Appendix E – Interviews of Mediation Parties

The Task Force on Improving Mediation Quality of the American Bar Association Section of Dispute Resolution Report: Interviews of Mediation Parties

METHODS

After gathering information from attorney advocates and mediators about mediation quality issues, The Task Force on Improving Mediation Quality of the American Bar Association Section of Dispute Resolution, (hereinafter **"**the Task Force") expanded its inquiry by interviewing thirteen repeat mediation parties. For the most part, the Task Force interviewed mediation parties who had participated in complex civil mediations.

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

In addition to asking task force members to identify firms/individuals who might be able to identify parties, at the conclusion of most interviews, the interviewer asked the interviewee if he or she knew of someone else who had been a repeat party that the interviewer could approach about the possibility of participating in the interview series.

Because of mediation confidentiality issues, it was somewhat difficult to identify repeat mediation parties. The interviewees, however, were a diverse group both from a geographic and industry background.

RECRUITMENT

The interviewer called and/or e-mailed possible interviewees about their interest in participating in this endeavor. In the initial communication, the interviewer provided an overview of the project and promised confidentiality. Candidates were told that the interviews would take a minimum of ½ hour but they could continue the interview if they had more to say. Ten interviewees continued the interview beyond the ½ hour mark to answer all the questions about mediation. The average duration of an interview was 52 minutes. When a specific date and time were agreed upon, the interviewer sent the contact a confirming e-mail that again outlined the process and reiterated the confidential nature of the interview.

QUESTIONS

The interview questions addressed six content areas: 1) the subject's professional background together with his or her experience in mediation; 2) the subject's relationship with his or her lawyer before and during the mediation; 3) the subject's perspective on selecting a mediator; 4) the subject's preparation for mediation, including preparation with his or her lawyer; 5) the subject's perspective on whether a mediator should offer suggestions or express opinions about resolution of the matter or outcome in court; and, 6) a catch-all group of questions about mediation quality in general.

PROCEDURE

Each interview started with an overview of the interview process, assurances of confidentiality and the opportunity to ask questions about the process before the interview started. Fourteen individuals were interviewed but one interview was discarded because he did meet the Task Force definition of a decision maker in the mediation.

Broadly speaking, the interviewees represented the following industries:

International Finance	3
Telecommunications	1
Medical Center/Health Care System	4
Utility Services	2
Government	1
Food Distribution	1
Pharmaceutical	1

Each of the individuals served his company/entity in a high level professional role. Their positions included manager (3), institutional liaison (1), employee representative (1), operations support (1), consulting firm president (1), and chief legal officer/general counsel (6). The interviewees have worked professionally from anywhere from 12 to 50 years. The average number of years these individuals had worked professionally is 26.4. The interviewees had attended anywhere from 3 to 150 civil mediations during their professional career. The average number of mediations that the interviewees had participated in was 43. A few of the interviewees had actually completed mediation training. Several of them participate in an internal mediation program.

These individuals had participated in mediations involving a wide range of civil case types: employment, contract, tort, environmental, intellectual property, neighborhood and commercial.

Five of the interviewees participated in mediation on the plaintiff's side and seven participated on the defense side. One person stated that he was on the plaintiff's side about 50% of the time and on the defense side about 50% of the time.

The gender of the interviewees was fairly evenly split -six interviewees were women and seven were men. For purposes of confidentiality, all the interviewees will be referred to as "he."

RELATIONSHIP WITH LAWYERS

Three of the thirteen interviewees did not participate in a system that provided for lawyers in mediation. Therefore, the conclusions in this section are based on responses from 10 individuals who went to mediation with their lawyers at least 50% of the time. The majority of this survey group had their attorney with them in mediation 100% of the time. Two of the parties who did not have a lawyer with them every time were women and they related that it was common for the opposing side to try to take advantage of them. One woman related that when she was not accompanied by her lawyer, she felt that both the opposing side and the mediator would try to strong arm her. Neither was pleased with this behavior.

