

“What’s Going On:” What Really
Happens in the Mediation of
Charges Before the EEOC
(With apologies to Marvin Gaye)

center for *conflict*
resolution
at Salisbury University

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Background

- The debate over the role of evaluation in mediation (without defining it!)
- The debate over facilitative versus evaluative mediation
- The absence of empirical evidence in the debate

Research Questions

1. Is an entirely facilitative mediation process realistic? (in employment law)

Research Questions (cont'd)

2. What do mediation participants report about mediation style?

Research Questions (cont'd.)

- Participant satisfaction
 - A. Which mediation style compares more favorably across a range of
 - procedural measures
 - distributive measures
 - B. Which mediator style results in the party reporting that
 - they obtained what they wanted
 - they would be willing to participate in EEOC mediation in the future

Research Questions (cont'd.)

3. Does mediation style affect the amount of money obtained by the plaintiff in mediation?
 - A. What factors influence the amount obtained?
 - B. Which mediation style yields more money for the charging party?
 - C. Does representation influence the amount obtained in mediation?

The Research

- Based on data from our comprehensive study of the EEOC mediation program:
<http://www.eeoc.gov/mediate/report/index.html>
- Research subjects: all charging parties, respondents, and mediators involved in mediation from March to July 2000
- The profile of this sample is consistent with the overall profile of EEOC mediations.
- Database: 645 mediated cases with completed questionnaires from the participants and the case mediator.

The Survey Instruments

- CP and R Satisfaction Survey: Questionnaire includes 14 five-point Likert-type questions dealing with
 - Procedural due process and
 - Distributive elements
- Mediation Results Survey: Questionnaire consists mostly of open-ended questions dealing with
 - The conduct of the parties at mediation (actions that contribute to or interfere with the resolution of the dispute)
 - Mediator tactics used to resolve a dispute

Data Coding and Analysis

- Data from the open-ended questions in the Mediation Results questionnaire were team coded. (Drs. McDermott and Polkinghorn)
- Coders worked side-by-side to ensure inter-coder reliability/consistency.
- Each survey is read in its entirety and in many cases by both coders.

Mediator Behavior – Source of Information

- Based on two consecutive questions in the Mediation Results Survey (“belt and suspenders approach”):
 - “If the dispute was resolved, describe the conduct [you engaged in that] you believe facilitated resolution.”
 - “If the dispute was resolved, identify any major acts or conduct that you used as mediator to facilitate resolution.”

Mediator Behavior – Classification

- Evaluative behavior is conduct that opines, challenges, suggests, predicts, or otherwise attempts to influence a party's perception or position.
 - Reality checking/testing; played devil's advocate; introduced hypotheticals; engaged in outcome probing conduct
 - Evaluated the strengths and weaknesses of the case
 - Described other possible outcomes; used "what ifs"; explained parties' rights if not settled; explored "watna"/ "batna"

Mediator Behavior – Classification

- Facilitative behavior is conduct that encourages or assists the parties to resolve the dispute without reliance on the mediator but rather by their own interaction.
 - Listened; facilitated catharsis/discussion; paraphrased/restated answers/issues; used reflexive questions
 - Kept parties focused on mutual desire for resolution, on what was important to the parties, on issues; kept track and summarized their options; convinced parties that they were heard
 - Encouraged/pushed openness/honesty; let parties talk directly; allowed for venting dialogues/exploration of fairness/negotiation; encouraged the parties to explore options with each other; demanded that a party or parties develop proposals/offers

Mediator Behavior – Classification

- “Hybrid” classification consists of tactics that may be either facilitative or evaluative in their applied context.
 - Use of caucuses (includes brainstorming), long joint caucuses, timeouts
 - Maintained control of the process; police the process
 - Neutrality (even if party is entitled to more); restraint; deflected personal comments

Research Results

- 10 important findings
- Findings 1 and 2: mediator conduct during mediation
- Findings 3 and 4: mediator conduct and participant satisfaction
- Findings 5 to 10: monetary benefit is a function of representation and mediator conduct

1. In a mediation program labeled as facilitative, a substantial number of mediators engage in evaluative behavior.

Mediator used evaluative technique(s)	48.5%
Mediator used facilitative technique(s)	60.0%
Mediator used hybrid technique(s)	24.9%

2. Mediators do not necessarily have to use evaluative techniques.

Mediator used evaluative technique(s) only	25.4%
Mediator used facilitative technique(s) only	34.1%
Mediator used hybrid technique(s) only	8.9%
Mediator used both evaluative and facilitative techniques	17.4%
Mediator used evaluative and hybrid techniques	5.6%
Mediator used facilitative and hybrid techniques	8.5%

3a. Charging Parties in cases where facilitative techniques were employed rate the procedural and distributive elements higher compared to charging parties in cases where evaluative techniques were employed.

