

## Evaluating Scope of Services and Provider Qualifications in State ADR Programs<sup>□</sup>

By

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State and local governments are involved with Alternative Dispute Resolution (ADR) in every conceivable way that such programs and techniques have been used. A brief summary of state involvement in ADR includes these state-sponsored ADR activities:

- Designing, funding and managing ADR programs within state governments to resolve disputes between private parties arising under state law or between or among state agencies and private parties;
- Funding state court-annexed mediation, early neutral evaluation and arbitration programs;
- Licensing or credentialing ADR practitioners;
- Funding community mediation programs;
- Operating ADR programs to resolve EEO and other employment disputes between state and local governments and their employees; and

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- Participating as a party in ADR cases, where they are represented by in-house (either agency or Attorney General) or outside counsel.

Although each of these areas deserves its own extensive analysis, this chapter will only briefly focus on state administrative ADR programs generally and then it will limit its analysis to state court-annexed ADR programs and state credentialing of ADR practitioners applicable to those programs. This chapter outlines some of the major elements of each of the court-annexed programs, and focuses on the major differences between programs: in the nature and type of service offered; what disputants might expect to see in each of the programs; the different qualifications the court-annexed programs have established; why the standards and qualifications are different; and, whether those qualifications can reasonably assure quality ADR services.

## **I. State Administrative ADR Programs**

The best source concerning various state ADR programs is the National Policy Consensus Center (NPCC) and the Policy Consensus Initiative (PCI). The NPCC “develops collaborative governance systems that enable state leaders to achieve better solutions to complex issues.” The PCI “builds and supports networks that provide states with leadership and capacity to achieve more collaborative governance.”<sup>1</sup> These two sources were established to help state ADR leaders develop a collaborative system of governance. Together, NPCC and PCI work to:

- Create and support collaborative governance capacities, structures, and networks in states;
- Offer a nationally-recognized source of information on collaborative governance, consensus building, and conflict resolution;

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<sup>1</sup> <http://www.policyconsensus.org/index.html>

- Demonstrate effectiveness of collaborative, consensus-based processes; and,
- Support and foster state leaders who champion these approaches.

State administrative ADR programs are located in the executive branch of state governments and provide ADR services to state agencies. According to the NPCC/PCI, several states have established and funded ADR programs to resolve administrative disputes under state law. The programs range widely, from mediating special education disputes to conducting multi-party negotiations, to seeking consensus on state policy issues. Examples of these state programs include:

- **Office of Administrative Hearings, State of Maryland**

Hears all contested state administrative law cases, mediates special education disputes, and encourages mediation where appropriate.

- **Montana Consensus Council**

Provides consensus building, training and education, research, and publications for state and local government.

- **Office of Dispute Settlement, State of New Jersey**

Provides mediation and other neutral dispute resolution services to the public and private sectors.

- **Office of Administrative Law, State of New Jersey**

Handles environmental conflicts for the Department of Environmental Protection. Holds formal hearings on disputes, provides a well-regarded settlement program prior to hearing, and conducts arbitration involving toxic spills.

- **Office of Public Facilitation, State of New Mexico**

Provides resources to any interested state agency that requests help on issues of water, natural resources management, environmental health, public health, and other public policy issues that may benefit from the facilitative process.

- **Commission on Dispute Resolution and Conflict Management, State of Ohio**

Established in 1989, the Commission provides Ohioans with constructive forums, processes, and techniques for resolving disputes. Focused on four program areas – educational institutions, state and local government, courts, and communities – the Commission works to positively affect the lives of all Ohio citizens by providing dispute resolution and conflict management training, consultation and technical assistance in designing dispute resolution programs, and facilitation and mediation services.

- **Office of the Property Rights Ombudsman, State of Utah**

Helps resolve disputes and solve other problems between property owners and Utah governmental entities as a non-partisan, neutral state office. The attorneys in the Office of the Ombudsman take no sides in a dispute, and advocate for fairness and compliance with state and local laws and ordinances. Helps determine whether state government actions are fair and reasonable. Investigates and recommends solutions if a government action may violate private property rights or otherwise involve land use regulation by either the state or local government.

