**Analysis of Data from New Hampshire Mediation Trainings**

Linked from "Stone Soup: Takeaways From New Hampshire Mediation Training"

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On November 2-3, 2017, Susan Yates and I conducted mediation trainings on behalf of the United States District Court for the District of New Hampshire, the New Hampshire Judicial Branch Office of Mediation and Arbitration, and the University of New Hampshire, School of Law. The training on November 2 was oriented to the federal court, with the morning focusing on mediators and the afternoon focusing on lawyers representing clients in mediation. The entire training on November 3 was oriented to the state court, focusing on mediators. Many of the people attending on November 2 stayed all day and some of them also attended on November 3. Ninety people attended all or part of the training on November 2, and 37 people attended all or part of the training on November 3.

We collected data from the training participants as part of the Stone Soup Project, both to enhance the training and also to test (and demonstrate) the value of using continuing education programs to collect data. This analysis illustrates how we succeeded in achieving both goals.

We conducted a survey of mediation participants asking about their practice experience, activities performed in mediation, and their hopes and concerns about mediation practice. When people registered for the trainings, they were asked to complete the survey online and 62 people did so. At the trainings, we distributed copies of the survey and an additional 25 people completed the survey, for a total N of 87. We can't calculate a response rate because some people may have completed the survey online but didn't attend the training and we don't have an unduplicated count of attendees. However, it appears that there was a very substantial response rate.

Most of the questions were forced-choice questions, though the last two questions were open-ended. Those two questions asked people to describe some of the most challenging problems they have experienced in mediation and what topics they would like to be covered in the training. Statistical significance tests were not performed on the survey data.

During continuing education programs, presenters often elicit participants' views on various issues. Our process was similar though we made a point of systematically eliciting and recording their views, and we promised to circulate summaries after the training. We asked participants about various issues (some of which related to the survey data we presented), and court personnel took notes summarizing their responses. This process was somewhat like a focus group, though the audiences were much larger than typical focus groups and, because the primary goal was to train the participants, we didn't spend as much time asking questions as typically occurs in focus groups.

Data from the surveys and discussions have complementary advantages and disadvantages. The survey data reflect the views of the entire sample and are more generalizable, but do not provide as much depth. The comments during the training help explain people's thinking to a greater extent, but do not permit generalizations.

This document integrates and summarizes the data from the survey and training discussion. Also included are some of my analysis and suggestions. For more detail, you can click on the following links to access the survey results, notes from the federal court training, and notes from the state court training.

In evaluations of our trainings, the participants generally found it helpful to get ideas from other participants, especially in comments during the training. Sixty-four percent that it was very helpful to get ideas from participants during the training and an additional 23% said it was somewhat helpful. Thirty-five percent said that it was very helpful to get ideas from the pre-training surveys and an additional 29% said that it was somewhat helpful. Although the training participants were not as enthusiastic about hearing about the survey data, almost two-thirds said that it was very or somewhat helpful. The lower level of interest may have been due to the fact that we didn't spend much time discussing the data and that it didn't focus as directly about how to solve problems they encounter in practice.

**Profile of Respondents**

About three quarters (73%) of survey respondents have served as a mediator and almost all (93%) have law degrees. We asked how long they had served as mediators and how long it has been since they received their law degrees, providing options of less than 1 year, 1-5 years, 6-10 years, 11-20 years, 21-30 years, and 31 years or more. Since we don't have the exact numbers of years, we can't calculate precise medians. The vast majority of mediators have served for more than 6 years and the median is somewhat less than 20 years. The vast majority of participants with law degrees have been out of law school for more than 10 years and the median is somewhat less than 30 years. Only 3% are judges or former judges. Twenty-one percent are on the federal court's mediation panel and 31% have contracted with the state court to conduct mediations.

We asked respondents to estimate the percentage of their practice in 2017 in various roles. The average response for lawyers representing clients was 60%, the average for mediators was 26%, and the rest were in other roles. In hindsight, we should have specified that we were asking about the amount of time they spent in the various roles because some people might have interpreted the question as asking about the number of cases, not amount of time.

