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# Best Practices for Mediation Training and Regulation: Preliminary Findings

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# **Best Practices for Mediation Training and Regulation: Preliminary Findings**

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## **Abstract:**

This article makes recommendations as to “Best Practices” for the training of mediators in court-connected settings. The authors’ findings cover issues including the design of training programs, the importance of experiential learning through role-plays, teaching methods for adult learners, class size and length, training ethical mediators, suggested trainer qualifications, and recommended regulatory practices for administrators. Data comes primarily from an assessment of mediation training and regulation in Florida, but the findings hold insights for court-connected mediation programs throughout the U.S. Additionally, the authors’ highlight the benefits of a collaborative approach to assessment which involves all stakeholder groups and eases implementation of any needed changes.

## **Introduction**

Over the past thirty years, many courts throughout North America, Europe and elsewhere have incorporated mediation into their regular menu of services offered to or required for disputants. To ensure quality mediation services, delivered by qualified mediators, many jurisdictions have formalized rules and regulations concerning the training and preparation of mediators. While many courts in the US and worldwide maintain guidelines for oversight and regulation of trainings, few of these have

undertaken periodic or ongoing assessment for the purposes of continued growth and improvement. As the field of mediation matures, it is likely that rules, procedures and training guidelines bear periodic review and revision. Using an analysis of the pre-existing literature on training as well as data gathered through interviews, surveys and observations with the state of Florida's Dispute Resolution Center (DRC)<sup>1</sup> staff, judges, trainers, mediators and program administrators, this study makes recommendations as to best practices for mediation training in U.S. court-connected mediation programs. Florida provides a good case study for the examining mediator training because it has one of the oldest, well developed, institutionalized and regulated systems of court-connected mediation in the U.S.

### **Review of Related Literatures**

Based on that review of the literature it is clear that many questions remain unanswered and are of interest to this study: What should mediation training include or not include? How much training is enough? How should ethics be taught? Should testing be included as part of the training or regulatory processes? How can regulators set standards high enough to ensure quality mediation training while keeping the costs of training and administration at reasonable levels? What can administrators do to ensure that their quality assurance measures do not unfairly bar access to the mediation training market for new trainers?

In order to briefly acquaint readers with the existing state of knowledge on these questions, and due to the constraints of space, a very brief review of related literature will

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<sup>1</sup> The DRC is the regulatory body that oversees and regulates mediation for the Florida Supreme Courts. The DRC establishes rules and standards for mediator training and qualifications that individual court programs must comply with in order to operate

be undertaken herein. First, we should note that the debate over what to include in mediation training is not new (Moore 1983). From the earliest days of mediation training in the U.S., experts have believed that mediation training needed to include a combination of procedural information (e.g. how to give an opening statement, conduct brainstorming, when to use caucus, etc), substantive information (e.g. related legal knowledge), and psychological knowledge and skills. Additionally, early commentators recommended the use of experience-based learning, including continuing education, that allows mediators to practice applying what they have learned through lecture and discussion (Moore 1983). These early influences on mediation training can still be seen in the preparation of mediators today.

While not specifically tied to training, many scholars have examined the skills associated with “successful” mediators.<sup>2</sup> Goldberg (2005) found that developing rapport with the parties was key to success in mediation. Goldberg and Shaw (2007) further examined the “secrets” of successful and unsuccessful mediators in their work. They conducted a survey of 216 advocates in mediation and asked them to share information about what mediators did (and didn’t do). They found that successful mediators were able to gain the confidence of the parties through displays of friendliness, empathy, respect, and caring. Successful mediators also display integrity, neutrality, trustworthiness, nonjudgmental attitudes, and are intellectually quick, which enables them to get up to speed quickly with the necessary details of the dispute. Successful mediators were patient, persistent, diplomatic, and asked good questions. These mediators were candid,

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<sup>2</sup> While “success” is a hotly debated term in the mediation field, it has frequently been defined in court-connected mediation to include a reliance on settlement rates, party satisfaction, and even agreement durability.

used humor to lighten potentially difficult situations, were calm, flexible creative, and used “soft” language when making any suggestions or delivering bad news (such as the rejection of a proposal by the other party). All of these behaviors allowed the mediator to establish a relationship of trust with the parties.<sup>3</sup> In summary, Goldberg and Shaw conclude that some of these findings lead to training recommendations, while others are likely to be inherent in the personal characteristics of individual mediators (2007:415). For example, training can emphasize the importance of integrity, but cannot guarantee mediators will act with integrity. Trainers cannot teach empathy, but they can train mediators about ways to show empathy appropriately (2007:415).