While this is a short list of state administrative programs, it by no means tells the full story about state uses of ADR techniques. As shown in the discussion of state court-

annexed programs below, many programs, while located in the judicial branch, provide similar ADR services to those provided by the programs located in the administrative branch of state governments. There does not appear to be a clear delineation between administrative branch programs and court-annexed programs in part because there is little difference in the types of cases mediated by court-annexed and administrative programs.

Three states, however, have administrative ADR programs that provide ADR services in specific, specialized types of cases. For example, Utah focuses on “takings” cases, involving governmental takings of private lands. Maryland, in addition to conducting traditional public hearings, provides mediation services in special education cases through its Office of Administrative Hearings. The New Jersey Office of Administrative Law, handles toxic spills and, other specialized environmental cleanup disputes using ADR techniques instead of Administrative Procedures Act type hearings. It is also interesting to note that Maryland has a court-annexed program, the Mediation and Conflict Resolution Office (MACRO) that supports mediation in all types of cases.

As shown in the spreadsheet in Appendix 1, most state ADR activity takes place within or through the courts. Our research confirms NPCC/PCI’s assertion that there are at least 39 state court-annexed ADR programs. These programs vary widely in the types of cases they accept, and include small claims and civil litigation disputes, family disputes (including custody and dependency cases), restorative justice issues, state administrative conflicts, and permitting and licensing issues.

## **II. State Court-Annexed ADR Programs and Practitioner Qualifications**

Most state court-annexed ADR programs provide one or more of the following programs:

- Small claims mediation programs;
- Larger civil case mediation programs;
- Family mediation programs; and,
- Early-neutral evaluation programs.

Some state court-annexed programs also offer several other ADR services, including: victim-offender mediation, educational mediation, and arbitration. This article will focus only on the four programs enumerated above. The other programs are offered by only a few states, such as Alabama and Arizona, and even there are limited in scope.

The four types of programs listed above involve two types of ADR processes: mediation and early neutral evaluation. Mediation/facilitation<sup>1</sup> and early neutral evaluation are important ADR processes because they have become, by far, the most commonly used techniques. They are discussed together because the skills and techniques necessary to become effective mediators and early neutral evaluators are in some respects similar. Arbitration, another frequently used ADR process employed by many court-annexed programs, is dealt with in depth elsewhere and is not included in this analysis.

#### **A. Mediation and Early Neutral Evaluation Defined**

As noted above, there are a wide range of ADR techniques. First, it is useful to provide some definitions. For the purpose of this analysis, mediation and facilitation are defined processes in which disputants meet with “an impartial and neutral person who assists them in the negotiation of their differences.”<sup>2</sup> Some court-annexed programs

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<sup>1</sup> For the purposes of this paper, mediation and facilitation are treated the same.

<sup>2</sup>JAMs, “Mediation Defined”, 2003, 6 April 2008 <<http://www.jamsadr.com/mediation/defined.asp>>.

allow parties to mutually select the mediators for their cases, while most programs appoint neutrals from a roster of neutrals maintained by the court.

Early neutral case evaluation is another form of alternative dispute resolution where a neutral assesses each party's case and gives an opinion as to how the evaluator thinks the case would be resolved if it were to go to trial.<sup>3</sup> Early neutral evaluators are generally required to be attorneys, often with a number of years of experience, and to be members of the local or state bar. These specifications are based on the assumption that their legal training, experience in court, and understanding of the law provide a sufficient basis upon which they can make a reasonable and realistic evaluation of the merits of the case.

Because so many states now offer a variety of ADR processes through court-annexed programs, states, especially their courts, have had to grapple with whether and how to qualify people to serve as mediators, early neutral evaluators, arbitrators, and other types of ADR service providers. Appendix 1 lists most state programs and the types of services they offer.

The following section briefly describes small claims, large case, family, and early neutral evaluation ADR programs.

## **B. Small Claims Mediation Programs**

Many states, such as New Jersey, Maine, and Virginia, offer small claims mediation programs through either court-annexed programs or community mediation programs. Some states, such as Maine, even offer it through both routes. Small claims mediation programs have been among the earliest mediation programs offered by state

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<sup>3</sup> From the 26th Judicial District in North Carolina Administrative Office found at <http://www.aoc.state.nc.us/www/public/courts/meck/disk01/glossary.html>

and local governments. They generally provide volunteer mediators to assist parties in resolving disputes that might not be appropriate for litigation, but are still very important for the parties to resolve. For example, small claims mediation offers disputants an alternative way to resolve their conflict when it is too expensive for them to go to court.

