinion 518 does not attack that value; it simply requires that credibility is not used to replace a party's own agency.

Psychology: Trauma, bias and persuasion in neutral hands

If litigation is like a car accident, then parties and counsel arrive at mediation with shock, anger, fear and confirmation bias already in the car. Psychology matters because those emotions, left unmanaged, drive decisions more than doctrine or spreadsheets ever will.

A sophisticated mediator can, within the ethical boundaries of 518, harness cognitive and behavioral psychology in ways that are both persuasive and neutral by reframing and loss aversion. People feel the pain of loss more than the pleasure of equivalent gains; so often a mediator reframes settlement not as "giving up money" but as "avoiding additional uncontrollable loss" in fees, time and reputational risk.

The carcrash metaphor reinforces this: the goal is not to "win the wreck," but to walk away with as little permanent damage as possible. Another critical tool that most sophisticated mediators use is countering overconfidence and confirmation bias. Counsel and clients often outweigh favorable facts and discount bad ones; the mediator methodically raises disconfirming evidence, opposing narratives and adverse law in a way counsel may have struggled to communicate internally. It's called playing "Devil's Advocate," and it's done in every mediation that I've ever participated in. Of course, this is always done in both rooms (neutrally), which is the logical way to bring both sides closer to a resolution and bridging what at the outset looked like huge gaps in relative case evaluation and expectations. By posing questions such as: "How do you think a juror will hear this?" the mediator invites parties to step outside their own story without declaring that their position is "wrong."

Helping each side articulate not only what they want but what they fear, and then reflecting that back, lowers defensiveness and shifts the focus from blame to problemsolving. In caucus, the mediator can neutrally describe the emotional and practical needs expressed by the other side, enabling clients to see human beings rather than caricatures, which often soften rigid positions. These are persuasion techniques described in behavioral science, but they are not coercive if used to expand insight rather than to obtain a mediator's preferred outcome. ABA Opinion 518's prohibition on misleading or outcome-directive statements leaves ample ethical space for this kind of psychologically informed influence.

Game theory: From collision course to coordinated exit

Game theory treats disputes as strategic interactions where each party's best move depends on what the other is likely to do. In bilateral negotiations, parties often behave as if locked in a prisoner's dilemma: both invest heavily in threat and bluff, and both risk a mutually worse result at trial. Mediation, properly understood, injects a third player whose role is to transform a non-cooperative game into a more cooperative one.

Opinion 518 does not prevent mediators from using gametheoretic tools; it simply shapes how those tools are presented. When both sides see that "nosettlement" is a bad strategy (more cost and risk for both), the incentive to search for a cooperative move increase. Reducing information asymmetry and mistrust by filtering and framing information from each room (accurately and nondeceptively, as 518 requires), a mediator attacks the very conditions that produce prisoner's dilemma outcomes. It makes people look at outcomes from an angle that they were not looking at before. Most expert mediators are skilled in this practice and learn these skills in mediation courses taught nationally.

As parties gain confidence that offers are genuine–not puffed or misrepresented by the neutral–the perceived benefit of continued brinkmanship declines. Let's be honest, in 2026, mediator's proposals are used in more mediations than ever before. While Opinion 518 criticizes mediators who declare "this is the proposal you should accept," it explicitly allows mediators to work with counsel to design proposal numbers or structures the lawyers can recommend. But isn't that what any good mediator would do? I've never seen a mediator make a proposal they don't believe both parties are likely to accept or counsel would not recommend. Otherwise, why make a proposal that is assured of rejection?

The real value of a persuasive, neutral mediator

The true power of a highlevel mediator is the ability to illuminate what counsel, and clients have not yet fully seen. Namely, legal, psychological and strategic points and then hold a safe space for parties to make hard, adult decisions. This could also

include surfacing unspoken interests and constraints, future business relationships, insurance dynamics, media or publicity optics, and internal precedents that aren't modeled before mediation.

Sophisticated mediators also can do another task that a party's own lawyers cannot: provide an informed and credible third-party perspective. Parties often hear their own lawyers' cautions as "rhetoric"; the same message, delivered by a neutral with no dog in the fight, can finally land with authority. Opinion 518 allows that a neutral may articulate "here is how this kind of argument has fared in front of judges and juries" while clearly disclaiming any role as anyone's personal legal advisor.

When a mediator explains that proceeding to trial is akin to entering a highspeed intersection in dense fog–where both cars may collide even if each believes it has the rightof-way–the metaphor is not a directive, it is a lens. Parties retain the choice to drive through the intersection; the mediator's ethical mission is to ensure they do so with headlights on, brakes tested and a realistic sense of what happens if impact occurs.

In the postOpinion 518 world, the best mediators are not neutral in the sense of being bland or inert, shuttling numbers from one room to another; they are neutral in allegiance, but very active in insight. They deploy law, psychology and game theory to bridge gaps, challenge illusions and create credible pathways out of costly collisions, all while scrupulously avoiding what Opinion 518 condemns: using the mask of neutrality to drive someone else's car.

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