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DESIGN REQUIREMENTS FOR MEDIATOR DEVELOPMENT PROGRAMS

Joseph B. Stulberg* and B. Ruth Montgomery**

The use of alternative dispute resolution (ADR) processes to resolve disputes has developed steadily during the past two decades. Such efforts have invited analysis of their conceptual desirability1 and institutional effectiveness.2 However, as controversial as those analytical debates are or as uneven the use of ADR forums might be, as a practical matter, ADR processes are a permanent feature of our jurisprudential system.3 Given that reality, it is important to analyze and evaluate different features of their operations.

Writers catalogue ADR processes in various ways. One impor-

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1. See generally Mediation Contexts and Challenges (J. Palenski & H. Launer ed. 1986) (surveying the validity of mediation practices in a variety of social contexts); Vermont Law School Dispute Resolution Project, A Study of Barriers to the Use of Alternative Methods of Dispute Resolution, (1984) [hereinafter VLS Project] (noting the barriers and impediments to widespread use of ADR process); Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev 668 (1986) (discussing the impact of the ADR movement on traditional litigation); Fiss, Against Settlement, 93 Yale L.J. 1073 (1984) (arguing that interpersonal power balances mandate the courts as the only appropriate arenas for resolving disputes).


3. American Bar Association, Dispute Resolution Program Directory (1986) (finding the number of community dispute resolution programs has remained relatively steady at over 300).
tant distinction that is often made divides ADR procedures according to the degree of decision making authority that the disputing parties vest in the third party intervenor. Two primary groups emerge: those ADR forums in which the designated intervenor has the authority to render a binding decision on the disputants and those in which the intervenor's role simply is to facilitate settlement discussions through persuasion. ADR processes that fall into the first category include grievance arbitration systems, commercial arbitration, rent-a-judge programs, mini-trials, and court-annexed mandatory arbitration programs. The latter category includes conciliation and mediation systems that focus on resolving impasse issues in collective bargaining, employee grievances, interpersonal disputes, environmental controversies, civil rights disputes, and separation and custody issues.

In this paper, we examine one limited topic: how an agency that administers an ADR program effectively trains a person to serve as a facilitative intervenor, i.e., as an intervenor who has no authority to impose a decision on the disputants in the event that they cannot

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5. Id. at 40-42. See D. MCGILLIS & J. MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS 17 (1977).
6. While many such programs provide for a trial de novo if parties are not satisfied with the outcome of the ADR forum, program designers have helped formulate statutory provisions that provide financial incentives for parties to accept the results of the ADR forum. See S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 226-31 (1985) [hereinafter DISPUTE RESOLUTION] and the statutory references contained therein.
7. See generally Getman, Labor Arbitration and Dispute Resolution, 88 YALE L.J. 916 (1979) (describing labor arbitration programs as the “paradigm of private justice”).
8. Id.
9. See Bethel & Singer, Mediation: A New Remedy for Cases of Domestic Violence, 7 VT. L. REV. 15 (1982) (explaining that while mediation is most often no less costly than court proceedings, it is more efficient because it does not draw on the scarce resources of the legal system).
10. See generally McCrory, Environmental Mediation—Another Piece for the Puzzle, 6 VT. L. REV. 49 (1981) (discussing the role of mediation in the resolution of environmental disputes); Susskind, Environmental Mediation and the Accountability Problem, 6 VT. L. REV. 1 (1981) (advocating a methodology for environmental decision making and dispute resolution when mediation is used).
resolve the matter in a mutually satisfactory way. For some programs, notably the more than 350 neighborhood justice centers (NJC) operating throughout the country in which misdemeanor charges are referred to a mediation process for resolution, the operative assumption has been that citizen volunteers of varying backgrounds can be trained to perform as mediators. In other contexts, such as mandatory custody hearings, the programs assume that persons with a prescribed professional training already possess the requisite skills to serve as mediators. In hiring persons to serve as government agency staff mediators of labor-management conflicts, an agency such as the Federal Mediation and Conciliation Service (FMCS) believes that by supplementing an individual’s relevant work history with the agency’s internal apprenticeship training program, the agency can develop competent mediators. The fundamental assumption of each of these approaches is identical: the intervenor’s tasks and responsibilities can be identified, the qualifications necessary for executing the mediation process can be established, and persons can acquire the requisite education and training in order to perform it. Some individuals may have natural inclinations that make the training process more likely to be successful, but no one is a born mediator.

Our analysis focuses primarily on how NJCs recruit and train persons to serve as mediators, although we do examine some implications of our analysis for mediator development efforts that serve other ADR forums. Our goal is to develop a conceptual framework and model format for conducting such development efforts, but the rationale for our concentrating on NJCs requires elucidation.

NJC serve parties involved in disputes that might otherwise be prosecuted as misdemeanors. As many commentators note, these

13. Referral to a mediation center is typically through the District Attorney's office or through the courts. For a description of the standard program formats of Neighborhood Justice Centers, see D. McGillis & J. Mullen, supra note 5.


15. Telephone interview with Janice Boggess, FMCS Training Officer and Staff Assistant to the Executive Director (March 27, 1987). See Susskind, supra note 10, at 4 n.9 (stating that FMCS "[m]ediators are selected for the job because of their demonstrated skills in collective bargaining").

cases constitute matters that are not of major social policy significance although they matter greatly to the individual disputants.\textsuperscript{17} Additionally, these cases are referred to a mediation process where the intervenor has no authority to prescribe the outcome. One might expect therefore, that only a modicum of interest and attention would have been paid to the question of who serves as mediators. In fact, quite the contrary has occurred. NJCs, more than other ADR agencies or programs, have analyzed the challenges of how to find mediators or develop programs for training persons to become mediators.\textsuperscript{18} The animating spirit in part, no doubt, has been that NJCs typically use non-lawyers in the neutral's role to handle court-referred cases; as such, NJCs must establish their credibility with lawyers and judges and gain their confidence if they are to have them endorse and support the use of the process.

During the 1960's and early 1970's, the development of selection guidelines and training curriculum proceeded in a virtual vacuum. While drawing to some degree on the model of dispute resolution exemplified by the collective bargaining and mediation processes used in private sector labor-management relations, experimental efforts have blended materials from the law, psychology, anthropology, communication, and the sociology of group action to train persons to meet program needs.\textsuperscript{19} Model curricula were developed and revised. Guidelines for recruiting potential mediators were articulated. Most important, NJCs provided the laboratory—i.e., actual cases—to confirm whether the efforts were successful and where adjustments were required.\textsuperscript{20}

These various factors have generated more discussion and activity concerning the selection and training of mediators than any comparable ADR effort, but the approaches to training used by NJCs have been episodic, if not inconsistent. Budget limitations have led to regrettable compromises in the design or implementation of such de-

\textsuperscript{17} \textit{Dispute Resolution, supra} note 6, at 7.
\textsuperscript{19} \textit{Interim Evaluation Report, supra} note 18, at 54-55.
\textsuperscript{20} \textit{See Dispute Resolution Alternatives Committee (DRAC), Study of Five CDS Programs in Florida} (1979). This study constituted the first credible evaluation of such programs. Of course, public funding of these projects carried with it an implicit evaluation component inasmuch as unsuccessful programs would not receive continuing funding. The prototype centers funded by the Department of Justice had an explicit evaluation study, though only a small part of it focused on the selection and training of mediators. \textit{See Interim Evaluation Report, supra} note 18.
development programs. Our analysis identifies the necessary focal points for any NJC mediator development program and explains the relationships among them. It identifies the suitability of different pedagogical approaches to meet divergent training goals and it elucidates the different levels of evaluation that are ingredient to assessing the program's success. As a result, our analysis establishes a framework for assessing the strengths and weaknesses of mediator development programs that are used in support of other ADR forums.

Our analysis proceeds as follows. In Section I, we identify the tasks that comprise the mediator's role and the qualifications necessary for performing those tasks. We then identify the various skills and strategies that mediators employ to discharge their jobs effectively. In Section II, we set out the three constituent components of any mediator development program; we describe how NJCs typically handle those matters and identify criteria that enable us then to assess at a general level the effectiveness of efforts to implement these components. In Section III, we set out an analytical scheme for assessing a mediator development program and illustrate its application in the NJC context. Finally, in Section IV, we address the methods for evaluating the effectiveness of a mediator development program and two issues emanating from that subject: the transferability of mediation skills from one substantive area to another and the matter of licensing mediators.