These matters would go unresolved if it weren't for the services offered by local community mediation programs or the courts. In Maryland, for example, community mediation programs offer "day-of-trial" mediation of claims pending in the District Court, Maryland's court of limited jurisdiction and small claims. The point is to offer parties the option of settling their case more efficiently and cost-effectively before the case is heard by a judge.

These programs generally recruit volunteers with a certain level of mediation training, generally forty hours. In some states, mediation training must be provided through qualified training programs, which usually include "experiential" or "role-play exercises" where the trainees have the opportunity to practice mediation skills. The programs may also qualify or otherwise establish standards for the providers of the training however, these standards tend to be generally that the trainers have had mediation experience.

Small claims mediators are required by most states to have skills training, but most are not required to have any subject matter expertise; nor are they required to be licensed attorneys or even have particular educational qualifications, such as a college degree. These requirements appear to be based on the assumption that mediation skills are much more dependent on practice than on any academic education or professional

experience, and that “life experience” is important to assist people to resolve human conflict.

Because mediator qualification standards, including process skills, background, and prior experience, vary tremendously between states, so do the mediation services provided by small claims programs. One common thread in all of those programs, however, is that the mediators are generally directed by program guidelines not to express an opinion about the possible outcome.

Courts tend to restrict mediators from evaluating the merits of a case for two major reasons. The first is that since volunteer mediators are not required to be attorneys, there is a concern that merits-based opinions could be incorrect. The mediators are usually only trained to be process and communication experts and not to be informed about the merits. Secondly, mediators can lose their neutrality and ability to work with parties as an “honest broker” focused on communication and process if they ineffectively express opinions about the merits.

### **C. Large Case Civil Mediation Programs**

Maryland and many other states also offer large case civil mediation programs (in Maryland, at the Circuit Court level). These programs generally offer mediation to parties in almost any filed civil litigation case. These mediation programs often have similar criteria for qualifying mediator process skills, but very different criteria regarding mediators’ subject matter experience. While parties are often free to select their own mediators, using whatever qualifying standards upon which they can agree, the large majority of these cases are handled by mediators qualified by the courts and listed on

court-maintained rosters. Generally the mediation standard – 40 hours of mediation skills training – is the same or very similar to that applicable to most small claims programs.

The main difference in qualification standards in these large civil case mediation programs are the mediator's level of education, the requirement for professional certifications, and sometimes the years of experience with the types of issues litigated in the courts. Here the standards are very different from the small claims programs. Most court-annexed programs require large case civil mediators to have experience practicing law. Often the programs require bar membership in the bar of the state in which the court is located, reflecting an indication of some knowledge of the law applicable to the particular dispute.

#### **D. Family Mediation Programs**

Family mediation programs are similar to large case civil mediation programs in that, in addition to requiring mediators to have received mediation skills training, the programs also require specialized knowledge and experience with child and family issues. As shown in Appendix 1 these programs often require practitioners to be attorneys with specialized training or experience in family law, or be licensed as family practitioners in psychology, psychiatry, or social work. Most require as well some mediation skills training. These standards exist because the courts recognize that family law and family issues are complex and require significant subject-matter knowledge in addition to the process skills.

#### **E. Early Neutral Evaluation Programs**

Early neutral evaluation programs are designed to allow a neutral with subject matter expertise in the dispute at hand to listen to both parties present facts and

arguments about the strength of their case in order to provide parties with an assessment of who is likely to prevail should the case go to trial. The neutrals are, therefore, selected not based on their mediation skills – although some programs do require mediation skills training – but on their credibility and experience regarding the matter in dispute.

The problem with this type of ADR technique is two-fold; the parties' willingness to accept a recommendation by neutrals is largely based on the perceived credibility of the neutral. Thus, their subject-matter experience, the ability of the neutrals to listen to – and demonstrate that they truly understand each party's case -- and their ability to communicate effectively with the parties are each critical to establishing such credibility.

