



**NOT ON TREES, BUT MEDIATORS GROW:
ASSURING BEST PRACTICES IN COURT-ANNEXED MEDIATION**

A joint pilot project and report by the New York City Bar Association Committee on Alternative Dispute Resolution and the ADR Program for the U.S. District Court for the Southern District of New York

EXECUTIVE SUMMARY

The Mediation Program for U.S. District Court for the Southern District of New York assigns volunteer mediators to over 1000 cases per year. Like many other mediation programs there are criteria for assessing prospective panel applicants and the program solicits feedback from mediation participants. However, until recently, there was no mechanism for continued evaluation of mediators once they were added to the panel. In 2013, the Mediation Program partnered with the Alternative Dispute Resolution Committee of the New York City Bar Association to develop and pilot a protocol for ongoing evaluation of the Southern District's panel mediators. The protocol requires live observation of actual mediation practice utilizing a checklist of mediation skills and interventions. Feedback from the pilot program was largely positive with both mediators and program evaluators reporting that the observation and subsequent feedback session were both interesting and enriching. The resulting Mediator Evaluator Protocol went into effect in January 2016 making the Southern District the only federal District Court to conduct ongoing observation/evaluation of court-annexed mediators.¹

Introduction

Over the last four decades, federal, state and local courts have developed programs to provide mediation as an alternative to litigation. Indeed, in a significant number of courts, participation in mediation is “automatic” in all or certain categories of cases pursuant to court rules or by order of a judge in a particular case. In the Federal District Courts there is great variety in the design of mediation programs. Some District Courts use Magistrate Judges to mediate cases; others have self-executing programs which direct litigants to retain the services of a mediator whom they select with little intervention by Court staff. In most District Courts that offer the option of a private mediator, parties select a mediator from a Court roster or the private market. In less than a handful of District Courts, mediators are assigned by court staff from a panel of mediators who have been previously approved by the court on the basis of training and/or experience.

¹ The pilot program was designed by Joan Caridi, Richard Friedman, Charles Newman, Rebecca Price, Kathleen Roberts, and Richard Weil. The primary authors of this report are Joan Caridi, Kathy Marks, Anna Pohl, Rebecca Price, and Kathleen Roberts. Additional research and administrative assistance was provided by Timothy Kepler and Kaitlyn Laurie, interns in the ADR Program.

Unquestionably, courts have a responsibility to ensure the quality of court-annexed mediation services. Remarkably, however, only a handful of programs on the state and federal levels have even attempted to implement systematic, performance-based competency assessments of mediators. Rather, virtually all court-annexed mediation programs rely on training and experience requirements, settlement rates, and/or participant feedback, to determine whether the mediators on their rosters are competent.²

The History of Mediator Evaluation at the Southern District of New York

In 2012, the Mediation Program at the U.S. District Court for the Southern District of New York (the “Court”) undertook a review of its mediator evaluation processes. As is common in many court-annexed programs, prospective panel mediators had been evaluated based on training and experience. For a time, prospective mediators were also interviewed by the Court’s ADR Administrator. Other than post-mediation surveys there was no mechanism in place for continued assessment of mediators once they joined the panel. In 2013, the Court began a more intensive review of potential mediators resulting, in January 2015, in a formal evaluation process for all potential panel mediators. Potential mediators are now required to observe at least three mediations over a six-month period conducted by current panel mediators. These observations are coordinated by the Mediation Program including securing consent from parties. Once the observations are complete, the potential panel mediator is paired with a “mentor mediator” to conduct a mediation. The purpose of the mentor mediator is to insure the quality of the mediation process for the litigants, and to make a recommendation to the Mediation Program about whether the potential mediator should be added to the panel.

Beginning in 2013, the Mediation Program and the Alternative Dispute Resolution Committee of the New York City Bar Association embarked on a pilot program for systematic evaluation of mediator competency using assessment tools and a cadre of highly-experienced mediators to observe and assess actual mediations conducted by members of the Court’s mediation panel.

A joint subcommittee was convened. As an initial task, the subcommittee set goals for the pilot program which included assessing whether the tools and protocol: 1) generated a picture

² There are a number of issues surrounding assessment/standards for mediators which we are not exploring here. Among them are national differences in mediator certification, the question of whether mediation is or is not the practice of law, and the comparison of mediation to other clinical and/or licensed practices.

of a mediator's strengths and weaknesses; 2) supported mediators in self-reflective practice; 3) enhanced collegiality and sense of community among mediators; and 4) identified specific topics for further training and skills enhancement. Underlying these goals were several interests: that the project be viewed as an enhancement to the Mediation Program and to the experiences of individual mediators and mediation participants; that the program be fair in terms of its implementation; and that it function alongside other professional development opportunities for mediators such as trainings and practice groups.

