

THE SECRETS OF SUCCESSFUL (AND UNSUCCESSFUL) MEDIATORS: STUDIES II AND III

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Introduction

This article reports the results of Studies II and III of an ongoing research project designed to determine the reasons for mediator success in assisting disputing parties to arrive at settlements, as well as the reasons for lack of success. The purposes of the research are threefold: (i) to assist mediators in resolving disputes; (ii) to improve mediator training by informing trainers which mediator attributes and skills are most important to successful dispute resolution; and (iii) to aid users of mediation services in selecting mediators by pointing out the mediator skills and attributes that mediation users in general regard as important for mediator success.

There are many different goals which may be sought in mediation, and, as a result, many possible definitions of mediator success. Among the possible goals of mediation are settlement of the dispute that brought the parties to mediation, resolution of the underlying conflict that led to the dispute, and empowerment of the parties and their mutual recognition of each other. As a result, a successful mediator may be defined either as (i) one who obtains frequent settlements, (ii) one who typically enables the parties to resolve their underlying conflict(s), or (iii) one whose mediations typically result in empowerment of the parties and their mutual recognition of each other.

For purposes of this research, we utilize the first of these definitions -- a successful mediator is one who obtains frequent settlements -- understanding that regardless of the mediator's talents, disputing parties will not agree to a proposed settlement unless it satisfies the core interests of each and is perceived by each as preferable to its best alternative to settlement (Brazil, 2007). While we do not have data to measure the numbers of settlements achieved by the mediators in this research, we do know that in the commercial, labor, and employment disputes in which these mediators were most frequently involved, parties usually select mediators known for their success in assisting parties to settle when settlement is possible. This we use frequent selection to serve as a mediator as a proxy measure of mediator success.

This is not the first effort to determine the reasons for mediator success in dispute settlement. (See Herrman, M., N. Hollett, and J. Gale, 2006, and Wissler, R, 2006, for a wide-ranging summary of existing mediation research; see also Swaab and Brett, 2007). It is, however, among the few empirical studies which draw upon the views of both

* We wish to acknowledge the invaluable assistance of Melissa Cryder, who sent out over 400 letters to potential respondents and conducted over 200 oral interviews. Her efforts provided the data on which this research is based. We also want to thank Prof. Jeanne Brett, whose assistance in both study design and data analysis was invaluable. Finally, we wish to express our appreciation to the mediators who provided us with the names of advocates for whom they had mediated, and to the advocates who took the time to respond in a thoughtful fashion to our questions. Without their cooperation there would be neither Study II nor Study III.

successful mediators and persons who have used their services in order to determine the extent to which their views coincide – or do not – with respect to the reasons for mediator success. (See also Hiltrop, 1989) It is also the first empirical study of which we are aware to determine – from the perspective of mediation users – which behaviors lead to mediator failure.

In Study I, we asked 30 experienced mediators, nearly all of whom had mediated over 100 disputes, how they accounted for their success. “What skills and techniques”, they were asked, “enable you to get settlements? . . . What [do] you view as your essential strengths and techniques?” Seventy five percent of the mediators responded that their ability to achieve rapport with disputing parties – a relationship of understanding, empathy, and trust – was central to their success in bringing about settlement (Goldberg, 2005). A majority of the mediators attributed their ability to achieve rapport to empathic listening, in which they conveyed the message that they truly cared about the parties’ feelings, needs, and concerns. Other mediators attributed their success in achieving rapport to their being honest, ethical, and trustworthy.¹

The surveyed mediators also reported that once having achieved rapport, their most useful techniques in achieving settlements were (1) their ability to generate novel or creative solutions to the dispute, (2) patience and persistence in encouraging settlement, and (3) the use of humor to reduce tension.

A limitation on the value of Study I was that it was based entirely upon the personal observations and reflections of the mediators, and did not include the views of mediation participants regarding the reasons for the mediators’ success. Accordingly, in Study II, we surveyed persons who had participated in mediation as representatives of disputing parties to determine their responses to this question. Then, in Study III, we asked the same group – representatives of disputing parties in mediation – about what constituted unsatisfactory mediator behavior, reasoning that this, too, might aid in illuminating the central elements of mediator success, as well as pitfalls for mediators to avoid.

Study II

Methods

In order to collect Study II data, we asked each of the 30 mediators who participated in Study I to provide us with the names of the disputants’ advocates in six mediations conducted by them – a total of 12 advocates per mediator. Seventeen of the original mediators agreed to do so; thirteen did not.² Those of the original mediators who chose

¹ Both of these views are supported by research which shows that a trust relationship can flow from reputation or certification, such as a law degree, as well as from demonstrations of the mediator’s sincerity and concern for the parties. (See Doney et al. 1998)

² The reasons for the refusals were varied. Some of the mediators feared that providing us with the names of their clients, followed by our contacting those clients, would be resented by the clients, and lead to an unwillingness to engage the mediator in the future. Others had not mediated in some time, and asserted

not to participate in the follow-up study were replaced by equally experienced mediators who were willing to provide us with client names. Of the 30 mediators who participated in the original study, 28 had mediated at least 100 disputes, 2 had mediated 50 – 100 disputes. Of the 11 mediators who participated in Study II, but not Study I, 10 had mediated at least 100 disputes, 1 had mediated 50-100 disputes. The mediators who participated only in Study II were thus as successful in the marketplace as were those mediators who participated in both Study I and Study II.