I. THE MEDIATOR'S JOB

The mediator's job is to assist parties develop terms of settlement which they find acceptable. The fact that the resolution may be inefficient, short-sighted, or selfish is irrelevant, and whether the mediator approves of the settlement terms is unimportant. The goal of the mediation process is to facilitate the democratic decision-making process in which the disputing parties are engaged.

By agreeing to mediation, negotiating parties commit themselves to participating in a process in which the goal is to develop concrete commitments to do things that resolve the controversy. The parties articulate the substance of their dispute and attempt to resolve it through mediated negotiations, where they must mutually adopt any of the solutions that are proposed or developed. If no mu-

21. See generally J. Stulberg, Taking Charge/Managing Conflict 1-133 (1987) (discussing the full range of strategies, techniques and skills that facilitate mediation).
tually acceptable settlement terms are identified, then negotiations break off; mediation negotiations do not guarantee finality of disposition. The mediator's job is to structure the discussion so that the settlement-building process has the optimum chance for success.

This conceptualization of the mediation process, when incorporated into an NJC financially supported with public funds, must be limited in the following way: parties are not permitted to develop solutions that are illegal, even if the parties find such arrangements acceptable. That does not mean, however, that a mediator simply tries to persuade persons to resolve their dispute by agreeing to do things that the law would require them to do if legal rules were applied to resolve their controversy. What distinguishes the mediator's frame of reference from that of other intervenors is that a mediator cajoles parties to agree to settlement terms that are legally permissible even if not legally required. For instance, a mediator might prod a landlord to consider letting a tenant remain in his apartment and accept a schedule of periodic payments for rent in arrears even though the application of the pertinent legal rules in that jurisdiction would incontrovertibly result in a favorable judgment for the landlord. Similarly, a mediator might try to persuade a tenant to consider paying for a necessary improvement to the apartment, even though it is arguably an expense that the landlord should absorb, if the tenant's so acting might induce the landlord to renew the lease for a stated term. A myriad of other settlement options are possible. What is obvious is the following: the mediation process encourages parties to examine what their interests are—legal, business, political, economic, personal—and to explore settlement terms that satisfy those interests. The mediator structures the discussion in order to get parties to pinpoint those concerns and identify various options for satisfying them. What gives mediated negotiations their flexibility is that the mediator is not simply a compliance officer who blindly demands obedience to one set of rules.

The preceding discussion emphasizes the considerable freedom of thought and action that the parties and mediator enjoy when en-

22. Id. at 56.
23. Once an agreement is reached and signed by the parties, it has a binding effect. In the event of non-compliance, the parties are instructed to contact the NJC. If the NJC is unable to effect compliance, the agreement can be enforced by the courts without litigating the original dispute.
25. Id. at 24.
gaged in settlement discussions. While one hopes that parties capital­ize on this freedom in order to examine thoroughly and imaginatively the possible ways to resolve their controversy, there is no guarantee that this will happen. In mediation, negotiating parties are free to resist settlement not only because they believe the proposed terms are contrary to their interests, but also because they choose to remain obstinate, foolhardy, or stubborn. This phenomenon requires us to characterize the mediator’s job in an enriched, realistic fashion: a mediator must develop a structure to the negotiations so that the subsequent efforts of the parties and mediator are purposeful, efficient, and designed to stimulate agreement.

Given this basic charge, the mediator’s major functions include: chairing the discussion; clarifying communications; educating the parties; translating proposals and discussions into nonpolarizing terms; expanding resources available for settlement; testing the reality of proposed solutions; insuring that proposed solutions are capable of being complied with; serving as a scapegoat for the parties’ vehemence or frustration; and protecting the integrity of the mediation process. In order to discharge these responsibilities effectively, a mediator must be neutral, impartial, objective, flexible, intelligent, patient, persistent, empathetic, effective as a listener, imaginative, respected in the community, honest, reliable, nondefensive, persevering, persuasive, forceful, and optimistic. While these may appear to be the characteristics of a saint, many persons do possess most of these traits in sufficient degree to be capable mediators.

How do these functions and characteristics relate to one another? Assume one party has difficulty speaking the English language; the mediator must be patient when explaining particular concepts to that individual so that hesitations born of misunderstandings do not sabotage potential agreements. Similarly, it becomes the mediator’s job to inform forcefully a party who is advocating settlement terms that would bankrupt the other party’s resources that it is a waste of everyone’s time even to consider such a proposal.

Within this general framework, a mediator performs specific tasks. He prepares for a mediation session, begins the discussion, conducts the fact-finding process, identifies appropriate negotiating

27. J. Stulberg, supra note 21, at 43-57.
28. Id. at 59-63.
29. Id. at 69-76.
issues and develops a discussion strategy, \(^{30}\) generates movement (either in joint or private sessions), and closes the discussions. \(^{31}\) How one executes these tasks can be identified and taught; they are the guidelines against which one can assess whether or not a person is performing the job capably. How the mediator handles these tasks can be decisive for the mediation process.

Before a mediator brings the parties into a hearing room, he must consider where people should sit. \(^{32}\) Does it matter? If four different families are involved in a continuing fracas in the neighborhood, should they all be in the room at the same time, and, if so, how situated? Once people are seated, someone must start talking. Unlike a trial in which the parties' advocates are presumed to be familiar with court procedures and who begin by making opening statements regarding the case, a mediator at an NJC presumes that no one has previously participated in mediated negotiations. As a result, the mediator normally makes some opening remarks in order to educate the parties about the mediation process and the procedural guidelines that will govern the discussion. To do this effectively, he must know what to say and the order in which to say it, and must use a vocabulary that is both understandable to the participants and consistent with a mediator's posture of neutrality. \(^{33}\)

The fact-finding process requires the mediator simultaneously to listen effectively and to probe deeply. How can he do that? There are behavioral indices of effective listening; they include maintaining direct eye contact, resisting distractions, \(^{34}\) and using summarizing techniques that pinpoint the psychological as well as substantive content of the speaker's message. \(^{35}\) He must take notes in a way that complements effective comprehension but does not disrupt commanding eye contact.

An effective start and rich development of the dispute's factual context are prerequisites for a mediator executing his more important tasks. A mediator must separate the disputant's negotiating issues from their clashing personalities or bigoted attitudes and restrict the discussion agenda accordingly. There are guidelines for making this fundamental distinction. Additionally, a mediator must

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30. Id. at 81-87.
31. Id. at 123-26.
32. Id. at 61-63.
33. Id. at 65-67.
34. Id. at 70.
35. Id. at 72-73.
frame the negotiating issues in a manner calculated to enhance negotiating leverage. If during a mediation session, a supervisor accused his subordinate of disobeying properly promulgated directives, using offensive language, threatening his physical safety, and stealing his Walkman, a mediator would be acting ineptly if he labeled the negotiating issues as ones involving alleged acts of "insubordination" and "larceny."36

Once the mediator has helped the negotiating parties distinguish and frame the negotiating issues, he takes charge of establishing the order in which the issues are discussed. There is, however, a rationale for selecting some discussion frameworks rather than others. Dividing negotiating issues into such various substantive categories as financial matters versus behavioral concerns or issues of urgency versus those less pressing has advantages that do not attach to the strategy of arranging them according to the nature of their potential remedies.37 The mediator must know the strengths and weaknesses of competing frameworks, evaluate the negotiating issues against those standards, and then select the starting point that bears the greatest likelihood for catapulting the discussions in a favorable direction. In making this analysis, time is of the essence, for as soon as the fact-finding effort is complete, the mediator must instantaneously frame the issues, evaluate them against alternative discussion frameworks, select a strategic discussion context, and proceed without any pause in the dialogue.38

The challenge of mediating, however, has barely started. The mediator's primary contribution is to persuade persons to agree to do things that they had previously resisted doing. Persuading one party to refrain from playing his drums at midnight is not readily accomplished simply by reminding the offending party of the requirements of a local noise ordinance. Convincing a person not to harass his neighbor, reduce his financial demands, or make other accommodations for settlement is achieved through the conscious use of identifiable persuasive techniques. The skillful mediator moves smoothly from focusing on inconsistencies, examining past practices, and noting vulnerabilities, to highlighting mutual or compatible interests, linking general principles to concrete solutions, developing trade-offs, creating procedural guidelines to resolve contested issues, or portray-

36. *Id.* at 84-87.
37. *Id.* at 89-90.
38. *Id.* at 93.
ing vividly the costs to each party for continued intransigence. If necessary, the mediator might choose to meet individually with each party; he must know when such sessions are properly called and how to focus the ensuing discussion. In conducting consecutive caucus sessions, the mediator must know how to protect offers of movement, honor confidences, and yet use the information obtained in order to stimulate movement towards an agreement.

