Our understanding of what mediators do — and how, when, and why they do it — rests heavily on anecdote, the individual, personal experiences of mediators and other participants as expressed in their writings, speeches, teaching, or online discourse. Not having a broader vantage point limits our ability to appreciate how our evolving individual experiences compare to many others’ and how regional or national patterns may vary. In an effort to broaden our understanding of experienced mediators’ practices and perspectives and help contribute to a baseline for deeper research and discussion, the Straus Institute for Dispute Resolution at Pepperdine University School of Law (Straus Institute) and the International Academy of Mediators (IAM) recently cosponsored a wide-ranging survey that garnered responses from 130 IAM members.

If there is a “typical” respondent to this survey, he is a man in his early 60s who has mediated for 20 to 25 years, is employed full-time and devotes the vast majority of his working hours to mediating cases, and has mediated more than 1,000 disputes. He handles a diverse caseload of more than 50 cases a year. But to describe the “typical” is to obscure the variety and diversity of those who responded. Ninety-four of the respondents regularly practice somewhere in the United States, but 47, or more than one-third of all those who returned the survey, regularly practice in other parts of the world, in Canada, Europe, Australia, Asia and the Middle East, Latin America, and Africa.

Diverse, too, are the styles and individual techniques of respondents, many of whom made comments stressing their personal commitment to flexibility and dynamism in mediation. Asked about how much they embrace particular practices in mediation, people offered comments such as the following:

• “[My approach is] highly case-specific: a function of party preferences,”
• “I consider all alternatives ...and tailor to the situation.”
• “The mediation process must remain fluid and flexible.”
• “There is no skill, strategy, or tactic... that I haven’t used.”
• “It depends.”

That said, mediators did reveal considerable information about their tendencies, or “default preferences,” regarding many different elements of mediation. In addition to showing that mediators as a whole are diverse in their approaches and practices, the data offers evidence that, in some cases, the practice tendencies of one group of mediators in one geographic region may differ from those in another.

This article shares some of the data reflecting these differences, with the intent of spurring constructive discussion and further exploration of the possible divergence among mediation “markets” and regions of practice. Readers should be aware from the start, however, that this study is both preliminary and limited in scope, and the authors of the study warn...
against reading too much into this data, particularly as it relates to practices in the many regions outside the United States, because that part of the sample is relatively small.

**Joint Session vs. Caucus**

The survey showed significant divergence in mediator practice on one aspect of the process that has stimulated a good deal of discussion in recent years: the use of caucuses (private meetings between the mediator and individual parties with or without counsel present) versus joint sessions (meetings in which the mediator talks with all parties and counsel in the same room at the same time). As the first line of Table A shows, some respondents (39.7%) always or usually begin the mediation in caucus. Of course, this means that most responding mediators tend to begin mediation with a joint session.

Even more interesting, however, are the group results when sorted by regions of practice, also reflected in Table A. Although our initial report of survey responses did not include a breakdown by geographical region, a vociferous debate over the relative usage of caucus and joint session between California mediators (who represented nearly a third of the IAM respondent group) and mediators from other parts of the United States during an early presentation of the data on the use of caucus prompted me to go back and examine and compare the results for those practicing in California with those who practice in other parts of the United States. Mediators practicing outside the United States were treated as a separate category for this analysis. The resulting data suggests that while mediators practicing within each region show great diversity in their approaches to the use of caucus, there are also noticeable differences in the overall response from region to region — as can be seen by comparing the weighted average response for each group.

### Table A

*I begin the mediation with all parties in caucus.*

**Comparison of Responses by Regions of Practice**

<table>
<thead>
<tr>
<th></th>
<th>Never (0)</th>
<th>Sometimes (1)</th>
<th>About 1/2 the Time (2)</th>
<th>Usually (3)</th>
<th>Always (4)</th>
<th>Weighted Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>All responding mediators</td>
<td>21.4% (27)</td>
<td>35.7% (45)</td>
<td>3.2% (4)</td>
<td>25.4% (32)</td>
<td>14.3% (18)</td>
<td><strong>1.75</strong></td>
</tr>
<tr>
<td>Mediators practicing in US</td>
<td>17.2% (16)</td>
<td>37.6% (35)</td>
<td>3.2% (3)</td>
<td>30.1% (28)</td>
<td>11.8% (11)</td>
<td><strong>1.82</strong></td>
</tr>
<tr>
<td>Mediators practicing in California</td>
<td>14.0% (6)</td>
<td>32.6% (14)</td>
<td>0.0% (0)</td>
<td>34.9% (15)</td>
<td>18.6% (8)</td>
<td><strong>2.12</strong></td>
</tr>
<tr>
<td>US mediators practicing in states outside California</td>
<td>19.4% (12)</td>
<td>38.7% (24)</td>
<td>4.8% (3)</td>
<td>27.4% (17)</td>
<td>9.7% (6)</td>
<td><strong>1.69</strong></td>
</tr>
<tr>
<td>Mediators practicing outside US</td>
<td>37.8% (14)</td>
<td>27.0% (10)</td>
<td>2.7% (1)</td>
<td>13.5% (5)</td>
<td>18.9% (7)</td>
<td><strong>1.24</strong></td>
</tr>
</tbody>
</table>

