



ABA Section of Dispute Resolution

Task Force on Improving the Quality of Mediation

FINAL REPORT

April 2006 - March 2007



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Introduction and Summary

History

In January, 2006 the American Bar Association Section of Dispute Resolution formed a task force to address issues of quality in mediation. The task force followed efforts by the Section of Dispute Resolution and other organizations to evaluate the feasibility of a national mediation credential. After determining that a national credentialing program was not feasible for the current mediation marketplace, the Section of Dispute Resolution formed the “Task Force on Improving Mediation Quality” to investigate factors that define high quality mediation practice.

Task Force Membership and Approach

The seventeen Task Force members appointed by the officers of the Section of Dispute Resolution represent a diverse range of geographic locations, mediation perspectives, and practice areas (see Appendix A for a list of Task Force members). Task Force members include lawyers and non-lawyer mediators, lawyers who represent clients in mediation, academics, and administrators of court-connected mediation programs. Recognizing that the mediation field is broad and complex, the Task Force narrowed its focus to mediation quality in private practice civil cases (including commercial, tort, employment, construction, and other kinds of disputes that are typically litigated in civil cases, but not domestic, family law, or community disputes) where the parties are usually represented by counsel in mediation. The Task Force decided to take this approach in the belief that this focus would inform it about quality issues in a narrow, reasonably well-developed area of mediation practice, provide recommendations for improving mediation practice in that context, and perhaps suggest improvements for other areas of mediation practice that could be the focus of additional later efforts by the ABA or other groups.

The Task Force reviewed existing policy documents, reports, and research on mediation quality (see Appendix C). The Task Force determined that it could significantly contribute to a better understanding of mediation quality by embarking on an extensive effort to learn how users of mediation services felt about quality, while recognizing that user views are not necessarily conclusive. In order to gain an understanding of user views about mediation—at least in the context of private practice civil cases with represented parties (but not domestic, family law or community disputes)—the Task Force pursued several avenues of investigation.

Methodology

The Task Force organized a series of ten focus group discussions in nine cities across the United States and Canada: Atlanta, Chicago, Denver, Houston, Miami, New York, San Francisco, Toronto, and Washington D.C. (two meetings were held in Washington).

For each set of focus groups the Task Force worked with local groups to develop an invitation list. The participants included outside counsel, in-house counsel, and non-

attorneys (such as insurance industry managers, risk managers, and human resource managers) whose responsibilities include working for parties in mediation. In later focus group sessions, the Task Force also included small groups of experienced civil mediators, who were asked a slightly different set of questions. In addition to the focus group discussions, the Task Force collected more than 100 responses to questionnaires from mediation users and mediators, and conducted telephone interviews with thirteen individuals who have been parties in mediation.

This report summarizes the data gathered from the focus groups, questionnaires, and interviewees. The Task Force's findings, observations, and recommendations are discussed in the following sections. Detailed summaries of the data can be found in Appendices D and E.

Findings and Observations

Focus group participants, questionnaire respondents, and parties who were interviewed consistently identified the same four issues as important to mediation quality:

- Preparation for mediation by the mediator, parties, and counsel
- Case-by-case customization of the mediation process
- “Analytical” assistance from the mediator
- “Persistence” by the mediator

While the issues identified may not surprise many, we believe they are significant because mediation users consistently identified them as areas where steps could be taken to improve mediation quality. The report will discuss in depth these factors and provide observations, analysis, recommendations, and next steps. We emphasize here, as we do throughout this report, that our conclusions relate only to the arena of private practice civil cases where parties are represented by counsel. We offer no opinion whatsoever about the meaning, if any, of these conclusions for other kinds of mediation.

Report and Recommendations

The Task Force's findings and observations lead to a number of recommendations, some of which will be carried out by the Task Force and some by other groups, on ways in which mediation practice can be improved:

- Create comprehensive mediation user guides including a video for parties and their attorneys.
- Consider whether to conduct research similar to the Task Force's research focused on other mediation contexts, such as family mediation, and consider how, if at all, the observations and conclusions of the Task Force concerning preparation, customization, analytical techniques, and persistence might be relevant to those other practice contexts.

- Develop recommendations for how mediation training programs can be responsive to user concerns related to preparation, customization, analytical assistance, and persistence.
- Examine how to use mediator analytical techniques in civil cases in which parties are represented by counsel, consistent with high quality mediation.
- Promote local group discussions with mediation users, similar to those held by the Task Force, conducted by state and local Bar Associations and others.
- Develop brief practical application pamphlets for mediation users (lawyers and parties) and for mediators based upon the Task Force's research efforts, experience, and expertise. The pamphlets will highlight what mediation users or mediators should consider with regard to preparation, customization, analytical assistance, and persistence in order to have high quality mediation.

I. Discussion of Methods Used by Task Force

The principal focus of the Task Force's efforts has been to understand the views of certain mediation users about the quality of mediation, as it is conducted in a narrow practice area: specifically, private practice civil cases involving users who have significant experience in large commercial and other civil cases in which all parties are represented by counsel. While user perceptions of quality are not conclusive or determinative as to quality standards in the field, the perceptions of users are well informed and instructive about changing expectations in cases where mediators are privately retained.

The Task Force held focus group discussions between April 2006 and March 2007 in Atlanta, Chicago, Denver, Houston, Miami, New York, San Francisco, Toronto, and two in Washington D.C. In each location, the local and state bar associations, mediation organizations, law firms, and court programs helped identify individuals with significant experience in mediation in large civil cases. The participants included outside counsel, in-house counsel, and non-attorneys (such as insurance industry managers, risk managers, and human resource managers) whose responsibilities include work for parties in mediation. In most of our focus group discussions at least a few mediators also participated. In addition, at the later focus groups discussions, the Task Force collected questionnaires from mediation users and experienced civil mediators, and conducted telephone interviews with individuals who have been parties in mediation. In all, the Task Force conducted 30 different focus group discussions with over 200 individuals; collected 109 responses to the detailed survey questionnaire; and conducted individual telephone interviews with thirteen parties.

A. Focus Groups

When the focus group participants arrived they were assigned to small groups with 5-10 participants per group. Generally, the Task Force tried to assign mediation users and mediators to separate groups. Each group had an experienced facilitator leading the session (Task Force members often served as the facilitators). In addition, each group

had a note-taker to record the discussion. Each focus group session lasted 90-120 minutes.

For the first several sets of focus groups, facilitators asked broad questions about mediation generally. These questions asked about the quality of their mediation experiences, the characteristics of a good mediator, and how the mediation process should be structured. The facilitators heard the same topics identified repeatedly as areas of importance to users. In response, the Task Force narrowed the discussions in the later sets of focus groups to reflect those areas.

B. Surveys

In the later sets of focus groups the Task Force distributed two written surveys, one for mediation users and one for mediators. Participants completed the surveys immediately after the focus group discussions. The surveys asked for background data about the participants and also provided an opportunity for focus group participants to provide information about their individual experiences and opinions about mediation.

C. Party Interviews

The Task Force also conducted interviews of thirteen individuals who have been parties in mediation. The goal of these interviews was to understand the perceptions that parties (as distinct from lawyers) have of the mediation process. The parties were all people who had been involved in multiple mediations as a party and were the decision-makers in the underlying litigation or dispute. The party interviews were all conducted by telephone by one member of the Task Force, and they lasted approximately 30 minutes to an hour each.

D. Background about the Focus Group Participants, Questionnaire Respondents, and Party Interviewees

The focus group participants and survey respondents were not randomly chosen. We purposefully selected individuals with substantial experience in larger cases. We tried to identify individuals who were primarily representatives or parties in mediation. Many survey respondents had been in different roles in various mediations: 64% had been a mediator in at least one mediation, 63% had been representatives on the plaintiff's side at least once, and 73% had been on the defense side. Most of the representatives were generally on the defense side, with only 3% regularly representing plaintiffs.

As a group, the survey respondents had substantial experience with mediation: 82% had attended more than 30 mediations. Most respondents (94%) were lawyers, working in private practice (61%), as inside counsel (11%), or in other roles (21%). Of the lawyers in private practice, 25% were in firms of 1-5 lawyers, 25% were in firms of 6-100 lawyers, 28% were in firms of 101-500 lawyers, and 22% were in firms of more than 500 lawyers.

The survey respondents may not have been demographically representative of the general population or even the lawyer population. Almost three-quarters (73%) of respondents were males and 27% were females. Most respondents were white (91%), with the others identifying as Hispanic (4%), Black or African-American (1%), American Indian or Alaska Native (1%), and other (3%). About one quarter (27%) were under 50 years old, 33% were 50-59, and 40% were 60 or older. Of the thirteen individuals interviewed there were seven men and six women. The parties were fairly evenly divided between plaintiff and defense. Three interviewees attended mediations without having their lawyers present.

II. Discussion of the Task Force of Principal Findings and Observations¹

A. Preparation by Mediator, Counsel, and Parties

1. Information from Focus Groups, Surveys, and Party Interviews. Many participants in our user focus groups and party interviews identified preparation by the mediator, the parties, and the parties' counsel as important for success in the mediation's outcome. Many focus group participants mentioned liking pre-mediation discussions with the mediator, in part because the discussions prompt them to prepare themselves and their clients for mediation. Actual practice among mediators and among parties and counsel varied widely. Many mediation training programs have traditionally not paid substantial attention to the content of pre-mediation discussions.

A very high percentage of the survey participants endorsed some kind of mediator preparation, although participants disagreed about the preferred method. All but one of the parties interviewed by phone heavily endorsed both significant mediator and party/counsel preparation. The one party who claimed he had not prepared for mediation indicated that he wished he had.

Many mediators in our focus groups stated that it was part of their regular practice to have pre-mediation discussions. We found, however, that some mediators participate in court programs that require the mediator not to communicate with any participant prior to an actual mediation session, and some mediators chose to follow that practice in their private mediation practice. Others, again either by program direction or on their own, communicate their desire or willingness to receive a "mediation statement." These statements may range from totally confidential, to totally non-confidential, to a mix of both. Other mediators engage in a variety of other practices, with some mediators varying their practice with the perceived needs of a particular case. Some include in their preparation, with or without a mediation statement, joint meetings or calls with all counsel (and sometimes parties), private meetings or calls with each counsel (and

¹ For further discussions of the data, please see Appendices D (summaries of comments shared during focus group discussions), and E (party interview summaries).

sometimes parties), and review and analysis of pleadings, motions, briefs, transcripts, exhibits, expert reports, and other documents.

Among respondents to our written survey, more than 96% thought pre-mediation preparation by a mediator was important, very important or essential, and less than 4% thought it only somewhat important. Every single survey participant thought preparation was important. Our survey participants were about evenly divided between preferring private, individual calls with a mediator as opposed to joint calls. Eighty-five percent (85%), however, approved of private calls at least for procedural matters, and 76% for substantive matters. Our survey participants had a very strong preference for calls without parties. (Recall, however, that the survey participants almost all were counsel to parties and not parties themselves.) Most of the users and mediators believed that it is appropriate for mediators to be paid for their work before mediation sessions, generally at their normal hourly rates.

