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# How the Real Practice Systems Project Can Help Improve Mediation Quality

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Improving mediation quality is tricky.  This post describes how the Real Practice Systems Project can help.

In *Principles for Policymaking about Collaborative Law and Other ADR Processes*, I argued that policymakers generally should consider non-regulatory policy options before adopting new rules.

Non-regulatory approaches include training for disputants and professionals, dispute referral mechanisms, technical assistance for ADR organizations, and grievance mechanisms for parties in ADR processes.

Of course, some regulation of ADR is appropriate such as rules governing use of ADR communications in court, regulation of the relationship between ADR processes and the courts, and protection of dispute resolution consumers.  But regulatory policies are blunt instruments that are poorly suited to manage the complex interactions in everyday mediation.

This post shows that mediators' self-assessments, intentional development of their mediation systems, and coordination of pre-mediation-session preparation are non-regulatory approaches that are especially likely to help parties and mediators achieve their goals in mediation.

## Problems with Regulatory Strategies for Improving Mediation Quality

We should have realistic expectations about the generally limited efficacy of legal and ethical standards in actually regulating mediators' behavior.  Michael Moffitt's article, *The Four Ways to Assure Mediator Quality (and Why None of Them Work)*, stated, "Mediators today operate with no licensure, with little risk of state sanction for misconduct, with minimal public reputational information, and with virtually no risk of private liability for malpractice." Sections 7:10 et seq. in the Sarah Cole et al. treatise, *Mediation: Law, Policy and Practice*,

show that courts rarely, if ever, accept claims of mediator misconduct as a defense to enforcing mediated agreements.

In *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model*, Julie Macfarlane argued that mediation ethics codes embody at least three unrealistic assumptions about the nature of ethical dilemmas and the ways they actually arise in mediation.  First, the codes assume that there are generally "right" and "wrong" responses across contextual settings.  In practice, many of the challenging problems involve managing relationships rather than complying with specified requirements, there are wide variations in philosophy about what goals and techniques are appropriate and desirable, and there is great need for individual discretion.  Second, ethical codes generally focus on "snapshots" of the process and particularly the outcome, overlooking the ethical challenges in numerous "micro" decisions throughout a process.  Third, the codes are unable to manage conflicts between principles such as between self-determination and impartiality, when a mediator's action to help one party analyze a problem may be interpreted as bias against another party.

In *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, I analyzed court decisions interpreting "good faith" requirements in mediation.  I found that the courts interpret them to include only attendance at mediation (possibly with a representative having "sufficient" negotiation authority) and submission of any required pre-mediation materials.  The result is that the good-faith rules do not prohibit what people think of as bad faith.  Ironically, because of the vagueness of the concept and problems of enforcement, people who intend to act in bad faith are unlikely to be deterred and they actually could use the rules to harass others who do act appropriately.

Of course, mediators should pay attention to and follow legal and ethical rules – and we should recognize the limitations of the direct instrumental effects of the rules.  They have much greater impact indirectly by influencing mediators' values, the market for mediators, practice norms, and policies of organizations sponsoring mediators' work.  Mediation theories have similar indirect effects.  There are no official bodies issuing authoritative interpretations of theoretical doctrine, adjudicating theoretical disputes, or sanctioning violations.

Although regulatory policies have limited effect in actually regulating mediators' everyday conduct, other factors exert powerful constraints on what mediators do.  Mediators are likely to have a hard time continuing to mediate if they disregard the market for mediators, practice norms, and/or policies of organizations sponsoring their work.  Mediators generally act consistently with those pressures both because they want to continue mediating and, probably more significantly, they internalize these pressures in their thinking.

## Benefits of Mediators' Reflective Self-Assessments

Non-regulatory strategies are needed to promote high-quality mediation processes. Reflective practice techniques are particularly valuable.

