Teaching Practice Models, Learning to Learn, and Reflective Practice Groups

Mediation Clinical Think Tank
July 19, 2021

John Lande
Isidor Loeb Professor Emeritus
Center for the Study of Dispute Resolution
University of Missouri School of Law

Today's Conversation

- **I suggest that skills courses teach students to build their own practice models based on lots of factors.**
  - **Practitioners need system to help repeatedly decide "What do I do now?"**
  - **I will focus on mediation, but same principles apply to negotiation and other practice courses.**
- **Faculty also should consider assigning students to participate in reflective practice groups.**
- **Some of you may do things like this and it would be great to hear what you do.**

Traditional Models are Misleading and Confusing

- **"Facilitative" and "evaluative" models falsely imply that merely asking questions can't undermine parties' decision-making, and 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.**

- **Models are simplistic binary options combining different behaviors.**

- **Models focus on interventions, not goals.**

Mediators' Brains Don't Work That Way

Kressel's description of mediators' actual mental models:

- <mark>Largely unconscious mixtures of formal models and "personal 'mini-theories' of conflict and role of mediators"</mark>

- "Ideas mediator holds about role of mediator; goals to be attained (and avoided); interventions that are permissible (and impermissible) in striving to reach those goals"

- "Mediator coping responses to complex and demanding task of intervention decisionmaking and limitations of formal models of practice and conscious human deliberation."

Mediator Thinking, Fast and Slow

- **Kressel's work is based on Kahneman's *Thinking, Fast and Slow:***
  - **System 1: fast, unconscious, rules of thumb**
  - **System 2: slow, conscious "mental mapping" of potential interventions to achieve goals**
- **System 2 can train system 1 to develop practical profiles and routines**
  - **This is big part of what we should teach students – in addition to system 2 strategies**

BTW, There's
No Such Thing as Mediation

- **People talk about mediation as if it is a single, uniform process.**

- **But it's not.**

- **The process differs greatly depending on a zillion variables – including mediators' perspectives.**

- **So theoretical models provide mediators very limited guidance in deciding what to do next.**

Dimensions in Actual Models

Some dimensions of mediators' actual mental models:

- **Mediators' goals**
- **Types of case**
- **Types of parties and other participants**
- **History of conflict**
- **Parties' goals, interests, and positions**
- **Mediator interventions and effects of interventions**
- **Common challenging situations**
- **Principles and strategies to handle challenges**

Mediators' Goals

- Mediators' goals may include:
  - Helping parties make careful decisions
  - Producing fair process and/or outcome
  - Reducing monetary and/or emotional costs of dispute
  - Freeing parties to focus on things other than dispute
  - Promoting good communication
  - Cooperatively solving problems
  - Creating value
  - Promoting empowerment and mutual recognition
- Mediators have multiple goals, and vary in priorities
- Mediators have different goals in particular situations

Types of Cases

- **Mediation is used in lots of cases, e.g., small claims, landlord-tenant, family, employment, tort, business, international**

- **Some mediators mostly handle one type, and others handle multiple types**

- **Rules, norms, and routines differ by types of cases and practice culture**

Parties and Other Participants

Parties vary:

- **In experience and sophistication**
  - **One-shotters (OS) and repeat-players (RP)**
  - **Combination of OS and RP**
    - **Same types (OS-v.-OS or RP-v.-RP)**
    - **Different types (OS-v.-RP or RP-v.-OS)**
- **Whether some or all parties represented by lawyers**
- **Many other factors, e.g., motivation, personality, education, resources, demographics, culture**

Others may participate, e.g., insurance adjusters, team members, experts

History of Conflict

If parties had relationship before dispute, mediators may consider:

- **Nature and length of relationship**
- **Nature and length of conflict leading to dispute**
- **Any efforts to resolve conflict or dispute**
- **Barriers to agreement**

Parties' Goals, Interests & Positions

- Parties' <u>stated</u> goals, interests, and positions at <u>outset of mediation</u>
- Possible <u>unstated</u> goals, interests, and positions
- Changes in goals, interests, and positions <u>during</u> mediation
- Possible goals different from mediators' goals listed above, e.g.:
  - maximizing partisan outcome
  - vindicating important values or principles
  - avoiding victimization
  - punishing other side

Mediators' Interventions

Interventions and expected consequences of:

- **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, or others**
- **Providing information and resources**
- **Assessing intangible interests, issues, possible court outcomes, tangible litigation costs, and options**
- **Coaching, suggesting options, and giving negotiation advice**
- **Making proposals**
- **Predicting court outcomes and effects on parties' interests**
- **Applying non-coercive pressure**

A Note on Pressure

- **Key issue is actual effect of specific intervention on decision-making, not assumed effect of types of interventions**
- **We often assume pressure is bad, possibly coercive**
- **In fact, some pressure is inevitable**
- **Some is helpful to get people to make decisions**
- **Some is helpful to get people not to make bad decisions, harm others, or violate law**
- **Asking questions can exert pressure through implication**
- **Discussion of time can exert pressure**
- **Expectation of settlement, especially in one day, is pressure – often implicit**
- **Discussion of possible court outcomes isn't necessarily (added or inappropriate) pressure**
- **Distinguish coercion – threats, hostile action, force**

Mediators' Personal Theories and Routines

System 1:

- **Default goals**

- **Routine procedures, starting from first involvement**

- **Typical responses to common mediation dynamics**

- **Expected effects of particular interventions**

Handling Challenging Situations

System 2:

- Recurring challenging situations
- Strategies for challenging situations
- Which strategies have worked and which haven't
- Factors affecting choice of interventions
- Guiding principles for managing challenging situations

Reflective Practice Groups

- **Structured opportunities to analyze one's experiences and learn from others' experiences**
- **Typically focus on one individual's dilemmas in a case**
- **Ask questions to help subjects understand what happened, e.g.:**
  - **How they perceived the situation**
  - **How they intervened (and why)**
  - **What they expected to happen**
  - **What actually happened**
  - **What other interventions might they have used**
  - **How this situation compares with others**
- **Group members help subjects figure things out <u>rather than describing their own experiences or offering suggestions</u>**

Possible Course Assignments

- **Students write personal mediation model including some or all of above dimensions**
  - **Assignment at end of course**
  - **Assignment in middle of course, with update at end of course based on course experiences**
- **Assign students into groups (e.g., 4 students) to hold reflective practice discussions outside class about challenging situations**
  - **Each student discusses one challenging situation**
  - **Each student leads one discussion**
  - **Could prepare for grand round presentation**

For More Detail

- **Kenneth Kressel: [How Do Mediators Decide What to Do? Implicit Schemas of Practice and Mediator Decisionmaking](#)**

- **Wall & Kressel: [Mediator Thinking in Civil Cases](#)**

- **[Reconciling Allegedly Alternative Mediation Models by Using DIY Models](#) – theory generally**

- **[Reconciling Allegedly Alternative Mediation Models by Using DIY Models](#) – application to teaching**

- **[Merging Mediation Models – And Other Lessons](#)**

- **[We Should Replace Mediation Models with a Unified Conceptual Framework](#)**

- **[Decision-Making as an Essential Element of Our Field](#)**