COURT-APPOINTED MEDIATORS OR SPECIAL MASTERS: A COMMENTARY

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I. Introduction

At the Center for Public Dispute Resolution's Symposium, panel A was charged with exploring the use of court-appointed mediators or special masters. In some respects this charge was broader than that of the other panels; in other ways, it was narrower. It was broader in the sense that it included issues of mediator qualifications and confidentiality—the subject matters of the other panels. However, it was also narrower in that it looked at those and other questions largely in a specific context—where the mediator was court-appointed.

This article is a moderator's view of what the panel set out to do, how its deliberations developed, and what conclusions it reached. I have tried to convey some of the flavor of the rich discussion without breaching any confidences or identifying the views expressed by any individual panelist. An essential part of the panel's design was to encourage full and frank discussion by assuring anonymity. This I have attempted to honor.

The original charge to panel A was to develop a model Order of Reference, which New Jersey state court judges could use to appoint special masters to function, at least partly, as mediators. During the panel's discussion, however, the objective was changed. The panel decided instead to develop a proposed Bench Manual for judges.[1] The Bench Manual would include guidance about the Order of Reference but would also treat a variety of other matters relating to the possible appointment of a mediator.

II. Defining the Issues

As indicated, the panel's original charge was to develop a

[1] The text of the Bench Manual is set forth in full beginning of page 101.

model Order of Reference appointing a mediator or special master. The model Order was to address the following issues:

- What can a master/mediator do and not do?
- What should the relationships be between master/mediator and judge, and master/mediator and parties?
- More particularly, to what extent should the master/mediator engage in *ex parte* communications with the judge or with the parties?
- What due process rights should the parties have if they fail to agree?
- What effect should the master/mediator's report, if any, have?
- Any other issues which emerged from the panel's discussions.

In responding to this charge, the panel quickly became involved in several extended discussions. The first related to a matter of terminology. The charge itself referred variously to "court-appointed mediators and special masters," to "master/mediators," and to "mediators." There is a long and complex history of the use of masters in New Jersey and in many other jurisdictions. Masters have performed a wide range of functions, including factfinding, case management and supervision of remedies. The extent of judicial authority to appoint masters is primarily a function of constitutional provision, statute and court rule. There has been longstanding confusion about the terminology used. Adding court-appointed mediators to this list was bound to create even more confusion.

Panel members alternated between asserting that it made no difference what court-appointed mediators were called and predicting that major substantive consequences would follow terminology. Eventually, the panel seemed to agree that judges were limited by applicable court rules to appointment of "special masters," but that there was substantial flexibility in specifying the assignment.

The second issue which prompted extended discussion concerned the nature of the mediator's assignment. The panel understood full well the broad array of functions special masters can perform, many of which had nothing directly to do with mediation or other forms of case settlement. But, it was equally well-understood that the panel's discussion was to focus on masters whose functions included mediation. That realization left unresolved,

however, the question of whether the master/mediator should function solely as a mediator or could be assigned other tasks as well.

This issue was the major source of tension within the panel. Dialogue about this question recurred throughout the panel's deliberations and was an important element in shaping many of the panel's conclusions. On one side were the mediation purists who argued that to mediate effectively a person had to meet the classical definition of a mediator—a neutral without authority to impose a solution on the parties—and that this precluded the mediator from serving as an agent of the court with other functions. On the other side were those who asserted that efficiency required combining functions, that case management can be a necessary prelude to mediation, and that reporting to the judge can be a desirable aftermath to failed mediation.

As a result of the panel's discussion, the initial set of issues was substantially enlarged. Specifically, the panel discussed:

- For which cases is mediation appropriate?
- At what stage should mediation be initiated?
- Who should be the mediator?
- What instructions should the mediator follow and what authority should the mediator be given?
- What should happen if mediation is unsuccessful?

There are substantive and procedural dimensions to each of these issues. For example, in determining which cases are good candidates for mediation, there are substantive criteria to be applied and process questions to be resolved. The next major section of this article contains a discussion of the panel debate about each of these five issues.

A. *For Which Cases Is Mediation Appropriate?*

A threshold question the panel considered was how judges should decide which cases would benefit from a court-appointed mediator. The panel discussed briefly whether that was the same question as which cases would benefit from mediation. The weight of opinion seemed to be that mediation by judicial order might not be appropriate in the full array of cases where the parties could reasonably opt for mediation.

The panel discussed at greater length whether it could devise a set of criteria which would provide judges with guidance

about whether to appoint a mediator. The consensus seemed to be that it was not possible to devise such a list. Instead, the panel set out to provide a checklist which judges could use to evaluate whether a court-appointed mediator was needed in particular cases. The understanding however, was that judges would have to exercise substantial discretion in assessing these cases.

Despite these difficulties, the panel was able to reach agreement on a checklist of relevant factors. There was general agreement that a "test case" would not be an appropriate candidate for mediation, but it was also recognized that there is disagreement over what constitutes a "test case." Certainly, a case involving only an issue of constitutional interpretation would fall within the test case category. On the other hand, a case without significant factual disputes might be a good candidate for mediation.

Related issues concerned the need for confidentiality, and the appropriateness of public disclosure. One of the concerns about the alternate dispute resolution movement has been its potential, through the privacy of its processes, to impede the development of the common law and to permit undesirable behavior to continue except in those individual cases where litigation is directly pursued. Obviously, the concern is that defendants will seek to use mediation or other dispute resolution processes to resolve conflicts privately so as to avoid public knowledge of the dispute and its settlement. In this way no binding precedent is created. If the mediated settlement were sufficiently private, there might not even be any public awareness of the behavior challenged.