(Note: the column on the far right of Table A, the weighted averages, were obtained by assigning values to each of the response categories (“Never” = 0; “Sometimes” = 1, and so forth through “Always” = 4), multiplying the number of respondents in each category by that coefficient, adding all the results, and dividing by the total number of respondents to obtain a weighted average for the group. Although the responses of 126 individuals are reflected in Table A, a few respondents practice in more than one geographic region and therefore are “counted” more than once. Thus, when one adds together the number of respondents practicing in the United States and those practicing outside the United States in Table A, the total comes to 130.)
Survey data suggests, for example, that mediators practicing in California tend to be more likely to begin mediation with the parties in caucus, while mediators practicing outside the United States collectively tend to be much less likely to do so. Mediators practicing in the United States but not in California tend to fall somewhere in the middle, between the other groups. This data should be read with the firm caveat that the groupings of “mediators practicing in states outside California” and “mediators practicing outside the US” were made largely for the sake of convenience, and it is likely that, given a larger global pool of respondents, a further breakdown by state or region would highlight other differences not apparent from the data as currently configured. As already noted, moreover, there also appears to be wide diversity of practice within any group.5

Nevertheless, the regional divergence indicated in Table A merits consideration, particularly because similar patterns are reflected in a number of other group responses to survey queries. For example, other data from the survey indicated that about one-quarter (24.6%) of all mediators responding to the survey always or usually keep parties in caucus during the entire mediation; a slightly greater number (29.4%) never do so. Paralleling the patterns revealed in Table A, mediators practicing in California are more likely to keep parties in caucus throughout mediation, mediators practicing outside the United States are much less likely to do so, and mediators practicing in the United States (but outside California) once again tend to fall somewhere in between the other two groups.

While the survey showed a variety of reasons why mediators employ caucuses, comments by California mediators suggested that their use of caucus was often heavily influenced by the preferences of legal advocates:

“In California, counsel seem to have taken over the mediation process, and it is just not possible to have a pure mediation where the parties engage directly. On occasion, I have been specifically instructed that counsel and the parties do not even need to see each other.”

“In Los Angeles the lawyers control the process and the legal personalities can be difficult. These same lawyers, and others, refuse joint sessions.”

“At least 90% of the lawyers involved in the mediations I handle do not want to start with a joint session.”

(For additional discussion of mediators’ use of joint sessions, see the article by Jay Folberg on page 12 of this issue.)

**Handling Information**

The survey also reflected mediators’ varying approaches to handling information received from parties in caucus. As shown in the first line of Table B, the overall response is again broadly diverse. Our data indicates that some respondents tend to tell parties that all information shared during caucus will be confidential unless they instruct the mediator to share it; others tend to tell parties that they will share any information learned during caucus with the other party as they see appropriate, unless instructed not to share it.

Respondents practicing outside the United States were more likely to tell parties that all information (except that highlighted by the party) is confidential, and California mediators more likely to tell parties that they will share information they consider appropriate — unless parties instruct them otherwise. Once again, mediators practicing in other parts of the United States tended to fall somewhere in between. This is illustrated in part by Table B, which indicates the extent to which the statement “I tell parties that I will share any information I learn during caucus, as I see appropriate, unless they instruct me to not share it” is reflected in mediators’ practice. As may be seen from a comparison of the weighted averages for each group, shown on the right-hand column of Table B, California mediators tend to use such statements in their practice most frequently; mediators practicing outside the United States are the least likely to do so, and mediators practicing in US states other than California are again in the middle. The pattern might cause one to wonder if there is a relationship between the degree of emphasis on separating the parties during mediation and the propensity — or need — to have more flexibility in the sharing of information imparted in caucus.
Evaluations and Opinions

A third area of divergence was in the realm of mediator evaluation and opinion-giving. Although many US mediators were first taught that they should respect party autonomy by avoiding any expressions of opinion regarding the issues in dispute or the prospects for recovery in court, many of these same mediators soon found themselves offering evaluations at some stage of mediation, and parties often actively sought such input.Indeed, a 1991 survey capturing specific mediation experiences of US construction attorneys indicated a statistically significant correlation between mediator evaluation and settlement in construction cases. Given the strong representation of US practitioners in the IAM/Straus Institute survey, it is perhaps not surprising that 80% of respondents indicated that their reputation as a mediator who can offer useful assessments of parties' cases was a factor of some importance in attracting and maintaining clients.

However, there were distinct regional differences in responses to related queries. The data indicates that, generally speaking, mediators outside the United States tended to be much more likely than their Californian counterparts to “help parties develop, consider, and/or communicate proposals that may lead to settlement, but . . . not offer [their] own opinion regarding these proposals” (emphasis added). Conversely, mediators practicing in California were much more likely to “develop and propose potential agreements the parties might all accept as part of a potential settlement,” to “tell parties [their] predictions of how not settling might affect them, including what [they] think may result if the case proceeds to court or arbitration,” or “assess and share [their] opinion regarding the legal strength of arguments made by parties and/or counsel.”