Designing the Assessment Tool

As an initial step in the design of the mediator assessment pilot, the Mediation Program reviewed existing literature about mediator assessment and competencies and contacted mediation programs that had designed assessment protocols to gather information about those programs.³ The subcommittee then convened several times to consider existing academic resources on the subject of mediator evaluation and generate ideas based on the subcommittee members' experience with the Court's Mediation Program. The subcommittee members were in agreement that the objective was to create evaluative tools for observed mediation behaviors. The tools would be tested in twenty or so mediations over the following months to create a reasonable sampling of the current panel mediators.

Apart from capturing the identified core mediator competencies, the tools needed to be practical, rather than academic, easy and quick to use, and sufficiently flexible to allow for non-conforming observations and narrative details. The tools also needed to allow for keeping participant identities anonymous and for the efficient aggregation of data for the end-of-pilot goal of identifying themes and trends, and ultimately, making recommendations for the program going forward. Since no specific mediation model is mandated in the Court's Mediation Program, the tools needed to be broad enough to capture competencies from the facilitative to evaluative spectrum.⁴

³ The two primary sources from mediation programs were the New York Peace Institute and Diane Kenty, Director, Office of Court Alternative Dispute Resolution in Portland, ME. Each program identified as a major issue the sustainability of an assessment program given the relatively modest staff to mediator ratio.

⁴ There are a range of mediation styles that reflect varying degrees of intervention by the mediator. Optimally, the use of different interventions is linked to theories about how people react and respond when in conflict as well as to core principles that make mediation a practice that is distinct from other neutral functions such as arbitration or adjudication. A "facilitative" mediator regards party self-determination as a primary goal and seeks to enhance

The subcommittee members concluded that three tools would be appropriate for this purpose: an evaluation form for the Observer (a mediation competencies checklist), a self-evaluation form for the Mediator, and an evaluation form for the participants in the mediation.⁵ From the outset, the members agreed that the evaluative process would be transparent to all participants, especially the Mediators, that oral feedback from the Observer to the Mediator was essential, as was oral feedback from both the Observers and Mediators to the Director of the ADR Program (“Director”).

Referencing a detailed competencies form that was developed and utilized by the Maine State Court Alternative Dispute Resolution program, and existing academic resources, the subcommittee members created proposed lists of core competencies which they believed mediators should possess regardless of mediation style. Through consultation with one another, and periodic feedback from the Court’s Mediator Advisory Committee, and the NYC Bar ADR Committee, the members debated and edited the lists to tailor them to the Court’s program. Competencies were broken down into thematic categories. Categories were refined into short questions to which Observers could provide answers by “ticking” a box indicating the rating for the performance level of the mediator. Overall ratings were provided for each category and a section was provided for narrative comments from the Observers. When the Observer’s form was completed to the satisfaction of the members, the other two forms followed suit in the same consultative process.⁶

Next, the subcommittee members set criteria for the initial pilot Observers and identified a pool of mediators on the Southern District’s roster, or known to the members from other venues.⁷ For the pilot, the principal criteria for Observers were that they be well regarded as

parties’ information and understanding so that they can explore possible resolutions to a given problem. Evaluative mediators are likely to include settlement as goal equal to or greater than self-determination and, in the service of settlement, to offer their own opinions and assessments about various aspects of a dispute. There is much written about these (and other) approaches to mediation – including the ways in which mediators drift between the two.

⁵ The Court sends post-mediation evaluation forms to counsel of record. The response rate on those surveys is, unfortunately, very low. Given that, and given the limited staffing resources in the Mediation Office, the subcommittee ultimately decided to forgo the evaluation form for participants.

⁶ The subcommittee members debated a wide range of issues including the role of the Observers, the language used to describe certain interventions, the merits of certain interventions, and even the issue of describing performance levels. Among the questions the subcommittee members considered: How many choices should Observers be given? What was the right language for each choice?

⁷ Suggestions for possible Observers were elicited from the Southern District’s Mediator Advisory Committee, the City Bar ADR Committee, and other mediation groups.

mediators by their peers, clear about the goals of the pilot program, willing to follow the protocols, and both thoughtful about mediation practice and not wed to any particular mediation style. The subcommittee also made an effort to recruit initial Observers from both inside and outside of Court's mediation panel, thinking that having observers from "outside" of the program would diversify and enhance the feedback about the quality of the tool. The Director, with the assistance of the subcommittee, conducted two orientation sessions for the Observers to familiarize them with the purpose of the pilot, the intended use of the tools, and how to give feedback.

The Pilot Process and Initial Feedback

In anticipation of the pilot program, the Mediation Program sent periodic e-mails to the panel mediators introducing the program. Once the pilot was developed, panel mediators were notified of the launch of the pilot and were provided instructions so that those interested in volunteering to be observed for the pilot would know how to do so. Volunteers were provided with a packet of information about the pilot, including a comprehensive "Introduction to the Pilot Program" with all tools attached. Mediators who did not volunteer for the pilot continued to mediate cases in the usual fashion.