Nearly all the 28 mediators who participated in Study II dealt primarily with commercial, labor, and employment disputes. Two of them focused on divorce disputes and two on environmental and public policy disputes. Sixteen of the 28 were male, 12 were female. Four were former judges.

The 28 mediators in Study II provided us with the names of 329 persons who had represented disputants in mediations conducted by them.

Participants and Procedures

Each of the 329 mediation advocates was sent a letter stating that we had received his or her name from a named mediator as having been counsel or spokesperson in a recent mediation conducted by that mediator. The recipient of the letter was asked to respond to two questions, being assured that we would not share those responses with the mediator in question:

Thinking back to your most recent mediation with [the named mediator], and any other mediations that you may have had with him/her, what personal qualities, skills, or techniques did [the named mediator] demonstrate that helped move the parties toward settlement?

How would you account for [the named mediator's] success as a mediator?³

Of the 329 persons to whom these questions were sent, 216 responded, a response rate of 66%. Seventy percent (152/216) of the respondents were lawyers, 22% (48/216) were union or management representatives in labor dispute mediations, and 8% were either representatives of government agencies or public interest organizations in environmental and public policy disputes, or people who represented themselves in mediation.⁴

either that they had no existing records of their past mediation clients or that the passage of time would render their clients' views unreliable.

³ The answers to these two questions were essentially the same. Hence, they were combined for purposes of reporting and analysis.

⁴ Among the non-respondents, 75% (85/113) were lawyers, 21% (24/113) were union or management representatives in labor dispute mediations, and 4% (4/113) were representatives of government agencies or public interest organizations in environmental and public policy disputes. There are thus no substantial differences between those who responded and those who did not.

Forty-seven percent (102/216) of the responses were received in written form, and 53% were collected by telephone. In the course of the telephone interview, which was conducted only if the respondent had not submitted a written response to the questionnaire, the interviewer asked the two questions on the questionnaire, and transcribed the respondent's remarks directly on to the computer. No additional questions were asked. The only significant difference between the content of the written and telephone responses was that the latter were more likely to refer to the importance of the mediator's evaluation skills.

Coding

To code the data we followed several steps. First, Stephen Goldberg read 100 respondents' answers to both questions, identifying 15 distinct skills or attributes mentioned by at least one respondent. Goldberg then coded all questionnaires to determine the extent to which the previously identified skills and attributes were attributed to each mediator by each advocate who commented on that mediator. In doing so, Goldberg identified five additional skills. He then re-read all previously coded responses, noting and coding the additional skills if mentioned.

Next, Margaret Shaw, who knew neither the identity of the respondent, nor that of the mediator, nor how Goldberg had coded the comments about that mediator, independently coded all responses. In doing so, she utilized the 20-item skills and attributes code developed by Goldberg. Approximately 80% of Shaw's coding was the same as Goldberg's coding; disagreements were discussed and resolved. (To this day, Shaw does not know which responses were applicable to which mediator, nor who provided those responses.)

Goldberg and Shaw next grouped the 20 skills/attributes into 3 categories. Their purpose for doing so was to place similar skills and attributes together for purposes of discussion and analysis. The three categories, set out in Table 1, are: (A) confidence-building attributes (those mediator attributes that enable a mediator to gain the trust and confidence of the parties), (B) process skills (those skills, other than evaluating each parties' likelihood of achieving its goals outside mediation, by which a mediator seeks to encourage agreement), and (C) evaluative skills (the mediator's ability to encourage agreement by evaluating a party's likelihood of achieving its goals outside of mediation, typically a prediction of the likely outcome if the matter were decided by a court or an arbitrator).⁵

⁵ While we had little difficulty in deciding in which of these three categories to place most mediator skills and attributes, we had considerable difficulty in deciding in which category to place mediator intelligence and preparedness. In our view, it is neither a process skill nor an evaluation skill, but rather provides a foundation for exercising these skills. We considered placing it in a separate category, but concluded, on the basis of the context in which most of the comments relating to intelligence and preparedness appeared, that this was best treated as a confidence-building attribute. However categorized, it is apparent that intelligence and preparedness are seen by the advocates as among the most important attributes of the successful mediator. (See Table 1, page xx.)

Data Reduction

We analyzed the Study II data with a view to answering two questions: (1) Which mediator skills or attributes do mediation advocates regard as most important for mediator success? (2) Are all mediators successful for the same reasons, or are different mediators successful for different reasons?

In order to accurately measure the advocates' views concerning the skills and attributes of successful mediators, we had to take into account certain characteristics of the data set. First, some skills or attributes might be mentioned repeatedly by the same respondent. We handled this by counting only a single mention. For example if a respondent describing Mediator X gave two different examples of Mediator X's being empathic, or one example of empathy and one of friendliness (both of which are in the same code category), Mediator X received only one point for the empathy attribute. Second, some mediators were reported on by more advocates than were other mediators. To prevent the greater number of respondents from increasing a mediator's skill or attribute score, we generated a mean score for each mediator on each skill/attribute. For example, if eight advocates reported on Mediator X, and four of those advocates said that among the reasons for X's success was that he was empathic, X's mean score on empathy would be 50%. Similarly, if six advocates reported on Mediator Y, and three of those mentioned Y's empathy as a reason for her success, Y's mean score on empathy would be 50%. As a result, a mediator's rating on each skill or attribute is not affected by the number of advocates reporting on that mediator.

