

Turning Points in Employment Conflict: The Mediator's Perspective

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Preview

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Relationship of Phase I and II of the EEOC Mediation Study

- Phase I examines the survey research feedback of the Charging Party and Responding Party in regard to their mediation experience
- Phase II examines the feedback of the Mediator in regard to their mediation experience
- The combination of Phase I and II data sets provides a unique exposure to:
 - Subtle and non-obvious dynamics of the process
 - The impact of numerous tactics, strategies, conduct and conditions that impact solution focused or impasse focused outcomes and,
 - A greater appreciation of the EEOC Mediation Process and Program Administration

Purpose of Phase II of the EEOC Study

To analyze what the mediators (the process participants) report on the conduct of the parties, the process dynamics of the mediation, and how they relate to the outcome

Phase I of the Study conducted by McDermott, Jose, Obar and Bowers is located on the web at:

<http://www.eeoc.gov/mediate/report/>

The General Focus of Phase II

Phase II examines mediators feedback on:

- The conduct mediators attribute to the charging party, respondent, and themselves that facilitates the resolution of the dispute.
- The **turning points** (or events) that led to an agreement in mediation.
- The reasons given if the dispute was not resolved.
- The barriers that led to non-resolution in mediation.
- Things the mediators say they **would have done differently** to resolve the dispute.
- Mediator suggestions on **process improvements** to the EEOC mediation program.
- **(Red highlighted areas are the specific focus of this presentation)**

The Research Methodology

- **Data Collection Time Period:** March 1 to July 31, 2000
- **Data Coding Time Period:** September 2000 to June 2001
- **Data Set:** 2062 mediator surveys
- **Data Collection Tools and Protocol**
 - The Survey Instrument
 - The Research Protocol for Data Collection
- **Data Coding and Analytical Manipulation**
 - Method of Quantitative Data Analysis
 - Method of Qualitative Data Coding and Analysis*
 - Method of Insuring the Integrity of the Data Collection, Coding and Entry

* The two coders employed a constant and comparative method for coding and a variety of intercoder reliability techniques

An Overview of Selected Findings

- Things the parties (and their representatives) do to facilitate the resolution of the dispute
- Things mediators do to facilitate the resolution of the dispute
- An examination of the feedback by mediators on Turning Points, Doing Things Differently and Process Improvements

Things the parties do to facilitate the resolution of the dispute

- Conduct Attributed to the Parties
 - **Charging Parties:**
 - Flexibility & openness
 - Focus & preparation
 - Need for closure
 - Willingness to listen to lawyer
 - **Respondents:**
 - Flexibility & openness
 - Expression of a commitment to the resolution of the dispute
 - Good mediation skills
 - Apology/admission of liability/empathy
 - Willingness to listen to mediator & charging party

Things the parties representatives do to facilitate the resolution of the dispute

- Conduct Attributed to by the Parties' Representatives
 - **Charging Parties' Representatives:**
 - Reality checking
 - Flexibility & compromising attitude
 - Preparation/advocacy skills
 - Demeanor
 - **Respondents' Representatives:**
 - Demeanor
 - Expression of a commitment to the resolution of the dispute
 - Flexibility & compromising attitude
 - Good mediation skills
 - Client convincing conduct

Things mediators do to facilitate the resolution of the dispute (by mediator type*)

- Examples of Facilitative Conduct
 - **Listening** (reflective or active listening, keeping the focus on the party, not drawing attention away, catharsis, encouraging dialogue)
 - **Encouraging openness, honesty, & direct communication** (creating a problem solving environment and exchange)
 - **Focusing parties** (assisting behavior, direction toward needs, interests and mutual understanding)
 - **Reframing** (rework statements by removing escalatory rhetoric to present proposals to issues and ideas constructively)
 - **Helping parties see different vantage points** (exploring options, role swapping and bringing a human element to the setting)
 - **Gaining trust and support** (acting fair, consistent and being seen as transparent)
 - **Clarifying facts and areas of agreement** (build common ground)
 - **Defusing emotions** (sounding board, deflection, reduce heat)

Things mediators do to facilitate the resolution of the dispute (by mediator type*) continued

- Examples of Evaluative Conduct
 - **Reality checking behavior** (explore process options)
 - **Evaluating the strengths and weaknesses of the case** (provide substantive input on merit of the charge)
 - **Providing knowledge of the law** (understanding of case law and the parameters of case law precedent)
 - **Exploring and proposing options** (providing substantive guidance by actively participate in the direction of the process leading to a specified outcome)

Things mediators do to facilitate the resolution of the dispute

- Other Attributes include:
- **Professional Perspective**
 - **Professional demeanor** (process, expertise, control, impartial and caring among others)
 - **Empathy** (locking in on the human factor)
 - **Persistence** (refusing to give up because the parties do not see an outcome in sight, getting creative with little room to negotiate, matter of pride)
 - **Neutrality** (not taking sides YET being involved in the substance of the dispute)
 - **Optimism** (cheering leading for the process, providing positive feedback every time progress is made, seeing common ground even before it is evident)
- **Process Control Activities**
 - **Caucusing** - (with the parties, with the attorneys alone, when impasse looms, to break deadlock, to reduce face-to-face emotions)
 - **Process control** – (guardian of the process, consistent rule enforcer, managing past, present and future time line throughout the negotiations)