We have better data about the role they had most often in mediations they attended in 2017. Forty-six percent said mediator, 28% said lawyer on the plaintiff's side, 18% said lawyer on the defense side, and the rest responded with other roles.

The respondents handle a wide range of cases including family and juvenile, torts, civil rights in employment, small claims, and a variety of other types. Of course, the types differ in federal court and state court because of the differences in the types of cases they handle. In particular, based on the discussion during the training, it appears that a substantial number of the state court mediations involve self-represented parties. Thus the characteristics of cases in the federal and state court programs differ.

**Criteria for Evaluating Mediations**

In the survey and during the training, we asked participants what they considered some of the most challenging problems they experienced in mediation (either as a mediator or lawyer) – aka "mediations from hell." We also asked during the training (but not in the survey) about characteristics of typical mediations that went well – "mediations from heaven." As might be expected, the responses were mirror images to some extent.

The survey provided strong indicators of what the participants didn't like in mediations. By far, the largest number of the comments (35) were coded as referring to uncooperative parties or lawyers, who often reportedly had unreasonable expectations. The other responses included lack of preparation by parties or lawyers (14), working with self-represented parties (9), lack of attendance or participation by person with settlement authority (7), mediator passivity, lack of creativity, and giving up too soon (6), problematic mediator expression of opinion (4), scheduling problems (4), "no-shows" (2), and power imbalances between the parties (2) as well as a long list of varied other complaints.

Related to the responses about challenges in mediation, people were asked what topics they wanted covered in training. These topics were coded into the following categories, with frequencies indicated in parentheses: dealing with apparent impasse and other difficult situations (17), mediators expressing opinions and promoting agreement (9), preparing for mediation (5), ethics (3), and working with self-represented parties (2), among others.

Comments from training participants lauded mediations where lawyers have good rapport with their clients and have prepared them well, factually and emotionally. Some praised lawyers who provided effective and understandable mediation memos and who allowed clients to participate. As might be expected, someone liked when parties focused on the needs of the parties (and children, in family cases), and another appreciated when apparently intractable disputes were settled. One person seemed to appreciate when lawyers prompted clients to become more reasonable (telling the clients that they were asking for things they couldn't get in court). Based on numerous discussions in the mediation community, some mediators probably would believe that this approach would be problematic, at least under many circumstances. One person appreciates when mediators follow up after a mediation if no settlement is reached during the mediation.

Following simulations during the training, people praised mediators who set a good tone to promote rapport; set an expectation of party self-determination; were very positive, respectful, calm, candid, even-handed, flexible, patient, and persistent; asked good questions and listened; engaged the parties; let parties talk as needed; encouraged emotional expression; started with small, less contentious issues; productively dealt with unproductive comments; didn't get rattled; and stayed on course.

Many of the comments appreciated mediators' judgment in making good decisions given the context of the particular situation. One mediator quickly identified common ground so that people could focus on areas that needed to be resolved. In one case, the mediator "actualized" what the agreement would look like as people discussed specific points. Someone praised a mediator for keeping the parties in joint session because that was effective in getting the business people to focus on solving the problems. On the other hand, another person thought it was helpful for the mediator to suggest caucusing, which led to creative, productive ideas. When it was clear that the lawyers were the impediment to making progress, one mediator kept the parties talking. When the lawyers and parties were making good progress on their own, a mediator helpfully let that process proceed without intervening. In one case, the mediator suggested engaging a neutral expert. In another case, the mediator was praised for offering a suggestion to involve experts in "hot-tubbing" (having direct conversations between the experts). Mediators effectively asked questions that prompted the parties to consider the impact of not reaching agreement, and asked about possible impediments to a successful agreement. In one case, a mediator working on a loss of trust between the parties suggested some safeguards that were necessary to provide confidence in their resolution.

People playing lawyers said that the mediators helped deliver a message to their clients that they hadn't been able to effectively deliver, better communicate with the other side, and create a safe place for clients to express themselves.