Mediation skills are not seen by these state court-annexed programs to be as important as subject-matter experience. Mediation skills, however, are equally as important as the subject-matter knowledge of the service provider. It is as important for the provider to be *seen by the parties* as an empathic and knowledgeable listener. Absent this ability to become trusted by the parties as fair and neutral, as well as knowledgeable, neutrals are generally unable to provide the *sine qua non* of mediation, to assist the parties to understand each other (and their cases) better and hopefully to reach settlement.

A review of state court-annexed ADR programs and the qualifying standards for ADR practitioners demonstrates several important points. First, states are providing ADR services to disputants in a wide variety of settings and programs, with the majority of the programs housed in the judiciary. Second, the providers of these ADR services are not usually state employees, but rather volunteers or privately paid providers. This has led the courts to establish standards or qualifications for those listed on court ADR-provider rosters. State courts have established different standards for mediators than for early

neutral evaluators and other types of ADR providers, with mediators generally having the lowest barriers to entry. For example, many states rely on volunteers to mediate small claims cases. Lastly, many states substitute practice as an attorney or specific subject-matter experience in more complex or higher value cases for experience as a mediator or ADR practitioner. The remainder of this article examines each of these points in some detail.

### **III. Dilemmas with Mediator Qualifications in State Court-Annexed Mediation Programs**

Many states have not established qualifications standards for parties who mediate disputes outside the court-annexed programs using privately selected mediators.

However, court-annexed mediation programs have required the states to wrestle with designing and implementing standards to govern the quality of services provided by mediators who provide services within the state programs<sup>4</sup>. The court-annexed programs have begun to set boundaries on what a mediator can – and cannot – do, and to establish mediation training and other qualifications standards.

The programs have also started to restrict some types of cases to either attorneys or other professionals (largely therapists and family services professionals for those mediating family matters) or have imposed standards regarding subject-matter knowledge. These programs are defining mediation to prevent mediators – at least certain types of mediators – from expressing opinions about the merits of an issue or dispute.

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<sup>4</sup> The private bar is also grappling with this issue. *See*, for example, the Final Report of the American Bar Association Task Force on Improving the Quality of Mediation, April 2006 – March 2007 Published by the American Bar Association Section of Dispute Resolution [www.abanet.org/dispute](http://www.abanet.org/dispute)

Most small claims informal dispute resolution programs, such as in Idaho, use volunteers who have completed at least 40 hours of mediation skills training. However, mediation skills (as with most skills) are developed through experience and practice. Simply having taken forty hours of training does not provide trainees with enough practice and experience to develop effective mediation skills. Some court-annexed programs, for example those in Florida and Oregon, also require that new mediators co-mediate or otherwise be mentored by more experienced practitioners

It is also important to note that these neutrals are not expected to have any subject matter experience or professional credentials. Consider the standards applicable to “small claims day-of-trial” mediation. Many of these programs prohibit or otherwise discourage these mediators from expressing opinions about the merits of the case and the law, and often explicitly prohibit the mediators from doing so<sup>5</sup> as these mediators may have zero knowledge of the substance of the dispute. The courts have decided that to allow such mediators to become involved in the substance is to invite problems.

Some states, such as Georgia and Hawaii, have also defined other types of ADR services provided for larger civil cases and family issues. These may include: early neutral evaluation, use of settlement conferences, and making mediation available. For example, Maryland calls such service providers “ADR neutrals<sup>6</sup>.” However, simply re-naming the service, without really addressing the necessary skills to provide effective ADR services, does little to improve the quality of service and can mislead parties about what types of services they actually can expect to receive.

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<sup>5</sup> See, for example, Maryland and Florida.

<sup>6</sup> Maryland Judiciary, “Maryland Rules of Civil Procedure, Title 17. Alternative Dispute Resolution”, 2006, 6 April 2008 <<http://www.courts.state.md.us/>>.

Those states that have bifurcated programs into large, family, and small claims cases have similar mediation skills training standards but very different professional or subject matter qualifications. Proponents supporting professional and subject matter qualification standards suggest that without professional qualifications, unqualified mediators would possibly provide incorrect or biased advice to disputants about the merits of a particular matter. To guard against this risk, some programs, such as Maryland, have rules designed to prohibit ADR providers from expressing opinions about the merits of the case.

However well intentioned, these limiting rules are simply exhortations and essentially unenforceable. Further, the rules do not address the underlying concern – that the ADR providers be competent and knowledgeable about the issues under discussion. The courts have qualified mediators in both the small claims and large case and family disputes by only requiring 40 hours of training and no actual mediation experience<sup>7</sup>.

