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Training Interveners for ADR Processes

BY JOSEPH B. STULBERG*

INTRODUCTION

Why train persons to serve as interveners in Alternative Dispute Resolution ("ADR") processes?

With the growth of ADR programs connected to state and federal court systems,¹ attention has focused on the training and qualifications of those who serve in the intervener roles required in some of these models.² A historical perspective of the approach addressing this concern is useful.

ADR processes refer to non-trial procedures for resolving selected civil and criminal claims. Arbitration has been the most widely used ADR adjudicatory process with formal standing.³ Parties to commercial, employment, and international business transactions often use arbitration

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Dr. Stulberg has trained more than 4500 community residents in 18 states to serve as mediators in dispute settlement programs that operate throughout the country. He was the sole trainer of mediators in each of the three original Neighborhood Justice Center programs established by the U.S. Attorney General in 1977. Dr. Stulberg helped to establish, and served as the first director of, the Rochester (NY) Center for Dispute Settlement. He also served as Vice-President of the American Arbitration Association in charge of its nationwide Community Dispute Services program.

¹ For an exhaustive listing of relevant statutory provisions regarding legislative provisions structuring the use of mediation and other consensual processes, see generally NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* app. B (1989 & Supp.). Federal statutory provisions in the Federal Arbitration Act, 9 U.S.C. §§ 1-9 (1947) and provisions in the Unif. Arbitration Act §§ 1-25 (U.L.A.) (1968) provide a basis for arbitration programs. State programs are also supported through various state arbitration statutes.

² See COMMISSION ON QUALIFICATIONS, SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, *PRINCIPLES CONCERNING QUALIFICATIONS* (1989); see also Margaret L. Shaw, *Mediator Qualifications: Report of a Symposium on Critical Issues in Alternative Dispute Resolution*, 12 SETON HALL LEGIS. J. 125 (1988).

³ See FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 23-95 (1990).

because it is both prompt and private. Furthermore, the parties can select as decision makers those persons who possess expertise in the subject area under dispute. In the late 1960s and early 1970s, advisory arbitration programs were initiated in various court jurisdictions. Claims filed in civil court were sent to arbitration panels.⁴ The arbitrators were volunteer lawyers who analyzed documentary evidence, heard witnesses, and then issued awards. Though parties were free to accept or reject the advisory award, most programs reported high acceptance rates.

The primary thrust for the use of non-adjudicatory dispute resolution processes began in the late 1960s with the introduction of mediation to resolve minor criminal complaints.⁵ Designed to remove from the court dockets a variety of lesser, though humanly complex, criminal charges, which the adjudicatory process seemed particularly ill-suited to address satisfactorily, these programs recruited and utilized neighborhood residents, law students, and volunteers from other walks of life to serve as neutral facilitators. To some, these programs had a distinctive "anti-lawyer" thrust. Since the perception was that conventional legal system participants were systematically insensitive to the needs of the persons who used the court process, the remedy was to exclude or minimize the presence of lawyers in the intervener's role.⁶

Two strands of ADR—arbitration and other judicial-like procedures such as the summary jury trial and the mini-trial, and consensual procedures such as mediation and negotiated rule making—continue to demarcate the explosive development of their use in a range of court-annexed and institution-affiliated processes.⁷ There are mediation programs annexed to court systems,⁸ administrative agencies,⁹ and such public service institutions as elementary and high school systems.¹⁰ Adjudicatory-like processes are similarly employed at the federal and state judicial levels¹¹ and by business and

⁴ See PATRICIA A. EBENER & DONNA R. BETENCOURT, COURT-ANNEXED ARBITRATION: THE NATIONAL PICTURE (1985); Patricia A. Ebener & Donna R. Betencourt, *State Arbitration Programs*, 3 Alternatives, 10 (1985) (providing an update of EBENER & BETENCOURT); see also E. ALLEN LIND & JOHN E. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Fed. Judicial Ctr. 1983); Paul Nejelski & Andrew S. Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787, 808-12 (1983).

⁵ See generally DANIEL MCGILLIS & JOAN MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS (1977).

⁶ See *id.* at 163.

⁷ See STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 3-6 (1992).

⁸ See *supra* note 1 and accompanying text.

⁹ 9 LA. REV. STAT. ANN. § 3100-26 (West 1969).

¹⁰ See NATIONAL ASSOCIATION OF MEDIATION IN EDUCATION, REPORT ON MEDIATION IN EDUCATION (1989).

¹¹ See *supra* note 1 and accompanying text.

community organizations that deal with commercial¹² or employment disputes.¹³

One question that immediately arises is who should serve as the intervener—be it the arbitrator or mediator—in these processes. To answer this requires addressing the broader challenge of articulating the goals and values of the processes in which interveners operate. Those responses frame the role, qualifications, and training needs of the intervener.

Consider the adjudicatory process first. Arbitration is a private dispute resolution process, designed to allow parties to identify the issues they wish to submit to arbitration, the procedural framework within which the matter is heard, and the method of arbitrator selection. Parties use arbitration for a variety of reasons, but chief among the reasons is the opportunity to select a decision maker in whose integrity, analytical skills, and contextual knowledge of the dispute they have confidence. It is no accident that specialized industries such as steel, auto, shipping, and construction have highly developed arbitration systems to handle grievances within their respective contexts. Who are the persons selected to serve as arbitrators?

The operative presumptions in such industry-based programs are that persons with knowledge in the field will serve very ably, and a particular academic training, such as law, is not a prerequisite for service. The most appropriate background for the arbitrator may be that of an engineer, architect, or veteran business person. Agencies that develop arbitral panel lists, such as the American Arbitration Association or the Federal Mediation and Conciliation Service, as well as the disputing parties, assume that such persons, many of whom are not lawyers, can be trained to understand and apply those principles necessary to ensure due process hearing procedures, including such matters as the assessment of the credibility of evidence. That is, arbitral participants, supported through our public policy of judicial enforcement of arbitral awards, assume that a person with such a background can be trained to discharge the arbitrator's role.¹⁴ Although arbitrator training is not a prerequisite for service, many agencies conduct limited arbitrator development programs that interveners are encouraged to attend.¹⁵

¹² See AMERICAN ARBITRATION ASS'N, *COMMERCIAL ARBITRATION RULES* (May 1, 1992).

¹³ For case law providing an example of arbitration in the employment context, see *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991). See generally ALLAN F. WESTIN & ALFRED G. FELIU, *RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION* (1988).

¹⁴ *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960).

¹⁵ Such not-for-profit agencies as the American Arbitration Association and extension programs

This laissez-faire approach to arbitral qualifications and training changed when court-annexed advisory arbitration programs commenced. These programs were designed to handle or reduce pending judicial caseloads. The primary objective was a matter of court administration: promote formal settlement of cases as a way of expediting docket management. These programs served litigants and their legal representatives at various stages of trial preparation, reflected the range of controversies that comprise a civil court calendar, and were administered by the court system. Because the thrust of this alternative program was to provide an early trial, it is no accident that those deemed qualified to serve as arbitrators were attorneys admitted to practice in that state.¹⁶ The goals of privacy and arbitrator content-expertise, so prominent in the industry-based arbitral programs, were muted in this program setting. Programs imposed minimal lengths of bar membership as a way of ensuring knowledge and experience deemed relevant to this arbitral forum. Nevertheless, skills training programs for conducting arbitration hearings were not required or furnished.¹⁷

It is reasonable to conclude that the operative analogy for these arbitrator qualification and training requirements was a consideration of those elements constituting threshold qualifications for judicial service in a trial court of general jurisdiction. The presumption was that all arbitrators possessing the requisite professional training and experience would be familiar with trial court processes and relevant legal guidelines, as well as know how to research and analyze relevant legal materials. Further protection in the process was that parties to these proceedings would be represented by counsel. Such an approach ensures that arbitrators have limited degrees of freedom to conduct their hearings in an innovative way. The primary difference in practice among lawyers serving as arbitrators was the degree of formality they would require of the presenting parties to comply with traditional evidentiary rules.

These early advisory arbitration models have since been incorporated into federal court practice.¹⁸ Given this milieu and presumed competencies, no specialized arbitral training programs have been designed or required of persons serving the arbitral role. If the person meets the stated qualifications, that person serves.

of such universities as the New York State School of Industrial and Labor Relations at Cornell University routinely offer one- and two-day training programs in basic techniques for conducting arbitration hearings.

¹⁶ See *supra* notes 4-6 and accompanying text.

¹⁷ See Nejliski & Zeldin, *supra* note 4, at 796; *supra* note 4 and accompanying text.

¹⁸ See LIND & SHAPARD, *supra* note 4, at 29; *supra* note 4 and accompanying text.

