

Kluwer Mediation Blog

Here's How Mediation Science Truly Can Originate In The Real World

Michael Leathes (Corporate counsel & author) · Friday, May 17th, 2019

My February 4, 2019 post [What if Mediation Science Originated in the Real World?](#) sparked much useful comment. Many people said they regretted the deficiency of negotiation and mediation field research, but were dismayed that I offered no proposals for fixing it. How, they asked, do you generate large-scale, real-life negotiation data? So, may I now offer for your scrutiny what I believe could be a cost-efficient, valuable and (despite the difficulties) viable way to address the problem?

The need for better data

Current negotiation and mediation theory is based on the propositions expounded by and since Fisher & Ury's *Getting To Yes* (1981). There have been many "laboratory" studies using students and trainees, as well as surveys and interviews by scholars and practitioners that have developed these established mediation theories. But there have been no large-scale field studies based on real-life mediations or negotiations that have subjected these existing generation-old theories to rigorous empirical testing.^[1]

E-negotiating, online dispute resolution, hybrid processes and other factors have changed the way people negotiate and mediate in the 21st Century. Established theories may no longer be fully applicable. New field research in the real world could indicate better "getting-to-yes" theories. Some received wisdom could be blown out of the water by new real-life research. Some is simply not typical of the real world.^[2]

The paucity of field data, specifically in mediation, was dramatically emphasised in a June 2017 Report by the American Bar Association's Task Force on Mediator Techniques.^[3] This US meta-study sought out field research on mediator actions and their effect on outcomes. The Task Force, comprising highly-experienced talent in dispute resolution, could only identify 47 studies, mostly related to court-connected mediations (where, unlike "free market" mediations, the presence of a researcher could be requested or required more easily). The results were largely inconclusive owing to the data's limited scale and scope, and the uncoordinated nature of the studies.

Why this is not surprising

In mediation, as in negotiation more generally, parties are naturally reluctant to allow an unknown

researcher to observe their confidential discussions – a stranger, sitting silently in the room, watching, listening, taking notes. This fly-on-the wall may have signed a non-disclosure agreement, but their presence is likely to raise the discomfort levels that are common at the start of many mediations.

This understandable reluctance is surely a key reason why there are practically no real-life large-scale mediation and negotiation studies. But as a result, scholars lack the credible data they need to develop new empirical theories that can improve mediation and negotiation processes and techniques and their success rates.

Crafting a solution

The crux of the problem does not appear to be resentment to research, but to the presence of a researcher who social psychologists would describe as “out-group”. In that case, what if the researcher were to be “in-group”? For example, a member of one party’s in-house business or legal team, or an associate of a professional firm representing one of the parties whose role is to observe, not participate. Associates, whether in-house or in a firm, are often present during mediations and negotiations, taking copious notes (that are rarely read), so why not systematically train them in more purposeful observational recording skills as a part of their career development?

Purposeful Observation. Businesses, Government agencies and professional firms often have organised tutoring or shadowing programmes for recently-qualified staff. They provide junior professionals with hands-on learning opportunities, encouraging them to accompany more experienced staff to depositions, negotiations, strategy sessions, corporate board meetings, conference calls and so on. Active, purposeful^[4] and well-structured observation stimulates deep learning and the development of true professional competency. It enables learners to advance their knowledge, understanding and skills as well as their attitudes towards the situation being observed. Few professional development opportunities are as valuable as this.

Training. Observing the behaviour of mediators and negotiators, and recording those observed behaviours objectively in a set of coded parameters, requires specialist training. The training would need to be state-of-art, devised and coordinated by a carefully-selected international group of experts, and qualify under CPD and CLE programmes. Many of the 50 or more corporate counsel associations worldwide should see the value and be willing to support and promote such advanced trainings, as should many companies and professional firms. Coordinated training for recording observed behaviour in validated ways would help ensure consistent data.

Resistance. Even an “in-group” person recording behaviours may be objectionable to some being observed, if handled inappropriately. Mediators in particular. They should be assured that the criteria being coded are non-judgmental and anonymous. The “other party” would also ideally contribute a similar observer. Involving major dispute resolution service providers and scholars in the design and delivery of such research parameters may go a long way to assuaging concerns all round.

Parameters. Comprehensive and sophisticated, yet simple-to-use, coding parameters are needed to configure such trainings and the formats for recording data. In my February 4th post, I mentioned the field-based studies led by Professor Neil Rackham on selling techniques. That research format was based on initiating, reacting and clarifying observed behaviours during sales negotiations. This model appears relevant, with modifications, to mediating and negotiating any matter. Despite this,

it is no easy task to configure the parameters and coding requirements, but well-studied performance indicators are available. It would be necessary to determine which behaviours to observe first, from a large number of possibilities. But the expertise is out there, so all of this should be achievable, borrowing from other disciplines.

Process. The behavioural recording interface could be a tablet/smart phone app or other interface that directly links into a central research database. It would need to be secure and bespoke, but once the parameters and functionality requirements have been determined, the app's construction should not be technically difficult.

Funding. This project needs a financial plan and to be well-funded. Funding follows the prospect of payback. The commercial value of the Rackham research over recent decades is probably measurable in the billions, if not trillions of Dollars. The value of more effective mediation and negotiation techniques and processes based on real-life research could also be substantial. And if, from the start, the project is designed to enable real-life research not only into mediation but also negotiation, with associates trained to note the behaviours of their own teams while negotiating, new theories to improve existing practices could well emerge, and the cumulative value and impact could be huge. Allow me to sneak in a payback example: what if new real-life research strongly points to the achievement of better, faster, more sustainable outcomes from a typical bilateral deal negotiation when the parties engage a facilitator? This could spark new and revolutionary ways to negotiate. Once published, there could quickly be more mediators working in deal-making than in deal-mending because there are many more deals being made than disputes being resolved. Such a scenario is perfectly feasible. But it first needs to be established through credible field research.

Challenges. Large-scale, real-life, international research is certainly possible, but is not going to be easy. Rackham's researchers observed 35,000 sales calls involving 10,000 sales people over 12 years in 23 countries. Most sales negotiations are quite straightforward, involving just two participants and a clear definition of success. In mediation and negotiation, however, there are many more variables, and success is often in the eye of the beholder. Inter-researcher reliability also needs to be assured, through excellent researcher training and in other ways. On the other hand, technology can greatly facilitate data recording, collection, analysis and interpretation, making it easier and faster when set up correctly, though getting the app design right is a formidable challenge in itself. As with any other great challenge, a salami-slice approach is called for, starting modestly and building up gradually. But a structured plan and process is possible, generating tremendous new opportunities.

If something must be done, the ingenuity, skills, energy and resources can be found. Or, as Seneca viewed challenges: "It is not because things are difficult that we do not dare; it is when we do not dare that they become difficult."

The purpose of this post is to attract comment, new thoughts and a lively debate on this important subject from scholars, practitioners, corporate and other users, students, policymakers and anyone with a stake or interest in better mediation and negotiation. Please do take a moment to react, preferably openly through the Kluwer Mediation Blog, but if you prefer, direct to me (contact details at www.michaelleathes.com).


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The graphic features a dark background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background of the graphic is divided into two sections by a horizontal line, with a blue line on the left and a green line on the right.

References[+]

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