Finally, the discussions must conclude. If there is no agreement, the mediator must bring the discussions to a close without leaving the parties feeling hopeless about ultimately resolving their problems. If the parties do reach an agreement, the mediator commits it to written form. In doing so, he must employ the standard skills of draftsmanship: minimizing ambiguities, developing a balance among the terms of agreement, and structuring the order of the substantive accord so that it is strategically sensitive and logically coherent. Additionally, since the mediator writes the agreement while the parties wait, he must do it quickly and accurately.

This is a skeleton account of what a mediator does when serving in a dispute at an NJC. This is not a mystery, nor is it magic. What the account reveals is that a mediator acts in thoughtful, deliberate ways. Failing to do certain things does not simply make the job harder; rather, it undercuts what the mediator is supposed to be doing. Being inattentive to one’s language, for instance, is not just an example of mediating ineffectively; it is bungling the job in the same way that a doctor who administers a drug known to have adverse effects is acting ineptly rather than simply making it more difficult to cure the patient. The important conclusion to draw is that whether the parties reach a settlement is not the only standard for determining if one has mediated capably. There are multiple performance criteria for examining and evaluating the quality of a mediator’s performance. The challenge is how an NJC can help a person develop the skills to perform these tasks.

II. DIMENSIONS OF A MEDIATOR DEVELOPMENT PROGRAM

How does one train an individual to become a mediator? When designing any training program, the first step is to identify training needs and consequent objectives. To do this, one must specify the

39. Id. at 104-06.
40. Id. at 120.
knowledge, skills, on-the-job behavior, and organizational results that are the desired end products of the training program. These elements, all but the last of which were discussed in Section I, constitute the foundation for the development of the specific needs and objectives of any NJC mediator training program. The concept of training, however, encompasses more than just conducting a concentrated, skill-building workshop. It consists of a development process that includes a series of three interrelated components: (1) a selection process for procuring appropriate candidates for service; (2) a course of study or workshop that teaches practitioner skills; and (3) a post-workshop setting in which candidates apply skills to actual disputes. In this section, we shall analyze each dimension of the training effort and examine how it is typically implemented in an NJC. Important design criteria will be discussed but a thorough analysis of the ways in which these dimensions interrelate will be left for Section III.

A. Selection

As part of the selection process, NJC staff personnel engage in a broad range of community outreach activities in schools, community action organizations, religious institutions, and business and professional organizations. When describing NJC activities to these various constituencies, they typically invite interested persons to apply to serve as mediators, mentioning the profile of desirable mediator characteristics as prerequisites for service. Some programs advertise in newspapers and on radio to recruit volunteers. Candidates complete application forms in which they are asked to list past activities which they believe would enable them to perform effectively in a dispute environment. Responses typically cite work-related experiences, volunteer work, or life experiences in which candidates were required to help resolve varying types of controversies involving persons of diverse backgrounds. NJC staff disqualify persons at this stage if the applicant has extremely limited experience, is unable to devote the required volunteer time to the program, has a reputation in the community that jeopardizes her ability to be perceived as de-

42. See D. McGillis & J. Mullen, supra note 13, at 454.
43. N.Y. Daily News, May 15, 1987, at 51, col. 3 (carrying a “community brief” advertising for persons to apply to serve as mediators at the Queens Mediation Center, Queens, New York).
44. Younger applicants typically fall into this category.
tached and neutral, or displays a profound misunderstanding of the mediation process. The remaining applicants are interviewed by the NJC director or her staff. The interview enables the staff to assess a candidate's oral skills, demeanor, range of life experiences, and understanding of the program. Through deft questioning, the interviewer can gain a sense of the candidate's tolerance for differing life styles, her attitude towards groups of persons who are consistent users of the mediation service, and her relative degree of comfort in dealing with emotionally charged exchanges. If there is a match, the individual is invited to participate in the workshop.

Choosing the criteria to assess applicants is a crucial component of a training program, for the choices made significantly influence what must be taught in the subsequent training program. While an NJC can typically assume that interested citizens from the community have a reasonable familiarity with the sorts of disputes that arise in the community, it generally would not be wise to assume substantive knowledge of specific laws governing landlord-tenant relations, consumer-merchant rights, or family court operations. Only if such knowledge is explicitly included as a selection criterion can instruction in such substantive matters be omitted from the subsequent training efforts. By contrast, successful applicants for jobs as mediators with FMCS must have seven years of collective bargaining experience. Thus, the subsequent training efforts do not have to include a component that inculcates an understanding of the collective bargaining process within the private sector industrial system.

45. For example, an active spokesperson of a highly visible community advocate organization or a local, provocative, and controversial radio talk-show host might not be perceived as neutral intervenors.

46. Interview with Mark Smith, Brooklyn Mediation Center (May 18, 1987); Interview with James Goulding, Queens Mediation Center (May 1, 1987); Interview with Joanne Vilaghy, Common Ground, Columbia County, New York (June 12, 1987). All three described the processes used at their respective mediation centers.

47. The staff has a decided interest in weeding out inappropriate candidates at the earliest possible time, since most programs must commit substantial staff time to selecting and guiding a person to service as a mediator and, in some cases, actual budget dollars to pay consultants to conduct the workshop. The selection process takes into account that persons must serve as mediators for all types of disputes involving all kinds of individuals; there is no specialization among mediators either for substance or parties. A mediator may handle a consumer-merchant dispute at one time and a domestic dispute at another. Similarly, the types of individuals who are parties will routinely vary with each dispute.

48. See, e.g., D. McGillis & J. Mullen, supra note 5, at 72-75 (comparing the advantages and disadvantages of lay citizens, law and other graduate students, professional mediators, and lawyers as mediators).

49. Interview, supra note 15.
but can concentrate on developing the skills and techniques required to mediate.

When implementing a training and development program in any context, careful planning must be devoted to the methods used to assess whether the applicants meet the established selection standards. These methods could include application blanks, aptitude and personality tests, assessment centers, and interviews. Any selection method that is used should be one that is a valid predictor of future training success as well as on-the-job success. The methods used in NJCs are primarily application forms and interviews. Despite the wide use of personal interviews, remarkably little attention is paid to its validity as a selection device. All too often, interviews are conducted in an offhand manner that is unlikely to gather the data necessary to make accurate predictions of future success. To enhance its validity, interviewers must define precisely what they want to assess during the interview and then structure the discussion to ensure that they elicit the desired information. Assessment of all candidates must be based on reasonable data and be done uniformly across all prospective candidates.

For the NJC, the selection process typically yields a group of approximately twenty-five persons who participate in a structured workshop session.

B. Workshops

Workshops have become the focal point of mediator training. Consisting normally of a minimum of twenty-five hours of instruction, the workshop constitutes the most intensive orientation and training that the potential mediator obtains in preparation for her service. It is in this forum that lectures, exercises, demonstrations, and role playing are used to enrich participant’s understanding of the mediation process and sharpen skill performance.

