

# Kluwer Mediation Blog

## More on Field-Based Mediation Research

Rick Weiler (Weiler ADR Inc.) · Wednesday, February 6th, 2019



Michael Leathes in his recent [thought provoking post](#) argues for the need for more “field-based” mediation research by which he means actual observations of the live action by skilled researchers. He poses the questions:

- “Has the mediation world spent too long developing lab-based facts to suit its theories?”
- Might it start to hone new theories of mediation excellence from field-based facts?”

These are important questions and I share Mr. Leathes hope that his post will stir a reaction. Indeed, here’s one now!

While more research on all aspects of mediation is always needed, my concern is that the over-resourcing of field-based research seeking evidence of effective mediation techniques will inevitably result in under-resourcing more important areas of mediation research – areas that would likely lead to increasing the utilization of the mediation process. I am reminded of a quote attributed to marketing expert, [Phillip Kotler](#), “if you chase two monkeys, both will escape”

My perspective is that of a commercial mediator with more than 4,000 matters mediated over almost 30 years and that of an adjunct professor teaching Mediation Theory & Practice to upper year law students.

## SPINning the Need for Field-Based Mediation Research

I understand Mr. Leathes' post primarily as an attempt to persuade potential funders of field-based research to open their purses to make funds available. His post invokes the field-based research work of another marketing guru, [Neil Rackham](#) into successful techniques in the art of selling – research that led to his 1988 best-selling book, *SPIN Selling*.

Ironically, it seems to me, Mr. Leathes' "sales" approach overlooks a fundamental tenant of SPIN Selling – *People buy when the pain of the problem is greater than the cost of the solution*.

Using Rackham's SPIN framework, I'd be curious to know more about the current *situation* (the "S" in the SPIN acronym) of potential funders that might lead them to consider funding such research.

Next, what, precisely, is the *problem* (that's the "P") that potential funders would be seeking to solve?

Clarity on that issue would lead to identifying the *implications* (yes, the "I") of those problems if they remain unaddressed. In other words, what is the pain that will be experienced if the research is not undertaken?

Answering the foregoing questions should lead potential funders to *Need-Payoff* questions (you guessed it, the "N" – although it does seem a tad contrived).

These final set of questions are designed to have the potential funders connect all the dots and come to their own conclusion that the proposed solution (more field-based mediation research) is the right one for them.

I am highly sceptical that this approach will gain much traction. Why? Well, in part, it's because I'm predisposed to agree with [Greg Rooney's](#) comment at the foot of Michael Leathes' post in which Mr. Rooney points out, "that in the complexity of human relationships, within which mediators operate, data is never repeatable."

Moreover my own experience, on those many occasions over the years that I have had observers attend my mediations, is that the [Observer Effect](#) (the theory that simply observing a situation or phenomenon necessarily changes that phenomenon) works to significantly diminish the chances of repeatable data being obtained.

## ABA Mediation Technique Report

In 2017 the Dispute Resolution Section of the American Bar Association released its [Report of the Task Force on Research on Mediation Techniques](#). It's an absolute must-read for those interested in mediation research. The Report's approach was, first, to identify 47 articles or reports containing empirical data examining the effect of mediator actions on mediation outcomes.

The Report then attempted to correlate seven categories of **mediator actions** with three categories of **mediation outcomes**.

These are the identified actions:

1. pressing or directive actions or approaches;
2. offering recommendations, suggestions, evaluations, or opinions;
3. eliciting disputants' suggestions or solutions;
4. addressing disputants' emotions, relationships, or hostility;
5. working to build rapport and trust, expressing empathy, structuring the agenda, or other "process" styles and actions;
6. using pre-mediation caucuses; and
7. using caucuses during mediation.

While these are the three outcomes:

1. settlement and related outcomes;
2. disputants' perceptions and relationships; and
3. attorneys' perceptions.

The Report's overall conclusions, from the Executive Summary, are worth setting out in full:

**“Overall Conclusions.** *Looking at the relative potential for positive versus negative effects, while bearing in mind the substantial likelihood of no effects, the following mediator actions appear to have a greater potential for positive effects than negative effects on both settlement and related outcomes and disputants' relationships and perceptions of mediation: (1) eliciting disputants' suggestions or solutions; (2) giving more attention to disputants' emotions, relationship, and sources of conflict; (3) working to build trust and rapport, expressing empathy or praising the disputants, and structuring the agenda; and (4) using pre-mediation caucuses focused on establishing trust. Some of these actions, however, have been examined in a relatively small number of studies and in only a subset of dispute types, primarily divorce, limited jurisdiction, community, and labor disputes.*

*The potential effects of other mediator actions appear more mixed. Recommending a particular settlement, suggesting settlement options, and offering evaluations or opinions have the potential for positive effects on settlement and on attorneys' perceptions of mediation, but have the potential for negative as well as positive effects on disputants' relationships and perceptions of mediation. Both caucusing during mediation and pressing or directive actions have the potential to increase settlement and related outcomes, especially in labor-management disputes; but pressing actions also have the potential for negative effects on settlement, and both sets of actions have the potential for negative effects on disputants' perceptions and relationships.”*

In other words, **“it all depends”**. I highly doubt that further field research will produce significant different results. Certainly the ABA conclusions echo my own anecdotal experience that effective mediating relies on an approach that [has the mediator focus on:](#)

1. Dignity and respect
2. Genuine Curiosity
3. High Expectations
4. A “Yes, and...” philosophy
5. Optimism and Perseverance

## Research, Yes – But In Areas That Will Make a Difference

I sincerely thank Michael Leathes for his post and the discussion I'm sure it will engender. Regular readers of The Kluwer Mediation Blog know that I'm a proponent of finding ways to [narrow the gap between mediation theory and practice](#). As well, I have advocated the collection and dissemination of basic mediation statistics that we currently lack in my jurisdiction (Ontario, Canada) and I suspect many others. Such needed data would include the number of mediations conducted, the settlement rates, the savings achieved through mediation, the cost, etc. That information could certainly provide evidence to assist policy makers steer a more informed course for the future of mediation; a proven robust dispute resolution process.

I think there's little reason to believe that more field-based mediation research focusing on mediation techniques will tell us anything we don't already know.

Mr. Leathes began his post quoting one famous detective on the need for data. Let me close by quoting another. Hercule Poirot says, "It is the brain, the little gray cells on which one must rely. One must seek the truth within—not without." (From the Agatha Christie novel, [Five Little Pigs \(Hercule Poirot #25\)](#))

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A graphic for a survey report. The background is dark with glowing blue and red lines representing data or technology. In the center, there is a gavel resting on a surface. The text is white and blue. A blue button with a white arrow points to the right.

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