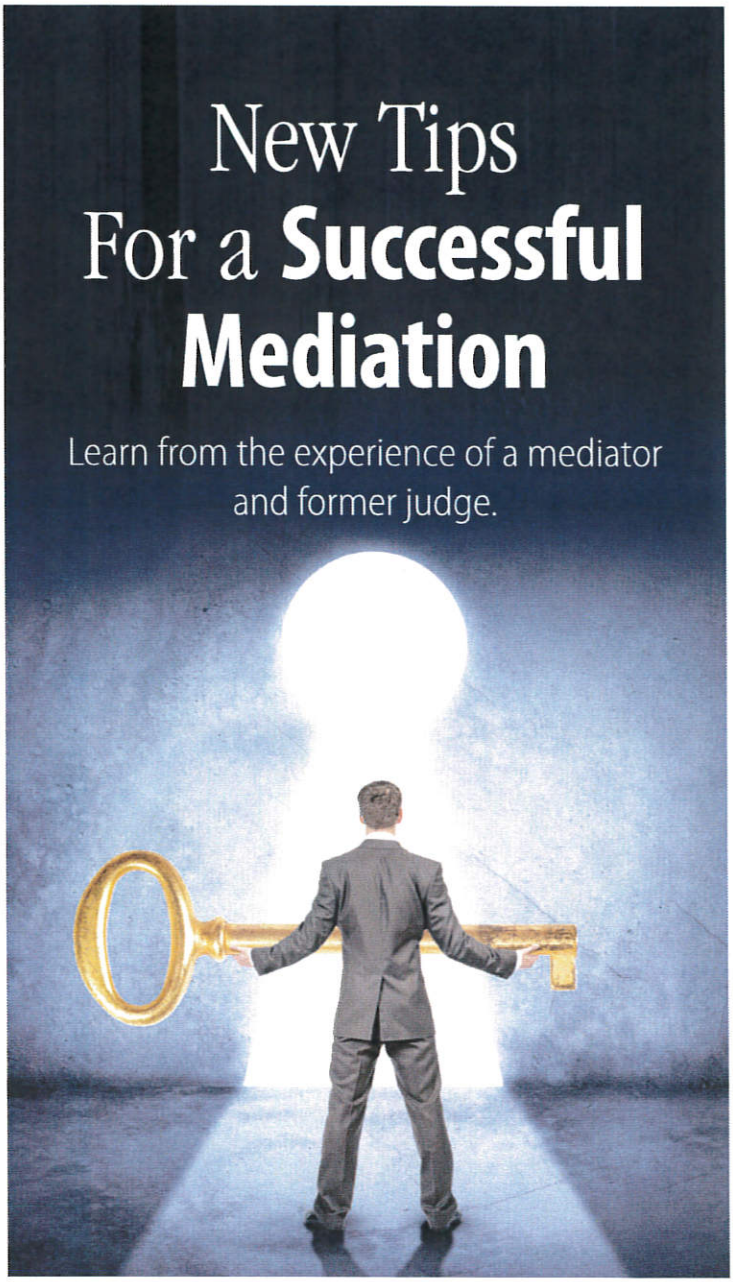
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New Tips For a Successful Mediation

Learn from the experience of a mediator and former judge.



BY JOSEPH P. SPINOLA

Since retiring as a Justice of the New York State Supreme Court in February, 2010, I have been fortunate enough to develop a full-time mediation practice. As a mediator, I get to work with exceptional trial attorneys and have had the opportunity to mediate over 3,000 cases. Based on these mediations, following are my tips to help increase your success at mediation.

1. Come to the table with a range of possible settlements, not an exact number. You cannot expect to just settle the case for what has already been offered or demanded. You can never expect to settle a case for what you want. Mediation is a fluid process. There must be flexibility during a mediation in order for it to be successful. A good settlement is when both sides have compro-mised.

2. Always have an idea prior to the mediation of what each side is demanding or offering. I have had experiences where there have been no prior negotiations, meaning the plaintiff has not made a formal demand and the defendant has not made any offer. Although I can still work with the parties to get the case settled, I find it better when the parties have had prior negotiations. Engage in some negotiations prior to mediating. If possible, always try to get a demand and offer before the mediation. This way you know the parameters (the last formal demand and last formal offer) before you walk into the mediation.

