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Listening to Experienced Users

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Listening to Experienced Users

Improving Quality and Use of Commercial Mediation

BY JOHN LANDE
AND RACHEL WOHL

IN RESPONSE TO CONCERNS ABOUT poor-quality mediation services in commercial cases, the Section of Dispute Resolution recently established a Task Force to develop realistic proposals to increase the quality and use of commercial mediation. As an initial step, the Task Force on Improving Mediation Quality conducted focus groups with experienced mediation users.

This article summarizes key findings from the initial sets of focus groups. We found that focus group participants have nuanced understandings of the mediation process, their role in it, and the qualities they want in a mediator. In general, focus group participants want better access to information about potential mediators during the selection process and recommend effective premediation preparation by all participants. They differed about whether it was helpful for mediators to express their opinions and, if so, in what ways and under what circumstances.

The Task Force plans to use the focus-group information as an important source of ideas — along with input from a broad range of mediators and mediation organizations — in developing practice guides to address users' expectations. These guides will be designed to improve mediator quality, build confidence among users, and help increase the use of mediation in

commercial disputes. They will suggest what factors mediators, lawyers, business people, and perhaps even courts, should consider in planning and conducting mediations.

Mediation users

The Task Force began its work by listening to experienced mediation users during focus groups in nine cities: Atlanta, Chicago, Denver, Houston,

Task Force on Improving Mediation Quality.

The focus groups generally lasted between 90 and 120 minutes and included about 90 people, broken into small groups. Background data was collected from almost 70 participants. Two thirds had attended more than 30 mediations and an additional 27 percent had attended between 11 and 30 mediations. Ninety percent

Lawyers want more and better information about commercial mediators to help them select an appropriate, high-quality mediator.

Miami, New York, San Francisco, Toronto and Washington, D.C. (Data from five cities was analyzed and summarized for this article.) While we recognize that user preferences are not necessarily synonymous with high-quality practice, the Task Force agreed that understanding the market for commercial mediation was a good place to start. (The Task Force is concentrating on commercial mediation, including tort, employment and other civil cases, noting that other groups are focusing on family and community mediation.)

We asked focus group participants to tell us about the quality of their mediation experiences. What characteristics should a good mediator have? How should the mediation process be structured? We invited the participants to disagree with one another and did not attempt to build any consensus.

Carefully selected participants

The participants were selected because of their experience with commercial mediation. They were not chosen randomly and the questions were open ended, so one cannot make valid generalizations about the proportion of people who hold particular views. The participants' opinions do not necessarily reflect the views of the Section of Dispute Resolution or the

of the participants were lawyers. The lawyers had been in practice a median of 28 years.

Ninety percent of the participants had been on the defendants' side in mediation at some time and 67 percent said that they were most often on defense. By contrast, 67 percent had been on the plaintiff's side at some time and 26 percent were on the plaintiff's side most often.

Thirty-five percent had served as a mediator at some point and about 7 percent said they play this role most often in mediation. The participants worked in or worked for a range of industries, with the most common industries being insurance, construction and financial services. Sixty-nine percent were male and 31 percent were female.

In addition to input from lawyers and mediators, the Task Force is currently exploring ways to get more input from parties in commercial mediation and would welcome readers' suggestions.

Mediation goals

Focus group participants identified various goals for mediation. Some saw settlement as the primary or only goal. Even if the case did not fully settle, they valued partial agreements and narrowing of issues.

Other important goals sometimes



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included: (1) minimizing the future time, cost and risk of continued litigation, (2) retaining control of the matter, (3) satisfying clients, (4) prompting people to focus on the case and take it seriously, (5) improving participants' understanding of the conflict and, if the case did not settle, of future litigation, (6) giving parties a chance to tell their stories and feel heard, (7) promoting direct communication between the parties, (8) getting feedback from a neutral professional, (9) providing a forum for client catharsis, (10) preserving relationships, and (11) developing creative solutions, which may involve resolutions not available in court, such as apologies.

When to mediate

Types of cases. Participants mentioned numerous factors indicating that a case is appropriate for mediation, including when: (1) there is potential for preserving an ongoing relationship, (2) the main issue is determining damages and there is not a critical dispute about liability or an issue of principle, (3) there is not a need for legal precedent (such as an early case in a set of related claims that would be relevant to later cases), (4) there is a lot at stake, (5) it makes sense to settle for less than the cost of defense, (6) the case is complex, especially if it involves technical expertise, (7) the case needs a creative solution, (8) a party needs emotional catharsis of having a "day in court" that he or she might not get in traditional negotiation or court itself, (9) all the parties are represented by counsel, or (10) the parties pay their own attorney's fees.

