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Performance-Based Assessment:

A Methodology, for use in selecting, training and evaluating mediators

The Test Design Project

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The Test Design Project

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Note

This Methodology reflects the suggestions and observations of many practitioners, academics and officials, accumulated over a number of years. Those who directly participated in the project are listed on the inside front cover, and some of those who wrote contributing as well as critical papers are listed in the references. (We would especially like to thank Robert Baruch Bush, who--while holding firm to the "transformative" view of mediation described in the text--was particularly helpful in the discussions involved in editing this document.)

But many others who have influenced this work are not named. They include individual mediators and mediation program managers working with labor-management, public policy, family, commercial, environmental, community, race relations and many other kinds of disputes; executives of virtually all of the membership organizations in the field; family, trial and appellate judges, as well as court administrators; and officials of many and diverse federal and state agencies. They also include scholars in at least eight disciplines. Many of these contributions have been thoroughly worked-out and published articles--especially the ten papers in the Special Section on the Interim Guidelines published by *Negotiation Journal* in October 1993. Others have been more informal. But even some of the more off-the-cuff remarks have illuminated particular problems and led us to new thinking.

We are grateful to all of them--particularly to those affiliated with the Wisconsin Employment Relations Commission, the Massachusetts Office of Dispute Resolution, and the Program on Negotiation at Harvard Law School, who have made contributions without number.

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I. Executive Summary

This document brings to conclusion a consensus-based effort to provide mediation programs, courts and other interested parties with improved tools for selecting, training and evaluating mediators. In so varied a field, the term consensus-based must be given specific meaning: Experience has demonstrated that agreement on every point of this difficult subject matter is not to be had, and the term is used here in its more limited sense of a process which has the goals of consensus and uses, broadly, the methods of consensus-building. This Methodology attempts to provide as rounded a discussion as is possible at this time, and tries to resolve several different approaches to mediation; but it also demonstrates the whys and wherefores of a complex discussion in which a number of statements should not be attributed to all members of the team.

The Methodology begins with a brief introduction explaining the origins of the effort, and continues with "Conceptions of Mediation," an explication of some of the varying views of what mediation is or should be. The two following sections turn to an analysis of objections that were raised to the direction of the document's predecessor *Interim Guidelines for Selecting Mediators*, and describe multiple ways that performance-based assessment can be used in this still-adolescent field.

This is followed by "How a Mediator Works," a discussion of the original field study that led to this effort, intended to ground the remainder of the discussion in the observed behavior of some mediators at work. Lists of common tasks and skills of mediators are then discussed; and the concluding section of the text proper, "Performance Evaluation Criteria," gives examples of the kind of evaluation scales which result from this type of analysis, together with a discussion of the process of analysis and redrafting which are required by the varying intentions and circumstances of different programs. In subsequent editions of this Methodology, appropriate additional scales will be included as they emerge in the field.

The references are followed by two appendices, which contain complex subject matter likely to be of interest primarily to program managers and others engaged in efforts to construct specific tools for specific usages. "Using Tests in Selection" is self-explanatory, and contains analyses of various aspects of performance-based selection based on the experiences of the original programs using such tools. "Two Sample Cases" is intended as a methodological aid to drafters of exercises, and goes into detail as to two (now retired) specific examinations, accompanying their verbatim text with a running warts-and-all commentary on how these designs worked out in practice.

II. Introduction

Major progress has been made in our society in recent years in developing peaceful means of resolving many kinds of disputes. Yet these mechanisms are vulnerable to lapses in quality of execution. As with any immature field of human endeavor, there has often been confusion over the nature of quality work, the doctrines to be applied, and the results that can reasonably be expected. In particular, many dispute resolution programs have been unreliable in their attempts to select in advance those individuals best able to handle the mediator's difficult and elusive role; to make the best use of available resources in training those selected; and to evaluate the results fairly.

Background

Over approximately the last twenty years, there has been a rapid and widespread expansion of dispute resolution programs nationally, in a plethora of subject fields that have previously seen their disputes handled mostly by litigation, by unilateral action and, occasionally, by violence. While these new programs and procedures have received considerable public acclaim, they have not yet been accompanied by the development of effective quality-control mechanisms. By 1987, concern was rising among those most familiar with the quality of results achieved in the field. This concern led the Society of Professionals in Dispute Resolution (SPIDR) to empanel a Commission on Qualifications, chartered to investigate and report on basic principles that might influence policy for setting qualifications for mediators, arbitrators and other dispute resolution professionals.

In its 1989 Report, the Commission set forth three major conclusions:

1. That in many types of disputes the parties could be considered sufficiently sophisticated and in control of the selection process that a market-based approach could be used; but that in the increasing number of cases and programs where neutrals were assigned to disputes without the parties having either knowledge of the neutrals available or an effective means to influence the selection, standards should be set to ensure consistent delivery of quality services.

2. That no particular type or degree of prior education or job experience had been shown to be an effective predictor of success as a mediator, arbitrator, or other professional neutral, and that where standards were to be set, they should be performance-based.

3. That no single entity (rather, a variety of organizations) should establish qualifications for neutrals.

Purpose of this Methodology

The present Methodology is an attempt to provide tools for programs that need to select, train, and/or evaluate mediators. It replaces and expands on the *Interim Guidelines for Selecting Mediators* published by NIDR in 1993.

In its 1989 Report, the SPIDR Commission noted favorably an early experiment with development of performance-based selection criteria for labor mediators, involving an

examination based on a role-play, conducted by the Wisconsin Employment Relations Commission. Subsequently, a similar format and grading standards were found adaptable for use in a Massachusetts court-based program dealing with the mediation of major commercial litigation, in a Hawaii court-based family mediation program, and in a California community-based program. This Methodology is based on experience gained in these and other early experiments, on a consensus of experts from diverse backgrounds, and on subsequent reconsideration following critiques of the Project group's tentative conclusions.

The original intent of this project was more simply to provide tools for performance-based *selection* of mediators. Selection continues to be a focus of concern, particularly in court-connected programs which assign mediators to disputes without the parties having a free-market choice. (See *National Standards for Court-Connected Mediation Programs*, 1992; also Shaw, 1993). Over the five years of the project's existence, however, it has become evident that programs' perceived needs vary quite sharply. (See the 1995 Report of the Second SPIDR Commission on Qualifications for a full discussion of these variations). The Project's previous "product" has been used in varied ways; some examples can be found in section V. below. This document represents an effort to respond to that variety, by providing a *framework* that will make it easier for any given program to use the underlying principles and approaches in ways consistent with its own principles and resources. For some programs, this will continue to revolve around problems of selection. Other programs, however, may use performance-based assessment more in contexts of training, case assignment or subsequent evaluation. This Methodology is thus drafted with an eye to such uses, and though it replaces the 1993 *Interim Guidelines for Selecting Mediators*, its purpose is now broader.

III. Conceptions of Mediation

From Fuller's epochal (1971) essay to the present, visions of what a mediator is, might be or ought to be have proliferated. For anyone contemplating the introduction of any kind of standard, complicating factors abound; nearly every criterion of a mediator's job which has been articulated has also been disputed.

For example, a lay person might find blameless a traditional definition of a mediator which goes something like this: "a neutral third party with no power over the parties, who attempts to help them settle their dispute." Yet such a definition immediately triggers at least four well-known objections. In the first, a succession of scholars of the mediation process identify a series of behaviors commonly engaged in by mediators which are not "neutral" in their effects on the parties. Mediators cannot, says this line of thought, be neutral, and should make no such claims. (See, for instance, Cobb and Rifkin, 1991, and Silbey, 1993).

Similarly, many observers have denied that mediators are "powerless"--or that they refrain from exercising power of various kinds. (See, for instance, Greatbatch and Dingwall, 1989). Even the concept that what causes the mediator to be summoned in the first place should be capsulated as a "dispute" invites challenge, from those observers who are less interested in the specifics than in the parties' long-term relationships--to each other or even to society.

And fourth, a respected line of argument holds that "settlement" is neither mediation's exclusive property nor its highest and best use, contending that other dispute resolution processes may be as efficacious in securing settlement, but that mediation alone provides the opportunity for parties to address their conflicts in a way that strengthens both their self-reliance and their consideration for others (and hence helps them to deal with similar problems in the future).

This view, best articulated in Bush and Folger (1994), holds that the drive toward settlement or problem-solving, while serving powerful social needs, neglects the most important dimension of the mediation process--its potential to change people themselves, in the very midst of conflict, giving them both a greater sense of their own efficacy and a greater openness to others. The *settlement-oriented* majority of mediators and mediation programs are thus seen as missing the greatest potential of the field: its capacity for the *transformative*.

There is a potential price to be paid for the "transformative" approach. Simply put, it is widely perceived that it takes longer, at least when large groups are involved on one or both sides. It thus may impose greater transaction costs both on the parties and on the program. But there is also a potential price to be paid for the "settlement-oriented" approach, because a focus on the short term may leave the parties unenlightened as to patterns of behavior which are likely to lead to other disputes in the future; at the extreme, it may even leave them hungry for another crack at each other.

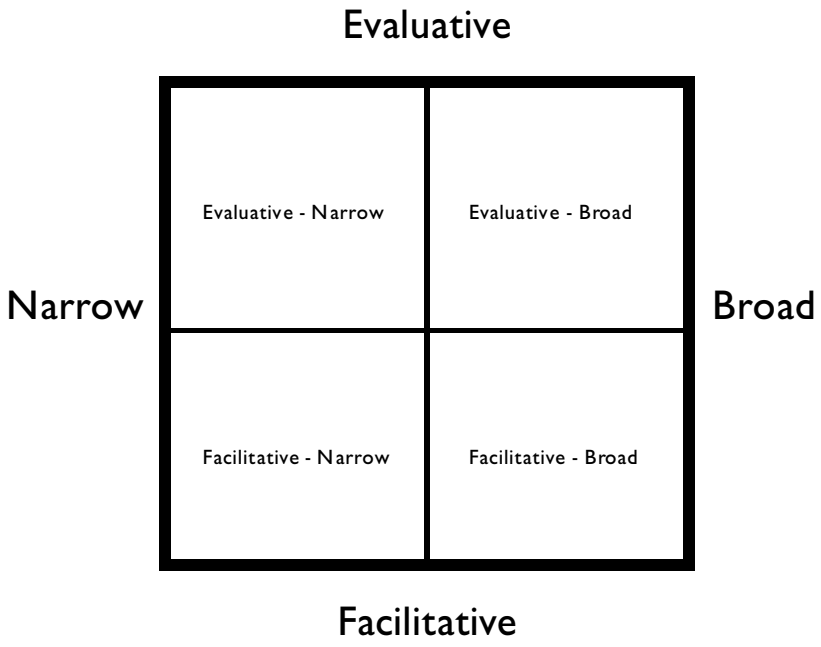
Two trains of thought in the mediation literature have sought to resolve these conflicts. Both are useful here. The first such view is a matrix consisting of two continua, resulting in four possible "quadrants" in which a given mediator might operate. One continuum is defined at its extremes as evaluative and facilitative; the other, as broad and narrow. (Riskin, 1994 and 1995).

In this view, mediators with a *narrow* focus assume that the parties have come to them for help in solving a relatively technical problem. Often, these problems are defined in advance by the parties, and take forms such as "who pays how much to whom?" Mediators with a *broad* focus, however, are seen as assuming that the parties might benefit if the mediation goes beyond the issues that normally define legal proceedings, and they attempt to discern and help the parties fulfill underlying interests. These contrasting purposes do not define an either/or; they are the ends of a continuum.

The two other defining characteristics of this view also form a continuum. The (most) evaluative mediator assumes that the parties want and need the mediator to provide some direction as to the appropriate grounds for settlement; the (most) facilitative mediator assumes that the principal mission is to enhance and clarify communication between the parties in order to help *them* decide what to do.

A graphic way of outlining these two sets of parameters may be helpful:

Mediator Orientations / Styles[1]



This way of categorizing mediators has the virtue of explaining some wide variations in behavior: A mediator inclined toward the facilitative and broad, for instance, is concerned with the parties' overall relationship, and seeks to help the parties improve that relationship by means which put the maximum possible control in the parties' own hands. An evaluative/narrow mediator, by the same token, believes the parties have retained him or her

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[1] This graph © Leonard L. Riskin, used by permission. (Riskin, 1994).

because what is wanted is specific and expert guidance toward a prompt settlement in a particular case.

The other approach is to describe a *common core* of behavior which many mediators engage in. This can be broken down into a series of criteria which are explicitly admitted to contain values which are not universally shared--but which also provide the seeds of alternate criteria which programs may substitute in a "seasoning to taste" process. The common core approach was the origin of this project, and continues to be the primary mode of discussion here. It is described in detail below; but this document's use of it has been extensively modified from the *Interim Guidelines'*. One way of aligning it to Riskin's "quadrant" form of description is to note that in the common core approach, by definition, the extremes of all four quadrants disperse into other occupations. Thus at the extreme of the evaluative/narrow quadrant, the work may be considered indistinguishable from that of an advisory arbitrator. At the extreme of facilitative/narrow is a convenor. The far reaches of the third quadrant, facilitative/broad, fit a common job description of a therapist. And the fourth (evaluative/broad), though somewhat harder to pin down, bears some relation to many religious and civil rights leaders' conceptions of peacemaking. The common core form of description also allows for the perception that many of the best mediators are versatile enough not to fit neatly within any of the divisions articulated by Riskin or Bush and Folger. These mediators, in effect, transcend much of the discussion by following more or less evaluative, facilitative, broad, narrow, transformative or settlement-oriented paths according to their sense of what the given occasion and the needs of a particular set of parties seem to require.

This document seeks to respond pragmatically to these circumstances. The working group that has prepared this document is not unanimous as to the relative value of each of the criteria discussed. Unanimity in this context, however, is not as necessary as clarity. By seeking to identify differences in values within the Test Design Project working group, disagreements about the purpose, character and style of mediation have been forced to the surface. These issues have been thoroughly discussed, the varying views have been accommodated to the extent possible, the criteria that result are made explicit, and these are treated as samples which any given program may justifiably use merely as a starting point for developing its own list. Finally, this document lays no claim to exclusivity of use of the term "mediator" to describe those who work within the common core. In the next two sections the Methodology explores how programs that exercise their freedom to disagree with the values implied in the sample evaluation scales can modify elements of this document to make it useful to them.