Next, in order to determine which skills and attributes were most characteristic of successful mediators in general, we calculated the mean scores of the entire sample of successful mediators on each skill and attribute. This was done as follows. Assume, as noted in the prior paragraph, that Mediator X's mean score on empathy was 50%, and Mediator Y's mean score on empathy was also 50%. Assume further that Mediator Z's mean score on empathy was 60%, and Mediator A's mean score was 80%. If these were the only mediators in the study, the mean score for empathy across all successful mediators would be 60%. This would indicate that taking into account the average number of advocates who indicated that empathy was a reason for success of Mediators X, Y, Z, and A, 60% of the advocates commenting on the average successful mediator thought that being empathic was one of the reasons for mediator success.

The results of this calculation are set out in Table 1, which shows the average frequency (the average across mediators of the average within mediator) of advocates reporting a skill or attribute as being characteristic of a successful mediator. These data were used to answer our first research question – which skills or attributes do mediation advocates view as most important for mediator success?

[INSERT TABLE 1]

Reasons for Mediator Success

As shown by Table 1, the most frequently cited reasons for mediator success dealt with the mediator's ability to gain the confidence of the parties, albeit by different means. Tops on the list - referred to by an average of 60% of the mediation advocates – was that the mediator was friendly, empathic, etc. Stated otherwise, the average across all mediators was that 60% of the respondents commenting on the mediator stated that one of the reasons for his/her success was that the mediator was friendly, empathic, etc. Examples of such comments include:

He is a genuinely nice guy. People like to be around other people whom they like – especially someone you have to spend hours with in a high stakes situation.

Because of his sincerity and likeability, he is able to keep people talking when other mediators might lose them.

She demonstrates compassion for the client, which makes the client feel that she is working hard on her behalf and tends to make the client trust her.

His style as a mediator is one of patience and empathy – projecting a sympathetic understanding of the party's concerns and positions.

The next most frequently cited reason for mediator success – referred to by an average of 53% of mediation advocates – was that the mediator had high integrity, as demonstrated by his/her being honest, neutral, trustworthy, guarding confidences, etc. Examples of these comments include:

He has honesty and integrity. We had absolute confidence that he would not reveal information we did not want revealed to the other side.

Another essential quality is her personal integrity – as it is essential to any mediator. Both sides trust that the information she relays is accurate, and that she's not putting a spin on things to help her get where she needs to go.

She was exceedingly professional and balanced in meeting with the parties. . This is critical. If the parties sense imbalance or that the mediator is unsure of what he/she is doing, they tend to dig in their heels and won't settle.

As a former judge, he had great credibility with the parties.

Rounding out the top three most frequently cited reasons for mediator success – referred to by an average of 47% of the mediation advocates - was that the mediator was smart, well-prepared, and/or knew the relevant contract or law:

She's extremely smart. That plays out in several ways, such as creativity in finding solutions.

She has a knack for quickly grasping the factual situation and the legal issues involved, and they become the focus of her efforts, rather than the legalities that one side or the other may be pushing.

He was an extraordinarily quick study who was able to master the underlying facts and issues of a complex case well enough to be credible in his discussion of the strengths and weaknesses of each party's position.

The first quality that he had was knowledge of the case. Knowledge of the facts and law is what I consider to be the prime personal quality – although most wouldn't think of that as a personal quality. You would be surprised at the number of mediators who do a 'once-over lightly', and expect to be educated by the parties, but who make so many *faux pas* before they get their full education that the mediation fails because the parties have no confidence in the mediator.

The results in Table 1 support the conclusion that that a central attribute of the successful mediator is his/her ability to gain the confidence of the parties. This Study II result based on advocates' perspectives is consistent with the views of the mediators themselves as reported in Study I (Goldberg, 2005) However, in Study I, a majority of the mediators attributed their ability to gain the confidence of the parties to empathic listening, which led the parties to like and trust them, and only a few mediators attributed their ability to obtain the confidence of the parties to their honesty and/or integrity. Here in Study II advocates regarded *both* attributes – empathy and integrity - as central to mediator success.

Another difference between the mediators' responses in Study I and the advocates' responses in Study II was the greater frequency with which advocates mentioned the mediator being intelligent and/or well-prepared as a factor in his/her success. Both differences may, we think, be due to most of the Study I successful mediators assuming that integrity, intelligence, and preparation are so clearly embodied in being an effective mediator that they were not worth mentioning.

Table 1 also shows that the various skills used by mediators in an effort to bring about agreement were, on average, referred to by fewer mediation advocates than were

the mediators' confidence-building attributes. The most frequently mentioned mediator skills were that the mediator was patient and persistent – referred to by an average of 35% of the mediation advocates, that the mediator provided useful evaluations or reality-testing regarding the likely outcome of the dispute in court or arbitration (33%), and that the mediator asked good questions and listened carefully to responses (28%).⁶

Among the comments relating to the mediator's patience and persistence were these:

Her patience was outstanding. The parties were very far apart: We didn't give this case a chance for success. . . . The parties kept insisting, "mediation is not going to resolve this matter: However, her patience resulted in a settlement.