Some states, like Virginia, require more than just forty hours of skills training, and providers also must first serve as observers or co-mediators. The only difference is that those who mediate large case and family disputes often must be qualified professionals with experience in civil case disputes and/or with the subject matter of the dispute.<sup>8</sup> We have found no court-annexed programs that require more experience as a mediator in small claims, large case, or family disputes. This is a problem.

Realistically, forty hours of skills training – even from the best training programs -- is not enough to equip people to perform as effective mediators in *either* small claims

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<sup>7</sup> States with 40 hr training and no observe/conduct requirements include: AL, IL, IN, MN, NJ, SC, CO, ID

<sup>8</sup> Attorneys for civil cases (FL, ID, IN, NH, SC) and attorneys and/or family professionals for family cases MN, PA,

or large case programs.<sup>9</sup> Most experienced mediators would agree that competence as a mediator requires forty hours of skills training *plus* many hours of actual mediation experience. Some state programs recognize that the forty hour training provides limited mediation skills and thus require that new mediators be teamed with a more experienced practitioner, at least for the first few cases they mediate after certification is completed.<sup>10</sup>

States that attempt to limit mediators from discussing the merits of a case sometimes do so by labeling the services as something other than mediation. Maryland calls such practitioners “ADR Providers<sup>11</sup>.” Many states also use attorneys and retired judges to mediate. In such programs the “ADR Provider” (or whatever other label they are given) are not prohibited from expressing opinions about the merits of a case – on the assumption that attorneys and retired judges are competent enough to understand an issue and any relevant law -- and may be given latitude to opine during the mediation. However, these same lawyers and retired judges are generally required only to have the same, relatively low training standard of forty hours in mediation skills and are not required to meet minimal mediation experience standards. Query whether they have the necessary skills to be able to express such opinions effectively.

Maryland provides an excellent example of the limitations of such state requirements in its programs. In 2003, the Maryland Court of Appeals, the State’s

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<sup>9</sup> For instance the only Federal roster of mediators, the U.S. Institute of Environmental Conflict Resolution requires roster members to have served as a lead neutral in a collaborative process (e.g., mediation, consensus building, conflict assessment) for at least 200 case hours in two to ten environmental cases, and has additional case experience and complex case experience; experience as a trainer or trainee; and substantive work/volunteer/educational experience in fields related to alternative dispute resolution/environmental conflict resolution, such as law, science, or public administration. (<http://www.ecr.gov/ecr.asp?Link=528>)

<sup>10</sup> FL, GA, MI, OK, VA, NJ, OR-

<sup>11</sup> Maryland Judiciary, “Maryland Rules of Civil Procedure, Title 17. Alternative Dispute Resolution”, 2006, 6 April 2008 <<http://www.courts.state.md.us/>>.

highest court, adopted Chapter 17 of its Rules of Procedure. Rule 17, Alternative Dispute Resolution, applies to all small claims (*i.e.*, handled by the District Court in Maryland) appointed mediators and to all large case (*i.e.*, handled by the Circuit Court) mediation. The small case District Court volunteers, called mediators, are explicitly prohibited from using evaluative techniques. Neutrals providing mediation services at the District Court level are required to have received forty hours of mediation skills training.

Circuit Court mediators (called ADR Providers) provide conflict resolution processes called non-mediation ADR services, which encompass early neutral evaluation, neutral fact-finding, settlement conferences, and arbitration. These ADR providers are not prohibited from using evaluative techniques.

The rule was adopted as a compromise between the court's desire for mediators who were not lawyers to be referred cases and the concern that mediators lacking legal training would make inaccurate pronouncements about the merits of a dispute. The compromise requires mediator lists to include all applicants with the requisite mediation training but does not permit a mediator to "render an evaluation of their [the parties] respective positions [or] an opinion as to the likely outcome of the dispute or issues . . . ." Offering a fair settlement value or weighing the strengths and weaknesses of the legal merits or facts of a dispute could likely cause a court-appointed mediator to run afoul of the rule.

Circuit Court "non-mediator ADR service providers," on the other hand, are required to be attorneys and to have also received the requisite forty hours of mediation skills training. These ADR providers are not prohibited from expressing opinions about the merits. The restrictions on evaluation generally apply to court-appointed mediators,

and parties remain free to select their own mediators who may practice without any restrictions.