50. See G. Milkovich & W. Glueck, supra note 41, at 331-32.
52. Id.
53. Id. at 352 (Table 11.1 lists seven common deficiencies in the selection interview).
54. See D. McGillis & J. Mullen, supra note 5, at 43 (number of trained mediators in six dispute processing projects).
55. E.g., N.Y. Jud. Law § 849-b(4)(b) (McKinney 1987) (providing that “[a] center shall not be eligible for funds under this article unless . . . it provides neutral mediators who have received at least twenty-five hours of training in conflict resolution techniques”); see D. McGillis & J. Mullen, supra note 5, at 75.
56. See D. McGillis & J. Mullen, supra note 5, at 104-05, 118-19, 131, 145, 159, 171; Interim Evaluation Report, supra note 18, at 54-55 (noting that different approaches
Most workshops today exhibit common topics and focal points: (a) a description of ADR efforts nationwide; (b) an examination of general principles of conflict resolution; (c) an assessment of the values embodied in the mediation process; (d) the strengths and weaknesses of the mediation process as a dispute settlement procedure; (e) a description of the administrative regulations and referral procedures used in the NJC; and (f) practitioner skills. There is a surprising lack of uniformity, however, in the manner in which these topics are taught. Some programs consist largely of a lecture orientation, perhaps supplemented by a film, while others are almost entirely experiential. The training and development literature, however, offers some guidance for matching pedagogical techniques to the distinctive substantive topics.

Heneman, Schwab, Fossum and Dyer categorize the variety of off-the-job instructional techniques into three types: information presentation techniques, information processing techniques, and simulation techniques. Each set of techniques is appropriate for certain learning objectives.

Where the learning objective is knowledge acquisition, information presentation techniques such as lectures, readings, films, and panel discussions are effective and efficient. Where the material is complex, these information presentation methods are best supplemented by group discussions, an information processing method. Group discussions promote trainee participation, thereby helping to ensure that complex material is completely understood. In NJC mediator training, the objectives that are best achieved using these methods are those that focus on the trainees acquiring knowledge of conflict resolution principles, program administrative rules, case to mediator training are influenced by a particular NJC's perspective and goals).


58. See D. McGillis & J. Mullen, supra note 5, at 89-172.


60. Id. at 399. Information presentation techniques are primarily designed to impart information with a minimum of activity by the student. Information processing techniques involve groups of students generating and discussing the material to be learned. Simulation techniques are designed to represent the work environment and to actively involve the student.

61. Id.

62. Id. at 401.

63. Id.
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processing procedures, laws and practices relevant to substantive disputes that arise with noticeable frequency, and the types of social services parties can be referred to as part of, or in addition to, their mediation agreement.

In contrast, where the learning objective is attitude change, such as reinforcing the trainees' confidence in their capacity to assist parties resolve disputes even though they lack the authority to impose a binding decision, information presentation techniques are not appropriate. Rather, group discussion, an information processing technique, and role playing, a simulation technique, are most effective.64 Furthermore, where mastery of behavioral skills is the learning objective, the most appropriate type of instructional technique is the simulation category.65 The key to the effectiveness of these techniques is that they involve active participation, opportunities for immediate feedback about results, and practice of the skill to be mastered.66 Role playing, case discussions of actual mediation problems, and mock mediations are all simulation techniques that can be used effectively in a mediation training program to develop mastery of such skills as starting the sessions, listening, questioning, identifying and framing negotiating issues, conducting a caucus, or persuading parties to change their points of view.67

These elementary but important insights into pedagogical techniques warrant our drawing some preliminary conclusions about mediation training workshops. First, they warn us that any workshop program which represents that it can train persons in a three hour course must be scrutinized carefully. To be effective, such a program would require extraordinary selection criteria for admission. More likely, however, such a program is using the wrong instructional technique—lecture rather than simulation—to teach the behavioral skills that are necessary to mediate effectively. Simulations, by their very nature, are more time consuming than are other instructional techniques.

Second, given the typical selection criteria used by NJCs, a small percentage of applicants would be exempt from the workshop program because of "equivalent experience." Lawyers, for instance, often believe that they do not need mediation training because their

64. See H. Heneman, supra note 59, at 401; K. Wexley & G. Latham, Developing and Training Human Resources in Organizations 130 (1981).
65. H. Heneman, supra note 59, at 401.
66. See K. Wexley & G. Latham, supra note 64, at 130.
work experience routinely requires them to deal with parties in controversy, but that posture misconstrues the nature of the mediation process and the skills required of the intervenor to generate agreements. It is unlikely that a lawyer, through her formal training or practice as an advocate, has paid attention to the manner in which a neutral third-party intervenor persuades parties to settle. Similarly, therapists, by training, might be effective, empathetic listeners, but their background does not prepare them adequately for discharging the mediator's tasks of crystallizing issues, moving competing parties aggressively beyond stalemates or towards commitments to concrete action.

Third, one way to evaluate the quality of different mediator workshop programs is to assess the various pedagogical techniques that they deploy. Workshops that consist of forty to fifty hours of simulated hearings might, at first blush, appear to be the most effective in enhancing behavioral skills; but if role playing constitutes the exclusive teaching technique, then the program has not sharply delineated different training objectives and shaped pedagogical techniques to match them. Not only might such an approach be an inefficient use of time, it might also create the impression that the mediator's job consists exclusively of executing a series of gambits and techniques divorced from any normative values or goals; to create and convey that impression produces mediators with an impoverished sense of the potential and limits of their service.

Fourth, if simulations are to be used, the ratio of trainees to instructors must be such that the value of the simulation technique is realized. Everyone has to have a chance to practice the skill and receive prompt feedback. Ideally, each instructor would be assigned a maximum of fifteen students.

Fifth, in choosing workshop materials, incorporation of the dispute context in the workshop exercises is critical to the ability of trainees to apply these skills as mediators. One condition that increases the likelihood of successful transfer of training is maximizing the similarity between the training situation and the performance situation. Couching workshop materials—most particularly simulations—in the context of the disputes to be mediated is vital to the successful transfer of skills. Since the skills employed by mediators

68. See Interim Evaluation Report, supra note 18, at 55. The discussion of "process" skills versus "technical" skills in the evaluation report naively assumes this distinction to be valid.
69. K. Wexley & G. Latham, supra note 64, at 75.
are not unique to the mediation process, there has been a tendency for consultants to conduct NJC mediator workshops by isolating such skills as listening, questioning, persuasive strategies, consensus-building techniques, and caucusing and then using prepared, "standardized" exercises to sharpen these skills. But, given that the trainees in an NJC program do not have prior mediation experience, such an approach is not well matched to the training objective, for the trainer is leaving the responsibility to the trainee to determine how that skill is applied in the context of mediating an interpersonal dispute. Conversely, if the exercise used in training is based on the sorts of situations that the trainees are likely to face as mediators, the transfer challenge is markedly reduced.

In Section I, we identified those functions, skills, and tasks that constitute the mediator's contribution to successful dispute settlement. They make possible and constitute the substantive focal points of a well designed mediator development workshop. The discussion above reinforces the conclusion that teaching someone to perform the range of functions comprising the mediator's job itself requires a careful mixing of the variety of teaching techniques and the substance of the exercises with the various topics to be covered. How well this is done has direct implications on how the remaining dimension of the training must be conducted.

C. Apprenticeship Training

The most complete sequence for an apprenticeship program (on-the-job training) at an NJC involves three components: a period of time during which the apprentice observes experienced mediators conduct cases; a segment in which the new mediator is assigned to

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70. Consider the challenge of teaching someone effective listening skills. How can that be done? A popular exercise divides the trainees into dyads and directs them as follows: A is to tell B about some activity (e.g. what he did the previous evening, what his favorite hobby is, his views on an issue such as abortion, etc.). When A has completed his statement, then B must summarize what he has heard. Such responses must include both the subject-matter content of what was said as well as the emotional dimension of the statement. If B inaccurately rephrases what A said, as confirmed by A, then A restates that portion of his comment and B must summarize it again. Only after B has accurately summarized what A stated does he proceed to make his statement about a similar activity which A must then summarize. The goal of this exercise is to sharpen the participant's listening skill so that when parties to a dispute are sharing their concerns with him, the mediator accurately captures the full range of the parties' message. But does it work? Does this prepare the trainee to capture accurately the heatedly hurled accusations by a store owner that his former employee pilfered goods, destroyed items in the store, and is leading a picket line in front of his store, or to appreciate the extraordinary amount of information that can be gleaned by letting persons yell uninterruptedly at one another about the matters that brought them to the NJC? By itself, not very well.
conduct a case with an experienced mediator ("co-mediating"); and a segment in which the trainee conducts the case completely on her own with a mentor observing her performance.\textsuperscript{71}

1. Observation. — Watching actual cases makes vivid the materials covered during the workshop.\textsuperscript{72} It permits the apprentice to shape her expectations to the reality of the hearing environment. To the degree that the workshop materials accurately reflect that environment, the apprentice should not be caught off guard by what she sees; hence, she should gain confidence rapidly in her ability to perform. But the observation phase is not a passive undertaking.\textsuperscript{73} The apprentice takes an active role in order to learn and grow.