Most important . . . is that he has unlimited tenacity, is indefatigable, is always working, phoning/emailing night and day, weekends from wherever he is and wherever you are in the world.

She *never* gives up, never. Some mediators will walk out at the end of the day, and say call me if I can help in the future. In contrast, at the end of day she will get contact numbers and call each lawyer separately, and continue to sort out the problems. . . . I've had many conversations with her at nine and ten o'clock to try and settle some element of a case.

The comments that the mediator provided useful evaluations or reality-testing regarding likely outcomes in court or arbitration included:

She will analyze (and help the parties analyze) the strengths, weaknesses and probabilities for success or failure

She readily identifies – and expresses in a non-confrontational fashion – the most significant weakness or downside in each party's position.

I think the first thing that is great with respect to my clients is that he is a retired judge and knows the risks of litigation and is able to communicate those risks to my clients with confidence. For me as an attorney, trying to get people to settle for a

⁶ When good questioning and careful listening was referred to by an advocate as evidence of the mediator's empathy, the response was coded as a confidence-building attribute "friendly/empathic". When good questioning and careful listening was referred to as accounting for the mediator's success in encouraging settlement, it was coded as a process skill. In order to avoid biasing the results in favor of supporting the conclusion of Study I that confidence-building attributes are central to mediator success, doubts were resolved against coding a reference to good questioning and careful listening as "friendly/empathic".

reasonable financial offer is incredibly difficult – I could do it all day, but my clients tend to believe his opinions, and glean a firm understanding of the risk of taking a case to litigation and the possibility of spending more money than what you could get in a pre-trial settlement.

Among the comments of the mediation advocates who said that asking good questions and listening carefully to responses were important were these:

The most important asset with us is that he is very methodical with his questions, and gets to the root of the issue nearly every time.

I think primarily he's a good listener, which is key for a mediator to be successful. He validates everyone's position in a way that is not wishy-washy, but is responsive to the concerns of the various constituencies.

Also highly valued, albeit less so, were:

- Being diplomatic/tactful - 21%
 - He is often able to work the parties into compromises that are their own ideas, and therefore acceptable.
 - She points out the positive points in each round of negotiation, such that both sides feel they're winning.
 - She has a nice way of telling you bad news.
- Proposing solutions/being creative - 19%
 - She's creative. She thinks outside the box. She hears the problem, listens well, and will push people to create their own resolution.
 - When he interjected himself, he was creative. He bounced ideas off the parties that he thought we might like. He tested his ideas out, and backed off if he thought they were losers. He pushed us to do the work that he knew we could do.
- Keeping the parties focused – 15%
 - He helped us focus on issues more. He made us ask what we really needed.
 - She is good about keeping us on point.
- Being candid/firm as necessary – 15%

- She is very patient and inherently likeable, but she is also very direct when she needs to be.
 - His straight-talking, frank input makes him one of the most successful mediators we've used.
 - He is very skilful in friendly confrontation.
- Understanding people and/or relational dynamics – 13%
 - His insight into people is phenomenal. He knows what buttons to push, when to push them, and how hard.
 - Not only does she understand people's behavior and motives, she also remembers everyone. She scopes out my clients like a good trial lawyer with a jury.
 - He knows the roles of the various parties in the process – clients and attorneys. He knows what our [the lawyers] needs are, and what our clients needs are. He doesn't put us down in front of the client.
 - Being calm and/or deliberate – 12%
 - Her ability to remain calm and keep the parties calm kept the parties together
 - He has a calming and peaceful demeanor. Each client who's there feels comfortable. He creates a safe zone.

A comparison of the advocates' views in Table 1 and the mediators' views in Study I regarding the importance of various mediator skills shows some similarities and some differences. The two skills that both the mediators and the advocates agreed were important were (1) being patient and persistent and (2) proposing solutions and being creative. The most striking difference between them was in the importance assigned to mediator evaluation skills, a factor regarded as important by 33% of the advocates and fewer than 10% of the mediators. Advocates, then, appear to regard evaluation skills as more associated with mediation success than do the mediators.

Components of Individual Mediator's Success

In order to generate an overall score for each mediator, we aggregated across process skills to create a single category labeled "process skills". To do this, we summed a mediator's mean scores on each of the 16 process skills and divided by 16. This gave us a score on the process skills category that was comparable to the mediator's scores on evaluation skills and each of the three confidence-building attributes – friendly/empathic, high integrity/honest, and smart/well-prepared.

We next standardized all mediators scores on the four attributes, summed the standard scores and re-standardized. Standardization generates a mean of zero and

standard deviation of one across mediators on each of the four skills and attributes and on the overall performance score..

Standardizing the mediators' scores on each skill and attribute enabled us (i) to compare a single mediator's scores on each of the four skills and attributes in order to see where he/she was strongest; (ii) to compare different mediators on the same skill or attribute; (iii) to create an overall score for each mediator that was equally weighted for each of the mediator skills and attributes

Table 2, set out below, shows the skills/attributes profile and relative standing of 26 of the 28 mediators in Study II.⁷ Relative standings are based upon each mediator's standardized score on each of the attributes: (1) friendly/empathic, (2) honesty/integrity, (3) smart/well-prepared, (4) process skills, and (5) evaluative skills.

