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.

CONVENING STAKEHOLDERS, ESTABLISHING GOALS

The first step in investigating local im-
Mediation Quality

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improvements 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 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.

A committee deciding to collect its own data should plan the process realistically. To help plan such efforts, the task force’s process, which was particularly challenging 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

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.

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 believe 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.


**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.

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**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.”

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

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.

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