Measuring Success in Mediation

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Abstract

The present paper critiques the tendency to rely on settlement rate as the prevailing criterion measure for evaluating mediation. Instead, a multi-dimensional framework is offered, utilizing a decision tree approach. If a dispute is settled, then one set of criteria become particularly relevant. If a dispute is not settled, then a different set of criteria become relevant. Further, the evaluator must determine whether the mediator emphasized issue settlement or relationship improvement when evaluating mediation efforts that did not result in agreement.

Measuring Success in Mediation

A mediator (whom we will call Joan Smith) spends three days helping two business owners and a delivery company work through a dispute over who should pay for a damaged shipment of costly merchandise. At the end of the last session the parties agree to disagree and announce they will file suit and counter-suit in court. Joan leaves the mediation session feeling that she had been a failure as a mediator.

But has she really failed? Is "agreement" the only – or even the optimal – way to measure success in mediation? This paper will explore this issue and briefly examine additional criteria that may be used for evaluating the success of mediation. This paper will focus on types of outcomes rather than mediator behaviors when evaluating mediation (see Honeyman, 1990, for a discussion of this latter topic). This paper will, in many instances, mention some of the commonly used mediation techniques that have been successful for each outcome criterion. However, it is beyond the scope of this paper to describe each of these topics in great depth or to tell how to maximize the probability of mediation success for each criterion. The present paper's goal is more modest: to provide an overview of multiple types of outcome criteria for evaluating mediation and to offer a framework for deciding when each type is most appropriate.

Why This Issue Is Important

The criteria to be used when evaluating mediation are important to the mediator, the disputants, and to society at large. Mediators often work for private dispute resolution firms or for government agencies and may be subject to performance appraisal.

The overall performance appraisal rating is highly dependent upon the criteria that are used; the appraisal, may, in turn, determine a mediator's pay raise or even whether the mediator keeps his or her job. A failure to effectively design a performance appraisal system may subject the firm or agency to legal liability, should an employee have a complaint (Gatewood & Field, 1998). Disputants may also informally evaluate mediators, choosing to use (or not use) mediation for future disagreements or to refer (or not refer) their friends to particular mediators. Such evaluation may make the difference in whether a mediator remains a full-time dispute resolution professional or must seek other employment. Finally, in the United States, mediation is still considered an "Alternative" Dispute Resolution technique – not a primary method of resolving conflicts. Whether mediation is effective and appropriate relative to more traditional dispute resolution procedures (e.g., adjudication) is still very much an open question to many in society; sometimes evaluation agencies ask for evidence that mediation is effective. Settlement rates are an easy type of evidence to provide (Sander, 1995). Thus, it is important to consider the various criteria that may be used and to educate mediator's managers, disputants, and society as to their relevance.

A Matter of Agreement

Whether a dispute is settled is the most commonly used measure of success in mediation (Sander, 1995). It is certainly what the parties themselves hope will emerge from a mediation experience. Obviously, helping the parties achieve an agreement is a critical criterion measure: It ends the immediate dispute, it helps the parties experience the positive affect that comes from having worked through a series of problems together,

and it avoids the costly consequences of leaving the dispute unresolved (e.g., businesses going to court; experiencing a labor strike). Most writers advocate that, all other things being equal, mediation produce an agreement (e.g., Kolb, 1994; Slaikeu, 1996) and, indeed, mediation usually does produce an agreement. Statistics from a various fields suggest that mediation tends to be successful in about 60-80% of the cases, and in private-sector U.S. labor relations the figure is even higher (Kressel & Pruitt, 1989)

Ah, but what kind of an agreement? Simply securing an agreement, for the sake of having an agreement, may result in outcomes that are relatively poor for one or both parties. Ideally, the disputants will secure an agreement with high joint payoffs: So-called "integrative" or "win-win" agreements. Integrative agreements often involve fashioning package deals involving tradeoffs among several issues or discovering creative alternatives that satisfy each side's underlying concerns (for discussion of the variety of approaches to fashioning integrative agreements, see Lax and Sebenius, 1986 or Lewicki, Saunders, and Minton, 1999). Integrative agreements usually offer higher payoffs to each side than do "compromise" settlements (where each issue is considered individually and "splitting each issue down the middle" is common; see Thompson, 1998; Ross, 1990). Several authors have noted that the disputants themselves often do not discover integrative agreements – it often takes a trained mediator to offer the creative insights that produce integrative agreements (McGrath, 1966; Ross, 1990).