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

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

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

During the mediation, parties wanted their counsel to:

- Provide information/documents gleaned from discovery;
- Provide counsel during mediation ;
- Play bad cop to the party's good cop;
- Work in partnership with the client, recognizing that it is ultimately the client's decision to settle;
- Build a relationship with the opposing party;
- Act as a sounding board for the client;
- Help educate the mediator and the opposing side about the case, both legally and factually;

- Rely on technical expert (the party) to provide information in a technical case;
- Tell the party when he is wrong;
- Act as a back channel to get information to the other side and the mediator;
- Document the settlement; and,
- Remember that the client has the final decision.

A couple on interviewees specifically identified actions that their lawyers should not engage in during mediation. These interviewees believed that lawyers should not:

- Telegraph to opposing side what their anticipated settlement range is or pre-negotiate the case so the party's hands are tied in mediation; and,
- Negotiate the amount of the settlement.

Who Does the Talking?

Whether the party does most of the talking or the lawyer does most of the talking varies from party to party, and case to case. A consistent theme in the response to the questions about who speaks at the mediation is that the roles/tasks of the party and the lawyer are highly choreographed and discussed and agreed to ahead of time. As one party explained it, "It works best when I know the lawyer and the lawyer knows me and we are a team in the mediation."

One interviewee stated that he wants his lawyer to speak during the opening and closing but the client wants to do most of the talking in caucus. Another wants to do most of the talking during the mediation but wants the attorney to deliver "bad" news such as talking about the opposing party's contributory negligence. Another party echoed the position that he wanted to do most of the talking so his attorney could be the voice of moderation and be used to break an impasse. Another interviewee expressed a similar perspective and said that he wanted to be seen as the stumbling block. That way, his attorney, because he or she had the relationship with the other lawyer and the mediator could be viewed as the "good cop. One party sees himself as providing strategic emphasis in the discussion of the case at the mediation table. Some parties want to do the talking about settlement and settlement amounts. One party took on the role of dealing with the emotional issues of plaintiffs in personal injury actions; the party's attorney provided information; he provided concern and empathy.

Eight of the ten parties who were represented by counsel on a regular basis in mediation, had participated in mediations where the lawyers had met with the mediator privately. This practice was not the norm for mediations, however, despite the fact that all the parties thought these private meetings could be helpful. Parties expressed that they thought these lawyer-mediator caucuses could help attorneys save face, help move the mediation forward in an impasse situation, take the emotion out of a case or provide the mediator with a clear understanding of the underlying facts.

On the flip side, very few of the parties had ever been in a caucus without their lawyers.

Disagreements with Counsel.

Four parties reported that they did not have disagreements with their counsel during mediation but occasionally disagreed with their counsel during the mediation preparation. Disagreements were usually over what was most important about the case, the value of the case, the bottom line, or where to start the negotiation. The other parties reported occasional disagreements with their counsel during the mediation. Disagreements most often arose over the next offer/response to an offer, disclosure of information, and whether to be back in joint session.

Specific instances recounted by the parties as significant disagreements included: differences in what the bottom line of the party should be; a lawyer who disregarded the party's instructions and disclosed to the other side what their bottom line was; a lawyer who, prior to mediation, did not reveal to the party how badly injured the plaintiff was; a lawyer who indicated to the other party that they were willing to 'concede" without clearing it in advance with the client.

Lawyer Goals and Pressure to Settle.

Only two parties reported that they felt that they had a different goal for the mediation than their lawyers. One party had several experiences where the lawyer, during mediation had higher expectations for a settlement than the client did. The party did not think the case as strong as the attorney. In the other situation, the party was very displeased that a lawyer representing the party on several occasions had acted as if he "just wanted to dispose of the case" and did not appreciate that dollars spent in settlement are dollars taken away from the corporate mission—providing patient care.

Eight of the ten parties who were represented during the mediation reported that their attorneys had never pressured them to settle. As one party expressed it, "It's a collaborative decision to settle."

The two parties who had experienced a relationship with their counsel that was less than this teamwork model related that on a few occasions their attorneys had tried to pressure them to settle. Both individuals felt that their lawyers had pressured them to take an amount in settlement that the party felt was too low. One party felt that the pressure was appropriate in the 2-3 instances that it had occurred. The other party who related that his attorney had tried to pressure him to settle stated that he resisted the pressure because of the way it was handled. He does not want an attorney to tell him "It's a bad case; you need to settle." He wants a fact based discussion about why he should settle.

Helpful Lawyer Actions.

