# Doing the Best Mediation You Can

## By John Lande

As a mediator who handles civil cases, what can you do to be most effective? What would lawyers and parties most appreciate in your work as a mediator? Conversely, what might you do that would "turn them off," impede the process, and reduce your chances of being selected again?

These were some of the questions considered by the Task Force on Improving Mediation Quality (Task Force) of the ABA Section of Dispute Resolution, which recently issued its final report.[1] In 2006, after the Section decided that a national credentialing program was not a feasible way to ensure mediation quality, it created the Task Force to investigate factors that promote high-quality mediation practice. The 17 Task Force members represented diverse geographic locations, mediation perspectives, and practice areas. They included lawyer and nonlawyer mediators, lawyers who represent clients in mediation, academics, and administrators of court-connected mediation programs.

The Task Force recognized that mediation norms vary widely by type of dispute, and thus it would not make sense to focus on all types of mediation. Rather, it focused on one area and anticipated that similar inquiries might be undertaken later for other areas. It 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 conducted research on the views of lawyers, parties, and mediators by using focus groups, surveys, and interviews. It held focus groups in nine cities across the United States and Canada, including Atlanta, Chicago, Denver, Houston, Miami, New York, San Francisco, Toronto, and Washington, D.C. At the end of some focus groups, participants completed surveys. More than 200 people participated in the focus groups, and 109 respondents completed the surveys. The Task Force also conducted individual telephone interviews with 13 parties in mediation.[2] The participants were selected because of their mediation experience with large civil cases, so this was not a random sample of civil litigators, mediators, or parties.

The Task Force used the data to inform its recommendations, recognizing that the subjects' views are not necessarily the best indicator of mediation quality. The Task Force concluded that there is not a one-size-fits-all best practice regime that would improve the quality of civil mediation. Rather, it recommended that mediators and mediation participants tailor the procedures to fit each case.

### What's a Mediator to Do?

The Task Force found that many mediation participants said they appreciate mediators who are not only skilled and knowledgeable, but who also have good intuition about meeting parties' emotional needs. They have been dissatisfied with some of their mediation experiences, and the Task Force was particularly interested in identifying strategies to satisfy mediation participants.

The Task Force findings focus 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.

### Preparation Before Mediation Sessions

The vast majority of the survey respondents said that preparation by the mediator and mediation participants is very important. Indeed, it helps to consider that "mediation" really begins during the preparation phase—not when everyone convenes at a mediation session. Some subjects emphasized that it is critical for a mediator to personally "be there" from the beginning.

Most of the respondents said that lawyers should send a mediation memo to mediators and that it is essential for mediators to read everything they receive (which may include additional documents such as pleadings, legal memos, or expert reports). They also generally said that mediators and lawyers should talk before the mediation session to discuss procedural and substantive issues, including the "real issues" and potential stumbling blocks. They overwhelmingly said that mediators should discuss who will attend the mediation session and confirm the participation of individuals with appropriate settlement authority. They also generally said that it is very helpful for mediators to encourage people to take a constructive approach in mediation.

These discussions can prompt the lawyers to prepare themselves and their clients, which can make a big difference in the success of mediation. The parties should have an appropriate understanding of the process, the issues, and their real interests. They should expect to hear things that they will disagree with, and they will probably be asked challenging questions. Parties should be open to reconsidering their positions based on the discussions in mediation.

The Task Force research suggests that mediators should use the preparation process to help identify the parties' goals. Not surprisingly, the vast majority of survey respon-

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dents said that in most cases, settling the case and minimizing the time, cost, and risk are important goals. Almost as many respondents said that satisfying the parties' underlying interests is also an important goal in most cases. Substantial proportions of respondents identified additional goals, such as giving parties a chance to tell their stories and feel heard, having parties reach closure, promoting communication between parties, and preserving relationships. So it would be a mistake for mediators to assume that "it's just about the money" or that the only goal is to settle the case. Instead, mediators should be attentive to the parties' goals, starting before the first mediation session.

Mediators and mediation participants should use their judgment in applying these principles in particular cases. For example, the amount at stake in some cases may not justify a large investment of time and cost for preparation. Moreover, in some practice settings, such as in certain court mediation programs, it is considered inappropriate for mediators to have ex parte discussions with the lawyers about substantive issues before a mediation session convenes.

### Case-by-Case Customization of the Mediation Process

The Task Force study found that mediation participants generally said they wanted the mediation process to be tailored to their needs rather than a standardized "cookie cutter" procedure that is used in every case. For example, one lawyer said that his biggest frustration is when mediators use a "formulaic recipe" that does not fit the participants and their goals. Indeed, participants said that they appreciated getting coaching from mediators about the process, such as how to frame an argument or whether to discuss particular issues in caucus or joint session.

Mediators can play an important role in scheduling events related to mediations. Most of the survey respondents preferred scheduling mediation sessions to occur after "critical" discovery is completed, but before discovery is fully completed. Mediators may coordinate scheduling of mediation with critical discovery or other events and arrange for the timing, process, and content of information exchanges before the mediations.

Survey respondents varied in their preferences about some aspects of the preparation process. Some said they prefer conference calls, while others preferred separate conversations between mediators and the lawyers. They also differed about whether, in addition to providing mediation memos to the mediator, each side should provide them to the other parties.

In customizing the process, mediators and lawyers may discuss whether each side should make opening statements at the beginning of a mediation session. Although many mediators and lawyers assume that each side should always give opening statements, a substantial minority of survey respondents said they believe that such opening statements are not helpful in most cases. Some expressed concern that if some participants are especially angry, inflammatory opening statements could be counterproductive. Moreover, opening statements may not be needed if there has been a lot of preparatory work before the mediation session and if it makes sense to go right into caucus after the mediator's opening statement.