IV. From "Qualifications" to "Performance-Based Assessment"

This project originated as an offshoot of the first SPIDR Commission on Qualifications, and was intended to follow through on the Commission's finding that where standards were necessary in mediation, performance-based methods should be used rather than educational degrees or particular kinds or levels of experience. The initial basis for the project was a series of papers[2] outlining a possible definition of a mediator's functions and skills, and exploring variations based on the widely varying circumstances of different programs. The Test Design Project group was therefore formed to develop the underlying conceptual framework and to try to provide programs with the most reliable and economical tools available for making their own mediator *selections*.

Within this overall purpose, the group's particular focus was on those dispute resolution fields characterized by rapid increases in mediator populations combined with a pattern of mandatory assignments of particular individuals to the parties. These were identified initially as family, commercial and community disputes. A further purpose was to assist programs in their training. Experience with prototype tests had shown that performance-based testing enables programs to make distinctions between their newly selected mediators' skills, which allows training to be targeted to individual needs. But at first, this purpose was secondary.

Limitations of Selection Testing

As already noted, the "institutionalization" of mediation has made accountability and quality control an increasing concern. The *Interim Guidelines* did not propose legislated or court-mandated certification, but rather program-by-program review of their own mediators, applicants and trainees. Some of the drawbacks of selection testing were then noted:

- Performance-based selection of the type contemplated, by itself, is unlikely to be an effective device for assessing reading or writing abilities, organizing skills, ability to follow procedures, commitment or integrity.

- Costs are highly variable, depending on the availability of in-house talent for drafting the selected exercise as well as for service as role-play actors and graders. A number of other assessment strategies exist which may eventually supplant role-plays on grounds of cost-effectiveness. Tools such as weighted application blanks, personality inventories and interest inventories can be helpful in screening large numbers of applicants down to a group manageable for the more costly role-play phase. But while development and administration costs for these tools are relatively low, they need to be constructed by professionals, because adverse impact on minority groups can result from careless design.

- Integrity and commitment are probably best assessed by careful background and reference checks.

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[2] See Honeyman, 1988, 1990a, 1990b; Honoroff, Matz and O'Connor, 1990; Honeyman, Miezio and Houlihan, 1990; Honeyman, Peterson and Russell, 1992.

- Reading, writing and substantive knowledge (where required) can be assessed most economically in written examinations, particularly those requiring essay answers.

- The educability of a given candidate is a significant issue. A program might justifiably admit an inexperienced mediator based on evidence that weaknesses shown in a performance-based test may be remedied through training. The converse is also true; an extra margin of skepticism may attach to a candidate who shows the same weaknesses despite a resumé showing substantial prior exposure to the mediation environment. (See "Some advice for mediator evaluators" in Appendix A).

- Adverse impact on minority groups is a risk attendant on all assessment strategies that are not professionally developed and supervised.

The potential that performance-based selection methods might become so standardized that programs' variety would be adversely affected concerned many programs and other observers. (See Russell, 1993; Silbey, 1993; Menkel-Meadow, 1993). It has become clear that listing a series of caveats is not enough. When critiques of the *Interim Guidelines* were requested, a common strain of criticism held that the mere existence of such a document was likely to create a single model of practice which would then be enshrined in court rules or legislation, and in turn imposed on programs whether or not they had values consistent with the *Interim Guidelines*' implied or expressed criteria of quality. (See, for instance, McEwen, 1993 and Pirie, 1994). Fears of "professionalization" of the field also engendered opposition to performance-based testing among community-based programs, many of which use volunteers and seek to maximize their community's involvement in the program, which leads to much greater stress on training than on initial selection.

Avoidance of the "abstract and decontextualized criteria" (Dingwall, 1993) often embedded in other occupations' "professional" standards was, however, a key part of the *Interim Guidelines'* original purpose. Meanwhile, the varied and creative uses which programs have actually made of the *Interim Guidelines* have demonstrated that in fact the tools advocated there were capable of such uses. (See below under "Why a Methodology?")

Far from creating the premature closure of the field which some have feared, the emergence of performance-based assessment methods is a context-sensitive approach to ensuring *competence*. This promises to help a wide variety of programs to ground not only selection of mediators, but their training, assignment and subsequent evaluation, in each program's respective conception of the actual work that must be performed. Many programs claim to do performance evaluation, but there is little evidence that this is done either very systematically or with a clear articulation of the criteria employed. And the potential for use of such tools in training courses is particularly important in the wake of suggestions that many training courses may involve a post-training "weeding out" that is not always explicitly admitted by program managers. (See Honeyman, 1995). The following sections describe how the specific content and proof of that competence will vary from program to program; here it is sufficient to point out that failure to develop tools for programs' use in making the necessary judgments inherently denies that mediators and programs must be accountable, and would virtually guarantee that eventually, standards would be imposed on the field from outside.

A more rigorous approach

Though this Methodology outlines an array of ways that performance-based assessment may be useful to programs, there is good reason to believe that the creation of simpler and less costly selection tools is a valuable goal. Training, experience, peer and supervisory review, and other methods for improving competence within the criteria of any given program are clearly important, but it remains difficult for any of these to compensate for unwise initial selections; wide variations in quality of service, even within the same program, appear common. Moreover, dispute resolution programs often have insufficient management time and training budgets, and lack stringent internal quality controls.

If programs can be freed of the necessity of designing their own assessment devices from scratch in order to ensure context sensitivity, more of them will be inclined to use such tools. The consequence is that it would then be *less* likely that a small number of mediators or managers in those programs will use their own--often unarticulated--standards to judge others. Furthermore, it is widely recognized that the basic skills of a mediator can be acquired in very different walks of life. Encouraging programs to use performance-based assessment at an early encounter with mediator candidates reduces the likelihood that candidates will be rejected by a program manager on grounds that do not relate well to their ability to perform the work. A number of issues specific to testing-related uses of this Methodology are discussed in Appendix A, and two sample cases that have been used for tests are discussed in Appendix B.

Most of the current cost and complexity of performance-based testing in dispute resolution comes from two sources: The unavailability of standardized, "off the shelf" tests, and the reliance on mimicry of real disputes. The validity believed to adhere to the exercises described in Appendix B depends on consensus and, in turn, on close adherence to the setting, personalities, issues and patterns of actual cases in the particular programs involved--what the testing profession would describe as "face validity." Unfortunately, at present the exercises duplicate some of the cost and complexity of typical cases as well. While there is no guarantee that--even with the safeguards this Methodology advocates--standardized testing methods will become generally accepted in this field, it is quite clear that without such safeguards and without a reduction in costs, they will not.

Abstraction of the essence of a mediator's skills from a role-play, or "case-equivalent," into a simpler, less costly environment for testing is not the work of professional resolvers of disputes, but of testing professionals. And a movement from program-by-program design of tests to any kind of "off the shelf" approach will pose a real challenge to the testing industry, because an excess of standardization could render true the already-voiced concerns about various forms of "cultural bias" that can all too easily be incorporated into tests in many fields. (For lists of these concerns, see Morris and Pirie, 1994. For a description of the methods used in the testing industry to avoid such biases, see "Need for validation of assessment procedures and job analysis" at pp. 19-21 of the *Interim Guidelines*).

Costly and difficult as the prototype tests have been to develop, the program-by-program design process, and the consequent close adherence to the culture in which the using program operates, has at least minimized the "cultural bias" problem. It does not seem impossible for the testing industry to resolve this issue satisfactorily on a larger scale. Strategies exist which appear to allow the development of sets of standardized test

components, not all of which are suitable for any given situation, together with devices that permit programs to identify *which* components fit into the culture or setting that program is trying to address. (See Balma, 1959; Mossholder and Arvey, 1984; Russell, 1993; Test Design Project, 1993). But devising means of simplifying tests without ignoring the variations among programs and settings requires sophistication in job analysis and test design, as well as experience in designing assessment devices for other kinds of work in which proficiency cannot normally be measured by paper-and-pencil tests.

A current effort

Development of better-validated and more easily-administered assessment tools will be costly in terms of past expenditures in the dispute resolution field. In 1991, the Project selected two not-for-profit firms as partners for the initial steps of such an effort, the American Institutes for Research (AIR) and the Human Resources Research Organization (HumRRO). By late 1992, the Project's partners were able to obtain a $50,000 grant from the National Science Foundation to perform a feasibility study to determine whether it was possible to create a standardized, validated "bank" of test components, from which an interested program could draw elements suited to its particular needs and culture. The feasibility study encompassed family, commercial and community mediation, the three fields in which the assignment of a specific mediator to parties, without the parties having an effective choice, was considered most likely to become prevalent. The study was completed by late 1993, with the cooperation of a wide variety of practitioners and programs, and provided preliminary evidence of a significant degree of commonality of the core skills involved in practice in all three areas. (Russell, 1993). But it also demonstrated that there existed a significant degree of hostility to the development of standardized test components, among a number of persons and entities active in commercial and community mediation whose support was considered essential to the successful marketing of any eventual "product."

Among individuals and organizations active in family mediation, on the other hand, there was sufficient agreement on the desirability and workability of such measures that it was considered practicable to proceed immediately. In particular, a consensus developed in favor of the use of these concepts in the development of a certification program already being considered by the Academy of Family Mediators. The feasibility study led directly to a specific plan to create such a certification program. The Academy and other organizations formed a North America-wide consortium for this purpose, which by late 1994 included the Association of Family and Conciliation Courts, Family Mediation Canada, and the Society of Professionals in Dispute Resolution. The consortium retained one of the Project's original partner firms (HumRRO) to pursue the design and funding of the certification examination.

V. Why a Methodology?

In the two years since the *Interim Guidelines* were published, there has been repeated evidence that organizations concerned with quality in mediation (however defined) had their own uses for that material, often uses that could not have been predicted. These four examples will illustrate the trend:

- The Alaska Judicial Council embedded many of the *Interim Guidelines'* criteria in its *Consumer's Guide to Selecting a Mediator*, a document designed for use directly by individual parties in an open marketplace.

- Three federal agencies (the Federal Mediation and Conciliation Service, the Administrative Conference of the U.S., and the Department of Health and Human Services) collaborated on a manual for use in routine week-long training courses for federal agency personnel; some of the *Guidelines'* definitions of mediators' skills became part of the manual for training purposes, without reference to selection.

- The San Diego Mediation Center, in search of a model for role-play-based assessment of potential mediators that would reduce the scope of the subjective judgments necessitated by the broad performance criteria in the *Interim Guidelines*, refashioned those scales into a longer series of short behavioral statements.

- The U.S. State Department, creating for the first time an in-house mediation service and on a tight budget, used the *Interim Guidelines*' performance criteria to create an informal interview-based protocol for selecting candidates for its first training course.

It is thus evident that programs have started to see these tools as useful in a broader context. The Project group has endeavored to learn from these experiments and to make this document one which will encourage still broader use. Among the possible applications some, such as peer review and supervisory review (see Honeyman, 1990a), or self-evaluation (see Honeyman, 1990b) have been part of the discussion for some time. But as noted above, others have emerged which appear likely, in parts of the field at least, to be widely acceptable.

The boundaries of these potential applications of performance-based assessment are not yet known; it has only been a few years since the first form of these tools was articulated. But beyond the examples above, it is already clear that one simple but potentially influential use of performance-based criteria is in the form of explanations to prospective mediators (and consumers) of what the work actually entails. Most job descriptions given to prospective mediators in the past, whether professional or volunteer, appear to have been less than fully helpful. Describing the work of a mediator in the kinds of terms used in this Methodology can help focus a program's investment of resources on likely prospects and encourage consumers to see mediation's potential for helping them in a realistic light. Another use of these tools is to compel an honest discussion of a program's strengths, biases and limitations, as the program managers and mediators sit down to begin the process of redrafting the sample criteria to fit their own values, intentions and resources.

This Methodology, accordingly, represents an attempt to provide the most broadly useful descriptors, caveats and suggested modifications possible at this time.

Note that a number of programs and critics consider a wide variety of attitudinal issues to be appropriately addressed in a context of "qualifications"--as distinguished from a context of appropriate or ethical *practice*, which would imply that the issue arises primarily in a context of either training or post-training evaluation. It is not clear whether these issues can be addressed better in selection tests or in subsequent training. Readers are requested to note, therefore, that this Methodology largely treats programs' varying views on such subjects as whether mediators should seek to "empower" weaker parties in two alternative ways. One is to defer these as an issue for training. The other is to invite any program which wishes to select mediators partly based on their handling of such issues to design its own assessment device so that the issue becomes salient, and thus examine the candidates' responses in the course of the selection examination. In either event, the flexibility inherent in current program-by-program design of assessment methods inherently allows each program to decide for itself.

VI. How a Mediator Works

For many years, the choice of methods in mediation had been considered so personal, and so specific to the goals and attitudes of the individuals involved, that a mediator's effectiveness seemed to defy detailed analysis. "An art, not a science" became an all-too-familiar way of dismissing the subject. The successes of the dispute resolution movement, however, made this attitude increasingly risky. If a mediator's performance could not be evaluated according to intellectually respectable standards, a growing field would have no dependable way to select those who are best suited to do this work. Furthermore, it would remain difficult to explain what a given mediator could do to improve effectiveness. Such concerns led to a 1985-86 study, in which a group of five labor mediators chosen from twenty working for the Wisconsin Employment Relations Commission was observed closely to see if their sharply differentiated working styles contained any matrix of common skills and abilities. While subsequent research and deliberation has refined the initial description of the qualities needed, and while it is now clear that the criteria will vary at least to some extent from one setting to the next, a brief account of that study's findings will help to show the significance of such a matrix of skills.

On the surface, these mediators did almost everything differently. Initial taped interviews established that three were primarily interested in the problems of the moment, and in getting the settlement; two were more concerned with the parties' long-term relationship. Thus even within that one program, it became evident that some mediators were settlement-oriented while others were, in a phrase coined only several years afterwards, inclined towards the "transformative." This difference showed up in their quite disparate approaches to each of the activities described below. At the time this was referred to as a matter of "style," but subsequent reflection suggests that this term failed to delineate that the mediators involved in the study differed in their *intent* as well as their methods.[3]

One mediator read up on comparable settlements and disputes before going to a meeting; two spent substantial time before each case discussing it with the negotiators on the telephone; two others did almost no specific preparation. One mediator routinely used the physical environment, such as whom to sit next to in a caucus; four at least professed to ignore it. Three used sidebar meetings as often as possible; two, as seldom as possible. And when asked to identify types of cases they particularly liked or disliked, no two came up with the same answer.