Quite a different approach and set of standards were developed and deployed when implementing the consensual dispute resolution processes. The reasons were both pragmatic and professional. ADR received a dramatic impetus with the use of mediation to handle minor criminal complaints and small claims court actions.¹⁹ Although judicial and court personnel participated in the planning and implementation stages, these programs were often initiated and developed by nonprofit agencies. Since many nonlawyers were part of these referral agencies, public policy questions surrounding the propriety and relationship of the agencies to such programs immediately surfaced. To whom were these cases being referred? What were the qualifications of these individuals? Given their training, what was the appropriate oversight function of the referring court officers? Judicial personnel were amenable to making referrals to such agencies (and, by implication, to nonlawyers) in part, because the mediation process did not allow the intervener to render a binding decision.²⁰ To instill added confidence in the system, and to ensure integrity of service, however, most program planners proposed that all persons serving in the mediator's role would be required to participate in a training program approved or provided by the agency.

For this category of case referrals, the following approach to program design principles were established: (1) nonlawyers could legitimately participate in dispute resolution processes that resulted in final disposition of legal claims; (2) *prima facie* qualifications for persons serving in the mediator's role related to their range and breadth of life and working experiences rather than their formal educational credentials; and (3) a systematic training program could be designed and conducted to train persons to execute this role competently. With these guidelines, nonprofit agency directors could canvass persons from a variety of backgrounds—community organizers, business persons, lawyers, social workers, teachers, senior citizens, homemakers—for service as mediators while simultaneously assuring judges, prosecutors, and other court-annexed referral personnel that disputants were being referred to competent interveners. This diversity of backgrounds among potential mediators, though, meant that only limited assumptions could be made regarding consistency of the panelists' prior training and their familiarity with legal and social systems as well as with the lifestyles and problems of the serviced constituency. Program directors quickly developed mediator training programs.²¹

¹⁹ See MCGILLIS & MULLEN, *supra* note 5 and accompanying text.

²⁰ This was not true for those programs that combined mediation with arbitration. See *id.* (discussing the program in Rochester and the Institute for Mediation and Conflict Resolution Center).

²¹ See *infra* part IV and text accompanying notes 54-61 (explaining various plans for training

Typical programs consumed twenty-five to forty hours of training and consisted of matters ranging from analyzing case referral procedures to conducting mediator skill-building simulation exercises. In 1979, the U.S. Department of Justice supported the development of model Neighborhood Justice Center programs in Kansas City, Atlanta, and Los Angeles. Each program was required to provide training in mediation skills for those serving the center; their training workshops ranged from forty hours to seventy hours in length.²² By the end of the 1970s, Florida, through its Office of State Court Administrators, had encouraged the development of Citizen Dispute Settlement centers by securing funding to develop model curricular and training materials for a fifteen-hour training program,²³ county programs could use these model materials and manuals or design their own training approach with the model materials as a governing paradigm. In 1981, New York State promulgated the first statewide, publicly funded statutory scheme enabling each county to adopt a mediation program for its jurisdictions to handle misdemeanor cases and small claims disputes. The statute required that each such program be administered through a not-for-profit, community-based agency and that no one could serve as a mediator in these programs without undergoing at least twenty-five hours of training conducted by providers approved by the relevant administrative agency. Such a public policy established the norms that guided the establishment of mediation programs in other contexts.²⁴

A further development that heavily influenced mediator training programs and criteria was the use of mediation to resolve divorce actions.²⁵ Its use started in the private sector in the late 1970s as a new service offered to disputing parties by persons representing themselves to be competent mediators; later the process was incorporated into a

mediators).

²² DAVID I. SHEPPARD ET AL., NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT 20 (1980).

²³ See JOSEPH B. STULBERG, CITIZEN DISPUTE SETTLEMENT: A MEDIATOR'S MANUAL (1981); see also JOSEPH B. STULBERG & SHARON PRESS, A MEDIATOR'S MANUAL (2d ed. 1990); JOSEPH B. STULBERG, INSTRUCTOR'S GUIDE FOR THE TRAINING OF PERSONS SERVING AS MEDIATORS IN FLORIDA'S CITIZEN DISPUTE RESOLUTION PROGRAMS (1979).

²⁴ See Act of 1981, ch. 847, 1981 N.Y. Laws 847 (codified as amended at N.Y. CRIM. PROC. LAW § 170.55(4) (McKinney 1982)); see also Community Dispute Resolution Centers Program, N.Y. JUD. LAW §§ 849 a-g (McKinney Supp. 1983-84). See generally JOYCE BLOCK, MEDIATION: ALTERNATIVE FOR PINS: A RESEARCH REPORT OF THE CHILDREN'S AID SOCIETY'S PINS MEDIATION PROJECT (1982); Albie M. Davis, *Dispute Resolution at an Early Age*, 2 NEGOTIATION J. 287 (1986) (discussing programs in student mediation projects).

²⁵ JOHN M. HAYNES, DIVORCE MEDIATION (1981) (one of the early contributions to the literature in this field).

court-provided²⁶ or court-annexed service.²⁷ With this development, mental health professionals became engaged in mediation, and the controversy over appropriate qualifications and training for persons who mediate divorce cases erupted. The Academy of Family Mediators, an organization dominated by mental health professionals, unilaterally incorporated into its certification requirements for member mediators the model of professional training required in the counseling professions, i.e., 2000 hours of supervised training. Given the dearth of publicly reported cases that have been handled through mediation, exactly what such training and supervision entails is uncertain. It is incontrovertible, however, that both lawyers and mental health professionals who serve as mediators in this area must believe it is necessary that special mediation training should be a prerequisite for service.

These developments serve as the historical basis for the inauguration of significant initiatives that states such as Texas and Florida advanced to encourage or mandate the use of mediation on a statewide basis for a broad range of civil court actions. Comprehensive statewide initiatives provide the context in which questions regarding mediator qualifications and training have received their most considered reflection. Since the thrust of, and controversy surrounding, the discussion about qualifications and training applies to mediators, the following discussion focuses exclusively on training persons to serve as interveners in that process.

I. WHAT IS MEDIATION?

Most of the recent interest in and funding for mediation programs in the United States is tied to its use as a court-annexed activity. Courts serve as the primary source for case referrals to agencies or individual mediators, and the ultimate disposition of the matter frequently requires judicial approval. This phenomenon is an important and significant national development in the public justice system, but mediation is not limited solely to this context.

A. Non-Court Mediation Activities

Mediation activities dot the landscape. Mediation has been used within governmental agencies to resolve such contested matters as discrimination complaints or worker compensation claims. In addition, it

* CAL. CIV. CODE § 4607(3) (West 1985).

²⁷ FLA. STAT. ANN. § 44.302 (West 1988).

is promoted within school systems as a way of addressing charges of student misconduct or other disciplinary matters.

The sustained history of mediation use began as a response to labor-management turmoil and led to the development of the professional service of mediators to help resolve labor-management problems.²⁸ Beginning in the late 1960s, mediation in the U.S. was used to resolve a range of socially explosive group disputes, including student sit-ins, prisoner uprisings, citizen protests regarding economic development projects, school desegregation plans, and Native American land claim disputes.²⁹ Experiments were conducted in using mediation to facilitate dialogue among government officials at federal, state, and local levels as well as with nonprofit service providers regarding the development and implementation of significant public policy initiatives.³⁰ In Central and Eastern Europe the processes of mediation and collaborative planning are being deployed to facilitate discussion among political, civic, business, and union leaders regarding matters relating to economic development, environmental cleanup, and the creation of new systems for dealing with such new social and legal relationships as those that structure labor-management relations.³¹

Such uses underscore the broad range of applications for mediation and crystallize some of its defining components, including the identification of parties to a dispute, establishing the authority of spokespersons to agree to settlement terms, developing the time frame for discussions, clarifying how the process costs will be allocated, and formulating the eligible topics that constitute the bargaining agenda. Mediators serving in such disputes must become conversant with the

²⁸ Labor Management Relations (Taft-Hartley) Act § 201(ff) 29 U.S.C. §§ 171-83 (1969).

²⁹ See ROUNDTABLE JUSTICE (Robert B. Goldmann ed. 1980); ASSEPA HIZKIAS & PAUL WAHRHAFTIG, EXTREMIST GROUPS AND CONFLICT RESOLUTION: THE MOVE CRISIS IN PHILADELPHIA (1988); see also CIVIL RIGHTS ACT OF 1964, Pub. L. No. 88-352, 78 Stat. 267 (codified as amended at 42 U.S.C. § 2000g (1981)) (establishing a Community Relations Service to assist persons in resolving disputes arising out of practices that discriminate on the basis of race, color or national origin).

³⁰ The Charles F. Kettering Foundation sponsored a project entitled the Negotiated Investment Strategy, designed to gather representatives from each governmental level and representatives of relevant not-for-profit service providers to participate in mediated negotiations on issues ranging from urban planning and economic development to delivery of social services. See LAURENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE 235 (1987).