The symbols in Table 2 indicate, for each skill or attribute, whether the mediator was at or above the mean for all Table 2 mediators on the skill or attribute (+), at least one standard deviation above the mean (++), or below the mean (O). For example, Mediator G was at or above the mean on friendly/empathic, at least one standard deviation above the mean on honesty/integrity, above the mean on smart/well-prepared, and below the mean on both process skills and evaluation skills.

[INSERT TABLE 2 HERE]

Two points should be made in looking at Table 2. First, we considered the possibility that a high overall score for one mediator compared to another mediator meant only that the advocates who commented on the former were more verbose than those who commented on the latter. If there had been only one or two respondents per mediator, this would have been a major concern. As noted, however (see n. 7), the average number of respondents per mediator was eight, and no mediator included in Table 2 had fewer than four respondents. Furthermore, the responses on each item in Table 2 were averaged across respondents. Thus, a mediator could not receive a high comparative score on a Table 2 skill or attribute unless a high proportion of his/her respondents credited the mediator with possessing that skill or attribute. Accordingly, we are confident that the differences in the mediators' overall scores are not a function of differences in the verbosity of the respondents who commented upon that mediator, but represent genuine differences in the respondents' perception of each mediator's skills and attributes.⁸

⁷ Two mediators are omitted from Table 2 because we received too few advocate responses for those mediators— one response for one mediator, three responses for the other mediator— for us to be confident that those few responses provided a valid profile of those mediators. Each of the mediators included in Table 2 was commented on by somewhere between 4 and 11 advocates; the average number of advocate responses per mediator was 8.

⁸ We also considered, and checked for, the possibility that the union/management representatives, who were not lawyers, were less verbose than the lawyers, thus reducing the comparative scores of those mediators whose practices were primarily in the labor-management arena, but that was not the case. Those mediators with primarily or exclusively labor-management practices did not receive significantly fewer (or more) citations to their skills and attributes than did other mediators. We also compared telephone

Second, it should be clear that the mediators with the highest overall Table 2 scores are not necessarily “better” or “more successful” than the other mediators – they are all successful in marketplace terms, and, we believe, all successful in dispute resolution terms. Table 2 does, however, explain why the mediators in that table are successful. We know, for example, that, in addition to Mediator B’s other qualities, a high proportion of his/her clients view Mediator B as friendly/empathic and providing useful evaluations. Similarly, we know that Mediator L is viewed by a high proportion of his/her clients as friendly/empathic and possessing process skills. Indeed, as one moves down Table 2, one is able to discern what are – from the respondents’ perspective – the reasons for the success of nearly all the mediators in Table 2. To be sure, some of the mediators lower down in Table 2 were only at or above the mean on one or two skills and attributes, but in this select group of highly successful mediators, that may be enough to be successful – or the lower-ranked mediators may possess skills or attributes of which their respondents were unaware, but that account for their success.

What is most striking in Table 2 is that there is no single profile that is characteristic of all successful mediators, much less of those mediators whose overall scores were the highest. Nor are the highest-ranked mediators outstanding with respect to all skills and attributes. Mediators A and D are the only mediators who were outstanding – more than one standard deviation above the mean - in more than two categories. Only seven (including A and D) of the 26 mediators in Table 2 were more than one standard deviation above the mean on more than one skill or attribute.

There was no significant correlation between a mediator’s gender and that mediator’s overall score or that mediator’s scores on any of the five skills or attributes. Female mediators were not cited significantly more or less often for being friendly and empathic than were male mediators, nor were female mediators cited significantly more or less often for their process or evaluative skills than were their male counterparts.

Nor was there any significant difference between the overall evaluations or individual skills/attributes scores of the four mediators who were former judges compared to those mediators who had no judicial experience. The former judges were neither significantly more often cited for their evaluation skills, nor significantly less often cited for their process skills, than were other mediators. To be sure, neither the four former judges who participated in this study nor the other mediators who did so are representative of all practicing mediators. Each of the mediators in Study II is highly successful, and it is not unlikely that the process skills of the four former judges play some role in their success. In brief, whatever merit there may be to the view that former judges, compared to mediators without judicial experience, are more highly valued for their case evaluation skills than for their process skills, there is no support for that view among this small sample of highly successful mediators.

responses to written responses, and found, as previously noted, that the only significant difference between the content of the written and telephone responses was that the latter were more likely to refer to the importance of the mediator’s evaluation skills.

The only significant correlation between a mediator's score on one skill or attribute and that mediator's score on another skill or attribute is found in the relationship between (i) the mediator being viewed as smart, well-prepared, knowledgeable about the relevant contract or law, and (ii) the mediator being viewed as providing useful outcome evaluations. Not surprisingly, those mediators who received high scores on smart/well-prepared/knowing relevant contract or law were significantly more likely to receive high scores for providing useful outcome evaluations – typically a function of knowing the relevant contract or law.