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[3] In several instances, the performance evaluation criteria which initially resulted incorporated within the same scale both of these contrasting ways of viewing what the mediator is trying to do. One consequence is that some observers believe that these sample scales gave "mixed messages" about which approach is favored by the program; see Bush, 1993. It is a matter of record, however, that the first two programs to essay performance-based selection used scales crafted this way. This probably reflected internal willingness to bring in mediators oriented toward either perspective, as long as they were competent within their respective approaches. With minor emendations, we have largely preserved these contrasting features in the first examples given in this Methodology–see Variant 1 in section VII below–but in Variants 2 and 3 we give examples of some alternate terms.

They also had several things in common. They all had a demonstrated record of success, whether that was measured by the high rate of settlements in their cases, the number of requests for their services jointly filed by the parties, or their general reputation among their peers. But most significantly, it developed that, to a surprising extent, they all followed the same sequence of action. It took repeated observation to discern the factors which resolved apparently dissimilar tactics under a common heading. But what gradually emerged was the conception that there were five generic types of activity in which all the mediators were engaged; and that variations in their relative strengths within this typology made it possible to explain their differences in style. After several tries with other phrases, the five types of activity were defined in the first published description as *investigation*, demonstrations of *empathy*, *invention*, *persuasion* and *distraction*:[4]

> *Investigation.* In different ways, all of the mediators engaged in intensive investigation of the facts behind the dispute early during the case. For the most part, this took the form of questioning spokespersons and other team members in a caucus. Under this heading, the mediator was performing two functions at once: Obtaining hard information, sometimes information the party did not want to give; and demonstrating to the same party some potential holes in its point of view. The ability to pin down a spokesperson not only got the mediator the information, but allowed everyone else present to see that the negotiator was trying to evade that process. The fact of an attempt at evasion, conspicuously opposed by the mediator, itself became evidence to those present that their position might be untenable.
>
> *Empathy.* All the mediators took various steps to try to establish empathy with the disputants. These demonstrations tended to occur at the same time as investigative attempts. Each mediator showed himself or herself as being obviously willing to hear and discuss matters of concern to the parties or individual team members, which were not necessarily "relevant" to the dispute.
>
> *Persuasion.* Specific attempts to obtain concessions began early, at a relatively low level, and typically rose in intensity during each case. Though one mediator started out at a level of intensity that resembled another's last-ditch effort, it was the progression, not the general level, which was thought significant. It was clear from the outset that parties "read" the mediator's temperament--otherwise, patient mediators would never get anywhere. The progression in intensity thus signified to the party both the mediator's rising self-confidence in pressing for concessions (based, as noted, on increased understanding of the dispute) and the increasing need for action as the dispute drew to a head.
>
> *Invention.* Attempts to create out of whole cloth a solution to an issue, or more likely a series of potential solutions, were generally reserved until after

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[4] See Honeyman, 1988. Note that these are reprinted verbatim, while subsequent deliberation has led to many changes in these concepts.

the mediator was not only knowledgeable about the parties' situation, but obviously so. The reason seemed to be that an early attempt by the mediator to invent a solution appeared condescending to the parties, even when the mediator happened to have found the "right" answer. Once or twice during the study, a mediator did try to move things along by coming up with an invented solution early in the game; in each case, however, this was a conspicuous failure.

Distraction. All of the mediators found a need to distract the parties regularly. This could be described as a function of entertainment; one of the mediators studied described it as the "vaudeville element" in mediation. But the common factor appeared to be distraction rather than the ability to tell jokes as such. It rapidly became evident that a frequent resort to some kind of relief of tension was necessary, in order to keep the parties from assuming a "set" which soured the atmosphere and made settlement more difficult.

Based on these concepts, a role-play selection examination was developed. It will be discussed below, and its full text is reprinted in Appendix B.

Subsequent exposure of the underlying conceptual framework to the sharply varied settings and cultures of diverse programs has resulted in a progressive series of refinements to the initial evaluation criteria. In particular, three such occasions stand out: The Massachusetts Office of Dispute Resolution added the criterion of *managing the interaction* to the original list. The Test Design Project working group made a number of detail changes in devising the *Interim Guidelines for Selecting Mediators*, as well as reorganizing the evaluation scales so that they divided along more conceptually integral lines. And a knowledgeable and diverse group of critics and commentators enriched the discussion, in the Special Section on the Interim Guidelines in the October, 1993 issue of *Negotiation Journal* and elsewhere--which in turn led to many of the changes made for this Methodology, such as the alternate scales listed in Section VII.

The scales themselves are discussed under "Performance Evaluation Criteria," below. They are examples of what the testing industry calls performance dimensions. But performance dimensions are normally built up from lists of tasks and knowledges, skills, abilities and other factors (known in the testing industry as "KSAOs") which make it possible for a given person to perform those tasks. The reader may therefore find it helpful to begin by reviewing the sample lists of tasks and KSAOs which follow.

These lists were primarily developed in two stages. (1) The testing experts working with the Project combed a selection of mediation training manuals and job descriptions, forwarded by various programs in response to the Project's solicitation, for references to specific skills, tasks, etc. involved in family, commercial and community mediation. (2) They compiled these into tentative lists, which were then submitted to the working group for discussion and amendment in formulating the 1993 *Interim Guidelines*. (The lists have been slightly modified for consistency with other changes made for the present document).

The resulting lists are not exhaustive, and they do not reflect reality for every program. They are intended merely as a starting point to encourage any given program to prepare a modified list that reflects its actual practices. For example, mediators in many programs are unlikely to draft agreements for the disputants (see Task 31 on page 20); in circumstances where the parties are deaf, the ability to communicate in sign language might replace the ability to speak clearly (see KSAO 6 on page 20); and so forth. Also, in some programs which expect to use more than one mediator per case ("co-mediation") one way of assigning mediators might be to use performance-based assessment to ensure that skills are complementary. In this context it is not necessary for any one mediator to be proficient at all the relevant skills, as long as both mediators can work together. Of course, programs which use co-mediation more to provide racial, gender etc. balance, in cases where these are sensitive issues, may make a different kind of match.

Depending on the milieu of the program involved, it is possible that the changes may be extensive. More than one commentator has pointed out, for instance, that the terms used here arise out of the predominant North American culture, and may not necessarily apply to another society or even to indigenous or minority cultures within North America. (See e.g. Duryea, M., in Morris and Pirie, 1994; also MacArthur, 1994). What is important here is that a given program engage in the serious self-examination required to define *its* most-needed skills. It is neither desirable nor reasonable that the skills be found identical for all programs.

Tasks

A. Gathering Background Information

1. Read the case file to learn about the background and disputants.
2. Gather background information on a case from negotiators or other mediators (e.g. settlement patterns in similar cases).
3. Read legal or other technical materials to obtain background information.
4. Read and follow procedures, instructions, schedules and deadlines.

B. Facilitating Communication

5. Meet disputants and make introductions.
6. Explain the mediation process to disputants.
7. Answer disputants' questions about mediation.
8. Listen to disputants describe problems and issues.[5]
9. Ask neutral, open-ended questions to elicit information.
10. Summarize/paraphrase disputants' statements.

[5] It is worth noting that some commentators believe that at least in some settings, this criterion outweighs virtually all others in the list. Certainly the fact that diverse tasks and skills are listed should not be taken as endorsement of the proposition that they are all of equal importance for any particular program.

11. Establish atmosphere in which anger and tension are expressed constructively.[6]
12. Focus the discussion on issues (i.e. not personalities or emotions).
13. Convey respect and neutrality to the parties.

C. Communicating Information to Others

14. Refer disputants to specialists (e.g. alcoholism counselors) or other services, or bring such specialists into the mediation process.
15. Refer disputants to sources of information about their legal rights and recourses.

D. Analyzing Information

16. Help the parties define and clarify the issues in a case.
17. Help the parties distinguish between important issues and those of lesser importance.
18. Help the parties detect and address hidden issues.
19. Analyze the interpersonal dynamics of a dispute.

E. Facilitating Agreement

20. Assist the parties to develop options.
21. Assist the parties to evaluate alternative solutions.
22. Assess parties' readiness to resolve issues.
23. Emphasize areas of agreement.
24. Clarify and frame specific agreement points.
25. Clearly convey to parties, and help parties understand, limitations to possible agreement.
26. Level with the parties about the consequences of non-agreement.

F. Managing Cases

27. Estimate the scope, intensity and contentiousness of a case.
28. Ask questions to determine whether mediation service is justified or appropriate.
29. Ask questions to determine appropriate departures from usual practice for a given situation.
30. Terminate or defer mediation where appropriate.

G. Documenting Information

31. Draft agreements between disputants.

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[6] At least one commentator has objected that "building trust" is a key to effectiveness as a mediator (Salem, 1993). While this Methodology does not disagree as such, to use such a term directly is to pursue the unmeasurable. Furthermore, mediators engage in certain behaviors to gain the parties' trust–and those behaviors can be described more easily. The document therefore treats trust-building as a *compound product* of many of the tasks and skills it describes.

Knowledges, Skills, Abilities, and Other Attributes ("KSAOs") [7]

1. Reasoning: To reason logically and analytically, effectively distinguishing issues and questioning assumptions.
2. Analyzing: To assimilate large quantities of varied information into logical ideas or concepts.
3. Problem Solving: To generate, assess and prioritize alternative solutions to a problem, or help the parties do so..
4. Reading Comprehension: To read and comprehend written materials.
5. Writing: To write clearly and concisely, using neutral language.
6. Oral communication: To speak with clarity, and to listen carefully and empathetically.
7. Non-verbal communication: To use voice inflection, gestures, and eye contact appropriately.
8. Interviewing: To obtain and process information from others, eliciting information, listening actively, and facilitating an exchange of information.
9. Emotional stability/maturity: To remain calm and level-headed in stressful and emotional situations.
10. Sensitivity: To recognize a variety of emotions and respond appropriately.
11. Integrity: To be responsible, ethical and honest.
12. Recognizing Values: To discern own and others' strongly held values.
13. Impartiality: To maintain an open mind about different points of view.
14. Organizing: To manage effectively activities, records and other materials.
15. Following procedure: To follow agreed-upon procedures.
16. Commitment: Interest in helping others to resolve conflict.

Once again, just because a given task has to be performed does not necessarily mean it is significant or discrete enough to be an essential component of a selection test or a training course. Both tests and training have to be designed for the real world of budgets and timetables, and for a complex job inevitably something has to be left out. The evaluation criteria which follow, and the prototype tests recounted in Appendix B, reflect judgments as to which criteria justify the investment of time and resources; those judgments will not suit every program, and are subject to programs' modification.

[7] "Knowledge" refers to legal or procedural subject matter. Knowledges are not listed here because they are specific to the situation (e.g., type of mediation program, state law), and because for some types of program little or no substantive knowledge is required prior to selection.

VII. Performance Evaluation Criteria: Examples

Development and use of a set of evaluation scales suitable to the program concerned is desirable on several grounds. If performance-based assessment is contemplated for purposes of initial selection, providing such scales is the first requirement for ensuring that different evaluators will be able to reach a reasoned agreement as to a given mediator's potential in a given program. If training is the primary subject of concern, development of such scales tells the trainer what will have to be addressed, and also provides a ready reference for use in classroom simulations. Beyond these uses, a serious discussion of the individual program's needs and potential--a necessary part of developing such scales--can lead to a more sophisticated and more widely shared understanding of what the program *is*, and is not.

Such *performance dimensions* were part of the original work on which this Methodology is based. The first set of sample scales shown here (Variant 1) is based on that work, but has been modified to reflect a series of intensive reviews by participants with broader perspectives. These scales represent fairly broad judgments of qualities likely to be needed in many programs to perform common and essential tasks of a mediator. Yet a task common enough in one program may be considered inappropriate in another. Also, there are significant differences of values between programs, for reasons already noted. Thus it is necessary for a given program, not to use any of these criteria uncritically, but to consider its own values and circumstances and rewrite the scales accordingly. Nothing here is cut and dried, and some alternatives are shown in Variants 2 and 3.

It may help a program manager who finds some of the terms used in these descriptions unsympathetic to her goals to note a few of the real-world conditions which influenced the composition of these sample scales. For example, the program being run by the Massachusetts Office of Dispute Resolution was operating under a set of court-mandated rules which included a requirement that the parties pay a fee of significant hourly size to the mediator for three hours, but not necessarily longer. This placed a premium on that program's ability to obtain mediators who could work fairly rapidly. Meanwhile, the Wisconsin Employment Relations Commission's caseload featured high numbers of disputes, and often, extensive travel per meeting; this influenced the amount of progress that program's mediators were expected to achieve in a single meeting--as did the tendency in labor relations for the more "transformative" approaches to be constituted as virtually a separate professional practice, under the heading of facilitating labor-management cooperation.

The original drafts and the 1993 refinements of performance evaluation scales thus reflected program-specific conditions that are far from universally shared. To that extent, any given statement in these examples may be inappropriate for one program or another. Note also that the examples contain terms that are associated with different approaches to mediation, such as settlement-oriented and transformative, or evaluative and facilitative. For example under 4A, Generating Options, the criteria include "Generated, assessed and prioritized alternative solutions. Assisted the parties to develop their own options and to evaluate alternative solutions for themselves." These two statements are based on different models of mediation. Both have been included, however, because they seem to fall within a core of

widely accepted behavior and, for that reason, some programs will make no qualitative distinction between them. Programs which have a clear preference for one or the other approach are encouraged to adjust their scales accordingly.

It is also worth pointing out that the "perfect mediator" does not exist. The Variant 1 sample scales are drafted to imply a high standard; for example, one of the best-known mediators in the U.S., upon seeing the first version of these scales, remarked that he thought he could hit the top note on two or three of these scales--on a good day. The use of that implied level of proficiency here is a deliberate attempt to make these scales useful for distinguishing between the relative strengths of very proficient mediators in programs which demand (and can afford) such expertise. Other programs may choose less stringent terms.

Note that some of the tasks identified above, such as the "background" investigatory work (Tasks 1 to 3) or Task 22's reference to "assess disputants' readiness" are not included in these performance dimensions, because they were impracticable to incorporate in a role-play test environment. For other uses of these scales, including in training, this would not be appropriate. Note also that while the numerical scales used in Variants 1 and 2 appear to imply that they should be weighted equally, that is not necessarily intended--as Variant 3 demonstrates. Moreover, in programs which have a sharply defined preference among the characteristics defined earlier as evaluative, facilitative, broad, narrow, transformative or settlement-oriented (some programs have a use for any and all of these orientations) the weight they might apply would logically differ according to the perceived relative importance of the associated strengths. For instance, a strongly evaluative style of mediation is commonly associated with a relatively high level of substantive knowledge, for obvious reasons. A program emphasizing that orientation may be willing to sacrifice on other qualities in order to get that degree of substantive knowledge. Programs with other intentions often find substantive knowledge less immediately necessary than some of the other qualities--a perception reflected in the sample scales here.

