# Developing the MRI (Mediation Receptivity Index)

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I have long wondered why some states (such as Florida and Ohio) appear to have a high level of mediation activity, while others have moderate or low levels of mediation activity. Consequently, I began exploring the possible creation of a metric to measure the extent of mediation development. If such a tool could be validly formulated, it would permit many insights about how to enhance mediation utilization in a particular jurisdiction. For example, if one studies the evolution of mediation activity in a High MRI jurisdiction, one might learn much about which factors enhanced or impeded the mediation activity. Similarly, much might be gained by comparing State *X*, which has a High MRI with State *Y*, which has a Low MRI; such a comparison might be very instructive in helping State *Y* to enhance its use of mediation.

## I. BACKGROUND

Before I discuss in detail how the MRI might be constructed, let me briefly provide some historical framework. The development of Alternative Dispute Resolution (ADR) since the 1976 Pound Conference—which is often considered the birth of the modern ADR movement—has taken place over three distinct periods. One might denominate the first period: "Let a Thousand Flowers Bloom." This period was exemplified by much innovation and experimentation. Then came a second phase, whose motto might be "Separating the Wheat from the Chaff." In this second phase, people raised criticisms and asked questions about the ADR movement.[1] We are now in the midst of the third phase, which can be characterized under the rubric of "Institutionalization" or "Mainstreaming." The principal aim of this effort is to seek ways of working mediation into the fabric of dispute resolution, so mediation will be naturally considered in the process of resolving disputes, rather than putting the burden on the disputant who wants to invoke mediation.

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* Bussey Professor, *Emeritus*, Harvard Law School. I am indebted to many individuals for their helpful suggestions. I would particularly like to thank Dwight Golann, Jim Henry, Chris Honeyman, David Matz, Craig McEwen, Michael Moffitt, Matthias Prause, Nancy Rogers, Alison Sander, and Tom Sander.

[1] *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (perhaps the most trenchant of these).

Thus, we come to the question of how we can further accelerate the process of institutionalizing mediation.[2] One way to further this process is to continue on our current path until we reach "The Tipping Point"[3]—a point where the balance shifts to a presumption of exploring the use of mediation in particular settings unless it is shown to be contraindicated.[4]

Another approach is suggested by the thrust of this Article. If we can learn how to attain higher levels of mediation activity from High MRI jurisdictions, then we may be able to develop a more focused approach in mainstreaming mediation. We might then dub this particular phase: "Follow the Leaders."

How then might we construct and implement such an index? That is the focus of the remainder of this Article.

## II. DEVELOPING THE MRI

While the concept of the MRI is fairly easy to comprehend, its actual determination is far from simple. One might begin with some quantitative aspects, such as the following:

### A. *Providers of Mediation*

1. Number of professional mediators in jurisdiction
2. Number of mediation firms
3. Extent of mediation programs in courts and number of cases referred
4. Scope of community mediation programs (e.g., number of mediations handled by them)

### B. *Institutional Support for Mediation*

1. Total public funds devoted to mediation
2. Existence of a state office of mediation in the jurisdiction

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[2] This question assumes the desirability of doing so, an issue beyond the scope of this article. But if the MRI takes hold as an important indicium of a jurisdiction's dispute resolution capacity, it may set in motion a competitive force that will stimulate mediation-enhancing activity.

[3] *See* MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (2000).

[4] *See* Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 36–39 (2006).

3. Number of professional schools that teach mediation (e.g., law schools, business schools, public policy schools), number of students involved, and presence of ADR journals
4. Number of peer mediation programs in schools and number of students involved
5. Presence of potential movers and shakers on behalf of mediation (e.g., Chief Justice Thomas Moyer of the Ohio Supreme Court)
6. Number of local members of national ADR organizations
7. Enactment of mediation legislation (e.g., Uniform Mediation Act) in jurisdiction
8. Enactment of court rules relating to court-based mediation
9. Executive branch orders to increase the use of mediation to resolve disputes with (and within) state agencies and to employ consensus-based processes
10. State bar committee or section on ADR
11. Bar rule requiring lawyers to advise clients regarding ADR options

## C. *Some Cautions and Caveats*

### 1. *Counting Problems*

Note that some items in the preceding list (e.g., A1 or A4) call for a count of cases or providers, and others call for a check-off of features of a jurisdiction's mediation apparatus (e.g., B2 or B7). A method for calculating these items must accommodate these essentially incommensurate numbers. This leads to a broader concern. One must find a way to develop a meaningful metric to assess and compare jurisdictions' mediation receptivity without getting bogged down in the minutiae of specific numbers. The bare numbers are not nearly as important as the process of examining what different jurisdictions have or lack in regards to mediation activity. One way of dealing with this problem might be to allot some point value (e.g., out of 100 total) to each of the above-listed items. Some portion (e.g., 20 points) might also be allocated to a subjective overall evaluation by a group of ADR experts.[5]

