A CALL FOR EVIDENCE BASED STANDARDS FOR MEDIATOR QUALITY

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1. PREFACE AND PROPHYLAXIS

Preface.
The use of Mediation as a primary means of resolving disputes, as practiced in the United States since the early 1970’s, has been thoroughly institutionalized as a part of civil litigation in many parts of the world. Even in Bhutan, closed for centuries to the outside world, mediators, attorneys, legal scholars and judges from the US have been working closely with the government of the erstwhile kingdom to train new lawyers and courts in “mediation” as that country constructs an adversarial civil justice system. Where, until recently, there were fewer lawyers than members of the royal family, the relatively new constitution mandates mediation in civil litigation.

Whether expressly or implicitly, practitioners and judicial and non-governmental organizations the world over make assertions about quality in mediation. Trainers teach best practices. International professional associations empower groups of practitioners, scholars and theoreticians to study the question of quality and to issue reports. Some mediation organizations have even developed coding instruments for use in evaluating mediators while observing the mediators in the course of the mediation of real disputes. It is to be expected now that mediators who serve in the litigated case will have completed 40 hours of training and that, during that training, they will have been “coached,” during role playing exercises on how they could have done things better.

The basic thesis of this paper is that a rigorous and intellectually honest approach to understanding “how to mediate well” must be based on empirically verifiable information and not on untested assumptions or dogmatic beliefs about “what makes good mediation.” Courts that sponsor mediation programs and those that mandate the use of mediation ought to base their assessment of the programs and mediators on empirically verifiable information on mediator behaviors and tactics. Mediation trainers ought to ground their teaching in empirically derived knowledge.

Mediation, of course, in its general sense, has been a part of human culture for eons. There are references to dispute resolution processes in which a “third party” helps people in conflict to “settle their differences” in non-adjudicatory ways in many ancient texts. Scholars and researchers have documented a wide variety of “indigenous,” non-adversarial problem solving methods in populations that live today without the trappings of life in the “developed world.” But the emergence of a profession called “mediator” and, in many jurisdictions, the enactment of rules and statutes that encourage and even mandate the use of mediation is, taking a broad view of history, brand new.

The recent history of mediation, as we now understand its basic practice, traces its roots to two streams in our culture’s approach to conflict. The headwaters of one stream spring from the

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socio-political changes that occurred in “the West” in the 60’s. The other flows from the
creation, by law and judicial action, of previously unrecognized classes of rights, for the violation
of which, remedies were to be found in the court, leading to a correlative explosion of formal
litigation. This “flood of litigation” strained the resources of the judicial institutions that had
been designed and built in earlier times. There arose a hue and cry to do something about the
“clogged dockets” and to stem the tide of wasted precious resources which otherwise might
have been harnessed to the creation of value. In the eyes of many floaters in both streams
litigation cost too much, took too long and often left those involved with less than what they
started with.

I have had hundreds of hours of mediation training myself. I’ve been a trainer and a coach and
have suggested to trainees that they try to do things differently because “it would be better.” In
my current position as administrator of an appellate mediation program I choose cases for
mediation and appoint mediators to handle the cases. I usually feel like I know what I’m doing
but am rarely asked why and, to be blunt, when I have been asked or if I ask myself I frequently
find that I am basing my assertions on a set of assumptions, many of which have never been
empirically tested.

When I was appointed to this position and realized that I would be choosing mediators (many
of whom I had never even met) to work with lawyers and litigants whom I had never met I
began to seriously confront the epistemological conundrum that is, I think, endemic to our
profession. We believe we know what is the right thing to do as mediator in any circumstance
most of the time. We believe we can explain why and we believe we can help others to learn
“how to do it.” But, I am concerned that our beliefs are not shared equally across the spectrum
of mediation professionals and that they are founded more on socio-political and philosophical
footings than on empirically derived knowledge.

In order to ground our work more firmly in knowledge as opposed to belief, it is useful to review
how we got here. There is a history to understand and the issues are susceptible of clarification.
There is a need, I think, to do this work as mediation becomes ever more intrinsic to the
management of disputes. This is particularly important for the judiciary and for governance.
There are some pressing current concerns about Court mediation programs (especially here in
California.) To speak about quality, we need to agree on what those concerns are and establish a
shared understanding of what we will mean by “mediation,” “success” and “quality.”

Ultimately we need to understand the answer to two questions:

1. What is the goal of mediation?
2. What should mediators do if they want to help people in conflict achieve that goal?

The answer to the first question may be idiosyncratic to the parties and the mediator or the
convener of mediation (a court, e.g.) That is, some parties may be interested in increased
understanding and better communication while others want their dispute settled or both. Some
court programs and some litigators may care only that the case is settled. The answer to the
second question, though, is much more difficult. It depends on the purpose mediation is to serve.
If understanding is the goal then the question is “what should mediators do to help people understand each other better?” If settlement is the goal, then, we ask “what should mediators do to help people settle their disputes?” To answer these questions, we need to examine mediator behavior. What do mediators do? Do those behaviors achieve the desired results or not?

My hope is that this paper will serve several purposes. First I hope the paper will be useful as a background briefing for those interested in both mediation quality and court mediation quality assurance. Second, this is a call to those in our profession to sharpen our conversation about mediation, to raise the bar on what we take to be “true” and, as a part of this call, to be a context document for the “mini-conference” on mediation research which will be part of the ABA Section on Dispute Resolution’s annual conference in Washington, D.C. in April 2012.