The parties reported a variety of "most helpful actions" taken by their lawyers in mediation. These positive activities taken by the lawyers can be generally broken down into three categories:

1. Preparation for Mediation

In preparing for mediation, the parties praise lawyers who:

- Are knowledgeable about the case;
- Are thoroughly prepared and are ready to go to trial;
- Have made sure the client is thoroughly prepared;
- Engage in open communication with the client about the strengths and weaknesses of the case;
- Prepare excellent mediation statements;
- Organize files and audio visual aids so that it is easy to locate/provide information during the mediation;
- Provide the client information about the value of comparable cases and the admissibility of evidence.

2. Discussion of Anticipated Personal Dynamics

Parties value lawyers who:

- Provide insight into the mediator and opposing counsel;
- Provide insight into the bench and juries in the applicable jurisdiction;
- Serve as liaison with the mediator.

3. Lawyer activity during the mediation

Parties commend lawyers who:

- Are persuasive advocates;
- Understand the company's goals and perspectives;
- Take a hard line when necessary;
- Communicate the values of the client;
- Show respect for the other side;
- In a technical industry, are very knowledgeable about the applicable law and regulations so that they can educate the other side, if necessary.

Actions Lawyers Should Change.

Interviewees expressed several useful ideas about what lawyers could change when they go to mediation.

- Press for earlier mediation—mediation should happen more quickly; after discovery is complete, counsel should be aggressive about setting up mediation;
- Be aggressive about ensuring that all the parties at the table have settlement authority;
- Be more open to reconvening the joint session;
- Be more willing to help maintain the mediator's role as neutral;

- Don't be buddy-buddy with the other side and talk about your vacation, your kids, golf game, etc.;
- Improve presentation skills;
- In a technical industry, learn as much as possible about the technical aspects of the case;
- Make sure that you work to get along with your client;
- Don't bring multiple lawyers to the mediation;
- Be realistic about how the case will resolve; and,
- Help the client understand the benefits of each of the mediators that are suggested.

MEDIATOR SELECTION

Eight of the thirteen parties have participated, directly or indirectly, in selecting a mediator in at least some cases. The parties involvement ranges from helping create a roster of acceptable mediators to providing input regarding whether the mediator should be from an internal roster or external roster, reviewing resumes of potential mediators that counsel has identified, checking with peers about specific names, conferring with counsel about individual strengths and weaknesses of a short list of potential mediators to making a final selection.

Three of the seven parties who had participated in shaping the mediator selection expressed concerns about finding high quality mediators. (One person who participated indirectly in the mediator selection did not have an opinion to offer on this topic). One of the parties related that he was happy with mediators for court cases in the various jurisdictions where he had mediated but did not find agency mediators that he had worked with as helpful. One party said that infrequently he had encountered difficulty in identifying high quality mediators. The third party decried the lack of quality mediators as very disturbing. He wants senior leaders in industry or retired judges, not a "host." Five of these seven parties use a few mediators over and over again. One party reported that he would like to do that but could not because he mediated in so many jurisdictions, he didn't have that option.

All of the parties who played an active role in mediator selection reported that they tried to match mediators to cases. Six of the seven parties identified that they looked for a mediator with substantive knowledge of the applicable law or case type. One party focused on the mediator's relationship with opposing counsel because the party routinely looked for a mediator who worked well with the other side. In addition to substantive knowledge, one party identified that he looked for personality characteristics that would mesh with the other personalities at the table. A third party looked not only for substantive knowledge but an ability to stand up to high powered party attorneys.

Only four of the parties had experience with court ordered mediation. These parties reported that, for the most part, mediator selection was different because there was little freedom of choice of mediators and, in some cases; the venue for the mediation was fixed.

Twelve of the 13 parties interviewed had worked with a mediator who is a person of color or a woman. Five of the 13 said they would consider a mediator's race/gender /culture in making the selection if race/gender/culture was a factor that would make the plaintiff feel more comfortable in the mediation. Four of these parties were always on the defense side. A sixth party stated that although he would consider race/gender/culture in making the mediator selection, he would ultimately base the selection on the mediator's other technical strengths.