This line of reasoning suggests that it is not enough for mediation to be evaluated strictly on the basis of securing an agreement. The extent to which that agreement fully satisfies each side's underlying concerns and interests by providing high joint payoffs

must also be considered. Thus, *the integrative nature of the agreement* is a second, related, criterion for measuring success.

If integrative success is an objective measure, equally important are *subjective measures of success*. The parties must see the outcomes as fair and as desirable and they should feel that they reached a satisfactory agreement without undue pressure from the mediator (Honeyman, 1990). For example, consider a situation where a package deal proposal consists of one side giving in completely on issue "A" (a low priority for that side but a high priority for the opposing side), and in return, that side completely "wins" issue "B" (a high priority for that side but a low priority for the opposing side); a third issue "C" is to be split equally. This package deal may result in objectively greater payoffs than if the two sides compromise by splitting each issue down the middle. But a compromise may make each side subjectively happier because each "got something" on each issue. Empirical research suggests that this is often the case (Conlon & Ross, 1997). Therefore, mediators need to carefully attend to the subjective happiness of the parties with any agreement. Naturally, such considerations become more complex if there are also constituents who must also be satisfied (Adams, 1976). Mediators must be aware of how any agreement is likely to be received by the constituents. In the final analysis, mediators must attempt to balance objectively high joint outcomes with each side's subjective satisfaction from any agreement. Thus, a mediator may sometimes take consolation in knowing that even though the particular agreement was not ideal, both parties were thoroughly satisfied with it.

The final criterion to consider when there is an agreement is *whether the parties implement the agreement.* An agreement that is not satisfactory to the parties may be

worse than no agreement at all, for one or both parties may only half-heartedly implement it or may later challenge or subvert that agreement. For example, in labor-management relations, if one side is not happy with one contract clause, it is not uncommon for that side to later challenge that clause using a grievance arbitration procedure; the grievant hopes that the arbitrator will at least partially reinterpret the clause more to the grievant's liking. Thus the parties' willingness to implement an agreement can be a critical measure of mediation's success. Fortunately, research in a variety of fields (e.g., small claims disputes) suggests that generally, mediation produces agreements that the parties implement more readily than they do from other procedures such as adjudication (McEwen and Maiman, 1989).

What if There is no Agreement?

Is mediation a failure if there is no agreement? No, mediation may make numerous contributions to the discussion and negotiation process even when there is not an immediate agreement. Mediation may also impact the relationship between the two parties. Each of these types of criteria will be considered.

Issue-Related Criteria

Several issue-related criteria may be used to assess the contributions of mediation when there is no agreement. One such criterion is *clarification of the issues*. People in dispute often misunderstand how the other side defines and prioritizes the issues, and the other side's motives for making or withholding concessions (Holmes and Miller, 1976). A mediator may play a critical role in helping the two sides clarify such matters. For

example, one mediator assisted with a regional sewage system/river cleanup dispute involving over 40 government agencies, local communities, and major industries situated along the river. The mediator played a crucial role in helping the parties understand how each party prioritized the many issues in this complex dispute (Susskind, 1985). While valuable in its own right, such clarification may also lead to other benefits (e.g., facilitating agreement) at a later date.