3. Send the mediator a brief Mediation Statement prior to the conference. As a mediator, I always appreciate when an attorney sends me a summary of their case. I mediate a lot of cases where I haven't received information in advance, but receiving a Mediation Statement prior to the mediation allows me to get a basic understanding of the case and saves time at the mediation conference. A Mediation Statement helps the mediator settle the case.

4. Make sure the opposing side is bringing their client whenever possible. Prior to mediation, make

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sure the opposing side is bringing their client. I settle a lot of cases where the plaintiff or adjuster are not there, but it increases the success of mediation if they are present. I find that when the actual plaintiff who is looking for a settlement attends the mediation, there is a much greater chance of reaching settlement then if just the attorney appears. Also, the presentation of the case with the actual client present is usually more persuasive. If possible, try to have the claims adjuster attend the mediation. It helps the adjuster determine whether or not the plaintiff would be favorably or unfavorably received by a jury in that venue. If the adjuster cannot attend, please make sure they are available by video conference or cell phone. Having all decision makers present decreases conference time and increases likelihood of settlement.

5. The venue of the case makes a difference. You cannot expect to settle a case in Nassau County for the same amount as you would in the Bronx or Brooklyn. In addition, the ethnic background of the plaintiff may also make a difference based on venue. The venue makes a difference and you should adjust your offer accordingly.

6. During the mediation, do not get into arguments with your opponent, it does not help. Never make any personal attacks on your adversary, because of the damage that can do. After the joint session, I always try to keep the participants separated during the mediation. I have had experiences where attorneys have insisted on arguing their case in front of the other party thinking that would help. It has been my experience, however, that it rarely helps. You can't keep trying your case at every round of the mediation. In fact, I usually then spend the next hour trying to calm the parties down in order to reach an agreement.

7. Always make offers and demands so that you have room to move. Most cases will settle if the parties are reasonable and continue to move during the negotiation. As a party to the negotiation, focus on what you can do to make progress toward settlement and not merely react reflexively or negatively to a movement that your opponent has made. If a party does not move to your liking, you can always shorten your increments rather than stop moving altogether. Movement breeds movement. It has been my experience that when each side sees movement by the other side, they are more interested and apt to continue with a difficult mediation. Each small move generates progress and helps the possibility of settlement.

8. Be honest with your mediator. He or she is there to settle the case. Tell the mediator your honest range of settlement and he or she will try to help you get there. If you are honest with the mediator, he or she will have a better idea of where the case can possibly settle and hopefully will settle for an amount that will make you look good to your clients.

9. Have patience for the mediation process. It is really a process that works. During negotiations, the parties should make movements to encourage the other side to move and create a real chance to settle the case. During the mediation, it never helps to react to another side's proposal with anger, frustration or resignation. The idea is to keep the negotiation going. Most successful mediations occur when the parties hang in there and don't give up on the process.

10. Plaintiff should provide defendant with as much documentary proof of their damages as possible. I have found that when the parties submit documents to each other in advance or at mediation it can help legitimize any settlement. It also helps the claims adjuster obtain the necessary settlement authority.

11. No backward negotiating. Never go backward during mediation. This will almost always result in a failed mediation. Prior to mediating, you should memorialize the last demand as well as the last offer.

12. Structured settlements help. A structured settlement can often help settle a case because the annuity that the insurance company purchases with the settlement proceeds pays the plaintiff

over time and this could be a solution for a plaintiff who is worried about continuing medical care or future medical costs. Structured settlements can also be very effective when they are tailored to the needs of the plaintiff laid out in the life care plan provided.

13. Consider litigation costs. Litigation takes time and costs money. The parties should always consider the cost of litigation. It also takes time and energy to prepare for and conclude a trial, and it usually disrupts one's normal life and opportunity to concentrate on productive activities.

14. It is never a good idea to give your adversary your walk away number. Even if you have a great relationship with the opposing party. Otherwise, it will be converted to a formal offer or demand.