As one examines the 13 mediators (Mediators A through M) whose overall scores are above the standardized overall mean score - it is also noteworthy that 11 of the 13, all except Mediators J and K, are more than one standard deviation above the mean on at least one of the confidence-building attributes. This, we think, corroborates the Study I finding about the importance of confidence-building attributes in mediator success.

Summary

Study II shows that from the perspective of mediation advocates the most important attributes of successful mediators are those that we have characterized as confidence-building:

- friendliness and empathy
- honesty and integrity
- being smart, well-prepared, and/or knowing the relevant contract or law.

The most important of the successful mediators' skills, again from the advocates' perspective, are:

- patience and persistence
- useful evaluations and/or reality checks
- asking good questions and listening carefully to the responses

Study II also shows that the advocates view different mediators as achieving success as a result of different combinations of skills and attributes. Some of the mediators with the highest overall scores were outstanding – more than one standard deviation above the mean – in the categories of friendly/empathic and possessing excellent process skills or evaluative skills; others were outstanding for possessing high integrity and excellent process or evaluative skills; while still others were outstanding in the categories of being smart, well-prepared, knowing the relevant contract or law, and possessing excellent evaluative skills. The sole characteristic shared by nearly all the thirteen mediators in the top half on the overall advocate scores was that eleven of the

thirteen were a standard deviation above the mean on at least one of the confidence-building attributes.

Study III

The very fact that all the mediators in Studies I and II are successful is, in some respects, a weakness of those studies. In Study I, we could not compare the views of successful mediators concerning their skills and attributes with the views of less successful mediators. Nor, in Study II, could we compare the respondents' views of the skills and attributes of successful mediators with their views of the skills and attributes of unsuccessful mediators – there were no unsuccessful mediators in Study II. Study III is an attempt to compensate, at least in part, for this weakness by exploring the views of mediation advocates concerning the respects in which some mediators (not those participating in Study II) failed to satisfy their expectations of the skills and attributes of a competent mediator.

Methods

Each of the 216 mediation advocates who responded to the Study II questionnaire was sent another letter, which contained two additional questions:

Have you ever participated in a mediation in which the mediator engaged in conduct that you thought was counter-productive, that reduced the likelihood of settlement? If so, what was that conduct?

Have you ever participated in a mediation during or after which you decided that the mediator was so unsatisfactory that you would never again use that mediator? If so, why? What personal qualities or behaviors of the mediator led you to that conclusion?⁹

This letter did not refer to the mediator who had originally provided us with the respondent's name. Additionally, the respondent was requested not to report the name(s) of the mediator(s) whose behavior was described. This request was almost universally honored. In the few instances in which the respondent did include the name of the mediator to whom he/she was referring, the mediator was not one included in Study I or Study II.

Of the 216 persons to whom these questions were sent, 96 responded, a response rate of 44%. Seventy percent of the respondents were lawyers, 23% were union or management representatives in labor dispute mediations, and 7% were either representatives of government agencies or public interest organizations in environmental and public policy disputes, or people who represented themselves in mediation. The

⁹ The answers to these questions were essentially the same. Hence, as was also the case with the two Study II questions (see n. 4), they were combined for purposes of reporting and analysis.

distribution of respondents among these three groups – lawyers, union/management representatives, and others – was almost identical to the Study II distribution.¹⁰

Seventy-three percent of the responses were received in written form; the remainder were obtained in telephone interviews in which, as in Study II, the interviewer asked no questions other than those on the questionnaire, and transcribed the respondent's remarks directly on to the computer. The 73% proportion of written responses was greater than in Study II, in which 47% of the responses were written. We suspect that the difference is attributable to the fact that the persons to whom the Study III questionnaire was sent had already participated in Study II. Hence fewer of them needed the prodding of a follow-up telephone call to respond.

The only significant difference between the content of the written and telephone responses was – as in Study II – that the latter were more likely to refer to the mediator's evaluation skills. Neither here nor in Study II can we account for this difference. The questions asked in the oral interview were exactly the same as those in the written questionnaire; nothing was asked during the oral interview that was not asked on the written questionnaire. Why there were more references to evaluation skills in the responses to the oral interview than in the responses to the written questionnaire in both Study II and Study III remains a mystery – happily not one that would appear to undercut the results of either Study II or Study III.

Coding

In coding the Study III criticisms of mediators, we used antonyms of the positive skills/attributes codes developed in Study II. For example the Study II code “friendly/empathic” becomes “self-absorbed/not empathic” in Study III. Similarly, the Study II skills/attributes groupings – confidence-building attributes, process skills, and evaluation skills – become lack of confidence building attributes, lack of process skills, and lack of evaluation skills.

As in Study II, all coding was done initially by Goldberg, then independently by Shaw. Approximately 80% of Shaw's coding was the same as Goldberg's; disagreements were resolved by discussion. Both Goldberg and Shaw knew the identity of the respondent; neither, except in one or two instances, knew the identity of the mediator whose conduct was described. As noted above, the few mediators who were mentioned were not among the mediators involved in this research.

Results

¹⁰ The distribution of the non-respondents was also similar to that of the Study II non-respondents (see n. 5) and to that of the Study III respondents - 75% were lawyers, 18% were union or management representatives in labor dispute mediations, and 6% were representatives of government agencies or public interest organizations in environmental and public policy disputes. In neither study, then, is there a significant risk that the respondents represent a skewed sample of those to whom the questionnaire was sent..