All but one of the parties who had not participated in mediator selection in a direct way would welcome the opportunity to participate in the process. The parties who had not participated in selecting a mediator in all their cases were quite specific about the type of information they wanted prior to making a selection. They were looking for resumes/CVs that demonstrated the mediator's background both in mediation and subject matter and reflected their mediation style. One party wanted to know about mediators' background as a trial attorney. Two of the parties stated that they would like an opportunity to conduct a short interview of potential mediators. Parties wanted information/ reassurance about the interpersonal skills and listening skills of the mediator. One party said he would look for a mediator with both facilitative and evaluative skills. One person said it was important to know if the mediator had possible conflicts of interest, e.g., a family member who was operated on in his hospital.

PREPARATION

The "take away" from the questions the parties answered about preparation for mediation can be summed up as "You cannot be too prepared." Almost 100% of the parties prepare extensively for each mediation. The one individual who reported that he had not prepared for each case also said that he regretted that his lack of thorough preparation.

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

1. Talk with lawyer

The ten parties who are represented in mediation talk with their lawyers before mediation. Ninety percent of them talk to counsel before every mediation. One person talks to counsel most of the time.

2. What do you talk about with your lawyer?

When parties prepare with their lawyers, they participate in a full spectrum of attorney advisory activities. With their attorneys, parties discuss: the facts and the strengths and weaknesses of the case; mediation strategy, including how the party and the attorney will work together in mediation; the settlement range for the case, including what they would like to get, what their bottom line is, what their initial offer will be, the value of comparable cases, and, local jury trends. Parties sometimes use the time with their attorneys to work on the mediation brief, and discuss the personalities of the players on the other side. A person who is serving in a consultant role will ensure that counsel is educated about the applicable technical regulations/law/best practices and that they understand the client's perspective.

3. The most important part of preparation

Interviewees who answered the survey question about what was most helpful to prepare for mediation identified the following aspects of preparation:

- Thoroughly reviewing the facts;
- Developing the mediator's statement;
- Reading the 5-6 page summary of case prepared by counsel for party;
- Discussion of strategy;
- Building a collaborative relationship with their lawyer;
- Understanding the strengths and weaknesses of the case;
- Learning about the opposing counsel as well as the opposing party--personality, ability, style, other personal factors; and,
- Determining the value of case; and,
- Discussing the ability of the other attorney, the court where it is assigned, and witness statements.

Two parties offered insights on what they would do to prepare if they more time to devote to preparation. One person said he would read the all of the depositions, not just the summaries. Another would make site visits if he had time.

Unrelated to time constraints, a third interviewee stated that in preparation he would like the issues relating to the bifurcation of liability and damages clarified with all the parties ahead of time so in mediation they could focus on unresolved matters.

4. What a party tell the mediator ahead of time?

Interviewees gave varied responses to the question about what they and/or their attorneys should tell the mediator ahead of time. One person believed that he and/or his attorney should not try to talk to the mediator ahead of time. Several people thought that the decision about how much they should tell the mediator ahead of time should be made on a case by case basis. (One person related that when his lawyer knew the mediator, he and his lawyer showed up early to tell the mediator about their view of the case.) Others

thought that they should tell the mediator about their perspective of the case, what they are looking for in mediation and what issues were not up for discussion. One interviewee wanted his attorney to call the mediator to make sure that the mediator clarified signature authority before the mediation convened.

Other interviewees stated that a party should submit mediation briefs ahead of time that contained facts, theories of liability and the settlement history of the case. (One person added that a good mediator would ask for advance materials and, of course, the parties should provide them.) One of the parties volunteered that parties should prepare a confidential mediation brief for the mediator laying out the strengths and weaknesses of their case and stating how they would address their weaknesses.

5. What should mediator do to prepare?

Parties were very clear that they expected the mediators to be thoroughly prepared. As one interviewee expressed it, "The mediator is being paid so they should act like a professional and prepare." Parties expected the mediators for their cases to read the mediation briefs and to be familiar with the case. For one interviewee, this included reviewing underlying medical records. Another party pointed out that during the preparatory phase, a mediator should develop a sense of what the weaknesses for each side are. Mediators should be familiar with general case law, applicable rules/regulations, and best practices in the industry. Lastly, a mediator should be prepared to listen.