Normally, an apprentice meets with the mediator following each hearing.\textsuperscript{74} Each dissects what has transpired. The mediator asks the apprentice to identify the issues, sort out the possible strategies that could have been used to direct the discussion and evaluate their distinctive strengths and weaknesses, and pinpoint persuasive strategies that the mediator employed during the hearing. When agreements are reached during a mediation session, the mediator frequently instructs the apprentice to write her version of the agreement while the mediator prepares the actual document. The parties to the dispute never see the apprentice's document, but following the hearing, the mediator reviews it, compares it to her own, and then offers constructive comments about its format, language, and content. This process takes advantage of the fact that most human behavior is learned observationally through modeling the behavior of others.\textsuperscript{75} It also eases the fear of failure for the trainees. The likelihood of learning the desired behaviors is enhanced by defining them clearly in the training program prior to the observation of skilled mediators\textsuperscript{76} and by the immediate feedback provided by the follow-up discussion and analysis of the mediation.\textsuperscript{77}

During this observation phase of the training, the apprentice, to

\textsuperscript{71} See, e.g., The Brooklyn Mediation Center Mediator Apprenticeship Program (on file at Hofstra Law Review). This twelve week apprenticeship program was authorized by Susan Marcus, Director, Brooklyn Mediation Center and was adopted for use in that program Sept 1987.

\textsuperscript{72} K. WEXLEY & G. LATHAM, supra note 64, at 75. This would "[m]aximixe the similarity between the training situation and the job situation." \textit{Id.}

\textsuperscript{73} See supra note 71.

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} A. BANDURA, SOCIAL LEARNING THEORY 22 (1977).

\textsuperscript{76} K. WEXLEY & G. LATHAM, supra note 64, at 69.

\textsuperscript{77} \textit{Id.} at 77.
the extent possible, observes a representative range of the types of substantive problems serviced by the program, the types of behaviors among parties (submissive, argumentative, hostile, cooperative, etc.) and the differing styles of various mediators. When various program personnel determine that the apprentice is ready, she takes the mediator's chair.

Some NJCs have developed a formal process for conducting this observation phase of the apprenticeship training. A selected number of experienced NJC mediators guide the apprentices through this aspect of their training; each are assigned approximately six persons to guide during a three month period. The mentors assign cases for the apprentice to observe and participate actively with the mediator and apprentice in the post-hearing analysis and discussion. Where appropriate, mentors devise simulations, use exercises, or analyze previous agreements to help apprentices sharpen or augment particular skills. Such mentors are paid a small stipend for their service.

The advantages of this formal approach are apparent. The same mentor monitors the apprentice's progress. She can be consistent in her comments and assess what progress, if any, is made over the time period, observing whether apprentice weaknesses noted in previous sessions are corrected in ensuing discussions. If the mentors themselves are trained to perform their tasks, or, minimally, use standard elements for assessing performance, then this approach ensures a measure of quality control for the program.

Not all NJCs have the financial or personnel resources for implementing such a structured approach to this phase of the apprenticeship program. Compromises are invariably struck. For example, one apprentice might observe several different individuals mediate cases during a five week period; each mediator becomes her mentor for the evening, analyzing with that apprentice what transpired during the hearing. The drawbacks to this approach are obvious: there will be a lack of consistency (if not direct contradictions) in the comments made to the apprentice by the various mediators and there is no standard for assessing whether the apprentice is improving from

78. See, e.g., supra note 71.
79. In addition to the structured apprenticeship program, supra note 71, the Brooklyn Mediation Center utilizes weekly trainer evaluation sheets for each trainee and trainer self-evaluation sheets. These set out the goals and objectives on a weekly basis. See Trainer Evaluation Sheet & Trainer Self-Evaluation Sheet, The Brooklyn Mediation Center (on file at Hofstra Law Review).
session to session.

The worst case scenario arises when NJC staff adopt the approach of simply asking the apprentice to observe as many cases as she wishes and to inform the staff when she feels ready to handle a case as a co-mediator. Such an approach neither requires the observed mediator to talk with the apprentice about matters that transpired during the hearing nor answer any questions. This approach disengages the staff from participating in any evaluation activity and effectively abandons making crucial efforts to maintain quality control in mediator development. Such an outcome, however, is not the necessary consequence of restricted budget resources.

2. Co-mediation. — In the most complete apprenticeship sequence, after an apprentice displays a satisfactory grasp of the mediator's role in managing the discussion process, she is assigned to conduct a case. Although an experienced mediator is officially assigned to the case as well, the responsibility for conducting the hearing lies with the apprentice. The mentor intervenes only if she believes it essential to keep the discussions moving in a constructive fashion.80

This is a fail safe system. By now, the apprentice should be comfortable with the dynamics of the hearing process and her role in managing it. The anxiety and doubts that always attend one's conducting the first several sessions is diminished by the knowledge that the experienced co-mediator will intervene if the hearing presents unusually difficult challenges. Following each hearing, the experienced mediator and apprentice discuss what transpired; they replay the hearing and analyze various options not pursued by the apprentice. Such discussions, anchored by a checklist of the standard dimensions of mediator performance, reinforce the apprentice's awareness of the structured, purposeful manner in which any mediator executes her tasks. These conversations enable the apprentice to analyze the specific strategies she adopted during the session. When the apprentice demonstrates the capacity to work comfortably with a variety of disputes and disputants, she is ready to move to the final phase.

Again, this phase of apprenticeship training is most effective if the apprentice can have one mentor serve as the co-mediator for these several cases. Such an approach insures consistency of comment and enables the mentor and apprentice to chart the apprentice's development from one case to the next. If no formal mentor

80. See supra note 71.
program is used, then having the apprentice co-mediate all cases with the same experienced mediator enables them to develop a comfortable, complementary team style when conducting the hearing and insures consistent monitoring of the apprentice’s development. When program personnel assign an apprentice to various cases with different veteran mediators as their co-mediators, they jeopardize these valued dimensions of quality control.

3. Mentor Observation of Mediation. — In this phase, the apprentice takes complete charge of the hearing. The mentor adopts an observer role and is physically removed from the area where the apprentice and parties interact. By now, the chances that the apprentice will not perform capably should be minimal. The mentor’s responsibility is to confirm that the individual adroitly discharges her tasks.  

This training dimension can be readily implemented by any NJC regardless of its level of financial resources. Ironically, NJCs often eliminate this aspect of the apprentice’s training on the belief that program personnel or designated veterans should not interfere with any mediator conducting her case; that belief, if persuasive at all, is misplaced here, for the assumption is that the individual is still a mediator-in-training.

III. STRUCTURAL RELATIONSHIP OF DESIGN COMPONENTS

These three dimensions—the pre-workshop selection process, a skills building workshop conducted in a setting removed from the actual performance context, and an apprenticeship phase—constitute the core dimensions of any NJC mediator development program. These three components are necessarily interrelated. If an NJC deemphasizes or eliminates one or more of these components, it must then enrich the design and content of the remaining elements if it is serious in its desire to develop a cadre of capable mediators.

Schematically, the possible combinations of these components are:

<table>
<thead>
<tr>
<th>Pre-Workshop Selection</th>
<th>Workshop</th>
<th>On-site Training</th>
</tr>
</thead>
<tbody>
<tr>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
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</table>

81. Id. The clinical ADR program at Hofstra Law School has 1 faculty member and 2 consultants (lawyers who are experienced mediators) who supervise the same students throughout the entire apprenticeship program, thereby insuring consistency of comment and assessment.
To make this schema more plausible, one must qualify the "no" entry in the "pre-workshop selection" column by assuming that some selection standard other than random sampling is used. The standard, however, need not be a very stringent one.

