

Alternatives

TO THE HIGH COST OF LITIGATION

DIGEST

ADR TOOLS

Following up on the recent release of the ABA Section of Dispute Resolution's mediation quality report, task force member and regular *Alternatives* contributor **John Lande**, of Columbia, Mo., discusses how to use the report's "Tool Kit for Improving the Quality of Mediation in Your Geographic or Practice Area." The tool kit is a step-by-step guide to holding focus groups that analyze the nitty gritty of mediation work, and producing a study that allows for application**Page 89**

CPR NEWS

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INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION

VOL. 26 NO. 5 MAY 2008

Improving Mediation Quality: You, Too, Can Do This in Your Area

BY JOHN LANDE

There are many reasons mediators want to improve the quality of practice in their geographic or subject area.

Most mediators have a strong sense of professionalism and sincerely want to help people in conflict. When parties and lawyers are in a difficult dispute, sometimes the only way they can get out of that jam is through skillful mediation. So many lawyers and parties have come to really appreciate the process.

Moreover, if parties, lawyers, judges, and observers are satisfied with mediation, the overall volume of mediation practice is likely to grow. Thus mediators have a shared interest in providing the best possible quality of mediation service in all cases.

To help achieve these goals, the ABA Section of Dispute Resolution created a Task Force on Improving Mediation Quality, which recently issued a report describing its two-year research project. See "ABA Task Force Releases Mediation Recommendations—And Calls for More Research," 26 *Alternatives* 79 (April 2008).

The task force focused only on private practice civil cases—such as commercial, tort, employment, and construction cases, but not family law or community disputes—where the parties are represented by counsel in mediation. The task force

studied the views of lawyers, parties, and mediators by using focus groups, surveys, and interviews. It held focus groups and conducted surveys in nine cities across the United States and Canada (including one set of focus groups organized by *Alternatives'* publisher, the CPR Institute, in New York in January 2007; *Alternatives'* publisher Kathy Bryan was a task force member.)

The task force findings focused on the following four aspects of mediation that the research subjects said are particularly important: (1) preparation for mediation by mediators and mediation participants, (2) case-by-case customization of the mediation process, (3) careful consideration of any "analytical" assistance that mediators might provide, and (4) mediators' persistence and patience. The task force has set up a web page containing the full report at www.abanet.org/dch/committee.cfm?com=DR020600.

The task force also published a "Tool Kit for Improving the Quality of Mediation in Your Geographic or Practice Area," which describes how regional or specialty practice groups can conduct similar projects. It provides suggestions based on the task force's experience. The tool kit is posted on the website, along with sample documents. This article highlights key points from the tool kit.

ADR TOOLS

The author is associate professor and director of the LL.M. Program in Dispute Resolution at the University of Missouri School of Law. He was a member of the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality and he took the lead in designing and analyzing the Task Force's research.

CONVENING STAKEHOLDERS, ESTABLISHING GOALS

The first step in investigating local im-

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TOPIC	CPR	ICC	ICDR/AAA	LCIA	UNCITRAL
Confidentiality of Award	Yes, except in connection with judicial proceedings ancillary to the arbitration. (R 18.)	Silent.	Yes, except by parties' agreement. (Art. 34 (4).) Nevertheless, the Administrator reserves the right to publish awards, rulings and decisions redacted to conceal the names of the parties and other identifying details or that have been made publicly available in the course of enforcement or otherwise. (Art. 27 (8).)	Not published without parties' prior consent. (Art 30.3.) General rule of confidentiality. (Art. 30.1.)	Yes, except by agreement of the parties. (Art. 32 (5).)
Miscellaneous					
Confidentiality of proceedings	Yes, except in connection with judicial proceedings ancillary to the arbitration. (R 17.)	Silent.	Yes. (Art. 34.)	General requirement of confidentiality with respect to "all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain." (Art. 30.1.)	Silent.
Mediation amidst Arbitration	Rules are supportive. Tribunal members barred from mediating and "will not be informed of any settlement offers or other statements made during settlement negotiations or a mediation between the parties, unless both parties consent." (R 19.)	Silent.	Silent but covered by AAA Rules of Ethics.	Silent.	Silent.
Limit of Arbitrator Liability	Yes, except for conscious and deliberate wrongdoing. (R. 20.)	General exclusion of liability for tribunal. (Art. 34.)	Yes, except for conscious and deliberate wrongdoing. (Art. 35.)	Yes, except for conscious and deliberate wrongdoing. (Art. 31.1.)	Silent.
Waiver of Compliance with Rule	Yes, if a party knows of the failure and fails to promptly object. (R 21.)	Yes. Wording may be argued to apply to jurisdictional claims as well. (Art. 33.)	Yes, if a party knows of the failure but proceeds with the arbitration and fails to promptly object. (Art. 25.)	Yes, if a party knows of the failure but proceeds with the arbitration and fails to promptly object. (Art. 32.1.)	Yes, if a party knows of the failure but proceeds with the arbitration and fails to promptly object. (Art. 30.)
Arbitrator compensation	Arbitrators compensated "on a reasonable basis determined at the time of appointment." The compensation of each arbitrator shall be fully disclosed to all tribunal members and parties. (R. 17.)	Determined by the ICA, not the arbitrators. The ICA uses a published scale (Appendix III (B)) but it may deviate from it in exceptional circumstances. (Art. 31 (2).)	Arbitrators compensated based upon their amount of service, taking into account their stated compensation rate and the case's size and complexity. Rate is set by negotiation through the ICDR "as soon as practicable after the commencement of the arbitration" or, if no agreement is reached, it is set by the ICDR. (Art. 32.)	Rates agreed prior to appointment, referred to a schedule of guidelines.	Arbitrators' compensation fixed by Tribunal (Art. 38) and shall be "reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case." (Art. 39.)
Arbitral Institution as Appointing Authority	N/A	Available in ad hoc proceedings.	N/A	N/A	N/A