³¹ For a critical analysis of the use of negotiation and mediation in the development of independence in Eastern Europe, see Richard E. Rubenstein, *Dispute Resolution on the Eastern Frontier: Some Questions for Modern Missionaries*, 8 NEGOTIATION J. 205 (1992). For a response, see Raymond Jhonholtz, *The Role of Minorities in Establishing Mediating Norms and Institutions in the New Democracies*, 10 MEDIATION Q. 231 (1993).

multiplicity of plausible analyses for effectively addressing each such element.³² This can only be accomplished through training.³³

B. Court-Annexed Mediation Programs

The brief comments regarding the use of the mediation process in many contexts of social conflict help to place court-annexed mediation programs in perspective. In sharp contrast to social conflicts, a court-referred case already answers such questions as party identification, meeting times and places, the general nature of concerns, appropriate ways for parties to prepare for the mediation conference, guidelines regarding confidentiality, and, in some cases, mediator compensation. One might conclude that the appropriate training of mediators for such cases can be comparably narrowed to this posited framework. This is untrue, however, and that conclusion is the result of assuming too limited a view of the goals and techniques of the process.

At least two competing governing perspectives regarding mediation compete for endorsement.³⁴ Their differences are clearly defined in the exchange that occurred in the arguments before the Supreme Court of Florida when it was considering the adoption of proposed rules to implement legislation making mediation available statewide.

Justice Rosemary Barkett, when questioning a lawyer regarding the purpose of a requirement that the mediator be a lawyer, remarked:

I have always envisioned—and perhaps erroneously—that the function of a mediator is not to advise either client about their legal rights or the ramifications legally of what it is that they want to do but rather it is to facilitate an atmosphere whereby both parties will agree to something that perhaps might not be in someone's legal interest, and then it is the function of the lawyer for the individual parties to advise them as to

³² See generally SUSAN L. CARPENTER & W.D.J. KENNEDY, *MANAGING PUBLIC DISPUTES* (1988); CHRISTOPHER MOORE, *THE MEDIATION PROCESS* (1986); JOSEPH STULBERG, *TAKING CHARGE/MANAGING CONFLICT* (1987).

³³ The singular absence of mediators in explosive civil rights controversies such as the Rodney King trial and its aftermath or the disruption in the Crown Heights section of Brooklyn, New York, is a significant comment on the focused—some would argue, narrow—manner in which mediation has come to be viewed as a court-annexed program only.

³⁴ See Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator's Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253 (1989) (providing a probing analytical account of ways to characterize the differing perspectives surrounding the goals and methods of arbitration and mediation); Robert A. Baruch Bush, *Dispute Resolution and Ideology: An Imaginary Conversation*, J. OF CONTEMP. LEG. ISSUES 1-25 (1989). For a related analysis of consequences affecting the practitioner, see DEBORAH M. KOLB, *THE MEDIATORS* 41-45 (1983).

their legal rights so that they can make an intelligent decision as to whether they should go forward seeking their legal rights or seeking their mental health.³⁵

David Strawn, Esq., chair of the Rules Committee that formulated the qualification and training requirements for mediators, responded to the chief judge's question concerning the committee's proposal to exclude as mediators out-of-state lawyers residing in Florida:

We came to the conclusion that it would be advisable to have lawyers who were familiar with Florida practice [serving as mediators] because they were going to have to try to make predictions about the outcomes of cases through their non-binding awards.³⁶

Justice Barkett: I understand that if we were talking about arbitration, but why for mediation?

Strawn: It is still important; there are nuances of Florida law that we felt were important in mediation for a lawyer.³⁷

This exchange reveals the significant difference in the vision of what mediation is designed to accomplish. Barkett articulates a conception of the process that advances significant party participation and shapes the lawyer's role in it as a counselor/advocate for his client. The challenge, and role, of the mediator is to facilitate dialogue in such a manner that a person's interests, aspirations, and concerns are identified in concrete terms and possible remedies are explored in a rigorous manner. This conception has straightforward practice consequences: the mediator will insist on active participation by the parties themselves; conversations will take place in language free of technical legal jargon; and the mediator will convert traditional litigation tactics deployed in cross examinations into constructive queries for settlement options. This conception of mediation resonates soundly with the experience of any lawyer who has represented unions or employers in mediated contract negotiations³⁸ as well as lawyers who represent parties in complicated business negotiations where the possibility of a collapsed deal is the operative factor in negotiations rather than the shadow of a trial.³⁹

³⁵ Videotape of Florida Supreme Court Oral Arguments, (Dec. 1987, on file with author) (reviewing proposed rules to implement mediation and arbitration provisions of FLA. STAT. ANN. § 44-301ff (West 1988)); see also Bush, *supra* note 34 and accompanying text.

³⁶ Videotape of Florida Supreme Court Oral Arguments, (Dec. 1987, on file with author).

³⁷ *Id.*

³⁸ See WALTER A. MAGGILO, *TECHNIQUES OF MEDIATION IN LABOR DISPUTES* (1971); WILLIAM E. SIMPKINS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (1971).

³⁹ See DONOVAN, LEISURE, NEWTON & IRVINE, *ADR PRACTICE BOOK 12-29* (John H. Wilkinson

Strawn's approach, conversely, betrays a conception of the process in which the mediator's role is to help the parties' counsel identify legal claims and to provide insights regarding the likely outcomes at trial. Thereafter, in light of the mediator's assessment, parties can decide whether they will settle the case or proceed toward trial. While this version of mediation may be a useful adjunct process for reducing court calendars (much like the court-annexed arbitration programs described above), it promotes dramatically different values than the Barkett approach and has significant implications for establishing qualification and training requirements for mediators.

The Barkett conception of mediation (hereinafter referred to as the democratic conception) dominates conventional practice in all neighborhood justice centers and is advanced as the paradigm for dealing with complex cases in family matters, standard commercial contract disputes, construction industry controversies, and all public policy disputes previously mentioned. The Strawn conception (hereinafter referred to as the administrative conception) reflects an overriding preoccupation with court management considerations and, more significantly, the "lawyerization" of the process.⁴⁰ These latter values and the approach they signify are strongly hinted at in such mediation programs as the Federal District Court experiments in the Southern District of New York. Clearly, competing conceptions for mediator training create different implications for instituting training programs.

II. CONCEPT AND DESIGN OF A TRAINING PROGRAM

A. *Job Specifications*

If the person serving as a mediator is performing a job, it is plausible to ask what the tasks of the job are and what qualifications are required to perform the job.⁴¹ Only then does the notion of training assume its shape.

A mediator performs required tasks that include chairing the sessions; managing the information flow; engaging in fact-finding activities; facilitating dialogue; serving as a translator of comments and proposals;

ed., 1990). The discussion indicates the range of benefits of ADR and its attendant practice consequences, when using mediation and other ADR processes in pending litigation. Reference for the discussion is always the assessment of non-legal benefits against legal costs and benefits. That dimension of analysis is irrelevant when considering, for example, whether to negotiate with a potential buyer of one's business.

⁴⁰ See JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 115-38 (1983).

⁴¹ See STULBERG, *supra* note 32, at 31-41.

acting as a "reality-check" on the proposed solutions that parties advance; and serving as a scapegoat. A mediator must preserve the integrity of the procedure and must serve frequently as the vehicle through which an education process occurs that ensures each party's understanding of the other's specific proposals or, more broadly, of the intellectual, legal, social, and emotional context informing the conversation. A mediator should, where appropriate, identify additional resources for the parties that could assist in resolving their concerns.

To discharge these broadly stated tasks, it is necessary to possess certain qualifications. Research emphasizes that the effective mediator is a good communicator, is an effective listener, and is intelligent enough to understand the matters under discussion. The mediator must also be sufficiently knowledgeable about the general problems of the parties in order to be a resource for possible methods of resolving the matter. At the very least the mediator must appreciate the problems as the parties present them. Patience, empathy, perseverance, articulateness, persuasiveness, optimism, flexibility, honesty, and imagination must be tempered by a healthy skepticism. Above all else, the mediator must be one who remains neutral and non-judgmental regarding the parties or the matters in controversy. These general observations about a mediator's job become concrete in the development and training process.

B. Segments of a Mediator Development Program

Generally, a mediator development program is best viewed as consisting of three components: (1) a screening process; (2) concentrated training and education programs; and (3) an in-service process.⁴² Each component is affected by how the others are implemented. If the initial screening process is designed, for example, to select only those persons who already possess the requisite qualifications and skills to perform the job, less training and/or in-service apprenticeship type work would be required. Alternatively, if the screening criteria are designed to select those individuals who possess some knowledge of the dispute environment in which they will work, the training program will focus on developing mediator performance skills. Finally, if the screening criteria are designed to select persons who possess mediator process skills but do not have a working knowledge of the dispute environment in which they would operate, the training program must focus on transmitting the requisite substantive information.

⁴² See Joseph B. Stulberg and B. Ruth Montgomery, *Design Requirements for Mediator Development Programs*, 15 HOFSTRA L. REV. 499, 509-27 (1987).

The dependent relationship between the screening and training components and the post-training component is also obvious. If the trainee will not have any post-training apprenticeship or orientation but will instead move immediately into conducting cases, the selection and training components of the program carry the entire burden of shaping participant performance to achieve professionally acceptable levels.