Once a mediator volunteered for the pilot, the Mediation Program notified counsel of record that the case had been selected for the pilot program and requested consent for an observer to be present during initial communications and the first mediation session. Observers were sent case information and asked to screen for conflicts. They were also sent the name of the mediator to insure that the parties did not have a close connection to the observer. Once parties consented (all but a very few did consent) and conflicts were cleared, mediators and observers were officially matched and were again sent the pilot protocols. Some number of pilot cases settled in advance of the mediation but, in all, 22 cases went through the entire process. The pilot forms were completed and submitted to the Director who then interviewed the mediator and observer. Five observers and four mediators did not hand in the final forms, despite repeated requests. A complete redacted set of the pilot documents, along with the Director's interview notes (also redacted), were provided to the subcommittee for review.

Performance of the Mediator Assessment Form

The tool used for the project assessed mediators in five different areas: (1) pre-mediation conference call; (2) mediator's opening statement; (3) joint session; (4) exploring facts/interests, developing opinions, and transmitting settlement proposals; and (5) personal attributes. The ratings were on a scale of 1 to 4, with 1 the lowest (*i.e.*, not done at all) and 4 the highest (*i.e.*, well done).

With respect to the numerical ratings, the ratings were predominantly in the 3's and 4's, as might be expected with this group, which was derived solely from volunteers. For example, the average rating for categories (2), (3), and (4) above (mediator's opening statements, joint session, and exploring facts/interests/opinions) was 3.5. However, even with this self-selected group, there were a few notable exceptions. For example, in the category of "personal attributes," which included attributes such as staying calm, positive and patient, listening attentively, conveying impartiality, and showing empathy, although the average of the 17 mediators evaluated was 3.74, one mediator was rated 2.5.

Similarly, the ratings indicated that the panel as a whole might be weak on pre-mediation conference calls. The average rating on that element was 3, was the lowest overall rating. Only 12 mediators were actually rated in this category, with five mediators being rated Not Applicable. Further, of the 12 mediators rated in this category, three were rated 2.5 or lower, five were rated 3, one was rated 3.5, and only three mediators were rated 4.

The post-assessment interviews revealed that the evaluation process was appreciated by, and beneficial to, both mediators and Observers. Mediators and Observers alike reported positive feelings about the process and expressed a general feeling that the process was valuable and informative. Comments included that it was helpful to have someone there to talk to between caucuses, that the Observer provided "a different point of view", and that working with the Observer "was really, really helpful". At least one mediator found the assessment useful because she was able to bounce ideas off of and ask questions of the Observer during breaks. Another mediator believed that having the Observer present kept him from giving up on the mediation too soon. One mediator thought it was wonderful to talk with the Observer and thought the Observer's presence helped enhance his mediation practice and made his day "so much more enjoyable". He volunteered to be observed because he "thought it would be an opportunity for learning and sharing ideas - and it was!" One mediator commented that the

assessment was very helpful because "there is no way to self-assess correctly" and another stated that the assessment was much more intense than training and much more direct in terms of feedback. The Observer "was able to give me feedback that I can use to change my actual practice".

However, several mediators and Observers expressed confusion concerning whether or not the Observer could or should participate in the mediation or offer comments or suggestions to the mediator during the mediation. The Subcommittee suggested that the Observer's role be discussed and clarified in advance of the mediation. Other feedback derived from the forms and interviews were: the value of the Observers as mentors to the mediators, rather than as passive critics of them; the value of pre-mediation efforts (joint and separate calls to plan, explore positions and facts, understand impediments); the value of post-mediation follow up efforts (where the mediation did not end in settlement); the appetite of the mediators and Observers for ongoing training and peer to peer support; the willingness of mediators to become Observers in future cases; and the minimal (if any) impact that the assessment process had on the mediation participants themselves.

With respect to the evaluation form, the Observers felt that the form was helpful but too long. Most reported that the form was a "helpful guideline" and useful as a "reminder," or to prepare for the mediation. However, there was a general consensus that the form was too long with too many categories and questions (although some stated that there should be "more range" in the numbers), and that it was hard to be "in the moment" while using the form to evaluate at the same time. A number of mediators and Observers noted that the form was useful as a planning guide or reference to review before the mediation.

Finalizing the Evaluation Program

Although there were suggestions for improvement to the pilot program, the overwhelming feedback from the participants was that it was useful and should be institutionalized. Given that, the Director reconvened the subcommittee (in slightly different form as some of the original members had moved on to other projects) to review the recommendations from the pilot and revise the protocol and forms accordingly. Among the suggestions for improvement were a more nuanced rating system for the different competencies, the replacement of the mediator self-evaluation form with an in-person feedback discussion

designed to elicit some of the same information, and the opportunity for the evaluator to recommend not only whether or not a mediator should continue mediating but also whether they would make a good evaluator. The subcommittee also discussed the parameters of the confidentiality of the evaluation process including what could be shared, by whom and to whom.