In addition, all the survey respondents felt it was important, very important, or essential for mediators to know the file and read the documents (100% users, 100% mediators), to encourage a constructive approach in the mediation (90% users, 88% mediators), and to discuss who will attend the mediation session (81% users, 96% mediators). All of the parties the Task Force interviewed reported that mediator preparation was essential. As one party interviewee expressed it, “The mediator is being paid so they should act like a professional and prepare.” Fifty-two percent (52%) of the users and 66% of the mediators felt it was important, very important, or essential to confirm the beginning and end time.

Perhaps the most interesting finding about the preparation phase was that sophisticated repeat mediation users wanted to have substantive input into the mediation process itself. Traditionally, the mediation process is controlled by the mediator and the outcome is controlled by the parties. We found, however, that in pre-mediation discussions, many users wanted to advise the mediator about process issues such as whether opening statements would be useful in a particular case, or about which issues in the case would best be handled in joint sessions and which in caucuses.

Another element of preparation concerns the goals the representatives, parties, and mediators have for the mediation. Eighty-eight percent (88%) of the users and 92% of the mediators surveyed indicated that in about half or more of their cases their goal is to settle the case. The survey respondents had the goal of minimizing the time, cost, and risk in a slightly smaller proportion of their cases (85% mediation users and 88% mediators indicated that minimizing the time, cost, and risk was a goal in about half or more of their cases). Satisfying the parties’ underlying interests is also an important goal for users and mediators in about half or more of their cases (81% mediation users, 92% mediators).

Although one might expect that civil mediation representatives and mediators would not be interested in the softer, more personal goals, a substantial number of respondents embraced such goals as giving parties a chance to tell their stories and feel heard (43%

users, 92% mediators), having clients get closure (46% users, 76% mediators), promoting communication between parties (52% users, 85% mediators), and preserving relationships (23% users, 47% mediators).

2. Analysis of Mediator Preparation. None of the approaches to mediation preparation described above can be said to be “right” or “wrong” under any or all circumstances, but in most civil cases in which parties are represented by counsel, some level of mediator preparation, including some form of pre-mediation communication with participants, is important in conducting a quality mediation. The exact approach to mediator preparation should ordinarily be governed by a variety of factors, including:

- the parties’ perceived value of what is at stake and the correlative cost of preparation;
- the cost effectiveness of a particular approach (e.g., it might be desirable to get a comprehensive, thirty-page mediation statement, which could be very costly for counsel to prepare—but it might be more cost effective to talk on the phone or in person with each side’s lawyer for 30 to 60 minutes and read a few briefs or pleadings which had been previously prepared in the normal course of the case);
- party/counsel/mediator preferences and concerns (e.g., in some circles it is thought inappropriate for a mediator to have “ex parte” communications with participants before the mediation starts, and in some limited instances a mediator may prefer purposefully to approach the entire mediation “cold” at a mediation session so that everyone witnesses the entire mediation experience in real time);
- previous mediator work with the parties' or counsel;
- The complexity of the issues and the number of issues presented in the case.

Mediators who confer with counsel/parties either privately or jointly may appropriately pursue a variety of goals in their communications, including:

- to discuss the overall procedure of the mediation in order to be certain that all participants have similar understandings of the process and to avoid surprises at the mediation;
- to discuss the mediator’s approach to mediation, especially with regard to offering analysis and opinions, and including discussion of whether the mediator needs permission to offer analysis or opinions;
- to discuss who will attend the mediation and who will have authority to settle and possible rescheduling if the “necessary” people will not attend (Settlement authority was a repeated theme of the parties interviewed. Several were blunt in their assessment that this was a part of mediator preparation. One party suggested that the mediator should include an agreement that specifically dealt with settlement authority that all participants had to sign in advance.);
- to gain insight into party interests that might not otherwise become apparent to a mediator until much later, if at all;
- to allow the mediator to begin to understand how the dispute might be settled and get ideas from participants about possible settlement approaches (e.g., will the disabled tort plaintiff consider a structured settlement, will the employer consider

- taking back the terminated employee, or will the plaintiff on the contaminated property consider conveying the property as part of a settlement and will someone at the table buy it?);
- to seek process input by discussing with participants whether “opening statements” by participants are desirable, to discuss or “coach” them on the content and tone of such statements, and to plan alternative approaches if such statements are not desirable;
 - to seek process input by discussing which issues might best be handled in caucus and which in joint session;
 - to determine whether further exchange of documents or other information, either before or at the mediation, might be productive;
 - to understand any previous settlement discussions;
 - to learn about the procedural posture of any litigation;
 - to understand potential impediments to settlement such as personality or emotional issues or hardened attitudes parties might have about the “merits” of a case or settlement approaches; and,
 - to identify anything about the case that might call for an atypical process for the mediation.

Our focus group mediation users, the majority of whom had attended upwards of 30 mediations, demonstrated a very textured understanding of the mediation process. Their desire for substantive and procedural pre-mediation discussions indicates a real evolution in the field and implies that a higher level of process design and substantive pre-mediation collaboration between mediators and users is a trend for the future.

3. Information and Analysis on Mediator Subject Matter Knowledge. One other aspect of mediator “preparation” warrants discussion here: mediator subject matter knowledge. To a very substantial degree, users endorsed the importance of subject matter knowledge, and in complex areas, subject matter expertise may be preferred. Those who value subject matter knowledge may be influenced in reaching their viewpoint by the understanding that a mediator may provide parties and counsel with opinions, analyses, or evaluations about certain aspects of the case or suggestions or proposals about how to settle—and that those with subject matter knowledge would be better suited to these tasks. Even in cases where users do not want the mediator to provide analytical assistance or to offer opinions, it is still often useful for mediators to have enough subject matter knowledge to understand the details and implications of the dispute, without requiring explanations from the participants during mediation sessions. This does not, however, take precedence over process expertise, which is essential for high quality mediation.

Depending upon the nature of the dispute, and the expectations and needs of parties and counsel, the mediator may need to be a lawyer or non-lawyer, or to have a particular kind of knowledge or expertise, say, in environmental, commercial or construction disputes, and perhaps even a narrower kind of expertise in one of those fields. It is perhaps not surprising in a legal environment in which lawyers today often specialize in somewhat narrow practice areas that those lawyers might want to direct their clients towards hiring

a mediator with a similar professional background. One cannot point to a right or wrong approach here; this is an issue where the best answer probably lies in the mind of the beholder. What is clear is this: those hiring mediators need to be thoughtful about what sort of knowledge or expertise they really need, or do not need, in a mediator, and they need to be clear with a mediator candidate about that as well; similarly, mediators need to be candid about their experience level. As the field continues to grow, one of the trends is likely to be increasing specialization on the part of mediators.

4. Information and Analysis on Preparation by Counsel and Parties. In addition to the mediator preparation discussed above, both the participants in the user focus groups and the party interviewees emphasized the importance of preparation by the parties and their counsel. Some counsel stated that one of the benefits of pre-mediation discussions with mediators is to prompt them (the lawyers) to prepare themselves and their clients for the mediation. Participants in our party interviews were especially forceful on the need for party and counsel to be prepared, and they almost universally endorsed the benefits of pre-mediation preparation. Indeed, parties thought it important enough that some indicated that they made decisions to hire (or not hire again) lawyers on the basis of the lawyer's preparation for mediation. At least one said that he expected counsel to be as prepared for mediation as for trial.

While counsel's preparation for mediation differs from trial preparation, there are several areas of overlap. Counsel should routinely help their clients understand the issue in their case and in the opposing side's case in preparation for both mediation and trial, although counsel's explanation of what will happen during the two processes will certainly differ. While counsel should understand their clients' interests to prepare for both mediation and trial, a more creative discussion about the client's possible settlement options helps prepare clients for mediation.

The relative involvement of parties and lawyers in the mediation is sometimes a source of tension between party and lawyer, and between party and/or counsel and the mediator. Mediators get frustrated when lawyers behave as though they are in trial, and refuse to allow their clients to speak. On the other hand, lawyers and mediators alike report that it is sometimes helpful if the mediator and lawyer can have private communications, either in advance of the mediation or even during the mediation, concerning a variety of issues that might relate to the party's view of settlement or to the lawyer's behavior. It is worth giving thoughtful attention to the relative roles of counsel and client at the mediation. Mediators report that some of the very best—and some of the very worst—presentations made at mediations are made by parties. Careful preparation can allow for the former and, where possible, avoid the latter.

One of the chief benefits of pre-mediation communications between mediator and counsel and/or party is to inform the party how the process will work. Both mediator and counsel need to do whatever they can to ensure that all participants have a clear understanding of the process.

In situations where a mediator communicates with parties principally through counsel prior to mediation, it is important that counsel obtain a clear understanding of the process the mediation will follow, so that counsel can effectively communicate that information to the client. Different mediators (especially in different jurisdictions) will use somewhat different approaches, and increasingly the same mediator may use different approaches in different cases. Such nuanced differences can include use or not of opening statements by parties/counsel, use of caucus or not, mediator private meetings with one or more lawyers, mediator meetings with one or more parties without lawyers, etc. The trend appears to be to maintain flexibility on these issues, adjusting them based upon the needs of a particular case.

Counsel should be certain to ask their clients, “What is really important to you about this dispute, and why?” This question helps counsel develop additional settlement options based on the client’s interests, instead of solely focusing on getting or giving a certain dollar amount. In contrast, discussions about settlement options can be counterproductive if they leave a party with inflexible and unmanageable expectations about settlement outcomes that turn out to be unrealistic. Throughout the representation of a client, and especially in the context of preparation for mediation or another negotiation session, counsel should avoid unintentionally leading their clients to unrealistic expectations, through what may seem like ordinary, zealous representation. Mediators repeatedly told about counsel who asked them privately to help them lower their client’s unrealistic expectations about settlement, but then during mediation, in the presence of their clients, forcefully made the very arguments that support those unrealistic expectations.

Lawyers representing clients in mediation should be mindful of one statement we heard in our party interviews: lawyers should be as prepared for mediation as they are for trial. Another way to think of this problem is in these terms: in a very substantial majority of civil cases mediated, a settlement will be achieved during or as a result of the work done in mediation. Those cases will not reach the stage of a trial and most often not even reach a ruling on a dispositive motion. The case that is settled at mediation will be settled on the basis of what is known about the case at that time, which in many ways really means on the basis of the level of preparation achieved at that time. In general, parties who are better prepared for mediation will logically settle more favorably than those worse prepared. Parties and counsel thus are generally well advised to prepare to the fullest extent consistent with their perception of the value of the case.

Finally, there is a fundamental point here related to client satisfaction with their lawyers, that is only coincidentally related to mediation: in general, parties who feel that their lawyers have prepared them for what will happen at a mediation are happy with their lawyers, and those who feel that their lawyers have not adequately prepared them for the experience are not happy with their lawyers.