Two other related factors also struck the panel as relevant to whether court-appointed mediation might be appropriate. One factor concerned the complexity of the case, as measured by the number and nature of issues involved, the number of parties and attorneys, and the extent of the public impact. The other factor related to the cost of the litigation, especially in light of the judicial resources required should the case have to proceed to trial and beyond. Of course, the more complex and costly the case, the more appealing a mediated solution may be.

A practical factor discussed was the availability of a suitable mediator or mediation team. This may be an issue especially in a case involving complex technical issues.

The panel also believed it important to consider the financial implications of court-appointed mediation. If the parties were expected to pay, or at least contribute to, the costs of mediation, the parties' respective financial circumstances become highly relevant. Whether party payment for court-appointed mediation is appropriate is discussed later in this article.

The panel also discussed the parties' willingness to engage in mediation. On the one hand, it is a *sine qua non* of mediation theory that the parties must be willing to participate in a voluntary manner. Under this theory, the court should not mandate mediation against the wishes of one or more parties. On the other hand, even most mediation purists agree that effective mediation can, and often does, occur although one or more of the parties had initial misgivings about the process. The skilled mediator should expect to encounter some, and perhaps substantial, resistance and should be able to overcome it.

Eventually, the panel agreed upon a procedural response to this dilemma. If, after considering the parties' wishes, the judge decides that mediation is appropriate, he or she should seek the parties' consent. If any party refuses consent, the judge can issue an order for the nonconsenting party to show cause why a mediator should not be appointed and an appropriate hearing can be scheduled. This agreement was reached after considerable debate about whether this would put the judge in an adversarial position regarding one or more of the parties. The weight of opinion was that this situation was no different than many others that might arise as a consequence of the judge's case management efforts.

Finally, the nature of the particular issue in the case which is before the court is a factor in whether mediation would be appropriate. Panelists drew sharp distinctions, in this and other respects, between issues bearing on the defendant's liability and issues relating to the nature or implementation of a remedy after liability had been found. Where the liability issue has not yet been determined, a court-appointed mediator may be in a more delicate situation. The parties, and especially the defendant, may be reluctant to disclose anything to the other party, or even to the mediator, which might influence a court's liability decision should mediation fail to settle the case. On the other hand, some panelists found much to commend in the early use of a court-

appointed mediator. Greater economy certainly can be achieved if settlement is effected prior to a judicial proceeding to determine liability. Additionally, a mediated resolution prior to the liability decision saves any party from being labeled with fault.

The balancing of these factors involves questions which will be considered more substantially later in this article. For example, how strongly a party may resist mediation prior to a liability decision likely will depend upon how much assurance the judge has provided that anything told to the mediator will be treated as completely confidential. This question is a central one with regard to the instructions under which the court-appointed mediator will function.

B. *At What Stage Should Mediation Be Initiated?*

Decisions about when to initiate informal efforts to resolve disputes in litigation almost always involve a tension between the desire to start early to achieve the greatest saving and the desire to have the parties and any third party dispute-resolver know enough about the dispute to craft a good and stable settlement. The panel's view was that generally the earlier the appointment the better. However, in complex cases, it may be necessary to develop the factual context before the qualifications of an appropriate mediator can be reliably determined. In one panelist's view, if a dispositive motion, such as one for summary judgment, is pending, mediation would not be appropriate. Also, another panelist thought that the judge might have to manage the case somewhat to position it for effective mediation. A third panelist suggested that an early management conference, where the parties identify likely issues and necessary discovery relating to those issues, and set a time for coming back together to discuss mediation, is one way to accomplish this. Appointing the mediator early in the dispute will enable the mediator to assist the parties in formulating their views about these matters.

The question of what schedule should be established after the mediator is appointed also occupied some of the panel's time. Consistent with the "early is better" approach, one panelist advocated that the mediator report back to the court within thirty to sixty days as to whether sufficient progress had been made to suggest that mediation was worth pursuing. There was a

general feeling that in complex cases a comprehensive schedule should be developed. This should include a provision for periodic scheduled reporting about the status of the mediation. Notwithstanding the desirability of defining a time schedule with some particularity at the start of the mediation process, the panel did not propose to lock the mediator into a mandatory schedule. The mediator should have the authority to terminate the mediation effort whenever settlement becomes impossible.

As with the other major issues considered by the panel, there was some discussion of the role the parties should play in determining timing. The general view was that the parties should play a significant but not necessarily dispositive role. In some cases, the court may have to act in ways not entirely consistent with the parties' preferences. However, in those circumstances due process, or related concerns might require that the parties have a formal opportunity to be heard on their objections.

C. *Who Should Be the Mediator?*

The panel engaged in extended discussion about mediator qualifications and the way in which they should be determined. The panel first recognized that there are at least three distinct kinds of relevant qualifications: subject matter expertise; mediation/settlement skills, including interpersonal skills; and legal/judicial process skills. Second, the panel acknowledged that there are a number of ways to provide these qualifications: by finding an individual who has them; by using a mediation team, which together has them and can bring them to bear as required; and by using a sequence of individual mediators, each of whom has special qualifications in one of the skill areas. Third, the panel considered whether it was more effective to have a fulltime, court-employed mediation staff or to employ mediators on a case-by-case basis. Fourth, the panel discussed how to ensure that the mediator would be objective. Finally, the panel considered the weight to be given professional credentials.

Regarding the process by which a mediator is selected, the panel focused on the role of the parties and their attorneys. As with other process issues, there was substantial feeling that the parties should have a meaningful voice in the selection, but not a veto.