A mediator may also help the parties to *resolve some of the issues*, even though not enough issues are resolved to prevent an impasse. Suppose that the two sides had fifteen issues in dispute and they were only able to resolve five of the issues when the disputants brought in a mediator. After many days of mediation, talks collapsed. Was mediation a failure? Suppose that the mediator had helped the two sides resolve seven of the ten issues, leaving only three issues outstanding at the time of the impasse. Mediation may not have produced an immediate agreement, but the two sides may be much closer to an agreement than they would be without the assistance of a mediator; the stage may be set for a later agreement, depending upon the flexibility of the parties.

Kochan & Jick (1978) identify an additional issue-related criterion for measuring mediator success: *Concession making on unresolved issues.* In the previous example, if the parties have made no concessions on the three unresolved issues, then, according to these authors, they are probably farther from an agreement than if each side had made either frequent or substantial concessions.

Related to this criterion is another measure. Several authors note that in many disputes, each side has an initial position on each issue, a somewhat more realistic "target" (compromise) outcome that they hope to receive, and a "limit" or "resistance

point" that represents the lowest point at which they will agree on each issue (Walton & McKersie, 1965; Raiffa, 1982; Lewicki Saunders, & Minton, 1999). In such situations, Kochan and Jick ask: Have the parties made all the concessions they are prepared to make on the unresolved issues? If the parties are *making concessions to their respective limits* (rather than withholding potential concessions) and they still do not agree, then the mediator has done all that he or she can do. No additional concessions leading to an agreement can be made until one or both disputants changes their limits. Despite the lack of an agreement, the mediator may be considered successful because he or she extracted all of the concessions from the parties that they were prepared to make at the time.

If, however, the two sides are withholding concessions from each other (and if they are, they are also often withholding information about potential concessions from the mediator), then the mediator cannot determine whether there is any overlap in what each side will accept. Ideally, a mediator will gain the confidence of the two sides so that they will reveal their limits in private caucuses with the mediator, so the mediator can determine whether a zone of agreement exists and can encourage the parties to make the concessions needed to secure an agreement. Thus, whether the parties are making or withholding concessions from each other is an important measure of mediation success.

A mediator may get the parties to *Expand the range of options* under consideration. Often, disputants become mentally "locked" into their respective settlement options. As noted earlier, a mediator may bring a fresh perspective that leads to an integrative agreement. Yet, even if an agreement is not secured during the mediation session, the mediator may have still performed a valuable service. The mediator may have helped the parties identify a new, wider-range of options to consider

and evaluate; the parties may eventually decide that one of these options is mutually acceptable. More importantly, the mediator may teach the disputants a different way of thinking about their issues. The parties themselves may be able to generate a wider variety of options in later discussions and find their own ways to achieve integrative agreements.

It has been suggested that some third parties have the inadvertent effect of causing the negotiators to come to rely upon them to a greater extent than is necessary. The result of this is that when future disputes arise, the parties tend to withhold potential concessions in bargaining (the so-called "freezing" or "chilling" effect) because they anticipate using the same third party procedure that they used previously. When the parties tend to use a third party procedure that they used in the past it is called the "narcotic effect" because it is as if they have become addicted to that procedure and are unable to resolve their dispute on their own. While this has been often discussed in the context of public-sector labor-management interest arbitration (where the arbitrator determines the content of the new contract), the narcotic effect can happen with mediation in a variety of contexts (Feuille, 1975). For example, a divorcing couple may have used a mediator to decide upon an initial parenting plan. When one parent later secures a better job in a different community, the parties may feel that they cannot resolved the resulting parenting plan issues without the assistance of a mediator. If the parties repeatedly turn to a mediator without seriously trying to resolve the conflicts themselves, they have fallen victim to "narcotic effects." It is not necessary for mediation to lead to an agreement for the narcotic effect to occur. The effect is seen in public sector labor relations, where mediation is sequenced so that it is used if bargaining

fails and then interest arbitration is used if mediation fails – here mediation exhibits a "narcotic effect" even though it sometimes fails. Thus, one additional issue-oriented criterion measure is *the presence/absence of the narcotic effect.* Ideally, a mediator will elicit the concessions needed to help the parties resolve the dispute and will also teach the parties effective negotiation processes. In this way, when future conflicts arise, they will not withhold concessions from each other and the parties will not become dependent upon the mediator. If the same divorcing couple is bringing a mediator a great deal of "repeat business," it may be a sign of failure, not of success.