Approximately one quarter (23%) of the respondents reported that they had never observed a mediator engage in counterproductive conduct, and had never used a mediator whose conduct was so unsatisfactory that the advocate would never again use that mediator. As shown by Table 3, the most common criticism of the unacceptable mediator reported by the remaining 77% of the advocates surveyed, was the mediator's lack of integrity, referred to by nearly half (48%) of all respondents.¹¹

[INSERT TABLE 3]

Some of the reported behavior struck us as nearly incredible:

I had one mediator . . . disclose information provided in confidence. . . Once it surfaced that the mediator had breached confidence, clients and lawyer were outraged and mediation failed.

Dishonesty in reporting the other side's position – confirmed later in conversation with counsel.

I've had mediators come in and say to both sides that their case stinks. No credibility there.

One mediator . . . had his view of the appropriate settlement, and appeared not to be interested in entertaining any other resolution.

I've had mediators with a predisposition toward [the other side]. . . When this happens, you tend to hold back information and deal with the mediator as a biased party to whom I would not disclose sensitive information.

A bad characteristic of a mediator that I have experienced is the 'settlement at all costs' mentality. I have had a mediator push me to settle a matter at an excessive cost. . . This shows too much adherence by the mediator to the notion that his or her success is measured by whether the case settles or not.

The absence of other confidence-building attributes was also the basis of considerable criticism. Twenty percent of the advocates criticized mediators who lacked empathy, and appeared more interested in themselves than in the parties.

When a mediator shows disinterest it becomes readily apparent to the attorneys and the parties. . . . The disinterest can be expressed with both language and actions or inaction.

¹¹ All percentages in Table 3 are based on the total number of Study III respondents (96), rather than the total number of Study III respondents who criticized mediator behavior (74).

Mediators who are more interested in listening to themselves talk rather than the parties are always counter-productive and frustrate the parties. We spend way too much time coming up with strategies to shut them up or keep them out of our conference and/or discussing what pompous asses they are.

Endless talk about themselves; expressing frustration on a personal level when clients would not relent to arm twisting.

A mediator who thought he was important. He lost sight of the fact that it was someone else's case, and he engaged in a lot of tricks and games which were counterproductive to the process.

Attitude that mediator "knows what is best" for the parties.

Seventeen percent of the advocates commented that the mediator did not understand the issues or the law, and/or was not well-prepared.

It was clear that the mediator didn't understand either side's position, and could not convey those positions effectively.

The mediator did not understand the legal issues in the case.

The mediator did not understand the case, had not done his homework, and thought that with a coterie of some 15 or 16 attorneys, merely saying, 'Why can't you fellows get together and settle the case', was going to be a successful tactic.

The process skills failure that was far and away the basis of the most criticism, referred to by 24% of the advocates, was that the mediator was not forceful in seeking a settlement, but just went through the motions of mediation, doing little more than carrying messages back and forth between the disputing parties:

I have participated in several mediations with mediators who merely relayed offers and counter-offers to the parties. The utter passivity of those mediators did not provide any reality checks for the parties and did nothing to assist the parties in understanding and evaluating alternative theories, solutions, or potential for liabilities.

I experienced a mediator who was so "neutral" -- nothing more than a dog carrying a bone from one room to another - that I would never use that mediator again.

[I would not use] ... mediators who just shuttle between sides and do nothing else.

The mediator was virtually useless. That is, all he did was relay messages without ever pushing either side to get off of ridiculous positions – including push us when we more than deserved to be pushed.

We had a mediator who refused to take control of a mediation that was spinning out of control. We needed him to get the mediation back in control and even asked him to do so. The mediator responded that ‘you guys know the facts and parties better than I do’ ... The parties ended up further apart than before.

The most striking omissions from the Table 3 critical comments, when compared with the Table 1 list of positive mediator attributes and skills, are the comparatively rare criticisms of mediators for not being patient/persistent (reported by 11% of the Study III advocates, compared to 35% of the Study II advocates who regarded patience and persistence as characteristic of successful mediators), and the similarly rare criticisms of mediators for poor evaluative skills (reported by 7% of the Study III advocates compared to 33% of the Study II advocates who regarded good evaluative skills as an important element of mediator success).

Similar differences are found with respect to the criticism of mediators for not asking good questions/listening carefully (mentioned by no Study III respondents, but said to be important to mediator success by 28% of the Study II respondents), and not being tactful/diplomatic (also mentioned by no Study III respondents, but characterized as important by 21% of the Study II respondents).¹²

We suspect that the reason for the comparatively low frequency of these criticisms by the Study III advocates is because the absence of these skills and attributes pales into insignificance when compared to the central Study III criticisms: (1) The mediator lacked integrity, cared more about himself/herself than resolving the dispute, or was unprepared/uninformed about the relevant issues and/or law; (2) The mediator did not demonstrate any process or evaluative skills, but was merely a messenger, transmitting messages from one party to the other. Faced with these behaviors, it is hardly surprising that the respondents went no further in their criticisms, and their failure to do so is not inconsistent with the views of the Study II advocates concerning the importance of skills such as patience/persistence, tact/diplomacy, asking good questions/listening carefully, and being capable of providing useful outcome evaluations.