In Maryland, the limit on small claims mediator behavior was in part based on the statements of many witnesses who testified at hearings across the state in support of a narrow definition of mediation that excluded mediators opining on the merits. For some, the narrow definition makes drawing bright lines easier. For others, narrow definitions might “level the playing field” between mediators who were not lawyers with those who had legal training.

However, these same limits were not placed on neutrals who mediate (or provide early neutral evaluation or other “ADR services”) to parties in large, Circuit Court cases. Here’s where theory and practice collide. Having mediated disputes in more than three dozen states involving many different types of disputes, my own experience supplies strong anecdotal evidence of an important point: that forty hours of mediation skills training is not enough to ensure that the neutral is providing skilled mediation.

What parties expect mediation to be in Florida, North Carolina, and Texas is vastly different than what parties in New Jersey or New York expect. Where mediation is mandatory, and a pre-requisite to being assigned a trial date, many parties expect mediation to be a one-day (or frequently less) event where the mediator performs a mostly facilitative role. Litigants have to “get their ticket punched” before they can proceed to trial. Another perspective of such mediation is that it resembles what used to be called judicial settlement conferences. In some states, lawyers expect the mediators to be much more aggressive in fostering a settlement, including providing more evaluative content to in that role.

The problem created is two-fold. It is understandable why the courts are unwilling to allow mediators to practice in an “evaluative” mediation style when there is absolutely no assurance that the mediators are competent to evaluate a case properly. And the forty hour mediation skills courses do not even pretend to train mediators on the merits and substance of the cases they are likely to be mediating. As a result, those mediators scope of evaluation should be restricted lest they provide incorrect merits-based advice and improperly influence parties’ settlement considerations.

The courts are less concerned about lawyers providing this same advice – thus the fact that so many states have two-levels of qualifications standards. Yet the courts do not insist that those lawyer-mediators receive any more mediation skills training – or have any more mediation experience – than those who are qualified to mediate small claims cases. This is a problem.

While skilled mediators often cross into evaluative and merits-based discussions with parties, they do not do so without a great deal of thought and attention to what, when, with whom, and how the merits-based discussion is to occur. In other words, skilled mediators do not simply tell the parties what they believe a judge would do in a case – at least not without a great deal of care and skill. Yet, anecdotal evidence is strong that inexperienced attorney-mediators and retired judges do exactly that. More than one party has told me that their prior experience with court-annexed mediation is that all the mediator does is to tell the parties the amount for which they should settle. This is not effective mediation, even in cases where parties expect and ask the mediator to provide evaluative services.

This is not effective mediation because settlement is likely to be coercive. Coercive mediation can create a group of disputants who, based on their experience with this type of mediation, are uncomfortable with mediation even in cases that settle. Coerced settlement is not what mediation is or should be nor is it in the long term interest of the courts and the field to provide such unskilled services.

Other than through review of mediator experience, there is no cost-effective way for the courts to judge accurately whether mediators are skillful. Direct observation of mediators is not seen as cost-effective. Using training or professional certification as a proxy for mediation skills is not enough to ensure effective mediation because it leaves to question the mediator's level of knowledge of the substance of disputes, which most professional mediators believe is necessary to ensure successful evaluative mediation.

In the name of clarity, the various states, other regulators, and ADR practitioners should be wary of courts that allow attorneys and others to practice mediation – with few or no limits on those mediators evaluating cases – based on only having taken a forty-hour skills training course. As any experienced mediator will agree, it takes actual mediation experience – a lot of experience -- to develop the necessary skills to be able to mediate effectively, that is, to genuinely assist parties in resolving their disputes.

ADR grew, in part, in response to the experience of parties and their attorneys that the courts and arbitration had become too “rules bound” and inflexible. However, whether or not limited solely to attorneys, mediation by someone lacking experience – in fact, especially attorneys – is likely to result in the neutral taking a coercive role. This in turn will result in creating a group of disputants who, based on their experience with this type of mediation, are uncomfortable with mediation even in cases where they settle.

Coerced settlement is not what mediation is or should be nor is it in the long term interest of the courts and the ADR disciplines to provide such unskilled services.