

How You Can Build a Mediation Model to Optimize Your Own Cases

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Overview of Presentation

- Traditional mediation models are misleading and incomplete
- You should recognize your own unconscious and conscious models
- You can tailor mediation model to your practice
- By end of this program, you can develop outline of your own model
- You will get a copy of this powerpoint
- I may write a blog post based on this program, but without names

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.

Reality is More Complicated

- Mediators often use interventions from both models in response to situations at different times in a case.
- Merely asking a question implies some opinions.
- “Reality-testing” questions imply that mediator thinks that a party has an unrealistic view.
- Mediators often express opinions using facial expressions, tone of voice, and body language.

More Complications

- Mediators imply opinions when they ask a series of questions about a topic.
- Mediators “selectively facilitate” discussions when they ask more “reality-testing” questions about one party’s perspective.
- Parties may feel pressured in marathon mediations.

How Mediators' Brains Work

Kressel's description of mediators' actual mental models:

- Largely unconscious mixtures of formal models and “personal ‘mini-theories’ of conflict and role of mediators”
- “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

Consciousness and Competence



- Gordon Training Institute model
- **Unconscious competence may become *incompetence* if people rely on outmoded habits and assumptions**

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' stated goals, interests, and positions at outset of mediation
- Possible unstated goals, interests, and positions
- Changes in goals, interests, and positions during 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

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

What Have You Learned Today?

Would you write answers in the chat to the following questions and then we can discuss them.

- Are you more conscious of things you do routinely and unconsciously?
- Do you have a clearer idea of your goals and guiding principles? What are your goals and principles?
- Do you have categories of challenging situations? What are your categories?
- Have you decided to change some procedures? How?
- Do you want to write your model in more detail?

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
- 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
- Book: Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions (25% discount with code 25LIRA22 for a limited time)

For More Information

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