¹² While these percentage differences are great, they are not exactly comparable since the Study III data are averages across all advocates and the Study II data are averages across all advocates and all mediators. For this reason, we have not tested the significance of the differences between the Study II percentages and the Study III percentages.

Discussion

While Study II shows that there is a wide range of attributes and skills that may contribute to a mediator's success, Study III shows that lack of success is primarily attributable to a few fundamental flaws. The most important of these flaws is a mediator's lack of integrity, demonstrated by such conduct as unauthorized disclosure of confidential information, providing the parties with inconsistent evaluations of the likely outcome of the dispute, and showing a lack of neutrality. Other mediator conduct widely viewed as a recipe for failure includes not demonstrating genuine interest in resolving the dispute; not understanding the issues involved in the dispute and/or being unprepared; and doing little to assist the parties to achieve resolution - doing nothing but carry messages back and forth between the parties.

Conclusion

The central conclusion to be drawn from these three studies is that a – if not the – core element in mediator success is the mediator's ability to establish a relationship of trust and confidence with the disputing parties. Most of the Study I mediators thought that achieving such a relationship was a result of their convincing each party that the mediator truly cared about its needs and concerns; a few attributed their success to their being honest, ethical, and trustworthy. The advocates in Study II, however, assigned essentially equal importance to these different attributes, as well as to the mediator's knowledge and preparedness, suggesting that mediator success in gaining the trust and confidence of the parties is equally likely to be associated with any of these attributes.

Both the Study I mediators and the Study II advocates regarded persistence and creativity as important for mediator success. Neither of those skills, however, was as widely regarded as important by either the mediators or the advocates as were the confidence-building attributes.

Study II also suggests that different mediators can be highly successful on the basis of different types of skill sets – process skills are key for some mediators, evaluation skills are key for others – and nearly all highly successful mediators are widely viewed as possessing at least one of the confidence-building attributes.

Study III approaches the reasons for mediator success from a different perspective – asking why some mediators are not successful. The Study III results reinforce the conclusions of Studies I and II regarding the importance of the mediator obtaining the confidence of the parties. For, according to the Study III advocates, the most common reason for mediator ineffectiveness was that the mediator lacked integrity – he/she disclosed confidences, gave inconsistent evaluations, was biased, etc.

Few of the Study III advocates viewed a lack of mediator skill as a central element in the mediator's lack of success, with one prominent exception. Not surprisingly, the Study III advocates were unwilling to use a mediator again if that

mediator contributed essentially nothing to the search for a resolution to the parties' dispute other than carry messages from one party to the other.

The common theme running through Studies I, II, and III, then, is that gaining the trust and confidence of the parties is the most important element in mediator success. The mediator's skills are also important, but these were less often cited as reasons for mediator success than were the mediator's confidence-building attributes. Finally, and of considerable importance, there is no single model of the successful mediator. Different mediators succeeded on the basis of different combinations of attributes and skills.

Implications for Mediators, Trainers, and Advocates

Mediators: Perhaps the most important finding of this research for the practicing or aspiring mediator is that the key to mediation success is quite straightforward:

- Obtain the trust and confidence of the disputing parties by being friendly and empathic, by demonstrating high integrity, or by being intelligent, well-prepared, and/or knowledgeable in the relevant law or contract.
- Be capable of taking advantage of the trust and confidence of the parties to assist them in resolving their dispute by exercising one or more of the skills set out in Table 1.

Trainers: There are some aspects of achieving success as a mediator that can be achieved by training and others that cannot:

- One cannot train aspiring mediators to be smart or to know the relevant law or contract, but one can emphasize the importance of being well-prepared for mediation. Similarly, one can emphasize the importance of integrity, for example by using simulations to put trainees in situations in which they are tempted to act inappropriately, for example by breaching a confidence in the hope that doing so will aid in obtaining a settlement.
- One cannot teach empathy – the mediator's genuine concern for the needs of each party – but one can teach the showing of genuine concern through demonstrations and interactive exercises (Goldberg, 2005).
- Many of the process skills set out in Table 1 can and are being taught and practiced in mediation training. Although some aspiring mediators will demonstrate greater aptitude for some of these skills than for others, it is worth remembering that the most widespread criticism made by the Study III advocates was not of mediators who lacked a particular skill, but of the mediators who were perceived as doing nothing to assist the parties other than carrying messages between them.

Advocates: The findings of these studies can be useful to advocates who are engaged in mediator selection. It is commonplace for advocates in search of a mediator to inquire about a particular mediator from others who have used that mediator's services. Most often, the inquiry consists of asking, "How good a job did X do for you in the ABC mediation?", or words to that effect. Based on this research, the advocate could, however, ask more pointed questions relating to the mediator's empathy, integrity, knowledge of the relevant contract or law, persistence, etc, focusing on those skills or attributes that the advocate believes would be most useful in resolving the dispute for which a mediator is being sought. (See Sander and Goldberg, 2007.).

In sum, a better understanding of the attributes and skills of successful (and unsuccessful) mediators can be useful in improving the practice, teaching, and selection of mediators.

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