

Reports of ABA Section of Dispute Resolution Task Forces on Improving Mediation Quality & Research on Mediator Techniques

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ABA DR Section Efforts to Promote Mediator Quality

- Model Standards of Conduct for Mediators
- Credentialing Efforts
- Task Force on Improving Mediation Quality
- Task Force on Research on Mediator Techniques

Task Force on Improving Mediation Quality

- 2006 – 2008
- Effort to learn how users felt about quality
- Mediation of civil cases with represented parties
- Focus Groups across the U.S.
- Questionnaires
- Phone Interviews

Task Force on Research on Mediator Techniques

- 2013 – 2017
- Effort to identify, assess, distill, and disseminate findings of existing empirical research of the effectiveness of various mediator techniques
- No original research conducted – meta-review of 47 studies
- Looked only at empirical research published in English examining the effects of one or more particular mediator actions on one or more mediation outcomes
- Wide range of dispute types – not limited to civil, represented cases
- Research studies included extend from 1975 - 2016

Assumptions About What Works – A True/False Test

- Applying pressure on the participants to reach a settlement is a helpful role for the mediator to play.
- Participants value mediators making their own recommendations about how the case can be resolved.
- Mediator efforts to reduce tension and hostility between the parties serve as an aid to settlement.
- Summarizing and reframing are key mediator tools that help produce settlements and increase participant satisfaction.
- Pre-mediation private caucuses – by phone or in-person – increase the chances of settlement.
- Eliciting solutions from the participants is positively associated with reaching agreement.
- Using private caucuses during mediation increases the likelihood of settlement and also enhances participant satisfaction.
- Settlement is by far the most important goal for mediation participants.



Task Force on Mediation Quality

Comments & Implications for Practice

Task Force on Improving Mediation Quality – Core Findings

- Preparation by Mediator, Counsel, and Parties is Critical to Successful Outcome
- Case-By-Case Customization of the Mediation Process is Ordinarily Desirable
- Most Participants Believe the Mediator Should Provide Analytical Input About the Underlying Legal Case
- Persistence by the Mediator is Highly Valued

Understanding the Goals of Mediation – User Survey Results

- Settling the Case – 88%
- Minimizing Time, Cost, Risk – 85%
- Satisfying Parties' Underlying Interests – 81%
- Promoting Communication Between Parties – 52%
- Having Clients Get Closure – 46%
- Giving Parties a Chance to be Heard – 43%
- Preserving Relationships – 23%

Pre-Mediation Preparation & Customization - Mechanisms

- Pre-session Phone Conference with Counsel
- Written Communications from Mediator

Pre-Mediation Phone Call



Agree on the Scope of the Mediation

- Are there related cases that the parties wish to resolve as well?
- Are there related disputes that have not yet become lawsuits that the parties wish to resolve?

Start to Define the Problem

- What did this problem look like before it became a lawsuit?
- Will addressing the legal issues be sufficient to create a lasting resolution?
- Are the parties interested in solving the business (or other real world) problem?
- If so, how can I help them do so?

Determine Who Needs to Attend

- Identify those with authority and make sure they can attend
- Who should attend depends on how you define the problem
- If a party is a government agency, identify the individual with the power and clout to “sell” an agreement to the decision-making body
- Identify others with a stake in the outcome:
 - Spouses
 - Lien-holders
- Identify other helpful participants:
 - Insurers
 - Accountants/Structured Settlement Purveyors
- If you’re mediating related cases, identify:
 - Other parties
 - Other lawyers

Develop a Plan for Information Sharing

- What does the mediator need to know to prepare?
- What does each side want the other to know?
- What does each side want to know from the other?
- Damages: If little discovery about damages, pay special attention to damages information.

Determine the Best Time for the Mediation

- Are the parties ready to discuss settlement, or would a later date make resolution more likely?
- Targeted discovery or motions needed before mediation?
- Did assigned judge establish deadline? Is there any flexibility?

Ascertain Sensitivities

- Any disabilities that need to be accommodated?
- Any particular emotional sensitivities?
- Any relationship issues?
- Previous history of settlement discussions?

Discuss Mediation Process

- Substantive Joint Opening Session?
- Opening Presentations?
- Your Preferred Mediation Style
- Expectations Concerning Analytical Input
- Confidentiality
- Preparation by Parties & Counsel

Written Mediation Statements

- Exchanged
- Confidential
- Both?
- Consider whether you want to give parties specific questions to answer

The Mediation Is Like a Dinner Party



The Mediation Is Like a Dinner Party

In advance you want to know that:

- You have the right mix of people
- You have a date that works for everyone
- You know everyone's particular sensitivities
- You have all the ingredients for your meal

Analytical Techniques Used by Mediators – User Survey Results


- 80% said analytical input by the mediator is appropriate
- Proportion of users who said the following activities by the mediator would be useful half or more of the time:
 - Suggesting possible ways to resolve issues – 100%
 - Asking pointed questions that raise issues – 95%
 - Giving analysis of the case, including strengths and weaknesses – 95%
 - Recommending a specific settlement – 84%
 - Applying some pressure to accept a specific solution – 74%
 - Making a prediction about likely court results – 60%