Interestingly, work by Lieberman et al (2005) also examined mediation training, although this time the training occurred in Israel. The authors of this study promoted a model of mediation training that was largely experiential and included the skills of self-reflection and analysis in order to increase the pace of the trainee’s improvement in various skill areas. In their conclusion, the authors note that the practical experience is an indispensable part of mediation training, especially when accompanied with self-reflective work that allows mediators to focus on what worked or didn’t work in the session. However, based on the observations of trainers, the findings also indicated that mediators were not able to be adequately objective about their skills in the area of neutrality and empathy. These ideas were echoed in an article on emotional intelligence and mediation training (Schreier 2002).

Many researchers have sought to elaborate the core skills and behaviors of mediators, in part out of a desire to improve mediation training and also out of a desire to

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<sup>3</sup> For more on trust building in mediation see Stimec and Poitras, 2009.

come to a shared definition of what mediation is and is not (see Honeyman 1995; Charkoudian et al 2009). Honeyman (1995) created a model that sought to map various mediation skills and behaviors, while Charkoudian and her associates observed a large number of actual mediations in order to create a list of mediator behaviors that are frequently (and infrequently) used to varying degrees of success. Likewise, Wall and Chan-Serafin (2009) examined mediator behaviors in high-end civil mediations in order to better understand which behaviors were associated with settlement and which were not. In this latter study, the authors found that case evaluation and pressure tactics had diminishing marginal returns: meaning that when taken too far they actually resulted in reduced settlement rates. This has important and rather obvious connections to court-connected mediations, with most court programs warning mediators not to undertake overly stringent case evaluations or to pressure the parties toward any particular settlement options. The work done by Charkoudian et al (2009) and Honeyman (1995) help further knowledge about mediator training by emphasizing core mediation skills such as listening, summarizing, agenda setting, etc. These studies help point trainers toward the core content areas to include in their curricula.

In 2008, the American Bar Association Task Force on Improving Mediation Quality issued a report that examined various aspects of the mediation process, including ways in which mediators can prepare for the mediation session, the case-by-case customization of the mediation process, analytical techniques used by the mediator, and the importance of persistence on the part of the mediator. The report confirmed previous studies in its findings that mediators need to have skills in the following areas: listening, questioning, knowing when and how to apply pressure (if at all), and understanding the

complexities related to making a case evaluation or giving a recommendation, etc. The report offered little explicit guidance on the training of mediators, but it points out possible significant differences in the way private mediation occurs versus court-connected mediations. These differences will be important for those who train both kinds of mediators.

In their 2005 article, Julie MacFarlane and Bernard Mayer examine the extent to which conflict resolution theories make it into mediation training and teaching. They found that most mediation trainers focused on the skills of mediation, but very few incorporated theories, research or knowledge from the academic literature. This was the case even though many of these theories have direct relevance to mediation and could help to provide the necessary cognitive frameworks for understanding the root causes of conflict and the factors that are related to its escalation or resolution. As you will read later in the study, this was echoed in our own observations of mediation trainings and has led to specific recommendations related to the continuing education of trainers.<sup>i</sup>

### **Training Standards Existing at the Time of Assessment**

Mediator education and training requirements vary greatly by state, and even within states (Harges, 1997). States such as Georgia allow individual court programs or regions to set education and training requirements above the minimal levels required for registration as a mediator by the Georgia Office of Dispute Resolution (GODR).

Mediation programs in California courts vary significantly in their education, training and experience requirements. Researchers have long been curious to know whether different types of educational preparation have an impact on settlement or mediation quality. For example, does it matter whether the mediator has a law degree versus a degree from the

mental health fields (Person 1979)? It is beyond the scope of this paper to set out the recommended educational pre-requisites for mediators in court-connected settings.

However, it can be said that there is a trend toward the professionalization of mediation, and as this occurs we are seeing increased educational requirements for paid mediators in court-connected programs. The educational prerequisites for volunteer mediators are likely to continue to be lower than for paid mediators.

### **Court-Connected Mediation in Florida**

After the creation of enabling legislation in 1988, mediation programs spread quickly across Florida's court systems. In late 2006 the Office of the State Courts Administrator and the DRC funded an independent assessment of DRC's training oversightis article will use the case of Florida to demonstrate the value of *collaborative* assessment of mediation training standards and discuss some of the findings related to "best practices" for mediation training and regulation.