B. Case-by-Case Customization of Mediation Process

1. Information from Focus Groups, Surveys, and Party Interviews. Customization generally occurs during the preparation phase, but the trend towards increasing customization warrants attention as a separate category. Customization is the element of preparation that involves planning a mediation process tailored to the needs of the parties and the dispute. According to focus group participants, the timing of the mediation, exchange of information before the session, and whether to have opening statements, are all elements that can be customized to each dispute. One participant in our first interview group complained that mediators too often handle their cases with a “cookie cutter” approach. Many others voiced essentially the same sentiment, and praised flexibility as a quality desirable in mediators.

In terms of timing of the mediation, the survey respondents indicated that the preferred time for mediation is generally after “critical” discovery is completed, but before full completion of discovery (81% users, 77% mediators). There was disagreement among the mediators and the users about whether mediation would be appropriate before suit is filed (36% percent of the users and 78% of the mediators in our survey sample say that in half or more cases mediation would be appropriate before the suit is filed).

There is no consensus about preferences for particular procedures before mediation sessions, which suggests the importance of mediators orchestrating the preparation and tailoring it to individual cases. On the exchange of information before mediation, a majority of the respondents considered it important to send a memo to the mediator (62% users, 72% mediators). The survey respondents considered it less important to send a memo to the other side. Sixty-four percent (64%) of the users felt it was not very important to send a memo to the other side; forty-one percent (41%) of the mediators felt it was not very important. There was very little agreement on the importance of sending pleadings, discovery, and expert reports to the mediator. The respondents also felt that it was not important for the mediator to do additional research (63% users, 74% mediators).

One area in which participants offered a range of views about mediation customization relates to the usefulness of “opening statements” by either counsel or parties, at or near the beginning of mediation. Some find them very useful opportunities to inform the other side of their positions and to find out more about the other side’s position. This, of course, is precisely what the opening statement, used appropriately, is intended to do. Only about two-thirds of lawyer participants in our survey agreed that opening statements are useful in all, almost all or most cases; a substantial minority thought they were effective in half or fewer cases. In the focus groups, some felt that in high conflict cases with angry clients, explosive opening statements can generate more hostility, and grind the opposing parties more firmly into their opposing views, thus impeding settlement.

2. Analysis of Customization of Mediation Process. Some mediators and some parties and counsel may, almost by rote, rely upon essentially identical approaches to every case. In most cases, however, mediators would be best advised to make an effort to evaluate each case on its own, and develop a process, in coordination with parties and counsel,

that is best suited for that particular case. In one case, it might mean spending 30 minutes or less reading an important court order in the case. In other cases, it might mean a more complicated process involving a day or more of reading and conferring with counsel. More preparation is not always better. But more effective, more focused and more customized preparation usually is better. Of course all pre-mediation activities should be undertaken for a goal and used so that the parties don't perceive the exercise as useless and an unnecessary increase in cost.

Similarly, parties and counsel should pay close attention to how best to prepare for mediation on a case-by-case basis. Such preparation might include many different activities, such as: review and summarization of key documents; further factual investigation; additional legal research; assessment of case "value" by such methods as may be appropriate, even including where appropriate a mock trial; preparation of an opening statement or a written mediation statement; or a host of other activities. As stated above, opening statements sometimes promote the adversarial nature of the dispute that mediation is intended to eliminate, particularly when the statements are overly inflammatory in content or tone. Sometimes a mediator can effectively head off an opening statement of that sort through dialogue with counsel before the mediation session.

At other times, the inflammatory opening statement is exactly what the lawyer or party intends to deliver and the lawyer would not omit it under any circumstances. Sometimes a lawyer wants to impress either his own side, or the other, with the strength or at least ferocity, of the client's position, and believes that this is an appropriate means to do so. And, while many mediators would ordinarily counsel against such a statement, many have seen inflammatory, ferocious opening statements that were not counterproductive to settling the case, and might have had the desired impact of impressing the listeners with the intensity of the feelings and opinions being expressed.

Still, in most jurisdictions, opening statements are expected. Mediators and the counsel or parties with whom they communicate, should consider whether this expectation is appropriate for a particular case, and all be in agreement before the mediation on the fundamental issue of whether or not to use opening statements. Mediators should also exercise as much influence as seems appropriate in a given case about the content and tone of an opening statement, in an effort to make opening statements productive.

Mediators should listen to what counsel have to say about whether to have an opening statement. If both sides do not wish to do so, and the mediator disagrees, then the mediator may use up some "capital" with the parties unnecessarily in order to persuade them to do it the mediator's way. A creative mediator can usually find other ways to achieve the aims of an opening statement. It is important for mediators to listen to the parties or their lawyer's opinions on this issue, to be thoughtful about how to achieve the goals of opening statements, and when opening statements are used, to help the participants to make them as productive as possible.

C. “Analytical” Techniques Used by the Mediator

1. Information from Focus Groups, Surveys, and Party Interviews. The Task Force collected substantial amounts of data about user perceptions of mediators utilizing analytical techniques in mediation. We observed in our focus groups that many reasonably sophisticated mediation users in civil cases want mediators to provide certain services, including analytical techniques. A substantial majority of survey participants (80%) believe some analytical input by a mediator to be appropriate.

Other survey questions focused more specifically on user attitudes about specific kinds of input by the mediator. The following percentages of our users surveyed rated the following characteristics important, very important or essential:

- 95%—making suggestions;
- about 70%—giving opinions;

In addition, we asked survey participants to indicate the proportion of cases in which a particular activity would be helpful. The choices included: (1) in all or almost all; (2) most; (3) about half; (4) significant minority; or (5) very few or no cases. The following percentages of users thought the listed activities would be helpful in about half or more of their cases:

- 95%—ask pointed questions that raise issues;
- 95%—give analysis of case, including strengths and weaknesses;
- 60%—make prediction about likely court results;
- 100%—suggest possible ways to resolve issues;
- 84%—recommend a specific settlement; and
- 74%—apply some pressure to accept a specific solution.

On the other hand, nearly half of the users surveyed indicated that there are times when it is not appropriate for a mediator to give an assessment of strengths and weaknesses, and nearly half also indicated that it is sometimes not appropriate to recommend a specific settlement. User reservations on these issues should give pause to mediators who routinely offer such analysis and opinions.

Users had a wide disparity of opinions on how various factors might affect their view of whether it was appropriate for a mediator to provide an assessment of strengths and weaknesses. Anywhere from 25% to 60% of users indicated that the following factors would impact that decision:

- whether assessment is explicitly requested;
- extent of mediator’s knowledge and expertise;
- degree of confidence mediator expresses in assessment;
- degree of pressure mediator exerts to accept assessment;
- whether assessment is given in joint session or caucus;
- how early or late in process assessment is given;

- whether assessment is given before apparent impasse or only after impasse;
- nature of issues (e.g., legal, financial, emotional);
- whether all counsel seem competent; and
- whether mediator seems impartial.

There is an interesting contrast between user survey responses and mediator survey responses when asked about recommending a specific settlement. Eighty-four percent (84%) of users thought it would be helpful in half or more cases and 75% in most or all or almost all cases; only 18% of mediators thought it would be helpful in most or all or almost all cases, and only 38% thought it would be helpful in half or more. Similarly, when asked about applying some pressure to accept a specific solution, 64% of the users responded favorably for most or all or almost all cases and 75% for half or more cases. Among mediators, however, only 24% responded favorably for most or all or almost all cases, while only 30% responded favorably for half or more of their cases.

The opinions of the parties who were interviewed differed from those of the focus group users, who were largely lawyers, on the issue of whether mediators should state their opinions about settlement terms. While only a minority of lawyers objected to this, six parties out of twelve stated that mediator comments such as “I think this is the best offer you’re going to get,” are inappropriate. An even higher percentage, eight out of eleven parties, objected to mediators telling them what to do, as in, “You should accept this offer,” or “If I were you, I’d offer \$70,000 and be done with it.”

2. Analysis of Information on Analytical Techniques. In undertaking this review of the information we have obtained about mediator analytical inputs, and in recommending further study of this topic, we recognize that this discussion occurs at least on the edge of a topic that is something of a land mine in the field of mediation. The concept of “evaluative” mediation (which some would say describes some or all of the techniques discussed here) is often controversial. The term itself is understood to mean many different things to many different people.

Hence, we believe it is helpful to describe more fully the types of mediation techniques in question. Here is what we mean by the phrases “analytical inputs” and “analytical techniques;” the terms may include, for example, among other practices:

- Mediator discussion and analysis of legal and factual issues (including strengths, weaknesses, or both) without necessarily articulating conclusions and opinions;
- Mediator questioning about specific legal or factual issues, sometimes referred to as “reality testing:” E.g., how do you think a jury will evaluate your testimony about an oral agreement, when the other side has a writing that seems to say something very different? Will the court permit any testimony about the oral agreement? Isn’t that case you rely upon substantially distinguishable from these facts based upon...?;
- Mediator “opinions” or observations of this sort: Who knows what a jury might do with this case, but based on what I have learned about this case... it looks like a horse race to me that either side could win. Or, who knows...but I like the other

side of this case better than yours. Or, who knows...but I would agree with you that you should win this case, but I am having a very hard time with your damages claims—I wonder if a judge or jury might have the same difficulties that I have?;

- Mediator suggestions or proposals about settlement, sometimes based upon the mediator’s views of the “value” of the case, sometimes based upon the mediator’s views of “what the parties might accept,” and sometimes based upon both; and
- Specific mediator opinions, delivered to all sides, or delivered selectively only to one side or the other, about potential outcomes, dispositive factual or legal issues or settlement values.

Our data collection efforts produced no direct explanation for the substantial discrepancy in the survey responses between the mediation users (largely lawyers) and the mediators with regard to the appropriateness of offering specific solutions and applying pressure to accept specific solutions. We can make a reasonably educated guess, however, as to either or both of two possible explanations. First, mediators may be more conservative in using these techniques than users because they may be more aware of some of the potential disadvantages, in particular, the possibilities of undermining self-determination, a cornerstone of mediation ethics, and losing neutrality, another core ethical principal. Second, it is also possible that mediators are using these techniques, perhaps more often or more subtly than they realize.

Similarly, there is no direct explanation for the difference between mediation counsel and mediation parties with regard to mediators offering opinions about settlement terms. Perhaps, because the ultimate authority for settlement belongs to the parties, they are more concerned about what may be perceived as encroachments on that authority.

The Task Force has arrived at three principal conclusions concerning analytical techniques used by mediators. First, a substantial majority of lawyers who are repeat mediation users (again, in the arena of civil cases where parties are represented) favor use of what we have described as analytical techniques. Second, for those mediators who use analytical techniques, the fact that a substantial minority of lawyer mediation users and a higher percentage of mediation parties do not want mediator opinions or case analysis should caution mediators to consider the factors listed above before offering their analysis. Third, a different group should undertake to study and make recommendations about quality as it pertains to using these various practice techniques (see Section III. 4. below). It is important that such a group consider the issue in the context of the expectations of participants with particular attention to how mediators and participants can communicate more effectively and clearly about the kinds of analytical techniques the participants expect and the types of analytical inputs a mediator is willing to provide in alignment with mediator ethics.