Part of the dispute resolution process involves helping the parties *overcome mental heuristic errors.* Many mental heuristics – mental shortcuts – are generally useful for decision making, but can lead to problems in conflict situations. A full discussion of the many mental heuristics is beyond the scope of this paper (see Thompson, 1998 or Neale and Bazerman, 1991), but let us consider one heuristic as illustrative. The "anchoring heuristic" occurs when one decision is closely tied to the value of some other variable. In negotiation situations, this can lead to what Neale and Bazerman (1991) call "insufficient adjustment error" where one or both parties tie their bargaining positions to incorrect "anchors."

For example, suppose one young professor receives a job offer from another university that included a $12,000 pay raise. He sees his dean and states, "I like Wisconsin and I'd like to stay here, but this offer is too good to turn down. If you can come anywhere close to matching this offer, I will stay, but otherwise, I owe it to my family to take this other school's offer." The dean promises to consider this request for a raise. When the dean makes his counteroffer it is only for a $4,000 raise. "I'm giving you

approximately a 10% pay raise – that is a larger percentage raise than any of the other faculty are getting this year." The dean has fallen victim to anchoring effects. He is basing the raise on the professor's current salary and on what raises others are receiving. The problem is that those statistics are irrelevant to the immediate negotiations. Only a raise that is close to the $12,000 offer will keep the faculty member. The professor takes the other school's offer and, in the end, the dean has to pay a high salary (equivalent to the professor's old salary plus almost $12,000) to secure a replacement – a fresh Ph.D. with much less experience. A mediator can help each side avoid such mental heuristic errors by educating each side about them and the effects they can have on conflict resolution. Research in other fields (e.g., performance appraisal) suggests that simply informing individuals of mental errors can often reduce their prevalence (Smith, 1986).

Relationship Factors

Mediators can make a contribution in another area even if the immediate issues are not settled: they can help re-orient the relationship. Honeyman (1990) suggests that factors such as showing empathy (and encouraging mutual empathy between the parties), managing the interaction of the negotiators, and using humor or other distractions effectively to reduce tension may be critical for understanding the effectiveness of mediation. This suggestion implies that improving the quality of the relationship between the parties is an important area for evaluating mediators.

One specific problem area within conflict is a lack of trust between the disputants. Research in the field of "trust" suggests that when the parties do not trust each other, they allow mental errors to affect the relationship itself. A mediator can do a great deal to

work to *reestablish trust between the parties* (Ross & La Croix, 1996; Ross & Wieland, 1996). This is not easily accomplished, for when the parties do not trust each other, they sometimes also distrust the mediator (Carnevale, Lim, & McLaughlin, 1989). Keashley, Fisher, and Grant (1993) have developed a program for such instances where the third party emphasizes rapport-building consultation rather than issue settlement; they report that the rapport-building consultation program leads to an increase in each side's trust toward the other.

Often distrust is closely related to an escalation of hostility. A mediator may do a great deal to *de-escalate the conflict.* Sometimes, a mediator's first job is to de-escalate the conflict to a level where the parties are willing to talk to each other again (ending what Holmes and Miller, 1976, call "autistic conflict"). De-escalation involves a variety of techniques and is beyond the scope of this paper (for a fuller exploration of this topic see Rubin, Pruitt, and Kim, 1994). However, a few techniques commonly used to de-escalate the conflict are as follows: using humor strategically, taking short breaks, using "shuttle diplomacy" between the two parties and "filtering" out information that will keep hostility high. Other techniques include: dividing larger issues into smaller component issues so that each side can "win" on some issues, encouraging the parties to discuss issues in concrete, rather than abstract terms, and not allowing the parties to use name calling or to "multiply" the issues under discussion by adding minor, irrelevant issues, often left over from previous disputes ("as long as we're on the subject of what we don't like about each other, I've got a few things I've been wanting to get off my chest…"). Even if no settlement is reached, the mediator may make a contribution to the quality of the discussion by de-escalating the conflict and building trust between the parties.