As experienced mediators, trainers, and facilitators, we purposefully designed a collaborative stakeholder process. In order to "walk the talk" and embody the spirit of collaboration found in the mediation process, we strove to involve all stakeholders and gather all ideas during the process. Throughout the project we enjoyed strong support and input from a broad range of stakeholders including judges, court program administrators, mediation trainers, mediators in Florida, and the DRC staff. Our work was thoughtfully guided by input from an Advisory Committee consisting of experienced researchers, scholars, and mediation professionals.<sup>4</sup>

### **Goals and Challenges of the Assessment**

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<sup>4</sup> We thank James Alfini, Tricia Jones, Peter Salem, Donna Stienstra, Josh Stulberg, Andrew Thomas and Roselle Wissler, who generously shared their insight and expertise as advisors to this project:

Our mandate was to examine the policies and practices of the DRC in reviewing and certifying mediation training programs, and to make recommendations for quality improvements in mediation training. Individual trainers and training programs were *not* evaluated as part of this project. For the purposes of this research, the terms “neutral” and “mediator” are used to refer to those who provide mediation services in U.S.-based court connected mediation programs

In order to understand the backdrop of this and similar studies it is important to note the entrepreneurial nature of mediation training in Florida and most other U.S. states. Trainers generally operate within the guidelines set by their regulatory agency or office, yet they also exhibit a great deal of individuality in their teaching styles and methods. While mediators and trainers tend to espouse a deep commitment to the practice of their craft and a desire to serve their communities, it is also important to note that practitioners and trainers must be able to make a living if the field of mediation is to flourish. The challenge is to strike an appropriate balance between the regulation necessary for quality control and the freedom required for trainers to create and market innovative trainings.

### **An Evaluation of Court-Connected Mediation Training in Florida**

We approached this project with a commitment to collaboration that we hoped would reflect mediation’s fundamental principles and solicit insights and buy-in from all stakeholder groups. Data for this study comes from surveys, observations and interviews with mediators, trainers, judges, program administrators in Florida as well as an examination of previous studies and insights from court-connected programs across the

U.S. Like mediation itself, the research design was based on a collaborative model that values the ideas and needs of all stakeholders. This method of program assessment/evaluation is based on the assumption that the stakeholders themselves are best situated to understand the milieu in which their mediation programs operate. Outside evaluators act as expert facilitators in that they gather ideas and help stakeholders identify those that would work best in their situation. Full details of the methodology can be found in the endnotes to this paper.<sup>ii</sup>

Mediation training in Florida is regulated and provided through programs certified by the Florida Supreme Court. There are four areas of practice in which mediators can become certified: county mediation (i.e. civil claims up to \$15,000), circuit civil mediation, family mediation (i.e. divorce and parenting matters), and dependency mediation (i.e. mediations involving child protection agencies and parents). The training *program* is certified rather than individual trainers. Prospective primary trainers must submit all of their training materials to the Dispute Resolution Center (DRC) for approval. Once approved as a training program provider, trainers must provide the DRC with an agenda and updated materials, each time they train. Training programs in each of the four areas described above (county, circuit civil, family, and dependency) must meet all “learning objectives” required for that particular training. The daily agendas must indicate which learning objectives are covered during each segment. Daily evaluations are administered to trainees to ensure that each of the learning objectives listed for that day’s agenda were indeed covered.<sup>5</sup> Each of the four trainings has more than 100 learning objectives.

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<sup>5</sup> The requirement of daily evaluations has since been eliminated.

Each of the four trainings include, among others, these requirements: each trainee must participate in role plays with at least one experience as mediator and one as disputant; role plays simulations must be observed by an experienced mediator acting as a “critiquer”; role plays should include at least fifteen minutes of time for debriefing. Ninety minutes of ethics training is required in addition to “weaving” ethics discussions throughout the training. The training standards encourage trainers to take into account the principles of adult learning by using mixed teaching methods such as short lectures, small group activities, simulations and role-play experiences (for more on adult learning see Hedeem, Raines and Barton 2009).

### **Findings and Recommendations**

While some of the findings discussed herein relate specifically to the case of Florida, most also apply logically to mediation training and regulation in the U.S. more broadly. This information may be particularly useful for new programs faced with important decisions about the design and requirements of mediation training and trainers.

#### *Finding # 1: Training design*

Some states, such as Florida, require stand-alone courses in the various subject areas in which mediators practice (e.g. 40 hours in Family Mediation; 40 hours in Civil Mediation, etc.). Other states, such as Georgia, adopt a graduated approach which requires a basic mediation course be taken first (e.g. civil mediation) with more advanced courses coming later (e.g. domestic relations, dependency, etc.). The former approach assumes that mediators are likely to practice in only one area and/or that each area of practice is unique enough that mediation skills must be taught within that specific context. The latter approach assumes that basic mediation skills and process are similar in

each context, with the legal, emotional, or other contextual issues varying by area of application.

Through the online surveys and interviews, many Florida stakeholders expressed concern about redundancy between the four separate types of training. Stakeholders also voiced concern about a lack of consistency in method and content between trainers related to fundamental skills. Based on this data, we recommended the development of a “core” mediation skills course, with additional training for specific areas of practice.