The Task Force certainly does not purport to take a position on the ever-controversial issue of whether “evaluative” mediation is proper. We do recognize, however, that certain types of practice sometimes characterized in this way occur with great frequency, and that many lawyer users find it desirable, at least in the narrowly viewed field of

mediation of civil cases in which parties are represented by lawyers. This conclusion finds overwhelming support in our user focus group discussions and our surveys. We also recognize, however, that even among those who generally view these techniques favorably, there are concerns that the quality of the practice can vary widely, and that techniques sometimes could be used more wisely and more prudently. It is this quality aspect, for those who may find it appropriate to use analytical techniques in a particular mediation setting, that we believe warrants further study. We are not recommending that mediators simply give lawyers whatever they want, but we are recommending further investigation into possible contributions analytical input may make to high quality mediation practice.

D. “Persistence” by Mediator

1. Information from Focus Groups, Surveys, and Party Interviews. Many of the participants in our focus groups and interviews discussed several different aspects of the issue of mediator “persistence.” These include trying to keep people at the table, trying to get the case settled by exerting some “pressure,” and trying to get people back to the table after a mediation session fails to settle the case. In our survey, over 98% of the users thought persistence to be an important, very important or essential quality in a mediator, and 93% identified patience in the same way. Users expressed dissatisfaction with mediators who threw in the towel when negotiations became difficult. They want mediators who are consistently engaged in the process and willing to work hard to help the parties meet their needs and settle their case.

Ninety-three percent (93%) of users thought that if a mediation session ends without agreement but has some potential to reach one, then the mediator should follow-up with each side. Participants in our interview groups generally spoke favorably of mediation follow-up in an effort to resolve a matter that was not resolved at the mediation session, and some participants criticized mediators who did not do so. Eighty-two percent (82%) of users thought “exerting some pressure” was an important trait, very important or essential for a mediator to be effective. We also asked the question in reverse: whether it is important for a mediator to “refrain from using pressure,” and we got consistent responses.

2. Analysis of Mediator Persistence. It is clear that mediation users, both parties and lawyers, want mediators to be actively engaged in helping them to settle their dispute. Complaints about “potted plant” mediators were ubiquitous. Mediators need to use and refine their own intuition about when to be quiet and when to work the process. This is perhaps an area in which more mediation training could be useful.

Complaints also abounded about mediators who end mediations because the negotiations have become too difficult, either emotionally or substantively. It is precisely at these junctures that mediation users need mediators to be creative and to hold out the belief that these difficulties can be successfully overcome. Most mediation trainings cover techniques for “breaking impasses.” Perhaps more advanced trainings focusing on breaking impasse role-playing could be useful.

The large percentages of buy-in for the use of “pressure” may surprise some. Apparently, some users recognize, expect and even desire this characteristic in mediations, in the context of civil cases where parties are represented. It is important to note, however, the obvious distinction between “pressure” on the one hand, and coercion and intimidation on the other. Pressure may also refer to pressuring the parties to keep on working to achieve settlement rather than pressure to accept a particular outcome. It is important to note that “refraining from applying pressure” received the same percentage of support that “applying pressure” received. This is another instance in which we caution mediators to consider their ethical obligation for self-determination by the parties.

Some mediators may not be aware of the user’s desire for follow-up after a mediation that fails to settle the case. It is a simple matter for mediators to contact users, after the final session, to ask how things are going and ask whether they may be of any further assistance. In addition, at the conclusion of any “failed” mediation session, the mediator and other participants should consider discussing specific follow-up to be taken by the mediator and/or by counsel or parties. Again, this may be something that trainers will want to give more emphasis. It is clear that persistence is almost uniformly important to mediation users and paying attention to this aspect of mediation practice will help to improve mediation quality.

III. Discussion of Task Force Recommendations and Next Steps

We have learned a great deal from talking with mediation users. And while we hope that the observations and findings contained within this report will assist mediators, lawyers, parties, and program administrators to improve mediation practice, we know that there is still much to be done. Thus, we have six recommended next steps.

1. Development of Comprehensive Mediation User Guides. The Task Force has observed that mediation users come to mediation with a great variety of understandings and misunderstandings about the mediation process. The problem is even more pronounced among parties than among their lawyers. The Task Force has similarly observed that parties and their lawyers do not always achieve the level of preparation for mediation that is desirable. As a way to train both lawyers and parties, and to facilitate their mediation preparation, we suggest that the Section of Dispute Resolution Mediation Committee and Advocacy Committee be tasked with the preparation of a comprehensive mediation guide, perhaps in the form of a brochure or pamphlet, as well as a video that would explain the entire mediation process.

2. Further Examination of Quality—Other Mediation Contexts. It is important to reiterate the narrow focus of this Task Force on commercial and civil cases involving reasonably sophisticated users of mediation, and in which all parties are represented by counsel. Having conducted focus group discussions, surveys, and party interviews in that practice area only, we have limited our observations and conclusions to that practice area. We have not attempted to extrapolate to other practice areas, including for example

domestic disputes, personal disputes, and disputes in which parties are not represented by counsel.

We know that there are many differences between the types of mediation cases we have studied and other types of mediation cases, and that some of these differences are quite substantial. For example, the implications of mediator analytical techniques could be very different in family mediation cases or in cases where parties are not represented by counsel who can help their clients evaluate, understand and filter mediator analytical inputs. And, as a further example, court programs may find that some of our recommendations concerning mediator preparation are logistically impossible or cost prohibitive. There may be many other differences from one mediation context to another. Just as we recognize that there are severe limitations on the efficacy of mediators and parties/counsel taking a cookie-cutter approach to a particular case, so are there severe limitations on the validity of trying to devise singular training, rules or other guidance for the many different contexts in which mediation occurs.

These and many other concerns lead us to recommend that another group(s) might consider our recommendations in light of these differences and evaluate their usefulness in practice areas other than civil cases involving reasonably sophisticated users and in which all parties are represented by lawyers.

3. Further Examination of Quality—Training Implications. The Task Force has identified several aspects of mediation related to quality practice in civil cases in which all parties are represented by counsel that may have implications for the way in which mediation training is conducted. These relate to preparation for mediation by the mediator, counsel and parties; mediator subject matter expertise; customization of the mediation process; case-by-case analysis of the use of opening statements by counsel and parties; mediators using and/or refraining from using analytical techniques; and mediator persistence, including pressure and follow-up meetings and telephone calls.

We recommend that an appropriate Section committee or other group should examine whether there are any implications from our work product for how mediators are trained.

4. Further Investigation of Analytical Techniques. The Task Force recommends that the Section of Dispute Resolution appoint an appropriate group to examine how mediators can offer the highest quality service while using various analytical techniques in mediations, only in civil cases where all parties are represented by counsel. We have observed that counsel prefers such a style of mediation and that many mediators undertake to meet this demand and provide such service. We recognize, of course, that there is a controversy over whether mediation styles sometimes thought of as “evaluative” are appropriate. It is not our goal to recommend a study aimed at resolving that controversy. Rather, the goal of this study is to analyze and make recommendations, if possible, on the ways in which mediation services utilizing analytical techniques can be provided consistent with mediation standards of practice and providing the highest quality mediation services.

5. Promotion of Local Efforts to Improve Mediation Quality. As we conducted our focus group discussions around the country, representatives of several groups asked us if the Task Force could assist them in conducting similar sessions in their communities. Accordingly, a subcommittee of the Task Force has prepared a Guide for Convening Discussions about Mediation Quality (see Appendix F). The guide includes sample focus group questions and sample surveys for both mediation users and mediators. It encourages local groups to tailor these questions and surveys to be certain that they will cover the information that local groups are interested in collecting. The Task Force began its effort with broad questions and then focused them more specifically once themes became evident. Local groups should similarly customize and focus their process in response to what they learn.

We encourage interested state or local bar or other professional groups to use this Guide to hold focus group discussions with mediation users in their communities. As the work of the Task Force illustrates, these discussions can be very enlightening. Before undertaking this project, however, we offer two notes of caution. First, if the participants feel that the focus group facilitators are mediators who are there because they want to drum-up business, it may taint the process and color the results. Second, groups should view the results of their work as informative but not dispositive, unless a more rigorous effort to obtain a random and demographically representative sample is undertaken.

6. Pamphlets for Mediation Users and for Mediators. Finally, as part of its work, the Task Force has produced a very brief pamphlet for mediators. (To read the pamphlet please visit <http://www.abanet.org/dch/committee.cfm?com=DR020600>). The members of the Task Force are working on similar pamphlets for lawyers and parties. The pamphlets pose useful considerations for each group with regard to the Task Force's major findings related to preparation, customization, analytical techniques, and persistence. The Task Force hopes that this practical application of its research effort will help improve the quality of civil mediation.

Conclusion

We hope that this report and the Task Force's other work products generate discussion and analysis—and perhaps even controversy—beyond the specific issues we have identified here. We further hope that the quality of mediation in many walks of life, not just in the narrow arena of civil cases with represented parties, might benefit from such discussion, analysis and controversy. And finally, we hope that our findings are applied to mediation practice in a practical manner, and that they help elevate the quality of mediation services.

Appendix A — Task Force Members and Acknowledgments

Task Force Membership

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Acknowledgements

As Co-Chairs of the Task Force on Improving Mediation Quality, we want to acknowledge the many contributions of those who have worked to make this project a success.

First and foremost are the members of the Task Force. They are an extraordinarily talented group of highly experienced and dedicated conflict resolution professionals who devoted a great deal of time, energy, and creativity to this effort. They made complex arrangements for hosting more than 200 participants in ten focus group discussions in nine different cities, and they served as facilitators and note-takers during those sessions. They devoted many thoughtful and critical hours to shaping, refining, and reviewing the Task Force's work and attended numerous meetings and teleconferences. They have made presentations at conferences around the country to report on and discuss the Task Force's work. In addition, their generosity of spirit and unflagging good humor made this difficult project a delight. We are deeply grateful to all of them and thank them for their efforts.

Second, certain of our members led particular aspects of the project. John Lande designed the protocols and surveys for the focus groups, compiled the survey results and wrote several much needed and very useful summaries of our work along the way. Lisa Bingham designed our Tool Kit for Improving Mediation Quality and Leila Taaffe prepared protocols for conducting telephone interviews with mediation parties, arranged for and conducted the party interviews, and prepared an extensive report on those activities.

Third, a number of our members took responsibility for arranging and hosting individual focus group meetings in various cities around the country. In many instances non-members of the Task Force also played a critical role in these activities. Appendix B provides a complete list of the focus group locations and hosts.

Fourth, like most other ABA projects, this one would have been unimaginable without the contributions of its superb and gifted staff. Our special thanks go to Section Director Ellen Miller for her encouragement and thoughtful substantive insights, to Dispute Resolution Resource Center Director, Gina Viola Brown, the principal staffer for the project, who organized hundreds of drafts of documents, drafted documents outright, and massaged both documents and Task Force members, all with remarkable and relentless calm; and to David Moora, Section Staff Attorney, who has provided enormous assistance during the project's completion, turning ideas and comments from many Task Force members into a report of the whole group.