As the practice of selecting and training persons to serve as mediators for court-annexed programs has matured and become embodied in program operations, the following paradigm emerges: (1) Selection criteria have been sufficiently broad to allow individuals with no prior mediation experience to be admitted as potential trainees. Furthermore, every approach has endorsed affirmatively the concept that no one is exempt from participating in the mandated training by virtue of experience.⁴³ Selection criteria do screen for knowledge and familiarity with the subject matter area. Controversy remains, however, concerning the breadth of selection criteria for content-knowledge. Although the administrative conception of mediation significantly restricts entry to those with formal educational training, the weight of professional opinion argues for broader criteria.⁴⁴ (2) The on-site training programs in which candidates participate focus on training persons in mediator performance skills. Minimum class times of twenty-five hours are routine in order to accommodate interactive pedagogical approaches necessary to ensure a practitioner's comprehension of the mediation process characterized in its democratic conception. (3) A minority of programs require a structured apprenticeship or on-the-job training.

The straightforward implication of this paradigm is that the primary responsibility for preparing individuals to perform capably as mediators resides with the trainers and those designing the contents of that program.

C. Subject Components of Mediator Training

Three content categories structure mediator training designed to inculcate performance skills. The categories are: (1) subject matter knowledge; (2) procedural due process considerations; and (3) mediator tactics and strategies. Each is discussed separately.

⁴³ For mandated training requirements for persons serving in court-annexed programs, irrespective of professional training and experience, see *supra* notes 24 and 27 and accompanying text.

⁴⁴ See *supra* note 2 and accompanying text.

1. *Subject Matter Knowledge*

The screening process ensures some participant familiarity with the subject matter jurisdiction of the cases referred to mediation. Such knowledge is essential, because the goal of providing mediation as an alternative is to enable disputing parties to settle their controversy, if possible; the mediator cannot handicap the discussions through ignorance of the substantive milieu in which the controversy occurs. The knowledge a mediator needs to help neighbors address interpersonal disputes over the use of a common driveway is different from that which is relevant to the discussion of a disputed workers' compensation claim or the allocation of pension benefits among partners in a divorce proceeding. While no one credibly continues to advocate the position that a mediator need only be a process expert because the function of a mediator is simply managing the information and dialogue process,⁴⁵ the uncertainty remains over the nature of the knowledge requirement and where the threshold of the requirement ought to be. Controversy also brews over the approach training programs should take to teach the subject matter content knowledge.

The family counselor can persuasively challenge the capacity of a mediator, with little or no training in individual or group psychology, to be a capable participant in helping a divorcing couple conduct constructive discussions about such matters as parenting arrangements for their three children, all of whom are under the age of nine and one of whom is severely disabled. Similarly, a lawyer questions how persons without legal training can contribute effectively to the discussion of a contested personal injury case, and a business person challenges the capacity of many to understand and appreciate the language, dynamics, and pressures of the business community. Each presumes that substantive knowledge of the area under discussion plays a critical role in making an effective contribution as the mediator. While each of these claims seems plausible, it is also necessary to examine other relevant knowledge that may be considered a necessary condition of service. An example of the need for other knowledge bases is the consideration of whether a white Anglo male mediator of a matrimonial action involving a Haitian couple can understand the values and behavioral modes of persons with such a background and to such a level that he is able to contribute effectively to

⁴⁵ Some commentators have tried to distinguish a facilitator from a mediator, arguing that the latter role is more directive than the former because the mediator must suggest possible solutions, while the facilitator's role is simply to police the meeting. See M. DOYLE & DAVID STRAUS, *HOW TO MAKE MEETINGS WORK* (1976).

the dynamics of resolution. In addition to a mediator's cultural sensitivity and insights, does gender constitute an attribute experience that enhances or hinders insight into the dynamics and needs of the disputing parties?⁴⁶ In such rule-governed contests as arbitration or a trial, it is maintained that the intervener's gender, race, ethnicity, and religious background are irrelevant to effective participation in assessing evidence, identifying rules, and applying those rules to the case at hand.⁴⁷ If mediation, though, aspires to enhance dialogue among persons, secure a more firm understanding among the parties of their respective aspirations and constraints, and, within such a setting, develop concrete solutions to practical problems, then a mediator's range of life experiences and understanding of persons of different ethnic and racial backgrounds—viz. matters of ethnicity, gender, or race—might become critical ingredients to effective service.⁴⁸

Court experience reveals the general fact patterns of controversies in which persons are embroiled and, less reliably, an insight into the demographic variables of court users. This information feeds into shaping the nature of the materials addressed in a mediation training program.

For cases emanating from criminal courts and small claims courts, diverse demographic factors are so prominent that allocating a segment of the training process to diversity topics is compelling and could ensure a mediator's sensitivity to as many cultural and societal dynamics as possible. The argument for diversity training has greater force when considered in light of the fact that the legal rules established to guide behavior in this domain are constitutionally vague and incapable of

⁴⁶ At the Program on Mediating Theory and Democratic Systems at Wayne State University (a program funded by the William and Flora Hewlett Foundation), the primary research and curricular development thrust is to examine how matters of race, ethnicity, and gender influence the manner in which persons define disputes and the systems they design and embrace to deal with them. Using the bibliographies from newly developed graduate courses, several working papers have begun to explore the influence of such immutable factors on negotiating and mediating principles and practices.

⁴⁷ See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (advancing the compelling argument of the irrelevancy of race, color, or gender in his critique of consensual decision-making processes). For the most remarkable and comprehensive discussion of the relevance of such factors to questions of distributive justice, particularly in its analysis of the concept of a veil of ignorance, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁴⁸ See generally DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990) (discussing an area with the potential for grave misunderstanding—communication between males and females). Tannen's book provides an example of the need for an understanding of different perspectives. If, for instance, Tannen's claim is true and men and women do communicate in radically different styles and attach different meanings to identical locutions and communication practices (how to interpret interruptions, for example), a danger exists that a male mediator interacting with a female party will seriously misinterpret such subtle dynamics and possibly misdiagnose the nature of the defined problem or solution set.

providing effective remedies to the real-world dynamics that shape the disputants' lives.⁴⁹ Family cases of all types argue for the mediator possessing a similar understanding.⁵⁰ Mediators for more complex civil litigation matters, however, may have different needs. To the degree that the particular arena is one governed primarily by rules that are or can be known to most of the participants, the nature of the individual parties to the dispute becomes less pertinent to the matter's resolution, if resolution means achieving the parties' acceptance of the application of designated rules in a particular mode. That would fit the administrative version of mediation and argue against including such materials in any training for such mediators. The democratic version, alternatively, requires a deeper understanding of individual party behavior, values, and aspirations and would dictate allocating time to this topic in a training program.

Other content areas must also be addressed in training. Family cases involving parenting and financial arrangements invite a host of substantive topics worthy of treatment in a mediator training program. The behavioral elements that contribute to functional and dysfunctional family dynamics, the known impact of the divorce experience on both the adults and children, the economics of surviving as single heads of households, and the broad range of legal doctrines governing equitable distribution of property, pensions, insurance, and the like need to be examined in order to ensure the mediator is in a position to target issues, facilitate the exploration of alternative settlement options, and generate movement within this setting. Furthermore, having a firm understanding of basic management, economic, and legal principles germane to such significant business enterprises as insurance companies or financial institutions enriches the knowledge base of a person mediating a typical commercial case.

Given that the paradigmatic screening process does not ensure that each participant possesses all the substantive knowledge presumed relevant to effective service, trainers have allocated as much as fifteen percent of a training program for the direct exposition, explication, and discussion of these and similar matters. The trainer's challenge, as discussed below, is to ensure that the presentation of content knowledge

⁴⁹ For a penetrating discussion of the broad range of personal agenda and concerns that are not frequently captured by the legal definitions of disputes, see SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS OF WORKING-CLASS AMERICANS* (1990).

⁵⁰ Some Florida mediators have suggested to the author in informal discussions that a growing trend in the mediation of family disputes is for private mediator providers to systematically neglect those families with severely dysfunctional interactions in favor of a more "boutique-type" practice. If true, this suggests another undesirable aspect of letting market forces drive the delivery of public justice services.

is not simply delegated to an expert who has no comprehension of the mediation process and, therefore, cannot select and present the substantive information in a manner pertinent to the mediator's need.

2. Procedural Due Process Considerations

A mediation conference is conducted in private; no records are kept of discussions. The dialogue is conducted in an informal manner in order to promote candid conversation. The process is not guaranteed to be conducted in a manner that comports with the traditional notions of due process. In addition, the absence of procedural constraints means that parties are not prevented from reaching settlement terms that violate public policy, exceed the court's jurisdiction, or are based upon information clearly inadmissible in a courtroom. These safeguards, therefore, must be identified and taught in the training program.

Despite the conventional wisdom that no rules exist in mediation, the mediation process does and must have a structure. The mediator establishes guidelines for determining the order of discussion, the right of an individual to hear accusations of the other party, and the right to respond to those accusations. The mediator's neutrality is the central dimension of the due process component of the procedure.