To be more specific, we recommended a 24-hour core training that would be required for every mediator, regardless of the area of mediation practice. This core course would include training on the mediation *process* and fundamental *skills*, including listening, questioning, framing skills, and ethical practice (Barton, Hedeem, Raines 2008). In terms of practical and logistical considerations, the core course could be presented as a stand-alone course or paired with a specialized training in one of the four specific contexts (i.e. county court, circuit civil, family or dependency). Each specialized course would consist of 20 hours of additional training, with the exception of county court (i.e. small claims), which is often undertaken by volunteers and would consist of only 8 additional hours. For example, if one sought to be a family mediator, s/he would take the basic 24 hour core course and then take the additional 20 hour family mediation course. This would represent an overall increase in training hours by eight hours for county mediators, and four hours for the other areas of practice in Florida.

Stakeholders identified the following advantages in core training: each mediator would receive the same basic training in mediation process and skills; additional advanced training would not include redundant material concerning basic mediation

process and core skills; separating the basic and advanced skills courses would allow more time for role-play (which was almost universally supported by stakeholders).

Support for the “core-plus” model was mixed. Those preferring the stand-alone training concept voiced the following concerns: the logistics of unbundling the trainings would impose a significant burden on existing trainers (note: this would not be a problem for new court programs); without a larger increase in the required training hours, 20 hours would be insufficient to cover necessary material in the advanced courses; learning mediation within each specific context is important, even if it results in some redundancy between trainings; 8 hours might not be enough to deal with the special issues faced by county court mediators.

On balance, there was more support for the change than against it, although it must be observed that making a large structural change such as this would not be without controversy. Further, the authors recommended that if the core training concept is not adopted, then each training should be increased by at least four hours to allow more time for role-play and debrief, as will be discussed next.

#### *Finding #2: Role-play*

One of the most striking findings of this study was the high level of consensus concerning the value of role-play in mediation training and the desire, on the part of trainees, for the amount of time devoted to role play to increase. All sources of data indicated that each trainee should have the chance to practice mediating as many times as possible. While the current rules do not prohibit additional role play opportunities, many trainers have used them as a ceiling, rather than as a floor for structuring the use of role play in their trainings. We suggested that partial process role-plays (e.g. a simulation

covering only the mediator's opening statement, issue identification and agenda setting; parenting plans, etc.) would be a change that would add significant value to the current practice of mediation training. New training programs being established outside of Florida should consider ways to maximize the time spent on role-play, debrief and analysis in order to allow mediators to begin the process of incorporating these skills and habits into their practice.

Additionally, the minimum time currently allotted to small group critique and large group debrief should be increased from the common practice of fifteen minutes to thirty-plus minutes for the longer role plays. A great deal of learning occurs in the interaction and feedback between the role-play critiquers and the trainees. Observers noted that debriefing periods often seemed rushed and could be lengthened to afford more detailed consideration and discussion, particularly in the small groups. Some trainers (inside and outside of Florida) use video recording devices to capture the trainee's performance during role play so that the trainee can replay their performance at a later date as a learning tool. This is advisable so long as the trainee is comfortable being recorded and the technology is reasonably available to the trainer.

*Finding #3: Class size and materials*

The class sizes observed varied from six to forty. The tone and dynamics of the interaction between the students and the trainer(s) varied by class size, with the smaller classes allowing more time for detailed questions and a higher level of per-student interaction and engagement. Larger classes seemed to make it more difficult for the trainer to accurately gauge whether or not individual students were mastering the material and skills covered in the course. Larger courses also exhibited more "side-bar"

conversations between trainees and even the checking of emails and text messages during trainer-given lectures. In the largest classes, a handful of students were consistently engaged, answering questions and participating, while a larger number behaved more passively and with less interaction.

Clearly, class size is an important issue related both to pedagogical concerns as well as to the cost of providing training. There is an economy of scale at work here: the larger the class, the less expensive it can be on a per student basis. Based on observations of trainings, and on our own experiences as trainers, we recommend that a “best practice” standard should limit mediation class size to approximately two dozen students. Each regulatory entity will have to decide for itself where to draw the line in terms of maximizing the learning experience while making training affordable for trainees and adequately profitable to incentivize trainers.

Observers also noted that many of the materials used for role-plays, discussion exercises, in-class activities, or materials related to legal rules and regulations were out dated for some trainers. A review of training manuals indicated that handouts, ethics advisory opinions and other materials occasionally did not reflect the current legal or procedural requirements as well as the current state of knowledge in the field of mediation. We believe this is a challenging and important issue both within and beyond Florida. The laws, rules and procedures for mediation programs are changing rapidly in response to the rapid growth in use of Alternative Dispute Resolution more generally. It is crucial that trainers frequently update their training materials, as well as attending to their own continuing education, in order to remain current with this rapidly changing field. Failure to do so will result in inconsistent and even inaccurate training. While the

market may punish trainers who do not keep their trainings and manuals current, it is insufficient to the task. Most mediation trainees are not able to differentiate between current and out-of-date information. Therefore, it will fall to regulators to periodically and thoroughly review the training manuals of approved trainers in order to ensure accuracy and currency with recent changes. Regulators may wish to consider posting all required training documents on their website for trainers and trainees to access easily. They may also wish to consider a required periodic review of training materials to ensure they are complete and up to date.