Prophylaxis
I have a great concern that this paper not be misconstrued as advocating that settlement should be the primary goal of mediation. One of my main theses is, though, that studying how mediators get people to settle is a really good idea. Anyone familiar with the extant social science literature on mediation knows that people feel the process is fairer and “nicer” if attention is paid to whether it affords the parties robust opportunity to tell their stories, to increase understanding and to the achievement of other important social goods. I share those values and know that processes that are supportive of those ends make mediation participants happier and may even help to make this a better world. I suspect that, if mediators didn’t work toward those goals while, at the same time, trying to achieve settlement, there would be a lot less mediation.

Ultimately, though, if cases didn’t settle in mediation I don’t think we would have civil and family law mediation programs in courts, there would be no mediation industry and the ABA Section on Dispute Resolution would be half the size it is. So, no, I don’t believe that settlement ought to be the primary social good delivered by mediation nor do I believe that it is “more important” in many ways than that people feel the process was fair, that the outcome is fair, that it enhances the participants’ views of the courts' integrity and beneficence, etc. I do think it is worth finding out if achieving those goals also enhances the likelihood of settlement. I believe that studying settlement is a good idea because it is easier to objectively measure and I'm not sure that we really even know “how to do it.”

It is possible that more research may determine that the factors that increase settlement might not have equally positive effects on other goals. So, if we learn that behavior X makes settlement more likely, we will also need to determine what effect X has on the achievement of those other social goods. Threatening the participants with waterboarding if they don’t settle may be a good way to get cases resolved but it probably wouldn’t work to make people feel they had a chance to experience self determination.

Hopefully, we can uncover empirically proven interventions that enhance the likelihood of settlement and the other social goods simultaneously. What this means is that we need more robust research into how mediators can effectively intervene to accomplish the whole range of
identified social goods that are derived from mediation.

2. INTRODUCTION
Those in search of reliable and verifiable information upon which to evaluate the quality of court mediation programs face at least two broad epistemological tensions:

- between the ontology and values of social science and the social and philosophical impulses that informed the beginnings of the “mediation movement,” and
- the paradoxical role that mediation plays in the adversarial adjudicative institution.

A good argument can be made that the “mediation community” operates according to a set of assumptions and beliefs about mediation that have, in some sense, risen to the status of “received wisdom.”

As a “profession” it is imperative that we figure out how best to verify that what we believe to be true and what we believe to be useful really are true and useful things. E.g., is it true that mediators succeed when the parties feel heard? Does the fact that parties report feeling heard lead them to resolution of their disputes? If a mediator or a mediation program values settlement of disputes, should the mediators try to persuade litigants to adopt any specific set of behaviors? If a court mediation program is dedicated to helping the parties understand each other better, to have a chance to “tell their story” is there any acceptable role for persuasion by the mediator at all?

3. MEDIATION AND ITS PLACE IN THE COURTS
   a. The genesis of the modern mediation movement
The modern mediation movement finds its roots in the political and philosophical principles and the politics of the 1960’s. These principles were succinctly summarized by the then ubiquitous *cris de couer* (or, as some had it, *cris de guerre*) “Power to the People.” Two essential tributaries fed what eventually became the mediation river in which so many of us now swim: community mediation programs for resolution of civil disputes and divorce mediation. Both originated in the belief that disputes belonged to the disputants. Based on this belief the early adopters believed that the people most likely to be able to help would be members of the community itself.

At the same time, American courtrooms were beginning to experience serious challenges in handling their civil case loads. This was the era in which the “trial court delay reduction” movement took root. The social and political causes of the challenges to the judiciary that necessitated this new approach to civil litigation are beyond the scope of this document. It is

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2 See, e.g., Bernard Mayer’s “Beyond Neutrality” chapter entitled “Ten Beliefs that Get in our way” here. Some of the beliefs he includes are:
1. We are neutral.
2. Competition is bad; cooperation is good.
3. Our goal is a win-win solution.
4. The focus of mediation and negotiation in mediation should be on Interests, not positions. Constructive communication is more important than passionate advocacy.
5. Respect trumps anger.
6. Facilitative mediation means minimal substantive influence.
7. Good relationships are our goal, adversaries our problem.
8. Conflict resolution is a process and has no specific goal.
important, however, that we keep this context in mind as we assess the role that mediation plays in the courts now and how to evaluate both court program quality and the quality of court connected mediation.

b. Family Law Mediation – the beginning of court connected mediation

Mediation first began to play a significant role in the family law area of general civil litigation. Jay Folberg wrote about the development of the family law mediation practice in the very first article of the very first issue of the Mediation Quarterly in September 1983. Although Folberg was then recounting what was “recent history,” the piece seems, now, in retrospect, to be virtually contemporaneous with the time. The following excerpt from that article is a brief overview of the genesis of mediation in the U.S. and provides a glimpse of practice, particularly family mediation practice, in the 1960s and 1970s.

“Acceptance of divorce as a common life event also seemed to grow. Domestic relations case filings soared. The dramatic increase in the divorce rate was accompanied by sweeping changes in the substantive law of divorce. The most significant of these changes was the almost universal acceptance in this country of some form of no-fault divorce. In most states, the decision to end a marriage became, in effect, a matter of private choice. Alimony based on fault and entitlement began to give way to support based on need and ability to pay. In an increasing number of states, rigid rules of property division were replaced by considerations of equity and fairness dependent on the unique circumstances of the parties. There were, however, few changes in the procedural law of divorce. Lawyers, judges, and experts continued to intervene in divorce with the same procedural shell that existed prior to the no-fault revolution.