There has been some discussion as to whether mediators should seek to engage in "power balancing" by making the weaker party seem stronger and the stronger party feel weaker on the assumption that the parties are more likely to agree if they are equal in power. Some mediators advocate this. Others suggest that the mediator's job is to help each side accurately see the nature of the relationship (one mediator said that his role was to make "the lion-lamb relationship clear to the lamb," Bellman, 1982, pp. 2-3). This paper will not take a position on this controversial issue, and research may show that no one approach is optimal for all cases (see Weingarten and Douvan, 1985). However, it is mentioned here because another measure of mediation success is if a mediator *deals successfully [as defined by the mediation agency] with power issues in the relationship.*

Mediators can improve the quality of the relationships between the parties according to the principles espoused by Bush and Folger (1994) and Weingarten and Douvan who speak of "tranformative" rather than "transactional" mediation. Much of this work involves extensive involvement of the mediator as more of a counselor than an issue-oriented problem-solving agent. Within this general rubric, the mediator often seeks to move the parties away from a competitive Motivational Orientation (with each side seeking to "do better than the other") and instead *help the parties have a more cooperative Motivational Orientation (MO).* To accomplish this goal may require much more time than the typical two-hour community mediation session may allow. Yet, as demonstrated by laboratory research, without working to produce a mutually positive atmosphere between the parties, it is difficult to resolve the specific issues (see Rubin & Brown, 1975). Thus, transforming the quality of the relationship between the parties is

one of the mediator's most difficult goals, yet it is critical if there is to be a lasting settlement of the issues.

There are a variety of techniques that mediators can employ to help accomplish a more cooperative MO (again for fuller discussion, see Bush and Folger, 1994 or Walton & McKersie, 1965). Many of these are objective behaviors and thus could be included in a performance measurement instrument. Some of these techniques include the following: emphasizing a common background if one exists, recalling a history of successful prior negotiations (if they exist), "building momentum" by settling smaller issues first, emphasizing, in private caucuses how substantial the other side's concessions are (in order to avoid a common tendency to minimize the importance of the other side's concessions), emphasizing the implications of the negotiations for the future relationship, and couching each side's proposal in language that the other sees as important.

Conclusion

To summarize, mediation outcome criteria can be classified according to a decision tree shown in Figure 1. The first decision to be made is whether an agreement was reached. If the answer is "yes", then the identified set of criteria become particularly relevant. They include the type of agreement and the satisfaction of the parties with the agreement. If no agreement was reached, then the second set of criteria become relevant. Within this second set of criteria one must ask whether the mediator focused more on issue settlement or relationships among the negotiators. Issue-related criteria include the following outcome measures: the number of issues settled, concessions made on the unresolved issues, and the making or withholding of concessions. It also includes criteria

such as expanding the range of options under consideration, the presence (or absence) of the "narcotic effect," and the presence or absence of cognitive errors rooted in mental heuristics. Relationship-oriented criteria may also be relevant, particularly if no agreement is reached. These include: the level of trust between the parties, the level of hostility between the two sides, whether or not the mediator has addressed the power balance within the relationship, and the extent to which the mediator has been successful in getting the two sides to move from a competitive to a cooperative Motivational Orientation.

Insert Figure 1 About Here.

In conclusion, the propensity to evaluate mediation solely on the basis of whether an agreement was reached is incomplete at best and misleading at worst. Mediation agencies, disputants, and society at large must learn to move beyond such cursory evaluation methods and look at the additional outcomes identified in this paper. Only in this way can we accurately assess the performance of mediators and truly appreciate the contributions they make.

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Figure 1. An Decision Tree Approach to Selecting Criteria for Evaluating Mediation