Advocates of industry and commercial arbitration programs are confident that nonlawyers can be trained to conduct hearings in a manner consistent with due process requirements. Whether a similar confidence exists for mediators, especially those who are not lawyers, in court-annexed programs is open for debate. Two strands of analysis compete for endorsement. First, since mediation is a consensual rather than adjudicatory process, no one is compelled to agree to an outcome. Thus, it might be less likely that due process violations will occur during the conference. The counter and more persuasive view, however, is that while persons can be effectively persuaded to accept settlement terms through techniques that are neither disingenuous nor illegal, no reviewing body could ever detect whether the parties' acceptance of these terms resulted from a discussion process that ensured fair participation. Given this debate, several strategic responses are available for addressing this concern.

One approach is to develop mediator program rules so that no practicing mediator could be in a position to allow the mediation conference to proceed without comporting with stipulated due process requirements. One rule, for instance, could stipulate that the parties enjoy a non-waivable right to a lawyer in mediation. This would ensure, ostensibly, that no one party or counsel dominated the discussion, was allowed to engage in tactics that flagrantly intimidated the other party, or used wildly improper evidence for

persuasive purposes. This assumes that all lawyers have a firm grasp and appreciation of due process requirements and the skills to effectively insist that the mediator adhere to due process during the conversation.

To ensure compliance with a due process requirement such as notice, another program rule could restrict dialogue in a mediation conference to only those matters stipulated on a mediation submission agreement form. Although this might sacrifice the free and unfettered exchange of ideas and explanations that are often critical for moving toward resolution, the due process requirements would be protected. Insisting that parties speak only through their legal representatives could be another rule developed for safeguarding due process considerations.

A second formal approach would be to allow parties to exit a mediation conference by showing that the mediator imposed an unreasonable hardship on one or both of the parties.⁵¹ This might capture the most flagrant violations of due process such as a mediator scheduling meetings at times and places that impose substantial time and financial burdens on one of the parties or that force the party to appear without legal representation when alternative arrangements were possible.

With each such rule's integration into the mediation process, administrative values, as Strawn articulated, are increasingly imposed on the process. A process laden with rules is less resilient to imaginative exchanges in favor of structured dialogue surrounding legal rights.

The alternative approach is to transmit through the training process a conception of the mediator's role in which the mediator is responsible for ensuring the parties' respect for orderly discussions; the open, unconstrained but focused participation of persons at the table; and a dominant focus on engaging in informed problem-solving dialogues. The result of this approach is to create a forum where the principles of procedural due process are honored in practice but do not serve as the focal point around which adversarial tactics and strategies pivot.

The reality is that the components of procedural due process must be addressed during the training program because no mediator can perform effectively without comporting with their elementary principles.

3. *Mediator Tactics*

With knowledge of the substantive environment in which the dispute is set plus a commitment to conduct mediation in a manner consistent

⁵¹ See FLA. STAT. ANN. § 44.103 (West 1988). This approach is more consistent with the idea of offering parties an alternative to a trial than is the administrative strategy.

with fundamental procedural due process principles, the mediator still has a job to perform. The mediator must establish a comfortable context in which discussions occur; explain the mediation process to the participants; engage in focused fact finding by deploying effective listening, note taking, and questioning skills; formulate issues in non-judgmental terms; and develop a discussion strategy. In addition, the mediator must use techniques to get parties to reconsider acceptable solutions, know when to call for caucus sessions, conduct those separate sessions in a way that capitalizes on the parties' trust to generate settlement options, and bring closure to the discussions. These mediator skills and strategies can be identified, taught, and used as benchmarks for evaluating trainee performance.

In any mediator skill-building training program, these matters, combined with an analysis of a mediator's ethical responsibilities, comprise the core of the program. These three content categories structure the training program segment of a mediator development process. The agenda is formidable. The challenge is to find persons qualified to teach it using pedagogical strategies that effectively inculcate the required skills.⁵²

III. WHO TRAINS?

Until recently, market forces have provided the only constraint on the entry of mediator trainers. A review of how mediation training developed is instructive.

The training of mediators for labor-management controversies had its own history, with the Federal Mediation and Conciliation Service⁵³ combining a substantial work experience requirement in industrial relations with an on-the-job mentoring training approach. While many

⁵² No one suggests that the conventional legal education process provides such training to lawyers. Early courses in a law school curriculum that related to such matters were courses in either labor or commercial arbitration. More broadly conceived courses in alternative dispute settlement did not emerge with accompanying texts until the 1980s. Most of the courses now serve as a survey course for all types of ADR processes rather than training students in the performance skills of the mediator. That is not necessarily a criticism, since most lawyers will be involved in these processes not as a third-party intervener, but as an advocate for a party who is participating in these processes. Learning the appropriate lawyer/counselor skills for effective use of mediators as a resource is a separate topic, however, that warrants training for all law students.

Some law schools have developed clinical mediation programs in which students receive training in mediation skills. The most rigorous and effectively designed program of this type, linking practical training, on-site service, and theoretical seminar materials, is the year-long clinic conducted at Yeshiva University's Benjamin Cardozo School of Law with Professor Lela L. Love.

⁵³ Labor-Management Relations (Taft-Hartley) Act, § 201ff 29 U.S.C. §§ 171-83 (1969).

university-based and university-extension programs were teaching and performing research on matters relating to industrial relations, none focused on mediator development training. No school had been established where new staff could obtain the requisite performance skill training.

The absence of developed and publicly available mediator training resources became immediately evident when various mediation programs emerged in the late 1960s and early 1970s. No standard curriculum was set to meet the training needs of these court-annexed programs and no known experts were available to teach it. This vacuum resulted in substantial experimentation among various program providers, nonprofit agencies, university faculty, and private consultants in developing mediator training programs. The promise was explosive: the field, particularly if envisioned as part of a broader-based social justice movement and a response to community-based confrontations and problems, invited a multidisciplinary and interdisciplinary intellectual approach. Anthropologists, lawyers, psychologists, educators, engineers, social workers, economists, political scientists, businesspersons, historians, communication specialists, and philosophers all seemed to have something constructive to contribute to the burgeoning development of training informed and competent neutral interveners.⁵⁴

While none of these scholarly perspectives or contributions seemed irrelevant to the thoughtful training of effective mediators, each shared a critical flaw; none provided a commanding viewpoint, such as that of the mediator, that organized the relevance and use of each of these important perspectives to persons who would serve as mediators. The result, charitably speaking, was and, save for the important exceptions noted below, remains a remarkably inconsistent range of training approaches, program quality, and trainer experience. Management consultants competed for the mediator training business with the same presumed competence as an experienced mediator/trainer. Private individuals developed seminars and conferences to train mediators in much the same manner consultants train persons interested in starting a home business or writing an effective résumé. Different trainers employed diverse training strategies: some taught exclusively by war stories; others used only

⁵⁴ Important and influential early works in this domain include: 3 *ACCESS TO JUSTICE: EMERGING ISSUES AND PERSPECTIVES* (Mauro Cappelletti & Bryant Garth eds., 1978); *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* (Laura Nader & Harry F. Todd, Jr. eds., 1978); Richard Danzig & Michael J. Lowy, *Everyday Disputes and Mediation: A Reply to Professor Felstiner*, 9 *LAW AND SOC'Y R.* 675 (1975); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW AND SOC'Y R.* 95 (1974).

simulations without any focused discussion or analysis; still others used participatory exercises whose content was divorced from any mediation case context to teach such important mediator skills as effective listening. When addressing such substantive content issues as family dynamics or the law governing equitable distribution, some trainers would invite guest lecturers with practice expertise in that area, but the presenter, ignorant of the mediation process and how a mediator must use the insights provided, would deliver remarks in a manner that often befuddled rather than enlightened the trainee.⁵⁵ Further, no training group formally put itself in the position of certifying the competency of its program attendees.

That free market approach continues to generate a situation marked by the absence of a shared understanding of mediation, limited public availability of training materials, and no trainer accountability for the performance level of its program graduates. Several initiatives have been undertaken to respond to these problems.

During the 1970s when citizen dispute settlement ("CDS") programs began to proliferate in Florida, the state permitted such programs in each county but neither required nor funded them with state appropriations. In order to address the need to provide trained mediators to support and implement these programs and to address the concern about consistency of conceptions and skills among the mediators across counties, the Office of State Courts Administrator ("OSCA") of the Florida Supreme Court spearheaded the development of model program and training materials. It supported the development of several projects: one developed a manual that sets forth the types of considerations and resources required to design and implement CDS programs.⁵⁶ Another resulted in the development of both model training materials and an instructor's guide for conducting such training programs.⁵⁷ While CDS mediation personnel were not required to use these materials, the OSCA project accomplished three goals: (1) it gave the individual program directors a training resource that would enable them to conduct—however modestly—their own training of mediators; (2) it disseminated a common model and understanding of mediation; and (3) it displayed concretely how various mediator skills and strategies capitalized on findings in psychology, communications, ethics,

⁵⁵ Such program structures occur regularly. Mediation training programs offered by organizations like the American Arbitration Association routinely have this format and must contend with its vulnerabilities.