“In the early 1970s, several attorneys [and other professionals] took the newly emerging no-fault divorce legislation to heart and began to offer no-fault legal services in dissolution cases. These attorneys proposed a non-adversarial mediation model, in which they advised both parties on issues of money and children and urged separate legal counsel to advise the clients concerning their individual interests. Other attorneys saw mediation as an opportunity to use their skills in a non-lawyer capacity, in which they refrained from giving legal advice.”

In time, attorneys, overcoming professional ethics issues of conflict of interest arising out of dual representation, began to offer their services to married couples seeking a way to divorce that would cause the least disruption and manage the conflict in the most constructive ways possible. The fact that mediation services provided by one practitioner that were designed to help the couple reach separation and custody agreement appeared to be cheaper and less emotionally destructive than litigation was in large part responsible for the growth of this form of dispute resolution.

4 Although California courts had offered conciliation services in domestic cases in the forties they were not mediations as we now understand them. Of course, there had been mediation of a sort in the collective bargaining arena before this development. This was, though, a specialized and rarefied practice that had limited impact on the daily conflicts that courts of general jurisdiction heard every day.
c. Civil dispute mediation

The community mediation programs of the period enshrined the principles of party participation—empowerment, creativity, education, and self-determination. They relied on non-professional and unpaid volunteers from the community to help community members resolve conflict. The mediators served as mediators because they were neighbors and part of the community. The disputants negotiated everything, including the norms by which they would evaluate the options for resolution generated in the process.

Kimberlee K. Kovach in her article Privatization of Dispute Resolution: In the Spirit of Pound, But Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future tells how, this non-professional, community centered process which functioned at most in the shadow of the law, eventually became an institutionalized component of modern litigation.

“Early discussions during the evolution of these programs centered on whether individuals would go to mediation on their own; the answer was “rarely.” The adage mentioned frequently throughout the early eighties in dispute resolution circles was, “If you build it, they will come.” But they did not. Someone or something of power had to mandate or strongly suggest the use of mediation. The legal system took the initiative and has since been a critical factor in most ADR schemes.”

Kovach explains the evolution of court mediation programs as the melding of two streams of dispute resolution thinking: the community mediation movement and the constantly accelerating demands placed on the country’s judicial systems to resolve more and more disputes. In 1976, a symposium was held which has become known as the “Pound Conference,” to address the growing challenge to the ability of the judiciary to expeditiously and economically handle the explosion of both civil and criminal litigation our country was experiencing. Professor Frank Sander (who gave a keynote address to that symposium) an early student of alternative dispute resolution processes and intrigued by the process of mediation, proposed the multi-door courthouse. One of the doors he proposed to be added to the marble entryways led directly to the mediation table.

The introduction of mediation to the adversarial civil justice system was, in retrospect, a momentous event. It changed the way litigators operate and, to the chagrin of some, it changed the notion of exactly what mediation was supposed to be and how it was supposed to be done. Perhaps even more importantly to some, it challenged the core values and principles that had been developed when mediation was introduced as a way of returning power over conflict resolution to the people who “owned” the conflict.

Kovach writes that when the mediation community was faced with the challenge of dealing with

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5 From Privatization of Dispute Resolution: In the Spirit of Pound, But Mission Incomplete: Lessons Learned and a Possible Blueprint for the Future. Kimberlee K. Kovach, Copyright (c) 2007 South Texas Law Review, Inc.; Kimberlee K. Kovach. Kimberlee K. Kovach currently serves as the Distinguished Lecturer in Dispute Resolution at South Texas College of Law.

6 Some questions posed by a commenter that are not answered here are: Exactly how did this change the way litigators operate? Did litigators rush to mediation, though parties did not? What did litigators expect from mediation? Have those expectations changed? How was mediation originally different from other ways that helped their clients to settle cases?
a system that was adversarial and contentious by its very nature, it “embraced these approaches and changed its processes to fit within the adversarial system.” She notes that studies of mediation programs asked different questions in the community mediation world than in court connected programs.

“Early evaluations of community mediation centers examined, among other things, party satisfaction. Other studies, such as the empirical research conducted in 1990 by the Rand Corporation, focused on the courts and efficiency concerns.”

What research has been done on “efficiency,” according to Kovach, has not adequately measured the intangible benefits of “creative solutions, the significance of self-determination, and the power of an apology... Such results should not be unexpected since mediation was sold to the courts as a method of saving time and money...”

As more and more courts began to look for ways to encourage and, in some cases, mandate the use of mediation in civil cases, the practice of mediation began to evolve into something that its early, community based and family mediation practitioners had not envisioned. At least in the community mediation model, the law was not the predominant source of normative guideposts; the parties and the mediators strove to create agreements that met their interests but were not constrained by the types of analysis and remedies that might be available to them in court. Kovach continues:

“Limiting the view of mediation to a process focused almost exclusively on the resolution of legal disputes, contributed to the transformation of the process into a quasi-legal one...

“Interestingly, it does not appear that most mediation advocates or courts acknowledged the irony--and potential conflict--created by transplanting a process which rejects the relevance of the law into the very institution which conditions access upon an effective invocation of the law. Further, this party-centered process was transplanted into an institution which tended to constrict parties' participation in its processes.... Viewed in this way, it was inevitable that the mediation process had to adapt in order to survive in its new home. In addition to reliance on precedent, the strength of the status quo is also quite powerful in a rule-based legal system. Interestingly, this is one of the factors noted thirty years ago by Sander that might obstruct the advancement of suggested innovations in courts. Because mediation was so dissimilar to court proceedings, with little to no concern for rules or precedent, many lawyers and judges were unsure of how to approach the process. As a result, many of the early valuable goals of mediation vanished because they were incompatible with traditional court ideology.