**Reasons to Mediate**

Since lawyers and parties often settle cases without mediation, they may decide to mediate for several reasons (in addition to being ordered by the court). For example, mediation is helpful when opposing counsel have a hard time communicating with each other and need a mediator to help them work through difficult issues. Having a court-connected mediator helps parties tell their stories to a person they associate with the court process. Being in mediation creates a climate where people are more invested in reaching agreement. When they are in mediation, it is harder to say "no" than in unmediated negotiation.

People may want to mediate even if they believe that they have a good case and are likely to win if they go to trial. One person noted that no matter how good a case is, there is always risk and settlement mitigates the risk. Settling provides more control over the outcome. Someone said that there is always a nuance that cannot be

resolved by a trial that is more likely to be addressed in settlement. Of course, going to trial adds to the cost and time, so one person asked rhetorically, "How much do you want to spend to win a great case?"

**Timing of Mediation**

People listed several reasons why mediations may not take place until shortly before trial. Lawyers want to know as much as can about the case before they mediate and they may not know the full extent of the damages until then. Parties have spent a lot of money to get to that point and may not be emotionally ready to resolve disputes until the eve of trial.

Mediation may not be optimal if it is too early or too late. One person said that the "sweet spot" of an ideal time is after completion of paper discovery and depositions of the key players. Another person said that they may be ready to mediate after expert report disclosures but may not need depositions of experts before mediation.

To get to the sweet spot, one person said that lawyers need to plan for what really need, though this usually doesn't happen. Another person said that lawyers need to agree with the opposing party about what needs to be exchanged before mediation.

**Mediation Memos**

Our survey found that 46% of people who participated in mediations in 2017 as mediators said that in more than half of those cases, all lawyers (or parties) provided substantive mediation memos before the mediation session. This compares with 62% of the people who participated as lawyers in mediations in 2017. Perhaps the most important possible explanation for the difference is that the mediators and lawyers were referring to different sets of cases. Some mediators in the sample handled small claims and family cases, often with self-represented litigants, where it wasn't normal or feasible to work with the litigants (or their lawyers) before mediation convenes. If the mediators and lawyers in the sample dealt with comparable sets of cases, perhaps the proportions of respondents in the two groups reporting use of mediation memos would be similar.

Another possible explanation relates to a common tension in which mediators and lawyers express frustration about mediation memos. Mediators around the country sometimes complain that lawyers do not submit them at all and when lawyers do submit the memos, sometimes they are late or unhelpful. Lawyers may feel that writing mediation memos may not be helpful in advancing the case and/or may be a low priority compared with other tasks on their agendas. Also, lawyers may be more likely to credit their activities as producing memos than mediators do.

During the training, several people said that the memos often were not very helpful. People said that the typical practice in New Hampshire was that the memos generally are not provided confidentially to the mediators but, rather, are shared with the other side. One person said that the memos were "useless" and another said that

the memos don't address the "real issues," such as obstacles to settlement. A plaintiff's lawyer complained that defense statements are "just fluff and very little substance," which annoys plaintiffs who made an effort to provide good memos. One person did like the memos, which were valuable for sharing information about chronologies of events and itemization of damages.

In response to a question about challenging experiences, people complained about receiving mediation memos from one side but not the other and getting the memos the night before the mediation. This prompted a discussion of possible tactics of mediators including setting deadlines for receipt of memos, explaining the mediator's difficulty in reading the memos, and asking if the parties want to reschedule the mediation.

**Preliminary Conversations with the Mediator**

In the survey, we asked people to indicate the proportion of mediations they participated in during 2017, in which all lawyers (or parties) had a substantial discussion about the mediation with the mediator before the mediation session. Only a small proportion of the people responding as mediators (16%) and as lawyers (17%) said that they had such discussions in more than half of their cases.

This pattern is somewhat puzzling to me considering people's frustration with the system of using mediation memos. Phone conversations take less time than preparing memos and phone calls don't result in documents, which lawyers might fear would come back to haunt them – especially if they are candid. Having preliminary conversations may not be as relevant for court-appointed mediators who receive small, fixed payments per case, as it may not be reasonable to expect them to do additional work before a mediation session.