Whether the mediator should have substantial subject matter expertise was a question debated at some length. Such expertise may aid the parties in reaching settlement because the mediator's knowledge can encourage the parties to act in good faith and because the mediator can be the source of ingenious settlement proposals. But, there was concern that the mediator's subject matter expertise may lead the mediator to become excessively involved in the dispute, even to the point of dictating solutions to the parties. Of course, this would prevent the mediator from functioning in an objective, neutral manner.

The panel felt strongly that the mediator should be knowledgeable and effective in the "gentle art" of mediation and its interpersonal aspects. However, where the court-appointed mediator is to perform other master functions, such as aiding in discovery or supervising hearings, some panelists cautioned that priorities among the skill areas should depend upon the Order of Reference and its assignment to the master. There was also some feeling that the pre- and post-liability distinction is relevant to what skills should be given high priority.

These variables were also influential in the panel's discussion about the importance of legal and judicial process skills. As with subject matter expertise, legal expertise may have a mixed effect on the mediation. On the one hand, in many mediation settings the parties may need to be well-informed about the legal context and their respective rights. If the parties have disparate legal knowledge or legal resources, the alert mediator may be tempted to correct this imbalance. The mediator may need legal expertise, or ready access to it, even to be aware of the imbalance. On the other hand, legal and judicial process expertise can have some negative effects as well. People trained in the law may tend to have an adversarial, or at least legalistic, view of the world and sometimes exalt the legal aspects of the dispute over the business or practical aspects. There may be another type of negative effect where a lawyer-mediator is from the geographic area and is familiar with the problem and the parties involved.

The importance of legal knowledge or skill increases if the court-appointed mediator is assigned judicial or quasi-judicial responsibilities, such as conducting evidentiary hearings or supervising discovery. The panel noted that one person need not possess the impressive array of skills necessary for the effective

discharge of these multi-faceted responsibilities, including mediation. Indeed, since relatively few individuals possess them, the success of court-ordered mediation should not be dependent upon the availability of one of those people. As the case becomes more complex, in terms of the nature or number of issues, the number of parties and attorneys, the number of non-parties with significant interests in the dispute, and the ultimate public impact, the benefits of a mediation team increase.

The increase in effectiveness by a mediation team, however, must be balanced against the likely increase in costs. In turn, this focuses attention on who will bear mediation costs. Some courts, often on an experimental or pilot basis, have employed full time masters who sometimes function as mediators. Other courts use full time law clerks as case managers and perhaps mediators. In those situations, the costs are usually borne by the public fisc. However, mediators can be appointed on an *ad hoc* or case-by-case basis. Under this approach, it is more likely the parties would be expected to pay at least part of the costs, unless the mediators are volunteers. Such an approach may raise fairness and due process considerations. The problems are exacerbated if mediation is attempted prior to a liability determination.

Using publicly paid court personnel as mediators eliminates the party-payment problem. It also ensures continuity and facilitates development of uniform and enforceable standards. On the other hand, using *ad hoc* court-appointed mediators makes it easier to get mediators with special skills suited to the particular case. Experience has indicated that qualified volunteers come forward in considerable numbers to serve occasionally as court-appointed mediators. This approach also informs the broader community about alternate dispute resolution efforts, such as mediation, and directly involves interested persons.

Regarding the mediator's real and apparent objectivity, court personnel may be less likely than *ad hoc* appointees to pose problems of conflicts with a party or a party's attorney. Most appointees, and especially volunteers, will probably be drawn from the same local community as the attorneys, if not the parties themselves. However, there is a much greater chance that the court employee will be, or appear to be, willing to defer to the judge.

The potential conflict problem with *ad hoc* appointees can be

cured in most cases by having the judge and the parties discuss possible mediators prior to appointment. Although enforcement may be difficult, the objectivity of court employees can be assured by court rule or procedure. To some degree, both problems can be minimized by a good Bench Manual and Order of Reference.

The panel did not discuss at length the issue of mediator credentials. Although it recognized that in some mediation settings legal expertise is important, or even essential, the panel did not advocate any sort of blanket requirement that court-appointed mediators be licensed attorneys. To the contrary, there was a recognition that in many cases such a requirement would be counter-productive. If mediators were required to be licensed as such, compliance would be inevitable. Some doubt was expressed, however, about whether licensing would provide any substantial benefits. Finally, the issue of party participation in court decisions about mediation extended to the selection of a mediator. Many panelists indicated that there should be substantial opportunities for the parties to have input about the characteristics to be sought in the mediator or mediation team, as well as about their identity. While short of absolute veto power, the parties' right to participation should have real substance. One model suggested was to have the parties and their attorneys review lists of possible mediators proposed by the court. Another would have each of the parties propose possible mediators, subject to review and comment by the other parties.

Once the court and parties have addressed the first three issues, they must reach the issue which dominated the panel's discussion: how should the mediator function? This issue involves matters typically dealt with in the court's Order of Reference appointing a master. The Order of Reference must define the court-appointed mediator's responsibilities, describe the mediator's authority to discharge those responsibilities and describe the procedures required to be used. These complex and important issues are discussed below.

D. *What Instructions Should the Mediator Follow and What Type of Authority Should the Mediator Have?*

Initially, the panel had to determine who would be responsi-

ble for resolving issues regarding mediator functions and the process by which these issues would be resolved. The panel opted for a broadly participatory approach. The parties and their attorneys should have the opportunity to be heard about the court-appointed mediator's powers and responsibilities, and the procedures to be used. Additionally, the designated or putative mediator should be invited to provide input. This is especially important if the mediator is selected on an *ad hoc* basis for the particular case. One panelist suggested that some mediators will not accept appointment in particular cases unless they are given an opportunity to participate in the formulation of the Order of Reference.