“Legalization” of a dispute replaces the more human element with considerations of relevancy, admissibility, and the proof or disproof of legal constructs.”

In other words, the analytical framework used by lawyers and courts was superimposed on the
problems between mediation participants trapping the mediative dialogue. The parties’ disputes became “cases” and their bargaining at mediation became dominated, if not entirely focused on, risk assessment and evaluation of the likely outcome in courts. This necessitated a reductive approach to problem definition, to solution finding and to dialogue itself.

Mediation participants began arriving with lawyers who brought with them cases instead of disputes. The analytical framework in mediation had to shift because all of the participants had internalized the framework that is used in litigation: causes of action, elements, relevant evidence, duty, causation etc. Once mediation became dominated by the cognitive paradigms inherent in an adversarial, rule and rights-based process housed at the court there was an inevitable “legalization” of the process. Lawyers and judges became the primary mediators. Courts began to mandate participation. Rules were enacted, courts began to enforce the new rules about mediation and litigation ensued over procedural issues in mediation.

Kovach addresses the challenge now being faced by court ADR administrators whose philosophical roots are in the mediation movement as much as if not more than in the justice system:

“Contemporary literature has questioned, in some depth, the justice aspects of mediation... On one hand, supporters of party self-determination and empowerment advocate that justice is reached whenever and nearly however the parties decide. In other words, the parties themselves are determiners of justice. This view is consistent with the empowerment model of mediation or proponents of party self-determination. An alternative perspective contends that societal or legal norms are indispensable with justice. A need or even requirement exists to use normative standards in order to determine appropriate or even permissible resolution. These scholars contend that without norms private dispute resolution is likely to be less equitable, fair, or just.”

The cultural and political left of the late 60s and early 70s held dear the idea that two people could, through dialogue and non-violent communication, reach a resolution to a problem that they “owned.” The notion that disputants might not be permitted to resolve their own disputes on their own terms would have seemed ludicrous. That idea epitomizes the problems that the left had identified with our political and cultural institutions: undesired hegemony over the lives of citizens by the power elite whose values were inimical to the “revolution in consciousness” that was then a part of the daily lives of millions of Americans.

Not a few mediation scholars have raised some of these concerns in research on “procedural justice.” In a recent article Is That All There Is?: “The Problem” In Court-Oriented Mediation, Len Riskin and Nancy Welsh address what they describe as the “gap between the expansive potential of mediation and the constricted reality of most court-oriented mediation.” They note:

“In civil proceedings, the “problem” defined by the pleadings must state a sufficiently...
recognizable legal claim...

“But mediation is an entirely different story--or at least that has been a dominant theory. Conventional wisdom among a segment of influential commentators on mediation holds that the process has several capacities that courts lack. It can empower the parties to work together in a respectful and productive manner; allow a focus on the parties' real needs and interests, in addition to their legal claims; offer a flexible process customized to fit the parties’ situation, emotions, and interests; and encourage the development of a range of creative and responsive outcomes. In appropriate situations, mediation may even enable the parties to heal or restructure their relationships, both personal and professional...

“[Mediation is now routinely offered or even mandated in civil litigation in jurisdictions all over the world but] Available evidence is mixed at best, however, regarding whether these mediation sessions fulfill the expansive promise described above.”

So, today, in a wide variety of dispute resolution settings, including in courts, regulatory agencies, private organizations such as hospitals, universities and multi-national corporations, and in non-profit community mediation centers all over the world, the participants in a negotiation are likely to work with a mediator. But mediators in many of these contexts confront this tension: there is the “promise” of a non-adversarial dispute resolution methodology that encourages the development of agreements based on the parties’ own mutually satisfying standards and there is the procedural and conceptual framework in which mediation occurs that values a more “aggressive” or “adversarial” process in which rights and duties, predictions of success in the arena, and legalistic risk assessment and framing may often limit what is said and done.

4. A CASE IN POINT: CASSEL V COMDREN

This year the California Supreme Court rendered an opinion in the matter of Cassel v. Superior Court (Comdren) (2011) 51 Cal.4th 113. Its holding can be (albeit, perhaps, dramatically and too simply) stated thusly: “

You cannot sue your lawyer for malpractice in California based on evidence of communications made in preparation for or at mediation, even if the only communicators were you and your lawyer.

Cassel followed a line of California cases interpreting California’s robust mediation confidentiality statutes, Evidence Code 1115, et seq. The first California Supreme Court case in the field was Foxgate Homeowners’ Assn. v. Bramalea California, Inc. (2001) 26 Cal.4th 1 which held that confidentiality of mediation communications in California was an “extrinsic policy” and not a mere evidentiary privilege. Analysis of claims of protection of mediation communications is not a balancing act. Unlike attorney client privilege claims or other privileges, mediation confidentiality is, essentially, an exclusionary rule. It is not subject to judicial exceptions and is, for all intents and purposes, inviolable unless disclosure is required under the 6th amendment in a criminal case to permit confrontation of witnesses. (See Rinaker v. Superior Court (1998) 62 Cal.App.4th 155.)
This evidentiary restriction is not limited to those communications made in the course of mediation. Rather, the restriction applies to any written or oral communication made "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation," as well as all "communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation." (California Evidence Code § 1119.) Section 1119 also bars discovery of such evidence.