(See Table A for complete listing.)	Purely Evaluative	Purely Facilitative
I was satisfied with the fairness of the mediation session.	77.4%	86.6%
I was satisfied with the results of the mediation.	66.3%	75.2%

3b. The Respondents' ratings exhibited a similar pattern although the differences were less pronounced.

(See Table B for complete listing.)	Purely Evaluative	Purely Facilitative
I was satisfied with the fairness of the mediation session.	87.0%	88.8%
I was satisfied with the results of the mediation.	77.0%	81.0%

4a. For both styles, there is high agreement among participants that they would be willing to participate in the EEOC mediation program in the future.

	Purely Evaluative	Both Evaluative & Facilitative	Purely Facilitative
Charging Party			
Yes	94.2%	97.2%	95.8%
No	5.8%	2.8%	4.2%
Respondent			
Yes	99.0%	100.0%	100.0%
No	01.0%	0.0%	0.0%

4b. Mediation style influences Charging Parties more than Respondents. Respondents are more likely to respond that they obtained what they wanted with no substantial difference between purely evaluative and purely facilitative mediations.

	Purely Evaluative	Both Evaluative & Facilitative	Purely Facilitative
Charging Party			
Yes	59.2%	56.1%	66.3%
No	40.8%	43.9%	33.7%
Respondent			
Yes	80.0%	76.7%	84.6%
No	20.0%	23.3%	15.4%

5. Where evaluative mediation was used, the charging party was likely to receive a settlement amount of almost \$5,000 more than if facilitative mediation was used.

Actual technique employed	Average dollar benefit
Purely evaluative	\$ 14,889.42
Both evaluative and facilitative	\$ 7,121.20
Purely facilitative	\$ 10,106.06

6. Representation on the side of the charging party is very important: a charging party with representation will obtain significantly more money.

	With representation	Without representation
Purely evaluative	\$ 31,275.56	\$ 5,987.95
Both evaluative and facilitative	\$ 16,213.79	\$ 4,025.85
Purely facilitative	\$ 13,027.54	\$ 8,778.52

7. Potential synergy between evaluative mediation and representation exists: the return to the charging party is far more if evaluative technique is combined with representation.

	With representation	Without representation
Purely evaluative	\$ 31,275.56	\$ 5,987.95
Both evaluative and facilitative	\$ 16,213.79	\$ 4,025.85
Purely facilitative	\$ 13,027.54	\$ 8,778.52

8. Representation is relatively more important compared to the mediation style: the worst possible position for a charging party is evaluative mediation without representation.

	With representation	Without representation
Purely evaluative	\$ 31,275.56	\$ 5,987.95
Both evaluative and facilitative	\$ 16,213.79	\$ 4,025.85
Purely facilitative	\$ 13,027.54	\$ 8,778.52

9. Purely facilitative mediation, while establishing a protective floor for recovery without representation does not have the same upside potential as does evaluative mediation with representation.

	With representation	Without representation
Purely evaluative	\$ 31,275.56	\$ 5,987.95
Both evaluative and facilitative	\$ 16,213.79	\$ 4,025.85
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10. While numerous contextual factors are important in employment mediation, representation and evaluative mediation are key to determining the amount of monetary benefit.

- Regression analysis measures the impact of selected determinants on monetary benefit:
 - type of case,
 - representation, and
 - mediator conduct.
- See Table C for complete results.

10. Regression results (cont'd.)

- The presence of a representative on the side of the charging party raises the average dollar settlement by \$12,753.
 - Public policy issue: move to minimize the role and involvement of attorneys in mediation
- The use of evaluative tactics raises the average dollar settlement by \$4,885.

Conclusions - 1

- The critical role of representation and its practical implications:
 - Participants, especially charging parties, should be advised of the benefits of counsel;
 - Counsel should think twice about allowing a client to participate in mediation without their presence;
 - Mediation models that limit the role of representation are inherently suspect.

Conclusions - 2

- “Feel good” versus “More money”
(Our version of the “tastes great” versus “less filling” debate)
 - Facilitative mediation clearly produces higher disputant satisfaction ratings on both procedural due process and distributive measures.
 - Evaluative mediation offers the highest potential payout only where there is representation.

Related Questions

- Are evaluative conduct and comments used to intimidate charging parties without counsel into settling?
- Is the difference in settlement benefit due to “framing?”
- Are the above results robust? I.e., do they hold in other mediation forums outside of employment conflict?

Caveats

- The definition of evaluative and facilitative tactics
- Coding
- Mediator Responses
- Generalization beyond the EEOC

Discussion Questions

- Is this evaluation – facilitation research helpful to mediation in the real world?
- Do we have evaluation cowboys? (with apologies to Texas)
- Is mediation fair (or less fair) without representation?
- Has the world passed by pure facilitative mediators?
- Isn't it all about context?

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A preview of our next paper

- What factors influence the professed style of the mediators?
- Are attorney mediators more likely to be evaluative?
- Are mediators' self-reported style comparable with their actual conduct in mediation?