Table I enables us to analyze NJC mediator development efforts in three ways. First, we can use it descriptively to catalogue how an NJC has designed and implemented its mediator development program. Second, assuming that the goal of the training enterprise is to develop capable mediators, we can note how a program has chosen to emphasize or deemphasize each training component and indicate how each variable, in light of that choice, must be designed in order to achieve the desired goal. Third, we can take this second analysis and use it to evaluate the strengths and weaknesses of individual training efforts. We can summarize the first level of analysis for each combination as follows.

Combination one reflects the standard approach used by most NJCs that are funded with public money.\(^{82}\) It would appear to be the most successful approach conceptually for finding and preparing the greatest range of capable people to perform the mediator's job; but it is clearly the most costly process in time or dollars and not necessarily the most efficient means for obtaining competent mediators. Combination two is used by almost every NJC when it inaugurates its program, for normally there simply are no available experienced mediators to provide on-site training. Regrettably, it means that people learn as they go. Combination three reflects the selection and training process typically used by companies when hiring a new salesperson or by a law firm taking on a new associate, whereas combination four reflects how organizations fill their higher-level executive positions. NJCs follow the third combination when they have neither the staff resources to conduct the skill-building

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82. Although funded with public money, NJCs typically are not governmental agencies. They tend to be not-for-profit organizations operating in cooperation with the district attorney's office or courts.
workshop nor the financial resources for hiring someone to conduct it; they follow number four when they simply recruit only those persons experienced in mediating other types of disputes to serve as mediators in their program. An NJC that employs combination five, as will be discussed below, permits any interested person to participate in the remaining training components as long as they meet the minimal prerequisites of being available for service. This is the least efficient in terms of the yield ratio of capable mediators for resources invested. Combination six captures those NJCs that use anyone who represents that he has attended some type of mediator skill-building workshop (e.g., someone who has attended a workshop on divorce or family mediation), and who believes that he can become a mediator simply by attending these various skill-building workshops. Combination seven characterizes the training process used by NJCs during the late 1960's and early 1970's when, as experimental programs, no paradigms were readily available. Combination eight, one hopes, is a null set.

Moving from this description of the various combinations employed by NJCs, consideration of this schema reveals how diminishing or removing any one training component requires a corresponding increase in the depth, rigor, and amount of resources allocated to those that remain in order for an NJC to secure its goal of having competent mediators. For instance, if an NJC adopts combination four, it must develop a selection process that by itself will generate functioning mediators. The selection devices used—application forms, tests, interviews, etc.—must be functionally precise and legally adequate. The number of candidates screened would have to be sufficiently large to ensure that the selection process yielded an adequate number of persons to serve the NJC's caseload needs. Similarly, if an NJC used combination two, it can develop a pre-

83. See infra notes 88-91 and accompanying text.
84. This combination could reflect the individual entrepreneur who simply believes that mediation is a viable business and proceeds to "open shop" with the hope of becoming successful. Such a possibility prompts demands for licensing mediators in order to protect the public from self-styled mediators. See infra pt. V, at § C.
85. See, e.g., D. McGillis & J. Mullen, supra note 5, at 129. At the Miami Citizen Dispute Settlement Project, mediators are drawn from a pool of professionals whose backgrounds include sociology, psychology, law, and social work.
87. Whether a program could obtain qualified persons, so defined, to undergo this process simply in order to volunteer their time to the program is an important practical concern.
workshop selection process less rigorous than that required for combination four, and, hence, tap a greater number and variety of persons from the community for potential service; however, the workshop's content must be more rigorous and thorough than that required in combination one in order to compensate for the absence of an on-site training process.

Combination five merits special emphasis. Directors of community based programs typically do not want to offend or alienate any of their multiple constituencies. When building local support for their program, directors are tempted to invite any and all persons with whom they interact to volunteer their services as a mediator. This approach is based upon one of three possible beliefs: (1) that the skills required to be a mediator are so pervasive among the population that many persons can discharge the role; 88 (2) that no particular skills are required in order to perform effectively as a mediator; 89 or (3) that not offending any applicant is of such overriding political importance that the program director must permit any interested citizen to enroll in the workshop and rely on the workshop trainer to judge who passes or fails. 90 The weaknesses of this approach are both obvious and serious. The first belief is exaggerated, the second is false, and the third, while plausible, has three significant costs. First, there may be so many who fail that the program must spend additional resources to generate an adequate cadre of mediators to handle the caseload. Second, the quality of the workshop's content might suffer as the trainers try to keep persons of significantly different skill levels engaged and current in the materials. Third, the NJC develops the reputation for not being selective and thereby discourages capable persons from volunteering to participate in what they perceive to be a non-professional operation. An NJC might understandably but regrettably adopt combination five when it tries to promote simultaneously two laudable but not neces-

88. See, e.g., DISPUTE RESOLUTION ALTERNATIVES PROJECT, CITIZEN DISPUTE SETTLEMENT GUIDELINE MANUAL 25 (2d ed. 1981) [hereinafter GUIDELINE MANUAL]. One model used in Florida relies upon key volunteers such as housewives and retirees. The only requirements for mediator trainees are the ability to listen and to understand the issues involved. When this model is used, however, comprehensive training programs are employed.
89. Id.
90. Most NJCs operate as non-profit agencies the bulk of whose cases are referred by the District Attorney's office or a judge. Mediators are citizens recruited from the community. If one of the referral judges also recommends that one of his friends be invited to become a mediator, the project director may feel pressured to agree, even if the proposed mediator is inappropriate.
sarily consistent goals: mediator development for NJC service and enhancement of dispute settlement skills of community residents as a desirable social policy objective. These activities should be kept separate.

We can also use Table I to compare the approach to mediator development adopted by NJCs with efforts to develop staff mediators by such government agencies as FMCS and the Community Relations Services (CRS) of the U.S. Department of Justice. Both agencies, by utilizing high selection standards, have a low yield of new hires. FMCS combines a five day off-site workshop with an intensive on-the-job training process. For CRS, on-the-job orientation and performance immediately follows the hiring, with only episodic forays into off-site workshops or classroom study. Using the logical relationships identified in Table I, FMCS's approach reflects combination one whereas CRS's mirrors combination three. Are these desirable models for NJCs to adopt? There are some important differences in agency mission and need between Federal government agencies and NJCs that merit attention and, arguably, a different approach to mediator development. For instance, the number of persons serving as mediators in these federal agencies is relatively small; by contrast, NJCs typically train fifty people annually. Additionally, federal agencies hire individuals; candidates approach these job opportunities as career choices. The tenure of service is expected to be substantial and staff turnover low. For NJCs, high turnover is expected and desired; after a year or two of service, the individual volunteer moves on to other activities. Hence, for an NJC to concentrate intensive training on a small number of individuals who would not serve the program on a long-term basis is not cost effective whereas the more substantial financial investment made by the Federal agencies in their training process can be justified when one distributes the total cost over a substantial number of years of "return on the investment." An additional argument advanced by NJC advocates that militates against adopting an approach similar to that of these government agencies is that an NJC deems it part of its mission to demystify the processes of dispute resolution and efforts to limit

93. See Wahrhaftig, supra note 91, at 1463 (growth of the community dispute resolution programs reflect attempts to simplify the resolution process).
participation as mediators to a small group of alleged experts contravenes that spirit. 84

As previously noted, Table I is an oversimplification of the possible relationships among the three components of the training process. Each component is not simply present or absent, but rather can be present in varying degrees and complexity. Figure 1 presents more adequately the relationship between the rigor and extent of the pre-workshop selection process and the corresponding level of rigor and extensiveness that is required of the workshop and on-site training components. Stated formally, the relationship is inverse: when the rigor of the selection procedure is minimal, the workshop and on-site training components shoulder the entire burden of developing competent mediators and must therefore be very extensive and intensive in their coverage. As the selection standards increase in rigor, the demands on the workshop and on-site training components are correspondingly reduced. Similarly, as the workshop increases in coverage and intensiveness, the demands on the selection and on-site training components are lessened. The same relationship holds for the impact of intensive on-site training on the selection and workshop components.

Figure 1 prevents one from adopting a telescoped view of mediator development efforts. For instance, New York State's Community Dispute Resolution Centers Program requires a minimum of twenty-
five hours of workshop training for persons serving as mediators, for which a model content guideline has been developed. But, as Figure 1 indicates, one cannot view this workshop component in isolation. What assumption does the model program make about who the participants are or what on-site assistance will be provided? Assessing whether the workshop’s model content guideline is adequate to the task and, whether it is “successful,” requires that its scope and intensity be integrated with the other two components. Similar questions arise in states that have developed model training curriculum for individual program use.