15. If possible, research applicable reported settlements from the Jury Verdict Reporter that are from the same venue, same injury, and same age plaintiff. This allows the negotiations to proceed from a frame of reference.

16. In cases with high exposure and excess coverage, research appellate cases. I think it will serve you well to research similar cases in the appellate division so that you'll be able to negotiate based on what is a sustainable verdict in your case.

17. Make your biggest moves early and smaller moves later. It's important to make a good opening offer at the mediation. It will build trust with your adversary and set a positive tone for the mediation. Your first move should be the biggest and each subsequent move progressively smaller.

18. Do not make ultimatums. It may seem efficient to cut to the chase, but much theory suggests that you have to leave the other party some room to come back and feel they also have had an opportunity to negotiate. Good negotiation often involves a number of moves before people are satisfied that they have done their best.

19. Never put a time limit on a mediation. Each case must be given the appropriate amount of time necessary to reach a settlement. The process should not be rushed.

20. A great time to mediate a case is when there is a pending summary judgment motion. Both sides may be uncertain about the outcome and more willing to compromise at that time.

21. Determine lien amounts. Prior to the mediation, try to find out the lien amounts as well as the payback amount. Liens are a practical problem that we all have to deal with when settling cases.

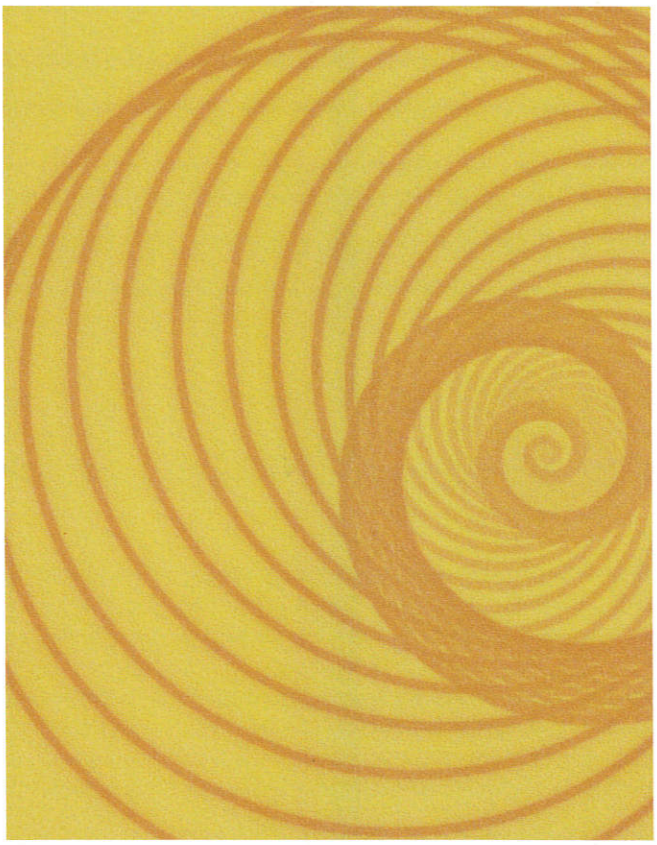
22. Obtain Medicare information when necessary. Prior to the mediation, obtain the Medicare information if the plaintiff is 62 or older or if he or she is receiving Social Security disability benefits.

23. Harness momentum in mediation. It's important to gain momentum in the mediation process. Therefore, lawyers should not take too much time (hours) between offers and demands.

24. Each side shares equally in mediation fees. I find it most productive when each side shares equally in the cost of the mediation. Otherwise, the party not paying has no incentive to negotiate fairly. Instead, they will just be there to establish a floor for further negotiations.

25. Dealing with co-defendants. If you know that a co-defendant has no money, they should not attend the mediation because it will only frustrate the process.