Finally, we are indebted to several officers and council members of the ABA's Section of Dispute Resolution: to then-Chair-Elect John Bickerman, then-Immediate Past Chair David Hoffman, and Council member John Lande for developing the idea of creating the Task Force and persuading the Section to pursue it; to then-Chair Robyn Mitchell for her appointments of Task Force members; to current Chair Larry Mills for his patient (though

persistent) and enthusiastic encouragement of bringing the project to conclusion; and, again, to John Bickerman for his gracious recognition that in spite of everyone's best intentions, this project simply could not be completed in a high quality fashion during his year's term as Section Chair.

R. Wayne Thorpe
Atlanta, GA

Rachel Wohl
Annapolis, MD

Co-Chairs

Appendix B — Locations of Focus Group Discussions

Atlanta

April 2006

Hosted by Phillip Armstrong,
Georgia-Pacific, LLC

Washington, D.C.

June 2006

Hosted by John Buchanan, Covington &
Burling, held at the JAMS Washington
D.C. Dispute Resolution Center

Washington, D.C.

Hosted by Debbie Masucci and John
Bickerman at the American Insurance
Association Meeting

Denver

October 2006

Hosted by Davis Graham
Coordinated by the Colorado Office of
Dispute Resolution

Toronto

October 2006

Hosted by the ABA Dispute Resolution
Section and held in conjunction with the
Section of Dispute Resolution Advanced
Mediation Institute

New York

January 2007

Hosted by Kathy Bryan, International
Institute for Conflict Prevention and
Resolution, held at the Essex House in
conjunction with the CPR Institute
Winter Meeting

Houston

January 2007

Hosted by Judge Frank Evans and Bob
Dunn at the South Texas College of
Law, Frank Evans Center

Miami

February 2007

Hosted by John Barkett, Shook, Hardy &
Bacon LLP

San Francisco

March 2007

Hosted by the United States District
Court for the Northern District of
California

Chicago

March 2007

Hosted by William H. Boies,
McDermott Will & Emery

Appendix C — Selected Resources

Charles Pou/March 17, 2006
Promoting Mediator Quality
Policy Documents and Advice

***ABA Section of Dispute Resolution.** Report on Mediator Credentialing and Quality Assurance (2003). *Concludes that it will be most productive to focus initially on mediator preparation programs, calls for developing model standards for these programs, and outlines one or more prototype systems of mediator credentialing.*
http://www.abanet.org/dispute/taksforce_report_2003.pdf

ABA Section of Dispute Resolution and Association for Conflict Resolution. Joint Mediation Certification Feasibility Study (2004). *Responses to an online survey of attitudes on issues relating to certification of mediators.*
<http://www.abanet.org/dispute/surveysummary41805.pdf>

ACR Mediator Certification Task Force. Report and Recommendations to the ACR Board of Directors (2004). *Concludes that the field needs certification. Recommends that ACR establish a program documenting that a mediator has completed a minimum level of training and experience using a “portfolio” of experience and training, completion of a written knowledge assessment, periodic re-certification, a waiver process, and potential decertification for violating standards.*
<http://www.acrnet.org/pdfs/certificationreport2004.pdf>

CPR-Georgetown Commission on Ethics. Principles for ADR Provider Organizations (2001). *Advises ADR provider organizations on the delivery of fair, impartial, and quality ADR services. It seeks to offer benchmarks for entities that provide extrajudicial dispute resolution services on responsible practice, quality, impartiality, access, disclosure, and confidentiality in day-to-day operations. Includes a taxonomy suggesting the diversity of these organizations and their goals and approaches.*
<http://www.cpradr.org/pdfs/finalProvider.pdf>

Hewlett Test Design Project. Performance-Based Assessment Methodology for Use in Selecting, Training and Evaluating Mediators (1995). *Consensus-based report setting forth general knowledge, skills, aptitudes, and other characteristics (“KSAOs”) related to mediators’ job performance, and offering a conceptual framework and methodology for using performance-based methods to assess candidate mediators’ likely success.* Republished electronically at <http://www.convenor.com/madison/performa.htm>

Maryland Mediation and Conflict Resolution Office. Meeting the Challenge of Mediator Excellence: Final Report of the Maryland Mediator Quality Assurance Committee (2004). *Consensus-based report describing the process used to create the new Maryland Program for Mediator Excellence, its results, and members’ reasons for*

their decisions. Outlines rationale for, and implementation of, a voluntary, multi-faceted strategy to promote quality mediation.

*** SPIDR Commission on Qualifications.** *Qualifying Neutrals: The Basic Principles (1989). A report addressing skills necessary for competent performance as a neutral, and basic principles that should influence policy for setting qualifications for mediators, arbitrators and other DR professionals.*

*** SPIDR Second Commission on Qualifications.** *Ensuring Competence and Quality in Dispute Resolution Practice (1995). Report that sets forth several questions for consideration by policy makers, practitioners, program administrators, and consumers interested in competent practice.*

SPIDR Environmental/Public Disputes Sector Committee. *Environmental/Public Policy Sector--Competencies for Mediators of Complex Public Disputes (1992). An overview developed by the Environmental/Public Disputes Sector that addresses what qualifies people to serve as a mediator in environmental and complex public disputes.*

Certification and Credentialing

Academy of Family Mediators. *Outline of Credentialing Basics and Application for "AFM-Approved Mediation Training Program." (2000). Extensive summary of credentialing literature and initiatives in credentialing ADR neutrals.*
<http://www.mediate.com/afm/afmtrainapp.html>

American Bar Association Section of Dispute Resolution. *Focus: Credentialing Mediators, Dispute Resolution magazine special edition (2001). Contains several articles, including looks at the new trends (Judy Filner), use of skills-based testing (including Ellen Waldman's, see below), and rosters and mediator quality (Peter Maida).*

Melissa Broderick, Ben Carroll, and Barbara Hurt. *Quality Assurance and Qualifications (2001). Outlines NAFCM's activities and policy views on mediator quality and credentialing. See also NAFCM's Self-Assessment Guide listed below.*
<http://www.ajc.state.ak.us/Reports/mediatorframe.htm>

Robert A. Baruch Bush. *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance, 19 Ohio St. J. Dis. Res. 965 (2004). Concludes that performance testing of mediators has been undermined by a premise that there is a single set of "core skills" needed to be considered competent. Says that recognition that different models of mediation are in use could make performance testing more practical and acceptable. Suggests what a pluralistic approach might look like.*

*** Sarah Cole.** *"Mediator Certification: Has the Time Come?" 11 Dispute Resolution Magazine 7 (2005). Generally anti-testing, pro-"holistic" in promoting quality.*

Albie Davis. How to Ensure High Quality Mediation Services: The Issue of Credentialing, in *Community Mediation: A Handbook for Practitioners and Researchers* 203 (Karen Grover Duffy et al., eds. 1991).

W. L. Dobbins. The Debate Over Mediator Qualifications: Can They Satisfy the Growing Need to Measure Competence without Barring Entry into the Market?, *Florida Journal of Law and Public Policy* 7 (1994-95). *Overview of some approaches to quality and their potential consequences.*

FDIC. Report of the FDIC/RTC Qualifications Panel, 5 *World Arb. & Mediation Rep.* 1, 17 (1994). *One federal agency's effort to draw on expert advice to develop selection criteria for members of its roster of mediators.*

Key Bridge Foundation. An Introduction to Mediator Credentialing (2000). *Contains basic data on mediator credentialing, its background, and issues involved.*
http://www.keybridge.org/med_info/credentialing.htm.

Craig McEwen. Giving Meaning to Mediator Professionalism, 12 *Dispute Resolution Magazine* 7 (2005). *Advocates focusing less on certification and more on "designing a strategy for strengthening communities of practice among mediators as the best hope for building both professionalism and quality."*

Craig McEwen, Nancy Rogers, Sarah Cole. Mediation: Law, Policy, Practice. In "Regulating for Quality, Fairness, Effectiveness, and Access" (Chapter 11). *Basic law school text discusses possible approaches to seeking quality, effective, fair mediation.*

James McGuire. Joint Certification: An Idea Whose Time Has Come, 10 *Disp. Resol. Mag.* 22 (2004). *Indicates that credentialing mediators is a growth industry, and summarizes some recent initiatives.*

Catherine Morris and Andrew Pirie. Qualifications for Dispute Resolution: Perspectives on the Debate (UVic Institute for Dispute Resolution 1994). *Written from a Canadian perspective, this volume offers a dozen articles that range from an overview of the qualification dilemma (e.g., complexity of the qualification problem: ideology, different perceptions of the purpose of ADR, differing backgrounds of the participants) to discussions of qualifications in several specific contexts (e.g., family, education, victim-offender) and critical perspectives (e.g., cultural factors, downside of professionalization and other routes to realizing mediation's potential).*

National Alternative Dispute Resolution Advisory Council of Australia. Who Says You're a Mediator? Towards a National System for Accrediting Mediators (2004). *Looks at some issues in seeking to ensure quality mediation.*
<http://www.nadrac.gov.au/agd/www/disputeresolutionhome.nsf/page/publications>

Linda Neilson & Peggy English. The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience,” *Mediation Q.* (Spring 2001). *A discussion of Family Mediation Canada’s rigorous multi-year efforts at certification.*

New South Wales Law Reform Commission. Training and Accreditation of Mediators (1991). *Research report and analysis on the need for training and accreditation of mediators* Concludes that while training is useful, it is not appropriate for the law to require that mediators receive particular training before entering practice and that regulation or accreditation was not currently required. As to court-affiliated ADR programs, however, the Commission felt the need for clearly articulated guidelines.

* **Charles Pou.** Assuring Quality, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality, 2004 *Jnl. Dis. Resol.* 303 (2004). *Draws on extensive interviews to describe ADR programs’ diverse approaches, including certification, in seeking to advance mediators’ competence and enhance the field’s credibility. Seeks to assess how employing any particular one of these varying approaches may produce differing results.*

San Diego Mediation Center. Mediator Credentialing: An Implementation Guide (1994). *Manual presenting the “San Diego model” -- a community program’s performance-based credentialing system -- and provides information on implementing it.*

Glenn Sigurdson. Inside the Space Between A & B and C, D, & E: Reflections and Suggestions on Practice and Quality (2002). *ACR Environment/Public Policy Section Critical Issues paper gives a helpful look at a number of practical questions.* available at <http://www.acrnet.org/pdfs/epp-criticalissues.pdf>

SPIDR Commission on Qualifications. Qualifications Sourcebook Compendium (1993).