Major Turning Points of Mediation

I. Communication (Effective Exchange)

- **Information obtained at mediation** (Getting past the “misses” clarification, specific personal motives, offer of evidence to support claim)
- **Charging parties specific expression of need**
- **Pre-mediation dialogue**

II. Party Disposition (Attitude)

- **Openness to Compromise and Resolution** (Predisposed to settle, need for closure or to move on, good relationship, honesty)
- **Parties’ Willingness to compromise**
- **Parties Mutual Trust** (prior relationship, generated in mediation)
- **Shift from positional to interest-based discussion** (this is also a communication coding category)

Major Turning Points of Mediation

III. Offer or Outcome focused Dialogue (See I)

- **Providing specific information** (more money, information conveyed on the specifics provides concrete facts and intentions)
- **Position and disposition on the offer** (meeting demands, reasonable initial exchange of offers, parties description of the resolution offer)
- **Communication of the final offer**

IV. Mediator Influence on the Process and the Parties

- **Process** (reality checking, making use of the caucus)
- **Parties** (keeping parties focused, encouragement)

V. The Influence of Representatives

- **Constructive demeanor and conduct of the parties attorneys**
- **Positive influence of external parties**
- **Participation of key players**
- **Removal of a participant!**

Major Turning Points of Mediation

VI. Acknowledgement of Feelings

- **Recognition of one parties' hurt**
- **Recognition by both parties of each others' hurt**
- **Recognition of some liability and/or an apology**
- **Charging parties' venting/catharsis**
- **Charging parties admission of some liability**

VII. The Parties' Influence

- **Recognition of the Costs of not Settling** (see reality checking)
- **Parties' Need to Preserve Future Relationship**
- **Charging parties need to move on with their life** (closure)
- **Strong desire to leave mediation** (hammer)

Mediator Perceptions of What They Would Have Done Differently

I. Early Proactive Preparation

- **Engaged in more thorough preparation of the parties**
- **Engaged in more comprehensive pre-screening of cases**
- **Ensured that appropriate decision-makers are present (pre-screening)**

II. Make Use of Other Tactics and Strategies

- **Make better use of caucuses (speak to parties alone)**
- **Ensured better timing of mediation**
- **Engaged in better probing**
- **Gotten tougher with the parties**
- **Given a stronger dose of reality checking**

Mediator Suggestions for Process Improvements

I. Pre-mediation related suggestions

- **Preparation of the parties**
- **Decrease the amount of pre-mediation paperwork**
- **Better participant screening**
- **Require pre-mediation briefs and other documents**
- **Expedite the case handling process**

II. Hygiene factor related suggestions

- **Provision of better caucus space, free parking, provision of pens, pads, better computers, flip charts, etc.**
- **Provision of better clerical help**
- **Shorter evaluation forms** (less post mediation work)
- **Better timing of mediation** (start earlier, avoid Fridays, etc.)

Mediator Suggestions for Process Improvements

III. Training and Communication suggestions

- **Train internal mediators**
- **Facilitate dialogue and interaction among mediators to strategize on tough cases** (advanced training and case analysis)
- **Train parties on confidentiality and legal requirements**
- **Train repeat respondents**
- **Train mediators on substantive information** (worker's compensations law and relationship to EEOC)
- **Keep contract mediators in the loop** (provide more and continuous updates on program developments and other information)

IV. Compensation Related suggestions

- **Pay the mediators**
- **Budget more money**
- **Charge the parties a fee**

Mediator Suggestions for Process Improvements

V. People and Process suggestions

Mediator focus

- **Certify mediators**
- **Provide more mediators**
- **Permit mediators to be more evaluative in caucus**
- **Decrease pressure to reach settlement**

Process focus

- **Provide standardized settlement agreement language**
- **Provide parties with an options checklist**
- **Guidance from EEOC on rules that impact the substance of the issues being mediated**

Attorney focus

- **Provide pro-bono attorneys for the parties**
- **Require attorneys to prepare better**
- **Limit attorney participation**

Common Themes between Turning Points, Doing Things Differently and Process Improvements

- These three questions are linked as they require the mediator to think in terms of the past, present and future of the mediation process
- **Past thinking** – focus on those **turning points** in the process that led to an agreement
- **Present thinking** – focus on when a mediation did not reach an agreement what the mediator would **do differently**
- **Future thinking**– focus on what can be done to **improve the process** and program administration

Common Themes between Turning Points, Doing Things Differently and Process Improvements

- All three categories emphasize effective communication including better preparation
- All three categories place an emphasis on mediator control of the process
- Data from the Turning Points and Doing Things differently questions compliment each other
- Data from the Process Improvement question directly support the Turning Points data

Conclusions and areas of Future Research

Conclusions

- Turning Points in mediation provide insight on specific events and tactics that redirect the dynamics of the process
- Changes in communication, party disposition, outcome focused dialogue, mediator influences on the parties and process and representatives' influences on the parties and process can positively influence the dynamics and lead to resolution

Area of Future research

- Are there any specific statistically significant relationships between mediator styles and/or professional training and that influence the patterns in the turning points data?