

Future Trends in Civil Mediation



By Hope B. Eastman

If you are a sophisticated user of mediation, take comfort in knowing your voice has been heard – and your input is going to reshape mediation for the better.

For too long, dialogue about best practices was exclusively between mediators. Those days are gone. When the American Bar Association’s Section of Dispute Resolution launched the Task Force on Improving the Quality of Mediation, its members sought the views of attorneys and parties who were repeat players in commercial cases.

One of the task force co-chairs, Rachel Wohl, Esq., Executive Director of the Maryland Mediation and Conflict Resolution Office (MACRO), which works on fostering mediation in many contexts, describes the goals of the task force and its newly released report: “Our intention was to listen to consumers of commercial mediation to help us make meaningful recommendations for improving its quality

and expanding its use. While we did not necessarily equate ‘what lawyers want’ with ‘what constitutes high quality practice,’ their experiences and opinions, as well as mediator ethics, provided us with great insight.”

Recognizing that the range of case types and mediation approaches in commercial mediation is so varied – and that flexibility is so critical – the task force did not attempt to develop “best practices” for all circumstances. It will soon publish practical application pamphlets for commercial mediation and a “tool kit” for state or local bar associations to help them undertake similar projects listening to local mediation consumers if they so desire.

The critical lessons for mediators come down to: (1) Throw away your cookie cutters; and (2) Roll up your sleeves. Regarding Lesson 1, the Report (available at www.abanet.org/dch/committee.cfm?com=DR020600) states:

Our focus group mediation users, the majority of whom had attended upwards of 30 mediations, demonstrated a very textured understanding of the mediation process. Their desire for substantive and procedural pre-mediation discussions indicates a real evolution in the field and implies that a higher level of process design and substantive pre-mediation collaboration between mediators and users is a trend for the future.

Attorneys want to work with mediators on customizing mediation case by case. While divided on whether they prefer joint or separate pre-mediation calls, attorneys are united in their desire to discuss with the mediator beforehand who will attend, whether opening statements will help, what the key issues are and in what order they should be discussed, how much the mediator should weigh in on substance and settlement terms (more on that later) and other process issues. To all these questions, the parties are saying, "It depends on the case. Let's talk about it."

As for Lesson 2, the survey shows many mediators underestimate how engaged the parties want them to be on substance. When asked whether it is helpful for a mediator to recommend a specific settlement, 18 percent of *mediators* responded "yes" in all or most cases while 38 percent said this practice helps in half or more cases. In contrast, 75 percent of *users* endorse this practice in all or most cases, and 84 percent welcome recommendations half or more of the time. A significant minority of lawyers and a majority of the parties did not want mediators to offer their opinions and those who did only wanted them under particular circumstances. Parties generally welcome "reality testing" (pointed questions that raise issues), analysis of strengths and weaknesses, and suggested ways of resolving issues.

Whether or not they weigh in on substance, mediators must familiarize themselves with the case and the parties' interests and objectives *before the session*. The parties' sense of "how much the mediator needs to know" varies from case to case. The task force will address this in its practical application pamphlets. In the meantime, mediators should take full advantage of the knowledge of the lawyers to get a feel for the parties, their personalities, positions and interests. Speaking jointly with the lawyers in a pre-

mediation conference call, followed by separate conversations with each lawyer, can go a long way toward giving the mediator grounding in the nuances of the dispute. Securing pre-mediation information on the parties' positions, weaknesses and settlement parameters can also be very helpful.

Some parties want the mediator to go further and predict likely court results or push for a specific solution, but others strongly object to such practices. It is wise to clarify the parties' intentions before getting underway.

Finally, and perhaps most importantly, when emotions run high or an impasse develops over substantive issues, parties want mediators to keep their sleeves rolled up until the job is done. Over 98 percent of users rated "persistence" as an important, very important or essential quality for a mediator; 93 percent gave a similar ranking to "patience." If a session ends without an agreement but with some hope of resolution, the parties nearly always want the mediator to follow up. Many said they would appreciate a call from the mediator a week or two after a mediation does not reach an agreement to check in and see whether their services might be useful. Indeed, a mediator should be willing to continue the process if the formal mediation session does not produce a result and the parties wish him or her to do so.

Repeat players have become more sophisticated consumers, demanding better service and greater customization. This is what's happening now in civil mediation, and it's sure to increase the quality of the experience for all.

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