In Section II, we discussed the problem of ensuring transfer of the skills learned in the workshop session to on-site performance. Reconsideration of this issue emphasizes the importance of the interrelationships depicted in Figure 1 between selection, workshops, and the apprenticeship phase. The apprenticeship phase guides the trainee in systematically applying the skills and principles learned in the workshop. If NJCs minimize the apprenticeship component, as most do, then given normal selection criteria, the workshop becomes the primary vehicle for preparing the individual to mediate capably. Using materials and exercises that are tailored to the NJC dispute context is more likely to sustain a successful transfer of skills and principles from the workshop to on-site performance than would be obtained by using materials that are more general in content.

The interrelationship of these components influences not only the content of each element but the roles of the individuals responsible for implementing each component. The existence and nature of a post-workshop apprenticeship phase, for example, significantly affects the role of the person who conducts the workshop. In a typical workshop, the leader discusses the mediator’s role within an analyti-

95. N.Y. JUD. LAW § 849-b(4)(b) (McKinney 1987).
97. The New York State guidelines contain no references to selection criteria and the demands of the apprenticeship phase permit varying degrees of rigor in its implementation; by contrast, the clinical program at Hofstra Law School admits only a limited number of students to the program, all of whom must have successfully completed a one semester course on alternative dispute resolution. A comparable year long clinical program at Benjamin Cardozo Law School accepts only 20 students from the more than 60 applicants. The Office of the State Courts Administrator in the State of Florida commissioned the development of model training materials, mediator manuals, and an instructor’s guide for use by citizen dispute settlement programs operating throughout the state. Suggested recruiting and selection procedures for mediators are contained in a separate publication. See generally Guideline Manual, supra note 88.
98. See supra notes 41-81 and accompanying text.
cal framework of conflict resolution principles and has participants practice executing mediator skills by using various exercises and simulations. During a twenty-five to thirty hour program, however, it is practically impossible to structure the workshop so that each person in a group of twenty-five participants has an opportunity to examine the skills ingredient to the mediator's job, practice executing each of the component skills, and conduct more than one or two simulated mediation sessions from beginning to end. Given normal selection criteria for admission to the workshop, the result is that participants, by the end of the workshop, will demonstrate a growing mastery of the mediator's role but, quite understandably, continue to make errors one would expect a beginning mediator to make. If the workshop leader knows that each person will undergo an apprenticeship phase of mediator training following the workshop, he can assess the demonstrated growth in mediator development of each participant, provide feedback to that individual and program personnel with respect to what matters need further development, and suggest a series of activities that the apprentice and his mentor can undertake to strengthen that individual's performance. On the other hand, if there is no apprenticeship phase and trainees are assigned to conduct cases immediately following the completion of the workshop, then the workshop leader's assessment posture must be altered. He must diminish his coaching function and become an evaluator who assesses each participant's performance against objective standards of minimally acceptable performance levels for a mediator. Without even considering the impact that imposing such an evaluator role would have on the workshop leader's capacity to conduct the workshop effectively, a major concern immediately arises with respect to insuring compliance with an NJC's obligation to service its public with persons who are capable mediators.

First, one can justifiably predict that the percentage of persons who would successfully complete the workshop under the workshop leader/evaluator scenario will be smaller than those who would "pass" under the coaching model. As a practical matter, NJCs that depend upon citizens to volunteer their services to such programs

99. See K. Wexley & G. Latihem, supra note 64, at 114-17 (problems arise when a manager is asked to fulfill the conflicting roles of coach and judge. This conflict may cause a compromise of the training session).
100. Id.
101. See Final Evaluation Report, supra note 2, at 10 (one of the goals of an NJC is to effectively and fairly resolve neighborhood disputes).
MEDIATOR DEVELOPMENT PROGRAMS

might not be able to tolerate a high failure rate and still attract persons to volunteer; this factor puts pressure on the workshop leader/evaluator to pass a higher percentage of participants than is otherwise warranted. Second, the workshop leader might be tempted to “pass” those persons who, in fact, did not meet the minimally acceptable performance standards during the workshop but who did show improvement with each repetition of the skills and therefore displayed the potential to perform capably as a mediator. Were he to act this way, then the workshop leader is endorsing the proposition that the NJC clients can serve as guinea pigs for interested citizens to sharpen their mediating skills on. The result gives renewed force to the ADR critics’ claim that NJCs provide second class justice to persons already victimized by the system. Finally, workshop leaders have a professional, and perhaps pecuniary, interest in having a favorable passing rate; these factors operate as incentives to inflate the number of successful workshop candidates. In each of these instances, the potential losers are the very persons the NJC is designed to serve.

The lesson is straightforward. There are three constituent components of any mediator development program. The designer of such a program must consider the interrelationship of the components and their manner of execution. Resources must be allocated accordingly. Failure to proceed in this fashion results in a distorted use of available resources and diminishes the value of implementing any isolated training component, however well-conceived it might be.

102. As for the role of the workshop leader/evaluator, this situation is analogous to inviting a group of elementary students to learn to swim or play a musical instrument. Many of the youngsters might be coordinated, interested, and motivated to learn. One can identify and teach the various skills that comprise each activity. The youngster, during the class sessions, might exhibit noticeable improvement in executing the various parts of the activity; the instructor might be able to say with confidence that the person could become a competent swimmer or orchestra member with additional work and practice. But, if the instructor had to decide which persons, at the program’s conclusion, would be allowed in the deep end of the pool or to join the orchestra, demonstrating a capacity to learn to swim or to play the musical instrument is not sufficient. The standards of judgment appropriately change.

103. See generally J. MARKS, E. JOHNSON, JR. & P. SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESS IN EVOLUTION 51 (1984). One criticism levelled at ADR forums is that certain disputants, particularly the poor, are being provided “second class justice.” There is a fear that the poor will be forced to resolve their disputes in lesser forums, while the courts will be reserved for the more affluent.

104. D. MCGILLIS & J. MULLEN, supra note 5, at 107. “[T]he model of community involvement necessarily involves higher administrative costs due to the need for tighter management controls, more extensive training and recruitment activities and more time to develop and sustain community interest.” Id.
IV. CONSEQUENCES FOR RELATED TRAINING ISSUES

The analysis in Section III helps clarify debated topics relative to the development of mediators to serve in multiple ADR arenas. We shall examine three such matters: (1) evaluating training efforts; (2) transferability of mediator training among ADR substantive sectors; and (3) licensing mediators.

A. Evaluation of Training Efforts.

A training effort can be evaluated from both an internal and external perspective. An internal perspective takes the program as a given and focuses on the training success achieved by the participants. Four standard measurements for assessing success are available: (1) participant reaction and satisfaction with the program; (2) participant's demonstrated level of knowledge acquisition; (3) participant's demonstrated level of skill mastery; and (4) participant's demonstrated effectiveness in her actual performance of the tasks that were trained for. 105

Adopting an external perspective involves assessment of the effectiveness of the overall training design and the persons charged with implementing the program. The measures for evaluating these matters quite obviously go beyond those applicable to assessments conducted from an internal perspective. The external perspective uses measures that focus on evaluating the design and implementation of the three constituent components previously discussed. Questions relating to the effectiveness of selection procedures, workshop content, and apprenticeship training become germane. Yet, it is clear that the results of the evaluation from the internal perspective are critical to conducting this external evaluation. The workshop content might be inappropriately pitched to the persons who were selected, so adjustments would have to be made. Program goals might be added, altered, or deleted. For instance, if a program objective is set to diversify the range of individuals serving as mediators, all three components might require adjustment. If experience reveals that mediators handling particular kinds of cases are ineffective because they lack substantive information regarding practices and policies germane to that topic, adjustments to the workshop content or apprenticeship phase might be in order.