One party wanted the mediator to host a call prior to convening so all the participants understood what the expectations for the mediation were. This theme of personal conversation with the mediator was reiterated by several interviewees. One party expressed his desire that there be a conference call with just the attorneys so the mediator could ensure that the parties came with signature authority and a mindset that they were prepared to reach a settlement. One party believed that the mediator should talk to the parties ahead of time to learn their perspective on the issues and assess any cultural differences. (Another person candidly related that if it were possible to talk to the mediator ahead of time that opportunity should be used to try to influence the mediator to do or not to do something if it would be helpful to the party.)

Seven parties had never talked with a mediator head of time, however. One party had talked with the mediator on one occasion when his counsel was unable to answer a question. Another had talked with the mediator by telephone in about 2% of his cases. His lawyer participated in these calls with him. Another party talked to the mediator in every case but only about administrative matters. He very infrequently discussed the case with the mediator. Only two interviewees related that they frequently spoke with the mediator with, or without, their attorney.

MEDIATORS MAKING SUGGESTIONS OR EXPRESSING OPINIONS

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

Three of the thirteen interviewees participated in the interview for only 30 minutes. All three answered the first question in the section on mediator suggestion/opinion but did not get any further. Therefore, the answers to the questions do not add up to thirteen interview responses for each question. Arguably someone who is not represented by counsel in mediation could have an opinion about these matters that would stem from their lack of representation during the process. Therefore, I have isolated those responses as NRR (not routinely represented) in order that the reader might have additional background information to filter the responses to the questions posed in this section.

1. Is it okay for a mediator to make suggestions?

Twelve of thirteen interviewees answered yes to the following question: "Do you think it is OK for a mediator to make suggestions-for example a mediator asks whether you would consider taking an annuity or a structured payout?" (All three NRR parties answered yes to this question.) One party did not think it was appropriate for the mediator to make suggestions about a resolution but was comfortable with a mediator who made suggestions about a method of implementation that might bridge the gap.

The reasons why parties thought it was permissible for the mediator to provide suggestions were varied. Several people perceived this approach by the mediator as just one more way to get to resolution. One party frankly exclaimed, "That's what we're paying for. Otherwise we could exchange offers over the phone." Another party commented that the mediator could make a suggestion that he would never have considered making. "What is too small for one side to talk may be very important to the other side." Others noted that mediator suggestions were helpful because the mediator had a sense of what the other side will take.

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

2. May a mediator tell a party what is likely to happen to the case in court?

Again, a majority of interviewees believed it was permissible for a mediator to tell a party what was likely to happen if he took his case to court. All of the NRR parties felt this was permissible and eight of ten of the interviewees routinely represented in mediation believed it was okay. These parties generally believed that this opinion was just another layer of information to consider in making a decision to resolve a case. As one party expressed it, "This is part of the value that the mediator brings to the table." One party reported that this was helpful information for attorneys and parties who were local and do not know the judges or jury pool in the jurisdiction where the case was filed. A few parties said the mediator could give an opinion but the party would ignore it.

The majority of those who thought it was allowable mediator conduct said it was more effective for the mediator to discuss this likelihood in private caucus. One party who believed this discussion should take place in private caucus reasoned that private caucus gave the mediator a chance to beat up on each side. It also made it easier for the party to absorb the information. One party thought it should happen in caucus because joint session was too soon in the process for the parties to get this information.

The parties cared about how this information was relayed. It is okay to say, "You have a risk with X, not "This is what's going to happen."

One of the NRR parties stated this was a topic that the mediator might bring up strategically in joint session as well as caucus. He suggested that there were occasions when one of the parties is dragging on and not making a decision. The reluctant party might need to be reminded there was a next step and that he needed to decide what he wanted to do. Another of the NRR parties stated that a mediator who discussed what was likely to happen in court in joint session would be engaging in threatening behavior. Two of the NRR parties mentioned that while they believed that a mediator's prognostication on what might happen in court could be helpful, they cautioned that a mediator should be careful to avoid doing this a coercive/threatening manner. One of these parties identified that doing this in joint session would be threatening.

Two parties stated it was not okay for a mediator to tell a party what was likely to happen in court. It was appropriate for the mediator to ask a party if he had thought about what was likely to happen if he went to court. However, the mediator should not provide this information; the parties' attorneys should do this. The neutral's role was breached if he provided this information. Another party suggested that providing this information might be unnecessary intimidation and it has the reverse affect on the party.

