Protocol for Interview
Mediators and Case Prediction

There are two potential protocols:

I.   Observation followed by interview
II.   Interview without observation

I – Observation followed by interview

1. Arrange for observation: Either on your own initiative or as assigned by Prof. Yarn, arrange with a lawyer-mediator (subject) to observe a mediation prior to our last class, Nov. 15.[1]
2. Send consent form and demographic survey questions (see below) to subject in advance of the observation.
3. Observation – meet subject in advance of mediation. During mediation, be unobtrusive and stay with the mediator during caucuses. With regard to analytical techniques, look for pointed questions, discussions about strengths and weaknesses of parties' cases, suggesting possible ways to resolve issues, what may constitute a "fair" settlement or recommending a specific settlement, pressure to accept a specific solution, risk analysis, and *any predictions or discussion about likely court results*.
4. Conduct interview

Start open-ended questions, such as "how typical was this case?" "From your perspective as the mediator, what happened in this case?"

Eventually, you want to guide them toward a discussion of how they may or may not have used analytical techniques, particularly case prediction. With respect to case prediction, if you saw it, then ask how they mentalized it (how did they come to a conclusion about the possible litigated outcome of the case), how accurate they feel the prediction was, and how they make that assessment, and how did they decide how to use that assessment in the mediation process. Compare to what you observed. If you didn't see case prediction, ask if they mentalized it anyway, followed by some of the same questions above. If they claim not to make such a risk assessment in their own minds, how do they avoid thinking about it? Be skeptical and curious without being disrespectful.

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[1] If assigned, the mediator will have received a copy of a letter explaining the purpose of the project (see "170930 email solicitation" posted in iCollege). If you make arrangements on your own initiative, please consult with Prof. Yarn on what information to provide the subject in advance.

II –Survey and interview without observation

1. Arrange a meeting either in-person (preferable) or via phone or video-conference: Either on your own initiative or as assigned by Prof. Yarn, arrange with a lawyer-mediator (subject) for an interview prior to our last class, Nov. 15.[2]
2. You can send the consent form and demographic survey questions (see below) to subject in advance of the interview or include this step in the interview.
3. Conduct interview

If we haven't observed, I think we can be a little more up-front as to what we want to discuss. So after some ice-breaking, ask about a recent or memorable case, without names or identifying information. Then move toward analytical techniques, including the use of pointed questions, discussions about strengths and weaknesses of parties' cases, suggesting possible ways to resolve issues, what may constitute a "fair" settlement or recommending a specific settlement, pressure to accept a specific solution, risk analysis, and *any predictions or discussion about likely court results*. Ask if they ever help the parties with risk analysis through case prediction. If so, how do they go about it? Get examples of any case in which they used it. How they mentalized it (how do they come to a conclusion about the possible litigated outcome of the case), how accurate they feel the prediction was, and how they make that assessment, and how did they decide how to use that assessment in the mediation process. If they say they don't use case prediction, ask if they mentalize it anyway, followed by some of the same questions above. If they claim not to make such a risk assessment in their own minds, how do they avoid thinking about it?

Demographic Survey Questions:

Tell me a little about yourself:

- What is your age?
- What is your gender?
- What is your ethnicity?
- What mediation training have you received?
- Experience:
  - How many years of law practice?
    - Description of law practice
      - If litigation, what percentage was plaintiffs' and defense.
    - Have you ever been a judge?
      - Court
      - Number of years
  - How many years of mediation practice?
    - Number of mediations conducted (approximate)
    - Dominant dispute types

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- Sources of referral
  - Court-connected %
  - Private administrated %
  - Private ad hoc %

How would you describe your mediation practice and style.

- Why do you think parties or their attorneys pick you?
  - How important is your experience as a mediator to the selection?
    - 1 unimportant 2 a minor factor 3 important 4 very important
  - How important is your experience as an attorney to the selection?
    - 1 unimportant 2 a minor factor 3 important 4 very important
  - If applicable, how important is your experience as a judge to the selection?
    - 1 unimportant 2 a minor factor 3 important 4 very important
- Are there particular types of cases for which you are often picked?
- What would you describe as your primary goal in mediation?
- How would you describe your mediation style or technique?
  - Prompts – transformative, facilitative, evaluative, non-directive, directive, combination, as the case requires

1.
2. Review definition of "case prediction."

When settling legal disputes, lawyers frequently engage in case prediction. For our purposes, "case prediction" means forming an opinion as to the likely outcome if an issue in dispute is adjudicated, either by a court or through arbitration. The purpose of this survey is to better understand how mediators use case prediction. In this context, case prediction can be a completely internal mental process in which the mediator forms an opinion but does not share that opinion with any participants. It can also occur when a mediator shares an opinion with one or more participants or when a mediator facilitates participants in forming or revising their own opinions. Although sometimes related, case prediction is distinct from forming an opinion on what is a "fair" or "correct" resolution of an issue in dispute. Nor is it necessarily synonymous with "evaluative mediation."