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[5] Two additional caveats: The numerical items, such as number of professional mediators in the jurisdiction, have to be expressed on a per 100,000 population basis, so as to be able to properly compare different jurisdictions with different size populations; or perhaps they should be expressed per 1,000 attorneys in the jurisdiction. The second caveat is the further question of how to account for federal mediation efforts. One should either treat the federal government as a separate jurisdiction or allocate federal efforts to

### 2. *Dearth of Data*

A related concern is that in many jurisdictions we do not presently have available data for many of the listed items. However, this is a useful deficiency in that it might lead to the development of better data collection on some of these topics—a useful end in itself.[6]

### 3. *Definitional Issues*

There may also be threshold definitional issues. For example, what does the concept of "mediation" encompass?[7] In order to avoid undue refinement at the outset, and because of limited data, we should take a fairly expansive view at the start of what constitutes mediation for present purposes. Additionally, who constitutes a "mediator?" A search of the Web will reveal listings of individuals who identify part of what they do as mediation. Self-identification may not be adequate. However, since there is presently no licensing of mediators unless they are listed on an official panel or roster as mediators, there is no real alternative.

### 4. *Appropriate Unit*

One must consider what is the proper unit for measuring the MRI—the state, the county, or the locality. Additionally, we may come across a High MRI island in a Low MRI sea. While such a phenomenon poses a challenge, it may create an opportunity for more precise insights. We may learn the cause of the disparate development in the "island," for example whether key individuals or more available funds spurred its development. We may also learn what barriers prevented growth in the surrounding "sea."

Professor Craig McEwen has pointed out to me another variant that needs to be taken into account. Some states have taken a very decentralized approach to mediation (i.e., central authorization plus local implementation).

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the states to which they relate. Probably the former makes more sense, because the ultimate goal of the MRI is to encourage further development in the jurisdiction in question. Thus, for example, federal ADR legislation in 1990 and 1998 had an important impact on developments in the judicial realm. *See, e.g.*, *In re* Atl. Pipe Corp., 304 F.3d 135, 140–41 (1st Cir. 2002).

[6] The internet may be of considerable help in gathering the necessary data. The Geographic Information System (GIS) is a useful way of gathering and finding relationships between data that has a geographic base.

[7] Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 11 (1996).

Such a jurisdiction will be more difficult to assess.

### 5. *Quality v. Quantity*

Not only should our goal be to stimulate *more* mediation activity in a Low MRI jurisdiction, but also to encourage the growth of *high quality* mediation. The MRI needs to reflect both quality and quantity. But these aspects are often in tension; the more we encourage growth and expansion, the greater danger there is to reducing the quality of individual mediations. Moreover there is no easy way to measure quality; this may require different kinds of research and data gathering.[8]

### 6. *On Paper v. In Use*

One of the most difficult aspects of determining the MRI in a particular jurisdiction is distinguishing between existence and use. For example, a state might decree that each division of the trial court should have an ADR coordinator. This looks like a general plus factor. But because of personality differences or other individual variables (such as the interest and involvement of the presiding judge of each division), very different results may ensue in each branch, with mediation activity being significantly enhanced by the ADR coordinator in one division and quite unaffected in the other. As with the active island in the passive sea, closer study of this variable may reveal valuable information—another example of the point made earlier that it is the *process* of determining the MRI that may be most revealing, not the end result.

### 7. *Cause and Effect*

Suppose a jurisdiction had a large number of court cases referred to mediation. Other things being equal, it would also have a relatively High MRI. But without more information, we may not be able to draw meaningful

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[8] *See infra* pp. 604–606. Some interesting work has also been done recently focusing on the dispute resolution climate of a city. *See, e.g.*, Christopher Honeyman & Lela P. Love et al., *New York Moveable Feast: Boundaries to Practice*, 5 CARDOZO J. CONFLICT RESOL. 147 (Spring 2004); Christopher Honeyman & Carrie J. Menkel-Meadow et al., *Washington, D.C. Moveable Feast: The Odds on* Leviathan*—Dispute Resolution and Washington, D.C.'s Culture*, 5 CARDOZO J. CONFLICT RESOL. 159 (Spring 2004); Christopher Honeyman & Ellen A. Waldman et al., *San Diego Moveable Feast: Competition in Cooperation-Building*, 5 CARDOZO J. CONFLICT RESOL. 173 (Spring 2004).

conclusions from these facts. They provide little information for a neighboring jurisdiction that wants to enhance its MRI. It may be that one way of doing so is to increase the number of court cases referred to mediation. However, if the metric used to determine the MRI of Jurisdiction *X* indicates the multifaceted nature of the task, then a more encompassing answer will be provided (i.e., that there will be many ways of bringing about a higher MRI, and that the choice among these will depend on other variables, such as available funding and personnel).

#### 8. *Separation by Sectors*

Should we pursue the indicated data gathered by subject matter (e.g., family mediation, commercial mediation, etc.) or sectors (e.g., court programs, school programs, etc.)? This is a difficult question. On one hand, subject matter data may appear excessively refined at the outset. But in some settings better data may be available for some well developed subcategory, such as family mediation, and hence there may be much to be said for starting small with a confined pilot project. On the other hand, specific sectors may reflect special considerations and make wider extrapolation more questionable.

## III. RESEARCH OPPORTUNITIES

In addition to the need for data obtained by mere counting,[9] the MRI presents an opportunity—indeed a challenge—for more diverse types of research.[10]

### A. *Longitudinal Studies*

Much could be learned by a longitudinal study of the mediation developments in a particular jurisdiction. We may learn if major changes—either in an affirmative or negative direction—occurred at particular points. We may also figure out why they occurred and what lessons can be learned.

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[9] *See supra* Part II.A–B.

[10] Indeed the MRI might be thought of as a Full Employment Bill for ADR students seeking paper topics and maybe even untenured ADR professors.

## B. *Comparative Studies*

Similar insights could be gained by a comparative study of two jurisdictions that have a High and a Low MRI respectively. How did an innovation in State *X* lead to excellent results in that state but not in State *Y*? Of course, in such comparative studies attention must be given as well to structural and contextual aspects that impede ready transfer from *X* to *Y*.[11]

## C. *In-Depth Studies*

Perhaps most needed, in contrast to the quantitative macro information gathered by the research suggested in Parts IIA and IIB, is an in-depth study of a particular program or initiative. A promising example might be a study of the New York legislation which funds community mediation programs in the state.[12]

Although New York is not a state that is likely to have a High MRI, the community mediation funding bill is a clear exception. What led to its enactment? Has it led to other mediation developments in the state? Are there any general lessons for mediation enhancement that can be drawn from a study of this legislation and from the impact of the centers that it spawned?

A similar effort might be undertaken with respect to the filing fee add-on legislation in a number of states.[13] This permits the courts either generally, or in a particular subdivision, to add a small amount to the general court filing fee, and use the proceeds to fund mediation efforts or ADR efforts generally. Studying some of the jurisdictions that enacted such laws could prove valuable. Are these statutes just ways of raising money for public ADR efforts—not a goal to be minimized—or is the enactment of such legislation sometimes an opportunity for publicizing the benefits of mediation and ADR generally? Further research should consider what stimulated the legislation: a particularly dedicated proponent, or a court official who sought to preserve general court funds for traditional non-ADR purposes?

A different type of research effort is now under way at the Center for Negotiation and Conflict Resolution at Rutgers University in New Jersey. Center staff are interviewing a number of public officials to find out why they often resist the use of collaborative problem solving tools, even when

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[11] *See* Craig McEwen, *Examining Mediation in Context: Toward Understanding Variations in Mediation Programs*, *in* THE BLACKWELL HANDBOOK OF MEDIATION (Margaret Herrman ed., 2006).

[12] N.Y. JUD. LAW §§ 849a–g (2006).

[13] *See, e.g.*, FLA. STAT. §§ 44.108(1)–(2) (2006).

those tools are readily accessible. By finding out more about the barriers, efforts could be undertaken to specifically address those barriers.[14]

Another type of study would be an intensive examination of a specific, limited program to provide mediation services for a particular set of disputes.[15]

### D. *Surveys*

Surveys and specific inquiries may also prove beneficial both in gathering data for the Index and for setting those data in context. For example, citizens in a High MRI jurisdiction might be asked: if they do not use mediation, why they do not.[16]

Another form of inquiry would be a questionnaire for, or a focus group discussion with, a select subset of Association for Conflict Resolution (ACR) or American Bar Association Dispute Resolution Section (ABA DR Section) members in the jurisdiction. Such an inquiry could address more broadly pluses and minuses of the development of mediation in the jurisdiction. A possibly simpler version of the same type of inquiry would be to select two or three ADR leaders in a jurisdiction and have in-depth, in-person interviews with them.

### E. *Testing Specific Hypotheses*

Finally, once MRIs have been developed, they could be used to test specific hypotheses. For example, if one assumes that mediation at an early stage in a dispute saves time and effort, one could pursue the correlation *vel non* of that feature with a High MRI. Additionally, one might try to determine a possible connection between a High MRI and an ADR-active bar or law school(s) in the jurisdiction.[17]

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[14] Letter from Sanford Jaffe, Director, The Center for Negotiation and Conflict Resolution, to author (Mar. 9, 2006) (on file with author).

[15] Such a study was undertaken by a student in my mediation class who looked at the use of mediation in the disputes arising out of Hurricane Katrina.

[16] Responses provided might be:

1. Do not know what mediation is
2. No ready free access to providers of mediation
3. Only courts can resolve disputes
4. My lawyer discouraged the use of mediation
5. Other

[17] *But see* discussion *supra* Part II.C.7. If measures of MRI include law school mediation programs or membership in the DR section of the Bar, then these connections

## IV. IMPLEMENTATION

In theory, any jurisdiction could apply the preceding analysis as a guide to evaluate the extent of its mediation activity. But there are many points in the preceding discussion that need further refinement, and a major thrust of the MRI proposal is to have a generally accepted protocol that would permit comparisons between different jurisdictions, or in any one jurisdiction, over time. Accordingly, it would be preferable if some nationally recognized and respected group (such as ACR, the ABA DR Section, or a major academic center) would undertake at least the initial task of convening a group of knowledgeable experts to flesh out the ideas put forward in this Article and come up with a generally accepted protocol for determining the MRI of different jurisdictions.[18] Perhaps with a grant from some foundation, this might lead to actually determining the MRI of different jurisdictions, leading in turn to a multi-colored map, showing the different MRIs of various states.

Short of such optimal developments, there are some possibilities for pilot studies. One such approach would be to focus on some smaller discrete subcategory in which there is more readily available data (such as family mediation) and seek to come up with a Family MRI. Such a process might give helpful insights for the larger enterprise. Another start-up idea might be for some researcher to make a rough attempt to apply the preceding analysis to a handful of varying jurisdictions and to compare the results reached with what is generally known about the state of mediation receptivity in those jurisdictions. While the numerical end results are not likely to be very valuable because of the imprecision of the enterprise, the process created and the questions raised by it might be quite revealing.[19]

A helpful guide in any implementation efforts would be to study a comparable effort—the Corruption Perceptions Index (CPI).[20] This consists of annually prepared data rating the perceived extent of corruption in a host of foreign countries. Data are gathered from a variety of business people and country analysts from a number of independent institutions. An interesting

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will be built in.

[18] Such a central site could also serve the important function of a clearinghouse for disparate research efforts conducted in a variety of settings.

[19] Such an effort was undertaken by my research assistant, Matthias Prause. *See infra* Appendix.

[20] *See* Johann G. Lambsdorff, *Background Paper 2003 Corruption Perceptions Index: Framework Document 2003*, INTERNET CENTER FOR CORRUPTION RESEARCH, (2003) http://www.icgg.org/downloads/FD_CPI_2003.pdf. Note that because of the difficulty of measuring actual corruption, the CPI focuses on the perception of corruption. *See, infra* Appendix (setting forth such an attempt).

feature of the listing is inclusion of two additional factors for each country—Confidence Level and Number of Surveys used—in order to give the user a sense of the reliability of the resulting data.

## V. APPLICATIONS

In addition to some of the MRI uses suggested earlier, other uses might be possible. Although the initial focus on mediation as "the sleeping giant of ADR" makes sense, eventually the concept might be extended to all forms of ADR. Indeed, while such an extension might be contemplated at a later stage in the development of the MRI, it may have to be done sooner, because the data needed in Part IIA and IIB above may not be readily available solely for mediation.

Another extension would be to use the MRI to assess the mediation developments in various foreign countries.[21] But in this connection, the caution suggested earlier[22] concerning the difficulty of cross cultural-transfers becomes salient.[23]

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[21] E-mail from Erica Fox, Director, Harvard Negotiation Insight Initiative, Program on Negotiation, Harvard Law School (Sept. 27, 2006) (on file with author). Apparently such an effort is under way by the Union Internationale des Avocats (UIA) working in connection with the World Forum of Mediation Centres. At a recent conference in Dublin, a half day was spent on "Breaking Barriers to Mediation," during which the moderator facilitated an exchange of narratives between countries where mediation has penetrated the culture and those where mediation has not yet reached a cultural tipping point. Representatives of mediation centers around the world engaged in a discussion about what key factors were required to reach the point in a society or country where mediation is widely used (in business and higher-level legal disputes). People shared anecdotally about what had happened in their own country. Was legislation critical? Was enlisting judges critical? Was it getting lawyers to bring cases to mediation? They also shared observations about different obstacles in their respective countries. The purpose of the discussion was to equip lower usage countries with practical ideas about how to spread mediation more deeply in their own countries. When the half day ended, people agreed that this international conversation about overcoming barriers to wider use of mediation in low-use countries and the chance to learn from the success stories of countries with higher use was very beneficial. They left with a commitment to continue the dialogue with each other in order to share the lessons learned in high "MRI" countries with low "MRI" countries—again ultimately with an eye toward bringing low MRI cultures more in step with those places and societies where mediation is more commonly used.

[22] *See* McEwen, *supra* note 11.

[23] I am indebted to Gloria Lim, a student from Singapore in my ADR class, for attempting to adapt the MRI metric to the situation in Singapore. She pointed out, for example, that Singapore does not have private mediation firms, so Part II.A.2 of this

Another application might be to private institutions that handle disputes, such as law firms and businesses. But this would require an adaptation of the metric to these different settings.

## V. CONCLUSION

The MRI is a complex and multifaceted idea that has both objective and judgmental aspects. Considerable further analysis and experimentation is needed before it could become fully functional. Hopefully this Article can serve to start a discussion and further research about the dramatic differences in growth and implementation of mediation across the United States and beyond. The United States has proved once again to be a natural laboratory, and mediation has taken different forms and reached different levels across jurisdictions. The MRI proposal calls attention to that natural laboratory and what it might reveal to us to inform policy and practice.

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Article would have no applicability there. Still, adapting the MRI concept to a particular foreign jurisdiction proved to be a worthwhile effort. *See generally Exporting, Importing ADR: What Have We Learned?*, DISP. RESOL. MAG. (Spring 2006).

# APPENDIX:

## A Methodology for the Determination of the MRI (Mediation Receptivity Index)

MATTHIAS PRAUSE*

## I. INTRODUCTION

Professor Frank E.A. Sander's Mediation Receptivity Index (MRI) is a powerful concept which opens a realm of new research opportunities and provides a tool for both the theoretical understanding and the practical advocacy of Alternative Dispute Resolution (ADR). One of the major methodological challenges in implementing this pioneering idea is to develop a metric which enables measurement of something as ambiguous as mediation receptivity. Such a generally accepted protocol that allows comparisons between different jurisdictions, states, or regions, is necessary for the MRI to become fully functional. This Appendix presents an initial proposal for such a metric and describes a methodology that makes use of numerical MRI calculations.

The goal is to create an index which reliably describes the distribution of mediation receptivity within a particular setting and allows comparisons between different environments. Following in the footsteps of the well-proven methodology of the Corruption Perceptions Index (CPI),[24] the MRI will be designed as a composite index drawing from various data sources and

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[24] Transparency International, Corruption Perceptions Index 2006, http://www.transparency.org/policy_research/ surveys_indices/cpi/2006 (last visited Mar. 21, 2007); *see also* Johann G. Lambsdorff, *The Methodology of the 2005 Corruption Perceptions Index*, TRANSPARENCY INTERNATIONAL: THE GLOBAL COALITION AGAINST CORRUPTION, Sept. 2005, http://www.transparency.org/content/download/1521/7934/file/methodology.pdf; *see* also Fredrik Galtung, *Measuring The Immeasurable: Boundaries And Functions Of (Macro) Corruption Indices*, *in* MEASURING CORRUPTION 119, 119–156 (Charles Sampford & Fredrik Galtung eds., 2006); *see also* Johann G. Lambsdorff, *Measuring Corruption—The Validity and Precision of Subjective Indicators (CPI)*, *in* MEASURING CORRUPTION 81, 81–100 (Charles Sampford & Fredrik Galtung eds., 2006).

combining them according to their relevance to provide an indicator for mediation receptivity through a numeric metric.

The numerical determination of the MRI requires five major steps. First, the researcher must select the environment for using the MRI—jurisdictions, counties, states or even countries. Second, the subject matter for measurement—mediation activity in general or only in a particular branch such as family mediation—must be defined. Third, it is necessary to determine criteria which could serve as reliable indicators for mediation receptivity and to collect the actual empirical data for these criteria. Fourth, for each indicator sub-MRI must be calculated and then scaled with a metric between 0 (low mediation receptivity) and 10 (high mediation receptivity) using the statistical method of percentile ranking. In the fifth and last step, these sub-MRI categories must be weighted according to their relevance and then serve as a basis to determine the final MRI according to an overall formula. At first glance, this methodology seems to be simple; however its implementation poses considerable systematic and practical challenges, especially when considering questions of the availability of data (step three), its scaling on a metric (step four), and the design of the mathematical formula which determines the final MRI (step five).

## II. SELECTING THE ENVIRONMENTS TO EXAMINE

The first step includes the definition of the basic variables and the scope of analysis. The specific environment for which the MRI will be calculated depends on the purpose of the survey as well as on the availability of the data. For most applications, it might be most revealing to determine the MRI for different geographical areas rather than functional branches of mediation. This would help identify the factors which enhance or impede the use of mediation. The most obvious choice would be a longitudinal profile of mediation receptivity throughout the United States at the state level. This is particularly salient because the environment of a particular state determines the legal and organizational structure as well as the promotion, advocacy, and future implementation of mediation. A nationwide state-based MRI would need readily available data which would be much more difficult to obtain for some geographical settings. Such an MRI, which could be determined on a regular basis, might help the states learn from one another in order to increase the use of ADR and to improve the quality of ADR services.

## III. DEFINING WHAT TO MEASURE

Prior to determining the actual MRI, one needs to clarify what the test measures. What exactly is mediation receptivity and to what type of mediation does it apply? If mediation receptivity is understood literally as the openness of the public to the use of mediation as a means of resolving disputes, then it must contain a strong subjective component based on a poll among representatives of the public. Conversely, if mediation receptivity is understood as the level of actual mediation activity within a particular setting, then the MRI must be determined based on objective indicators only, such as the number of mediators, the number and size of court-annexed mediation programs, or the number of mediated cases. The latter approach would be more appropriate for an MRI which aims to measure the actual level of mediation in practice rather than its mere theoretical potential. To look at the level of actual mediation within a geographical area, a preferably broad definition of mediation would be most appropriate, unless the availability of better data encourage confining the survey to a well developed and thoroughly investigated branch, such as family mediation.

## IV. SELECTING INDICATORS AND GATHERING DATA

Based on such a definition of mediation, criteria must be identified to serve as reliable indicators for mediation receptivity. In order to enhance the quality and the reliability of the MRI for each indicator, data from multiple sources should be used to serve as a basis to determine a mathematical average for each indicator value. One of the major challenges in determining the MRI is measuring the quality of mediation. It is difficult to quantify quality. This problem might be solved through a subjective approach: a survey among knowledgeable ADR experts that would measure the subjective perception of mediation receptivity among a confined group of experts. A comparison between the objective empirical data and the subjective perceived data might be explained by differences in the quality of particular programs. If the findings correspond with a particular evaluation of the mediation programs in academic publications, then such an approach might indeed be a feasible way to measure the quality aspects of mediation. The MRI would then be based on a combination of objective and subjective indicators whose actual weight for the final MRI would depend on their relevance to reliably indicate the level of mediation receptivity. Practically, the collection of empirical data for these indicators might be the most challenging part of this undertaking. In addition to quantitative information, data about infrastructure features such as the adoption of the Uniform

Mediation Act or the presence of a State ADR office could be collected (as infrastructure indicators).

## V. CALCULATING THE SUB-MRIS

The empirical data for the MRI indicators are available in a variety of different units. In order to be meaningful, the MRI must be processed and scaled on a metric. The metric would allow researchers to draw conclusions as to the level of mediation receptivity it represents. Following the approved methodology for the CPI,[25] a metric from 0 (low mediation receptivity) to 10 (high mediation receptivity) would provide a base internal unit from which to calculate the MRI. Before the data can be scaled to this metric it first must be adjusted to the population of the respective settings—in our case, the data must be adjusted for each state. This is necessary to make the data comparable and to eliminate population size as a distorting factor.[26] In the next step, the data can be scaled on a metric from 0 to 10 using percentile ranking[27] to determine a sub-MRI for each of the environments which are to be surveyed, e.g., different states. These sub-MRIs form the basis from which the final MRI is calculated (quantitative sub-MRI). Through the statistical method of percentile ranking, it is possible to determine the relative standing of the value for a given state in relation to all remaining values. The resulting percentile rank describes the proportion of indicator values in the set of states that a specific value is equal to or greater than by comparison. The sub-MRI itself is the result of the percentile rank for the values which were collected for every indicator multiplied by 10.[28] This means that for every indicator, the highest and the lowest values must be determined and attributed a score of 10 and 0, respectively. The remaining values would then be transformed according to this assignment.[29] Next, a

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[25] *See supra* note 24 and accompanying text (providing an overview of the CPI).

[26] However, in order to evaluate the absolute mediation activity, an unadjusted "absolute" MRI might be processed for reasons of comparison. *See infra* p. 618.

[27] *See generally* LINDA CROCKER, JAMES ALGINA, INTRODUCTION TO CLASSICAL AND MODERN TEST THEORY (1986) (providing a basic introduction).

[28] For the spreadsheet software using Microsoft Excel, the formula for the sub-MRI would be PERCENTRANK (range of indicator values; value of indicator to convert)*10. The function returns the rank of a value in a data set as a percentage of the data set.

[29] The percentile rank of a particular value within a given range can be easily determined with standard spreadsheet software such as Microsoft Excel. *See supra* note 28. For an introduction into statistical reasoning see ARTHUR M. GLENBERG, LEARNING FROM DATA: AN INTRODUCTION TO STATISTICAL REASONING, 44–45 (2d ed. 1996); LINDA

sub-MRI for each indicator (e.g., number of mediators) can be determined and then used as a variable in the overall formula for the MRI.[30] The following tables illustrate the basic idea. For the purpose of demonstration, the percentile ranks of the value "Attorneys per state" for a random selection of fifteen states were determined and the resulting table sorted by each state's percentile rank. This variable might be later replaced by actual indicators for mediation receptivity.[31] In order to determine not only the absolute number of Attorneys, but also its density—the number of Attorneys in relation to the state's population—the percentile rank was determined in two versions: in an absolute and in a relative variant. For the calculation of the actual MRI, the same method would be applied to the indicator values, such as the number of mediators per state.

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CROCKER & JAMES ALGINA, INTRODUCTION TO CLASSICAL AND MODERN TEST THEORY (1986).

[30] *See infra* p. 617.

[31] Although the number of attorneys in a specific jurisdiction is not an indicator for mediation receptivity and cannot therefore be included into the MRI it might nevertheless serve as a valuable tool for the interpretation of the MRI and can help to understand the factors which facilitate high or low mediation receptivity. It might for instance reveal the correlation between mediation and litigiousness or provide answers to the question whether a high mediation activity is the consequence of the presence of a significant lawyer population or vice versa.

**Absolute Percentile Ranks for the Variable: Attorneys per State**

| State | Attorneys per state[32] | Percentile rank x 10 |
|---|---|---|
| California | 141,030 | **10.00** |
| Illinois | 61,130 | **9.28** |
| Florida | 46,475 | **8.57** |
| D.C. | 43,445 | **7.85** |
| Georgia | 25,632 | **7.14** |
| Connecticut | 18,578 | **6.42** |
| Colorado | 18,449 | **5.71** |
| Indiana | 13,069 | **5.00** |
| Alabama | 12,625 | **4.28** |
| Arizona | 12,172 | **3.57** |
| Arkansas | 5,500 | **2.85** |
| Hawaii | 4,016 | **2.14** |
| Idaho | 3,166 | **1.42** |
| Delaware | 2,391 | **0.71** |
| Alaska | 2,318 | **0.00** |

[32] Number of resident and active attorneys as of December 31, 2005. American Bar Association, National Lawyer Population by State, www.abanet.org/marketresearch/2004nbroflawyersbystate.pdf (last visited Mar. 30, 2007).

**Relative Percentile Ranks for the Variable: Attorneys per 100,000 People**

| State | Population[33] | Attorneys per 100,000 people | Percentile rank x 10 |
|---|---|---|---|
| D.C. | 581,530 | 7,470.81 | **10.00** |
| Connecticut | 3,504,809 | 530.07 | **9.28** |
| Illinois | 12,831,970 | 476.39 | **8.57** |
| Colorado | 4,753,377 | 388.12 | **7.85** |
| California | 36,457,549 | 386.83 | **7.14** |
| Alaska | 670,053 | 345.94 | **6.42** |
| Hawaii | 1,285,498 | 312.41 | **5.71** |
| Delaware | 853,476 | 280.15 | **5.00** |
| Alabama | 4,599,030 | 274.51 | **4.28** |
| Georgia | 9,363,941 | 273.73 | **3.57** |
| Florida | 18,089,888 | 256.91 | **2.85** |
| Idaho | 1,466,465 | 215.89 | **2.14** |
| Indiana | 6,313,520 | 207.00 | **1.42** |
| Arizona | 6,166,318 | 197.39 | **0.71** |
| Arkansas | 2,810,872 | 195.67 | **0.00** |

A different scheme must be implemented for the infrastructure indicators because they only return a binary value (yes or no), and therefore cannot be immediately converted into a sub-MRI. In order to calculate the value on an MRI metric for the existence of every infrastructure element, (such as implementation of the UMA and existence of state ADR offices) a score of 0.5 could be attributed.[34] The sum of all scores could then be added to the overall MRI of the respective state so that the existence of a particular infrastructure increases the MRI of that state.[35] These sub-MRIs would be

[33] U.S. Census Bureau, Population Estimates for United States by State as of July 1, 2006, http://www.census.gov/popest/states/NST-ann-est.html (last visited Feb. 12, 2007).

[34] To avoid the MRI exceeding the value of 10, the maximum amount of the score should be limited to a reasonable number—1 or 2—or the MRI should be capped at the value of 10 so that any amount which exceeds this value would be disregarded.

[35] This methodology is not unproblematic. A state may not have adopted the UMA but might have similar and effective statutes in place. Likewise, a particular state might not have a state ADR office but a highly effective ADR coordinator or an ADR organization, which serves the same function as a state office. However, the presence of

given a specific weight, and they would constitute the final MRI calculated according to an overall formula.

## VI. WEIGHTING THE SUB-MRIS AND CALCULATING THE FINAL MRI

The design of the overall formula is the most challenging part of calculating the MRI. In order to determine a single MRI for every environment, the sub-MRIs for each indicator must be weighted to flow as intermediary results into the calculation of the final MRI. The next crucial part is to decide to what extent a particular indicator will be considered. Because there are a multitude of possible rationales and objections for any given value, it is critical to acknowledge that a certain level of arbitrariness seems to be inevitable and intrinsic to the index calculation process. Yet, this Appendix leaves the question of whether the weighting of indicators within the formula was done correctly. Based on this rationale, the basic rule might be applied that every indicator is to be considered with the same weight unless particular reasons justify a different weighting. Therefore, the same weight might be attributed to all quantitative indicators. However, a different method might be used for the subjective sub-MRI (qualitative sub-MRI). As Professor Sander suggested, 20% could represent a reasonable value for the subjective element because it serves as an auxiliary criterion which complements, but does not equal, the core objective indicators.

According to these considerations, the overall formula for the MRI would be as follows:

$$\text{MRI} = 0.8 \text{ x objective MRI} + 0.2 \text{ x subjective MRI}$$

The objective MRI could be determined according to the following formula:

$$\text{Objective MRI} = \text{infrastructure score} + \frac{\sum \text{quantatitive sub-MRIs}}{\text{number of quantatitive sub-MRIs}}$$

Three different versions of the MRI could be calculated to maximize options and gain insight. One version of the MRI is adjusted to the population and shows the relative mediation receptivity in a given environment (relative MRI). The second version, which remains unadjusted,

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certain infrastructure elements might well be an indicator of the general awareness and endorsement of ADR by the legislature and the mediation community at large, and therefore, relevant as an indicator even if it is not effective as an instrument.

provides insights into the absolute level of mediation activity that occurs in the environment (absolute MRI). A third option would be to determine the MRI on a regular basis and track long or mid-term trends. This capability would highlight the MRI's full potential. However, the determination of such a long-term MRI is not easy to do because it assumes a consistency in data collection as well as a consistent methodology in calculating the MRI. Because the MRI is an index which will be further developed as an ongoing project over time, the backward compatibility and comparability of data leads to a dilemma. On the one hand, the ability of the MRI to describe long-term trends requires a consistency in methodology and data collection. On the other hand, the appeal and potential of the MRI depends largely on its capacity to remain open-ended and adaptable to future developments. However, a solution could be to select a specific data set and a methodology as the core of a long term trend MRI that will remain compatible with MRIs from earlier years, and then to develop a dynamic version of the MRI that is open for future adoptions.

In whatever way the MRI might be used—be it in a static snapshot or in a dynamic long-term trend version—together with the sub-MRI's for each of the indicators, it provides a powerful tool to determine the strengths and weaknesses of the various mediation communities, and it might provide an overview of the locations of mediation receptivity centers and what has been done differently across those locations. In this way, the MRI might not only improve the understanding of mediation, but might also be a powerful tool for its practical promotion and advocacy.