Sample Scales for Evaluating Mediators' Capabilities

The first set of scales shown below was prepared for the 1993 *Interim Guidelines* based primarily on scales developed by the first two programs using these tools. It represents one of several variants, each of which reflects certain core values. Scales 1A, 4A and 5A, in particular, have more "transformative" counterparts in the "B" series which follows (Variant 2, a hypothetical set which has not been used in practice to date). The third variant was prepared by the San Diego Mediation Center for its performance-based selection testing. Note also that the use of "1 to 3" scales is for simplicity; in practice, 1 to 5 (see below), 1 to 9 and 1 to 10 have all been used.

Variant 1

1A. *Gathering information*: Effectiveness in identifying and seeking out relevant information pertinent to the case.

3 Asked neutral, open-ended questions. Listened to disputants describe problems and interests. Summarized and paraphrased their statements. Identified and addressed hidden issues. Clarified the issues. Demonstrated an understanding of the scope, intensity and contentiousness of the case. Gathered information through incisive and, where necessary, uncomfortable questions.

2 Asked at least the obvious questions. Case data was used, but did miss some issues or avenues of questioning. Generally appeared to discover and comprehend the case facts, though not with great depth or precision. Missed at least some aspects of the underlying facts, reasons, or interests of one side or the other. Missed some aspects of agreement possibilities for either side.[8]

1 Asked few or mostly irrelevant questions. Appeared at a loss as to what to ask in follow-up questions. Was easily overwhelmed with new information or trapped by faster thinkers. Disorganized or haphazard questioning, filled with gaps and untimely changes in direction. Did not explore the settlement possibilities for both sides on most or all issues.

2. *Empathy*: Conspicuous awareness and consideration of the needs of others.

3 Established atmosphere in which anger and tension were expressed constructively. Conveyed respect and neutrality to the parties. Questions were neutral and open-ended, listened respectfully. Voice inflection, gestures and eye contact used appropriately. Remained calm and level-headed. Recognized emotions and responded appropriately. Demonstrated an open mind. Was able to restate and reframe disputants' statements and issues in ways both parties could understand. Helped parties improve their understanding of each others' concerns.

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[8] For this as well as each succeeding scale, an additional statement at the "2" level would be: "Generally succeeded at some aspects listed under (3) above, but failed at others." At the (1) level, a similar addition: "Generally failed at most or all aspects listed under (3) above."

2 Listened to others and did not antagonize them. Conveyed at least some appreciation of parties' priorities. Helped when asked, but missed opportunities to volunteer.

1 Came into the discussion abruptly to challenge others. Disregarded others' warnings. Saw others' problems as of their own making and did not want to be bothered.

3. *Impartiality*:

3 Manner of introductions and initial explanations showed equal respect for all disputants. Listened to both sides. Asked objective questions, conveyed neutral atmosphere. Demonstrated that he/she was keeping an open mind. Non-verbal communication did not favor either party.

2 Generally showed respect for all disputants, but questions and non-verbal communication sometimes showed he/she was more comfortable with one party than the other. Maintained a balance, but showed a better understanding of one party's goals and beliefs than the other's.

1 Asked misleading, loaded, or unfair questions exhibiting bias. Engaged in oppressive questioning to the disadvantage of one of the parties.

4A. *Generating Options*: Pursuit of collaborative solutions, and generation of ideas and proposals consistent with case facts and workable for opposing parties.

3 Generated, assessed and prioritized alternative solutions. Assisted the parties to develop their own options and to evaluate alternative solutions for themselves. Avoided commitment to solutions early in process. Recognized underlying problems as opposed to symptoms. Invented and recommended unusual but workable solutions consistent with case facts. Vigorously pursued avenues of collaboration between the parties.

2 Interrelated at least some proposals and compromises with ideas of other party. Worked well with solutions parties suggested, but did not pursue inventive or collaborative solutions. Appeared to comprehend case facts/problems as they developed, though not with great depth. Allowed collaborative problem solving, but did not stimulate it.

1 Prematurely tried to come up with solutions, pushing to judgment prior to establishing essential facts. Ideas were ineffective and unworkable. Waited for things to happen. Blocked efforts at seeking collaborative solutions.

5A. *Generating Agreements*: Effectiveness in moving the parties toward finality and in "closing" an agreement.

3 Assisted the parties to evaluate alternative solutions. Clearly conveyed limitations to possible agreement and consequences of non-agreement for each party. Emphasized areas of agreement. Clarified and framed points of agreement. Asked questions to highlight unacceptable and unworkable positions. Consistent use of reality testing. Effectively broke apparent impasses. Showed tenacity throughout. Packaged and linked issues to illustrate mutual gains from agreements.

2 Choices of what to present and manner of presentation did not compromise goals of resolution. Generally but not always at ease with situations presented. Points and comments were sufficiently well organized and presented, but not particularly forcefully. Avoided getting at some tough issues, thus sidestepping putting self and others in difficult situations at the cost of missing possible opportunities for joint gains.

1 Did not initiate suggestions; required considerable help from the parties. Presentations not well related to goals of resolution. Was difficult to understand or unclear in expression. Had little or no impact and did not persuade. Appeared flustered and uncomfortable most of the time. Readily withdrew when challenged or questioned. Little or no confidence expressed.

6. *Managing the interaction*: Effectiveness in developing strategy, managing the process, coping with conflicts between clients and professional representatives.

3 Had effective techniques for redirecting parties' focus away from sullen or otherwise unproductive colloquies. If humor was used, the use was appropriate to both the situation and the parties' cultural perceptions. Maintained optimism and forward movement, emphasized progress, showed tenacity. Showed a good grasp of each party's essential requirements to reach agreement vs. areas of flexibility. Made all decisions about caucusing, order of presentation, etc., consistent with rationale for progress toward resolution. Managed all client/representative relationships present effectively. Gave appearance of being ready to cope with any exigency.

2 Generally recognized signs that discussion had turned sour, took action to try to redirect it. Not always effective at lightening the atmosphere. Demonstrated a minimum understanding of each party's requirements for agreement and areas of flexibility. Controlled process, but decisions did not reflect a strategy for resolution. Did not dominate, but was not overwhelmed by, factual or legal complexities. Did not allow bullying by clients or representatives.

1 Made little or no effort to provide perspective on the parties' problems or to engineer lighter moments. Showed little or no grasp of the parties' basic requirements for agreement or areas of flexibility. Encouraged discussion of issues or proposals with little relevance to potential agreements. Decisions on procedure and presentation were unjustified. Was confused or overwhelmed by factual or legal

complexities. Allowed clients or representatives to control process in ways counterproductive to resolution.

Substantive knowledge: Competence in the issues and type of dispute.

Substantive knowledge can be specified at several levels. For purposes of this Methodology, there is a distinction between the degree of knowledge expected of an "expert" and that reasonably to be required in a new mediator. Also, it must be recognized that programs vary in their ability and desire to mount extensive training programs, and that some programs will use the selection tools advocated here only after a period of training, while others will only train mediators that have already passed muster. Moreover, programs may reasonably decide that initial lack of substantive knowledge is less important if a given mediator is judged to be a "quick study." For these reasons the Methodology does not advocate the use of a substantive knowledge scale in a selection test, and defines the need for substantive knowledge as arising *by the time of assignment of the mediator's first case*.

Such a new mediator needs enough knowledge of the type of parties and type of dispute to be able to

a. facilitate communication;
b. help the parties develop options;
c. empathize;
d. alert parties (particularly pro se parties) to the existence of legal information relevant to their decision to settle.

The new mediator will also require knowledge of the program's procedures for finalizing agreement, and of what options are open to the parties for resolving the dispute if no agreement is reached.

Variant 2

1B. *Generating Information*: Effectiveness in assisting the parties to bring out information pertinent to their concerns.

3 Asked neutral, open-ended questions. Listened to disputants describe problems and interests. Summarized and paraphrased their statements without distortion. Helped the parties to define and clarify the issues. Demonstrated an understanding of the scope, intensity and contentiousness of the case. Succeeded in generating information about the most sensitive issues.

2 Asked at least the obvious questions. Showed some awareness of parties' less-articulated concerns, but did miss some issues or avenues of questioning. Generally appeared to comprehend the case facts, though not with great depth or precision.

Missed at least some aspects of the underlying facts, reasons, or interests of one side or the other. Missed some aspects of relationship-building possibilities for either side.

1 Asked few or mostly irrelevant questions. Appeared at a loss as to what to ask in follow-up questions. Was easily overwhelmed with new information or trapped by faster thinkers. Disorganized or haphazard questioning, filled with gaps and untimely changes in direction. Did not explore the possibilities for improving relationships and mutual understanding between the parties.

4B. *Assisting the Parties to Generate Options*: Pursuit of collaborative solutions, with focus on helping/teaching parties so that they come up with ideas themselves.

3 Assisted the parties to develop their own options and to evaluate alternative solutions for themselves. Helped the parties avoid commitment to solutions early in process. Demonstrated commitment to setting aside mediator's values and allowing full play to parties' own values. Recognized underlying problems as opposed to symptoms. Helped parties to see beyond the frames of reference in which they arrived at the dispute. Vigorously pursued avenues of collaboration between the parties.

2 Made at least some attempts to get parties to think about their dispute on a deeper level. Showed parties how at least some proposals and compromises interrelated with ideas of other party. Worked well with solutions parties suggested, but was not inventive at pursuing collaborative solutions. Appeared to comprehend case facts/problems as they developed, though not with great depth. Allowed collaborative problem solving, but did not stimulate it.

1 Failed to lead parties toward greater mutual understanding. Tried to come up with solutions individually, without letting parties have control over their fate. Ideas for collaboration-building were ineffective and unworkable. Blocked efforts at seeking collaborative solutions.

5B. *Generating Improved Relationships*: Effectiveness in moving the parties toward the ability to relate better to each other and third parties.

3 Assisted the parties to evaluate alternative solutions. Helped the parties to understand limitations of possible immediate agreements and consequences of a superficial approach for each party. Emphasized areas of improved mutual understanding. Clarified and framed issues which pointed to continuing failure to understand each other. Showed tenacity throughout. Helped parties to package and link issues to demonstrate mutual gains from agreements and from improved mutual understanding. Progress of discussion demonstrated that mediator had helped improve the way the parties viewed each other.

2 Choices of what to present and manner of presentation did not compromise goals of relationship-building. Generally but not always at ease with situations presented. Points and comments were sufficiently well organized and presented; but not particularly forceful. Avoided asking some significant questions, thus sidestepping putting self and others in difficult situations at the cost of missing possible opportunities for improved understanding between the parties.

1 Did not initiate help; was inert rather than actively listening. Presentations not well related to goals of relationship building. Was difficult to understand or unclear in expression. Had little or no impact. Appeared flustered and uncomfortable most of the time. Little or no confidence in the parties' ability to improve their future relationship expressed.

Variant 3

The third variant was created by the San Diego Mediation Center for use in its own selection tests. This set is reconstructed to use shorter, but more numerous, behavioral statements, and is intended for use in a situation where the program does not wish to give evaluators the level of discretion inherent in the larger groups of behavioral statements listed above. Note also that in this example, the program concerned does not feel that all items on the list should be weighted equally--those marked with an asterisk are given double weight.

SECTION I: CONTROL OF PROCESS

Personal Interaction

Is there overall rapport between mediator and parties? Does mediator exhibit comfort with process and project an air of confidence that contributes to a reduction of tension and a sense of balanced perspective on the issue(s)?
(1 2 3 4 5 points)

Tone of Proceedings

Is the mediator's tone professional and impartial, demonstrating respect for all parties (setting expectations that will empower them to make their own decisions)?
(1 2 3 4 5 points)

Process Flow

Are the mediator's interventions timely and appropriate? Is time managed effectively so that transitions are clear and balanced and forward movement acknowledged? Is there clear movement toward a resolution?
(1 2 3 4 5 points)

Opening Statement

Does it cover sufficient information, concisely and clearly, so that it sets the tone for the mediation? Does it adequately cover procedural information, clarification of roles for both mediator and disputants, confidentiality, ground rules and expectations. Are questions from disputants answered clearly and respectfully?
(1 2 3 4 5 points)

Facilitating Position Statements

Does each party have sufficient uninterrupted time to present personal perspective on issues to be mediated? Is time apportioned relatively equally among disputants? Does mediator ask necessary clarifying questions and enforce the ground rules when needed? Does mediator's summary statement accurately and neutrally reflect major issues?
(1 2 3 4 5 points)*

Coordinating the Exchange/Conflict Analysis

Does mediator have the ability to frame issues for discussion and facilitate understanding between parties? Does mediator set out clear agenda of issues that recognize interests of parties, as well as positions? Are commonalities noted and expression of emotions respectfully handled so that parties understand each other's perspectives? Do parties have equal opportunities for discussion? Does mediator balance interaction between parties so that all participate?
(1 2 3 4 5 points)*

Managing the Negotiation

Does mediator facilitate a productive negotiation between parties so that offers are clearly understood and alternatives realistically explained? Are all relevant issues covered and parties given equal opportunities to participate? Is discussion future oriented?
(1 2 3 4 5 points)*

Generating Options

Does mediator facilitate productive brainstorming? Are all parties encouraged to participate in generating options without evaluation? Are options examined neutrally and framed to fit specific interests of disputants? Does mediator encourage parties to take individual responsibility for realistically dealing with issues? Does mediator use techniques of reality testing to test options for workability?
(1 2 3 4 5 points)*

Closure

Does mediator provide a definite conclusion to the session that conveys necessary information regarding compliance and follow up? Do parties know what is expected of them in relation to each other and what will happen next (is another session scheduled?)? Did mediator provide a clear summary of progress and of agreement or lack thereof?
(1 2 3 4 5 points)*

Ethical Behavior

Was the mediator impartial? Did the mediator refrain from giving advice, opinions or judgments indicating bias, prejudice, partiality, or statements of preference regarding the law, facts or parties? Unless appropriate to the mediation model and the parties' expectations, did the mediator refrain from offering advice or giving legal opinions?
(1 2 3 4 5 points)*

TOTAL THIS SECTION

**These items are weighted because of their importance to the process; scores to be doubled.*

SECTION II: SPECIFIC SKILLS AND TECHNIQUES

Empowerment of Clients

Do parties accept responsibility for dispute and resolution? Are opportunities provided for parties to demonstrate responsibility?
(1 2 3 4 5 points)

Communication

Look for appropriate non-verbal communication (gestures, body language, voice/tone, eye contact; clear and appropriate language, and sensitivity to cultural misunderstandings).
(1 2 3 4 5 points)

Creating Empathy

Be aware of how mediator is able to show understanding of interests, concerns and feelings of each party; creates a climate in which parties understand each other's interests, concerns and feelings; acknowledges movement by disputants.
(1 2 3 4 5 points)

Clarification

Note mediator's use of open-ended questions (no probing or cross examination), and use of summary statements to reframe and clarify.
(1 2 3 4 5 points)

Organizing Issues

Is there evidence of a strategy for prioritizing issues and for overcoming impasse? Are feelings considered, as well as facts?
(1 2 3 4 5 points)

Active Listening

Does mediator use paraphrasing, reframing, summarizing, mirroring, acknowledging and encourage parties to do the same?
(1 2 3 4 5 points)

Neutral Language

Look at mediator's ability to appear impartial, reframe issues in neutral or positive language, and put disputant demands into context of "interests."
(1 2 3 4 5 points)

Strategic Development

As needed, does mediator adjust process and guide clients toward productive interaction and resolution? Is there evidence of pre-planning in room set up, focus on future behavior, and appropriate use of caucus to move process forward?
(1 2 3 4 5 points)

TOTAL THIS SECTION

SECTION III:
ADDITIONAL OBSERVATIONS OR CLARIFYING COMMENTS.

