

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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