One person said that pre-mediation conversations with mediators are very helpful to resolve a lot of things in advance, including discovery disputes. S/he said that this "helps make the most of a live session." Following a simulation of a preparatory conversation between the mediator and lawyers, mediators said that it was helpful to understand what the parties wanted, what issues they might work on in mediation, and what potential problems they will need to overcome.

The low frequency of these conversations in participants' actual cases may be related to the general practice in which lawyers' memos to mediators in New Hampshire generally are not confidential. The discussion in the training assumed that mediators would talk with mediators separately, though it would be possible for mediators to have conference calls with all the lawyers. One mediator said that some lawyers (especially less experienced ones) think that private pre-mediation conversations with mediator are not permitted or are wrong. People in the training noted that mediators could be transparent by telling both sides that they are calling both sides to have separate conversations, which would be like having caucuses during a mediation session.

Regularly having such conversations would involve a change in the practice culture in New Hampshire.

**Getting People Prepared to Mediate**

Lawyers can help clients prepare emotionally for mediation. For example, in death cases, lawyers can prepare clients for the offensiveness of talking about money as a way to redress a death. Lawyers also can prepare clients so that they do not act in an offensive manner.

Preparation is important so that lawyers learn information from clients that they need as counsel, including information that might be shared with the other side so they are ready for mediation and to reach agreement.

Opposing counsel (or "counterpart lawyers") generally don't seem to consult with each other to prepare for mediation in New Hampshire but it can be helpful to exchange information so that each side has what it needs to mediate successfully. For example, I suggested that lawyers might jointly plan logistics, such as preparing a common set of documents, much like joint preparation for trial. Lawyers also can agree in advance on some terms that would be part of a final settlement.

In the state court training, some of the mediators handle small claims cases and cases involving self-represented litigants where the mediators don't know who the parties will be until they meet at mediation. Some people asked if the courts could do more to help parties prepare, such as providing contact information of parties and their attorneys, if any. In family cases, it would help if parties complete their financial affidavits before arriving at mediation.

After a simulation in which lawyer-client pairs met to prepare for a mediation, one person said that this meeting helped them define the issues and the importance of those issues. Another person said it was helpful to find out what the client wanted and do some reality testing about how the client would feel about continued litigation. A third person said that it helped to listen to the client's anger and then get the client to reflect on the anger without the lawyer having to tell the client to calm down or be reasonable.

**Joint Sessions**

In our survey, we asked how often there was there a substantial joint session during the mediation with all sides in their mediations during 2017 (not including joint sessions that cover only the process). More than half (52%) of people responding about cases where they participated as lawyers and more than two thirds (68%) of people responding about cases where they participated as mediators said that there were joint sessions in more than half of such cases. The higher proportion of mediators reporting such joint sessions may be related to the fact that some mediators in the sample deal with self-represented parties and types of cases (such as family cases)

where joint sessions probably are more common. The survey question did not specify that the joint session would necessarily be at the beginning of the mediation. Nor did it ask about the proportion of the time was spent in joint sessions. In any case, it was surprising that people reported using joint sessions so frequently considering much recent commentary about the dwindling use of joint sessions.

People cited benefits of joint sessions including humanizing the parties to each other; giving parties a chance to be heard; and understanding the issues, the other side's perspective, and possible paths forward. The big fear is that joint sessions will open a Pandora's Box of unproductive emotion that can't be "put back in the box."

Lawyers may be more afraid of emotions than the parties. Some people said that joint sessions may be necessary precisely to deal with emotions, especially in small claims mediations. One person said that caucus is necessary to do "reality testing" with the parties. Several people commented that mediators generally prefer joint sessions more than lawyers do. One person said that, as an advocate, she hates keeping parties together, but as a mediator, she wants to be in joint session as long as possible. Another person said that mediators sometimes have to persuade lawyers to use joint sessions.

