Mediation is Risky Business

Research Tells Us Where Mediators and Advocates Disagree

By Sam Imperati and Devin Howington

Mediators work in the intersection of logic and emotion. Our craft combines art, science, and ethics. We often rely more on the “art” than the “science.” Research can provide insights that help check our assumptions about how our “art” should be practiced within our ethical framework. How much room do our ethics give us to change our behavior to match the desires of the parties, and should we?

We believe research can enlighten mediators on what the parties want and expect from them. What really matters to everyone else in the room? These questions guided a pilot study into mediator behaviors, and what advocates think about those interventions. We asked mediators about their actions, and we asked advocates from the same pool about their preferences for those behaviors. We used advocates in this study as a proxy for parties, and all questions were worded to ask about general preferences in their typical mediations. The survey was sent to the ADR and Litigation sections of the Oregon and Washington State Bar Associations. In all, 125 people responded to the survey (79 mediators and 49 advocates).

The study results revealed several differences, and a few points of agreement, between mediators and advocates. Both prefer a mediation styles that is between Evaluative and Facilitative (mediators 43% and advocates 45.7%). Interestingly, 17.4% of advocates were unsure of the differences between the approaches. What does this say about the mediator’s obligations of Full Disclosure and Informed Consent?

When it came to the quantum of process and subject matter knowledge, 56% of the mediators say they should have “expertise” in both, while 35% of advocates believe that is needed. Rather, 48% of advocates want the mediator to have process “expertise” and subject matter “familiarity.” Does this mean that advocates are less interested in mediators predicting the likely outcome than they are in having us be process guides?

When it came to mediator behavior during the session, the results were mixed. One of the largest differences in opinion was the use of joint sessions. Mediators were typically open to using joint sessions, with 58.3% of mediators reporting they either occasionally, frequently, or always used them; 41.8% reported they rarely or never used them. Advocates, however, overwhelmingly fell in the “never” and “rarely” categories when asked about their preference for joint sessions (78.2%). Future surveys will ask why that is the case.

Some mediators and advocates agreed that mediator proposals were an appropriate tool, but mediators (31.7%) were more likely than advocates (13.1%) to disagree or strongly disagree with their use. If the matter didn’t settle, advocates wanted mediators to offer an opinion about the likely outcome of the case either “frequently” (37%) or “occasionally” (28%), whereas mediators were most likely to say they “rarely” (34.2%) or “never” (25.3%) provided an opinion.
Some additional results follow.

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<th>Topic</th>
<th>Results</th>
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<td>1) Sharing Information at Mediators Discretion: Agree?</td>
<td>60% of mediators don’t agree while 43% of advocates agree</td>
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<td>2) Mediators pointing out mistakes of law: Agree?</td>
<td>52% of advocates want this done but 14% of mediators do it.</td>
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<td>3) Mediators should emphasize weaknesses and diminish strengths: Agree?</td>
<td>59% of advocates agree compared to 39% of mediators.</td>
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Perhaps the most interesting difference came from examining client satisfaction. Almost all mediators thought clients were typically either “satisfied” or “very satisfied” (97.5%), whereas only 60.9% of advocates said their clients were typically “satisfied.” No advocate reported their clients typically being “very satisfied.” This difference should alarm mediators and should prompt us to reflect on our effectiveness. It may be that advocates feel more pessimistic about mediation than the parties did; a question for future research.

Once the picture becomes clearer, we may find that what advocates and parties want is at odds with our ethical standards. For example, advocates want more mediator opinions and more mediator proposals than mediators typically say they offer. To what extent can mediators provide proposals and opinions and still be Impartial? Is obtaining Informed Consent from the parties sufficient to overcome that obstacle? If we do offer opinions, do parties understand the difference between opinions and legal advice? The data will tell us what parties and their advocates want, but adapting to those wants must always include a close look at the ethical implications.

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