Although the independent mediator cannot be required to accept an assignment, the situation is different with the fulltime court-employed mediator. Presumably, such a person ultimately would have to accept the judge's decision. Under many court-annexed mediation programs, that would also be true for the parties. In some situations the parties' participation in mediation is mandatory, but the parties have discretion whether to agree to a mediated settlement. To the extent the judge can or must require the parties' participation, presumably the judge also can dictate the nature of the mediation process and the court-appointed mediator's function within it. While most of the panelists accepted these circumstances, all of them repeatedly stressed the importance of substantial party input and some panelists expressed concern about the due process implications of mandatory participation.

The judge's role is an issue, not only as to the formulation of the mediator's assignment, but also as to the judge's ongoing interaction with the court-appointed mediator. In part, this relates to whether the court-appointed person functions only as a mediator or also has case management responsibilities. But, even if the responsibility is solely to mediate, there are important questions about the judge-mediator relationship. One such question relates to the appropriateness of the mediator having *ex parte* contacts with the judge. Indeed, the panel even discussed whether the mediator should have access to information obtained by other court personnel, perhaps in connection with the case intake process. The panel's initial reaction was a diverse one. Some panelists considered *ex parte* contacts as entirely inappropriate,

given the importance they attached to the mediator's neutrality. Other panelists looked favorably on *ex parte* contacts and perceived many practical benefits. Such contacts increase the pressure on the parties to settle and position the judge to bring about a settlement through other means if the mediator is unsuccessful. As the discussion proceeded, the panel seemed to move much closer to the former position, even though it was at variance with the previous predilections or practices of some panelists.

Another, somewhat related question concerns the reporting obligations of the mediator to the judge. None of the panelists advocated that the mediator remain *incommunicado* from the judge throughout the mediation. As indicated previously, the panel supported a schedule of one or more interim reports from the mediator about the status of the mediation process. However, most of the panelists felt that the reports should be general and that they definitely should not disclose confidential information or attribute blame. How and where to draw an appropriate line, of course, will vary with the case. One factor likely to have significant impact is whether the court-appointee is functioning solely as a mediator or has case management responsibilities as well.

The panel recognized that the answers to questions about the relationship between the judge and the court-appointed mediator are interwoven with answers to other questions about the nature of the mediator's total assignment and about the mediator's relationships with the parties and their attorneys. In the latter connection, issues of confidentiality and *ex parte* communication loom large. The panel seemed to reach a consensus that, if mediation is to proceed in the classical way, the mediator has to be able to assure the parties of confidentiality. Because this extends to the other parties as well as to the judge, the mediator needs to have *ex parte* communications with each of the parties. Indeed, this "shuttle diplomacy" approach is likely to be essential in many of the larger and more complex cases.

The panel discussed other important aspects of the mediator-party relationship. These included: the mediator's authority or duty to provide legal advice to the parties, to initiate settlement proposals, to redress perceived imbalances among the parties; and the role of the parties and their attorneys in actual mediation sessions. The panel discussed, but did not reach any definitive conclusions about, the mediator's providing the parties

with legal advice. There seemed to be recognition that in cases where legal issues predominate it is inevitable that the mediator would become involved in these issues. Of course, that does not necessarily mean the mediator will be providing the parties with legal advice, especially if the parties are well-represented by competent counsel. The panel also recognized that the mediator's involvement in legal issues is likely to be greater in the pre-liability phase.

When discussion shifted to the mediator's role in initiating settlement proposals, or at least structuring the process designed to produce settlement proposals, the panelists generally seemed comfortable giving the mediator considerable discretion. Several panelists spoke positively about court-appointed masters or mediators suggesting settlement guidelines, while others approved enlisting the assistance of experts to develop computer models through which the parties could explore settlement possibilities. However, the panel did not approve of the mediator forcing the parties to accept a settlement developed by the mediator. Indeed, the panel's desire to ensure that the parties, not the mediator, made the ultimate decision was one of the reasons why some panelists had misgivings about selecting a mediator who was an expert in the substance of the parties' dispute.

Whether the mediator should correct a perceived imbalance between the parties is one of the most controversial issues in mediation. On one hand, neutrality requires that the mediator work with the parties as they are, and accept the parties' weaknesses and relative lack of resources and sophistication. The mediator is not responsible for trying to alter reality for to do so would inevitably make the mediator an advocate and not a neutral. Critics of this approach contend, however, that when the mediator remains neutral in the face of clear imbalances among the parties a skewed result is likely. The mediator's neutrality promotes inequality and unfairness. Those involved in the movement to further the use and professionalization of mediation, such as the Society for Professionals in Dispute Resolution, favor some mediator responsibility to ensure fairness of result. Such responsibility would seem to be required when the mediation occurs under court mandate. Although the panel did not discuss this point at length, the court-appointed mediator's assumption of

some responsibility for the fairness of any settlement was consistent with the panel's general approach.

Regarding the participation of parties and their lawyers in the actual mediation sessions, there was consensus that if a judge ordered the mediation, the parties themselves could be required to participate at least in some initial sessions. Beyond that, the panel discussed whether attorneys for the parties could be barred from participating in mediation sessions either with the parties or as their representatives. Some panelists thought that in some instances attorney participation in mediation is counter-productive. Other panelists, not necessarily disagreeing with that proposition, argued that it did not justify barring the attorneys' participation unless the parties consented. Ultimately, the panel seemed to agree that parties had a right to be accompanied or represented by someone of their choosing, and if they wished to assert that right a judge should not bar its exercise.

