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# Kluwer Mediation Blog

## We Should Replace Mediation Models with a Unified Conceptual Framework

John Lande (University of Missouri Center for the Study of Dispute Resolution) · Tuesday, April 6th, 2021

A quarter century ago, Professor Leonard Riskin published an [article describing a grid of mediator orientations](#) including a facilitative-evaluative dimension. Despite critiques of this framework, including by Riskin himself, many mediators, trainers, and teachers still use these concepts as mediation models, expressing strong feelings that one model is good and the other is bad.

These models are very misleading because they are based on false assumptions, and they provide counterproductive concepts to guide mediators' behaviors and set parties' expectations. This post outlines a unified conceptual framework using clearer, practical concepts and omitting the problematic assumptions. It is an outline that can be elaborated and refined.

### Theory

Facilitative and evaluative mediation are **bundled models** consisting of distinct behaviors within each model that are assumed to be interchangeable and have equivalent effects.

Facilitative mediation consists of the following actions bundled into a single model: helping parties evaluate, develop, and exchange proposals; asking about strengths and weaknesses of each side's case; asking about consequences of settling and likely court outcomes; helping parties understand their interests; and helping parties develop options that respond to their interests.

Evaluative mediation is a bundled model consisting of assessing the strength and weaknesses of each side's case; predicting impact of settling and court outcomes; urging parties to settle; and proposing settlements.

Mediators who adopt a facilitative philosophy ("facilitative mediators") try to promote party self-determination, helping make decisions without pressure caused by mediators' expression of opinions about likely court results and without pressing parties to make concessions. Mediators who adopt an evaluative philosophy ("evaluative mediators") try to help parties satisfy their interest in resolving disputes by expressing their assessments of the case and making proposals to help the parties make decisions. I put the labels in quotation marks to reflect some mediators' *philosophies* even though mediators often use interventions identified with both models at different times in a single case.

### Reality

Facilitative-evaluative theory is based on false assumptions and generalizations, and the reality often is a lot more complex than portrayed in these models. The theory implies that merely asking questions can't undermine parties' decision-making and that mediators' expression of opinions necessarily does so. In reality, asking questions can create problematic pressure on parties, and providing assessments can help parties make well-considered decisions.

Facilitative mediators generally assume that mediators' questions help parties make their own assessments without being pressured by expression of the mediators' opinions. In reality, merely asking questions generally implies some opinion. Asking particular questions implies that the questions and answers are significant, not mere small talk. Facilitative mediators believe that it is appropriate to ask "reality-testing" questions, but these questions imply that mediators think that a party has an unrealistic view. Mediators imply opinions when they ask a series of questions about a topic. Sometimes mediators "selectively facilitate" discussions when they ask more "reality-testing" questions about one party's perspective than another's.

Much of the concern about mediators' explicit evaluation is related to the use of a [counteroffer negotiation process](#) in which the parties make a series of extremely biased offers allegedly based on expected court outcomes. Parties have a legitimate interest in making reasonable estimates of the court outcomes to help them decide how to negotiate and what possible agreements they might (or might not) make. When lawyers and/or parties focus heavily on extremely biased claims about court outcomes, it is understandable that they would seek mediators' input about the likely court outcomes, especially when there is a lot at stake. Even when parties are represented by lawyers, they may want neutral "second opinions" from mediators. In some cases, mediators can help parties make well-considered decisions by assessing issues and options, coaching, giving advice, making suggestions or proposals, and predicting outcomes, depending on the circumstances.

Sometimes mediators are very heavy-handed, quickly expressing their opinions about likely court results and pressing parties to make concessions. Often, however, mediators express opinions much more subtly, using facial expressions, tone of voice, and body language. Mediators' expressions of opinions do not necessarily hurt parties' decision-making, especially when the parties are represented by counsel who do a good job advising clients and advocating their interests.