_Foxgate_ was followed by _Rojas v. Superior Court_ (2004) 33 Cal.4th 407:

"In _Rojas_, contractors and subcontractors settled a construction defect case brought by the owner of an apartment complex in which it was alleged "that water leakage due to construction defects had produced toxic molds and other microbes on the property." A settlement was reached during mediation. Thereafter, several hundred tenants of the apartment complex sued many of the entities who had been involved in the development and construction of the complex, as well as the complex's owner [for personal injury resulting from the mold...]. The tenants served deposition subpoenas and demanded production of a number of items prepared during the prior litigation including, the "entire files" relating to the construction defect case, witness statements, test samples, physical evidence removed from the building, analyses of raw data, videotapes, and photographs.

_Rojas_ acknowledged that the trial court expressed concern that, without the requested discovery, the tenants might not have been able to obtain much of the necessary evidence. [Citation omitted.] However, _Rojas_ held that the mediation confidentiality statutes are not subject to a "'good cause' exception." [Citation omitted.] _Rojas_ concluded that the requested items were not discoverable because they were "'[citation omitted]'prepared for the purpose of, in the course of, or pursuant to, [the] mediation'" in the underlying construction action. In reaching this conclusion, _Rojas_ focused on the strong public policy favoring mediation and the need for confidentiality in the mediation process. [Citation omitted.]

( _Wimsatt v. Superior Court (Kausch) _ (2009) 152 Cal.App.4th 137.)

The _Rojas_ court practically destroyed the plaintiff’s ability to prosecute their habitability and injury claims against their landlord.

Given the broad interpretation the mediation confidentiality statutes had been given in California it was practically inevitable that a case like _Cassel_ would come along. In _Cassel_, a party to a mediation who settled his case at a very late hour after a volatile day eventually sued the lawyers who represented him in the mediation for malpractice. He asserted that they had coerced him into agreeing to accept less than he should have at mediation. In support of his claim against the attorneys he sought to introduce evidence of what the lawyers had said to him in private meetings at their offices on the two days before the mediation session, in private meetings with the attorneys alone during the mediation, and even conversations that took place while he and an attorney of his were in the bathroom together alone. None of this evidence was allowed because it was held to be either in preparation for or in furtherance of the mediation. Without this evidence, the plaintiff’s case fell apart and he was unable to proceed to trial.
Although there is much more to the *Cassel* opinion, the logical conclusion that you cannot sue your attorney for malpractice in mediation is the primary takeaway and has been the source of general angst and hubbub in certain circles in the California mediation community, bar and legislature. The intellectual and moral turmoil that the case gave rise to is driven by tensions between legal ethics, legal-political concerns, consumer protection impulses and the original sociopolitical-ethical purpose of community mediation in taking back the power over disputants’ lives from the “establishment.” The *Cassel* case evokes this tension even more pointedly than the *Rojas* case did.

In *Cassel* we see a collision between essential values of the legal system (including “a remedy for every harm” in the form of money damages, liability predicated on legal proof) and the notion that mediation is “something different.” The mediation process is seen by many as one that “ought to” enable the participants to bring to bear legally irrelevant and even legally incomprehensible feelings, values and interests in working through disputes without concern that their communications will be used against them in court. Community mediators may never have given any thought to whether or not the people who conducted the mediations or the participants would ever be able to sue anyone involved for professional negligence or anything else arising from the mediation itself. There were no professionals involved, hence, no one to sue for failing to fulfill any duty to anyone to perform according to a professional standard of care. Essentially, aside from hypothetical cases in which one participant might punch another participant in the face, mediation was a “litigation free zone.”

5. LOOKING AT COURT ADR PROGRAM QUALITY ASSESSMENT

So, it seems to me that any inquiry into the quality of court mediation programs must start, at this juncture, with an exploration of the values and principles that undergird them. The first step in this process should be to identify the purposes and policies of the courts’ mediation programs. Once these are clearly articulated by the Court, then we can begin to find ways to empirically verify that quality mediation services are being provided to litigants. If, for example, Court A emphasizes “settlement” as the primary goal of its mediation program, then we should know what mediators who work in the program ought to actually do to enhance the likelihood of settlement.

I believe that the kind of “knowing” we should be aiming for is the kind that is derived from *statistically significant, verifiable, replicable, empirical studies and experiment, not from opinion surveys or self reporting post hoc evaluations*. Those methods are notoriously unreliable except as a source of data of the parties' views of mediation. Opinion surveys and post hoc self reported evaluations can get at the answers to questions such as whether participants felt pressured to settle or had enough time to talk. Early studies found that observers and participants gave fairly similar ratings. However, asking parties cause and effect type questions is unreliable. The participants’ views on, e.g., whether a mediator’s choice to press for concessions helped the parties to reach agreement may not be a reliable way to know whether that behavior did or did not help. We should hold ourselves to the kind of rigorous standards we expect from any profession. For us, they are derived from the social sciences.

Clearly, history demonstrates that, at minimum, the initial impulse to develop court connected

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mediation programs was rooted in the desire to clear dockets. This is certainly true of both the judiciary and the Bar, perhaps the latter to a lesser extent given the fact that the early adopters of mediation within the Bar shared some of the values that informed the community mediation movement. The market, however, for mediation services in litigated cases is certain that settlement is the overarching goal of mediation.10 Many courts and most mediation scholars, court program managers and designers, are adamant that the “softer” goals and policies are important, too. I count myself among them.