⁵⁶ FLORIDA SUPREME COURT DISPUTE RESOLUTION ALTERNATIVES COMMITTEE, CITIZEN DISPUTE SETTLEMENT GUIDELINE MANUAL (1979).

⁵⁷ See *supra* note 23 and accompanying text.

law, and related disciplines. Subsequent efforts built and improved upon this approach.

New York promulgated statutory and financial support for the statewide provision of court-annexed community dispute resolution center mediation programs in 1981.⁵⁸ In both the legislative scheme and implementation strategies, the approach to the training of mediators became more firm. Administrators with oversight responsibilities for the statewide program sought the advice of experienced mediator trainers and others to develop a model table of contents for the statutorily mandated mediator training program consisting of a minimum of twenty-five hours. Prospective trainers were required to submit proposed syllabi to the agency and a statement of their training credentials. Only those approved through this process were authorized to conduct training programs for persons who would serve as mediators in these court-annexed programs. Agency staff conducted anonymous on-site reviews of training programs to ensure competent delivery of the materials.

This approach constituted a significant advance. It ensured that training programs shared a resemblance in content and that those conducting the training were familiar with the context in which the trainees were to serve. However, weaknesses remained in the program. No consensus, for example, developed on effective pedagogical strategies for teaching these materials, and doing so in a manner responsive to challenges presented by the adult learner. Furthermore, training materials were neither shared nor required to be updated, and no common training approach was required to ensure adequate and sustained individualized attention and feedback from trainers. In addition to lack of positive reinforcement, trainers also had no requirement to provide explicit assessment and evaluation of each trainee's performance level. Fortunately, some of these weaknesses have been addressed in more recent initiatives.

Michigan's statutory program parallels that of New York in terms of case jurisdiction and administrative design. Its training strategy, however, differs. After operating for one year with individual program centers hiring consultant trainers to conduct the mandated forty hours of training and responding to common concerns regarding lack of consistency in content, quality and cost, the State Court Administrator's Office initiated a four-part program calling for: (a) development of a model forty-hour training agenda; (b) development of materials for the delivery of each training component of the model agenda; (c) development of a trainer's

⁵⁸ See *supra* note 24.

manual; and (d) a regular "train-the-trainers" training program where prospective trainers nominated by the individual programs and approved by the state office convene for a training program to address executing the model program and developing training materials.

This approach meets several training gaps: (1) the model training materials are matters of public information; (2) those who will train the mediators are screened at multiple levels; (3) individual program directors, while free to use individual trainers from any source, can reduce training costs by using the local persons whom they helped to select and train; and (4) a program-connected trainer is trained and skilled in regularly updating materials to reflect program changes.

Florida's most recent approach represents the most mature and comprehensive response to the various training challenges noted above. Florida's statutory scheme permits the chief judge of each district to refer a broad range of civil case filings to mediation. The supreme court's implementing rules for the statute provide that for cases involving claims of less than \$5000 (hence, falling within the jurisdiction of county court), persons of diverse trainings and community-service backgrounds can serve as mediators. Each is required to complete a minimum twenty-hour court-approved training program before doing so. For those individuals mediating cases involving family issues, including divorce, eligibility is restricted to those individuals who have at least four years of practical experience in a relevant field and have earned either a law degree or graduate degree in the helping professions or are certified public accountants. Mediators in these areas must complete a required forty-hour training program. Finally, those persons serving as mediators for civil claims involving claims of \$5000 or more must be members of the Florida bar for at least five years and complete a court-approved forty-hour training program. While satisfactory completion of either the family or civil circuit mediator training program automatically meets the training requirements for conducting county court mediations, meeting the training requirements for the civil circuit case does not result in automatic certification for family cases or vice versa. These training requirements warrant review at this stage.

The Florida Dispute Resolution Center ("FDRC"), a specially dedicated administrative branch of the OSCA, has oversight responsibility for the training programs offered to meet the requirements noted above. In 1988, the supreme court's training committee, staffed by the FDRC, developed the basic table of contents for a model training program for the three sectors and, through a public bidding process, selected private providers to develop and conduct the prototype training programs. Thereafter, any private training provider could apply to the committee to

become an approved provider of mediator training programs for any or all of three jurisdictional areas. As part of the review process, each candidate had to submit proposed syllabi, materials, and qualification statements that paralleled the prototype training program. Any individual who wanted to be a certified mediator in Florida, and thereby become eligible to receive cases referred by Florida courts, can satisfy the minimum training requirement only by attending and satisfactorily completing the requisite training from a state-approved provider.

With experience, more structured guidelines regarding trainer qualifications and pedagogy have emerged. Persons wishing to serve as trainers now must have practitioner experience mediating those cases that are the subject matter of the training program. This requirement eliminates the "jack-of-all-trades" consultant from proposing a model program and entering the training market. More significantly, it limits the contribution of otherwise qualified participants in adult-learning processes (such as professors or consultants) to only those who can certify that they are familiar with the context within which particular performance skills must be deployed. This requirement, to some degree, ensures that the commanding perspective of the proffered intellectual and behavioral insights is that of the mediator.

The guidelines further structure the pedagogical techniques used in training by allocating time frames for the primary segments of the program with a minimum amount of time required to be devoted to learning through interactive participant exercises. Given these pedagogical guidelines, the state has imposed two related trainer requirements. Each training organization must ensure that a sufficient number of assistant trainers are employed so the trainer/participant ratio does not exceed one trainer observing more than two mediation simulations simultaneously.⁵⁹ This meets the need of providing individual feedback to each participant during some of the interactive exercises in the training program. In addition, the assistant trainer also must possess minimal mediator experience in the substantive area to which the training is directed.

In an attempt to ensure sustained mediator trainer expertise, the FDRC conducts a mandatory conference for trainers each year (though attendance by any assistant trainer meets the requirement). At that time, the FDRC can share feedback from various trainee participants regarding effective or ineffective training approaches as well as update trainers on innovative pedagogical techniques, new program rules, and related developments in the field.

⁵⁹ Given that the standard mediation simulation involves from three to five participants, this requirement results in a trainer/participant ratio during simulations of no more than 1:10.

Two related developments in Florida's experience affect the nature and delivery of the training program. In recognition of the limits of a forty-hour training program, Florida now requires that all trainees, following satisfactory completion of the mandatory training, serve as an apprentice for a minimum number of cases before officially being certified to a court-approved mediator list. The mentor for such service is not the trainer but other certified mediators. This requirement reflects an important understanding of the relationship between screening, training design, and post-training strategies, a sensitivity that is not even hinted at, for instance, in such court-annexed mediator training programs as the federal district court programs noted above.⁶⁰ What is lacking in this implementation, however, is a structure for ensuring consistency of feedback from the mentor to the trainee. Private trainer providers could exert leadership in this area by providing the mentoring dimension as part of their service or by having individuals who successfully completed their program serve as mentors to more recent trainees. No such initiatives have occurred, however, and particularly in the family and county court areas, this results in most trainees using court-employed mediators as their mentors.

Finally, Florida, through its rules for mediators, encourages certified mediators to engage in continuing education programs. While meeting this guideline is left to the design talents of individual mediators, Florida court-certified mediators have developed statewide organizations to meet their own continuing education needs.⁶¹ This significant professional initiative fills a void, for at present, neither private providers nor state agencies have developed and marketed, much less mandated, any advanced mediator development program. The apparent assumption that the required minimum will serve the parties and public adequately over time is consistent with the mandate that certified mediators engage in continuing education efforts only if the notion of "remaining current" is restricted to keeping abreast of subject-matter knowledge in the dispute areas and is not expanded to sharpening mediator performance skills.

IV. TRAINING COSTS

Training consumes time, expertise, and energy. Its compensation varies considerably. These factors influence both who conducts the training and who has access to it.

⁶⁰ See *supra* note 53 and accompanying text.

⁶¹ The Florida Association of Professional Family Mediators sponsored "Mediation: Advanced Training, Strategies and Exposure to Alternatives Program" on Jan. 29-30, 1993. One and one-half days were devoted to analyzing mediator skills and ethical dilemmas; half of one day was devoted to attorney and judicial presentations addressing the current law regarding pensions and taxes.

A. *Volunteer Mediator Service*

Those who provide training to neighborhood justice center programs deal with clients with severely limited resources. Florida addressed this problem in its early CDS efforts by developing model training materials and training guides and incorporating the duty to train neighborhood mediators into the program administrator's job description. Although adding this training function risks placing too great a strain on the administrator's overall responsibilities, the effort constitutes a deliberate, thoughtful trade-off to meet a recognized need to provide training without cost to the participant.

Michigan, on the other hand, addressed this issue by assuming a more direct responsibility for training mediators. The state expanded the eligible pool of trainers to persons affiliated with and selected by program administrators. In addition, Michigan provided direct materials and training guidance.