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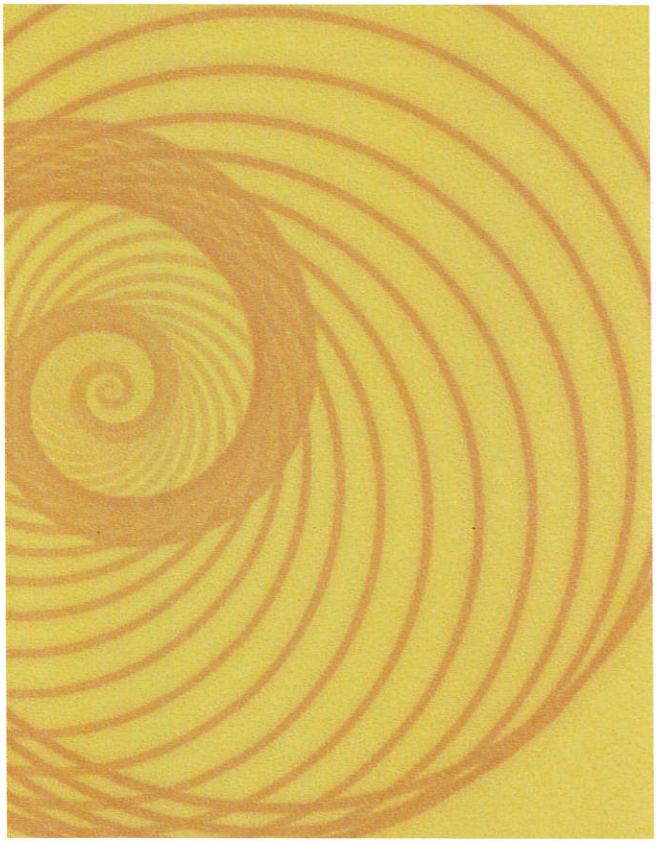


preparing for MEDIATION

AMERICAN BAR ASSOCIATION
Section of
Dispute Resolution

Other versions of this guide that are specifically designed to help parties prepare for mediation in family and complex civil cases are available at http://ambar.org/disputeresources.

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PREPARING FOR MEDIATION

Mediation may be used to help parties settle many different kinds of disputes including divorce, business, and employment disputes. This guide provides parties with information to help them prepare for mediation in all kinds of cases so that the mediation process will be as useful as possible.

Research shows that most parties are very satisfied with the mediation process and hopefully you will be too. Using this guide to prepare for your mediation should help you have a successful experience.



WHAT IS MEDIATION?

Mediation is a process in which an impartial third party (the mediator) facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute. Mediators help parties understand each others' perspectives and discuss options for settlement. Mediators do not decide who is right and who is wrong. Whether parties choose mediation or a court orders them to try mediation, the decision whether to settle is always up to the parties. The mediator has no authority to impose a settlement on the parties.

The time when the mediator and the parties come together to mediate the case is called a mediation "session." Some of the time during a mediation, mediators meet with both parties together, often called a "joint session." Other times during a mediation they may meet with parties separately, often called "private caucuses." The amount of time that a mediator spends with a party in a private caucus can vary. Mediators may spend more time with one party than the other.

In most states, there are rules providing that mediation is a confidential process, meaning that communications made during a mediation session by any participant (whether in a joint session or private caucus) cannot be used in court regardless of whether the parties reach an agreement. These rules may also prohibit, or the parties may agree to prevent other, public disclosures of communications made in mediation. Also, these rules may provide that communications made during a private caucus involving one of the parties and the mediator will remain private from the other party unless the party who participated in the private caucus permits the mediator to disclose any of the communications to the other party. The rules sometimes create exceptions to confidentiality. Your mediator is likely to discuss all these aspects of confidentiality with you but, if he or she does not, be sure to ask.

If the parties reach an agreement, the mediator may help the parties write it down. If the parties have lawyers, the lawyers usually draft any written agreement. Once an agreement is signed by all parties, it normally can be enforced in court.

Different states, courts, and mediation programs may have different mediation rules, so you should check about any rules governing your mediation.

Mediation is a process in which an impartial third party (the mediator) facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.



SELECTING A MEDIATOR

In many cases, the parties select or participate in selecting the person who will serve as the mediator in their case. Even if a court orders parties to mediate, the court may give the parties the chance to participate in selecting the mediator. If you can participate in selecting the mediator, consider what experience and qualities in a mediator would be most important in helping the parties resolve their dispute. If you know of particular mediators, consider whether any of them have the experience and qualities you think would be most helpful in your case.