There are some courts that have articulated a broader range of benchmarks for success. The US District Court for the Northern District of California is a prime example. Howard Herman, the senior-most mediator of that renowned ADR office, my professional neighbor directly across the street with whom I’ve discussed much of the material in this paper, memorably told me that, in his court, mediation is considered a “justice event.” As I recall, Howard explained that his court does not measure the utility of the mediation program based primarily (if at all) on the settlement rate of mediated cases. He told me that the Court is concerned much more with the nature of the interaction that takes place in mediations convened under the jurisdiction of the program. Howard pointed out that the very definition of mediation in the Court’s local rules supports this approach to defining quality.

Rule 6-1 describes mediation like this:

“Mediation is a flexible, non-binding, confidential process in which a neutral person (the mediator) facilitates settlement negotiations. The mediator improves communication across party lines, helps parties articulate their interests and understand those of their opponent, probes the strengths and weaknesses of each party’s legal positions, identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. The mediator generally does not give an overall evaluation of the case. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.” [Emphasis added.]

This court, then, believes that its mediation program and its mediators succeed when mediation results in:

- improved communication between litigants;
- improved articulation of a litigant’s own interests;
- improved understanding of their opponent’s interests;
- participation in a robust examination of the legal positions taken by the litigants;
- the identification of areas of agreement;
- the development of options for resolution; and
- thoughtful examination of matters that are important to the litigants but which are outside the scope of issues that litigation can resolve.

Assessment of whether the Northern District of California mediation program is performing well
must describe its achievement of outcomes that are entirely disconnected from whether the litigation ends at the mediation table.⁹ For example, a quality assurance program for that court would need a set of tools to determine if its mediators helped the litigants “experience improved communication and understanding” and if they got the litigants to do “better” or “more” exploration of matters of import to the litigants that litigation cannot resolve. The participant evaluation data collected after mediation by many court programs demonstrates that, in general, mediators in court programs do a reasonably good job on many of those tasks at least inferentially.

If, then, we are to set about to assess court ADR quality and make recommendations about how to improve court ADR quality, we need to ground our analysis in a frank articulation of the fundamental policy imperatives in each court. There has been a fairly robust history of evaluation of court-connected mediation programs that has relied primarily on post hoc input from participants, typically on an “Evaluation Form” which asks for their views on various measures. The research shows consistently that participants “like” mediation, would use mediation again, and that they would most often recommend the particular mediator to others. These studies fairly consistently also show that the litigants believe mediation has, overall, saved them money and time. Court statistics on the effect of mediation are mixed: some studies show mediation resolving cases faster and with less expense, but others show no difference from litigation. Many courts track and publish the settlement rates of their programs and, typically, the settlement rate hovers in the 50% or over range.¹⁰

But, if there is a desire for improvement in the quality of court-connected mediation, I believe we need to understand and identify the behaviors of the mediators themselves in cases who “successfully” mediate in the Court program, however the particular court defines “success.” Most mediation programs require that panel members have training. Some specify the number of hours, some provide the training directly. A very few do some performance based testing and observation of mediator in practice.

There are a number of extant coding systems that have been designed to measure the degree to which mediators achieve certain goals in the course of mediation. The National Conflict Resolution Center (NCRC) (formerly known as San Diego Mediation Center) offers mediation training in a “32-hour skill-building course, offered three times a year, [which] introduce[s] you to effective mediation techniques through a combination of lectures, simulations, and participatory exercises” The curriculum includes conflict theory, stages of mediated problem solving, balancing power, managing the negotiation, strategic communication skills, handling emotions and impasse among other things.

⁹ One of the reviewers of a draft of this paper responded with the following: “[T]his statement itself a very sharp narrowing of mediation around the goal of settlement, rather than the much more expansive one cited by Riskin & Welsh (in their article on broadening the issues addressed in court ADR.) For example, it precludes the idea that an important goal might be exploring where the parties’ interactions went off track in order to help them reestablish a better relationship going forward? ... Another issue raised implicitly: By the time the case gets to the District Court it is so thoroughly shaped by the attorneys and the legal context that it is hard to imagine anything but a narrow settlement orientation unless the mediator and the lawyers and the parties are extraordinarily flexible, thoughtful, and capable of “escaping” the narrow frame that has by now encased their dispute.

¹⁰ A lot of the reports on settlement rate, however, are based upon criteria that differ from court to court. What “counts” as settlement is often defined differently.
NCRC also offers a Mediator Credential for those who complete a three step process. This includes observation of two mediations, co-mediation of 6 actual community cases, a mid-term coaching session with actors observed by a trainer, and then “a live Mediator Performance Evaluation.” Applicants perform a simulated mediation under the observation of NCRC evaluators. Professional actors play disputants roles. The evaluators use “a comprehensive assessment instrument” that “evaluates ... competency in eighteen different skill areas.”

“In 1990, a group of San Diego mediators representing San Diego Mediation Center (now NCRC), the local chapter of SPIIDR, the AAA, the former dean of USD Law School and other academics as well as private practitioners met in a collaborative process for six months to develop an instrument by which mediator behaviors could be evaluated. The group was motivated by concerns that regulation of mediation was inevitable and it was important that mediators have the controlling voice in what the standards of this emerging profession would be. At the time there were fears that consumer agencies or other institutions and professions would impose inappropriate requirements such as a particular academic degree (law or mental health in particular).