Donald Schön's book, *The Reflective Practitioner*, has inspired many practitioners including Michael Lang.  In Michael's book, *The Guide to Reflective Practice in Conflict Resolution*, he wrote, "Reflective practice is a means for thoughtfully and introspectively examining professional actions and then, through self-assessment, learning to enhance our abilities and skills. … Schön (1983) describes two methods for learning through experience: *reflection-in-action* and *reflection-on-action*.  The former might be described as thinking on your feet, or, almost intuitively, making sound decisions in response to quickly changing circumstances.  The latter involves deliberation and self-examination following an event."

Along the same lines, Julie Macfarlane wrote:

> [W]hat Schön describes as "professional artistry" requires the capacity to deal with unique and uncertain areas of practice by drawing on past experiences and by constantly experimenting and revising.  A reflective-practice model requires each practitioner to develop a capacity for reflective self-analysis of their effectiveness in practice situations and to adopt a systematic approach to the learning that accrues.  Reflective practice increases professional effectiveness by enhancing awareness of the impact of contextual factors and constraints, raising the level of responsiveness and flexibility, and emphasizing self-growth which builds on experience.

Self-assessment can be hard because it's hard to perceive oneself accurately.  So some practitioners participate in reflective practice groups to get the benefit of colleagues' questions prompting deeper self-reflection.  The Reflective Practice Institute delivers a variety of education, coaching and training programs to teach reflective practice, assist in developing and facilitating reflective practice groups, offer individualized mentoring, and provide information and resources about the theory and application of reflective practice.

In *Doing the Best Mediation You Can*, I summarized recommendations of the ABA Section of Dispute Resolution's Task Force on Improving Mediation Quality, which identify certain approaches requiring careful reflection.  It conducted focus groups and a survey of lawyers and mediators that informed its recommendations.  The Task Force 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.  Although these

approaches are not always permitted, feasible, or appropriate, they constitute a good starting point for mediators to consider.

## Invitation to Use Structured Self-Assessments

The Real Practice Systems Project is intended to encourage practitioners to be more conscious and intentional about their ideas and mediation practices.  It grew out of my article in the Cardozo Journal of Conflict Resolution, *Real Mediation Systems to Help Parties and Mediators Achieve Their Goals*, which argues that mediators can improve their performance by using a systematic self-assessment exercise to develop and refine their own mediation systems.   Mediation systems are the combination of factors affecting what mediators do before, during, and after mediation sessions.  These systems include their routine procedures and strategies for dealing with recurring challenging situations.

I developed a suggested structure for these self-assessments consisting of:

- Mediators' contributions to their mediations (including their personal histories, goals, and values)
- Participants, cases, and contexts in their mediations (including common patterns of conflict, parties' perspectives, and various external factors)
- Mediators' system design (including their routine procedures for before and during mediation sessions and strategies for dealing with challenging situations)
- Reflections after mediations (including the evolution of their approach, what they learned from the exercise, and what they want to improve)

*Ten Real Mediation Systems* provides illustrations of this exercise.

The exercise is flexible, and I encourage people to modify the structure and include whatever makes most sense to them.  It can help students and trainees begin to develop their own nascent systems as well as help experienced mediators become more aware of their systems and make desired improvements.  The exercise can help any people who regularly mediate, including unpaid volunteers and organizational employees.  It can be used to help practitioners using other repeated tasks such as advocacy in mediation, negotiation, or a wide range of other functions.  So I generically refer to this as Real Practice Systems, not limited to mediation.

## Improving Mediation Quality Through Pre-Session Preparation

Helping parties (and their lawyers, if any) prepare before mediation sessions should help the parties and mediators achieve their goals as I described in *The Critical Importance of Pre-*

*Session Preparation in Mediation*.  When parties and lawyers are well prepared before partici-pating in mediation sessions, they are more likely to advocate effectively for themselves or their clients and be satisfied with the process and outcome.  This is especially important considering the limited efficacy of ethical, legal, and theoretical standards in protecting par-ties' interests.

The Real Practice Systems self–assessment exercise can be especially effective in promoting good mediation quality, particularly if it prompts mediators to arrange for careful prepara-tion before mediation sessions whenever permitted and feasible.

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