In other jurisdictions, programs hire outside trainers to conduct their training sessions. These trainers could be private consultants or directors/trainers of other programs in the state who market training services as part of their overall program package.⁶² Some jurisdictions, such as Florida and Kentucky, obtained sufficient funding from private or public resources to hire consultants for the initial mediator training, but thereafter those jurisdictions provide the training service via staff or local resources.⁶³ Federal district court mediation programs have assumed the initial training costs in a comparable fashion.

While the overall strategy has been to provide training without charge to those volunteering their time, the amount of financial resources allocated to support this mediator training reflects important choices made by program supporters. The trade-offs represent difficult but necessary choices. If resources are available only to hire one trainer to teach a forty-hour course to thirty-five people, the effectiveness of any interactive pedagogical technique is severely restricted. If trainers must use outside experts to deliver some substantive knowledge training components but such persons will not do so without a fee, serious compromises may arise.

⁶² The practice among community dispute resolution centers in New York state is to hire consultants to perform the mediator training. Some programs have developed a training capability and bid for such training opportunities themselves.

⁶³ Such an approach has been adopted by numerous programs, including the center implemented in Lexington, Ky., through the joint initiative of judicial personnel and Professor Thomas Stipanowich of the University of Kentucky College of Law. See Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation*, 81 Ky. L.J. 855 (1992-93) (discussing the experiences of the Mediation Center of Kentucky).

Clearly, the more limited the investment in training, the more likely the trainee will learn at the expense of his first few cases.

B. Compensated Mediator Service

Persons who charge fees for rendering mediation services in court-annexed programs receive training through private providers whose costs are regulated by market forces. Costs vary among the providers, but program registrations typically start at \$700 plus expenses for enrollment in a five-day program. Twenty-five persons is a typical class size for a program. Consequently, interested persons confront two entry-level decisions: (1) is the financial cost worth the investment in light of projected income returns thereafter and (2) in which training program should the potential mediator enroll? Although trainer reputations quickly develop in various jurisdictions and indicate the range of available quality training, the state's responsibility for ensuring quality training resources continues. Indeed, the responsibility intensifies when a future mediator is restrained from gaining credentials for access to the market through any other means. At this juncture, equal opportunity for service without discrimination becomes a critical public policy consideration.

Early demographic information on mediator training participants enrolled in statewide programs where training is mandated reveal several incontrovertible trends: (1) those persons who serve as volunteer mediators reflect a more representative profile of citizen backgrounds in terms of gender, age, ethnicity, and race than do any of the other court-annexed mediator program panels; (2) females constitute a disproportionate percentage of mediators of family-connected cases; and (3) mediators of business or substantial civil cases, certified as mediators through state programs, are overwhelmingly Caucasian males, and Caucasian females are the most significantly represented group for diversity purposes. Non-Caucasian men and women, on the other hand, do not pierce the table.⁶⁴

The lesson is clear, and somewhat ironic. When mediation is provided without charge and focuses on disputes that are less capably defined by the law's rule-governed practices, a broad range of citizens, deemed suitably trained, generally become involved. Conversely, where people believe that preexistent rules constructively shape the dispute and the available remedies, the pool of mediators who receive compensation is

⁶⁴ MICHIGAN SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE COURTS, FINAL REPORT 33-34 (Dec. 1989).

less demographically diverse. It is merely speculative whether the economic barrier of buying into a training program is significant enough to warrant a state's affirmative measures to ensure the presence of and access to such professional opportunities for persons of all races or ethnicities.⁶⁵

V. FUTURE CHALLENGES

Despite notable improvements in the quality of training and implementation strategies adopted at the state level, several shortcomings remain. These shortcomings are both administrative and substantive.

A. Administrative Challenges

In those states where private training providers must be approved by a state agency, financial or staffing resources generally are not adequate to permit systematic and regular monitoring of each provider's training program. While most states have conducted an on-site visit of each provider at least once to ensure quality and compliance with the required program contents, little effective machinery operates to ensure ongoing compliance or to enforce discipline or removal of such providers should their program offerings fail to meet minimum standards. The disciplinary dimension clearly is complicated by the fact that participants in the program are at the mercy of the program director or court system in presuming that satisfactory participation in a pre-approved program would satisfy minimum training qualifications for service. Thus, training participants may be involved in programs that contain deficiencies such as the absence of instruction in ethical issues for mediators or the failure to provide an opportunity to conduct an observed, simulated mediation session, despite a clear state mandate to the trainer to include such elements in training. Such a trainee quite literally has no way of knowing that the program did not provide the mandated training pedagogy. Whether that person should be disqualified from certification because of the trainer's non-compliance raises troublesome administrative questions.

A related consideration that would arise from regular on-site observations of training programs is the extent to which a trainer-provider could be disciplined or disqualified from offering future programs due to teaching incompetency. Arguably, the better regulator of incompetency

⁶⁵ SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, MANDATED PARTICIPATION AND COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS (1991).

is the marketplace, through which news of one disastrous trainer will quickly spread, putting that provider out of the business. Although the market may regulate incompetency, state approval of trainers' entry into the market and practical limitations on class size due to trainer-participant quotas may affect the automatic conclusion that the training business is sufficiently lucrative to attract remaining providers to offer more training programs, thus replacing the ineffective provider. Given a limited number of offerings, then, the less capable provider can remain viable in the restricted marketplace. If the state's agency has no leverage to terminate a provider from the list based on skills, it is restricted simply to requiring the provider to make certain corrections in the program. Whether the public is well-served by such a practice is an important issue that should not be ignored.

Finally, no provision, administrative or otherwise, ensures that those providing the training remain current with developments in the fields of training technology and learning theory. While the code of ethics encourages mediators to stay up-to-date with developments by attending relevant advanced training, no parallel requirements exist for the training provider. Again, it might be argued that the marketplace is the best regulator, but it is far more likely that current practice reflects the operative presumption that training approaches can remain stabilized because the mediator's role is neither difficult to learn nor subject to radical change over time. It is to a review of these final considerations that I now turn.

B. Substantive Challenges

It is important to distinguish between minimally acceptable training programs and the aspirational goals of any educational effort. All the state-initiated efforts discussed above have focused on providing a satisfactory level of competency to those discharging a public responsibility. The approaches have tried to combine assumptions and policies relating to screening practices for service entry, training programs for those selected, and post-training or on-site training opportunities. The training programs, as so conceived, have focused on communicating information about program design, conveying dispute resolution philosophy, and displaying and transmitting performance skills and strategies for implementing the intervener role. The typical format does not exceed forty hours of training. While these efforts have become the conventional approach for such training efforts, it is important to examine the following elements as educational components missing from most training programs.

1. *Teaching Methods*

a. Pedagogy

To date, mediator training programs have consisted of classroom sessions involving lecture presentations, class discussions, case analyses, and simulations. Prepared videotapes of model mediation sessions are also deployed. No significant use, however, has been made of such technology as videotaping or interactive computer simulations. The possible benefits of combining satellite conferencing with on-site interactions have yet to be tried, nor have any experiments been conducted combining such technology-based communication devices with the development of more individualized training modules.

b. Evaluation

The methods for ensuring competent trainee performance vary widely. Clearly, no trainers administer pencil and paper tests focused on the trainees' mastery of the conceptual material conveyed during the training program. Most trainers attempt to provide individual feedback to each participant regarding areas of performance strength and areas in need of improvement. No standardized check list or pivot points exist to help provide uniform and consistent feedback among various trainers to each participant. Furthermore, no articulated baseline of performance has been established to indicate whether a participant has satisfactorily completed a course.

Indeed, no trainer must formally take responsibility for the determination that some persons are incapable of performing the required role. This practice reinforces three regrettable attitudes: (1) that anyone can be a mediator; (2) that by virtue of carefully identifying qualification requirements for entry to the training program, anyone so screened can be taught the requisite skills, attitudes, and concepts to perform the job capably; and (3) that the skills, concepts, and strategies of the mediator's job are so vague that the concept of evaluating performance is incoherent. Each attitude is misplaced. The first presumption displays an ignorance of the intellectual and performance skills comprising the mediator's role. The second remarkably and implausibly assumes that the screening process is foolproof, or that an incompetent mediator cannot do sufficient or irreparable harm to the parties so a more rigorous evaluation process during the training program is not warranted. Finally, the third presumption ignores the reality that the only basis for determining the

higher quality of one mediator over another is through performance criteria around which such evaluations can be made.