Stage of litigation. Some people believe that it is important to mediate early in a case — sometimes before suit has been filed — to prevent investment of too much time and money and entrenchment of people in their positions. Others said that it should not be done until discovery is completed so that people could make fully informed decisions. Some said that if a mediation is held too early in a litigation, it can be an empty exercise that polarizes the parties. Several participants expressed frustration about me-

diations where one side was not ready to mediate due to lack of preparation and/or unwillingness to take reasonable positions.

Some said that the timing should be decided on a case-by-case basis, possibly in consultation with the assigned judge. One participant talks informally with opposing counsel in advance to determine whether they are serious about mediating, and will mediate only if the other lawyers seem seriously interested in mediating.

Mediation schedule. Participants want the time in mediation to be productive and efficient. Some think that some mediations (in particular, court-ordered mediations) do not allow for enough time. Some expressed concerns about private mediations that seemed to take longer than needed and are too expensive. Several people noted that participants start to focus seriously on settling only at the end of the day and suggested starting midday rather than first thing in the morning.

Selecting a mediator

Participants said that mediators vary in quality. Some think that the quality is generally very good in some areas, though there is some dissatisfaction. Given perceived variations in quality, some participants expressed concerns about being able to select mediators appropriately.

Some participants said that it was hard to find a good mediator and they generally use the same few mediators over and over. Some said that they would like a system of certification with objective criteria and/or a mediator database. Others expressed doubts about whether objective criteria and certification would work effectively in helping select appropriate mediators, in part because the qualities needed are subjective and vary from case to case. In at least one government agency context, there is discussion between parties about desired qualities in a mediator and then a search to find a mediator with those qualities.

Some participants favor using retired judges, especially when they want case evaluations. Others expressed concerns about using retired

judges as mediators, believing that they generally do not invest as much effort, may not be attentive to a wide range of concerns (such as parties' emotions) and charge higher fees.

Some prefer lawyer-mediators who have had litigation experience. One participant likes to use non-lawyers as mediators in some cases, particularly where legal issues do not predominate, because such mediators may be especially helpful in anticipating how jurors might respond to certain aspects of the dispute.

Important mediator skills

Many participants do not want mediators to simply shuttle between the parties, pushing them toward a specific dollar figure. While many said that settling cases was their foremost objective, they also want mediators to address their clients' emotional needs and they expect creative, intuitive and highly skilled mediators to do so.

Participants said that the following mediator characteristics and skills are important:

Process management. Careful management of the process includes such things as: tailoring the process to fit the situation, establishing procedures and deadlines, having the right people present (including those with settlement authority), setting the agenda, managing the caucus process well, managing the process after the mediation ends and modifying the approach as needed. It also includes having a good sense of timing and sequence, keeping the process flowing without being overly rigid, asking probing questions, making good decisions about when to have joint sessions and caucuses, cutting to the chase when needed and intervening when people act badly.

Judgment. Good substantive judgment is a related concept that includes assessing the reality of the situation, sensing what will work for parties and lawyers in real life, knowing what information to obtain and whether to share it or not, knowing when to press people or not and having common sense.

Focus on clients' needs. Good me-

diators understand and care about parties' needs, goals, negotiation styles and underlying issues, including their emotional and relationship concerns.

Interpersonal skills. Focus group participants said a mediator needs skills to establish trust and rapport, including enthusiasm, respectful and active listening, empathy, emotional detachment, sincerity, candor, sensitivity to confidentiality concerns, integrity, impartiality, fairness, humor and the ability to ask difficult questions sensitively. Mediators also need to have intuition about interpersonal dynamics and the ability to promote constructive and creative communication between the parties.

Persistence. Mediators need patience and persistence but not stubbornness. They need to know when to keep the mediation going and when to stop it. They should be prepared to stay late — as long as it takes to finish the mediation.

Substantive knowledge. Good mediators do not just split the baby or look only at the numbers. They need skills related to case evaluation, including: knowledge and experience of relevant legal issues, ability to educate parties and lawyers, and persuasiveness without excessive pressure (e.g., “bullying” or “headbashing”).

Premediation preparation

Mediators. Many participants emphasized the importance of preparation before people meet in mediation, though people have different ideas about the best way to prepare. At a bare minimum, mediators should carefully read all materials sent to them. Some participants said that mediators should think about the substantive issues and possibly do some research in advance.

Many people believe that mediators should also talk with the lawyers in advance, except perhaps if the case is relatively simple and does not warrant the effort. These conversations may be done individually and/or together, in person or by conference call. Some people and mediation programs object to ex parte premediation conversations with the mediator, at least if

this involves substantive issues.

Premediation conversations often cover procedural matters, which might include: (1) who will attend and whether they will have sufficient settlement authority, (2) whether each side should provide premediation memos to the mediator (and perhaps other parties), (3) what, if any, additional information should be provided, (4) deadlines for submission of premediation materials, (5) encouragement of a productive and noninflammatory tone, (6) expectations about beginning and ending times of mediation sessions, (7) expectations about how the mediation process will unfold, and (8) whether parties would like mediators to express their opinions and under what circumstances.