*Finding #4: Teaching Methods*

Although Florida's current training standards encourage the use of mixed teaching methods, the review of literature pertaining to adult education and the observations of trainings undertaken by the authors led to a recommendation that trainers frequently change their teaching methods in order to maintain student interest and appeal to various learning styles.

Integrating and alternating among short lectures, small- and large-group discussion, scenario analysis, role-plays (including shorter, partial process role-plays), videos, and demonstrations keeps participants engaged and results in higher levels of learning and satisfaction...the use of a variety of teaching methods is a best practice that gives every learner the best opportunity to benefit from mediation training" (Barton, Raines, Hedeem 2008, p.49).

Data from the online survey and interviews with stakeholders, including members of the study's Advisory Committee, indicated that trainers should consider incorporating testing as a learning tool and/or as a necessary step before completion of the certification process for mediators. Regulators and/or trainers could consider using testing for subjects such as ethics rules, the calculation of child support, and the required elements of the opening statement, among other possible areas. Such tests would need to be objective,

rather than subjective. For example, trainees would need to display adequate knowledge of the ethics rules or the ability to calculate child support using a clearly written scenario. Testing can be a valuable way to cover subject matter and to determine whether certain areas require further study by students or coverage by trainers. Testing could be used as a learning tool by trainers, with students taking the tests as many times as needed in order to display mastery of the material. Alternatively, testing could be used by regulators as a criterion for mediator certification. The former approach is certainly less controversial and logistically challenging, while also ensuring mastery of the material by trainees. The data gathered for this study indicates that testing is an under-used tool which can enhance mediation training and mediator quality in general. As with all regulatory and training issues, there is a trade-off between ensuring quality and maintaining low barriers to entry for new mediators. An ongoing concern would be the validity of any test used. While program administrators may wish to consider this as an option, the data from this study do not allow for a definitive recommendation for or against pre-certification testing. More research is needed on the merits of pre-certification testing before any firm recommendation may be made.

#### *Finding #5: Ethics*

A sampling of training programs from various states indicates that training on ethics is a crucial part of every mediation training program. However, different programs devote varying amounts of time and energy to the matter of ethics, and teach the subject in varying ways.

For this study, the authors found that the Florida training standards have a strong emphasis on ethics. As is the case in all states, very few mediations result in formal

complaints against mediators. As of December 2005 more than 18,000 people had completed mediation training in Florida, with more than 5,000 mediators certified in one or more of the four categories (Young, 2006a). As an aside, this gap between the number trained and the number certified may indicate, in part, that people take mediation training for a variety of reasons. Some may not intend to work on court-related cases, but instead hope to use mediation skills in unregulated fora.

From May 1992 until April of 2005, only 74 grievances against mediators were filed with the Dispute Resolution Center (Ibid p.750). However, as is the case elsewhere, it is likely that many disgruntled parties seek and receive redress through the actions of their local mediation program administrators so that this number does not fully reflect the number of instances in which a party to mediation suspects that his/her mediator has behaved unethically.

Of the 74 grievances filed with the DRC, about one-third were dismissed because they were not grievable offenses or due to lack of probable cause. In total, about 25% of the grievances filed resulted in a sanction against a mediator, with most being required to receive further training and/or mentoring in order to maintain their status as state certified mediators (Ibid).

After examining the DRC's reports on these investigations and consultation with board members charged with hearing ethics complaints, patterns emerged in terms of mediator behaviors most likely to result in ethics charges. These patterns are similar to those found in other states (Young 2006a). The bulk of the complaints against mediators involved those instances in which neutrals strayed from the facilitative model of mediation by giving improper advice and/or pressuring one or both parties toward a

particular settlement. This finding paralleled analyses of the complaints against mediators in other states examined as part of this study. The grieving parties generally stated that this behavior was an indication that the mediator was no longer acting in a neutral, impartial manner. As mentioned earlier, recent research by Wall and Chan-Serafin (2009) indicates that such strategies backfire when taken too far by mediators in civil cases. While complaints of undue pressure are not widespread, it is likely that by altering the content of ethics training to mediators, the frequency of these behaviors and related complaints could be further reduced.

Research shows that parties are less satisfied with mediators who give them settlement advice, even if the party themselves asked for the advice (Bingham, Kim and Raines 2002). When mediators give legal opinions, tell the parties what the judge will likely do in the case, pressure or coerce parties toward a particular settlement, or pressure parties to settle rather than not to settle, they are often viewed as having abandoned or at least changed their role as a neutral.