In addition, the panel devoted considerable discussion time to the nature of the mediator's assignment. In fact, the recurring issue of whether the court-appointee should be assigned only mediation functions or should also be charged with case management responsibilities commanded more attention than any other issue. Initially, the panel had difficulty in differentiating between mediation or settlement functions and case management or information-gathering functions. This may be because many judges commonly discharge a broad array of functions without distinguishing among them. Many of the panelists, therefore, approved of designating the court-appointee as a "master" regardless of the function assigned and of assigning the master a mix of functions. On the other hand, some panelists felt that two characteristics are crucial to a proper mediated settlement: mediator neutrality and a lack of power to impose a settlement. Under this approach, the settlement that emerges from supervised negotiation is the parties' settlement, reflecting their views and wishes and not those of a third party.

Court-appointment of the mediator, however, poses special problems. The fact that the mediator is selected or endorsed by the judge, or is a fulltime court employee, suggests that the "mediator" represents the court and its values and interests. The parties may suspect that the court-appointed mediator has the power to impose a solution by virtue of the mediator's relation-

ship with the judge. These concerns may exist no matter what the judge does to insulate the mediator from the court's authority and to assure the parties that the mediator will function in a neutral manner. However, if the court-appointee is styled as a special master and is assigned a range of functions, including mediation, it is especially likely that the parties will doubt the mediator's neutrality and lack of power. According to the "purists," a court-appointed mediator must appear completely neutral to have any realistic prospect of assisting the parties to a true mediated settlement.

The "pragmatists," however, were not persuaded about the advantages of a mediated settlement over other forms of settlement. Throughout much of the discussion there was a sense that some level of coercion is necessary to bring many parties to actual settlement, and that it is naive to aspire to a system of perfect neutrality. These panelists felt that, even if classical-neutral mediation results in better settlements when it succeeds, important case management tasks might be required as a prelude to mediation or as a followup to failed mediation. In either of those circumstances, efficiency dictates that the same court-appointed person perform the mediation and case management functions. Especially in highly complex technical cases, the costs of separating the functions may substantially outweigh the qualitative benefits. During the course of the recurring debate between the "purists" and the "pragmatists," the weight of opinion clearly moved toward the purists. At the very least, the pragmatists came to understand that they had to be concerned about the impact that a mixed assignment has on the court-appointee. By the end of the discussion, the view held by some panelists prior to the conference, that a special master could move freely, easily and effectively back and forth between mediation and case management or evidentiary activities was significantly altered.

Perhaps the ultimate consensus reached was that a court-appointed mediator should function solely as a mediator unless the benefits of assigning additional functions clearly outweigh the detriments. The panel agreed that the court-appointee's responsibilities and authority should be clearly spelled out in the Order of Reference so that the parties are put on specific notice and can respond accordingly. If, for example, the parties consented to an

assignment with both mediation and case management functions the detrimental effects of mixed assignment may evaporate.

Included in this discussion was a debate over the judge's function. Some panelists described the special master as the alter ego of the judge. It was suggested that where a judge sits with a jury he has considerable freedom to function as a mediator or case settler. If settlement efforts fail, the judge can continue with the case because the judge is insulated by the jury. In other words, only when the judge is the ultimate adjudicator of the case is it inappropriate for the judge to seek to mediate among the parties. However, this suggestion provoked strong responses from other panelists. Some felt that the judge-master analogy should not be pursued since the status and attributes of the positions are quite different. A more fundamental criticism was that the special master's function should not be modeled after the judge's function because the mixture of adjudication, case management and settlement activities which the judge performs has a negative effect on the special master. One panelist urged that judges should adjudicate cases and not manage them or try to settle them because the skills and habits that make for good judicial decisionmaking are the opposites of the skills and habits necessary for good mediating.

The panel's discussion suggests a system with three separate functions and with a different person to discharge each: pretrial case management, mediation/settlement and adjudication. Although many panelists were attracted to this model they did not recommend it as a general proposition. Instead, they preferred leaving judges with flexibility to fashion assignments for court-appointees which best serve the needs of a particular case, so long as judges weighed the issues discussed by the panel.

The panel also discussed public access and media relations. Public access to a master-supervised activity seems more appropriate to case management than it does to mediation. Undeniably, the mediation process works best when it is conducted privately. However, it can be argued that a mediated settlement should be open to public scrutiny, at least if the dispute affects a public interest. One of the serious concerns about informal dispute resolution is that it cloaks with privacy those decisions with significant public implications. The panel also attempted to draw the line between the master's "private" or mediation function

and the master's "public" or evidentiary function where the master is assigned both functions. The panel recognized that the line between private and public is not precise or clear, and that often the judge has to make difficult decisions regarding these controversial issues.

The media relations aspects of the mediator's assignment raise important questions. In public impact cases, the mediator is sought out by media representatives about the status of the mediation effort. This exemplifies the political dimension of the court-appointed mediator's task. The panel favored giving discretion to the mediator about how to handle this sensitive matter rather than having the Order of Reference attempt to prescribe a response.