WHY AND HOW TO PREPARE FOR MEDIATION

Before mediation, people sometimes feel worried because they don't know what to expect. You are more likely to feel satisfied with mediation if you prepare carefully ahead of time. This is especially important if you have never been in a mediation before. Even if you have mediated many times, however, it is still helpful to prepare for each mediation because the issues, parties, and mediators are different in each case.



CONSIDER GETTING ADVICE

Before you start mediating, you might want to discuss the issues listed below with someone you trust and who may be able to advise you. For example, you should consider getting advice from a lawyer if the case involves legal issues, if there is a lot of money or property at stake, or you want a legal expert to advise you before and/or during the mediation.

If you have a lawyer, you should work closely with that lawyer to prepare for the mediation. In addition to helping you collect important information, develop a negotiation strategy, and consider the issues listed below, working together will help you know what to expect of each other in the mediation process. For example, you will want to discuss whether your lawyer's role will be only to help you prepare for mediation and advise you after each session or whether your lawyer will also join you at the mediation session(s). If your lawyer is going to be at the mediation with you, be sure to discuss what roles each of you will play during the mediation session. You might also decide how you and the lawyer will express your point of view during the mediation and how you will communicate with each other, for example, what you should do if you want to talk with each other privately during the mediation.

If you don't have a lawyer and you have questions about the mediation process, you may want to talk with the mediator, an employee of the mediator, or staff working in a mediation office. Note that in some mediation programs, the mediator may be prohibited from having private conversations with the parties before the mediation session. Be aware that mediators are neutral third parties and are not allowed to provide legal advice to the parties in a mediation.



ISSUES TO CONSIDER BEFORE A MEDIATION SESSION

Even if you don't talk with anyone else before mediation, you should think about the issues listed below. You may not be able to give a definite answer to some of the following questions and your answers may change during the mediation process, but it is still helpful to seriously consider these questions ahead of time.

What is the conflict really about for you? How does your view of the conflict change, if at all, when you think about it from the other party's point of view?

Are some of the problems caused by misunderstandings or hurt feelings?

What issues do you and the other party agree about? What issues do you disagree about?

What information, documents, legal rules, or other things might cause the other party to change his or her mind about the issues you disagree about? What might cause you to change your mind?

Are there objective standards the parties could agree on that might help resolve the dispute?

What would you like to accomplish at the mediation? What does the mediator need to understand to help you accomplish your goals? What does the other party need to understand?

What would you need to feel satisfied with the outcome of the mediation? What do you think that the other party needs to feel satisfied? This may involve payment of money, an apology, a change in behavior, or other things.

Is there an ongoing relationship with the other party that should be taken into account?

If you don't reach agreement, what is most likely to happen? What is your best possible (realistic) alternative if you don't reach agreement? What is your worst possible (realistic) alternative? In most legal cases, this means developing a clear understanding of the strengths and the weaknesses of your case before the mediation.

How would you know if a possible agreement is better than the most likely alternatives? As you compare possible agreements with your alternatives, consider the costs, time and effort required, effect on your relationships with the other party and other people, and the value of just getting the matter resolved, among other things.

How comfortable are you with the risks of not reaching an agreement, including the risks of going to court?

What would you need to feel comfortable reaching an agreement at the mediation session? Is there someone you would need to check with before you finalize an agreement? If so, talk with the mediator about the possibility of having that person attend the mediation session or at least being available by phone.

What might the other party say or do that would make you upset, and what might you say or do that would make the other party upset? Think about what you can do to avoid getting upset and unnecessarily causing the other party to get upset.



HOW TO APPROACH THE MEDIATION SESSION

In mediation, you may hear things that you will disagree with and you may be asked hard questions. You should keep an open mind and be willing to consider various options for settlement. Although you may think that the other party is wrong about some things, you will be more successful if you at least try to understand the other party's views. So listen carefully to what he or she says and look for things that you agree about. This may cause the other party to try to understand your views and it may help you reach an agreement. When you disagree, it helps to be respectful toward the other party, which may cause him or her to treat you respectfully as well.