A second common source of complaints involved particularly long mediation sessions during which the parties felt they did not receive adequate breaks for food or rest and did not fully understand they could end the mediation session at any time. Based on earlier observations by Coben (2000), some mediators feel that pressuring parties to skip lunch in order to build pressure toward agreement is an acceptable means of increasing the likelihood of settlement. He calls this “Acquiescence through exhaustion.” However, this type of mediator behavior, whether intentional or not, has been the basis upon which agreements were overturned and ethics complaints filed. Based on this finding, trainers should share this information with trainees so that they can be attentive to the physical

needs of disputants in order to assure a high quality process and avoid later requests to vacate mediated agreements.

A third source of complaints involved accusations that the mediator was rude, unprofessional, insensitive, or generally unskilled (Young 2006b). These complaints were less frequent than the first two categories of complaints, and appear to be more related to the personal idiosyncrasies of individual mediators rather than having direct links to mediator training.

Interviews from the Florida study shed interesting light on the link between mediation training and ethics complaints against mediators. All of those interviewed felt that relatively small changes to the current training standards could result in a reduction in the number of ethics complaints, and equally important, a reduction in the incidence of unethical mediator behavior. Eighty-three percent of those interviewed confirmed the information covered above, linking common ethics complaints to mediator behavior that compromises neutrality through the improper use of advice and/or coercion to produce a particular settlement. As a result, mediation training should emphasize the use of non-directive and non-evaluative models of mediation. Trainers should also educate mediators as to the ethical and professional dangers inherent in giving improper advice, including legal advice, recommending particular settlements, coercing the parties in any way, making decisions for the parties, pressuring the parties to settle, or carrying on mediation sessions beyond the time when reasonable party capacity would be diminished.

The majority of those interviewed and surveyed for this study stated a belief that ethics training for mediators should be interactive, rather than lecture-driven. This view was echoed by regulators. While the current training regulations do not specify the means

by which ethics training should be conducted, there was the perception among some respondents to the survey that some trainers were reading the rules and lecturing on this material in a didactic style. Stakeholders felt that the trainees needed to apply the ethics rules to realistic scenarios through small-group discussion exercises or role-plays. Half of those interviewed stated they felt that more time should be devoted to ethics training. While the current training standards do not specify the point in the course when ethics is covered for ninety continuous minutes, there is some perception among those interviewed that it is frequently relegated to the end of the course, when participants are fatigued and less attentive.

There was also a moderate level of support for the idea of an ethics test. Some felt that an ethics test should be offered online through the DRC website. This online test would require the test-taker to show familiarity with the ethics rules and be able to apply them to specific, rather objective scenarios. This test could be taken more than once, if necessary, but each applicant mediator would have to pass it before receiving certification. Others felt that the ethics test could be administered by trainers as a learning tool, but that trainees should have to demonstrate knowledge of the ethics rules prior to receiving their training certificate.

Regardless of the format for ethics testing, there was a desire to implement a change that would ensure that all applicant mediators have read and understood the ethics requirements. In Florida, Georgia, and other states studied by Young (2006a), mediators cited for ethics violations frequently claimed to have been uninformed about the particular rule or ethical code of practice which they violated. While this may be part strategy, part truth, ensuring that each prospective mediator has read and understood the

mediation rules might make future enforcement, including the de-certification of mediators, easier for regulators both inside and outside of Florida.

Due to the relatively rapid changes seen in the area of mediation ethics, and the related case law that is developing in each state, it is likely that relatively recent changes to advisory opinions are not being adequately taught to trainees inside and outside of Florida. We recommend that trainers be required to update their ethics material frequently to reflect changes to statutes and/or advisory opinions and to remove out-of-date material from their manuals. It is also recommended that these issues be covered annually in Continuing Mediator Education (CME) trainings. Those interviewed agreed that *no* increase to CME hours was necessary. Florida currently requires sixteen hours of continuing mediator education every two years in each area of practice (Administrative Order AOSC08-23). At least four of these hours must be in the area of mediator ethics.

To recap, in employing the best practices in teaching ethics (both inside and outside of Florida), trainers should: cover all applicable laws, rules, procedures, and penalties related to mediation practice and remain up-to-date on these matters; encourage discussion and analysis through the application of ethical dilemmas to various real-life scenarios; examine common sources of ethics complaints both within and outside of their own states in order to understand those practices most likely to result in ethics charges; discuss and decide with regulators how best to incorporate the use of tests (if at all); and lastly, communicate that ethical mediation *is* high quality mediation.