Table C provides a regional comparison of responses relating to the last statement.

These kinds of results provide a starting point for more thoroughgoing exploration of the development of mediation in different legal systems and regional markets. In summarizing the results of the survey, however, we do not want to overstate the degree of divergence among mediators practicing in different places. The overall body of data from the IAM/
Straus Institute survey indicates that, in many ways, patterns of practice do not vary greatly between regions and there appear to be some areas of general convergence — or, more accurately, similar spectra of mediator behaviors. For example, just as experienced arbitrators are coming to grips with the need to set the stage for the arbitration process through carefully planned prehearing conferences,9 this group of experienced mediators tends to place great emphasis on preliminary preparation before the actual mediation session(s). In addition to developing a picture of the issues in dispute, they may familiarize themselves with the history of negotiation, the “temperature” of the parties, and key personalities at play. They may work with counsel to lay the groundwork for an appropriate mediation process, including the agenda for initial joint sessions and the tentative timing and even the planned duration of caucuses. There appears to be pervasive appreciation of the importance of preparation in mediation.10

This survey, admittedly limited, does indicate some interesting variation between mediators in California and those who practice in other US states — notably in how often they use joint sessions (and private caucuses), how they handle confidentiality when speaking with one party in caucus, and how they feel about offering opinions at the table — but it also shows consistency on other themes. If there is a lesson from all this, it’s that we need more research from more practitioners. To learn from each other and really understand how our work is evolving, we need to share not just stories or great moments of remarkable sessions we’ve conducted but clear and comparable information about exactly how we work. ■

Table C

"I assess and share my opinion regarding the legal strength of arguments made by parties and/or counsel."

<table>
<thead>
<tr>
<th>Comparison of Responses by Regions of Practice</th>
<th>Never (0)</th>
<th>Sometimes (1)</th>
<th>About 1/2 the Time (2)</th>
<th>Usually (3)</th>
<th>Always (4)</th>
<th>Weighted Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>All responding mediators</td>
<td>10.7% (13)</td>
<td>33.9% (41)</td>
<td>18.2% (22)</td>
<td>30.6% (37)</td>
<td>6.6% (8)</td>
<td>1.88</td>
</tr>
<tr>
<td>Mediators practicing in US</td>
<td>4.4% (4)</td>
<td>31.9% (29)</td>
<td>17.6% (16)</td>
<td>38.5% (35)</td>
<td>7.7% (7)</td>
<td>2.13</td>
</tr>
<tr>
<td>Mediators practicing in California</td>
<td>0% (0)</td>
<td>22.0% (9)</td>
<td>14.6% (6)</td>
<td>51.2% (21)</td>
<td>12.2% (5)</td>
<td>2.54</td>
</tr>
<tr>
<td>US mediators practicing in states outside California</td>
<td>6.6% (4)</td>
<td>37.7% (23)</td>
<td>16.4% (10)</td>
<td>34.4% (21)</td>
<td>4.9% (3)</td>
<td>2.10</td>
</tr>
<tr>
<td>Mediators practicing outside US</td>
<td>32.4% (11)</td>
<td>38.2% (13)</td>
<td>17.6% (6)</td>
<td>8.8% (3)</td>
<td>2.9% (1)</td>
<td>1.12</td>
</tr>
</tbody>
</table>

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Endnotes

1 See generally IAM/Straus Institute Survey on Mediator Practices and Perceptions (Spring, 2014) (“survey”). The survey, which was prepared by the author and Straus Research Fellow Zachary Ulrich with input from Jeff Krivis, Jerome Weiss, and others, was distributed online to 153 individuals, all IAM fellows. One hundred thirty individuals, or 85 percent, participated in the survey.

2 Ninety-four of 128 individuals responding to the question regarding regions of practice (73.4%) practiced in the United States, with smaller numbers from Canada (14), Europe (20), Australia (4), Asia (3), the Middle East (3), Latin America (2) and Africa (1). A few individuals regularly practiced in more than one country or region.


4 Ideally, it would have been logical and highly desirable to present a further breakdown of US and non-US practitioners. However, the relatively small numbers from some regions of the United States or the world represented a significant obstacle to obtaining meaningful results from further breakdowns.

5 See RANDALL KISER, HOW LEADING LAWYERS THINK: EXPERT INSIGHTS INTO JUDGMENT AND ADVOCACY 209 (2011) (Kiser’s study of experienced US advocates found decidedly mixed views among interviewees, with “some regarding joint sessions as highly beneficial and others contending they were inflammatory.”)


7 Thomas J. Stipanowich, Beyond Arbitration: Innovation and Evolution in the United States Construction Industry, 31 Wake Forest L. Rev. 65, 123 (1996) (in reports of individual construction mediation, “there were significantly more settlements in cases in which mediators expressed views on pertinent facts or law”).

8 See Kiser, supra note 5, at 213-16 (Kiser’s study of experienced advocates delved deeply into the use of evaluation by mediators and surfaced significant disparities in attitudes regarding mediator evaluations and the circumstances when evaluations might be appropriate, if ever).