Conclusion

This Project has had an intricate career, beginning as an informal and relatively simple experimental follow-up to the first SPIDR Commission on Qualifications. NIDR's extensive review of the original proposal resulted in a shift toward more rigorous methods. But as time went on, it became apparent that the field was not ready for broad application of standardized tools--and that its funders were not ready for the costs of such an effort. Meanwhile, a consensus-based approach to developing tools that could be adapted program-by-program became more attractive, as the variations in intentions and resources between different programs made themselves felt. The 1993 *Interim Guidelines for Selecting Mediators* was the first result of this approach. This Methodology is the response to comments and criticisms of that earlier effort, and also to additional programs' experience using the *Interim Guidelines*.

With the creation of the consortium discussed in section IV. above, the more rigorous approach has taken a turn toward one specific application, geared to family mediation. This Project has supported the consortium's creation. The four-organization consortium--the members of which can legitimately claim to represent well over seven thousand mediators, program managers, judges and other interested parties--is a highly appropriate successor to a small independent project such as this one. The publication date of this Methodology has therefore been chosen as the appropriate moment to consider this Project concluded.

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Appendix A: Using Tests in Selection

1. Reliability

Several commentators have made the point that it is essential to the field that longitudinal and other validation studies be performed in order to ensure that performance-based tests develop to their full potential. Contrary to some of the commentators, however, it is entirely appropriate for programs to adopt such performance-based measures *imperfect as they no doubt are* pending such lengthy and costly error-checking. Like it or not, programs must operate in the "real world" of insufficient data, inadequate resources and constant arguments over the goals and direction of mediation. Also, an inherent safeguard in the "audition" type of performance-based test discussed here is that it involves a program's serious efforts to replicate the types of parties, issues and environment that that program's mediators will have to deal with in practice.

As best it can be determined, even the earliest and least developed examples of performance-based testing have been less vulnerable to accusations of unfairness on a whole variety of grounds, as well as ineffectiveness, than the other "real world" methods of selection available to programs. The initial uses of these tests have received preliminary study. No adverse effect on women or minorities has been found to date, and at least in those instances where the evaluators were thoroughly trained, the consistency of ratings of the same candidate by different evaluators was high.[9] Admittedly, the research to date is far from conclusive. But to fail to adopt the best methods known, merely on the ground that they are imperfect, in practice condemns the parties to endure the consequences of much less fair and reliable approaches. (See Dingwall, 1993).

2. Adapting Role-play Screening to Your Needs and Budget

With several different programs' experience to draw from, a number of choices have been identified which programs must make either consciously or by default. Because resources vary so widely from program to program, there is no one best answer. The following text will attempt, however, to lay out the considerations involved in order that the fewest possible design "decisions" will be made unknowingly.

1. Some degree of advance preparation of the candidates is essential. This avoids wasting the exam team's time on mundane explanations, and helps level the playing field between candidates long familiar with the setting and mores of the program and those being exposed to it for the first time. The approach noted in both sample cases in Appendix B was to give the candidates background written material shortly before the exam. In one case, a "transcript" of an opening joint meeting was used; in the other, a narrative account was provided. The transcript approach appears to give the candidate a better sense of the actors' likely demeanor and character. A further refinement might be to videotape an enactment of such an opening meeting, which could then be shown to each candidate. This may, however, cause confusion if the same actors cannot be used consistently. Another approach, used by the Massachusetts program in more recent iterations of these tests, is to hold group briefing sessions for candidates (two hours, in their case). Supplying candidates in advance with copies of the general evaluation scales–not, of course, marked-up scales referring to points in the particular exam being used–also helps level the playing field, since some candidates are increasingly likely to have encountered them in prior training courses.

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[9] In the first such data set, nine-point scales were used, and evaluators' scores for the same candidate varied by three points in 2% of the rating sets. In the second, ten-point scales were used; three-point variations represented 5% of the rating sets and there were a few larger variations, totalling an additional 2% of the sets. See Honeyman, Miezio and Houlihan, 1990.

2. Some sentiment in favor of starting the role-play at the very beginning of the case was registered by (successful) former candidates, who felt that this would be clearer as well as allowing them to set the tone in their own way. Against this must be set the probable difficulty of running the play for long enough, in that event, to get the candidate to the stage where she can demonstrate the capacity to conceptualize a solution (or to help the parties work toward a solution) based on all the information put forward.

3. Whether to use a garden variety or a difficult case must be considered. The result may differ depending on the level of proficiency demanded by the program at the outset; but at the least, care should be taken so that an ethical or cultural complication is not built in unknowingly. In general, more complex cases are more appropriate for assessing mediators who will be expected to function in such cases without significant investment in training; but completely routine cases run the risk of giving an advantage to minimally talented but experienced candidates who have encountered similar situations before.

4. Consideration should be given to "disclosure statements," a term used in the labor-management case in Appendix B to signify new offers and enlightening remarks made by actors at intervals whether the mediator had done enough to earn them or not. Without such pre-defined moves, slow mediators or less experienced candidates run a risk of never obtaining enough information to allow them to demonstrate skills that typically show up in the later stages of a case. Also, such centering devices help ensure that a single error committed early on will not trigger a whole chain of disasters for an unfortunate candidate.

5. For related reasons, actors must be instructed to temper the realism of their performances by responding with restraint regardless of any errors of tact made by the candidate. Evaluators can take these into account without any need for destroying the candidate's self-confidence by a direct confrontation.

6. Minimum requirements should be imposed for service either as an evaluator or actor, but they are not the same. Service as an evaluator should be restricted to persons who are attentive, thorough, considered fair-minded, *and who possess a thorough working knowledge of the program's operation and needs, as well as advance training in the particulars of the test being used.* Actors need not meet all of these criteria, but must be capable of repeating the same performance many times without substantial variation. There is evidence that many mediators, enlisted for service as actors, become bored after the first dozen or so candidates; programs selecting among large numbers of candidates may find that trained actors are available at relatively modest day rates. They will, however, require more training in the assumptions and possibilities built in to their roles than is necessary for experienced mediators.

7. How much training evaluators and actors should be given is a significant resource/cost issue. Preliminary experience (see comments accompanying the sample cases in Appendix B) suggests that evaluators require a minimum of a half-day's training if their ratings are to be consistent. Since evaluators may be recruited from among a conspicuously overburdened group, it may be advisable to give explicit warning that sloughing off this requirement will mandate disqualification from service. On the other hand, depending on the complexity and unfamiliarity of the play, actors may not require as much training time.

8. The physical setting should be conducive to the purpose. It does not seem essential to use one-way mirrors and soundproof rooms to separate the actors and graders; but at a minimum, some thought should be given to reducing distractions in the immediate environment as well as to isolating arriving candidates from those who

have completed the test. Videotaping the performances is useful for later review and exceptionally so in training. One program used videotapes instead of live observation as the basis for evaluation; this freed the evaluators from being on everyone else's schedule, but it is unclear to what extent this approach may have contributed to the unusual degree of disagreement among that program's evaluators.

9. The "real time" element in role plays makes it unlikely that all of the necessary ground will be covered, especially by mediators who work in a slow style, within a play of reasonable length. A set series of oral questions, asked immediately after the role-play, is an efficient means of assessing ability to understand motivations and conceptualize potential solutions. (See the sample cases in Appendix B for examples). These tests expose the candidate to considerable stress, and there is always a risk that a given candidate, particularly one inexperienced in mediation, will make a mistake that he or she would never repeat in practice. An open-ended question should therefore *always* be asked at the conclusion of the exam's question period, to the effect of "Is there anything else you would like to add?" The parallel risk that an evaluator will misconstrue a candidate's strategy or tactics from time to time can also be reduced by giving some attention to this possibility during the question period, as by a question such as "What were you thinking when you....?"

10. Feedback is immensely valuable both to the mediators and to the program, and should be provided for if at all possible. (See the commercial case in Appendix B). Some of the programs using the prototype tests have found value in arranging the schedule so that the actors spent a few minutes with the evaluators prior to final grading of each performance; quite often, they developed insights about the candidates which enriched the discussion. Separately, a later opportunity for the candidate to discuss her performance and the exam generally with a program official serves several purposes: It helps in training those selected, in improving the skills of those who were not, in keeping good public relations for the program, and in obtaining information and perspectives that may improve subsequent testing by the program.

11. While role plays are the best method found to date for testing the skills at the core of a mediator's effectiveness, they are not the only, nor even necessarily the best solution in all situations. (See the caveats listed in section IV. "From Qualifications to Performance-based Assessment" above).

12. While feedback is important, its converse–advance contacts and discussions with significant interest groups and influential persons in the program's area of concern–is very nearly essential if the use of so complex and costly a tool is to be widely supported. Such discussions will materially aid in the necessary marshalling of resources. Also, performance-based tests produce a fair share of surprises; an inevitable result of dispute resolution's past is that a certain number of existing practitioners, when objectively assessed for the first time, prove not to possess all of the skills they have claimed. At the same time, these tests have brought forward a significant number of newcomers who demonstrated that they had acquired most of the necessary skills in some other experiential environment. Advance discussion of this probability may serve to prepare the program's clientele, and people who have control over the program, to accept mediators who may not match the demographic profile that prior contacts (or bias) may have led them to expect.

13. Not all programs may wish to use performance-based testing at the same point in their encounters with potential mediators. Different circumstances may lead some programs to use such tests after a certain amount of training, others before undergoing such an investment; and there may also, at the extreme, be some programs which can obtain the resources for a one-time investment in testing but which lack the personnel or facilities to engage in significant training on their own.

14. Recent experiments have suggested that suitably qualified mediator-actors may be in as good a position to grade candidates as if they were serving solely in the more detached grader capacity. This in turn has raised the possibility that by using actors who meet these additional qualifications (see item #6 above) the size of the exam team might be reduced to as few as three. In such a design variant, only one team would be used to develop intra-party conflicts for the mediator to handle, while the other "team" would consist of a single individual. While this could cut the running cost of such an exercise by as much as two-thirds compared to the prototypes, this variant has not been tried in practice as of the date of this writing.

3. General Precautions: A Checklist

The construction of a suitable test case, the instructions given to evaluators and actors, and even the physical setup of the environment are all intricate and time-consuming matters. Pending the availability of standardized tests, this is unavoidable. Since circumstances vary so widely, this section will try to boil down the available experience to those requirements that are most general, and to focus on known trouble spots. In order to encourage programs to think through the issues involved, these are codified in the form of a checklist.

1. Is a role-play based examination most appropriate for the given situation, or are other strategies needed?

2. Has the program taken steps to see that there is a *consensus* within the program, its sponsors and its clients as to the values that are/should be incorporated in each rating scale?

3. Has the selected exercise been drafted so as to provide the mediator with a reasonable opportunity to show each skill the program wishes to test for?

4. Have steps been taken to ensure that the evaluators have been thoroughly instructed in *every* aspect of both the exercise and the underlying rating scales?

5. Have the actors been adequately trained?

6. What steps have been taken to plan for moments when a mediator may make a suggestion or ask a question for which an actor is unprepared?

7. Has the selected exercise been tried out in at least one dry run in the presence of all actors and evaluators?

8. Does the exercise contain at least one hidden option that can be used to evaluate inventiveness?

9. What steps have been taken to ensure that all candidates (eventually) receive all of the same information?

10. What opportunities have been provided to give evaluators an opportunity to reexamine their tentative ratings in light of each other's impressions?

11. Does the design of the exercise provide an opportunity for a mediator to demonstrate any biases relevant to the program's constituency? (If the actors' roles are designed around equally *unreasonable* characters, this provides a far better test of a mediator's ability to avoid bias than if the roles are those of model negotiators).

Careful use of this checklist will help a program to design a reasonably reliable performance-based selection test. The checklist, however, does not in and of itself suggest how the questions might best be answered within the constraints of any given program.

4. Some Advice for Mediator Evaluators and Trainers

Experience has made advisable some additional caveats which need to be kept in mind by evaluators using role-play-based tests. (At least in part, these may also be useful to trainers using role-plays and giving feedback in a classroom setting). The notes which follow are adapted from an article by David E. Matz which appeared in the October, 1993 issue of *Negotiation Journal.* They are in turn based on experience in the design, administration and grading of role-play performance-based examinations of several hundred mediator candidates.

1. In observing each role-play, individual evaluators are affected by, and remember, different events. It is useful at the end of each applicant's performance for all the evaluators to discuss that performance. Scoring of that applicant will thus reflect an "informed memory." It should not, however, reflect a single discussion about all the candidates from one block of time, such as one morning.

   If the series of candidates is large and evaluators will be rotated in and out, it is important that each applicant be measured against the evaluator's own sense of quality and performance, not in comparison with the randomly assigned other applicants who happened to be scheduled for performance that day. This is to avoid, for example, the problem of a weak candidate scoring too well because the other candidates of the morning were weaker yet. If thinking in comparisons is essential, and it is difficult to avoid when several candidates have just worked on the same case, it is better to base the comparison on a larger universe of mediators whom one has observed over years. The best practice, if possible, is to use the same team of graders throughout. In that instance it is both possible and desirable for the team to reconsider all tentative grades given at the end of the entire series of candidates.

