

Why?

Why is research about how mediators perform their roles important? Because mediation is important – very important. Because mediation has become so important, it is essential that we understand how it works. And the single most important variable affecting how mediation works is the behavior of the mediator.

Why has mediation become so important? The most commonly cited of the many answers to this question arises out of the current state of civil litigation in this country. In federal courts, only about 2% of the cases proceed all the way to trial. In state courts, the percentage might be a little higher, but not much. Why has the civil trial shrunk in significance? Primarily because of the growing disproportion between litigation costs and case value. It simply costs way too much to get to trial. So a huge percentage of civil cases leave the judicial system before trial. Some leave as a result of rulings on motions, some because the plaintiff or the defendant just gives up, but the most common exit route is settlement. And mediation has become the principal tool for achieving settlement. Thus, mediation has become the predominant vehicle for resolving civil cases.

But mediation has come to play a significant role in many less visible but certainly no less important arenas. Tensions between people and between institutions are endemic in our increasingly multi-pocketed society, and across a wide spectrum of circumstances, mediation has become the method of choice for responding to such tensions. From neighborhoods to mammoth institutions, people have learned how much mediation can deliver – not just to identifying solutions, but to increasing mutual understanding, to expanding and enriching the way people think about problems, to deepening sensitivities, to promoting respect, and to helping restore both relationships and individuals' sense of self. In all of these ways, we have learned that mediation can enhance the health both of individuals and of our society.

We would be unwise, in the extreme, not to try to develop as reliable and nuanced an understanding as possible of a process that already plays such significant roles and that has so much potential. The purpose of this Special Issue is to share some of the findings of recent empirical research in this arena, to help frame targets of and agendas for the considerable additional research that needs to be done, and to energize scholars from multiple fields to undertake this work.

The contributors to this Special Issue understand what thousands of users of mediation and early neutral evaluation in the U.S. District Court for the Northern District of California have opined for years: by far, the most important determinants of the value and productivity of these processes are the qualities and conduct of the mediators. We really need to understand the behaviors and characteristics of mediators that are likely to contribute most to realizing the potential of mediation. But we cannot assume that these behaviors

and characteristics are the same in all environments and for all purposes. So we need to consider differentiation. What are the factors or circumstances (including the personalities of the principal players) that suggest the wisdom of one style or another, or that suggest a particular sequence or blend of styles? And are there some traits of personality or elements of style that are valued and appropriate in virtually all mediation settings?

As the articles in this Special Issue suggest, the first step in shaping the specifics of our research agenda must be to identify particular goals or purposes. What is it that we most need to understand? What do we care about most? Again, the answer is likely to vary with the setting.

In some contexts, what we might need most to know is which styles or approaches or techniques are likely to maximize the odds of getting a deal. But in those same contexts, we also need to know how to answer that question on a case by case basis. In other words, we need to understand what it is that we need to know before we can make the most reliable judgment about which styles or approaches or techniques are likely to be most effective. We also must identify the variables or circumstances that should drive us to reassess our initial judgments – and, midstream, to shift stylistic gears.

In other contexts, what we might want to know is which styles or approaches are likely to help participants access positive feelings about themselves or about other participants. Or we might care most about teaching or learning: which styles or approaches are likely to help participants learn most about one another and their circumstances, or, simply to feel the emotional/psychological rewards of communicating with others through a particular mediation process.

Whatever the goal of the research, it is likely to be pursued with the greatest subtlety and to yield the richest results if it is interdisciplinary – drawing at various times on psychology, social psychology, anthropology, game theory, micro economics, and law. Well-conceived research also must take fully into account how dynamic mediations tend to be; that is, how the behavior of each disputant can affect the behavior of the others, and how changes in emotional and/or informational circumstances can call for changes in the behavior of the mediator, to say nothing of leading the mediator to ask (explicitly) for changes in behavior by the other disputants.

Moreover, it would be useful to understand better the pluses and the minuses (measured against values clearly prioritized in advance) of having the mediator actively involve all the disputants (before and during the session) in thinking about and selecting the character of the process as a whole, or the particular style that is to be used at any given juncture in the mediation.

It should go without saying that one of the most valuable contributions that research in this arena can make is to identify mistakes made by mediators, to try to understand why they are mistakes and what caused them, and to suggest alternative approaches that would reduce the risk of making similar mistakes in the future. By analyzing what went wrong, and why, we can learn a great deal about how to do things better.

It is important to emphasize, as the contributors to this issue so fully recognize, that the kind of empirical work about mediation that is most likely to generate reliable findings will be based on data that goes well beyond both self-reporting by participants and superficial statistical portraiture. We need data based on independent and direct observation of indi-

vidual mediations – as well as in depth interviews of participants that are designed to search for the reasons things played out the way they did. We need careful, detailed, circumstance specific case studies – to identify variables that matter (again, by prioritized values) and to inform strategies and designs for broader scale empirical studies.

As the contributors to this special issue remind us, these are tall challenges. But inspiration to rise to them flows from the signal importance of the undertaking.

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