The panel addressed the court-appointed mediator's authority to employ experts and other staff. In large and complex cases, more than a single mediator is almost certainly required. There are a number of models available to incorporate the wide range of skills and knowledge necessary in complex mediation. Even if the court opts to have a lead mediator rather than a mediation team or a sequence of mediators, the lead mediator still needs support. The panel discussed whether the mediator appointed as a special master can directly hire the necessary experts and staff. As the authority is not clear, two options were discussed. First, the judge could appoint the personnel on behalf of the mediator. Second, and clearly preferred by the panel, the court rules could be altered to make explicit the master's authority to employ experts and staff. The master's authority to deploy the necessary staff also raises, at least indirectly, another issue to which the panel directed considerable attention—who pays the costs of an attempted mediation and according to what standards? If the court-appointed mediator is a fulltime court employee or a government agency, the costs are borne initially by public funds. Even in that situation costs may be assessed to the parties. If, however, the mediator is a private individual or agency, appointed on an *ad hoc* basis, it is more likely that the parties will be expected to pay at least part of the costs. The panel concluded that, even at the pre-liability stage, a judge had authority to order the parties to pay the costs of mandatory mediation. If the parties had sufficiently disparate resources, the judge should be able to impose most or all of the costs on one party. However, one

panelist noted that these views of judicial authority had not been definitively confirmed. A way to avoid many of the problems inherent in this approach is to give the judge access to a pool of competent volunteer mediators. Many of the panelists indicated that there would be no difficulty in creating such a pool. In many states, such volunteer pools have been created for settlement day or settlement week programs and have proven effective.

This discussion led the panel to recommend that judges have available to them a variety of mediation resources—court staff, compensated outside mediators, and volunteers—and the discretion to select the most appropriate one for a particular case. The judge also should have discretion regarding the compensation to be paid to an *ad hoc* mediator. A variety of circumstances, such as the parties and the mediation effort required, should be considered by the judge in making such a determination.

The panel considered the mediator's authority regarding the mediation process itself. As to requiring party participation, the panel ultimately suggested that the mandate should come from the judge and not the mediator. There was strong feeling, however, that the parties should be accorded some due process rights to contest mandatory mediation. The panel was willing to grant the mediator the power to set the timetable for the mediation and for termination of the process. A specific, but not rigid, schedule should be set out for the mediation process and the mediator should report to the judge the progress made in relationship to that schedule. The mediator should have authority to terminate the mediation whenever, in the mediator's judgment, the mediation effort is likely to be unsuccessful.

The panel finally considered discharge of the mediator. This could be initiated by a party or by the judge. If the mediator is a fulltime court employee the court has authority over that person's status. The more difficult situation involved an *ad hoc* mediator appointed for a particular case. The panel agreed that a mediator could only be discharged for cause with an opportunity to be heard in situations where discharge might tarnish the mediator's reputation. There was less certainty about the procedures and substantive standards to be used where the problem is a mismatch between the case and the mediator, or where there is uncertainty about whether the case should ever have been

mediated. Ultimately, the panel concluded that the judge should decide based upon the circumstances of the case.

E. *What Should Be The Procedure When The Mediation Is Unsuccessful?*

With regard to this issue, the panel discussed whether information produced for or disclosed during the mediation process can be used after the mediation is terminated. The panel also discussed whether any formal or informal consequences should be imposed upon a party because of conduct during the mediation process. Several factors, such as the parties' consent, are relevant to these issues. Where the parties have consented to have the mediator report to the judge at the conclusion of the mediation, then presumably any problems dissolve. Without prior consent, however, the pre-liability/post-liability distinction is of significance. Reporting to the judge after pre-liability mediation raises serious problems, including due process problems. Reporting after post-liability mediation, on the other hand, tends to cause fewer problems. Another important factor in the post-mediation stage is whether the mediator is also serving as a special master with case management or other judicial responsibilities. In these situations, reporting information to the judge, or use of it by the master, follows more naturally. That is not to say the practice is less susceptible to challenge on due process or other grounds, or that it is less likely to undermine the mediation process. The panel also accepted a sharp distinction between the use of information disclosed in or generated for the mediation effort, and the reporting of the mediator's interpretation of why the mediation effort failed. Under some circumstances, the panel accepted the use of mediation information, but it did not support reporting the mediator's interpretation of why the mediation effort failed.

The panel agreed that specific notice should be provided to the parties, presumably in the Order of Reference, as to the potential uses of information resulting from the mediation process. Most panelists also felt that a party has due process rights to contest the information being used or reported. Indeed, some commentators have suggested that parties might have due process rights to cross-examine persons presenting information to the mediator during the mediation process. Although such a proce-

dure would go a long way toward creating a judicious process, without such protection a challenge to the mediator's factual report would become a formality lacking substance. However, the mediator is not always willing to disclose his findings and data to the public. Indeed, mediator confidentiality is a hotly debated issue in professional circles.

III. Conclusion

The issue of whether the "pure" mediator or the "mediator plus" model of mediation should predominate was at the heart of the panel's discussions on court-appointed mediators. In large measure, practicality supports a combination of functions. Giving the court-appointed master case management, evidentiary and mediator authority provides flexibility to respond to the exigencies of the particular case. It also comports with the way many judges function in that it brings to bear different weapons from the judicial arsenal at different points in the litigation process.

Initially, the panel had a preference for the "mediator plus" model. As the discussion proceeded, however, the purist view began to win converts. The panel moved toward the conclusion that, if the courts were serious about incorporating mediation into the judicial process, a commitment has to be made to "true" mediation. Although the panel recognized that in some cases the "mediator plus" model should be implemented, the panel came to understand that combining mediator responsibility with others diminishes the seriousness of the mediation effort.