#### *Finding #6: Trainer Qualifications*

There is a natural tension between the need to ensure that all mediation trainers are skilled, experienced and qualified on the one hand, and the need to keep the market

open and fair to new trainers, on the other hand. In stakeholders meetings, interviews, and surveys, the researchers were told about barriers to market entry for prospective trainers. As is common practice in nearly all states that regulate mediation trainers, the Florida rules require that prospective trainers have received mediation training and have conducted a prescribed number of mediations. Additionally, Florida rules require that prospective trainers have training delivery experience. This experience can be achieved through participation as guest lecturers and role play critiquers in the trainings given by others. This necessitates the cooperation of current trainers in helping to grow their competition, thereby presenting a high hurdle for would-be trainers without necessarily ensuring that they are any more qualified to offer high-quality training themselves.

Based on these concerns, the authors have drafted some best practice recommendations concerning the certification of mediation trainers inside and outside of Florida. First, all potential trainers should receive an orientation that informs them about the rules and regulations related to mediation training in their particular state or jurisdiction. This can be done on an individual basis or once a year for all prospective trainers. Secondly, prospective trainers should demonstrate knowledge of the principles and literatures related to adult learning through an oral discussion with regulators, test, or other mechanism. As mentioned in the literature review (MacFarlane and Mayer 2005), trainers need to show a mastery and currency of the literature on adult learning and conflict theory so that they can be effective as trainers. Third, they should show ongoing growth as an adult educator through continued education specific to training skills. Continuing education should also include any updates or changes to mediation rules, legislation, etc. Fourth, the regulatory agency (the DRC in this case) should observe each

new trainer during his/her first training course in order to offer developmental feedback and to serve as a gate-keeper, if need be. While the observation of would-be trainers would necessitate the development of objective criteria for evaluating training and might result in added administrative costs to regulators, there is no better way to ensure trainer quality and to improve quality control. Additionally, regulators should retain the right to observe subsequent trainings on a random or as-needed basis for the purposes of ongoing quality assurance. This has been done by some court programs in New York and elsewhere. While it is personnel intensive, it is the best way to guarantee quality control.

*Finding #7: Regulatory recommendations*

There has been a long running debate within mediation circles about the trade-offs between institutionalization and innovation, between assuring a threshold of quality control versus excluding some mediators or trainers from the field. Charlie Pou (2006) presents a useful matrix to understand these issues as they relate to the regulation of mediation training. He observes that there are two kinds of regulatory hurdles used by mediation program administrators: the first related to the “height” of hurdles which a training program/provider must *initially* meet to be approved by the court program, and the second involving the extent of oversight and support required of the regulatory entity to maintain *ongoing* quality. The options that he offers are:

- High hurdle/Low maintenance
- High hurdle/High maintenance
- Low hurdle/ Low maintenance
- Low hurdle/High maintenance

For each option, there is a trade-off between cost and quality. For example, the “high hurdle/high maintenance” option is the most expensive administratively, and provides the

least flexibility and market entry. However, it also has the most quality control of all four options.

We observe that the present system in Florida sets high entry standards for certification of training programs and relatively low ongoing maintenance. As a result, it is difficult for trainers to enter the market, but those who gain entry should provide relatively high quality services. Our recommendations involve changing some of the barriers to entry for new trainers, while increasing the amount of ongoing professional development required for maintaining high quality training over time. For example, there are some regulations that are unnecessarily time-consuming to both trainers and regulators. These include the cumbersome nature of the learning objectives, the use of daily evaluations which are tied to the learning objectives, and the requirement that even small administrative infractions (deadlines missed, etc.) be taken up by the Mediation Training Review Board, leaving the DRC with no authority to handle small violations.

On these matters we recommended: a review and reduction in the number of learning objectives; ending the daily evaluations in favor of a one comprehensive evaluation to be done at the end of the mediation training; and tying the evaluation to skill competence as perceived by the trainee. Therefore, instead of asking whether or not topic X or Y had been covered, the new wording would be something like this: “I know how to give an opening statement that includes all of the required elements..... strongly agree, somewhat agree, etc.”.

In order to ensure that trainers are using all the required hours to conduct training (e.g. ensuring that a “40 hour training” does indeed last 40 hours), a number of oversight and review processes are available. Survey respondents were asked what, if anything, the

DRC should do to monitor these mediation trainings. While five respondents (5.7%) checked “Do nothing,” the vast majority recommended the following: fifty-two individuals (59.1%) advised that the present practice of written survey evaluations at the conclusion of training be continued, thirty-two (36.4%) recommended DRC staff observe some trainings in-person, seventeen (19.3%) recommended follow-up phone interviews with some training participants. While we acknowledge that training evaluation by regulators bring up important due process issues and that observing trainings can be expensive for regulators, the ability to do so on a random basis may provide an important opportunity to give developmental feedback to trainers in addition to ensuring that guidelines are being observed.

### **Conclusions**

This study has sought to make an initial foray into the issue of “best practices” for mediation training and regulation. It is important to note that there are significant differences in the legal, social, and economic contexts in which mediation operates across states, provinces and countries. Therefore, these suggested best practices cannot be applied without attention to the individual circumstances facing particular court programs.