The subcommittee devised a mechanism for determining the order in which mediators would be evaluated. The entire panel would be notified of the new protocol and told that, based on the availability of evaluators, any panel member might be selected for evaluation when that mediator accepted his or her next case. Mediators would continue to mediate without evaluation until they accepted a case when an evaluator was available.

Some mediators who served as evaluators/observers for the pilot would continue to serve in that role. In addition, several of the mediators who were assessed for the pilot expressed interest in being trained as evaluators. The program design contemplates that as mediators successfully complete their evaluations some number will be added to the evaluator panel and, in this way, the program will develop and progress as a peer-to-peer model.

Conclusion

In July 2015 the Southern District formally approved the Mediator Evaluation Protocol. Panel mediators were notified and pilot participants (mediators, Observers, and subcommittee members) were invited to participate in several Town Hall meetings with the goal of providing opportunities for panel mediators to speak with others who had gone through the assessment pilot. Panel mediators were also encouraged to contact the Director, or pilot participants, if they had continuing questions. These meetings surfaced some anxieties about the program, which were to be expected. The Observers (renamed Evaluators) were offered another training on giving feedback and several new Evaluators were added from among the mediators who volunteered for the pilot. In January 2016 the first mediators and Evaluators were matched as part of the program. The Southern District has approximately 300 panel mediators so we anticipate that it will take a number of years before initial evaluations have been completed for the entire panel. Our hope is that once each mediator has been evaluated for the first time that they will be reevaluated approximately every four years for the remainder of their service on the panel. As this process moves ahead the Mediation Program will continue to look for and implement improvements to the protocol. The current protocol can be found at

<http://nysd.uscourts.gov/mediation>. Those with questions can contact Rebecca Price, Director of the ADR Program, at 212-805-0650 or Rebecca_Price@nysd.uscourts.gov.

Alternative Dispute Resolution Committee

Nancy Kramer, Chair

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PILOT DOCUMENTS

**SDNY Mediation Program
2014 Mediator Assessment Pilot Project**

Introduction to the Pilot Program
(Revised 5/15/14)

The Mediation Program for the U.S. District Court for the Southern District of New York is developing a program for the ongoing assessment and skills development of panel mediators. A sub-committee of the New York City Bar ADR Committee has developed a pilot. Working with the assistance of several observers from the panel, the pilot will assess twenty panel members as each conducts a mediation.

Two forms will be used: 1) a core competencies checklist used by the observer while observing the mediator's interactions with participants and 2) a self-assessment from the mediator. These two forms will be completed at the end of the first in-person mediation session, regardless of whether the mediation itself continues past the first session. After the forms are completed the mediator and the observer will participate in a review session to identify the mediator's strengths and areas for continued skills development. The mediation program supervisor may also participate in this meeting.

The goal of the pilot is to determine whether the forms and review session are effective in generating a picture of an individual mediator's strengths and weaknesses. The sub-committee will solicit feedback from the mediator and observer as to the effectiveness of the forms and review session.

Timeline for Process:

1. Mediator accepts a case and agrees to participate in pilot.
2. Mediation office confirms mediation participants' willingness to participate in pilot.
3. Observer clears conflicts and is assigned.
4. Observer/mediator commence pre-mediation process (contacting the participants for scheduling of pre-mediation calls or session, reading of pre-mediation submissions).
5. First in-person mediation session.
6. Observer completes competencies form. Mediator completes self-assessment.
7. Mediator and observer have debrief discussion.
8. Observer/mediator debrief with Mediation Program.

Additional Information: As a regular practice, the Mediation Program sends post-mediation surveys to mediation participants. Also, many mediations last beyond one initial in-person session. In the event that a participating case continues past one session, or the Mediation Program receives participant surveys pertaining to a participating case, the mediator and observer are encouraged, but not required, to have additional debrief discussions.

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Role and Expectations of Observers
(Revised 5/15/14)

All observers for the pilot program have extensive mediation experience and have received an orientation to the process and goals of this pilot program. Observers will be assigned before the mediator makes initial contact with the participants, will observe a particular case from the pre-mediation communications through the initial session and, using a form provided by the Court, will assess the mediator's core mediation competencies. The observer will not be a participant in the mediation process. However, at the request of the mediator, made out of the presence and hearing of parties and counsel, and if the observer is willing, the observer may provide limited suggestions or advice to the mediator. The observer will sign the confidentiality agreement.