**Frequency and Value of Mediator Actions**

There has been a long-standing controversy about the propriety and effectiveness of various activities collectively referred to as "evaluative mediation." The ABA Section of Dispute Resolution Task Force on Improving Mediation Quality conducted a survey in 2007 of civil mediators and lawyers that included a question about the value of certain mediation activities often considered "evaluative." The surveys were collected at focus groups conducted in five large cities in the US. Focus group participants were invited because of their reputations as effective professionals.

In the survey of New Hampshire training participants, we asked about the frequency of the mediators' actions listed in the ABA survey. Table 1 presents percentages of respondents who responded that the mediators engaged in the following activities in more than half of their mediations in 2017. We asked people to respond separately for mediations in which they participated as mediators and lawyers. As noted above, the cases handled by the sample of mediators and lawyers differ, which may explain some of the differences in the responses.

**Table 1. Frequency of Mediators' Activities**
percentages of respondents who responded that the mediators engaged in the following activities in more than half of their mediations in 2017

| Mediation Activity | Participated as Mediator (N=61-62) | Participated as Lawyer (N=60-61) |
|---|---|---|
| Spent a substantial amount of time discussing the parties' underlying interests (i.e., not merely saving time and money or settling the case) | 67 | 52 |
| Suggested possible ways to resolve issues | 70 | 66 |
| Asked pointed questions that raise issues | 76 | 61 |
| Gave analysis of case, including strengths and weaknesses | 46 | 50 |
| Recommended a specific solution for settlement | 24 | 50 |
| Made predictions about likely court results | 17 | 40 |
| Applied some pressure to accept a specific solution | 10 | 38 |

The activities in the top three rows generally are not considered controversial, unlike those in the bottom four rows. The mediators in the sample reported somewhat more frequently than the lawyers that the mediators explored underlying interests, suggested ways to resolve issues, and asked pointed questions. About half of both groups said that mediators gave analyses of the cases in more than half of the cases. Substantially more lawyers than mediators reported that mediators frequently recommended specific solutions, predicted likely court results, or applied pressure to accept particular solutions.

These differences may particularly reflect the differing caseloads and norms of the samples of mediators and lawyers. Some of the mediators' cases involve self-represented litigants and family cases, where mediators generally may consider "evaluative" activities to be less appropriate. In the lawyers' cases, these activities probably are more common and considered normal. Considering that the more "evaluative" activities are controversial for some mediators, the findings may reflect, in part, a "social desirability" bias, prompting people not to acknowledge things they find embarrassing.

The New Hampshire survey also replicated the questions in the ABA survey about the "helpfulness" of the mediator activities. Thus, rather than describing actual activities, these questions asked people to describe how helpful they believe the activities are. Table 2 compares percentages of reported actual frequency of activities in mediation in more than half the cases and activities that respondents say would be helpful in more than half the cases.

**Table 2. Comparison of Reported Frequency and Helpfulness of Mediator Activities**

percentages of reported actual frequency of activities in mediation in more than half the cases and activities that respondents say would be helpful in more than half the cases[1]

| Mediator Activity | Mediator | | Lawyer | | |
|---|---|---|---|---|---|
| | Actual (N=53-54) | Helpful (N=35-37) | Actual (N=57-58) | Helpful - P (N=23) | Helpful - D (N=16) |
| Spent a substantial amount of time discussing the parties' underlying interests (i.e., not merely saving time and money or settling the case) | 67 | 78 | 52 | 83 | 81 |
| Suggest possible ways to resolve issues | 70 | 70 | 66 | 78 | 94 |
| Ask pointed questions that raise issues | 76 | 83 | 61 | 96 | 100 |
| Give analysis of case, including strengths and weaknesses | 46 | 31 | 50 | 83 | 75 |
| Recommend a specific solution for settlement | 24 | 19 | 50 | 48 | 63 |
| Make predictions about likely court results | 17 | 11 | 40 | 61 | 44 |
| Apply some pressure to accept a specific solution | 10 | 6 | 38 | 52 | 50 |

In both the mediator and lawyer groups, larger proportions of respondents said that it would be helpful to discuss parties' underlying interests than said that this is actually occurring in most cases.