“The group agreed on three basic goals of a mediation and developed criteria to measure whether or not those goals had been reached through observing the performance of the mediator. The goals, as described in a law review article, Performance –Based Evaluation of Mediators: The San Diego Mediation Center’s Experience (Barbara Filner and Michael Jenkins in University of San Francisco Law Review , vol. 30, Spring 1996, No. 3) were:

“The goals were:

1. The mediator is neutral and behaves impartially.
2. The mediator directs or controls the process.
3. The parties, not the mediator, make final decisions about settlement.\(^{11}\)

“The goals were accepted by the whole group as central to a successful mediation regardless of the type of case. The above article lists several categories of cases including neighborhood conflicts, code violations, distributive (e.g. personal injury) cases, ‘rights based’ (such as sexual harassment) law suits, employment or labor disputes and reached the same conclusions in regard to skills needed for successful mediations.”\(^{12}\)

The group designed a tool with “18 observable skill sets “they “identified as necessary to achieve the goals articulated above.” NCRC observed simulated mediations with actors playing participants and concluded that the 18 skills were necessary to meet the goals outlined above.

“They were identified as what “worked” to help a mediation succeed in meeting the goals. They were skills identified through observation of mediators in thousands of mediations, many of which took place at NCRC (formerly San Diego Mediation Center) or at various Small

\(^{11}\) See (Performance –Based Evaluation of Mediators: The San Diego Mediation Center’s Experience by Barbara Filner and Michael Jenkins in University of San Francisco Law Review , vol. 30, Spring 1996, No. 3

\(^{12}\) From commentary on a draft of this paper by Steven Dinkin, President, National Conflict Resolution Center.
Claims Courts in San Diego County."

They also conducted interviews with mediators in which the mediators evaluated their own performance and also interviewed participants, usually on the phone. Mediators are assigned point values on each measure and must achieve a minimum score to receive a credential. The assessment tool has now been used for many years in San Diego and versions of the tool have been used in Germany and Bulgaria. NCRC reports that more than 600 mediators have received a credential.

Clearly, NCRC has invested an enormous amount of time, energy and thought in developing and utilizing its assessment methodology. It appears that validation of the instrument as measuring behaviors that are highly correlated with or causally connected to achievement of those goals has relied on self evaluation by mediators and post hoc interviews with participants. This type of study is capable of eliciting opinions and beliefs about what happened and what worked. It is not capable of supporting conclusions about what actually did happen and why.

We need to know more about the granularity of mediator interventions than whether or not, in general they demonstrate impartiality and support self determination. For example, if we accept that it is “good” for mediators to direct or control the process, we ought to be testing the types of behaviors that are believed to demonstrate “direction and control” to understand the actual impact on decision making, changed attitudes and other components of participant behavior that are, I believe, the real goals of the mediation process.

That is, people go to mediation because they want something about their conflict to change. They want it to be over and to make a deal or they want to improve communication or to feel understood. All of these ultimate results are achieved only when there are changes in attitude and behavior on the part of the participants.

Consider, by way of example only, Court A, which declares boldly that settlement of cases is the single most important policy objective served by its mediation program. To make an honest assessment of that court’s program requires us to understand what it is that mediators need to actually do to increase the likelihood of settlement.

We need to know where to look for that information. There needs to be a reliable, empirically derived and reasonably well accepted body of knowledge about “what works.” This means that, if the research has been done, we need to be able to skillfully assess and understand the findings, to know how to distinguish reliable conclusions that can be drawn from them from those that are only intuitively satisfying and, when some rational measure of confidence in the findings has been reached, share what has been learned with court administrators, trainers, mediators and consumers of mediation services.

6. LOOKING AT MEDIATOR BEHAVIORS TO GAUGE EFFECTIVENESS

The American Bar Association Section of Dispute Resolution Research and Statistics Task Force conducted a survey of court administrators and administrators of court ADR programs to assess what information they believed they needed in order to evaluate and demonstrate the effectiveness of their programs. The report identified the top ten data clusters these
administrators believed were important. Four of the most salient to this undertaking are listed below (along with the commentary included in that report.)

- Whether the case settled because of ADR. If settled, whether the case settled in full or settled in part.
  
  *Explanation: Advocates [of ADR (Ed.)] claim that ADR settles cases or at least narrows the issues in dispute. This question helps examine that claim.

- Case type (general civil, criminal, domestic, housing, traffic, small claims.)
  
  *Explanation: This information will permit examination of a number of claims and questions about ADR: For which cases is ADR most effective? Does ADR use and effectiveness vary by subject matter in dispute? Do more small claims cases settle in ADR than housing claims, for example? If the court has limited ADR funds, what kinds of cases should get priority for ADR?

- The cost of the ADR process to the participants.
  
  *Explanation: Critics suggest that the ADR process simply adds transaction costs to litigation. Advocates suggest ADR saves money. This question allows us to compare ADR costs to other studies on litigation costs.

- Satisfaction data: How satisfied are the participants with the process, the outcome, and the mediator.
  
  *Explanation: A key value in the justice system is that people who use it believe it is fair and provides justice. These questions are ways to determine how people who use ADR feel about their experience.

Using the ABA measures as a guide, it appears that program managers and designers who agreed that mediator effectiveness is a sine qua non of program effectiveness would, of logical necessity, measure mediator effectiveness according to the following criteria:

- Do the cases sent to a mediator settle?
- Is a particular mediator more likely to achieve settlement in certain areas of the law?
- Is the cost of using a mediator lower than the cost of other forms of dispute resolution?
- Do the parties report that mediators conducted fair processes that led to a just result?
- How do we know, then, why one mediator presides over more cases that settle than another?