Analytical Techniques Used by Mediators - Comments

Factors Affecting Provision of Opinion About Strengths and Weaknesses of the Underlying Legal Case

- Whether Assessment is Requested
- Extent of Mediator Knowledge and Expertise
- Degree of Confidence Expressed by Mediator in the Assessment
- Degree of Pressure Mediator Exerts to Accept the Assessment
- Whether Assessment is Provided in Joint Session or Caucus
- Timing of Assessment – Early or Late in Mediation/Before or After Impasse
- Competency of Counsel
- Whether Mediator Seems Impartial

Evaluation Continuum

More Elicitive				More Directive
Open Ended Questions	Asking a Party to Respond to the Other Side's Arguments	Leading Questions	Mediator Opinion	Mediator Pronouncements

Persistence issues

- **Persistence includes:**
 - Patience
 - Trying to keep people at the table
 - Exerting some pressure
 - Trying to bring people back to the table after the session
- **Pressure is distinguished from coercion or intimidation**



Task Force on Research on Mediator Techniques

Comments & Implications for Practice

Task Force on Research on Mediator Techniques – Mediator Actions Examined in the Studies

- pressing or directive actions or approaches
- offering recommendations, suggestions, evaluations, or opinions
- eliciting disputants' suggestions and solutions
- addressing disputants' emotions, relationships, or hostility
- working to build rapport and trust, expressing empathy, structuring the agenda, or other “process” styles and actions
- using pre-mediation caucuses
- using caucuses during mediation

Task Force on Research on Mediator Techniques – Mediation Outcomes Examined in the Studies

- settlement and related outcomes (e.g., joint goal achievement, personalization of the agreement, reaching a consent order, or filing post-mediation motions or actions)
- disputants' relationships or ability to work together and their perceptions of the mediator, the mediation process, or the outcome
- attorneys' perceptions of mediation

Task Force on Research on Mediator Techniques - Findings

- **Pressing or Directive Actions:**
 - Mixed Effects on Settlement
 - No Effect or Negative Effect on Disputants' Relationships and Perceptions of Mediation
 - No Data on Attorney Perceptions

Task Force on Research on Mediator Techniques - Findings

- **Offering Recommendations, Suggestions, Evaluations, or Opinions:**
 - Increased or No Effect on Settlement
 - Mixed Effects on Disputant Relationships and Perceptions of Mediation
 - No Effect or Positive Effect on Attorney Perceptions of Mediation

Task Force on Research on Mediator Techniques - Findings

- **Eliciting Disputants' Suggestions and Solutions:**
 - Increased Settlement
 - No Effect or Positive Effect on Disputant Relationships and Perceptions of Mediation
 - No Data on Attorney Perceptions

Task Force on Research on Mediator Techniques - Findings

- **Addressing Disputants' Emotions, Relationships, or Hostility**
 - Paying More Attention to Disputants Emotions, Relationships, or Sources of Conflict Increased or No Effect on Settlement
 - Attempting to Reduce Emotional Tensions or Control Hostility Had Mixed Effects on Settlement
 - No Data on Disputant Relationships or Disputant or Attorney Perceptions of Mediation

Task Force on Research on Mediator Techniques - Findings

- **Working to Build Rapport and Trust, Expressing Empathy, Structuring the Agenda, or Other “Process” Actions**
 - Working to Build Rapport and Trust with and between the Disputants, Expressing Empathy, Praising the Disputants, or Structuring the Issues and Agenda Increased or had No Effect on Settlement
 - Other Process-Focused Actions Such as Summarizing, Reframing, or Using a Facilitative or Nondirective style, had Mixed Effects on Settlement
 - No Effect or Positive Effect on Disputants’ Relationships and Perceptions of Mediation
 - No Effect on Attorney Perceptions of Mediation

Task Force on Research on Mediator Techniques - Findings

- **Using Pre-Mediation Caucuses**
 - Increased Settlement When Used to Build Trust
 - Decreased Settlement When Focused on Specific Settlement Proposals
 - Same Findings for Disputant Relationships and Perceptions of Mediation
 - No Data on Attorney Perceptions

Task Force on Research on Mediator Techniques - Findings

- **Using Caucuses During Mediation**
 - Mixed Effects on Settlement
 - No Effect or Negative Effects on Disputants Relationships and Perceptions of Mediation
 - Positive Effect on Attorney Perceptions

Task Force on Research on Mediator Techniques – Core Findings

- None of the categories of mediator actions has clear, uniform effects across the studies
- We should avoid making sweeping claims about what “the research shows” to be effective practice
- “We cannot conclude with confidence that a mediator action will have a positive (or negative) effect on mediation outcomes, only that the action can have a positive (or negative) effect and, in some instances, could have an effect in the direction opposite from that seen in the majority of studies.”
- Nonetheless, overall conclusions can be reached about which mediator actions, on balance, appear to have a greater potential for positive (or negative) effects on mediation outcomes