This evaluation process also provides a framework for assessing the various mediator development programs that are marketed. For

105. K. WEXLEY & G. LATHAM, supra note 64, at 78-88.
example, if the only evaluation instrument used in a program measures participants’ reactions to the workshop, then such responses accurately capture how an individual feels about the manner in which the program was conducted and her confidence in her ability to execute the mediator’s job. While such self-reporting is not unimportant, it does not answer the issue of whether the workshop was effective in increasing her knowledge or skill level. Similarly, persons who represent to the public that they have been trained, for instance, as divorce mediators are simply engaging in a self-evaluation (and self-promotion) exercise. Such workshops typically have no selection criteria for admission, utilize content materials that are shaped according to the principle of what every divorce mediator should know rather than being tailored to individual needs, incorporate no evaluation instruments for assessing whether participants have learned the required content or displayed an acceptable skill level, and are divorced from any post-workshop monitoring of actual performance. Such workshops can certainly be constructive in educating participants about the mediator’s role in such a context but they fall considerably short of constituting a sufficient vehicle for effective mediator development.

B. Transferability of Mediator Training

If an individual has successfully participated in an effective development program for persons serving as mediators in an NJC, does she need additional training in order to mediate disputes in other contexts such as a collective bargaining impasse between a private sector employer and its union or a dispute between a property owner and a roofing company over allegedly defective workmanship? We see how misleading it is to pose the question in that manner. A person trained to mediate NJC disputes through her selection, workshop participation, and on-site training activities has already undergone an intensive program that requires her to integrate analytical and interpersonal skills into a range of behavioral moves. The most important consequences for the trainee who completes such an integrated approach to training are her heightened awareness of the thoughtful, conscious way in which a mediator molds the substance of the negotiations and her sharpened skill at deliberately employing specific mediation strategies to move parties towards settlement.

106. See generally INITIAL CURRICULUM, supra note 57, at app. E-4. The required training curriculum includes evaluation by participants after the training experience.
If a person gains those insights and skills from her NJC training, she can transfer those skills to different substantive contexts without concentrating on the actual execution. Hence, a person trained to mediate disputes in an NJC does need training in order to mediate private sector collective bargaining impasses or disputes arising in the roofing industry, but its focus would emphasize the structure and design of an industrial relations system or the technology and dynamics of the roofing business rather than the concepts and strategies of the mediation process. The appropriate pedagogical techniques, given these aims, must be suitably matched. This same general principle applies to the transferability of mediator skills from any selected substantive context to another.

What the experienced mediator can do that the neophyte cannot is make the transition herself from understanding the content of various dispute environments to appreciating how a mediator can use that information in a strategic fashion without the need of having to practice those moves within a particular context. While this insight is accurate in principle, we shall note below that its application in practice is more restricted than the principle might otherwise suggest.

Given this general principle regarding transferability of training, a related question immediately surfaces: Are some "training grounds" richer than others? That is, if one knows how to mediate disputes in context X, is transferability of service to context Z easier or more fluid than if one's mediating skills had been originally developed in context Y? Using actual examples, if a person is trained to mediate private sector labor-management disputes, are her skills more readily transferable to mediating disputes between neighbors than are those of the person who was originally trained to mediate disputes involving parents and their children? The answer requires a two tier analysis: first, one must examine whether individuals can display relevant substantive knowledge of the new arena without additional training; and second, one must assess whether the mediating skills and strategies transfer among contexts without significant modification.

At the first level, many persons assume that knowledge of certain aspects of life experience is more widespread than for other, more specialized, areas of activity. If this is true, then those trained to mediate in the more specialized areas will move easily to mediating disputes in the less technical areas for which all persons are presumed to have a working understanding of the substantive areas in
dispute while persons trained to serve in the less specialized areas will have more difficulty when they attempt to move to mediate disputes in the more technical substantive areas. Difficult empirical issues arise at this level: How “simple” or “specialized” are disputes over curfews among parents and children? Harassment charges among neighbors of different ethnic backgrounds? Work assignments among prisoners and prison administrators? Payment demands for unanticipated construction work between a builder and homeowner? To assume independent knowledge of these matters might be presumptuous, but even assuming success at this level, the question of transferability is still an open one.

Transferability at the second level succeeds only to the degree that the context of service permits comparison in the dynamics of mediating. For instance, when mediating labor-management collective bargaining disputes, mediators often meet separately with the parties. Such meetings can frequently last several hours. Such a move is a strategic device that negotiating parties rely on to reach settlement and they fashion their negotiating behavior accordingly. However, when mediating disputes between neighbors, among family members, or between disruptive students in a high school, caucusing, by design, is minimized or in some instances explicitly forbidden. When caucuses are taken, they typically last less than twenty minutes. Those who are trained to use caucusing extensively must be schooled behaviorally to act differently in these contexts. Similarly, when mediating an explosive multi-party community dispute involving the location of a solid waste facility, a mediator typically engages in extensive discussion with various parties and participants before the first, formal negotiating session is held. Handling those meetings and related issues of entry is much different from starting one’s first mediation session at a scheduled time and place involving identifiable disputants who have formally declared a collective bar-

107. See Guideline Manual, supra note 89, at 25-26, which identifies four types of mediator service, two of which presume that the skills possessed by the individuals developed in their work or life experiences will, when combined with the presumed knowledge of the dispute’s substantive focus, transfer straightforwardly into the CDS context.


109. Some labor mediators claim that those who help disputing parties reach settlement terms without ever caucusing are not really “mediating.” The description of mediation in Section I illustrates that caucusing is a tool. If it is useful for getting a settlement, a mediator uses it, but if it is not necessary, no one invokes it. See C. Moore, The Mediation Process: Practical Strategies for Resolving Conflict 262-71 (1986).

110. Id. at 55.
gaining impasse or who are referred to the NJC. At this stage of our knowledge about mediator training, assuming that transferability occurs at this second level is more an act of faith or hubris than it is conceptually justified.

These observations regarding transferability of mediation training also bury one other mischievous claim, e.g., that an agency or society can conduct a "generic mediation training program;" there are no such entities.

C. Licensing Mediators

How can the analysis of mediator training contribute to the discussion of licensing mediators? From our analysis, it is certainly plausible to suggest that an individual who satisfactorily serves an NJC could be certified by that NJC as an "approved mediator;" that is the natural outcome of a well conceived and executed mediator development program. While the value of such a certification is diminished by the absence of uniform standards that would insure consistent performance levels across NJCs, it would serve the salutary purpose of having the sponsoring agency endorse — and, as a result, be in some manner publicly accountable for — the quality of service these persons render to the public under its auspices.

Licensing is more controversial because the stakes are more dramatic. Licensing establishes threshold requirements for offering a service. The need for precise, accurate evaluating instruments is more urgent because entry into the field hangs in the balance. Not surprisingly, typical licensing examinations test one's knowledge of a particular content area. That approach seems ill suited for assessing one's ability to mediate capably. The important dimension of the mediator's service is the manner in which she combines her knowledge of a specific subject area and insights into human behavior with interpersonal skills that enable her to persuade persons to modify demands or consider options. Not testing those skills neglects the critical core of the mediator's job. Testing these performance based skills by a written exam mismatches the evaluation instrument to the matter being evaluated. All of this suggests that the conceptual foundation for designing a licensing exam for mediators is flawed.

Other difficulties arise as well. What substantive content area

111. See generally N.Y. CIV. SERV. § 209 (McKinney 1983 & Supp. 1987) (impasse may be said to exist in collective negotiations between an employee organization and a public employer if the parties do not reach an agreement at least 120 days prior to the end of the fiscal year of the public employer).
would one examine? Would one impose a licensing requirement to mediate some disputes but not others? Would the licensing process require, legally or practically, a candidate matriculating in a required course of study and, if so, would the courses include a skill-performance dimension? Our analysis calls into question the viability of the presupposition made by licensing advocates, e.g., that there is a specific body of essential knowledge that any mediator must know and that appropriate evaluation instruments exist for testing one's comprehension of it.

V. CONCLUSION

Mediation is not a process in which the only standard for assessing mediator performance is whether disputants reach settlement. There are multiple components to the mediator's job. The skills required to prepare for and start the session, probe for facts, structure the discussion, persuade parties to change commitments, and close the session can be identified and taught. To be taught effectively, they must be taught in the context of a well conceived mediator development program and with pedagogical approaches that match and reinforce the overall program design. If the approach to developing mediators is implemented in this systematic fashion, we can be confident that there will be capable actors at center stage.