2. Any given move made by a mediator can have many meanings. A question asked by the mediator can elicit particular information. The same question can also serve to emphasize certain facts in the case and thus help persuade the party to consider the dispute from a different point of view. And the same question can help reframe the party's awareness of the alternatives available. Did the mediator intend all of these? Any of these? Or was he/she just filling time trying to think of something useful to do?

   More puzzling yet is a mediator's silence. Is an absence of response a sign that the mediator missed something? That the mediator wants to say something but doesn't know what it is? That the mediator has decided to wait for a more propitious moment to respond? Or that the mediator interprets the dispute differently than you do and sees no need for intervention?

   What is at issue here is some idea of the mediator's motivation at a given moment. When your judgment about a mediator is based solely on a single (rather brief) performance, and when individual moves can have quite different results, you will feel a strong desire to "understand" the mediator's thinking. "Understand" is in quotes because it is important that the evaluator not simply read in his/her own interpretation of the case and thus of what the mediator *must* have been thinking. Sometimes the *pattern* of the mediator's responses (and silences) will make clearer how the mediator thinks. And sometimes, the questions you ask the mediator at the end of the role-play can help, for example: "What were you thinking when you . . ." The question-asking device is, of course, not perfect; some people will

honestly not remember what they were thinking at a given moment, while others will invent such memories. Still, this brief interview can give you more clues about how the mediator thinks.

3. This evaluation structure focuses on two quite different questions. The explicit question concerns how well the mediator performed the tasks set out in the categories. The other question, generally implicit, is often at least as important. This has to do with educability. As the applicants will have a wide range of mediation background, from none to much, it will be important for the program managers to determine not only what skills the mediators have now, but also how well the mediators will be able to learn the ones they lack.

   This requires that you make the very difficult judgment about an applicant's ability in the future. You do have some bases to help make a judgment. By comparing an applicant's mediation history (case experience, prior training) with his/her performance, you can get some idea of how effectively a mediator has learned so far. In addition, the post-roleplay interview can give a further idea of the applicant's bent for self awareness and self criticism. There are, finally, some applicant performances that, by virtue of the consistency of behavior patterns, suggest limitations that will resist further training.

4. Now, a few comments about each category in the evaluation:

   Gathering information. This is a relatively easy skill to evaluate. One problem, a function of role-play dynamics rather than normal mediation dynamics, arises when the mediator believes that the testers may have buried a "secret" in the facts, and that it is his/her job to unearth it. This mediator will spend excessive time looking for inconsistencies or pursuing what he/she takes to be clues. This error, though costly in its use of time, is not necessarily a reflection on the applicant's mediating ability. It is, instead, a misunderstanding of the nature of the role-play.

   Empathy. This is a very difficult skill to evaluate. It depends, as the criteria say, on "establishing an atmosphere." It is sometimes extremely difficult to know whether such an atmosphere exists except by assessing the role-players, so their acting skill becomes determinative. Since expressing emotion and then managing it with consistency and credibility in the face of mediator behavior call for considerable acting skill, the positive creation of such an atmosphere is difficult to assess. It is, however, possible to observe errors that would antagonize parties.

   Impartiality. Even beginning mediators are generally very sensitive to this category. Mediators in a brief role-play don't so much do this well, as they occasionally make mistakes and lose points.

   Generating Options. Though it is rare for applicants to work at generating new options, some begin the process of packaging existing options. This can take considerable time, however, something in short supply in the evaluation process. Thus, an applicant's attention to expanding the pie, prioritizing options, evaluating alternative solutions, or any other steps taken in the packaging process, are signs of real strength in this category.

   Generating Agreements. This is very difficult for many mediators, particularly for beginners. It often implies a stance of persuasion, and particularly an attitude of persistence, that many find difficult to square with a stance of impartiality. It also draws heavily, in real mediations, on the chemistry of trust developed throughout the process between the mediator and the parties, a chemistry difficult for a mediator to develop or assess in role-play. Given these hurdles, if the applicant shows skill in this category, it signals a very promising performer.

Managing the Interaction. This category brings together several major tasks. The first is managing the conversation to avoid dead ends, repetition, and unproductive topics, a good test for role-playing mediators. The second is handling outbursts of emotional conflict among the participants. This requires the mediator to respond to very skillful acting by all the interacting parties, to read subtle cues, to send subtle cues. This is hard enough for mediators in real cases, but role-play actors rarely bring the skill needed to enable the mediator to work realistically with this problem.

The third task is developing a strategy for the case. The strategy is the mediator's game plan, and as such should inform everything the mediator does. Its importance, therefore, derives in part from its consistency and from the sense it communicates to the parties that the mediator knows what he/she is doing. Such a strategy may be inferred from a pattern of behavior or identified in the post-roleplay interview.

5. Concluding Remarks: In general, you will find in the process of judging that you will oscillate between your analysis of particular skills (gathering information, empathy), and your sense of whether this applicant has a "good feel" for the role and process. When the former is poor and the latter is particularly good, you may have a promising applicant inexperienced in mediation. The direct scoring in this instrument does not allow much room to keep this candidate in the running, and you may want to flag your sense of his/her potential in marginal notes on the scoring form. When the skills are good and the *gestalt* is poor, your score sheet may leave you feeling that you are recommending highly an applicant in whom you do not really have much confidence. Again, a note in the margin will be useful to the program managers.

Appendix B: Two Sample Cases

The two cases which follow represent hard-won experience in testing candidates for two very different programs, and are therefore reprinted in full. The right column is used to explain initial reasons for particular design decisions, but also includes their creators' subsequent judgments of their effectiveness.

These two cases are drawn from commercial and labor-management settings. For family, community and other programs, role-plays will have to be developed which answer to the values and resources of those settings. Because of the real-world critiques in the right-hand column, however, these samples may be useful to programs which themselves promote values different from those embedded in these cases. *Note: These cases are offered as examples only. For obvious reasons including the fact that they will have been widely distributed, they are not to be used in future examinations.*

A Commercial Case: Erie Elevator v. Owning Corp.

Text

INFORMATION FOR MEDIATOR APPLICANTS ON THE SKILLS EVALUATION PROCESS

This memorandum explains the mediation skills assessment you will engage in shortly as part of the evaluation process for appointment as a mediator in the Program operated by the Office of Dispute Resolution for the Superior Court.

Background Information

Enclosed you will find background information on a dispute that is similar to those that arise in the Superior Court. You will be asked to mediate this case while observers evaluate your efforts.

Consider how you will handle the situation the case presents. You are not expected to settle the entire case in the time allowed. You are asked to demonstrate how you would go about trying to move the parties toward a resolution.

Parties

The parties and their attorneys are persons acting in these roles who are not applicants for appointment as mediators in the program. They have read the enclosed background information as well as additional confidential information which will guide them during the session with you. We have also advised them on how best to play their roles in response to your efforts.

The parties, as they would in real life, know things that you do not, but they are prepared to disclose them if approached effectively. Neither party is eager to make concessions, but both are prepared to do so if you give them good reason.

Time constraints

In real life a mediation such as this would last up to three hours or more. It might even reconvene or be managed by telephone if further mediation seems desirable. Here, you will have forty minutes in which to work with them. (The observers will tell you when there is ten minutes left and when the time is up).

Comment

Time must be used efficiently in these exercises because of the number of people involved. Giving candidates written instructions in advance helps, and also helps ensure fairness by making sure that all candidates get exactly the same introduction to the test. But see Appendix A for other ways of addressing this need; a briefing, in particular, allows candidates unfamiliar with the setting to gather some background knowledge and so level the playing field.

This is an essential note in any but the simplest of test cases because without it mediators are likely to act out of character in an attempt to "get it done" within an arbitrary time frame.

It is entirely up to you whether you choose to continue the caucusing that is underway at the time you enter or choose to convene a joint meeting. We recognize that you face an initial problem of getting the names and faces of he role players straight. They are instructed to be forthcoming with you in just the way parties might after working with a mediator for 90 minutes.

Allowing the candidate a free choice of strategy produces a great deal of information about the candidate's style. That however, may be of secondary value given the price paid for that information. The exercise has to be artificial, so not everyone will be doing what they'd do naturally. But candidates who have little experience of mediation may make a basic error in strategy early on–a mistake some of them would make only once, or maybe never with a little training. Because this design fails to "center" the exercise at intervals, it's possible for one mistake early on to trigger a whole chain of unpredictable consequences. There is a related risk in that some candidates will end the exercise with more information than others, giving them a disproportionate advantage in trying to formulate creative ideas as well as in the questions at the end. Since people may well be more able to improve their questioning and management skills than their inventiveness, this favors "old war-horses" over "new geniuses."

As a general matter, we hope to be able to observe how you work with the parties in both joint session and in individual caucuses.

The exercise concludes with one of the examiners asking a set of questions. These are drafted with an eye to revealing the candidate's inventiveness and general understanding, which the exercise may have been too constrained to reveal otherwise. (See the labor-management case which follows, for examples).

The observers will not be able to give you an evaluation of your performance on the spot. It will be necessary to observe all the applicants and then to assess them comparatively before we can provide you with a balanced perspective and informed judgement on your performance. That will take us some weeks. Eventually, however, we will send you a brief summary of how your performance was evaluated. We will be available to discuss our evaluation with you at that time.

Experience shows that candidates given this type of test tend to take it very seriously, and to become quite invested in the problems the case presented them. Debriefing them afterwards is time-consuming (beyond the "question period" noted above) but is valuable as a training tool and as a form of public relations.

Conclusion

Though this is a simulation exercise, you should treat it as if you were mediating a real case. We know you are under pressure from various sources such as the presence of observers, the time constraints and perhaps the unfamiliarity of the mediator role. We will certainly take these factors into account in our evaluations. At the same time, pressure of a similar kind is present in real mediations as well. We hope you will approach the situation as the kind of challenge any mediation would present and respond in kind.

While all applicants will receive evaluations (and if you request it, suggestions on training you might pursue), only a limited number of applicants will be invited to go on to participate in the training program we will offer. All applicants show some degree of potential but our resources for training, particularly our ability to provide the individual observation and mentoring that is required for most trainees during their first year in the program, is extremely limited. We hope you understand that we are unable to take more trainees than we can handle.

Finally, we hope the evaluation process offers information that is useful to you and provides insights that will help you in future efforts you may make to strengthen your mediation skills.

This is a significant issue to many of the examinees. Pointing it out helps make a somewhat stressful experience more bearable.

And, of course, we wish you good luck!

BACKGROUND INFORMATION FOR ALL PARTICIPANTS

The Dispute

This mediation grows out of a lawsuit and counterclaim. The plaintiff is Erie Elevator Corporation. The defendant is the Owning Corporation, owners of a number of office buildings around Boston. Owning built a new office building ("121 Atlas Ave") and contracted with Erie to install two elevators in it.

This "basic" information represents a commercial dispute of no more than average complexity. Yet there is enough of it that special precautions must be taken to ensure that volunteer evaluators, if any are used, bother to digest it in advance. Experience shows that some volunteers will try to wing it; their judgments then are not grounded in the facts.

Owning contends that the elevators began to malfunction soon after they were installed. Owning further contends that another elevator contractor (Builtrite) had to be called in and paid $75,000 to get the elevators to work properly.

The original contract with Erie was for $200,000; $150,000 was paid during the time Erie was working on the elevators; $50,000 is still outstanding on the contract. Erie is suing for $50,000.

Owning has filed a counterclaim maintaining that it is owed $100,000 by Erie: the $75,000 that it paid to Builtrite for repairs and $25,000 in lost office rental due to the delay in the opening of he building caused by the elevator problem.

The original contract was signed in May and the work was to be completed by Erie in October of 1990. Erie in fact did complete the installation by that date. However, the building did not open until December of 1990 when Builtrite had finished its work. Erie filed suit against Owning in July of 1991.

Both sides submitted interrogatories to one another which were answered, and both sides, when asked by the court, said they were willing to try mediation. The information above was contained in memos filed by the attorneys with the mediator in advance of the mediation session.

The Mediation Session

The mediation session began with all parties in a joint session. The mediator made introductory comments to explain the mediation process and the mediator's role as a neutral facilitator of negotiations between the disputing parties. The mediator explained that while in mediation the discussions and any proposed settlements were confidential and would not be admissible in any future litigation. The mediator also explained that when meeting with either party in a private caucus, the mediator would also keep confidential matters discussed there when asked by the party to do so.

The parties, Erie Elevator and Owning Corp., then each had a turn to present an overview of the case. From the presentations by the attorneys and the client comments, the mediator learned the following:

Erie's Presentation:

- Erie has been in the elevator maintenance and service business for 15 years, and for ten of those years has had "service contracts" to maintain the elevators in the six other buildings owned by Owning. So far as you can tell, that service relationship was always satisfactory.

- Erie ventured into the elevator installation business in the spring of 1990. The contract with Owning was its first as an installer. Both sides agree that Owning knew this when it signed the contract. Erie said that its installation business has been growing steadily ever since.

- Erie produced a copy of a letter, called in the installation trade a "sign off," signed by Owning, and dated October 15, 1990, which indicates that Owning inspected the elevator construction job and found the work satisfactory under the terms of the contract. Usually the "sign off" triggers release of any final payment due to the installer. This document, according to Erie, is the basis of its case that it did the job properly and is owed the balance of the contract amount.

Owning's Presentation:

- Owning owns six other office buildings. All six buildings are located downtown and each is a high-rise structure with four banks of elevators. "121 Atlas" was its first to be built in Dorchester and is the first new office building constructed within fifteen blocks of that site. Owning acknowledged there was some financial risk to the venture.

- Owning said that a week after the October 15 "sign off" elevators began skipping floors, dropping suddenly 2-3 feet at a time, and occasionally stalling for up to an hour without any apparent reason. This unpredictable behavior by the elevators created confusion and inconvenience for building occupants and delayed the occupancy of the building for two months.

- Owning produced a letter from Builtrite dated December 15, 1990 saying that it had inspected the work done by Erie and found it deficient in a long list of specified ways. The cost of repairing these deficiencies was itemized in some detail and totalled $75,000.

Using a dialogue format for this section (see the labor-management case which follows) would give the candidate more of a sense of the characters she's about to encounter, although it works best when the dialogue can be written with specific actors in mind. The narrative approach used here has been criticized as too dry.

Both Owning and Erie:

- Eric (or Erica), representing Erie, and Oliver (or Olivia), representing Owning, have done business with each other over a number of years and have negotiated previous service contracts as well as the installation contract. Yet, you observed that in the joint session each made very harsh statements about the other.