Mediators' interventions almost inevitably cause some degree of pressure on parties. The issue is whether the interventions help or hurt parties' decision-making. The [litigation process itself often is extremely stressful](#), and some parties actually may appreciate moderate pressure to settle the case, especially if it seems principled and applied to both sides so that both sides make concessions. For example, in large commercial cases where the parties are represented by big firms, the parties and lawyers may believe that some pressure on both sides is needed to reach a reasonable result. On the other hand, pressure by mediators can be very problematic, such as when a mediator pressures an unsophisticated, self-represented party in a dispute with a sophisticated party who is represented by a lawyer.

Everyone knows that the mediation context matters. For example, mediators use different interventions in small claims, family, routine personal injury, large international commercial, and mass claims cases. The choice of interventions reflects differences in configuration of participants and practice cultures for the different types of cases among other factors.

In sum, the facilitative and evaluative models over-simplify a complex range of situations and

don't help mediators, lawyers, and parties choose appropriate mediator interventions at particular moments in mediations.

### **Toward a Unified Conceptual Framework**

Mediators should tailor their interventions to the circumstances in each case and pay close attention to the effects of their interventions. The ABA Section of Dispute Resolution's Task Force on Research on Mediation Techniques did an extensive review of empirical studies, which found that the overall body of evidence shows that there is **no consistent effect of particular interventions**. The actual effects of interventions in particular situations depend on many different factors.

Instead of relying on misleading and counterproductive facilitative-evaluative theory, mediators should select from a menu of specific **unbundled** interventions in response to the situation at particular moments in a mediation to help parties to identify their goals and interests, overcome settlement barriers, and make decisions. These interventions might include the following, though mediators could add or modify concepts on this list:

- Asking questions and listening
- Helping parties assess intangible interests, issues, possible court outcomes, tangible litigation costs, and options
- Referring clients to talk with lawyers, experts, associates, or others
- Providing information and resources
- Assessing intangible interests, issues, possible court outcomes, tangible litigation costs, and options
- Coaching and giving advice
- Making suggestions or proposals
- Predicting court outcomes and effects on parties' interests
- Applying pressure

The appropriateness of mediators' interventions depends on factors such as:

- What help parties ask for
- Parties' decision-making competence
- Whether some or all parties are represented by lawyers
- Relative power of parties
- Timing, amount, quality, and confidence of mediators' statements
- Cultural practice norms in relevant practice communities

Many mediators undoubtedly use such an eclectic approach, which they would simply call "mediation" without any philosophical qualifier. Of course, mediators should use only interventions consistent with their personal practice philosophies.

### **Conclusion**

Mediators should focus on the potential and actual effects of particular interventions at particular moments in their cases. Mediation theorists and practitioners should be cautious about making generalizations that may embody false assumptions. Rather than relying on general theories or models, mediators should consider whether particular interventions are likely to advance the process and observe whether they do so in particular situations.

For an excellent empirical analysis of what mediators really think and do, see Kenneth Kressel's article, *How Do Mediators Decide What to Do? Implicit Schemas of Practice and Mediator Decisionmaking*. He concludes, "We have learned that tacit knowledge, which we have variously described under headings like mediator 'styles,' 'mental models,' or 'schemas of practice,' play a powerful role in such decisionmaking; are often at striking variance with what practitioners consciously believe they are doing ...."

Paying close attention to the dynamics in mediation and effects of mediators' interventions requires significant, conscious effort. Novice mediators may want to adhere to theories they learned in their trainings. Experienced mediators are likely to have internalized rules-of-thumb that they rely on unconsciously.

To be most effective, mediators should be aware of what's happening both "in the room" and "in their head."

This post focuses on facilitative-evaluative theory but the same principles apply to other mediation theories.

This post grew out of a webinar I did for the American Bar Association Section of Dispute Resolution. Here's [the powerpoint](#) from the presentation, which includes suggested questions mediators might ask, and links for additional resources.

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