Task Force on Research on Mediator Techniques – Core Findings

- **Greater positive potential for both settlement and disputants' relationships and perceptions of mediation found in:**
 - Eliciting disputants' suggestions or solutions
 - Paying more attention to disputants' emotions, relationships, and sources of conflict
 - Building trust and rapport, expressing empathy, praising disputants
 - Structuring the agenda
 - Using pre-mediation caucuses focused on establishing trust

Task Force on Research on Mediator Techniques – Core Findings

- **Mixed effects on settlement found in:**
 - Attempting to reduce emotional tensions or control hostility
 - Other process-focused actions such as summarizing, reframing, or using a facilitative or nondirective style
- **Decreased settlement potential found in:**
 - Using pre-mediation caucuses focused on specific settlement proposals

Implications for practice

- Continued importance of pre-mediation consultation with counsel
- Know as much as possible about the audience for any particular intervention
- Have as many tools as possible because you can't be sure at the outset which tools will be most useful in each case
- Pay attention to emotion and hostility without necessarily trying to reduce or control these feelings
- Calibrate recommendations, suggestions, evaluations, or opinions, as well as pressuring tactics
- Consider closely the timing of interventions
- Use elicitive tools

Implications for practice - Eliciting

- Although only five studies looked at this question, eliciting suggestions or solutions from the disputants was the one category without reported negative outcomes – all found either a positive or neutral impact.
- Two are recent studies from Maryland Trial Courts and may be among the most useful
- Positive association with reports that participants:
 - listened and understood each other
 - jointly controlled the outcome
 - reached agreement

Eliciting Tools – Questions for Understanding the Problem

- Help me understand the situation from your perspective.
- Tell me about what matters most to you here.
- What do I need to understand to be most helpful to you?
- Help me understand how this situation arose.
- Why don't you give me a little background about how you see things?
- Tell me the five things that matter to you most about what happened here.
- Is there anything else you'd like to tell me?
- Is there anything else I need to understand to be helpful to you?

Eliciting Tools – Questions for Identifying the Issues

- What issues need to be discussed today in order for you to resolve this dispute?
- When you draft a settlement agreement, what will the headings for the paragraphs be?
- What subjects need to be addressed before you can settle this matter?

Eliciting Tools – Questions for Understanding Needs & Interests

- What needs to be taken into consideration for you to resolve this dispute?
- What interests of yours does _____ meet?
- Where do you want to be in five years? How could a resolution further your goals?
- What goals/interests/needs of yours could be furthered by an agreement?
- What does _____ mean to you?
- How does _____ further your interests/goals?
- What considerations/concerns/needs/interests of yours must be met by any agreement?
- What about _____ is important to you?

Eliciting Tools – Questions for Understanding Needs & Interests

- If the other party were to agree to _____,
 - What would that mean?
 - What problems would that solve?
 - What needs would be met?
 - What interests would be served?
 - What concerns would be addressed?
- Why is it important to you to have _____?
- Why is _____ important to you?
- Help me understand why _____ is important to you.
- If the other party were not to agree to _____,
 - What problems would that create?
 - What needs would go unmet?
 - What interests would be unaddressed?
 - What concerns would be ignored?

Eliciting Tools – Questions for Developing Options

- What ideas do you have for addressing the problem(s) you identified?
- What solutions will meet as many of your needs as possible?
- What would make it possible for you and _____ to work together again?
- What would make it possible to put this contract back together again?
- What would need to happen for this partnership to work again?
- At the end of the day, what will need to have happened for you to put this dispute behind you?
- You said _____ was important to you. How well does this option meet those interests/needs/concerns?
- What if _____ were to offer _____? Would that work for you? Why? Why not?
- What would have to change for that hypothetical offer to work for you?

Eliciting Tools – Questions for Discussing Legal Risk

- If you tried this case ten times, how many times do you think you are likely to win?
- What do you think are your strongest claims/defenses/points? (*The ones not mentioned are the weakest.*)
- If you had to pick, where is the one place your case might be most vulnerable?
- If you were to lose this case, what factors would have caused you to lose?
- Let's look at the evidence that supports your claim/defense that _____.
- What do you think are the other side's strongest claims/defenses/points?
- How do you think the judge or jury will react to _____?
- If you were on the other side of this case, where would you see the vulnerabilities of your case?
- Picture in your mind your most trusted advisor or mentor. What would that person say about your case?
- Pretend that a close colleague of yours was handling this case. This colleague has asked for your honest evaluation of the merits of the case. What would you tell your colleague?

Eliciting Tools – An Exercise

Using the hypothetical provided, try to frame one or more questions a mediator could ask the parties to develop options. Each question should meet all of the following criteria:

- Neutral - neither party should feel blamed
- Mutual - relates to the needs and interests of both parties
- Short & Clear
- Future-oriented
- Resolution-oriented
- Does not contain a suggested resolution, but elicits one

Assumptions About What Works – A True/False Test

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- Settlement is by far the most important goal for mediation participants.

Conclusion

- Research has obvious limits - always consider context
- Research doesn't fully account for personal qualities of mediator
- Consider the personal traits you naturally possess that allow you to gain the trust and confidence of the parties. Given those traits, are there specific skills or mediator actions suggested by the research that you might employ more or less frequently?