Mediators would often benefit from eliciting participants' procedural preferences and following them if appropriate in a particular situation. Mediators who try to impose their process may damage their rapport with the participants and lose some of their confidence that may be needed to help resolve the substantive issues.

### Careful Consideration About Providing "Analytical" Assistance

The Task Force research suggests that many mediation participants want mediators to use various techniques to help analyze the case and promote settlement, though some survey respondents had reservations about certain techniques. Table 1 shows the percentages of the mediation participants and mediators who said that specific techniques would be helpful in most mediations. Almost all of the mediators and participants said that mediators

**Table 1.**
**Percentage of Survey Respondents Who Believe That Certain Techniques Would Be Helpful in Most Mediations**

| Technique | Mediation Participants | Mediators |
|---|---|---|
| Ask pointed questions that raise issues | 95 | 96 |
| Give analysis of case, including strengths and weaknesses | 95 | 66 |
| Make prediction about likely court results | 60 | 36 |
| Suggest possible ways to resolve issues | 100 | 96 |
| Recommend a specific settlement | 84 | 38 |
| Apply some pressure to accept a specific solution | 74 | 30 |

can be helpful by asking pointed questions and suggesting options to consider. Almost all of the mediation participants, but only two-thirds of the mediators, said that it is usually helpful for mediators to give their analysis of the case. By contrast, a substantial majority of participants and only about one-third of the mediators said that it is helpful in most cases for mediators to make predictions about likely court results, recommend a specific settlement, or apply some pressure. The interviews with parties found that many of them were uncomfortable with mediators giving their opinions or recommendations about specific settlement options.

These results suggest that mediators should be cautious about using the more controversial techniques, such as making predictions, recommendations, or applying pressure. Although many lawyers may want mediators to use these approaches, the Task Force research suggests that many parties and a substantial minority of lawyers do not want the mediators to do so. For example, one lawyer did not "get the point" of going to mediation if mediators don't give their opinions. By contrast, another thought that doing so can be "very, very dangerous."

In actual cases, there are many variables that affect the appropriateness of the particular techniques. Substantial majorities of participants and mediators said that all of the following factors might affect their judgment about the appropriateness of a mediator giving an assessment of the strengths and weaknesses of a case:

- whether the assessment is explicitly requested
- the extent of the mediator's knowledge and expertise
- the degree of confidence the mediator expresses in the assessment
- the degree of pressure the mediator exerts on people to accept the assessment
- whether the assessment is given in joint session or caucus
- how early or late in process the assessment is given
- whether the assessment is given before apparent impasse or only after impasse
- the nature of issues (e.g., legal, financial, emotional)
- whether all counsel seem competent
- whether the mediator seems impartial

These issues touch the still-controversial debate over the propriety and value of facilitative and evaluative mediation techniques. The Task Force expressly declined to take a position in this debate. The research findings suggest that mediators who contemplate using the techniques described above should consider these issues carefully.

## Mediators' Persistence and Patience

Survey respondents overwhelmingly said they believe that it is important for mediators to be patient and persistent. Participants expressed dissatisfaction if mediators are merely "messengers" or "potted plants" or if they give up too easily when negotiations become difficult. These are situations when the antagonists need mediators the most, so it is precisely at these times when mediators should work the hardest to help people deal constructively with the challenges. If a mediation session ends without agreement but has some potential to reach one, the vast majority of participants think that the mediator should contact the lawyers after a week or two to ask whether they want additional help from the mediator—and some participants criticized mediators who did not do so. One person summed it up this way: "Never stop talking if there is any hope."

## Continuing to Learn About Mediation

Mediation is a very difficult craft, and virtually all mediators would benefit from continuing to learn about it. Many mediators attend continuing education programs to learn about mediation theory and practice skills, legal issues, and new developments in the field. Mediators may benefit from additional ways to develop their professional skills such as routinely debriefing mediations by writing what went well, where the mediation seemed stuck, and how they might handle similar situations differently in future mediations. Mediators can also routinely ask lawyers and parties to complete confidential feedback forms after mediations. Similarly, some mediators informally solicit feedback from lawyers after mediations. Some mediators ask colleagues to observe their mediations and give feedback (with the consent of the participants). Mediators can also participate in "peer consultation groups" to use a structured process for learning from actual case experiences.[3] Mediators may also work to improve mediation quality generally in their area. The Task Force developed a tool kit to help practitioners adapt the Task Force process to address participants' needs in their particular area. The tool kit is available on the Task Force's website, which includes model forms. ◆

## Endnotes

1. This article is adapted from the Task Force's Final Report, which is available at www.abanet.org/dch/committee.cfm?com=DR020600. The report includes detailed data of the findings summarized in this article. It also includes recommendations for possible follow-up initiatives, such as developing materials for mediators, lawyers, parties, and trainers; considering whether to undertake similar projects for other types of cases; and examining how mediators can use analytical techniques in ways that maintain a high quality of mediation practice.

2. Most of the Task Force data are from focus group discussions and surveys collected at the later set of focus groups. Almost half of the survey respondents said that their most common role in mediation was as a mediator, and about half said that their most common role was as a lawyer. About 3 percent said that their most common role was in another capacity, presumably as a party representative. Responses from those whose most common role was as a mediator were analyzed separately from the other respondents. In this article, the term "mediation participant" refers to lawyers and parties. Data from participants came primarily from lawyers. To get parties' perspectives, the Task Force interviewed 13 nonlawyer participants, and specific references to data from parties were derived from those interviews. "Respondents" refers to people who completed the survey, and "subjects" refers to everyone who provided data for the study.

3. For further discussion of these ideas, *see* John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 OHIO ST. J. ON DISP. RESOL. 619, 655–58 (2007).