Some questions that might be asked are:

- What kind of cases does the mediator handle?
- Are the cases sent to mediator A more contentious than those sent to mediator B?
- How large is the sample size and is the “settlement rate” of mediator A statistically significant?
- What do the participants say about the mediator?
- What do the participants say about why the case did not settle?
- What is the mediator actually doing during sessions (observational data)?
- How does the mediator decide what to do?
Although all of these questions are interesting and important to answer, I think the locus of a useful inquiry should be centered on mediator behaviors. That is, are certain mediator actions more strongly correlated with settlement? One recent study suggests, as have others previously, that settlement is highly correlated with the use of “pressing tactics” by the mediator. Pressing tactics, including behaviors more commonly seen as persuasion rather than facilitation are defined as precisely the type of behaviors that many mediators believe is anathema.

One value of framing the question this way is that it shifts attention from individual mediator characteristics, broad generalizations about a mediator’s “track record,” and claims to mediate according to a set of ideological beliefs about “what mediators should do” to practices that can be observed, quantified and, perhaps taught if proven to be useful.

Court mediation programs all have at least one thing in common: one way or another the litigants wind up in mediation with a mediator if the case is “selected” for mediation or “referred” to a mediator by the court, or the parties stipulate to participate in a court mediation program. This, of course, seems self evident but leads to the conclusion that effectiveness of the mediation program is dependent, primarily, then, on the effectiveness of the mediators themselves in achieving the goals of the court program, whatever they are. It is illogical to posit that a court ADR program can be “effective” or “good” if the mediators who mediate the cases aren’t also “effective” or “good” at what they do. Getting at the meaning of “effective” and “good,” is where, I believe, the real challenge lies.

If we are to go about proposing methods to improve the quality of court ADR programs, then, it seems that there are two projects that the court programs and their advisers need to undertake:

1. Identification, articulation and prioritization of the goals and policies of the program.
2. Evaluating the effectiveness of the court’s mediators in achieving those goals.

We need to know what the broad range of useful goals is for mediation and what mediator behaviors are best for achieving them. We also need to know which mediator behaviors that are proven effective in achieving those goals can be evaluated and can they be taught.

I suggest that, for a start, we narrow the focus on settlement. I make this suggestion fully aware that there are many (perhaps more socially, philosophically, politically and emotionally satisfying) purposes served by Court ADR programs. I understand that the mediation community urges mediators to help parties to conduct “procedurally just” processes.

Procedural justice focuses on the fairness of the process, not the outcome or results. A large body of research in many settings has solidly established that certain aspects of procedures lead participants to view them as fair. These include that that third party was neutral, permits them to present their views, gives what the parties said serious consideration, and treats them with respect. Research also has found that viewing the process as fair is related to feeling the

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14 One commenter noted that this raises an “interesting, open question: to what extent can best practices be separated from best practitioners?”
outcome is fair, compliance with agreements, and favorable views of the court.\textsuperscript{15} I understand and have argued myself, often forcefully, for broadening the range of issues that are dealt with in court connected mediation.

For better and for worse, though, at least in Court ADR and the cases that wind up in mediation because lawyers took them there, many, perhaps most, identify settlement as the primary objective. Given this reality and, given the relative ease of defining this result in some objective way (e.g., dismissal of litigation) I believe it makes sense to start trying to answer a simple yet perplexing question: \textit{what mediator behaviors are more likely to lead to the settlement of disputes?}\textsuperscript{16}

As of the time of this writing I have not found a comprehensive summary of empirically verifiable knowledge about what mediator behaviors are effective in moving litigants to make agreements from data collected since mediation has become institutionalized in courts and civil disputes all over the world. I have proposed to the Mediation Committee of the ABA dispute resolution section and the Court ADR Committee that we undertake a long term project to collect what is known about this in one place. I call the project “From Knowledge to Practice” in homage to and, hopefully, building upon, the seminal work of Christopher Honeyman, “From Theory to Practice.”

First steps are now underway. There will be a mini conference within a conference on mediation research at the 2012 ABA Dispute Resolution Section’s annual conference. There will be two consecutive sessions: “Looking Backward,” and “Looking Forward.”

The first session will feature panelists Ken Kressel and Dean Pruitt, authors of the first and only book on mediation research, Jim Wall and Craig McEwen, with me as moderator. This primarily didactic session will introduce attendees to the history of mediation research and summarize what we know about the effect of mediator interventions on a full range of measures in all types of disputes based on real evidence. The panelists will also provide a look at what is going on in mediation research right now: who's doing what and far along are they? This should be of interest to practitioners, trainers, academics and all who are interested in what the evidence actually shows.

The second session, \textit{Looking Forward}, will be a discussion on the future of mediation research facilitated by Carolyn Penny, a renowned practitioner and educator in collaborative problem solving processes from University of California, Davis and Common Ground. Panelists include Roselle Wissler, Phillip Glenn, Nancy Yeend and Tania Sourdin. This session is designed to pave the way forward for mediation research. We will ask questions such as:

- What types of questions should we ask?

\textsuperscript{15} Nancy A. Welsh, Making Deals in Court-Connected Mediation: What’s Justice Got to Do with it? 79 Washington Univ. Law Quarterly 787, 817-827 (2001)

\textsuperscript{16} It is worth noting, however, that research has found that some of the mediator actions that increased settlement led the parties to feel pressured and to view the process as unfair. If you want a cite, it is: Roselle L. Wissler, Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research, 17 Ohio State J. on Dispute Resolution 641, 700-701 (2002).
How can we foster more empirical research on mediation?
How do we disseminate it: an annual conference, a dedicated journal?
How best can empirical research help mediators become more effective at what they do?

I hope that this paper can be a useful foundational document for the conference and to spur debate and action that will enhance our practice, our programs and our teaching. I've been fortunate enough to participate in development of court connected mediation and the growth of the practice of mediation over many years. I am excited about the prospects of understanding better how best to do our work.

THANKS
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