The observer's assessment form, along with a self-assessment completed by the mediator, will be used in a meeting with the mediator to discuss the mediator's strengths and weaknesses. In addition to their work with mediators, observers will also be expected to participate in a short post-process interview with the Mediation Supervisor or a member of the SDNY Mediator Quality Assessment Subcommittee of the City Bar ADR Committee to discuss the effectiveness of the pilot program and to make suggestions to the Mediation Program with respect to the focus of future mediator training.

The Mediation Supervisor will share the results of all the assessments with appropriate court personnel and with the SDNY Mediator Quality Assessment Subcommittee of the City Bar ADR Committee. The mediator's name and any information identifying mediation participants will be redacted. The purpose of that sharing is to evaluate the effectiveness of the pilot program and implement changes to any permanent mediator quality assessment program that may follow. At the close of each mediator's assessment process all forms will be returned to the Mediation Supervisor and any remaining identifying information will be redacted.

PRE-SESSION PARTICIPATION

The observer will speak with the mediator prior to the mediator's contact with counsel in order to review the mediator's planned pre-mediation activities and to coordinate scheduling. Where possible, the observer should "observe" all mediator contact with counsel and/or the parties prior to the mediation. In instances where pre-mediation process is extensive, the observer will "observe" enough of the communications to be able to make an assessment as to the mediator's demonstration of competencies related to this phase. The observer will review all written submissions to the mediator prior to the first session.

PARTICIPATION IN THE FIRST MEDIATION SESSION

During the mediation session, the observer will strive to be in the presence of the mediator at all times. As noted above, the observer will not participate in or intervene in the

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mediation process in any way, or communicate with counsel or the parties beyond simple neutral pleasantries.

PARTICIPATION AFTER THE FIRST SESSION

Although it is not required, where possible, the observer will continue the assessment by observing post-session activities of the mediator, including, for example, follow-up telephone calls and scheduling and holding additional mediation sessions.

USE OF THE ASSESSMENT

At the conclusion of the initial session the observer will meet with the mediator to share and discuss the results of the assessment, to provide constructive feedback, and to encourage positive, neutral, and critical self-reflection by the mediator. The observer may choose whether to share the actual assessment form or to simply use the form as a guide for the conversation. The Mediation Supervisor may participate in this meeting. In the event that the mediation continues past one session, or other information is received such as the participant feedback forms, subsequent feedback meetings may take place.

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Process Skills Assessment
(Revised 5/15/14)

This assessment form is intended to provide guidelines for the assessment of skills, interventions, and competencies associated with mediators using a variety of styles and approaches to mediation. It is not expected that the mediator will necessarily use or reflect all of the identified skills, interventions, and competencies in any particular mediation. Where possible, please include specific examples of a mediator's comments and/or conduct to illustrate your assessment. In order to protect the confidentiality interests of the participants, do not use the names of the parties or the lawyers. Also be sure you do not provide information that might identify any of the participants.

Mediator _____

Observer _____

Dates of Observation _____

Process Skills Assessment Scale:

4 = well done; 3 = competent; 2 = not well done; 1 = not done; NA = Not Applicable

- | | |
|---|---------------------------|
| 1. <u>Pre-mediation Conference Call Conducted Either Jointly or Separately:</u> | Overall Assessment: _____ |
| a. Call scheduled promptly after notice of selection | Assessment: _____ |
| b. Greet participants; endeavor to set positive, friendly, cooperative tone | Assessment: _____ |
| c. Ask if participants have mediated before; explain, summarize,
invite input about the process | Assessment: _____ |
| d. Explain confidentiality and confidentiality agreement | Assessment: _____ |
| e. Confirm identity of persons who will attend,
including those with settlement authority | Assessment: _____ |
| f. Ask status of case and discovery | Assessment: _____ |
| g. Established interim steps (e.g. limited discovery, content/deadlines for
mediation statement, additional calls) | Assessment: _____ |

Comments/Examples:

- | | |
|---|---------------------------|
| 2. <u>Mediator's Opening Statement:</u> | Overall Assessment: _____ |
| a. Greet participants; establish friendly, cooperative tone | Assessment: _____ |
| b. Facilitate introductions | Assessment: _____ |

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- c. Explain process, role of mediator, role of counsel, confidentiality Assessment: _____
- d. Have everyone sign confidentiality agreement Assessment: _____

Comments/Examples:

- 3. Joint Session: Overall Assessment: _____
 - a. Listens attentively without interrupting Assessment: _____
 - b. Manages interruptions that threaten the process, if appropriate Assessment: _____
 - c. Asks clarifying questions Assessment: _____
 - d. Encourages active participation of parties Assessment: _____
 - e. Develops with participants an agenda of issues to be addressed Assessment: _____
 - f. Uses active listening techniques (e.g. reflection, summary, reframing) Assessment: _____

Comments/Examples:

- 4. Explores Facts/Interests, Develops Options/Transmits Settlement Proposals: Overall Assessment: _____
 - a. Utilizes caucus effectively Assessment: _____
 - b. Engages parties; encourages them to participate actively Assessment: _____
 - c. Ascertains participants' interests Assessment: _____
 - d. Asks open-ended questions Assessment: _____
 - e. Maintains control of process while allowing participants to shape details Assessment: _____
 - f. Helps participants evaluate strengths and weaknesses of their case Assessment: _____
 - g. Facilitates creative problem-solving, where possible Assessment: _____
 - h. Helps formulate and adjust settlement proposals Assessment: _____
 - i. Encourages reality testing of options and proposals Assessment: _____
 - j. Assists in defining next steps whether or not agreement is reached Assessment: _____

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Comments/Examples:

5. Personal Attributes:

Overall Assessment: _____

- | | |
|---|-------------------|
| a. Stays calm, positive and patient | Assessment: _____ |
| b. Puts participants at ease | Assessment: _____ |
| c. Listens attentively without interrupting | Assessment: _____ |
| d. Facilitates interaction between parties, including difficult conversations | Assessment: _____ |
| e. Conveys impartiality | Assessment: _____ |
| f. Responds appropriately to expressions of emotion | Assessment: _____ |
| g. Shows empathy | Assessment: _____ |
| h. Maintains confidentiality | Assessment: _____ |

Comments/Examples:

6. Overall, was the mediator effective? (Y/N): _____

Why or why not?

7. Please describe the mediator's level of engagement with the debrief process (e.g. did the mediator display insight into his/her mediation practice, was the mediator open to comments/feedback from the observer, etc.)

8. How can this assessment process and/or competencies form be improved?

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Mediator Self-Assessment
(Revised 5/15/14)

Mediator Name _____
CV # and Short Case Name _____
Session Dates _____

Please take some time to reflect on your performance as a mediator in the above case during which your core mediation competencies were also observed.

Assessment Scale

4 = well done; 3 = competent; 2 = not well done; 1 = not done; NA = Not Applicable

Guiding the negotiation process:	Assessment: _____
Reducing tensions, animosity:	Assessment: _____
Identifying interests, concerns:	Assessment: _____
Encouraging flexibility, compromise:	Assessment: _____
Helping the parties evaluate the strengths and weaknesses of their case:	Assessment: _____
Generating new ideas, options:	Assessment: _____
Overcoming obstacles, impasses:	Assessment: _____
Communicating impartiality, empathy:	Assessment: _____
Dealing with difficult people:	Assessment: _____

Things you did particularly well:

Things you wish you had done better:

Requests for Future Training and/or mentoring:

Did you find your debrief with the observer helpful? Why or why not?

FINAL DOCUMENTS



Mediator Evaluation Program: Introduction

The Mediation Program for the U.S. District Court for the Southern District of New York has developed a program for ongoing assessment and skills development of panel mediators.

GOALS:

The goals of the program are to: 1) generate a picture of a mediator's strengths and weaknesses both for the mediator's own development and to assist the Mediation Program in determining whether or not the mediator should continue to serve on the panel; 2) support mediators in self-reflective practice; 3) enhance collegiality and sense of community among mediators; and 4) assist the Mediation Program in identifying specific topics for further training and skills enhancement.

EVALUATION PROCESS:

Evaluations will be conducted by mediators who have been trained in the evaluation protocol and in giving constructive feedback. After the evaluation, evaluators will recommend that the mediator should a) continue to mediate for the Court or b) not continue to mediate for the Court. Mediators who receive a "should not continue to mediate" recommendation will be offered the opportunity to participate in the observation/mentoring process that is now mandatory for potential new panel mediators; they will have six months to observe at least three other SDNY mediations, participate in any training offered by the Court, and will be invited to participate in a second evaluation with another evaluator. Mediators who choose not to participate in the evaluation program, who do not pass the initial evaluation and choose not to participate in the observation/mentoring process, or who do not pass a second evaluation, will be removed from the panel. Depending on the needs of the program, mediators who do particularly well in the evaluation may be offered the opportunity to be trained as an evaluator for other panel mediators.

WHEN WILL MEDIATORS BE EVALUATED?

To remain in good standing on the SDNY mediation panel, all panel mediators will participate in an evaluation approximately every four years. Mediators who joined the panel after 2014 will be evaluated approximately four years after the mentor mediation which resulted in their addition to the panel. All mediators who joined the panel prior to 2014 will be evaluated over time, based on the availability of evaluators, and will have subsequent evaluations four years from the date of their initial evaluation.

CONFIDENTIALITY OF PROCESS:

The Mediator Evaluation program has been developed for the benefit of SDNY panel mediators and to enhance the overall effectiveness of the Mediation Program. The success of the evaluation process is

dependent on the full and complete participation by both mediators and evaluators, including candor and openness during feedback conversations. To that end, evaluators and mediators will not share any information, communications, or written materials related to the evaluation with anyone outside of the Mediation Program. In particular, mediator evaluations may not be used as letters of reference or to provide any information to other ADR programs. Any information, communications, or materials related to the evaluation process may be shared with the mediator being evaluated at that mediator's request.