Implicit in the panel's approach to this complex issue is the recognition of the benefits which result from mediation under court mandate. Indeed, at no point during the panel's debate did anyone deride mediation or argue against the use of court-appointed mediators. The panel's discussion certainly indicated that there are many important questions to be resolved and many significant details to be worked out before mediation by court appointment can be fully established. It seems certain that this will be followed and that court-appointed mediators will become a substantial part of the judicial process.

MODEL BENCH MANUAL FOR THE APPOINTMENT OF A SPECIAL MASTER TO CONDUCT MEDIATION

Introduction

This Bench Manual is designed to assist judges in deciding whether or not to appoint special masters in particular cases to mediate among the parties. If the decision is to make such an appointment, the Manual provides guidance about executing the decision.

The purpose of this Manual is to provide guidance, *not* definitive rules. Many of the issues which will have to be addressed are highly contextual; what is appropriate in one case will not work in another. Moreover, we still know relatively little about how best to achieve fair and efficient resolutions of disputes. We are coming to recognize, however, that techniques such as mediation can play a significant role in augmenting more adversarial approaches and that the courts, as well as the parties themselves, can fruitfully initiate resort to such techniques.

Judges will have to evaluate the relevant factors from their special vantage points on a case-by-case basis. Currently, the thoughtful exercise of judicial discretion is more likely to produce appropriate decisions than any system of rules.

Before reaching more detailed guidance, it may be helpful to provide some general guideposts.

1. To the maximum extent feasible, the process by which decisions are made about court-appointed mediators, including whether there should be court-ordered mediation at all, should be a participatory process. Parties and their attorneys, and perhaps affected members of the public, should have an opportunity to be heard. In this decision-making process, and in any mediation effort, parties are entitled to be represented by their attorneys. This should not preclude judges from requiring the personal participation of parties or from seeking consent of the parties to appear in mediation sessions without attorneys, if that seems appropriate.

2. Due process issues may be raised by a number of aspects of mediating under court auspices. These include: required par-

ticipation of the parties in mediation; imposition of any costs on the parties; any disclosure to the judge by the mediator or by a party of confidential information supplied by another party during mediation; any attribution of blame for the failure of mediation; and perhaps even the absence of an opportunity to challenge information presented to the mediator.

3. Judges should be mindful of the primary attributes of a "pure" mediator—a neutral third party without authority to impose a solution on the parties—in deciding how to fashion mediation in particular cases. Under some circumstances, the benefits of vesting a mediation function in a special master with other functions, evidentiary, case management or supervisory, may outweigh the benefits of pure mediation. But judges must understand that such a decision has costs. The broader the special master's authority and duty, and the more involvement he or she has with the judge, the less likely that the parties will consider the process to be true mediation. Therefore, the decision to combine functions in the same person should be considered carefully and adopted only when the judge is relatively certain about the weighing of benefits and costs.

4. The judicial posture of the case may influence whether or not a mediator should be appointed and, if so, how the mediator will function. In particular, the distinction between pre- and post-liability is likely to be very significant.

5. Judges should be especially wary of contacts with, or reporting by, a special mediating master which would jeopardize confidentiality of information provided by the parties during the mediation effort or which would place blame on a party for the failure of mediation to achieve a settlement.

6. Orders of Reference should spell out with particularity the powers and duties of a court-appointed mediator, the procedures and timetable for the mediation process, the termination of the process and any consequences of failed mediation.

Issues To Be Dealt With Regarding Appointment of a Mediator

1. *Factors to be considered regarding the appropriateness of mediation.* In deciding whether or not to appoint a mediator to function under the court's aegis in a particular case, judges should consider the following factors:

a. Complexity and number of issues;
b. Number of parties;
c. Amount at issue;
d. Public impact of the case;
e. Appropriateness of privacy;
f. Whether or not it is a test case;
g. Whether the primary issue(s) in dispute are legal or factual;
h. The stage which the case has reached (pre- vs. post-liability, adequate discovery concluded);
i. Extent of time pressure for resolution;
j. Cost of the litigation;
k. Capacity of parties to pay for a mediator;
l. Availability of an appropriate mediator; and
m. Willingness of parties to mediate.

2. *Procedure to be followed in deciding about mediation.* The parties' willingness to participate in mediation is a significant factor to be considered, but the parties should not be given a veto power. If, notwithstanding the reluctance of one or more parties, the judge concludes that mediation with a court-appointed mediator is appropriate, the judge should seek the parties' consent. If any party refuses to consent, the judge can issue an order providing the recalcitrant party with an opportunity to show cause why a mediator should not be appointed.

3. *Creating the Order of Reference.* If a mediator is to be appointed, under the existing New Jersey statute and court rules, the most likely mechanism is that of special master. The Order of Reference defines the special master's assignment and the implementing powers. Creating the Order of Reference involves procedural and substantive aspects.

a. *The process.* The judge should schedule a conference with the parties to discuss the Order of Reference. This discussion may take place at an initial conference to elicit the parties' willingness to mediate, if they consent to mediation. The parties' views should be sought about all aspects of the Order and of the mediation format. Also, the judge should seek the parties' input about who should mediate. This could be done by seeking the parties' reaction to a list of potential mediators compiled by the court, or the parties could be asked to submit their recommendations. If the parties were to agree on a mediator, ordinarily the

judge should accept that agreement. The ultimate responsibility, however, is the judge's.

b. *Mediator qualifications.* In general, the mediator should have expertise in the mediation process. In assessing this, the judge could consider: (i) formal training (and even some form of certification or licensure); (ii) experience, especially in similar cases; and (iii) references.