Ellen Waldman. Credentialing Approaches: The Slow Movement Toward Skills-Based Testing Continues, 2001 *Dispute Resolution* 13. *Article examining approaches to credentialing, discussing relation between training requirements and mediator skills, and describing efforts to employ performance-based testing.*

Ellen Waldman. The Challenge of Certification: How to Ensure Mediator Competence While Preserving Diversity, 30 *U.S.F. L. Rev.* 723 (1996). *Addresses and critiques specific legislative proposals in California, and advocates credentialing and training methods that accept and embrace the diverse approaches to mediation now in use.*

Consumer Guides

Alaska Judicial Council. A Consumer Guide to Selecting a Mediator (1999). *A guide to picking a mediator for a particular kind of case.*

Chris Honeyman and Charles Pou. Finding and Hiring Quality Neutrals: What Every Government Official Needs to Know (1996). *Monograph based on workshops addressing issues like sources for agencies, quality, conflicts of interest, budget, and contracting.*
<http://www.convenor.com/madison/fh1.htm>

Ohio Commission on Dispute Resolution and Conflict Management. Consumer Guide for Selecting a Trainer.
<http://www.state.oh.us/cdr/brochures/cgtrainer.htm>

Ohio Commission on Dispute Resolution and Conflict Management. Consumer Guide: What You Need to Know When Selecting a Mediator,
<http://www.state.oh.us/cdr/brochures/cgmediator.htm>

Dispute System Design and Implementation

Lisa Bingham. Control Over Dispute-System Design and Mandatory Commercial Arbitration, 67 Law & Contemp. Probs. 221 (2004). *Provides framework for analyzing structure of dispute systems.*

Center for Dispute Settlement & Institute for Judicial Administration. Qualifying Dispute Resolution Practitioners: Guidelines for Court-Connected Programs (republished by Center for Analysis of Alternative Dispute Resolution Systems) (1993). *Includes model standards for court-connected programs to guide and inform those interested in initiating, expanding or improving ADR programs to which they refer cases.*
<http://www.caadrs.org/studies/nationstd.htm>

John Conbere. Theory Building for Conflict Management System Design, 19 Conflict Resol. Q. 215 (2001). *Compares different frameworks of dispute system design theory.*

John Lande. Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA Law Review 69 (2002). *Suggests using system design process to promote productive behavior in mediation.*
http://www.law.missouri.edu/lande/publications/lande%20good%20faith_system%20design.pdf

National Association for Community Mediation. Community Mediation Center Self Assessment Manual (2003). *A non-prescriptive assessment tool that seeks to help community mediation centers focus on improving general management, case administration, and training, development, nurturing, and handling of volunteers.*

Charles Pou. Issues in Establishing an EPA-Sponsored Roster for Neutrals' Services in Environmental Cases (1997). *Consultant's report to the U.S. EPA on creating and running an effective roster of neutrals (including qualifications for listing, assessing their performance, panel assignments, advising parties, and complaint handling).*

Ohio State University College of Law and the Supreme Court of Ohio Office of Dispute Resolution. Planning Mediation Programs: (2000). *Chapter Six, "Staffing the Mediation Program"* (pp. 6-9 through 6-17) includes quality issues. http://www.sconet.state.oh.us/dispute_resolution/deskbook/ch06.pdf.

SPIDR Second Commission on Qualifications. A Guide for Implementing the Seven Steps to Understanding and Ensuring Competent Dispute Resolution Practice (Draft 1997). *How-to advice for carrying out the Second Commission's report (above). Never finalized or published.*

Joseph Stulberg and Ruth Montgomery. Design Requirements for Mediator Development Programs, 15 Hofstra Law Review 499-533 (Spring 1987). *Offers some structural suggestions for putting together mediator training programs.*

Evaluation Reports and Research

Margaret Herrman, et al. Defining Mediator Knowledge and Skills, 17 Negotiation J. 139 (2001); Supporting Accountability in the Field of Mediation, 18 Negotiation J. 29 (2002); and On Balance: Promoting Integrity Under Conflicted Mandates, 11 Mediation Quarterly (No. 2) 123-138 (1993). *Summarize initial Mediator Skills Project work seeking to assess what constitutes skillful mediation. MSP creates materials in support of quality mediation in courts or government agencies, including validated tests for mediators and continuing education materials for mediation program staff, mediators, and trainers.*

Margaret Shaw. Selection, Training, and Qualification of Neutrals (1993). *A very useful, if dated, State Justice Institute report summarizing lessons learned from research on critical skills for effective neutrals and how they are best acquired.*

Roselle Wissler. The Effectiveness of Court-Connected Dispute Resolution in Civil Cases, 22 Conflict Resol. Q. 55 (2004). *Summarizes empirical research on civil mediation's effectiveness.*

Mediation and Quality Generally

Robert A. Baruch Bush. Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications, 1994 Journal of Dispute Resolution 1 (2004). *Report on a seminal study for NIDR of ethical challenges facing Florida mediators.*

Margaret Herrman (ed). The Blackwell Handbook of Mediation: Bridging Theory, Research, and Practice (2006). *Provides and applies broad theory of mediation.*

* **Chris Honeyman.** On the Importance of Criteria for Mediator Performance (1999). *Notes that parties look for some externally validated evidence of competence, and take whatever they can find. "This, I think, is the real reason why parties tend to give so*

much - often too much - weight to prospective mediators' credentials in law or substantive knowledge of the particular field which seems closest to the dispute.”
<http://www.mediate.com/articles/honeyman.cfm>

Chris Honeyman, et al. Skill Is Not Enough: Seeking Connectedness and Authority in Mediation, 20 Negotiation J. 489 (2004). *Says connectedness and authority goals “do not always play out in ways consistent with expectations as to the value of ‘quality’ or the usual image.” Relevant to relative importance of legal/technical expertise.*

John Lande. How Will Lawyering and Mediation Practices Transform Each Other?, 24 Florida State University Law Review 839 (1997). *Includes discussion of seven factors leading to and/or indicating “quality of consent.”*
<http://www.law.missouri.edu/lande/publications/lande%20FSU%20transform.pdf>

Michael Lang & Alison Taylor. The Making of a Mediator: Developing Artistry in Practice (2000). *Provides a structure and methodology for those committed to “the artful practice of mediation” to further their practice.*

* **Nancy Welsh.** All in the Family: Darwin and the Evolution of Mediation, 7 Disp. Resol. Mag. 20 (2001). *Describes diversity of mediator practices and party expectations in varied programs by analyzing similarities and differences between practices in five contexts: community, special education, dependency, labor-management, and civil.*

Appendix D — Summary of Comments Shared During Focus Group Discussions

A. Goals for Mediation

In the focus group discussions, participants identified various goals for mediation. Some see settlement as the primary or only goal. Even if the case is not fully settled, they value partial agreements and narrowing of issues. Other important goals sometimes include: (1) minimizing future time, cost, and risk of continued litigation, (2) retaining control of the matter, (3) satisfying clients, (4) prompting parties to focus on the case and take it seriously, (5) improving parties' understanding of the conflict and, if the case is not settled, of future litigation, (6) giving parties a chance to tell their stories and being heard, (7) promoting direct communication between the parties, (8) getting feedback from a neutral professional, (9) client catharsis, (10) preserving relationships, and (11) developing creative solutions, which focus on parties' underlying interests and may involve resolutions not available in court such as apologies.

B. Preparation

Many of the focus group participants emphasized the importance of preparation before people meet in mediation, though people have different ideas about the best way to prepare. At a bare minimum, mediators should carefully read all materials sent to them. Mediators should think about the substantive issues and possibly have a plan from the outset. Many people believe that mediators should also talk with the lawyers in advance (not merely send a memo), except perhaps if the case is relatively simple and does not warrant the effort. These conversations should at least address procedural matters, which might include who will (or will not) attend (which is relevant to having sufficient settlement authority), whether to provide pre-mediation memos to the mediator (and perhaps other parties), what (if any) additional information should be provided (such as pleadings, copies of key statutes or cases, and experts' reports), deadlines for submission of pre-mediation materials (and consequences of failure to submit the materials, such as cancellation of the mediation), encouragement of a productive and non-inflammatory tone, expectations about beginning and ending time of mediation, and whether parties would like mediators to express their opinions and under what circumstances.

These conversations may be done individually and/or together in person or by conference call. Some people and mediation programs object to pre-mediation *ex parte* conversations, at least if this involves substantive issues. If pre-mediation conversations address substantive issues, mediators should make sure that everyone is aware that these conversations are taking place. Mediators might ask lawyers what they need to know about the case, the parties, their key interests, the "real issues," and possible stumbling blocks.

Lawyers also need to prepare for mediation. Parties should complete discovery necessary to make good decisions, such as depositions and interviews that would be helpful for mediation (e.g., of parties, if appropriate). Insurance companies and defendants should be prepared in advance to have authority to pay an amount that may reasonably be needed to settle the case.

Lawyers should prepare clients before mediation, educating them so that they will have realistic expectations about the procedure and substance, especially if they are not repeat players. Lawyers should explain the mediation process, the mediator's role, the clients' role, and their role. At least for less sophisticated parties, lawyers should describe when it will be appropriate for them to talk and what things they should and should not say (e.g., describing the caucus process and what is appropriate to say in joint session and caucus). Several participants referred to clients' need for "catharsis," which they are more likely to experience if they are properly prepared.

Several participants expressed frustration about mediations where one side was not ready to mediate, whether due to lack of preparation and/or unwillingness to negotiate seriously and take reasonable positions. Some complained about use of mediation as "cheap discovery." Some complained about cases where one or more lawyers were not sufficiently sophisticated. In these situations, mediation can do more harm than good if it entrenches the parties' positions. One participant talks informally with opposing counsel advance to determine whether they are serious about mediating and will not mediate if they do not seem to be serious.

C. Case-by-Case Customization

The focus group participants disagreed about the timing of mediation but generally agreed that the timing of mediation depends upon the characteristics of each case. Some participants believe that it is important to mediate early in a case—sometimes before suit has been filed—to prevent investment of too much time and money and entrenchment of people in their positions. Some participants said that it should not be done until discovery is completed, so that people can make fully informed decisions. If mediation is premature, it can be an "empty exercise" and polarize the parties. One person said that complex cases with multiple parties should not be mediated early in the case. Some said that the timing should be decided on a case-by-case basis, possibly in consultation with the judge in the case.

When mediation is conducted, participants want the time to be productive. Some expressed concern that some mediations (in particular, court-ordered mediations) did not allow for enough time. Some expressed concerns about private mediations that seemed to take longer than needed and are too expensive. Several people noted that people focus seriously on settling toward the end of the day and suggested starting midday rather than the morning.

Participants expressed different views about where to conduct mediation, in particular whether it is appropriate to hold it in the office of one of the lawyers. Some said that it is

fine to mediate in a lawyer's office if there is not an appearance of bias. Others expressed concern that the lawyer hosting the mediation may be distracted by other matters. Some expressed concern about taking certain clients to law firm offices, such as low-income clients and medical professionals. One cautioned about not having sufficient space (if conference rooms are too small) or lack of privacy (if rooms are adjacent to each other and people can hear things said in the other room).