3. Should a mediator express an opinion about a settlement offer?

One of the survey questions about mediator opinion was framed as follows: Do you think that it is okay for a mediator to express an opinion about a settlement offer? For example a mediator who says "I think this is the best offer you're going to get."

Only fifty per cent of the twelve parties who answered this question believed this was an opinion that the mediator should provide. (One of the 3 NRR parties thought that this was an acceptable opinion from the mediator.)

Two parties who did not believe that it was okay for the mediator to express an opinion about a settlement offer qualified their response by saying that if the party asked for the mediator's opinion, it would be okay to offer it. Furthermore, if the other side had requested that the mediator convey the message that it was a final offer it was okay to provide this information. Four parties voiced a concern that this kind of opinion from the mediator eroded the mediator's neutrality.

One party stated that when it comes to offers it's okay for the mediator to try to keep it open, "We have some more room on this," or "Give me some more room on this." The mediator should not express a specific opinion about an offer, however.

The six parties who thought it was okay for the mediator to give an opinion about a settlement offer generally viewed it as another layer of information that they would consider in making a decision and/or or believed that this was part of the mediator's value at the table. As one party expressed it, "We are paying to get this settled and are counting on the mediator's expertise and recommendation."

4. Should a mediator tell a party what the settlement should be?

The question about the mediator's opinion about the settlement amount was phrased as follows: Do you think it is OK for a mediator to tell you what your settlement agreement should be? For example a mediator says-"You should accept this offer," or a mediator says, "If I were you, I'd offer $70,000 and be done with it."

Eight of the eleven individuals who answered this survey question, including all the NRR parties, did not believe that this was appropriate mediator behavior. Two of the NRR parties objected to this mediator intervention because it undermined the neutral role of the mediator. One of these parties noted that this type of opinion or statement by the mediator could be coercive and undermine the party's autonomy. A third NRR party stated that he would not like the mediator to offer this type of opinion but then qualified his response by saying he would listen to this advice if there was good reasoning behind it but he might not be swayed.

The six RR parties who did not agree with this type of mediator action provided a variety of explanations for their perspective. One party stated that mediation was about the parties coming together to resolve the case, and "it wasn't about the mediator." He added that he did not like bracketing. Another party stated that the mediator should not be concerned about the actual dollar amount but rather should encourage the parties to continue negotiating by saying things like, should say, "I think you are in the right range, let's keep talking."

One party did not like a mediator to do this because the magic of mediation is having a neutral to help one analyze the case and kick ideas around. He felt that a mediator who provided this kind of opinion shed his neutral role. Yet another party believed that a mediator didn't know the case or the party's settlement parameters well enough to offer this opinion. Another party did not think a mediator should do this unless the party asks, and then, the party wants an informed opinion.

Three of the eleven parties who answered this question said that it was okay for the mediator to tell a party what the settlement agreement should be. If supported by sound professional advice, the mediator's directive regarding settlement was another layer of information these parties would consider in making a settlement decision.

5. Does the manner in which the mediator makes suggestions or offers opinions make a difference to the parties?

One survey question focused on whether the manner in which the mediator made suggestions or offered opinions made a difference to the parties. Eleven parties answered the four subparts of this question.

Subpart 1:

The first subpart of this question asked whether it would make a difference to the party if the mediator made suggestions or offered opinions in joint session or caucus.

Two of the three NRR parties answered this question and replied that this mediator activity should take place in caucus. One party mentioned that this would allow for "face saving." The second party thought if these discussions did not take place in caucus, the mediator would be seen as trying to railroad the process.

The RR parties were all over the map in their responses. Three parties reported that these discussions should take place in caucus. One person was not sure; his gut told him it should not be in joint session but he has never been in that situation. One party stated that this mediator intervention should not occur whether in joint session or caucus. One party reported that it "was worse in joint session." Three parties responded that the decision should be made on a case by case basis.

Subpart 2.

The second subpart asked whether the mediator needed the party's permission or the permission of his lawyer before offering the mediator opinion. Two of the three NRR parties reported that the mediator needed their permission to express this kind of opinion. One NRR party reported that is was not necessary.