TIMELINE:

1. Mediator accepts a case and evaluator clears conflicts and is assigned.
2. Mediation Office confirms attendance of evaluator with mediation participants.
3. Evaluator/mediator commence pre-mediation process (contacting each other and the participants for scheduling of pre-mediation calls and initial mediation session, reading of pre-mediation submissions).
4. First in-person mediation session.
5. Evaluator completes competencies form.
6. Mediator and evaluator have debrief discussion.
7. Process checklist, final recommendation, and competencies forms submitted to Mediation Program within 48 hours of feedback discussion, and to the mediator if requested.
8. Mediation Program discusses conclusions with mediator and plans next steps.

Role and Expectations of Evaluators

All evaluators for the program have extensive mediation experience and have received an orientation to the process and goals of this program. Evaluators will be assigned before the mediator makes initial contact with the participants. Each evaluator will observe a particular case from the pre-mediation communications through the initial session and, using a form provided by the Mediation Program, will assess the mediator's core mediation competencies. The evaluator will not mediate the case and will endeavor to be as unobtrusive as possible in the presence of parties and lawyers. However, at the request of the mediator, made out of the presence and hearing of parties and counsel, the evaluator may provide limited suggestions or advice to the mediator. The evaluator will sign the confidentiality agreement.

PRE-SESSION PARTICIPATION

The evaluator will speak with the mediator prior to the mediator's contact with counsel in order to review the mediator's planned pre-mediation activities and to coordinate scheduling. Where possible, the evaluator should "observe" all mediator contact with counsel and/or the parties prior to the mediation. When pre-mediation sessions are conducted by telephone, the mediator will conference in the evaluator before the call begins so the evaluator can listen without contributing to the pre-mediation call. In instances where pre-mediation process is extensive, the evaluator will "observe" enough of the communications to be able to make an assessment as to the mediator's demonstration of competencies related to this phase. The evaluator will review all written submissions to the mediator prior to the first session.

PARTICIPATION IN THE FIRST MEDIATION SESSION

During the mediation session, the evaluator will strive to be in the presence of the mediator at all times. As noted above, the evaluator will not participate in or intervene in the mediation process in any way, or communicate with counsel or the parties beyond simple neutral pleasantries.

PARTICIPATION AFTER THE FIRST SESSION

Although it is not required, where possible, the evaluator will continue the evaluation by observing post-session activities of the mediator, including, for example, follow-up telephone calls and scheduling and holding additional mediation sessions.

FEEDBACK MEETING AND SUBMISSION OF FORMS

At the conclusion of the initial mediation session the evaluator will meet with the mediator to share and discuss the results of the evaluation, provide constructive feedback, and encourage positive, neutral, and critical self-reflection by the mediator. The evaluator may choose whether to share the actual evaluation form or to simply use the form as a guide for the conversation. This feedback meeting should begin with the evaluator asking the mediator to reflect on what was done well and what could have been done better in that particular mediation, using the competencies form as a guide to ask about

specific interventions. The focus of the feedback meeting should be the mediator's performance, not the specifics of the case. In the event that the mediation continues past one session, or other information is received such as the participant feedback forms, subsequent feedback meetings may take place. Mediation Program staff may participate in the feedback meeting or in post-process discussions with the mediator or evaluator.

The evaluator will not discuss the mediator's strengths and weaknesses or any contents of the evaluation form with anyone outside of the Mediation Program. Nothing contained within the evaluation form may be used for any purpose other than the Mediator Evaluation Program.

Within 48 hours of the feedback meeting the evaluator will submit the evaluation forms to the Mediation Office. Failure to submit the evaluation forms may result in removal from the list of evaluators.



Mediator Evaluation Program: Process Checklist

- () Cleared conflicts for this evaluation mediation.
- () Understanding that the goal of this process is to assess a fellow mediator’s strengths and weaknesses, have spoken with mediator to determine the extent of my participation during any mediation communications.
- () Reviewed the evaluation forms and competencies tool in advance of any mediation communications.
- () To the best of my abilities, made myself available for pre-mediation communications and the initial mediation session.
- () Signed confidentiality form.
- () Filled out the evaluation forms.
- () Discussed evaluation conclusions with mediator. (Please note: final determinations regarding a mediator’s status on the panel are made by the Mediation Office.)
- () Submitted this form, the final evaluation form, and competencies form to the Mediation Office within 48 hours of the post-mediation discussion.
- () I departed from the guidelines above for the following reasons:



Mediator Evaluation Program: Final Recommendation

I _____ observed mediator _____ on the following dates _____.

