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Reconciling Allegedly Alternative Mediation Models by Using DIY Models

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

I was puzzled to get an email from a mediator thanking me for my recent post, which advocated using a **unified conceptual framework of unbundled mediation interventions**.

The puzzling part was that she wrote that it helped to "validate my theory that 'bundling' of mediation models can be appropriate and effective in the right case or situation." I wrote that this seemed like the opposite of what I suggested, and so I asked what she meant. She responded, "What I'm proposing is having a primary model (evaluative or facilitative etc.) and when/if appropriate take a little from column A and a little from column B to get the parties to their desired results."

This is a good description of what many mediators routinely do. At the beginning of an ABA Section of Dispute Resolution webinar, *Help Clients by Combining "Facilitative" and "Evaluative" Mediation*, of the 31 people who gave an identification as primarily facilitative and/or evaluative, 58% identified as both facilitative and evaluative, 39% identified as facilitative, and 3% identified as evaluative.

In other words, the 58% built do-it-yourself (DIY) mediation models to help them decide "What do I do now?"

This post discusses how mediators think and then describes how mediators can design optimal mediation models for their individual practices.

Mediators' Mental Models

In his very insightful article, ***How Do Mediators Decide What to Do?, Implicit Schemas of Practice and Mediator Decisionmaking***, psychologist Kenneth Kressel shows that mediators' mental models (or "schemas") are largely unconscious and consist of mixtures of formal models and "personal 'mini-theories' of conflict and the role of mediators." He defines mental models as "ideas the mediator holds about the role of the mediator; the goals to be attained (and avoided), and the interventions that are permissible (and are impermissible) in striving to reach those goals." They are "mediator coping responses to the complex and demanding task of intervention decisionmaking and the limitations of formal models of practice and conscious human deliberation."

Mediators' mental models vary in complexity. Simpler models are based on relatively little reflection by mediators, who rely on formal theoretical models and use basic mediation strategies and "scripts." More complex models involve a variety of intervention strategies and nuanced procedural scripts. Mediators using more complex models are likely to be more interested in learning from their experience than those using simpler models.

Even mediators' simpler mental models go beyond the formal models because mediators incorporate their unique beliefs, values, and experiences. Consider that many mediators specialize in certain types of cases and rarely handle other types of cases. Thus mediators who exclusively or primarily mediate small claims, family, personal injury, business, or public policy mediations develop their own models based on the types of cases and parties they work with. When mediators handle different types of cases, they presumably adjust their models accordingly. They also may develop specific variations related to the perceived sources of conflict, barriers to agreement, level of hostility, participation of lawyers, and many other contingencies.

Although mediators may talk as if they follow standard formal models, in fact, they rely on their own idiosyncratic mental models, which evolve with their experience. Numerous additional factors shape their models such as laws, organizational policies, and informal norms in their practice communities. Moreover, unconscious elements of their mental models may govern their actions more than the conscious elements. For example, Kressel's research shows that mediators who believe that they are focused on parties' interests may actually focus on their positions.

Mediators' Mental Mapping of Their Strategies

In a related article, *Mediator Thinking in Civil Cases*, James A. Wall and Kenneth Kressel analyze how mediators apply their mental models. Adapting **Daniel Kahneman's framework in his book, *Thinking, Fast and Slow*,** they argue that "mediators' thinking move[s] simultaneously along two parallel planes: a system 1, intuitive, spontaneous, and frequently unconscious plane, and a system 2, rational, deliberative one." System 1 is faster and more efficient, but is more prone to errors. System 2 is a more careful goal-oriented approach, but it is slower and requires more mental energy; mediators have limited capacity to use it.

In system 1, mediators start with assumptions and then use habitual interventions. System 1 involves "framing, speedy judgments, emotions, selective recall, habits, illusions, first impressions, unknown biases, and preferences for simple explanations." System 1 produces "rules of thumb" that mediators can use without much thought.

In system 2, mediators consciously identify outcome goals and then engage in "mental mapping" of potential interventions to achieve the goals. Mental mapping involves "thinking about what is going on, predicting what is likely to happen, reflecting on steps they should take, and pondering the effectiveness of their interventions."

Mediators inevitably use both systems. They would be overwhelmed if they had to consciously make every decision in every case. So habits based on mental models are not only helpful but essential.

Obviously, however, mediators can't and shouldn't operate completely on "auto-pilot." Mediation dynamics are inherently complex and there rarely is a single clearly "right" thing to do. Formal models are quite general and do not provide specific "recipes" about how and when to perform prescribed interventions. So even mediators who strongly believe in particular theoretical models

need to consciously assess situations and decide what to do.

Design Your Own Mediation Model

Since mediators inevitably design their own mediation models, it makes sense to do so consciously using system 2. Instead of focusing on mediator interventions, as the facilitative and evaluative and many other models do, mediators would do better to start by identifying the goals of the parties as well as the mediators themselves. This is particularly important as Kressel argues that mediators' success partially depends on whether there is a good "fit" between the parties' and mediators' interests and needs from the mediation process.

In the midst of conflict, parties may not clearly understand their own goals and priorities, let alone those of the other side. One of the most helpful things that mediators can do is to help parties identify their goals and priorities. For example, parties may have one or more of the following goals but not be clear about what they really want and what is most important to them:

- producing a fair process and/or outcome
- making careful decisions
- maximizing partisan advantage
- producing efficiency
- reducing monetary and/or emotional costs of the dispute
- freeing their attention and resources to focus on things other than the dispute
- promoting communication
- cooperatively solving problems
- creating value
- being empowered and promoting mutual recognition
- avoiding victimization
- vindicating important values or principles
- punishing wrongdoers

By helping parties identify their goals and priorities, mediators can better choose appropriate interventions.

As mediators gain experience, they may consciously develop certain practice routines. My prior post provides a **list of general interventions and criteria for deciding the appropriateness of interventions** that mediators can use as building blocks in constructing their models. They can refine their models through reading, attending educational programs, self-evaluation, participation in peer consultation groups, and conscious decision-making to revise their mediation procedures and routines.

This is the essence of "reflective practice," which is used by practitioners in many professions. Here's **Wikipedia's description**:

> Reflective practice is the ability to reflect on one's actions so as to engage in a process of continuous learning. According to one definition it involves "paying critical attention to the practical values and theories which inform everyday actions, by examining practice reflectively and reflexively. This leads to developmental insight." A key rationale for reflective practice is that experience alone does not necessarily lead to learning; deliberate reflection on experience is essential. … A

> person who reflects throughout his or her practice is not just looking back on past actions and events, but is taking a conscious look at emotions, experiences, actions, and responses, and using that information to add to his or her existing knowledge base and reach a higher level of understanding. (Footnotes omitted.)

By using these techniques, mediators can develop and test theories about what interventions are likely to produce particular results in particular circumstances in their particular practices.

Even experienced mediators can take advantage of reflective practice. Old habits may not be optimal, and mediators would benefit from periodic reviews and revisions of their routines.

Long-time mediator Michael Lang has focused his career on promoting reflective practice in mediation. He developed **this website** with articles, podcasts, videos, and bibliographies with helpful information.

Mediators may find that participating in reflective practice groups to be particularly valuable as described by mediator Laurel Tuvim Amaya in her short article, *Mediators Can Greatly Improve Your Skills Using Reflective Practice Groups*. Mediators generally don't have others who can provide thoughtful feedback about their work, and reflective practice groups offer this opportunity.

Whether they know it or not, virtually all mediators create their own mediation models. Some do so consciously and intentionally. They and their clients reap the rewards.

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