Five of the eight RR parties who answered this question stated it was necessary for the mediator to get permission. One of these parties believed it was necessary for the mediator to get permission from the party and his lawyer. One party reported that if he

asked the mediator for this opinion it was okay for the mediator to offer it. A third said it was okay for the mediator to do this after he or she asked permission, if the mediator was going to give his opinion on a non-monetary way to get past impasse. One party said it depended on whether the mediator was provided his own opinion or not. If it was the mediator's perspective, then he did not have to ask permission.

Three parties stated that it was not necessary for the mediator to get permission from the party. One of these parties summed up his response by saying that he was relying on the professionalism of the mediator and the mediator knows when it is necessary to provide this input.

Subpart 3.

Should a mediator give an opinion anytime or only if the parties are stuck? The three NRR parties reported that a mediator should give an opinion only when the parties were stuck.

The seven RR parties who answered this question were split in their answers. Three parties stated that the mediator could intervene in this manner at any time. One of these interviewees commented that an opinion was not helpful early on in the mediation process. A fourth party thought it appropriate for a mediator to offer an opinion at any time to the plaintiff. One party categorically stated that giving an opinion was appropriate only if he asked the mediator for an opinion. Two parties provided more nuanced answers. One stated that this action was more applicable if the parties were stuck and that he would be more comfortable about the mediator offering an opinion if he was stuck. Another party reported that, in his view, a mediator could give an opinion at three points: when asked; when the parties were stuck and as part of a post mortem (how could we have done better?)

Subpart 4.

Eleven parties answered the question: "Do you think it normally affects the mediator's impartiality if the mediator expresses an opinion about what the settlement should be?

The three NRR parties answered yes to this question. One person elaborated on his response by following up with it may not be true that the mediator's impartiality has been affected but it leaves the perception that it has been compromised.

Two routinely represented parties said that the mediator's expression of opinion would affect the mediator's impartiality. A third commented that it wouldn't compromise the mediator's impartiality if the mediator had been asked for his opinion. Three RR parties stated that the mediator's expression of opinion would not affect the mediator's impartiality. Two other RR parties offered qualified responses to this question. One party stated that the answer to this question depended on when the opinion was offered. If the opinion came in the thick of thinks it was normally okay. The other party who

provided a qualified response stated that he hoped it would not affect the mediator' impartiality. However, the answer to this question depended on the mediator's motivation in proffering the opinion—was it because the mediator wanted to go home or did he want to get the case resolved.

PRESSURE:

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

Six interviewees said that it was not okay for a mediator to apply pressure to get a settlement. (All three of the NRR parties are included in this six.) Five interviewees reported that it was okay.

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

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

2. How do you differentiate between persistence, pressure and coercion?

Parties had interesting responses to this question. Most of the interviewees stated that these activities were varying degrees of the same mediator conduct. One person stated that persistence is an obligation from the time you start. "You are here until you resolve this or agree you can't agree." It is a cooperative effort to be persistent, however. Pressure should be internal not external. The mediator is there to make the process work, not pressure participants, he reported. Another interviewee stated that he wants persistence or "keeping at it". Pressure, on the other hand is more overbearing and coercion is more extreme and off the scale. Pressure and coercion are the worst versions of persistence. One of the three NRR parties who answered this question defined persistence as keeping things on track in a firm manner. This theme was reiterated by another interviewee who said that persistence is just keeping at it. Persistence is reiterating a viewpoint while pressure is a push to reach a certain agreement "If you don't do this, then xx." In this NRR person's opinion, applying pressure was not the mediator's role. Another NRR party stated that persistence should not be overbearing. In his opinion, a client should never feel pressured into signing an agreement.

Another person defined pressure as an articulated strong confidence. Yet another interviewee reported that while persistence and pressure are part of reality testing and the pragmatism of the neutral's role, there can be too much pressure. It depends on how well represented the parties are. Good advocates militate against pressure. Another perspective on pressure was that it was the non-rational factors pressed by the mediator—emotion, anger, appealing to ego. This party did not find pressure helpful. Rather it was helpful to stay focused on the rational. Another interviewee offered that pressure is okay –but mediator needs permission to exert pressure. A mediator should not take over a case. Rather the mediator needs to be an honest broker between the two sides. Another interviewee stated that if the mediator is too aggressive it turns him off. In his case, a mediator can say something twice and then it crosses the line into inappropriate pressure.