Many mediation programs in North America are now more than thirty years old. With these years of experience, and taking into account the ever-changing contexts within which they operate, it is time for concerted efforts at program assessment to determine which rules or practices are serving program goals and clients and which are not. Collaborative assessment, if done thoughtfully, is within financial, political and practical reach of most ADR programs. In fact, it may result in cost savings, as outdated

rules and practices may cause important reductions in efficiency (including lower settlement rates, reduced party satisfaction, problems with political support for continued program funding, increased ethics complaints, etc.). Court-connected programs seeking to undertake program assessment might consider partnering with local universities or others in order to collaboratively develop cost effective, high quality assessment procedures. In addition to ensuring the highest degree of utility, collaboration between internal stakeholders and external reviewers is likely to garner buy-in and reduce anxiety among stakeholders.

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<sup>i</sup> Upon request, the authors can provide a fuller review of the literature review related to mediation training. As this literature is vast, it is not possible to summarize it all in the space of this paper.

#### ENDNOTES

<sup>ii</sup> . Accordingly, our process design encouraged dialogue, openness, and participation from as many individuals and groups as possible through a range of research methods, including the following:

*Facilitated stakeholder meetings:*

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To provide opportunities for input and interaction we met with wide variety of stakeholders: trainers, court program administrators, members of oversight and review bodies, and others with an interest in the field of ADR. Two stakeholder meetings were held in different regions of the state to accommodate as many participants as possible. The meetings lasted one day each and were open to the public, with invitations sent directly to trainers, judges, members of the Mediator Ethics Advisory Committee (MEAC), Mediator Qualifications Board (MQB), and the Mediation Training Review Board (MTRB), court program administrators and representatives of mediation organizations. The invited stakeholders also had the opportunity to share individual, anonymous comments with the consultants through a web-based survey (discussed later). Approximately two dozen stakeholders attended these meetings.

*On-site training observations:*

The consultants directly observed nearly every mediation training held in Florida between mid-November 2006 and early May 2007. The consultants did not observe the trainings in their entirety, but observed between one and three days of each course. Direct observation of these trainings provided an understanding of the modes through which material is communicated, the level of trainee engagement with the material and the trainers, the demographic make-up of mediation trainees in the various types of trainings, as well as providing an additional opportunity to meet and speak with trainers and trainees. In total, the consultants observed two county trainings (i.e. civil claims up to \$15,000), two circuit civil trainings, three family/divorce trainings, and two dependency trainings.

*Interviews:*

In order to get a deeper understanding of the concerns and ideas to be shared by individual stakeholder groups, interviews were conducted with the DRC staff, Florida mediation trainers (n= 21), and members of the Mediation Ethics Advisory Committee (MEAC, n= 6).

In order to explore the approaches taken by trainers and their concerns in the context of actual training, we conducted interviews with both primary and assistant mediation trainers. There are approximately 50 approved trainers in each of the 4 areas of mediation training. Of these, 47 are actively training. We successfully completed twenty-one telephone interviews (45% response rate). The interviews lasted anywhere from fifteen to sixty minutes. In addition to the interviews with trainers, all the certified

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primary and assistant trainers in Florida were sent the link to the online survey. In total, twelve (n=12) trainers completed the online survey.

*Online Surveys:*

Judges, court-connected program administrators, and policymakers from the Mediator Ethics Advisory Committee and the Mediator Qualifications Board were also asked to complete an online survey to gather information including:

- What skills, habits, knowledge, etc. do they expect their mediators to have at the end of the required training(s)?
- What kinds of complaints do they hear regarding mediation and mediators? How can revised training standards address or reduce the incidents of these complaints?
- Preferences regarding the content of trainings: What should be included or not included?

Twenty-eight (n=28) individuals from these categories completed the online survey out of a total of seventy (70) who were sent the survey link, for a response rate of forty percent (40%).

The online survey also included a random selection of past participants in certified trainings. Five hundred and ninety-seven (597) randomly selected certified mediators received an emailed invitation to take the online survey and provided an internet link to the online survey between January and March of 2007. These email addresses came from a publicly available list accessed through the DRC website. Of those emailed, one hundred and three (n=103) completed the survey (17%).

The survey examined the following:

- Relevance, applicability of training content to court-connected mediation practice
- Retention of lessons learned in mediation trainings
- Utility of various training methods and approaches
- Ideas for improving future trainings
- Ideas for improving training standards and the requirements for trainers
- Identification of core topics or skills that should be covered in required trainings
- Ideas for maximizing the learning from role-plays or other hands-on exercises

*Additional data sources:*

Other sources of data for the project included comprehensive reviews of the literatures on mediation training and adult learning; of ethics complaints from Florida and other states; of training agendas and materials used in Florida trainings; of insights from the study's Advisory Committee; and interviews with program directors from six other states.

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