In some cases, legal training and expertise may be an important qualification (*e.g.*, where the mediator/special master is also assigned evidentiary, case management or supervisory functions). But court-appointment as a mediator certainly should not be limited to attorneys. Frequently, legal training may be more of a disadvantage than an advantage in conducting a mediation effort.

On balance, expertise in the substance of the parties' dispute is a positive factor, because this will permit the mediator to head off wasteful detours and to assist the parties in structuring a fair and effective settlement. However, there are some risks associated with having a mediator very knowledgeable in the subject matter. Primary among these is the potential of the mediator becoming too involved personally in the substance of the mediation.

The judge should assess the mediator's interpersonal skills, especially in respect of the particular parties to the dispute and their attorneys. Related to this is the need for the judge to assure that there is no actuality or appearance of a conflict between the mediator and any party, or between the mediator and an attorney involved in the case. The judge must be on guard also against the actuality or appearance of the judge's engaging in favoritism or cronyism by his or her appointment of a mediator. This may be a particular problem if attorneys from the vicinage in which the judge sits are appointed. Yet, there is a strong likelihood that such attorneys may constitute a substantial portion of the available pool, especially of volunteers.

The judge may be able to respond to some of the issues regarding mediator qualifications referred to above through the mediator configuration selected. In relatively simple cases, a single mediator is likely to be sufficient. But, in more complex cases a greater mediation capability may be required. In a multi-party

case, with technically difficult issues and broad public impact, for example, a single mediator almost surely will be unable to provide the necessary skills, attributes and resources. The judge can remedy this in several ways: (i) a mediation team can be appointed; (ii) a series of mediators can be appointed to function in relation to different aspects of the settlement effort; or (iii) the mediator can be provided with the necessary support through appointment of experts, consultants and staff.

c. *Compensation.* Ideally, judges should be able to choose among various kinds of mediators, with different cost implications. The following options would provide desirable flexibility: (i) volunteer mediators, trained and placed on a panel; (ii) fulltime court-employed mediators; and (iii) private mediators, usually paid for by the parties. If such a choice were available, judges should consider a number of factors in making a decision. Primary among these are the nature of the case and the likely mediation process that it would require, and the nature of the parties in terms of their relative financial capability and general sophistication.

Volunteer mediators can effect considerable cost savings, but they are unlikely to be able to handle the sustained, complicated mediation burdens involved in a complex, multi-party litigation. Fulltime court-employed mediators may be able to assume such burdens without the necessity of imposing the costs on the parties. However, court-employed mediators will have to overcome the parties' suspicions that the mediators are alter egos of the judge before they can expect the parties to enter into the spirit of mediation. Private mediators can be selected with the specific needs of the case in mind and this may be an enormous advantage in specialized cases. Nonetheless, if the court must impose the costs on the parties this effectively may rule out private mediators in some important cases.

d. *Timing.* For the selection of the mediator and initiation of the process, in general the earlier the better. Major cost savings can be achieved and stigmatization of a party can be avoided if mediation can assist with a settlement prior to any liability determination. The main counterbalance is that a fair and lasting settlement usually requires that the parties know enough about their respective circumstances to make rational settlement decisions.

For completion of the mediation process, at least in complex cases, there should be a specific schedule, with periodic reporting to the court about the status of mediation. The mediator should have discretion, though, to terminate mediation whenever he or she concludes that it is fruitless.

e. *Defining the assignment.* Obviously, this is the core of the Order of Reference. The Order generally, and the definition of assignment specifically, should be sufficiently detailed to give the parties and the mediator adequate notice of the court's expectations. But, a balance must be struck such that the mediator is not unduly restricted in the discharge of his or her responsibilities. The definition of assignment has many elements, some of which will vary substantially from case to case. Among those likely to be common to most Orders are the following:

(i) In general, the court-appointed mediator should not also be assigned case management, evidentiary or supervisory responsibilities in the same case. Additionally, the mediator usually should be permitted to have *ex parte* communications with the parties but not with the judge. If, however, the parties are not concerned with the mediator's independence from the judge or other special circumstances exist, the mediator may be assigned other responsibilities. In such cases, the judge should take special care to spell this out in the Order of Reference.

(ii) Unless the Order of Reference specifically provides to the contrary, the mediator should preserve the parties' confidences as to the judge and as to the public at large. Generally, this will mean that mediation proceedings are closed to the public. In cases with substantial public impact, the court may consider providing interested citizens with an opportunity to be apprised of, and perhaps to be heard on, any proposed settlement. The mediator may report to the court about the general status of the mediation, being careful neither to disclose any substantive information nor to suggest that any party has been less than fully cooperative. Confidentiality considerations also require that the mediator deal very circumspectly with the media.

(iii) The court must provide specifically for the necessary expert and staff assistance, and other support, for the mediator. Unless New Jersey law and court rules are amended, the judge is likely to have to issue the necessary orders, rather than seeking to invest the mediator with authority.

(iv) In the Order of Reference, the judge should specify any due process requirements to which the mediator must adhere.

(v) The judge should also articulate any conflict of interest restrictions. For example, if the mediator is a private attorney the judge might place limits on that attorney appearing before the judge for a given period of time.

(vi) The Order of Reference should provide specifically for the circumstances under which the mediator can be discharged and the procedural rights he or she will have in that connection. For example, in the case of a private, *ad hoc* mediator performing only mediation functions, the parties might have the right to petition the court for discharge. The court could act only after affording the mediator an appropriate hearing. At least where the discharge is sought for reasons which might taint the mediator's reputation, the mediator should be entitled to a hearing even if the court sought his or her discharge.