As one might expect, parties considered "coercion" to be bad mediator conduct. One interviewee, while not defining coercion, stated flatly that coercion was never appropriate. Another explained that coercion was being "double teamed." Other interviewees saw coercion as: bending the truth or tricking people to achieve agreement; misrepresenting some aspect of the situation; a non-rational force synonymous with intimidation; an inequality of power with the mediator; happens when the mediator presents a situation and you have no other choice than to do what the mediator says; occurs when you are talking dollars—and the mediator who just wants to get it done says "You should take this $25,000. One of the NRR parties said that a mediator setting a timeline like "I have to leave by x o'clock" could be coercion

a. Does a mediator need permission to apply pressure?

Eight parties, including one NRR party, answered this question. Three parties said that the mediator did not need permission. One elaborated on his answer by stating that his presence at the mediation gave the mediator implicit permission to apply pressure. The NRR party who answered this question stated that a mediator should not apply pressure, as did one of the RR parties. Three parties believe that a mediator needs permission. One of these parties thought that this permission might be addressed in the ground rules with a question like, "If these things were to happen, how would you feel about me applying pressure?

b. Permission from the party or the attorney?

Three people answered this question and gave three different responses. One person said that the attorney should give permission because the attorney and the client should be on the same page prior to mediation. One party said the mediator needed permission from both. The third interviewee said permission could be obtained from either the party or the mediator.

c. What is the threshold between when pressure is okay and when its not?

Eight interviewees expressed an opinion on the threshold between when pressure is okay and when its not. The two NRR parties who answered this question believe that pressure is never okay. Most of the other parties who answered this question thought it had to be looked at on a case by case basis. One party was specific in saying that if a mediator says something more than twice it is inappropriate pressure. Another person who gave a specific answer thought it was inappropriate to try to pressure a settlement into a specific time period, e.g. "We have four hours to settle." Another interviewee suggested that there should be milestone points throughout the day. Every two hours the mediator should check in to avoid the "time is of the essence" press for settlement.

d. How much is too much pressure?

One of the three parties who answered this question said he did not know because he had not been in that situation. The other two interviewees gave specific answers. One stated that too there is too much pressure when the neutral is apparently vested when a neutral has a stake in a particular settlement and is no longer neutral. The other stated that when a mediation breaks down because of something that the mediator has done such as creating a take it or leave it situation where there is none, the mediator has created too much pressure.

e. Where?

Three of the four parties who answered this question thought any pressure should be exerted by the mediator in caucus. The fourth thought it should be decided on a case by case basis.

f. When?

The four parties who answered this question said that a mediator should use pressure when the parties are stuck. One of the parties added that the only other time pressure should be used was when there was a take it or leave it situation that had to be hammered home.

g. Can exerting pressure affect the mediator's impartiality?

Three of the four people who answered this question said that exerting pressure could affect the mediator's impartiality. The fourth interviewee simply said that he hopes it would not.

h. If so, under what circumstances

The two people who responded to this question said pressure/impartiality had to be looked at on a case by case basis. One person said as soon as one party loses trust, the mediator's impartiality has been affected. The other party thought that a prepared knowledgeable mediator could exert pressure without losing impartiality.

THINGS YOU WOULD CHANGE ABOUT MEDIATION

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

Another person was a strong proponent of a binding agreement to mediate that requires that the parties have someone at the table with signature authority.

Several people made comments about mediator preparation. Mediators should be prepared, know what the law is and be more than a messenger. One person expressed his belief that mediators should be much more aggressive for settlement. One person said that mediators should be fired if they didn't prepare for mediation.

One party thought that there should be much more rigorous preparation and experience to be a mediator.

Several people offered suggestions for change that affected the process itself. These suggestions ranged from wanting to see more joint session work rather than concentrating the mediation into caucus, wanting mediators to forget they were ever lawyers, and wanting to see the role of the parties emphasized and the role of parties' counsel de-emphasized.

Another party commented that he would like to see less experienced, younger attorneys get more direct mediation experience.

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

CONCLUSION

The party interviews were rich. The individuals who participated in the telephone interviews had a great deal to say about their relationship with their lawyers in the mediation process as well as their expectations for mediators. This is a very small

sample but provides some tantalizing information. More time and attention should be devoted to gathering information from repeat mediation parties.