Hence, the question remains concerning what, if any, responsibility the trainer has for developing and administering evaluation of training participants that could lead to determinations that certain individuals have not yet demonstrated their capacity to perform at a satisfactory level. While it is unnecessary to be dogmatic about what constitutes minimal performance skills, it is equally unwarranted to excuse trainers from executing this responsibility. The trainer has an obvious economic interest in *not* performing this function. If someone pays a registration fee to a private provider and is later held ineligible to serve, the trainee will demand justification for the trainer's assessment. Because of these determinations, the trainer might gain a reputation for toughness or for unrealistically high standards. The trainer might subsequently lose a share of the market. While any trainer clearly should be able to respond freely and promptly to the trainee's demand for an explanation of what elements went into making the overall performance assessment, the potential economic risk associated with failing students will deter private providers, short of state-mandates to do so, from offering evaluations and thereby becoming accountable to the participant.⁶⁶

c. Trainee Mix

What remains absent from many mediator training programs is a structured interaction between those just entering the mediation role and more experienced practitioners and court personnel. Although this dimension could be reserved for advanced training, seasoned mediators can bring important insights to the educational enterprise of the novice and help to make the experience more sharply structured. Programs deploying structured apprenticeship dimensions to the training best incorporate this feature.⁶⁷ In jurisdictions where mentoring activities are required but not systematically structured, this interaction is less effective. Some programs have veteran mediators serve as assistant trainers for various role plays; others structure their participation as a panel (e.g., sharing their "lessons of experience") in an attempt to address some

⁶⁶ When Florida's Office of State Court Administrators released a request for interested parties to develop prototype training materials and subsequently to conduct the initial training workshops for the first mediators under the state's statutory scheme, a provision required bidders to create an exam to test participants' learning. Despite the author's developing, administering and grading of such tests, the implementing agency discounted the exam results due in part to complaints of those who failed.

⁶⁷ See Stulberg and Montgomery, *supra* note 42, at 515-19 and accompanying text.

transition concerns that trainees might face. The assumption underlying this training concern is that the trainer strongly influences the trainee's sense of professionalism and aspirational performance level. Given the limited opportunities for mediators to interact with one another, a trainer can contribute to strengthening the sense and reality of professionalism by linking novice mediators to those veterans who most capably reflect the profession's values.

Judges are notably absent from many programs.⁶⁸ The judiciary have the distinct competency to integrate support for informal dispute resolution processes with a pronounced commitment to the collective and continuing fidelity to principles of procedural due process and fair treatment. The regular absence of such persons as participants in the program is regrettable.

2. *Training Content*

a. *Materials*

While many training providers include a bibliography of readings in their course materials, participants are not required to read any significant literature during the training experience itself. The trainers, therefore, have the burden of developing through lectures an intellectual context for the program. As the conventional format of any formal educational training experience attests, straight lecture is not a completely satisfactory way for students to learn.

Training programs typically do not allow time for reading and reflection. Significant arguments support the notion that a concentrated training program period is a more effective format for learning performance skills than is a multiple-session program. Granting those arguments, though, does not prohibit trainers from structuring their offerings so that trainees must engage in related readings following the group training session and demonstrate their command of such materials through written analyses of selected problems or case studies from those readings. Moreover, the mandated programs of twenty, twenty-five or forty hours, after all, are minimum, not maximum requirements. Training providers, however, have not taken the extra steps. The consequence of

⁶⁸ A remarkable exception occurred at the mediator training program conducted in Lexington, Ky., in April, 1992, where several sitting judges participated in the complete workshop as trainees. The purpose of such participation is not to convert judicial officers to mediators but to sharpen their insight into the strengths of the process and to allow them to share with other participants the range of possibilities available in mediation but not in adjudication.

not connecting trainees to the relevant literature is myopic attention on mediation consisting of a set of skills or techniques. As discussed below, that perception reinforces a constricted view of mediation's potential.

b. Normative Dimensions of Practice

A second substantive area that needs to be more effectively addressed relates to examining the ethical dilemmas mediators face. This is a double-edged sword. Ethical principles guiding mediator behavior clearly can be enunciated and taught during a beginning training program. These matters relate to elementary issues like full disclosure of conflicts of interests or conventional behaviors for ensuring a neutral posture of judgment. The more subtle dilemmas are frequently appreciated only after some practice.⁶⁹ How, for instance, should a mediator act upon learning in caucus that the financial settlement agreed to by the parties during joint session is predicated upon one party not knowing the other party is about to declare bankruptcy? Such situations arise with sufficient frequency to warrant having trainees conversant not only in problem identification but also in the epistemological methodology needed for analyzing it. This area suggests that structured training beyond the required minimum is warranted.

c. Conceptual Frameworks

Expansive use of mediation in court-annexed programs may promote a particular conception of mediation such as that captured by the administrative model. By most evaluations, the administrative model takes on characteristics constraining the value of mediation that others so warmly endorse. The richer version celebrates the following components as the distinctive strengths of the process: the opportunity to identify party concerns in a manner other than reiterating legal causes of action; the active participation of the client in the discussion process rather than his or her structured, limited participation through counsel questioning; the active exploration of solutions that meet practical exigencies and personal priorities, whether legal rights take top priority or not; and the aggressive consideration of the constraints within which all parties are operating as a technique for exploring settlement options rather than a primary focus on regurgitating the likely outcomes at trial.

⁶⁹ ROBERT A. BARUCH BUSH, *THE DILEMMAS OF MEDIATION PRACTICE: A STUDY OF ETHICAL DILEMMAS AND POLICY IMPLICATIONS* 7 (Nat'l Inst. of Dispute Resolution 1992).

So far, the dominant training models and prototypes have been geared to teach these democratic conceptions, even if practitioners subsequently narrow their interest. If the trend of court-annexed mediation becomes more legalistic, however, training programs inevitably will begin to reflect that conception. If that occurs, significant limitations on the transferability of these skills will occur, and with it, opportunities will be lost. Two examples will suffice.

The court-annexed model begins with identified parties of interest; they are those persons named in the litigation papers. In other contexts, notably the mediation of negotiated rulemaking processes that the federal governmental agencies regularly use, one of the critical questions the mediator must address is who are the proper parties to the discussions.⁷⁰ All the techniques and skills relevant to making that threshold determination are absent from court-annexed mediator training programs.⁷¹

Second, the court-annexed conception of mediation, embodied in the administrative model, leads to the mediator's formulating mediation issues in straightforward legal jargon—typically, as issues of “liability and damages.”⁷² To many individuals, portraying a dispute by defining it exclusively on the basis of the legal claims seriously impoverishes the potential of mediation and makes some startling value assumptions.⁷³ In the breathtaking account of the MOVE Crisis, for example, the authors argue that the least insightful way to describe the dispute, though it is one that would flow readily from the administrative conception, would be to define the activities of the MOVE organization as constituting elements of “criminal harassment” properly addressed in a criminal court.⁷⁴ In a more recent example, arguments advanced by lawyers regarding the alleged constitutionality of a town ordinance governing loitering on the public streets proved to be a bankrupt approach to engaging in the more productive discussions addressed to the most vital concerns of the town council, local business persons and dominant ethnic groups.⁷⁵ Only when

⁷⁰ See CARPENTER & KENNEDY, *supra* note 32, at 38; SUSSKIND & CRUIKSHANK, *supra* note 30, at 136ff.

⁷¹ The danger arises most acutely when persons who are affiliated with mediation processes in other domains, such as Florida's land-management activities, attend these court-annexed mediator training programs believing that the dynamics and responsibilities are totally transferrable.

⁷² See MEDIATION OF PERSONAL INJURY CASES, AMERICAN ARBITRATION ASS'N (1985) (videotape).

⁷³ See HIZKIAS & WAHRHAFTIG, *supra* note 29, at 146.

⁷⁴ *Id.*

⁷⁵ See Stuart Vincent, *Glen Cove Settles Gatherings Case*, NEWSDAY, Dec. 30, 1992, at 20. A copy of the agreement reached by the parties, as well as the District Court Order approving that agreement, are on file with the *Kentucky Law Journal*.

the parties embraced a mediator with a richer conception of the process did dramatic discussions regarding police practices, employment needs, and recreational activities take place and resolve the controversy.⁷⁶

Given the amount of public resources allocated to support the development and implementation of mediation processes and the development of skilled individuals to serve as mediators, it remains a regrettable waste of public resources to have invested so substantially in the training of individuals whose transferability for service in other, often explosive, contexts is so severely restricted.⁷⁷ While one training program cannot pretend to train persons to serve in every conceivable controversy, some aspect of the training that links the concept of the mediation process to these other domains of use might provide an important and stimulating vision of the potential of these processes to the family of procedures we use to develop and sustain democratic practices.

CONCLUSION

During the past two decades, public systems have refined the shape and requirements of mediator development training programs. Considerable improvements have been made in terms of program format, delivery, and trainer competencies. Because of these advances, the public should have confidence that alternatives to trial combat do not undermine their considered interests or their concern for fair treatment. To suggest that more can be done in training mediators is to demand that we continually strive to perform not simply at acceptable levels but at the highest possible standards of excellence. That does not seem to be an idealistic demand when what is at stake is how considerations of justice, fairness, and respect play out in the lives of our fellow citizens.

⁷⁶ It is this dimension of critical mediator performance that calls into question the unwarranted assumption in the Florida practice that persons who satisfactorily complete civil circuit training or family training are qualified to serve in county court cases. In the latter instances, mediation does not turn on defining the concerns in legal terminology but in examining the dispute from a more common angle of vision.

⁷⁷ See *supra* note 33 and accompanying text.