1. Opening Statements by Each Side. There was a difference of opinion about the value of each side making an opening statement. (This is not about the mediator's opening statement, which seemed unobjectionable if it is not too long.) A substantial number of participants believe that these opening statements are a waste of time or, worse, counterproductive as they can be inflammatory, resulting in polarization and entrenchment of people's positions. Others believe that opening statements are (or can be) helpful so that parties can speak directly to and hear directly from the other side, which can help them understand each other and the risks of continue litigation. This can help the parties feel engaged and not "left on the sidelines."

D. Analytical Input by Mediators

Many participants clearly expect and want mediators to express their views and would be disappointed if the mediators do not do so. Some, however, do not want it at all or want it only in certain ways or under certain circumstances. Mediators' expression of opinion varies along a number of dimensions including:

1. Types of opinion expressed by mediators
 - Pointed questions raising issues about particular aspects of a case (e.g., "Help me understand how the other side [or a jury] will buy X."). Although this may not seem like an expression of opinion, some participants consider it as such;
 - Analysis of the case, including assessment of strengths and weaknesses;
 - Prediction about likely court results (possibly in the form of a range and/or probability estimate);
 - Development of a specific option or proposal for consideration (including creative ideas that the participants had not thought of);
 - Recommendation of principles or specific options for settlement.
2. Whether parties or lawyers have explicitly requested mediator's opinions
3. Whether lawyers welcome mediators' evaluations to validate the lawyers' advice and soften the clients' position
4. Extent of mediator's knowledge, experience, or wisdom providing the basis for the statements
5. Degree of confidence, emphasis, or pressure expressed

6. Whether statements are given in joint session or caucus (though apparently almost always in caucus)
7. How early or late in the mediation process they are given
8. Whether evaluation is given before parties are at apparent impasse or only after parties have reached impasse
9. The nature of the issues about which the mediator gives evaluation (e.g., if evaluative statements are given about financial and legal issues and facilitative questions are asked about relationship issues)
10. Whether the mediator raises issues not previously identified by parties or lawyers
11. Sequence of facilitative and evaluative statements (i.e., whether evaluative statements generally precede or follow facilitative statements)
12. Impact on parties, which may be affected by whether they are represented and strength of their counsel and whether mediator's expression of opinion affects parties' perception of impartiality

E. Follow-Through and Persistence

Follow-through is patience and persistence but not stubbornness. Mediators need to know when to keep the mediation going and when to stop it. They should be prepared to stay late—and as long as it takes to finish the mediation.

Appendix E — Interviews of Mediation Parties

Below is a summary of the methods, procedures and findings from thirteen interviews conducted by the Task Force with repeat mediation parties. To read the full report, please go to the task force web site at <http://www.abanet.org/dch/committee.cfm?com=DR020600>.

A. Methods

In addition to organizing a series of ten focus group discussions, the Task Force expanded its inquiry by interviewing thirteen repeat mediation parties. One Task Force member was asked to do all the party interviews although all the Task Force members were encouraged to help identify individuals who might be considered “repeat users.” For the purposes of these interviews, a “repeat user” was an individual who served as the primary decision-maker/party in mediation and had served in that role at least twice. The Task Force decided that a “party” could be an attorney who served as the client in mediation. In these interviews, in-house counsel/corporate officers were often the repeat parties. Ordinarily, they had their own legal counsel at the mediation, however, and did not serve in dual roles.

For the most part, the Task Force interviewed mediation parties who had participated in complex civil mediation. These individuals had participated in mediation involving a wide range of civil case types: employment, contract, tort, environmental, intellectual property, neighborhood and commercial.

Five of the interviewees participated in mediation on the plaintiff’s side and seven participated on the defense side. One person stated that he was on the plaintiff’s side about 50% of the time and on the defense side about 50% of the time. The gender of the interviewees was fairly evenly split — six interviewees were women and seven were men.

B. Procedures and Questions

Each interview started with an overview of the interview process, assurances of confidentiality, and the opportunity to ask questions about the process before the interview started. Candidates were told that the interviews would take a minimum of 30 minutes; however, the average interview lasted 52 minutes. The interview questions addressed six content areas, including: 1) the subject’s professional background together with his or her experience in mediation; 2) the subject’s relationship with his or her lawyer before and during the mediation; 3) the subject’s perspective on selecting a mediator; 4) the subject’s preparation for mediation, including preparation with his or her lawyer; 5) the subject’s perspective on whether a mediator should offer suggestions or express opinions about resolution or outcome in court; and 6) a catch-all group of questions about mediation quality in general.

C. Findings and Observations

1. Mediator Selection. The parties' involvement in mediator selection included helping create a roster of acceptable mediators, providing input regarding whether the mediator should be from an internal roster or external roster, reviewing resumes of potential mediators that counsel had identified, checking with peers about specific mediators, conferring with counsel about the individual strengths and weaknesses of a short list of potential mediators, and making a final selection. All of the parties who played an active role in mediator selection reported that they tried to match mediators to cases. Six of the seven parties reported that they looked for a mediator with substantive knowledge of the applicable law or case type.

2. Preparation. Almost 100% of the parties prepare extensively for mediation. To prepare, parties immerse themselves in the case and learn it inside out. Their activities include things such as reviewing the file, reading all discoverable information, putting together the mediator's brief, preparing a statement for personal use in mediation, reading the mediation brief prepared by counsel, meeting/talking with counsel, talking with the risk manager, pulling and organizing documents that the party wants to have available in mediation, preparing a statement for personal use in mediation, making site visits, getting intelligence on the opposing party/counsel, preparing a thorough internal synopsis of the case with a specific bottom line, establishing a value for the case, understanding their BATNAs and WATNAs, giving oneself a pep talk before mediation about going in with an open mind, and reading about mediation.

3. The Role of the Mediator. The interviewees provided a rich and multi-layered perspective on the role they expected their attorneys to play before and during the mediation. These experienced professionals want their lawyers to play a variety of roles in the mediation. The roles were often specifically discussed and agreed to during preparation.

From the parties' points of view, prior to the mediation, their lawyers should:

- Discuss weaknesses of the case with the party and assess the risks involved if the case is not resolved in mediation;
- Provide a realistic view of the likely outcome of the case and discuss valuation;
- Ensure that the client is aware of all the facts and do what is necessary to prevent the client from being blindsided in mediation;
- Provide the party with the political lay of the land (how the other side will react to the high and low offer, and a description of the personalities of the other parties, opposing counsel, and the mediator); and
- Provide a perspective on how that type of litigation usually fares in the jurisdiction where it is filed.

During the mediation, parties wanted their counsel to:

- Provide information/documents gleaned from discovery;
- Work in partnership with the client, recognizing that it is ultimately the client's decision to settle;
- Help educate the mediator and the opposing side about the case, both legally and factually;
- Rely on the technical expert (the party) to provide information in a technical case;
- Tell the party when he is wrong;
- Act as a back channel to get information to the other side and the mediator; and
- Remember that the client has the final decision.

D. Mediators Making Suggestions or Expressing Opinions

Every section of the survey provided important information about party perspective on different facets of the mediation process. However, the section on mediator suggestion/expressions of opinion is one that many readers will turn to first. This topic is one that divides the ADR community and elicits an almost visceral response from many practitioners.

Questions included:

1. Is it okay for a mediator to make suggestions? Twelve of thirteen interviewees answered yes to the following question: “Do you think it is OK for a mediator to make suggestions—for example a mediator asks whether you would consider taking an annuity or a structured payout?” The reasons why parties thought it was permissible for the mediator to provide suggestions were varied. Several people perceived this approach by the mediator as just one more way to get to resolution. One party frankly exclaimed, “That’s what we’re paying for. Otherwise we could exchange offers over the phone.” Another party commented that the mediator could make a suggestion that he would never have considered making. “What is too small for one side to talk about may be very important to the other side.” Others noted that mediator suggestions were helpful because the mediator had a sense of what the other side will take.

However, some parties suggested that there were limits on making suggestions. One party believed a mediator suggesting various options was okay, but guidance was not. Another party reported that while it was permissible for a mediator to make suggestions, the mediator should not push her viewpoint or become an advocate for one side or the other. Another party noted that timing was important; suggestions were more useful toward the end of the mediation. Yet another interviewee reported that the mediator was free to make suggestions, but the party would usually go with his own alternative.

2. May a mediator tell a party what is likely to happen to the case in court? Again, a majority of interviewees believed it was permissible for a mediator to tell a party what was likely to happen if the case went to court. These parties generally believed that this

opinion was just another layer of information to consider in making a decision to resolve a case.

3. Should a mediator express an opinion about a settlement offer? One of the survey questions about mediator opinion was framed as follows: Do you think that it is okay for a mediator to express an opinion about a settlement offer? For example a mediator who says, “I think this is the best offer you’re going to get.” Only 50% of the twelve parties who answered this question believed this was an opinion that the mediator should provide.

4. Should a mediator tell a party what the settlement should be? The question about the mediator’s opinion about the settlement amount was phrased as follows: Do you think it is OK for a mediator to tell you what your settlement agreement should be? For example a mediator says, “You should accept this offer,” or a mediator says, “If I were you, I’d offer \$70,000 and be done with it.” Eight of the eleven individuals who answered this survey question did not believe that this was appropriate mediator behavior.

E. Pressure

1. Do you think it is OK for a mediator to apply pressure to get a settlement? Why?

Six interviewees said that it was not okay for a mediator to apply pressure to get a settlement. Five interviewees reported that it was acceptable.

The interviewees who stated that this was not appropriate mediator conduct provided the following explanations for their responses: 1) applying pressure eroded trust and communication; 2) there was a bit of pressure inherent in the process but there should not be external pressure; and 3) it makes him cringe.

The five interviewees who thought it was acceptable provided varied explanations for their answers. One person stated flatly, “It works.” Another person said that it was part of a mediator’s job to press hard for settlement — the parties wouldn’t need a mediator if they didn’t need pressure to get it done. The sentiment that pressure was necessary was echoed by a third interviewee. One party said that “pressure” may be the wrong word. Rather, one is talking about creating a sense of urgency in the parties that this is the day the case settles. The fifth interviewee said pressure should be a hard reality check, not based on sheer opinion.

F. Things You Would Change about Mediation

The answers to this question include both internal and external factors. Several interviewees believed that the mediation process should start earlier. One person said that not only should mediation occur earlier but it should occur more than once. Another person thought that a court ordered early settlement conference might help. The rationale for this position was that if they had something early on and pressured people to get things done, they might have a chance to settle things early on.

Several comments went to the public education process. Interviewees involved in workplace mediation wanted to see more promotion of the usefulness of workplace mediation and multi-party mediation. One person commented that he would like to see the demise of mandated mediation.

Conclusion

The party interviews were rich and substantive. The individuals who participated in the telephone interviews had a great deal to say about their relationship with their lawyers in the mediation process as well as their expectations for mediators. This is a very small sample but provides some tantalizing information. More time and attention should be devoted to gathering information from repeat mediation parties.

Appendix F — Tool Kit for Improving the Quality of Mediation in Your Geographic or Practice Area

Introduction

Background: This tool kit is based on the work of the American Bar Association Section of Dispute Resolution Task Force on Improving the Quality of Mediation. The Task Force developed the recommendations below and the documents attached over the course of more than 30 facilitated group discussions with mediation users and mediators. The Task Force conducted these discussions in nine cities in the US and Canada. A summary of comments shared during focus group discussions are available in appendix D.