In general, larger proportions of the lawyers said that the listed activities would be helpful than actually occurred in most cases in 2017. The only exception was that there wasn't a clear difference about mediators recommending a specific settlement.

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[1]There is some difference in the set of respondents included in the "actual" and "helpful" columns. Responses in the "actual" columns are from respondents describing cases in which they mediated or represented parties in 2017. The "helpful" columns refer to the roles that respondents said that they most often had in mediations in 2017. The number of respondents in the "actual" columns is larger than in the "helpful" columns. This is probably due to the fact that some respondents participated in different cases as a lawyer and a mediator and would be included in both groups describing activities in "actual" cases. For the data about what would be helpful, respondents were included in only one group based on the role they had most often in mediation. Given these differences in the sub-samples and the small sub-sample sizes, the comparisons should be interpreted cautiously. Moreover, since statistical significance tests were not conducted, small reported differences may not reflect actual differences. With these cautions in mind, the comparisons seem intriguing and worth pursuing in future research.

By contrast, responses by the mediator groups suggested that they thought it would be helpful if the most controversial listed activities would occur less frequently than they report as occurring in most cases. These include analyzing cases, recommending specific solutions, making predictions about likely court results, and applying pressure. The mediator groups' responses suggest that they think it is helpful to ask pointed questions and suggest possible ways to resolve disputes in about the same frequency as occurred in 2017.

Table 3 compares responses of New Hampshire training participants with those of respondents in the ABA study about what activities would be helpful in most cases.

**Table 3. Comparison of New Hampshire and ABA Data About Helpfulness of Mediator Activities**

percentages of respondents who think the activity by the mediator would be helpful in more than half of their cases regardless of how often it has happened in their cases in the past.[2]

| Mediator Activity | New Hampshire | | | ABA | |
|---|---|---|---|---|---|
| | Mediator (N=35-37) | Plaintiff Lawyer (N=23) | Defense Lawyer (N=16) | Mediator (N=44-48) | Med. User (N=53-56) |
| Spent a substantial amount of time discussing the parties' underlying interests (i.e., not merely saving time and money or settling the case) | 78 | 83 | 81 | Not asked | Not asked |
| Suggest possible ways to resolve issues | 70 | 78 | 94 | 79 | 100 |
| Ask pointed questions that raise issues | 83 | 96 | 100 | 87 | 86 |
| Give analysis of case, including strengths and weaknesses | 31 | 83 | 75 | 52 | 80 |
| Recommend a specific solution for settlement | 19 | 48 | 63 | 18 | 75 |
| Make predictions about likely court results | 11 | 61 | 44 | 21 | 45 |
| Apply some pressure to accept a specific solution | 6 | 52 | 50 | 23 | 64 |

[2]As in Table 2, the New Hampshire respondents were categorized based on the role in mediations that they had most often in 2017. Similarly, in the ABA data, respondents were categorized by role they had most often in mediation, though this was not limited to any time period. The "mediation users" primarily were lawyers representing clients.

Results from the two surveys are remarkably similar despite differences in the populations and the fact that the surveys were conducted ten years apart. The ABA data was collected in large cities from civil practitioners considered to be especially effective. Cities and towns in New Hampshire are much smaller and the survey respondents represent a wider range of the practitioner populations.

One difference between the surveys is that only the New Hampshire survey asked about the helpfulness of discussing parties' underlying interests, which the vast majority of mediators and lawyers said would be helpful in most cases.

In both surveys, there was broad agreement by mediators and lawyers that it is helpful for mediators to ask pointed questions and suggest possible ways to resolve issues. In both surveys, the lawyers generally want mediators to take certain actions to promote agreements that mediators generally were less comfortable doing. In particular, majorities of the lawyers believe it would be helpful for mediators to apply pressure whereas only 23% of mediators in the ABA survey and 6% of mediators in the New Hampshire survey agreed. There were similar differences between the lawyers and mediators about the helpfulness of mediators giving their analysis of the case, recommending particular settlements, and predicting likely court results.