Mediation Quality

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provements involves convening a group of stakeholders to serve as the project planning committee. The choice of stakeholders depends on factors such as the types of cases involved (e.g., general civil cases or a specific type of dispute), geographic location (e.g., nation, state, region, or locality), and any particular concerns that prompted

the project's initiation (for example, perceived problems or needs).

The planning committee might include mediators, lawyers, judges, court administrators, and representatives of bar associations and dispute resolution organizations.

Considering that mediators have varying mediation philosophies, the committee might include mediators with different perspectives. Organizers may invite representatives from other fields as appropriate.

For example, a construction mediation project might include architects and contractors; a family mediation project might include mental health professionals.

Mediation parties often have distinctly different perspectives from the professionals, so it is particularly important to elicit the parties' perspectives as much as possible. If appropriate, organizers might enlist repeat-users to serve on the planning committee.

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At the outset of the process, the planning committee should discuss the project's goals. Presumably, the general goal would be to improve the quality of mediation within the project's scope. The committee should discuss possible additional possible goals for mediation, such as increasing the levels of

- satisfaction of parties' substantive interests,
- substantive and procedural fairness,
- resolution of disputes, including efficiency in the process,
- parties' capabilities in handling other disputes, and
- quality of parties' relationships.

After the committee decides on its goals, it should consider the kinds of "products" it might develop. Examples of such products include educational materials, training programs for mediators or advocates, dispute referral mechanisms, mediator peer consultation and mentoring programs to improve professionals' skills, specialized ethical guidelines, court rules about mediation, credentialing projects, and initiatives to educate disputants and the public about mediation.

COLLECTING INFORMATION

The planning committee should consider what information it needs to be most effective

in its quality improvement project.

Each committee should tailor its process for getting information to fit its goals and circumstances. Collecting information can be time-consuming, so the

Boosting Quality

The focus: The ABA's mediation task force wants to spread its practice improvement efforts.

The tool: A how-to guide for holding local focus groups, designed to explore mediation users' needs, preferences, and dislikes.

The purpose: You, too, can do this—and jump-start a best practices initiative where it matters most, close to home.

committee should consider how much time and effort it can invest in the project, and weigh the value of collecting its own data or using data collected previously by others. The ABA task force report includes an extensive bibliography, with some Internet resources, so the committee should begin by learning about previous work in this area.

A committee deciding to collect its own data should plan the process realistically. To help plan such efforts, the task

force website includes sample focus group protocols, surveys, and related documents as well as memos with advice about conducting research and drafting surveys.

A committee may want to adapt the task force's process, which was particularly focused on getting mediation users' perspectives. It used focus groups, written surveys, and personal interviews to collect data from lawyers and parties as well as mediators. It started with focus groups that asked general questions about good and bad mediation techniques.

After analyzing the patterns of responses in the initial focus groups, the task force refined its questions to focus on specific issues, such as desirable qualities in selecting mediators, procedures in preparing for mediation sessions, and attitudes about various types of analytical assistance that mediators can provide. It also developed standardized surveys to get quantitative measures of people's views.

A committee should consider common challenges in collecting data—and be very cautious in interpreting it. The results can be strongly affected by the questions' wording and the sample of people selected to participate in a study.

For example, it often is difficult to collect data from parties who have attended mediation only once. Their views may be quite different from repeat users.