PROCEDURES FOR YOUR MEDIATION

In most cases, the parties play some role in deciding how the mediation process in their case will be conducted. Many states, courts, and mediation programs have rules about these procedures, so you should check about any rules governing your mediation. The mediator may also have procedures that he or she normally follows. However, some decisions about the mediation procedures may still be up to the parties and the mediator. Questions about mediation procedures that you may want to consider and discuss include:

- Will each party provide a memo to the mediator before the mediation session outlining the issues in dispute and whatever other topics the mediator requests? Will this memo be confidential to the mediator or exchanged with the other party?

- Will the mediator ask you to sign an agreement to mediate? If so, you might ask the mediator to provide a copy to you before the mediation session so you can review it and ask any questions you may have about it.

What information and/or documents should each party bring to the mediation session?

Who will be at the mediation session? Mediation is most effective when each party has in attendance someone with full settlement authority who is knowledgeable and can make independent decisions about the case. Will anyone participate by video, telephone, or be "on call" if needed?

Will the parties' lawyers attend the mediation session? Normally, if parties have lawyers, the lawyers do attend. Sometimes, lawyers advise clients outside of mediation session but do not attend, though the lawyers may talk separately with the mediator.

Should any professionals other than the parties' lawyers attend the mediation session? This might include financial, technical, or mental health experts, among others.

Does the mediator have a prior relationship with anyone who will be at the mediation (such as parties, professionals, attorneys)? If so, you should tell the mediator and the other side when you discover this. Despite the information you disclose, the mediator may still be able to be impartial and helpful but you, the other party, and the mediator will want to know about this from the beginning.

What time will the mediation session begin? How late might the session last?

Where will the mediation session(s) be held?

Will each party present its views in a joint session? If so, what would be most helpful for you (or your lawyer) to say?

What are the arrangements for keeping information confidential, including information provided to the mediator in caucus?

What can the mediator do that would be particularly helpful for you?

If the parties reach agreement, who would write it?

How much does mediation cost, if anything? How will the parties divide the costs?



WILL THE MEDIATOR GIVE SUGGESTIONS OR OPINIONS ABOUT THE CASE?

All mediators ask questions to help the parties analyze the situation and decide what they want to do. Sometimes parties also want mediators to analyze the strengths and weaknesses of the case, give opinions about what might happen in court, make suggestions about possible settlement options, give advice about making or accepting offers, or urge the parties to settle. Some mediators regularly give such opinions, some never do so, and some do so in some but not all cases. Usually, when mediators communicate this kind of information, they do so in private caucuses rather than joint sessions.

There are pros and cons to a mediator offering opinions, coaching, and giving case analysis. It depends on the dispute, the needs of the parties and the background of the mediator. Some mediators have web sites or provide bios that indicate their mediation approach. If you are represented by an attorney, your attorney may know the styles of mediators available for your case and help you choose one whose style fits your needs. Before and/or during a mediation session, you can tell your mediator whether or not you want to get his or her suggestions or opinions. **Even if your mediator gives you suggestions or opinions, you always have the right to disregard those suggestions and opinions and to make your own decisions, including a decision not to accept a particular offer or not to reach any settlement.**

APPROACHES TO NEGOTIATING IN THE MEDIATION

There are two general approaches to negotiation, sometimes called "positional" and "interest-based" negotiation. People may use both approaches at different times in a mediation; they typically don't use just one or the other.

In interest-based negotiation, the parties describe their interests and look for options satisfying the interests of both parties. In positional negotiation, both sides try to get the best result for themselves by exchanging offers.

Some people adopt positional bargaining as their negotiation strategy because they are familiar with it as a traditional way to negotiate. On the other hand, it risks angering the other side and losing the chance to reach good agreements. Interest-based negotiation provides the chance to reach the best possible agreement but some people are concerned that the other side would take advantage if they are too open in expressing their interests.

FOLLOW UP TO MEDIATION SESSION

It may take time to work through the issues in mediation, so you may not be able to resolve them right away. If you don't resolve all the issues at a mediation session, think about whether to follow up with the mediator by phone or schedule another mediation session. Sometimes parties need more information or time to think about a situation before they are ready to finally resolve a dispute.

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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 Observations[1]

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 activates 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.