If premediation conversations address substantive issues, participants said that mediators should make sure that everyone is aware that these conversations are taking place. Mediators might ask lawyers what they need to know about the case, the parties, their key interests, the dynamics of any prior settlement efforts, the real issues and possible stumbling blocks. One reason that participants value contact with the mediator before mediation is that it prompts them to prepare.

Lawyers and parties. Participants emphasized that lawyers and parties also need to prepare for mediation. They should complete whatever discovery is needed to make good decisions. Insurance companies and defendants should be prepared in advance with sufficient authority to pay whatever may reasonably be needed to settle the case.

Lawyers should prepare clients before mediation, especially if they have little experience with mediation or litigation. Lawyers should educate them so that they have realistic expectations about the procedure and substance. Lawyers should explain the mediation process, the mediator's role, the clients' role and their role.

Giving statements, opinions

Opening statements. Opinions differed about the value of opening statements by each side. (This is not about

the mediator's opening statement, which seems unobjectionable if it is not too long and is not delivered mechanically.) A substantial number of participants believe that these opening statements are a waste of time or, worse, counterproductive because they can be inflammatory, resulting in polarization and entrenchment of parties' positions.

Others believe that opening statements are (or can be) helpful so that parties can speak directly to and hear directly from the other side. This can help them understand each other and the risks of continued litigation. Many felt that the decision whether to have opening statements should be made on a case-by-case basis in consultation with the lawyers or parties.

Expression of mediators' opinions. There is a significant set of issues about mediators' making suggestions or expressing their opinions, which is often referred to as evaluation.

Although many mediation users said they want mediators to make suggestions or give their opinions, the Task Force recognizes that evaluation is a controversial issue and that many mediators believe that any form of evaluation is inappropriate.

It also recognizes that some forms of evaluation are common and expected in commercial mediation. Since some commercial mediators make suggestions and give opinions, the Task Force believes that it is important to identify key considerations about whether, when and how they do so.

The issue is complicated because mediators may express various types of opinions. Some participants consider even pointed questions to be a form of evaluative mediation, depending on the context and tone. Mediators sometimes also give their analysis of the case (including assessment of strengths and weaknesses), predictions about likely court results, suggestions of specific options for consideration and recommendations to accept a specific option.

Focus group participants' comments indicate that their receptiveness to getting mediators' opinions

depends on many factors, including: (1) whether parties or lawyers have explicitly requested the mediator's opinion, (2) the extent of the mediator's background knowledge, experience or wisdom, (3) the degree of confidence, emphasis or pressure expressed, (4) whether opinions are given in joint session or caucus, (5) how early or late in the mediation process they are given, (6) whether the opinion is given before parties are at apparent impasse or only after parties have reached impasse, (7) the nature of the issues about which the mediator gives an opinion (e.g., financial or relationship issues), (8) whether the mediator raises issues not previously identified by parties or lawyers, and (9) the impact on parties (which may vary depending on whether the parties are represented, the strength of their counsel, and whether the mediator's expression of opinion affects parties' perception of mediator impartiality).

Market and practice guides

Focus group participants indicated that mediation users and mediators could use guidance on what factors to consider to promote high-quality mediation. This is especially true for the preparation phase and in mediations where mediators make suggestions or express opinions. The Task Force plans to address these factors in practice guides, which may also raise issues for mediation trainers to consider. The Task Force is also sponsoring a program titled, "You Want WHAT? Changing Expectations in the Commercial Market for Mediators," on April 26 at the Section's annual conference.

In conducting the focus groups, the Task Force partnered with state bar associations and state courts, among others. Several partners said that they would like the Task Force's assistance to conduct their own local focus groups. In response, the Task Force plans to develop a guide to help local and specialty groups do market research and develop their own quality improvement efforts.

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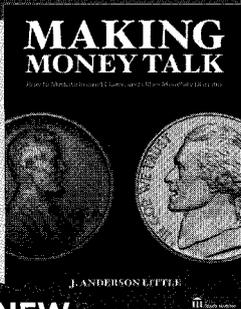
be used against them in arbitration. This, of course, means that if the parties use mediation in an effort to reach agreement, the mediator should not also serve as arbitrator, and the procedure should prohibit either party from introducing evidence of bargaining history in the arbitration.

Process experimentation is the hallmark of a maturing field. Yet we cannot simply assume that a process that works in one context will succeed as well in another. Understanding the conditions underlying success in the context of origin will lead to more thoughtful adaptations.¹

ENDNOTE

¹ See also, Stephen Goldberg, *Borrowing from Baseball: The Role of Final-offer Arbitration in Resolving Contract Formation Disputes*, 20 CORPORATE COUNSEL'S QUARTERLY 1 (2004), discussing the use of a variant of baseball arbitration to resolve disputes arising in the course of attempts to negotiate the terms of a commercial/business contract.

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