Ideally, researchers would use random samples to get representative results, though often this isn't practical. The results from non-random samples may not be accurate indicators of the relevant population's view, to some degree, and thus

Drawing Conclusions


Here's an excerpt from the "Tool Kit for Improving the Quality of Mediation in Your Geographic or Practice Area," part of the final report by the ABA Section of Dispute Resolution's Task Force on Mediation Quality:

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. . . .

. . . 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 be-

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

. . . 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. 

should be interpreted cautiously.

Research can help mediation stakeholders decide what actions to take. But it is not an end in itself in quality-improvement projects. Research can help inform decision-making but it should not be considered a substitute for thoughtful decision-making.

Even if a majority of subjects hold a certain view, if a significant minority believes otherwise, mediators and policymakers should not assume that everyone should follow the majority view.

For example, the ABA task force found that a majority of the lawyers it surveyed frequently want mediators to recommend a specific settlement and apply pressure to

accept a specific solution. Such a finding should not necessarily drive the conclusions of the project—and, in this context, the task force expressly declined to make a recommendation about whether mediators should use these techniques.

Indeed, the goal of research may be to conduct a systematic brainstorming process that identifies creative ideas or test reactions to some ideas rather than to precisely estimate the frequency of various views.

After a committee collects its information, it should review its goals and consider what steps would be most effective in achieving them.

Just as mediation in individual cases should be tailored to the circumstances of the cases, the mediation process in particular geographic or practice areas should be tailored to the circumstances in those areas. Quality-improvement initiatives can be part of a more general dispute system design process for mediation programs and practice areas to improve mediators' practice choices. The Task Force Tool Kit is a valuable guide to help mediation stakeholders improve the quality of mediation in their area. ■

DOI 10.1002/alt.20224

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The Survey Says: Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, But Party Sophistication Is Mandatory

BY GERALD F. PHILLIPS

In Part I last month, Gerry Phillips introduced his questionnaire on med-arb practices, and noted that discomfort with making the move to arbitrator from mediator—that is, same neutral med-arb—is receding. This month, he analyzes his survey results, question by question, and provides comments from well-known practitioners.

• PART II OF II •

Question # 1: "Do you believe that with the written consent of the parties, who are represented by competent counsel and are themselves sophisticated, an arbitrator may agree to serve both as the mediator and arbitrator?"

Tabulation of Question #1 Answers: "You

May Serve"—33; "Should Not Serve"—15.

As noted, 68% of those replying to this critical question said that they—as one respondent put it—believed that “with the written consent of the parties, who are represented by competent counsel and are themselves sophisticated, an arbitrator may agree to serve both as the mediator and arbitrator.”

ADR SURVEY

Since most arbitrators opined that arbitrators “May Serve” as the mediator and then as the arbitrator, it should be for the parties and their counsel to balance the risks and the benefits as to whether med-arb is appropriate for their dispute.

The risk-benefit analysis should be made by the parties and their counsel, not by the neutral. The arbitrators answering this question were not in a position to weigh the parties' determination to resolve the dispute in mediation in order to preserve their business relationship.

Arbitration actually is more likely to destroy that relationship, because of the nature of a third-party award. The tribunal couldn't

consider that the parties wanted the dispute mediated without paying two neutrals. The parties may want med-arb to assure that the dispute would be expeditiously resolved for economic or business reasons.

“I think same-neutral med-arb between well-advised ‘consenting adults’ can be a valuable and effective dispute resolution process,” according to survey respondent Lawrence R. Mills, founding partner in Seattle's Mills, Meyers Swartling.

Former Los Angeles Superior Court Judge Lawrence Waddington, a neutral in JAMS' Santa Monica, Calif., office, wrote, “Med-arb is a valuable addition to the constantly maturing world of alternatives to litigation. The increasing use of mediation by the bar has developed experienced lawyers who recognize a variety of techniques to settle cases, and med-arb is one. No mediator should ignore its potential for resolution of a dispute.”

Judith P. Meyer, of Haverford, Pa.'s J.P. Meyer Associates, answered the question by noting, “You may serve. In some cases, this is actually best for the parties. In one case we started with mediation but when the parties could not agree, they defaulted to arbitration with the mediator-turned arbitrator (in this case with no further evidence presented) making a binding settlement of the case.”

John S. Blackman, a name partner in

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The author is a full-time, Los Angeles-based neutral focusing on large complex commercial and entertainment disputes. He serves as a mediator and arbitrator on various panels, and is a founding member of the College of Commercial Arbitrators, a group discussed in this article. He is an adjunct professor at the Straus Institute at Pepperdine University School of Law, in Malibu, Calif., where he teaches ADR in the entertainment industry. The surveys discussed in this article are on file with the author; for more information, E-mail gphillips@pljl.com. He is a new member of *Alternatives'* editorial board.