- Eric said that Oliver had over-committed on this building and was trying to "stick it to Erie" as a way of covering its losses and that Oliver's older brother and business partner, Oscar, "always controlled the big deals" and probably was "pulling Oliver's strings" today.

- Oliver insisted he was in charge of the operation of all Owning's buildings and that Oscar was responsible for "sales and marketing." Oliver also said that perhaps Erie should have stayed with "washing elevators."

The mediator then adjourned the initial joint session and met with the parties in private caucuses.

(Except for the *Instructions for the Mediator* below, the remaining information was not given to the candidate till he/she drew it out in discussion).

CONFIDENTIAL INSTRUCTIONS FOR OWNING & OWNING'S ATTORNEY

Recent History

You have met in joint session and then the mediator met each of you separately - first you, then Erie. You think you have made a persuasive case that Erie left the elevators in a mess and that the expense of fixing them had to be substantial in any event. In private session, the mediator questioned you closely about Builtrite and you acknowledged that Builtrite was known to be among the most expensive companies in the elevator installation and repair business. You admitted that they may have done a more "deluxe" job than necessary because they knew you were in a tough spot.

The mediator briefly asked you about Oscar's role in all of this and whether it was necessary to have Oscar here. You replied that Oscar's hot-headed ways often made things worse, as indeed they may have here. You explained that Oscar and you were partners on 121 Atlas - and some other deals - but that you manage the business and have the authority to make operational decisions. Oscar thus does not need to be here - indeed, it's probably better that he's not present. You said, "As long as I get money from Erie, Oscar will be okay."

You were quite insistent that Erie should get no payment on its claim, and that you should be compensated for the repairs and lost rent. When the mediator asked you what kind of proof you had of lost rent, you stated that you had the testimony of a real estate broker about two or three tenants who scared off. You acknowledged your proof is not particularly strong.

While you indicated that you could come down significantly on your claim for lost rent (though you still want something) you said you should get at least $25,000 from Erie for the amount the Builtrite repairs exceeded the balance due on Erie's contract. You might discount the repairs a bit because of their high price, but all you are asking is that you be reimbursed for the extra cost to get the elevators working properly.

When the mediator asked about the service contracts that you have with Erie, you said that they were good contracts at a very reasonable price but were up for renewal in six months. Your plan is to refuse to renew them unless this lawsuit is settled amicably. You said, "I don't want to talk about those contracts until it is clear that Erie will pay something substantial towards the losses they caused at 121 Atlas." All the information above is contained in the mediator's confidential instructions.

All information, of course, should be known and understood by the evaluators in advance, so that they can gauge investigation effectiveness based on how much of the information was obtained by the mediator's efforts. Actors' ability to portray their roles realistically also requires them to understand their respective information without constantly referring to notes. It appears, however, that many people can perform adequately as actors without the kind of in-depth understanding of the exercise's construction that is essential in the graders.

Role-play Instructions

This brought your caucus with the mediator to a close. You waited 30 minutes or so outside the room while the mediator met privately with Erie. The mediator will now choose to: meet again alone with you, meet further with Erie or meet with both of the parties together.

1. Caucus with Owning: If the mediator chooses to meet alone with you again, avoid making any further concessions beyond those offered in your first caucus (i.e. $25,000 paid by Erie to you plus something for lost rent). Try to find out what Erie offered to the mediator in their caucus to see if Erie is "serious about settling this thing."

If pressed by the mediator about the service contracts, you can admit that you would really prefer to renew them. The contracts are currently for one year at a time and require an automatic $1,000 per building increase if renewed. You know any other maintenance service is likely to be more expensive or less reliable than Erie.

If pressed further by the mediator, you can acknowledge that you might be willing to include renewal of the service contracts as a part of a comprehensive settlement, but only if Erie is going to pay the $25,000. The term of the contracts might be extended or the value increased if the rest of the deal was to your liking.

While the contracts are a bargain, if forced, you would be willing to end them. You think you are in the stronger position - Erie needs the work. At the same time you can acknowledge that it was probably a mistake for you and Oscar to bring in Builtrite to do the repairs. You were against it but Oscar insisted on going with Builtrite when the elevators started malfunctioning.

You feel for now that you should end up with a payment from Erie to cover most of your costs for the Builtrite repairs. You should not take less than $15,000 (that would make Oscar happy) unless there is also a commitment on renewal of the service contracts as well.

2. Caucus with Erie: If the mediator chooses to meet again with Erie before meeting with you, then asks to meet alone with you, follow the directions in #1 above.

A much more flexible approach than the tightly designed presentation in the labor case below, this allows considerable room for candidates to employ their personal styles. The risk, however, is that not all candidates will end up with the same information. This compromises the attempt to gauge their ability to generate options based on a common information base.

3. Joint Meeting: If the mediator chooses first to meet with both parties together avoid making concessions until you see what the mediator asks of you. If the mediator does not mention it and you are properly coaxed, present the modified offer that you made to the mediator alone at the end of your first caucus (that is, payment of at least $25,000 to you plus something for the lost rent).

If asked directly by either the mediator or Erie, and only if asked directly, indicate a willingness to consider including the service contracts as part of a "total settlement." However, stress that this would not be acceptable "unless payment is made on the outstanding $25,000." Don't go beyond this in joint session.

If the mediator chooses to then caucus with you, follow the instructions in #1 above. Once you have reached the end of those instructions, you may go further to discuss reducing the payment form Erie to "something as low as $12,500" and renewal of the service contracts for two years.

Don't go this far unless you feel the mediator has made a persuasive case that you should. If you do go that far, see what the mediator says, then suggest the mediator try out that deal on Erie making it clear it is your "last, best offer - take it or leave it."

CONFIDENTIAL INSTRUCTIONS FOR ERIE & ERIE'S ATTORNEY

Recent History

You have met in public session and then the mediator met with each of you separately - Owning first. When the mediator called you in for your private caucus, the mediator began by mentioning the problems found by Builtrite with the elevators, and then asked whether there wasn't some expense that Owning legitimately had to incur.

You responded that the Builtrite bill was ridiculously inflated, but more importantly that none of this would have happened if Owning had just come to you to fix the elevators. You think that it was probably Oscar, Owning's older brother, who was behind the bad dealing. You said, "Oscar no doubt is tight with Builtrite and wants to send as much business to them as possible." You told the mediator that you are concerned that Oscar is pulling the strings behind today's mediation. You said, "I need some assurance that Owning has the authority to settle - otherwise I do not want to go forward at all."

The mediator reported that Owning was quite firm in refusing to pay your bill and in wanting some payment on its claim. You stated that that was backwards - you must be the party receiving cash. When the mediator had you carefully go through the Builtrite list and bill, you allowed as how some of those things may well have had to be done. You also allowed that you would have had to incur costs to do the repairs even if Owning had come to you. You then suggested you could take something off the balance of $50,000 due for those items. You would not do it at Builtrite's inflated price though. After some thought, you suggested you would knock off half the bill. That is, you would accept a payment to you of $25,000 as full settlement of the suit (Owning would have to drop its counterclaim).

When the mediator asked about the importance of the service contracts, you stated that they wouldn't be worth very much you didn't reestablish a proper business relationship of mutual respect: Owning had to respect and pay for services rendered. You suggested that you could replace the Owning service contracts with others, but admitted you would rather not lose them. You said "Owning admits we do a fine job. Our fees and our service are great, especially compared to what Builtrite charges for the same kind of work." But you mentioned the hope that eventually this lawsuit could be settled and the contracts renewed.

Roleplay Instructions

All of the history set forth above has been included in the mediator's confidential instructions. Now the mediator may choose one of three courses of action: reconvening both parties in a joint session, or caucusing with Owning again or caucusing with you. Your instructions vary depending on what the mediator does.

1. Caucus with Erie: If the mediator chooses to caucus with you again, do not concede to accept anything less than the $25,000 payment from Owning demanded in your first caucus.

However, in the caucus, if asked (and only if asked), you can disclose that, the contracts all come up for renewal in six months. If you could renew the contracts for two years, guaranteed, instead of the usual one, you would feel even more secure and that would begin to tell you that you don't necessarily need the entire $25,000.

The usual "cost-of-living" increase on each contract is $1,000 per contract per year. So if you were offered two-year renewals of all six contracts, you might be willing to trade some of that increase for your payment of some of this claim.

If pressed by the mediator you can agree to accept a payment as low as $15,000 if Owning would guarantee two-year contract renewals now.

2. Caucus with Owning: If the mediator chooses to caucus with you after caucusing with Owning, see what the mediator says came of that effort and respond favorably if any proposal is made that Owning pay you something. Reject proposals that you pay Owning anything.

If asked by the mediator, mention the service contracts and the possibility of renewals reducing the amount to be paid. If pressed, agree to consider taking no payment in exchange for contract renewals but only if such a proposal comes as a bona fide offer from Owning.

3. Joint Meeting: If the mediator chooses to reconvene the joint meeting first, avoid any quick concessions. See what Owning and the mediator do.

If the mediator proposes that you consider agreeing to what you demanded at the end of your first caucus (i.e. payment by Owning to you of $25,000 and dropping of Owning's counter-claim), agree to "consider it." If the mediator does not bring this up within ten minutes or so, then bring it up yourself. Do not offer concessions beyond this point in joint session. If the mediator caucuses next with you, follow the instructions in #1 and #2 above.

INSTRUCTIONS FOR THE MEDIATOR

The Caucus with Owning

You began your private caucuses with Owning. You questioned Owning closely about Builtrite and Owning acknowledged that Builtrite was known to be among the most expensive companies in the elevator installation and repair business. Owning admitted that Builtrite may have done a more "deluxe" job than necessary because they knew Owning was in a tough spot.

You asked about Oscar's role in all of this and whether it was necessary to have Oscar here. Owning replied that Oscar's hot-headed ways often made things worse, as indeed they might here. Owning explained that Oscar was a partner on 121 Atlas - and some other deals - but that Owning manages the business and has the authority to make operational decisions. Owning said "Oscar does not need to be here. In fact, it's probably better that he's not. As long as I get money from Erie, Oscar will be okay."

Owning was quite insistent that Erie should get no payment on its claim, and that Owning should be compensated for the repairs and lost rent. You asked what kind of proof Owning had of lost rent, Owning described the testimony available from a real estate broker about two or three tenants who were scared off. Owning acknowledged your proof is not particularly strong.

While Owning indicated that it could come down significantly on its claim for lost rent (though still wanted something for it), Owning said it should get at least $25,000 from Erie for the amount the Builtrite repairs exceeded the balance due on Erie's contract. Owning agreed to discount the repairs a bit because of their high price, but said "All I am are asking is that we be reimbursed for the extra cost to get the elevators working properly."

You asked about the service contracts Owning has with Erie, and Owning replied that they were good contracts at a very reasonable price but were up for renewal in six months. Owning stated its plan is to refuse to renew them unless this lawsuit is settled amicably. Owning said, "I don't want to talk about those contracts until it is clear that Erie will pay something substantial towards the losses they caused at 121 Atlas."

This, along with the "background" sections above, was constructed so as to move the candidate past the preliminaries. This information was furnished to each person about half an hour ahead of time. That approach has been criticized on several grounds; see Appendix A for alternate methods of preparing the candidates.

The Caucus with Erie
You then spoke with Erie in private caucus. You began by mentioning the problems found by Builtrite with the elevators, and then asked whether there wasn't some expense that Owning legitimately had to incur.

Erie responded that the Builtrite bill was ridiculously inflated, but more importantly that none of this would have happened if Owning had just asked Erie to fix the elevators. Erie insisted that it was probably Oscar, Owning's older brother, who was behind the bad dealing. Erie said, "Oscar no doubt is tight with Builtrite and wants to send as much business to them as possible." Erie expressed concern that Oscar is pulling the strings behind today's mediation. Erie said, "I need some assurance that Owning has the authority to settle; otherwise I don't want to go forward at all."

You reported that Owning was quite firm in refusing to pay Erie's bill and in wanting some payment on its claim. Erie insisted that was mistaken; Erie expected to be the party receiving cash. You had Erie carefully go through the Builtrite list and bill. Along the way, Erie allowed that some of the repairs may have had to be done. Erie also admitted that it would have had to incur costs to do the repairs if Owning had requested them. Erie then suggested it could take something off the balance of $50,000 due for those items, but not at Builtrite's inflated price. After some thought, Erie suggested it would cut its demand in half. That is, it would accept a payment from Owning of only $25,000 as full settlement of the suit, so long as Owning also dropped its counterclaim.

When you asked about the importance of the service contracts, Erie stated that they wouldn't be worth very much if it didn't reestablish a proper business relationship of mutual respect: Owning had to respect and pay for services rendered. Erie suggested that it could replace the Owning Service contracts with others, but admitted it would rather not lose them. "Owning admits we do a fine job. Our fees and our service are great, especially compared to what Builtrite charges for the same kind of work." But Erie seemed a bit nervous about the contracts and mentioned the hope that eventually this lawsuit could be settled and the contracts renewed.

Current Situation
You then decided to take a break to think over what you heard from both Owning and Erie.

Each of the parties does not want to be the one which pays the other. Either would probably be satisfied with some relatively modest payment to them, yet neither is willing to make a payment. One obvious alternative is a "wash" in which the two claims cancel each other out, but neither seems willing to agree to walk away with nothing.

You must now decide how to continue: you may meet with both parties in joint session or with either in another private caucus.

(Keep in mind that you are expected to hold at least one joint session and one caucus during the next 40 minutes).

ADDENDUM TO ERIE ELEVATOR CASE FOR ALL ROLE-PLAYERS AND OBSERVERS

Additional Confidential Facts and Instructions

The service contracts now in effect between Erie and Owning pay Erie a flat rate of $10,000 each year for each of the six buildings. Each contract has an "escalator clause" which requires that, if Owning decides to renew, there is an automatic increase each year of $1,000 for each building.

The installation contract for the Atlas building did not indude any requirement that Erie be used for the maintenance of the Atlas elevators. However there was a strong expectation held by both parties that once the installation was complete they would proceed to execute a contract for maintenance of the Atlas elevators much like those for the other buildings. Builtrite has been available to maintain the elevators since completing the repairs but has not yet been needed.

As the owner of Atlas, Owning was responsible for getting the necessary city and state safety inspection certificates for the elevators before occupancy is allowed. The installation contract gave Owning the right to require that Erie return and make any necessary repairs indicated at the time of the safety inspections. After Builtrite made the repairs Owning obtained the safety certificates.