Understanding that any final decision as to a mediator’s continued service on the SDNY panel rests with the Mediation Program, based on this observation, I make the following recommendations about this mediator.

This mediator should continue to mediate because he/she demonstrated competencies discussed in the attached form. In particular:

This mediator should not continue to mediate now because he/she needs to develop the following competencies: _____

This mediator will be offered the opportunity, within 12 months from the date of this form, to observe at least 3 other mediations coordinated by the SDNY Mediation Program then to complete another evaluation mediation. During this 12 month period the mediator may participate in any training or professional development offered by the SDNY Mediation Program.

I recommend this mediator as an evaluator for the program. (Explain briefly.)

I have discussed my recommendations with the mediator.

At his/her request I have provided a copy of the evaluation forms to the mediator.

Date:

: Evaluator



Mediator Evaluation Program: Competencies Form

This form is intended to provide guidelines for the assessment of skills, interventions, and competencies associated with mediators using a variety of styles and approaches to mediation. It is not expected that the mediator will necessarily use or reflect all of the identified skills, interventions, and competencies in any particular mediation. This form is a crucial aspect of the evaluation process and we ask that you take time to read and complete it before speaking with the mediator. Where possible, please include specific examples of a mediator's comments and/or conduct to illustrate your evaluation of individual sections/interventions.

In order to protect the confidentiality interests of the participants, do not use the names of the parties or the lawyers. Also be sure not to provide information that might identify any of the participants.

Mediator: _____

Evaluator: _____

Dates of Observation: _____

In each section below, please 1) check all interventions/skills demonstrated by the mediator, 2) provide an overall rating for that section, and 3) use comments to provide examples of particular strengths and weaknesses. If a particular section or skill could not be accomplished or demonstrated due to circumstances beyond the mediator's control please give no rating for that section and explain the circumstances.

1. Pre-mediation Calls with Counsel:

Contacted parties to schedule call promptly after notice of selection by: phone ___ e-mail ___ other ___

Greet participants; endeavor to set positive, friendly, cooperative tone ___

Ask if participants have mediated before; explain, summarize, invite input about the process ___

Explain confidentiality and confidentiality agreement ___

Confirm identity of persons who will attend, including those with settlement authority ___

Ask status of case and discovery ___

Discuss initial statements in joint session ____

Established interim steps (e.g. limited discovery, content/deadlines for mediation statements) ____

Overall Assessment of Pre-Mediation Calls ____

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

2. Mediator's Opening Statement:

Greet participants; establish friendly, cooperative tone ____

Facilitate introductions ____

Explain process, role of mediator, role of counsel, confidentiality ____

Have everyone sign confidentiality agreement ____

Revisit discussion about initial statements ____

Overall Assessment of Opening Statement ____

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

3. Joint Session:

Listens attentively without interrupting ____

Manages interruptions that threaten the process, if appropriate ____

Asks clarifying questions ____

Encourages active participation of parties ____

Develops with participants an agenda of issues to be addressed ____

Uses active listening techniques (e.g. reflection, summary, reframing) ____

Overall Assessment of Joint Session ____

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

4. Explores Facts/Interests, Develops Options/Transmits Settlement Proposals:

Utilizes caucus effectively ____

Engages parties; encourages them to participate actively ____

Ascertains participants' interests ____

Asks open-ended questions ____

Maintains control of process while allowing participants to shape details ____

Helps participants evaluate strengths and weaknesses of their case ____

Facilitates creative problem-solving, where possible ____

Helps formulate and adjust settlement proposals ____

Encourages reality testing of options and proposals ____

Assists in defining next steps whether or not agreement is reached ____

Overall Assessment of Above Skills ____

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

5. Personal Attributes:

Stays calm, positive, and patient ____

Puts participants at ease ____

Listens attentively without interrupting ____

Facilitates interaction between parties, including difficult conversations ____

Responds appropriately to expressions of emotion ____

Shows empathy ____

Makes effort to build trust and confidence of the parties in the mediator and the process ____

Overall Assessment of Personal Attributes ____

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

6. Adherence to Ethical Standards:

Demonstrates impartiality ____

Maintains confidentiality ____

Supports self-determination of participants ____

Understands conflicts/recusal ____

Demonstrates requisite subject matter expertise ____

Overall Assessment of Ethics Standards ____

(5 = Exceptional; 4 = Very Effective; 3 = Competent; 2 = Needs Improvement; 1 = Does Not Perform Necessary Skill)

If specific circumstances prevented demonstration, explain:

7. Overall, was the mediator effective? (Y/N): ____

Why or why not?

8. Please describe the mediator's level of engagement with the feedback process (e.g. did the mediator display insight into his/her mediation practice, was the mediator open to comments from the evaluator, etc.)

9. Please describe any consultation between the evaluator and mediator throughout the mediation process:

10. How can this evaluation process and/or form be improved?

NOTES: