Discovering the Importance of Mediator Style—An Interdisciplinary Challenge

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Abstract

Mediator style research is a continuing interdisciplinary challenge intersecting with professional practice and academic theory. The research discussed herein is drawn from a large database obtained from survey research of mediators, parties, and representatives at the Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing. Issues discussed include the importance of researcher background/possible bias in the construction of the methodology; development of effective survey research methodology and survey questions that measure the complex mediation process; the limitations of the use of survey research methodology in addressing the complex issues related to mediator style; the challenge to the identification of an effective mediator style or styles; the interdisciplinary team skills that can contribute to quality research vis-à-vis academic institutional barriers; and the ethical and program-centered contextual challenges to what can be high-stakes research outcomes.

Mediator style has always fascinated me. As a labor relations attorney and employment law litigator, I have found the role of the third party neutral has been at the center of the legal side of my professional life. Later in my career, while earning my Ph.D. and blending a law and academic career, I better understood mediation from a scholarly vantage point, contemplating integrated conflict resolution systems, mediation, and negotiation theory.

My first opportunity to blend these vantage points was a program evaluation for the Equal Employment Opportunity Commission (EEOC) that began in 1999 (McDermott, Jose, Obar & Bowan, 2000). I was the principal investigator in a study of consumer satisfaction with the mediation. At that time, we had some guidance on best practices for mediation evaluation research (Brett, Barsness & Goldberg, 1996; Brett & Goldberg, 1983; Kochan & Jick, 1978; Kressel & Pruitt, 1989; McEwen, 1994; Shapiro, 1985). Mediator style literature was sparse at that time. For participant satisfaction, there was a more mature

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body of literature addressing participants' perception of procedural and distributive justice in workplace grievance processes and other proceedings (Folger, Greenberg, 1985).

Our work on the analysis of mediator style began as an afterthought during the development of our EEOC survey instruments. In the course of preparing our participant surveys and research methodology and protocols, I recognized our unique opportunity for access to a large volume of mediations conducted across 50 EEOC offices. We requested the opportunity to also survey the mediators concerning their background and what occurred at mediation. The EEOC approved—as long as we did not charge them for our proposed enlargement of the project. Only academics would agree to do more work, without pay, in return for a database!

Our interdisciplinary research team has added great value to our mediator style research by providing unique vantage points. My Ph.D. in human resource management and, as importantly, my minor in organizational behavior, sparked my scholarly interest in the cognitive processes associated with bargaining and mediation, as well as workplace conflict resolution. My field research and related scholarship continues to benefit from my continued participation in settlement negotiations and mediation as an advocate in U.S. District Courts and Courts of Appeal; state courts, and federal and state administrative agencies. Between drafts of this paper, a federal magistrate judge used a new mediation tactic with me that at first surprised me because I had not seen it in the practice of law. I then remembered a similar technique had been reported to me years before during our EEOC study. The practice of law is my laboratory to test my data and my and others' theories. This is a labor of love.

My one research colleague, Dr. Brian Polkinghorn, is a graduate of the Institute of Conflict Analysis and Resolution at George Mason; he has a more traditional conflict resolution pedigree. He has not served as an advocate but rather as a program designer and as a mediator in matters ranging from local court programs to international disputes.

Our third key colleague, Dr. Ruth Obar, is trained as a statistician with a Ph.D. in economics. She provides us with empirical discipline and related methodological insights in support of the study design and data analysis. Because she is from outside the field, her insights are particularly valuable.

Our Study of Mediator Style

The EEOC Context

To best understand what we studied, we need to identify the historical context in mediation development. At the time of our investigation in the late 1990s, the mediation field was beginning to blossom, and there was some elbowing among practitioners and theorists. I have always had an intellectual interest combined with a practical concern about what went on in the mediation room or caucus. From a practitioner perspective, I thought that some mediators were not very effective for a variety of reasons. Some were hostile to involvement of counsel at mediation; some could not gain the confidence of my clients, often because they tried to steer the mediation to a feelings or relationship focus when my clients wanted money; others adopted manipulative, but transparent, tactics to force settlement. I also observed that some did not care about anything except settling the case—this

meant that they would try to beat down the party they perceived as weaker so as to get a resolution. Often this party was the plaintiff.

I also was interested in the mismatch of mediator styles with the situation as well as the broader debate over whether evaluation/directive mediation was appropriate. I found that the predominant facilitative mediation style of that era was not effective for many of my cases. This style dictated that the mediator not suggest a solution or try to value the case but rather be a facilitator who focused on problem solving and communication of the parties. Purists of this style argued that the use of caucuses were not appropriate. The evaluation style, on the other hand, called for the mediator to challenge a party position and to offer his or her opinion on the appropriate remedy for the case.

I particularly recall one early case in a private mediation of an employment law dispute involving issues of gender discrimination and defamation. Counsel for the employer and employee both felt that the case was ripe for settlement at mediation. A prominent mediator was assigned to the case. This was the first time that I experienced a pure facilitative mediation. This mediator was proud of this style and touted it as one of her key abilities. The style, however, was not effective. We found the mediator reflecting back to the parties on issues such as how the complainant/plaintiff felt about her termination and her relationship with the person who fired her in a situation where the negotiation was about money. To the disputants the relationships were secondary because both sides wanted the case to be over. In these types of termination cases, the client was not going to be reinstated—positions had hardened, the employee had been replaced. And there was too much management pride at issue to admit wrongdoing. My client needed this mediator to engage in some evaluative conduct, even mild evaluation, to wrap up the money negotiations. The mediator's facilitative style infuriated my client because she wanted some guidance on what the settlement should be. When my client asked the mediator to voice her opinion on what she thought of the offer on the table, the mediator refused to provide any insight. I felt at the time that the mediator's public claim of a superior mediator style was belied using a rigid style that simply did not fit the context of the case or needs of the parties. As a practitioner, I valued a mediator style that was flexible and context driven.

At this point in mediation history, I had been strongly influenced by labor mediators and arbitrators whom I had worked with over the prior decade. I found their style was more evaluative/directive; these mediators had much more skill in proposing solutions and guiding parties toward sustainable agreements. I saw some mediator strong-arming but I also found that this approach was sometimes able to bridge what appeared to be insoluble differences.

Thus, I carried the view—some might call it prejudice—that some evaluation can be valuable for mediation, at least for highly contentious employment law mediations that turn on the amount of money paid out to settle the case, in lieu of reinstatement, etc. Around this same period, I was also skeptical of the scholars and practitioners who were touting superior styles and even claiming that some styles, such as directive/evaluative styles, were not mediation.

At the time of my development of the EEOC mediator study, I did not fully appreciate the seriousness of the style issue, though I was aware of some debate (Kovach & Love,

1998). Nor did I appreciate the larger confluence of two mediation camps—those reared in the labor negotiation and grievance resolution process of third party neutrals, many with a J.D., and those from the peace studies/community mediation camp with a Ph.D. I also did not appreciate, as an experienced attorney but newly minted Ph.D., that some legal scholars and many from the community mediation/nonlegal mediation background had serious issues with the legitimacy of the rights-based evaluative orientation of many judges and lawyers.

Methods and Data Used to Capture Mediator Style

EEOC Mediation Program

We responded to an EEOC proposal request that sought a consumer satisfaction survey and a related evaluation of the EEOC mediation program. At the time, we evaluated the EEOC, it had jurisdiction over charges (i.e., cases) alleging race, color, religion, sex (including pregnancy), national origin, age (40 or older), and disability. We learned that the EEOC classifies charges at intake so that some charges may be internally dismissed, but the details of this summary rejection are not shared with the filing party. Charges classified as "A" usually are not selected for mediation. These charges involve cases where a reasonable case finding is highly likely or where important patterns or practice/systemic issues or other public policy concerns militate against the use of preinvestigation mediation. Where a party requests that an "A" charge be mediated, the District Director and Regional Director have the discretion to allow such mediation. However, this is the exception and not the rule for such cases.

Charges classified as "B" are charges where further investigation is required to make a determination concerning their merit. In general, "B" cases are eligible for preinvestigation mediation. However, "B" cases that involve the Equal Pay Act or pattern or practice/systemic allegations are not eligible for preinvestigation mediation. If a charge is classified as a "C", this means it has no merit and it is dismissed with minimal, if any, investigation.

Equal Employment Opportunity Commission mediation is a preinvestigation dispute resolution procedure. It is not offered in every case filing but rather primarily to "B" cases. The selection of those cases is discretionary and subjective; we cannot report with certainty why some "B" cases may be offered mediation but others are not.

For the period of our data collection, the EEOC used staff employees as mediators as well as external mediators who are either paid pursuant to an EEOC contract or served on a *pro bono* basis. The EEOC contract mediators included, but were not limited to, mediators from the Federal Mediation and Conciliation Service (FMCS). FMCS mediators were primarily utilized in cases far from EEOC offices where internal EEOC mediators and private contractors were not available.

We obtained 1,683 completed surveys from the charging parties and 1,572 completed surveys from the respondents over a 6-month period at all 50 EEOC offices. The research protocol required the mediators to ensure that the parties completed their surveys at the end of each mediation session. The mediators then placed the completed surveys in an envelope, sealed it and forwarded it to their local EEOC coordinator, who then forwarded it to us.

We sought to evaluate the program from the vantage point of the charging party (employee) and the respondent (employer). The following were the main research questions: (a) What was the participant feedback regarding the mediation? More specifically, how did the participants view the procedural and distributive elements of the mediation program? (b) Would the parties use the program again? (c) Do other variables such as the characteristics of the charging party and the characteristics of the mediation sessions affect participant satisfaction with the program? The EEOC program we noted was designed as, and advertised as, a facilitative program. We found this was attributed to the now-settled debate over the role of evaluation in the mediation of legal disputes as well as the thinking of that time that one could easily control a mediator's conduct by stating that a program had a certain style.

The party surveys included numerous measures that we classified into procedural and distributive justice measures. Questions concerning procedural elements included statements about mediation preparation, comprehension of the process, process satisfaction, voice (i.e., opportunity to present views), and the mediator's role and conduct. Distributive questions related to satisfaction with the results of the mediation.

We used our participant surveys to compare mediators' style to various participant reported outcomes. To measure mediator style, we used two sets of mediator surveys—a survey reporting on the actual mediation and a separate background survey filled out once by each mediator. In the mediator background survey, we sought key information about the mediator's background. We were interested in the different types of players who were establishing themselves as mediators; we were also cognizant of the archetypes of the rights-based lawyer-as-mediator as opposed to other mediator backgrounds. We could have performed a better job here, as we asked only whether the mediator was an attorney. (In a current court project, I am identifying the education of the mediator with an interest in whether degrees/skills in certain disciplines [e.g., conflict resolution, sociology, psychology, etc.] may influence outcome.)

In this background survey, we also incorporated the Krivis–McAdoo survey instrument that sought to identify whether the mediators were oriented toward a facilitative or evaluative style (Krivis & McAdoo, 1997). I added a few questions, including whether the mediators believed their style would be different in another mediation. Here, I sought to measure whether the mediators were context oriented more than style orientated.

We were also interested in the mediators' background, including training and the type of cases previously mediated. For example, it was important for us to know if the mediators were primarily engaged in family mediation, community mediation, or employment mediation. Here, we were wondering whether family practice or community mediators approach this process differently from labor or employment law mediators. We also sought to identify the volume of the cases they had mediated. We also asked if the mediators had ever served as an advocate in the type of cases that were being mediated (e.g., employment discrimination). Our thought here was that this would allow us to test whether a lawyer who regularly litigated these cases may be more evaluative because of expertise in the identification of the zone of settlement or going rate. In addition, we sought to identify what type of training the mediators would be interested in obtaining, so as to gain a window into the mediators' perceptions of how they could improve.

Our other mediator survey focused on the mediation that had just occurred. We divided our sample into cases that were resolved and those that were not. For the cases that were not resolved, we asked the mediators what they believed were the three main reasons the dispute was not resolved. We also asked the mediators to identify any conduct that they believed any party or party representative engaged in that was a bar to settlement. In addition, we asked the mediators to list the five major barriers to resolution in a hierarchical 1–5 format. Finally, we asked the mediators if they could have done anything different in retrospect. Except for the resolved-or-not question, we used open-ended questions.

For cases that were resolved, we asked the mediators to identify any conduct by the party or the representatives that contributed to resolution, and we sought to identify the turning points. We then asked the mediators to identify any major acts or conduct of theirs that facilitated resolution. Note that we had already asked a similar question in the preceding larger questionnaire, which asked what the parties, representatives or mediators do to facilitate resolution. This similar question was an attempt to further draw out what the mediators perceived they did that led to resolution. We also asked the mediators to rank the skills of attorneys as advocates in the mediation process. We included this question because of the existing debate over the role of attorneys in mediation. I wanted to gain insight into whether mediators felt the attorney was effective in the mediation process, which involves a different set of lawyering skills than pure adversarial representation. We also asked some general questions about the mediation, such as the length of the session, whether the parties had used mediation before, and if the parties were going to use mediation in the future if the case was still open. We obtained 2,062 useful mediator surveys. A handful of surveys were deemed to be invalid or useless.

Our data allowed us to explore various relationships using dependent variables such as settlement rate, amount of money obtained, and participant satisfaction. The fortuitous process by which we gained access to this mediator data was the reason that we did not set up any hypothesis testing but rather gathered the data and analyzed it in an exploratory fashion.

Our many open-ended mediator questions and participant feedback provided a wealth of interesting data that Dr. Obar and I were able to incorporate into both the EEOC study and subsequent Harvard Negotiation Law Journal (McDermott & Obar, 2004) and Journal of Dispute Resolution articles (McDermott & Ervin, 2005). In retrospect, closed-ended questions would have made the data analysis much easier. On the other hand, given the dearth of data about what actually happens in mediation, I decided to gather as much relevant data as possible and decide how to use them later.

This is an exploratory approach that I would not recommend to most researchers. I felt safe in using it because the EEOC concern was with the employee and employer perceptions of the process and because we used safe Likert measures with open-ended sweep-up questions to make sure we did not miss anything.

Dr. Polkinghorn's joining of the research team was well timed for the mediator style analysis. We proceeded to spend countless hours coding our open-ended responses, resulting in a valuable taxonomy of mediator styles and tactics, which then formed the basis for our improvements to our later work in with the California Department of Fair Employment and Housing. (The original EEOC mediator results survey can be obtained from the

author, as can the California mediator results survey.) In August of 2001, we published a second EEOC study entitled "The EEOC Mediation Program: Mediators' Perspective on the Parties, Processes, and Outcomes" (McDermott, Jose, Obar & Polkinghorn, 2001).

Dr. Polkinghorn's and my coding were without reference to existing work but rather based on our collective academic and applied mediation experience. Thus, when I later read the Wall, Stark & Standifer article on mediator theory development, I was impressed by the close relationship of our codes to their classifications (Wall et al., 2001).

The California Department of Fair Housing and Employment Context

After the EEOC work, we were retained by the California Department of Fair Housing and Employment to perform a similar participant evaluation (McDermott, Jose, Obar & Polkinghorn, 2002). In addition to standard party satisfaction measures, we used our extensive EEOC data and experience to develop improved measures. We took the open-ended answers from some of the EEOC questions to develop closed-end survey questionnaires that contained questions concerning (a) party conduct that interfered with resolution (unresolved cases) or contributed to the resolution (resolved cases), (b) barriers to the resolution of the case, (c) mediator behaviors used and their significance in resolution of the dispute, and (d) what behaviors the mediator should have used in unresolved cases but did not (what the mediator would have done differently).

In our California research, we also expanded our areas of inquiry to include data on the amount, type, and duration of caucuses. We did this because we learned from the developing literature on mediator style that some mediators did not believe in caucuses and actually saw this tool as contrary to the principles of mediation; as a practitioner, I did not buy into this tactic. We wanted to know more about this aspect of mediator style and try to link it to outcomes.

Findings: The Impact of Mediator Style

From the data of both studies, we found that some style tactics, such as the use of caucuses, time and the length of the mediation, did not contribute to a higher settlement rate or participant satisfaction rate. Left open is the issue of what is said in the caucus and its impact on settlement and participant satisfaction.

Our EEOC data did shed light on many aspects of mediator style. First, we found from this self-reporting that while a program may offer a certain claimed style, mediators may use styles outside of the professed program style. Thus, while the EEOC program was labeled facilitative, we saw that many mediators may use what we classified as evaluative conduct or mixed facilitative and evaluative conduct as needed.

We also detected effects of facilitative, mixed, and evaluative styles on participant procedural and distributive satisfaction. First, we found that mediators describing themselves as using the facilitative style attained higher participant satisfaction ratings on seven measures of mediator procedural justice measures and three distributive justice measures. This idea had been suggested in the mediator style debate; we were able to contribute data that supported this observation.

We also found that for both facilitative and evaluative styles, the parties/disputants would be willing to participate in the process in a future dispute. Also when asked whether the disputants had obtained what they wanted, those who were in a facilitative mediation were more likely to report that they had obtained it than were those in the evaluative process. This finding indicates that evaluative mediation can leave parties with a lesser feeling of success in mediation. This makes sense as each party is being challenged by the mediator, often in a caucus, so that the average participant may not recognize that the other party is also being challenged.

Our most interesting finding related to monetary outcome. While facilitative conduct was more pleasing to the parties, the highest and the lowest monetary outcomes for charging parties were found where evaluative conduct was used. Thus, facilitative mediation had a more leveling effect on the amount received, while evaluation provided a wider range of settlement with higher payouts.

We also found that the mediator style and role of counsel interacted to affect monetary outcome. When an evaluative style was combined with the presence of counsel, the charging party earned the highest payout. This finding highlights a fundamental issue in the mediation debate—the proper role of counsel. It also brought me full circle back to my original concern about some mediators who did not appear to want an involved counsel, which in turn caused me to wonder what they were doing when counsel was not present.

Our most important finding was that when the parties/disputants reached an agreement, they rated the process and mediator higher. As we stated in the California study, settlement is the *sine qua non* for participant satisfaction. We also found that parties and mediators both recognize the importance of mediator ability to generate solutions and other problem solving. Thus, while we established the influence of mediator style on a range of procedural and distributive justice factors, we also showed that if the case settles, the style is more likely to be acceptable.

We recognize some limits in our methodology. Because we used a self-reporting methodology, we did not have observation data which would have added value. We recognize that once the mediation door closes, there is a complex, often fast moving and usually emotional process that cannot be fully measured by survey methodology. A better methodology, but one that is very costly, would include observation with simultaneous coding. To do this, one must invest significant time and money to develop discrete codes, train the observers, and obtain an inter-rater reliability score for observer coding.

Major Implications for Researchers

Our study contains important implications for researchers interested in studying mediator style. First, data-driven analysis is important—there are limits to scholarly debate without data. This is particularly true in the area of legal scholarship.

Second, measurement is a major challenge for researchers. Obtaining access is difficult, and ethical considerations can interfere with measurement. From the ethics perspective, one has to make sure that an institutional review board approves the subject study. But this may not be enough as many IRBs may not have a feel for the intricacies of rights-based dispute resolution. Thus, one must ensure that professional codes of mediation and legal

ethics are not violated. For example, one may be intruding on the attorney-client privilege by asking participants or their counsel certain tactical questions. Or, one may actually influence the mediation by the questions asked in a pretest survey.

To develop effective measurement methodologies and instruments, it is often useful to assemble an interdisciplinary team. For example, an attorney may be needed as part of the research team to address attorney-client issues. This attorney may also be needed to develop context measures that Ph.D.'s may miss, such as the legal procedural posturing of the case, which may predispose the case to resolution regardless of mediation style. Also a team member may be needed who has expertise in the retrieval of archival data that can maximize the accuracy of measurement and scope of data obtained.

Third, qualitative research provides data that are as valuable as quantitative. Mixed quantitative and qualitative designs can be helpful because of the difficulties of developing an experimental design in applied law and related disputes such as civil law, criminal law, and community disputes. Because it can be argued that each dispute is unique, these combined methodologies can support findings that cannot be found by experimental design. Stated another way, for all of the limitations found without experimental design, an experimental design for this type of research can be just as suspect because of the complex measurements at issue and unique elements of each case and mediator style. A better approach may be a mixed method study that simultaneously observes what happens in the mediation, combined with self-reported data that address participants' pre- and postmediation impressions of the procedural posture of the dispute, what has happened to date in the dispute, the immediate perceptions of what just happened in the mediation, and data concerning the parties' perceptions of contextual elements. Comparison of these data to archival data should allow a researcher to examine the relevant factors external to the mediation.

Fourth, do not underestimate the interdisciplinary nature of this research area. One can accidently get trapped in a disciplinary approach that does not account for all of the ways that mediation theory can be tested. It took me a while to fully appreciate how mediation issues were being addressed in so many disciplines and subdisciplines. For example, there are the contributions of Dean Pruitt and Peter Carnevale on negotiation and mediation from the social psychology discipline. Also, there are the contributions of Kimberlee Kovach, Leila Love, and Leonard Riskin from the legal field, Kenneth Kressel from psychology, James Wall from management, and Thomas Kochan from the management/industrial relations discipline. Then there is the wealth of contributions from Morton Deutsch and the conflict resolution discipline.

Interdisciplinary contributions are important for research design in the study of mediator style. For example, a researcher well-versed in community mediation with a Ph. D. orientation may not be skilled in the measurement of legal disputes in a court system, and a lawyer/judge focused on rights-based dispute resolution, and case valuation may not be skilled in the community mediation area. This is because community mediation tends to be a more facilitative process in which caucuses are considered taboo by many practitioners, whereas legal dispute mediation is often more evaluative and caucus driven. Moreover, the only action in community mediation may be in the mediation room where parties must reach a consensus to resolve their dispute, while in legal dispute mediation, there may be powerful contextual forces such as a pending court ruling on motions that

may change a party's perception of case value. Also legal disputes, particularly certain types, tend to involve attorneys as key players, while community disputes may not involve any counsel. These complex factors and the need for interdisciplinary support make this research even more rewarding. A lot of disciplines and public policy makers are watching.

Fifth, for best design and results, one needs co-researchers and other support from those with practical experience in the area of the dispute being measured; this will help with study design and data analysis in a nuanced area of measurement. One needs to attack the nuances of the process measurements before the data are gathered, and one must understand the underlying context of the dispute resolution process and its players to maximize methodology quality and data gathering. The identification of archival data, the influence of context on the mediation process and outcome, and the subsequent interpretation of data are enhanced by team members with such experience.

Sixth, beware of, but do not be discouraged by, ethical challenges. The experimental design model is challenging here because of the denial of certain legal treatment such as mediation. It can be managed, but it must be considered from the outset. Also, what occurs in mediation is confidential so that there must be a consensus across all parties for certain disclosure.

Seventh, mediation is a multi-party process, so it is important to gather data from every possible vantage point. To study mediation fully, one needs to gather data from all players in the process, behind closed doors when parties caucus, and from other documents that shed light on the dispute. When we started our work, there was not much interest in the mediators' vantage point, but rather those of the parties. We expanded to mediators. In a new study we are conducting, I want to expand the vantage point to that of insurance adjusters in attendance so as to learn more about their influence on the process.

Eighth, this area of research is high stakes. Many professionals, court systems, and other interest groups have a stake in the outcome of the research. Be respectful of these interest groups while maintaining research integrity. Recognize that in many research contexts, like the EEOC and California Fair Housing research, there are existing interest groups with their particular concerns who function within a process that runs to the heart of this nation—the rule of law and administration of justice. For example, there are some mediators who believe that their particular style is superior and may even decry other processes as not being mediation. One can be respectful by sidestepping some of the debate using terminology such as "ADR provider" instead of "mediator." This is particularly helpful if you are researching in programs where internal experts have taken strong positions on these issues. You also wish to ensure that you identify the areas of program success. For example, when you are measuring mediation success rate, it is important to realize—and measure—that many mediations that do not result in settlement have actually minimized outstanding issues so that the parties are focused and close to resolution, which then occurs shortly thereafter outside of mediation or outside of the program's measurement process. Related to this point is that if you are doing evaluation research, you may have been retained after the party has declared their program a success or alternatively, continued funding of the program may be related to your finding. This creates a great deal of pressure on scholars to make sure they are designing the best possible research model, with the most effective use of cutting edge technology where needed, to ensure they are

fairly evaluating the program. We have found that the best way to be true to our independence while not disappointing the sponsors is to make sure that no stone is left unturned in our output/outcome, effectiveness, cost/benefit data gathering and related analyses.

Ninth, do not be afraid to use longer surveys than what consumer research may dictate. We found that for important issues in one's life, such as perceived workplace injustice, people will take the time to fill out longer surveys. While one should always pretest and be mindful of length, when in doubt go longer to gather more data. Related to this observation is that one should always improve the survey instrument to gather the most information possible by design.

Tenth, once one has developed a database and methodology, one can build on this research, and it can often be transferred across cultures for deeper insights, such our recent foray into Chinese employment dispute resolution (McDermott, Sun & Obar, 2010).

Major Implications for the Practice of Mediation

Who should decide on the mediation style? It could be argued that mediation may be lacking informed consent to the extent that the mediation styles are not explained to the parties so that they can elect the type of mediation that they prefer. In addition to discussion of mediator style, should there also be an informed consent warning of the risk of not being represented by counsel? On the other hand, for those mediation processes that simply cannot sustain the use of counsel because of cost factors, are courts providing second class justice to move their large docket? These questions dovetail into the high-stakes nature of some of this research and the importance of understanding the context of the mediation program that one is studying.

Mediators are difficult to pin down by style—in fact it could be argued that the person trumps the style. Thus, while the EEOC program was facilitative, we found a wide range of mediator conduct, including some strong evaluation and some mixed styles. As we were not in the room observing the actual conduct, our findings must be carefully considered. For example, the term reality checking can be seen as evaluative or facilitative depending on how strongly the mediator checks a party. Later discussions with some of these mediators after our study was published indicated that mediators tend to use a unique style that they will not subordinate to a generalized programmatic standard.

Our data indicated that the parties seek creative problem solving from mediators and want more of it. Solution generation is a key skill. While some would raise an empowerment claim and argue that such solution generation belongs to the parties, our data suggest that parties look to the mediator for help. Finally, our mediators report that they would like more training in this skill area.

The Vexing Issues

Using the discussion above as a foundation, I will now try to answer some of the challenging questions about mediator style research set by the editors.

Where does style research rank in importance relative to other important topics on mediation or mediator behavior? Many research questions center on mediator style. Thus, I would

not isolate the study of style research because it interfaces with other issues such as due process, settlement, role of counsel, best practices, tactics, etc.; these issues then dovetail into program development, mediator training, and program evaluation. For example, the role of counsel and counsel's strategies are affected by the mediator's style. Our research shows that both participant satisfaction and charging party monetary gain can be influenced by mediator style. I see this in a holistic context with mediator style research as central to what is going on in mediation.

Mediator style research is also important to train mediators to maximize a best practices style for their set of skills and valuable life experiences. It could be argued that some of the early arguments on mediator style, not supported by data, only served to hamstring effective mediators.

Why has so little progress been made in mediator style research? Can anything be done to stimulate more research progress? First, experimental design and observational research can be expensive and time-consuming. It is costly to develop a high-quality methodological process that guarantees validity and reliability. Second, ethical issues can impede an experimental design. If one party is denied a certain treatment, then you have an ethical issue. While one can randomly select cases, each case is unique enough to cause some issues in design.

Besides the problems of costs and ethical constraints, another issue is that program directors and mediators are concerned about what the researcher will find. It is sometimes more politically palatable for a program manager to declare the program a success than to measure it. This is particularly true if you use settlement as your key measure of success.

The external reward systems/structure of academic or professional culture raises another concern. In some disciplines, it is risky to devote time and money to a mediator style study with much comprehensive methodology when one can do a more controllable experimental design with college students and turn around a publication faster. Also, in institutions that use a numbers-based publication model there is little, if any, internal reward for quality and the related extra investment of time.

A related point—many law scholars do not have the level of research skills taught in a Ph.D. program; therefore, it is easier, and definitely less expensive, to write a law journal article than it is to invest the time in building a research team and engaging in the field work and related methodology work before one begins gathering data. To stimulate more research progress, we need more interdisciplinary cooperation. Each discipline can provide a rich and unique vantage point. With good interdisciplinary support, many law school professors can partner with social scientists with solid methodological and statistical analysis skills. This is where the future promise lies, as long as such research is rewarded across disciplines. Once again institutions may not reward the extra work that is involved.

What are the most pressing issues with regards to style that need studying? What kinds of methods/settings/mediators should be studied? In my opinion, we need to look at systemic issues beyond the mediation room and evaluate their impact on mediator stylistic inclinations. We need to consider:

How is the mediator paid (i.e., is there an incentive to manipulate the parties owing to amount of hours that a mediator is compensated for and other such issues)? Is the

mediation center obtaining significant remuneration for moving cases that the courts do not want to see clog the docket? Thus, is the mediation process centered on settlement and not litigation, which may be a legitimate alternative for some fact patterns? Does the program at issue put pressure on the mediator to engage in styles that produce settlements? Is there a spoken or unspoken risk of future selection in paid engagements based on settlement rate? How is the mediator selected? (Is thought put into matching the talent and styles of the mediator with the issues of the case?)

How extensive should the convening process be to shape issues and parties' expectations? Are parties properly educated as to mediator style and their right to choose a particular style or reject it? Is compensation capped at a certain number of hours of mediation even in situations where this is deleterious to the process? What do mediators do when counsel is not present versus when they are present? Finally, while recognizing the wide range of issues in mediation and type of programs, can we benchmark some best practices (i.e., styles) across issues, parties, mediators, and cultures?

Finally, my personal preference for needed research is to develop a research design that directly addresses the issue of mediator style and measures if there is any superior value to a particular style. Here, we would select three or four unique contexts such as family, community, employment, and civil, and test the effectiveness of each style. It is my prediction that the results may give us some insight into the effectiveness of each style but will probably force us to abandon some of our simplistic style concepts such as facilitative, transformative, etc., in favor of a more detailed understanding of style and context.

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