The letter from Builtrite to Owning detailing the repairs needed and estimating the cost at $75,000 was provided to Owning before Builtrite was told to proceed and a copy is in the possession of both parties at today's session. The estimate called for $15,000 worth of replacement parts and $60,000 for labor, overhead, etc. Erie feels it is impossible now to determine what repair were really needed but that both figures are grossly inflated, especially the labor figure. Owning if pressed can admit the figures may be high but should defend both the price and the work as justified by the "emergency" circumstances.

If an outside expert is proposed to evaluate Builtrite's bill, express concern about bringing in another "outsider" and the further delays this will cause. Express your strong desire to resolve the matter today. (Each of you feels that should be easy since you are obviously "right.") If pressed on the point, you can agree to an outside expert but should then be a tough negotiator on the process for selecting and the criteria for evaluating that person's work.

The requirement to hold a joint meeting is an example of a problem that can be caused by a design feature peculiar to a specific exercise. To hold a joint meeting at the stage of the case they're in does not strike most mediators as natural, and it caused some candidates to do bizarre things in order to try to comply with a mystifying rule. This was an attempt to build in a need for the candidate to deal with a potential confrontation; but it did not work reliably. Evaluators were also confronted, at times, with a candidate who simply ignored the instruction to hold a joint meeting. Experience showed that in such a situation, if left to themselves, some evaluators will downgrade the candidate; others (for whom obedience, in a mediator, is not a virtue) will not.

A final note: This case has been criticized as involving excessively complicated facts for the time available.

This case was contributed by the Massachusetts Office of Dispute Resolution.

A Labor-Management Case: Lakeshead County

Text	*Comment*
ADVANCE INSTRUCTIONS	For no essential reason, the basic instructions in this case were divided into two parts. This section was sent as advance warning to candidates who had passed the prior screening steps. Note, in connection with the *Methodology's* reference to multiple cutoffs, that one of these screening steps involved a four-hour written examination designed to test candidates' potential as arbitrators. This provided information about their reading and writing abilities, as well as some other criteria referred to in the task and KSAO lists that are not easily assessed in a role play.
1. *Description of Oral Exercise*	
a. Mock mediation panel consisting of 4 persons, 2 representing Union and 2 Employer, each carefully trained in their respective roles.	
b. Designed to bring out behavior important in mediation at WERC.	
c. No right or wrong answers.	
d. Hypothetical case and organization: You will receive written description to review prior to entering room with the mediation panel. Study it carefully.	
e. Do not assume that your organization's policies or procedures apply to the hypothetical case and organizations.	
2. *Role of Observers*	
a. They are separate from the role-players, and will record and evaluate your actions. Try to forget about their presence during the mediation exercise. They can provide no information, nor enter the exercise in any way.	
b. After the exercise has been completed, the observers will rate-discuss-rerate each participant individually.	
c. Observers know the job of mediator and have been specially trained in the rating process.	
3. *Suggestions for Participants*	
a. Don't try to play a role. You will do best if you are yourself.	
b. Observers will observe and rate your behavior on the exercise. Thus, it is important that they have something to observe. Don't hold yourself back – get into the exercise fully.	
c. Speak up! Observers must be able to hear you, and you must also be audible on the video taping equipment that will be used to record your oral examination.	The examinations were videotaped, and the grading team worked in an adjoining room, behind a one-way mirror, so as not to distract the role-players. Subsequent experience suggests that this difficult-to-arrange precaution is not essential.

ORAL EXAMINATION/MEDIATION: INSTRUCTIONS

Welcome! This memo is to explain the exercise you are about to do; we apologize for this rather formal method of communication, but it's unfortunately impossible to give these instructions orally without slight variations from one person to the next, and fairness is very important to this process.

Today's exercise is designed to allow you to demonstrate that you have the potential to be an effective mediator. We believe that the elements indicating probable success in mediation are a combination of investigation, empathy, inventiveness, persuasion, and some other qualities which we don't intend to test here. This test puts you in the position of a mediator faced with some real problems, and we'd like to see how you work through them. Please take heart: We haven't made this easy and we don't expect you to get a "settlement" in the tightly limited time allowed; we just want to see how you go about trying.

Attached are two sheets which you may assume are a transcript of an opening joint meeting at which you previously presided, where the parties made their opening explanations of their views of the dispute. You will then meet alternately with the union and employer, each of which has a team of two people. There will be two meetings of ten minutes each with each party, and a final five minute meeting with the union. Afterwards you'll be asked some questions.

Both parties, as is true in real life, know details that you don't, but they are prepared to tell you the truth if you ask the right questions. Neither party, as is true in real life, is eager to give anything up, but both are prepared to make concessions if you give them good reasons to do so. In the first caucus with each side it's generally best to concentrate on finding out as much as you can; it's easy to look silly by coming up with a suggestion too soon. Also, you might wish to try persuading each party of the merits of the other's position in the second caucus with each side; you'll get an opportunity to suggest how the dispute might be resolved in the questions at the end. Finally, we know you're under pressure, but that too reflects real life, and we think that's compatible with enjoying the work; so please take this as a challenge to enjoy the sparring as well as to cope with it.

The employer is a rural county highway department in an area with high unemployment. It has only this one labor agreement; its other employees are not unionized. Even though this meeting takes place in March 1987, three months after the old contract expired, management hasn't set any pay plan for non-union employees yet, preferring to wait until results of these negotiations are known.

The 1986 wage schedule was as follows:

	Start	1 Year	2Yr.
Laborer	7.16	7.52	7.88
Equipment Operator	7.52	7.88	8.24

The candidate was given half an hour to read and digest this section, along with a document purporting to be a transcript of an opening joint meeting between the mediator, union and management representatives, at which the parties had done all the talking. In the transcript the parties identify three issues as holding up an agreement, briefly explain the issues, and then fall to bickering. This format was chosen so as to avoid wasting time with a joint meeting as part of the "play" format; it was felt that using the limited time for caucus meetings was more likely to elicit valuable insights into the mediator's abilities in the type of dispute involved in the WERC's work. But see Appendix A for some alternate approaches. The mediator was given an explanation of the timing (which follows) and it was suggested that the mediator concentrate in the first two caucuses on trying to find out what was at the heart of the dispute, and after that start to attempt some persuasion in an effort to narrow the gap.

Even though many labor mediators have found that strategies differ depending on whether impasses are resolved by strike or arbitration, the instructions are deliberately silent concerning impasse procedures. This was done in order to encourage candidates to use their imaginations rather than fall back on "stock" arguments.

JOINT MEETING
Statements

Union:
Mr./Ms Mediator, there are three issues left. On wages, we've come down to five percent across the board, and that's reasonable, isn't it? We don't think that's at all out of line. Just as important is fair share. We let our first contract here settle without it and it was, frankly, a big mistake – it's caused dissension among our members because there are freeloaders getting the service without paying the cost, and that's unjust. So we're going to get that, period, or there won't be a settlement. And then there's a "nothing" issue, a takeaway from management; they want to gut our sick leave clause. That isn't going anywhere, but I'll let them tell you about it.

The four players were arranged with two women on one team and two men on the other, and were given roles ranging from abrasive to overbearing (the women) to whiny (the men). The candidates were scored as to empathy according to their ability to deal with these somewhat obnoxious characters, without hostility or apparent bias in favor of one party or sex.

Employer:
Listening to that, I didn't know whether to laugh or walk out! But out of deference to you, Mr./Ms. Mediator, I'll try to deal seriously with what to me are three very serious issues. First and foremost, we have been abused by employees taking sick leave when they are not really sick, and we have a very simple and equitable proposal to address that, which is that an employee taking sick leave turn in a doctor's slip when he or she returns to work. I can't see where the union can even object to that, there's no shortage of doctors around here. Besides, when their people goof off it's other union members who have to pick up the slack. We'll have more to say about that in caucus. But I can assure you that issue is not going away, no matter how lightly the union chooses to view our needs.

On the union's fair share demand our argument is the same as the last time, we aren't forcing any employee to join the union. Getting members is their problem. They admitted that by settling the first contract without this, they can do the same now.

"Fair share" is the financial core of union security. Though a widely used term in public sector labor relations, its technical/jargon quality, and the specific legal rulings governing it, make it and similar issues of questionable value in a selection test that is not meant to test for substantive knowledge. A level playing field among candidates with divergent backgrounds may be better assured by sticking to more generic subject matter.

Finally, on wages. We really think that in view of the economic and tax situation a freeze is in order, but to show our employees we're trying to take their interests into account we have bit the bullet and offered a one percent increase to the top rates.

BACKGROUND INFORMATION
(For Parties and Scorers)
Settlements with six other area highway departments have been reached. Two are 4% across the board; two are at 1% on top rates only; two others are unknown. Both parties tend toward optimism in guessing at those settlements.The remaining information was disclosed to the mediator either in response to specific questions or at the periodic disclosure points discussed below.

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The county budget is adequate to meet any likely settlement, but the union's opening proposal, if equal terms are given to non-union employees, would cause a shortfall. The county does not intend to make an ability-to- pay case and has told the union this.

There are 25 employees in the unit. All are entitled to twelve days' sick leave per year, and no proof is currently required under the contract. The employees have seniority varying from a low of three years to a high of 26. Eighteen employees are union members, but seven of the most senior employees are bitterly opposed to the union. Those seven never take a day's sick leave, no do seven of the union members; the remainder have used varying amounts, but four employees have a history of using up all their sick leave every year. The employer suspects these four may be abusing sick leave, but the patterns of use aren't easily obtainable because records are kept on a computer and last year a freak electrical storm wiped out the memory. Some of these four, additionally, are among the union's strongest supporters, and one is the second member of the union bargaining committee.

The negotiators' attitudes are similar on both sides, and include mild hostility toward the other party but some sympathy toward the mediator. This should be maintained even if the mediator commits gross errors of tact. Each negotiator is responsible for correcting immediately any errors made by the other on the team. Statements should be responsive to the mediator's remarks; movement beyond "disclosure points" is permitted if the mediator has so cornered you that it would be illogical not to concede the point. ALL statements made should be true within the facts provided here, except for the reference to "2 days" in session (4). But do not volunteer information, except at disclosure points.

Acceptable Settlement Terms (bottom line)

Union:

Wages:	3% or better, at least on top rates, delay of up to 3 months OK
Fair Share:	Grandfather (but prefer a referendum)
Doctor's Slip:	After 3 days

Employer:

Wages:	2 1/2% or less in cost over life of contract
Fair Share:	Grandfather all current employees (Only if cornered)
Doctor's Slip:	After 3 days

Ability to do the kind of simple math involved here is essential in a labor mediator, and figures in the inventiveness score.

DISCLOSURE POINTS

There are to be used if the mediator has not generated sufficient progress in each caucus to equal or pass these points.

1. Union (after 10 minutes)

"We know that there are a few people who haven't used a normal amount of sick leave and management has a point here. Also, we want to show some flexibility on money, but we don't have a lot of movement left after this. But fair share, one way or the other, we've got to have in this contract."

OFFER:
4% wages on all rates
Doctor's slip required after 2 week absence
Full fair share

2. Employer: (after 20 minutes)

"Not all the employees are trying to stick it to us on sick leave; we know that and we don't want to worsen the relationship with our good employees. But at the same time those are the ones who don't want any part of the union so we sure as hell aren't going to make them pay dues. On wages we had 293 people apply at the entry level the last time we had an opening, so we can't see raising those rates. This doubles our prior offer and we have very little flexibility beyond this. We realize our top rates are not the most competitive but we are very concerned about the cost of the contract during the upcoming year–it's going to be a bad year and we all know that!"

OFFER:
Doctor's slip required for the 2nd and all succeeding uses of sick leave during the contract term.
No fair share.
2% increase on top rates only.

3. Union: (after 30 minutes)

"This is our last offer to settle. Let's cut out the nonsense. We're willing to listen to a counter if it's real close to this but we don't see any reason to make a lower offer, and we won't."

OFFER
Doctor's slip for each occurrence of 3 or more days on sick leave.
Fair share after a referendum.
3% on top rates only, 1/1/87

4. Employer: (after 40 minutes)

"We can't agree with the union, except we can accept their doctor's slip proposal, that it's required for two days' sick leave or more. We won't put our most valued employees in the position of having to join the union or pay dues; the referendum is a charade because everybody knows they have a majority. We made a promise to all our existing employees that they'd never be forced to join, and we won't break it. On wages we can live with a 2 1/2% cost for the year and no more, period. We have no offer to make, please do what you can with that."

5. Union: (after 45 minutes)

"We can't agree. No one should come into this unit and think they can get a free ride; we have to have 3% on the top rate at least by three months after the contract starts; and the only thing we've gotten done is the medical slips. It's not your fault, but we're very disappointed in management's attitude and we see no point to continuing any further with this."

The exam proper began with a ten-minute caucus with the union. This was followed by three other ten-minute caucuses with the parties alternately. One danger in this structure was that if a given mediator was a truly lousy investigator–potentially something remediable in training–that person might never get the key information from the parties. But without that information, such a candidate might never get an opportunity to demonstrate how good he or she was at persuading anyone, or a fair chance to synthesize an original idea. So the exam design included at the conclusion of each caucus a "disclosure statement" to be made by that party, consisting of whatever part of the relevant information or new position on the issues the mediator had not already managed to obtain. This gave each candidate a clean start on each new caucus; but obviously, those who preempted the disclosure by getting the information or concession early scored higher.

The "two" days is a deliberate misstatement. Such sharp practice is common enough in labor relations that it was felt worth trying to identify those candidates who could spot and counter it immediately. This approach, however, may be unnecessarily "tricky."

A fifth caucus, with the union, gave the mediator a chance for a few minutes to try to persuade the union to accept management's "final offer," suddenly dumped on the mediator at the end of the prior caucus. But the union was instructed to turn it down, in language vehement but carefully drafted to provide a clue to a possible solution to the dispute as a whole.

The final part of this exam was a ten to fifteen-minute period in which an examiner asked the candidate a list of pre-established questions as to the parties' apparent motivations. These were designed to give the graders some way of distinguishing between a humdrum candidate who might know the ropes from prior experience, and a more intelligent one who was being exposed to the contentious atmosphere of such a dispute for the first time. The concluding question of the series was "If you had one chance and only one, to formulate a mediator's proposal to the parties to settle the whole dispute, what would that proposal be?" Such an open-ended question is useful in estimating whether a given candidate could put together the various clues the performers had given and conceptualize unstated possibilities. We now believe an even more open-ended final question is desirable to give the examinee an opportunity to explain his or her strategy. (See *Using Tests in Selection* above).

This case was contributed by the Wisconsin Employment Relations Commission.