Purpose: The purpose of this tool kit is to allow local and state mediation organizations and bar association to conduct their own local discussions, tailoring the discussion protocols and survey questionnaires attached to their local needs. This tool kit is not a guide to doing social science research in the academic sense. The recommendations below are merely guidelines and suggestions from the Task Force's experience conducting discussions on expectations, issues, concerns, and observations regarding local mediation practices. The Task Force encourages local and state groups to modify the process to suit their own local needs. If groups wish to conduct more rigorous social science research on mediation, we recommend that you partner with experts in your state's institutions of higher education.

Components: Section II lays out the steps for convening a discussion on mediation quality. Section III discusses how to convene an organizing committee and then how to identify and invite representative stakeholders to attend the discussions. Section IV covers how to use the information gathered during the discussions. Section V lists a number of documents that will assist organizing committees. The complete versions of these documents can be obtained from the Task Force's web site:
<http://www.abanet.org/dch/committee.cfm?com=DR020600>.

A. Recommendations for Convening Discussions about Mediation:

1. Convene a group of stakeholders to serve as the planning committee for the discussions. (See Section III on recommendations for convening a group of representative stakeholders.)
2. Create goals and strategy by having a planning committee discussion about specific goals. This tool kit assumes your overarching goal is to improve mediation quality in your geographic or practice area. Your group should discuss additional goals that you may have. These goals might include: substantive and procedural fairness, termination of disputes, satisfaction of disputants' substantive interest, efficiency in the process, increase in disputants' capabilities in handling other disputes, promotion of productive relationships, and increasing the market or demand for mediation.

3. Tailor the process of data collection to best meet the goals created by the planning committee. Ways to collect information include group discussions, individual in-person written or mail surveys (from mediators, lawyers, and/or their clients), telephone surveys or in-person interviews, and archival data (contained in case files or databases within the organization). When deciding on a data collection method, keep in mind some common data collection challenges, including the difficulty of getting opinions of parties who have only attended mediation once and the bias that can be created from surveying only repeat users of mediation services.
4. Review and revise survey protocols and questionnaires attached. The ABA Task Force used four separate tools for the group discussions:
 - a discussion protocol to use with a group of mediation users
 - a discussion protocol to use with a group of mediators
 - a questionnaire for mediation users
 - a questionnaire for mediators

The protocols provided structure for the discussions with small groups of mediators and users. The questionnaires were distributed at the end of these small group discussions and they allowed us to collect additional, individualized information. All of these protocols and questionnaires assume the participants are either repeat users of mediation services or mediators with significant experience. For guidelines on revising the questionnaires to meet your local needs, see the attached “Suggestions for Drafting Questionnaires.”

5. Determine the scope of your meeting. Do you want to learn about commercial mediation, family mediation, community mediation, or all of the above? Do you want to conduct these discussions with users of mediation services, mediators, or the parties themselves? The answers to these questions will help you focus your letter and your invitation list.
6. Find a location for your meeting. The ideal location is a law firm or other entity that has numerous small conference rooms available for the small group discussions.
7. Set the date for the meeting. The ABA meetings lasted almost three hours in total. We found that a 9-12 AM time frame worked best. When possible, we offered invitees breakfast as an extra incentive to attend.
8. Determine whether food and beverage will be served, and if so, how it will be paid for.
9. Determine what level of confidentiality you will provide to the participants in the discussions. Groups should be careful to protect confidentiality both in collecting data (without unnecessary identifying information) and storing data (to prevent unauthorized people to have access to the information). The participants will be more candid if they have assurances that their comments will be confidential. You can

inform the participants that their names and any other identifying information will be withheld from any notes or reports created. (The ABA Task Force group discussions were conducted under the auspices of the University of Missouri Institutional Review Board, which required strict confidentiality to protect the participants. Even though local groups are not subject these same restrictions, the ABA Task Force recommends that you establish and communicate a confidentiality protocol).

10. Draft the invitation letter. Where possible, the ABA Task Force asked a high-profile attorney, judge, or other appropriate person to sign the invitation letter. Make sure the person to whom RSVPs should be sent and the deadline for RSVPs is clear within the invitation letter.
11. Compile a list of invitees. For the ABA project, local and state bar associations, mediation associations, court-related programs, and ADR provider groups all helped identify appropriate invitees. The ABA effort found it to be somewhat of a challenge to identify individuals with significant experience representing parties in mediations. In many cities we relied upon word of mouth and informal networks to identify appropriate persons. We found it very difficult to identify parties (as opposed to representatives).
12. Send out the invitation letter at least 4 weeks in advance of the date scheduled for the meeting.
13. Create an agenda for the group discussions. A sample agenda is attached. The ABA Task Force focus groups typically started with a short (15 minute or so) welcome and explanation of the purpose and logistics of the meeting. We then split the participants up into smaller groups and adjourned to conference room for 90 minute or so discussions. At the end of the small group discussion, we handed out the questionnaires and collected them before the participants left the conference room.
14. Record the RSVPs. The Task Force developed a simple spreadsheet for keeping track of the RSVPs. A sample spreadsheet is attached.
15. Identify facilitators. Ideally, the facilitators will have some experience facilitating and will not be known to the participants in the focus group. We recommend assigning the facilitators to groups of 8-15 participants.
16. Identify note-takers. The Task Force found that graduate and law students made great note-takers. We asked the note-takers to load the focus group protocols onto their laptops and type the notes directly into the protocol. You will need one note-taker per focus group (8-15 people).
17. Send a reminder to the positive RSVPs a few days in advance of the meeting.
18. On the day of the focus groups, have a check in sheet. Be prepared for people who have not RSVPd to show up and even for people who did not receive an invitation to

show up. Try to separate participants into separate focus groups of mediators and users. If you have name tags for the participants you can write an identifier for the conversation group to which they are assigned on the name tag. You will likely find that the mediators want to sit in on the user focus groups. The ABA project tried to separate the groups so that the users would share their candid opinions about mediation, mediators, and the local mediation infrastructure.

19. Consider providing copies of the summary Task Force report so that participants can have a takeaway from the meeting.
20. After the focus groups, send thank you notes to all of the participants.

B. Recommendations for Convening an Organizing Committee and Inviting Representative Stakeholders to Participate in the Discussions

1. Those convening an organizing committee need to recognize that the field of mediation is diverse; it includes lawyer and non-lawyer mediators. Moreover, the field includes mediators in the court-connected sector, mediators who specialize in civil and commercial litigation, labor mediators, family mediators, community mediation centers, victim-offender reconciliation centers, public policy mediators, and mediators in government agencies and the executive branch, among others. The conventions of practice vary across sectors.
2. A state's bar does not always have representation from all sectors of practice. To maintain good relations and build the community of practice within a state, it is desirable to be inclusive. This is true even if the focus of your project is a single area of practice, for example, civil litigation. Having representation from other sectors may help insure good communication of your committee's purpose and mission.
3. Organizers should consider including representatives of those who make repeated use of mediation services, sometimes called users or consumers. These will vary with the focus of the discussion. For example, if the committee chooses to focus on civil litigation, it may wish to include a representative from the bench, plaintiff's bar, defense bar, insurance companies, and other repeat players. If the committee chooses to focus on family mediation, it may wish to include a representative from NGOs that specialize in providing services in cases of domestic abuse and social workers or family counselors. For small claims court mediation, organizers might consider representatives of the Better Business Bureau or Chamber of Commerce.
4. Academics from local colleges, universities, or law schools can provide many resources, including meeting space and student research assistance or note-taking support. Moreover, they may provide relevant expertise. For example, there may be scholars of family mediation in psychology or social work departments. Criminal justice scholars may have expertise on victim-offender mediation. Academics may also provide assistance with analysis of the information you collect.

5. Organizers should also consider including representatives from the policy community who are in a position to propose policy changes based on the committee's report. There may be an administrative office of the courts that has jurisdiction over mediation rules, for example.
6. One common method for identifying possible stakeholders is through what researchers call a snowball sample. The organizers should ask potential stakeholders whom else they think should be represented in the project. When all the stakeholders start to give a common set of names, you probably have an appropriate pool from which to select.

C. How to Use the Information Collected

1. The open-ended discussions suggested here collect information that is qualitative. It is not quantitative research. Questionnaires can provide quantitative data. However, the questionnaires will not provide data sufficient for social science research unless the people who fill them out constitute a scientific random sample of the appropriate population, and unless that sample is of sufficient size (30 at a minimum). The experience of the Task Force is that such a sample is very difficult to obtain. Thus, it is best to describe your results in terms of what your participants observe or report, not what the data shows or proves. See the attached, "Issues Doing Social Science Research" if your group would like to pursue social science research.
2. In deciding how to use this information, think about your original goals for these discussions. How do these discussions relate to your state's rules on mediation, to training, to court programs, or ethics guidelines? For example, this information can be used to develop policy on, among others, development of general protocols (such as guidelines and standards) in dispute resolution practice communities, training for disputants and professionals, use of dispute referral mechanisms, improvement of professionals' skills through peer consultation and mentoring, credentialing of dispute resolution professionals, and adoption and enforcement of legal rules. The information you collect can also be used to form the basis for ongoing discussions on dispute resolution policy.
3. When reporting your findings, take care to preserve the confidentiality of the people who participated in discussions. Also, consider the context of their comments and whether they might be perceived to criticize a specific, identifiable organization or court program or mediator. Edit the comments so that they are more general.
4. Remember that you should avoid drawing conclusions about causation. For example, it is inappropriate to conclude that a particular mediator practice either causes or inhibits settlement. Instead, you may report that participants in your group observed that this practice is either helpful or inappropriate. Your group might consider whether the results do seem to accurately represent the views of the population. Even if a majority of the population hold a certain view, if there is a significant minority

who believe otherwise, you should report this information so that decision-makers and practitioners can take it into account.

5. It may make your findings more accessible if you can report them in terms of what most or some versus few of your participants report. This requires coding the responses and counting frequencies. It is important to present the data in a way that audiences can easily understand. For example, often, a good quote can be very effective, or it may be helpful to use graphics instead of tables or numbers.
6. Analysis tools include different uses of statistics. Descriptive statistics are means or averages, percentages, and frequencies. These are the relatively easy to compile using the tools in typical spreadsheet programs.

D. Additional Resources

The Task Force developed a number of tools to assist local groups with convening their own discussions. The complete versions of these documents can be obtained from the Task Force's web site: <http://www.abanet.org/dch/committee.cfm?com=DR020600>.

1. Sample invitation letter
2. Sample agenda
3. Sample RSVP tracking spreadsheet
4. Discussion protocol to use with a group of mediation users
5. Discussion protocol to use with a group of mediators
6. Questionnaire for mediation users
7. Questionnaire for mediators
8. Suggestions for drafting questionnaires
9. Issues doing social science research
10. Summary of ABA Task Force on Mediation Quality Results