**Giving Legal Information or Advice**

A question about how to define good quality in mediation led to a discussion about the appropriateness of mediators providing legal information or advice, particularly in dealing with self-represented parties.

One family mediator said that she provides a lot of legal information because the goal is to keep parties out of court for the longest possible time. Before parties explain their situation, she provides information sheets on topics as they come up. She believes that it would be problematic **not** to give information in her subject area because this could lead to real legal problems if the judge does not approve an agreement or it is unworkable.

One mediator said that in court-connected mediation, mediators have some obligation about producing a fair outcome. From this perspective, parties need to know what they are giving up so that if, for example, defendants later find out that their cases would have been dismissed, they might be upset. The mediator said she did not advocate giving legal advice but was concerned that a mediation might result in a "miscarriage of justice."

Parties represented by lawyers can rely on them for legal advice, but this does not happen for parties who cannot afford or do not wish to hire lawyers. One person said, "I would hope the process begins at the court level informing a self-represented person that you proceed at your own risk when you move without a lawyer." Another mediator said that he sometimes tells parties in caucus that he thinks the court wouldn't approve their agreement.

Others are more cautious. One person said that it is hard to know what is fair when parties tell opposite stories. Another said that any information that mediators provide must be correct. Another was concerned that even providing information, such as about the statute of limitations, may reflect the mediator's judgment and may not be fair.

**Dealing with Emotions**

Dealing with parties' emotions in mediation can be both challenging and helpful. Expression of emotion can provide valuable information about people's perceptions, interests, and values. Mediators said that they sometimes could not focus on problem solving until parties dealt with emotional issues.

In dealing with the challenges, people suggested a range of strategies. These included acknowledging the emotion and not signaling that there is something wrong with it, for example, by seeming embarrassed. One person said that parties should be reassured that they don't have to be sorry for expressing emotions. Mediators can help by noting the progress that parties have made. Non-verbal communication can be important, including permitting a period of silence (even though it may feel awkward). If people cry, they should be offered tissues and asked if they want some time or privacy to compose themselves.

Dealing with emotions can be particularly challenging when working with self-represented parties and when there are significant time constraints. People suggested using an explicit agenda and asking people how they want to use their time. One person noted that in some cases, mediators may need to spend as much as three-quarters of the time dealing with parties' emotions. I suggested that mediators can periodically note the amount of time left and ask about the best way to use the remaining time or simply manage the time accordingly.

**Length of Mediations**

One person commented that in her experience, a long day of mediation is grueling for plaintiffs. So she said that efficiency in the process is better for plaintiffs. A number of people felt that mediations sometimes take longer than needed. One person noted that it is not unusual for people to take time in mediation to gain advantage and/or use as a face-saving device to justify settling. Another person said that mediation is as important as a trial and that parties need just as much work, preparation, and commitment.

**Conclusion**

The people in the trainings grapple with common problems in court-connected mediation in the US these days. Although some of the issues are specific to the practice culture in New Hampshire, many of these issues apply more broadly. The participants' reactions reinforced the recognition that problems and solutions in

mediation vary greatly in different types of cases. And mediators' perspectives often differ from those of lawyers who represent parties in mediation.

A major problem is getting parties and lawyers to cooperate in mediation. Of course, that won't happen in all cases but mediators and lawyers hunger for ideas about how to make this happen more frequently. Professionals may make more progress by focusing more on parties' underlying interests, an idea widely endorsed by the training participants.

Helping parties get better prepared before they arrive at a mediation session also may help. The ABA Section of Dispute Resolution produced some very useful guides to help parties get ready.[3] Lawyers, mediators, and courts who take advantage of these guides by providing them to parties and helping them prepare better may improve the process and results in their mediations.

[3]These guides were prepared by an ad hoc group including Tim Hedeen, Howard Herman, Jess Lidsky, Geetha Ravindra, Harrie Samaras, and myself.