MERGING MEDIATION MODELS – AND OTHER LESSONS

DECEMBER 30, 2020 | JOHN LANDE | LEAVE A COMMENT

Imagine that you just stared into the neuralyzer in *Men in Black*. It wiped out all your memory of the traditional bundled of models of mediation and negotiation. You know – facilitative and evaluative mediation, interest-based and positional negotiation, etc. etc. The neuralyzer also vaporized all references to them in texts and teaching materials.

You're scheduled to teach mediation next semester. What do you do?

This question is prompted by my conversation with a really good, experienced colleague who is revising his mediation course. He is grappling with a familiar dilemma about teaching the pre-neuralyzed facilitative and evaluative models. He doesn't like evaluative techniques, but he recognizes that they are widely used and he wants to prepare his students to act ethically and effectively in the real world.

Here are my suggestions, as elaborated below:

- Take advantage of the neuralyzation of the traditional models, which are poor representations of reality
- Help students understand dynamics related to assessments of court outcomes
- Teach students to strategically combine unbundled techniques
- Teach students how to manage the counteroffer process
- Include lawyer-client relationships in simulations
- Use longer simulations, including preparation for mediation sessions

These ideas are relevant to teaching negotiation, including negotiation of transactions.

This post includes several lists of questions that mediators and lawyers can ask to help clients make good decisions.

This post is a bit longer than usual, but there's a lot of useful material here, especially if you are teaching mediation.

Take Advantage of the Neuralyzation of the Traditional Models, Which Are Poor Representations of Reality

In the famous Riskin grid, facilitative mediation consists of the following actions bundled into a single model: helping parties evaluate, develop, and exchange proposals; asking about strengths and weaknesses of each side's case; asking about consequences of settling and likely court outcomes; helping parties understand their interests; and helping parties develop options that respond to their interests.

Evaluative mediation is a bundled model consisting of assessing the strength and weaknesses of each side's case; predicting impact of settling and court outcomes; urging parties to settle; and proposing settlements.

In practice, the reality often is a lot more complex and nuanced than commonly portrayed. Mediators perform many different actions in response to the situations at different times in a case, and they often use interventions from both models.

Mediators sometimes are very heavy-handed, quickly expressing their opinions about likely court results and pressing parties to make concessions.

But mediators' "evaluative" interventions often are much more subtle, as Dwight Golann describes in articles such as *The Changing Role of Evaluation in Commercial ADR*, 14 Dispute Resolution Magazine 16 (Fall 2007), and *How Mediators Evaluate, Through Words, Participants' Gestures and Sometimes Silence,* 38 Alternatives to the High Cost of Litigation 151 (Nov. 2020).

In the latter article, he writes, "Mediators often deliver opinions without using use words at all. The videotaped mediators raise an eyebrow, frown, pause, squint, dip their head, or lean back, using expressions and body language to express viewpoints silently and tactfully."

He notes that facilitative theory approves of "reality testing" questions but this "implies that the mediator has developed an opinion about what reality is, the disputant's view is different, and the mediator thinks the disputant's view would benefit from testing. … For instance, when a videotaped mediator, in response to a low first offer, asks the lawyer and executive in a thoughtful tone, 'What do you *suspect* their response is going to be?' some might say she's simply encouraging them to assess their counterparts' thinking. The disputants, however, understand exactly what the mediator is saying …. And even if questions themselves are neutral, if you return to a topic repeatedly disputants will read a message into it."

Moreover, mediators regularly "selectively facilitate" discussions where mediators ask "reality-testing" questions disproportionately challenging one party's perspective. See David Greatbatch and Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23 Law & Society Review 613 (1989).

So mediators' real-life behaviors don't map well onto the traditional theoretical concepts. The traditional negotiation models have similar problems as mediation models, as described in this article.

Fortunately, the neuralyzer erased your memory of these confusing traditional models.

Help Students Understand Dynamics Related to Assessments of Court Outcomes

The purpose of mediation is to help parties make decisions about their case. The expected court outcome is a major factor in some parties' decision-making and, in particular, setting their bottom lines. Some parties really value mediators' assessments about the court outcome, and they may not consider their lawyers' assessments to be a satisfactory substitute. This is evidenced by lawyers' common refrain that mediators often repeat the lawyers' advice but the clients don't accept it until they hear it from the mediators.

Evaluative mediation is controversial because of an assumption that mediators' assessment of options, prediction of outcomes, and giving advice necessarily result in inappropriate pressure on parties that undermines their self-determination.

You might ask students to consider whether some mediator pressure always is bad. Consider that parties generally have a very strong interest in resolving litigated cases. The litigation process itself often is extremely stressful, and some parties actually may welcome moderate pressure to settle the case, especially if it seems principled and applied to both sides so that both sides make concessions. In real life, lawyers often welcome some pressure from mediators to settle difficult cases when they believe it would be in their clients' interests to do so (as well as in their own interests).

When parties have seriously unrealistic assessments about the likely court outcome, would it be inappropriate for mediators to ask a series of "reality-testing" questions that the parties recognize as challenging their assessments? Is it inappropriate to pressure stronger parties who are trying to take advantage of weaker parties? Are some methods of pressure appropriate and others inappropriate in particular situations? If you believe that pressure sometimes is appropriate, how do you distinguish techniques and situations when it is or isn't appropriate?

You might note that coercion is pressure through intimidation, threats, or force. You could discuss non-coercive pressure, such as asking a series of reality-testing questions or conducting marathon mediations where parties are expected to mediate long into the evening until they reach an agreement.

In my view, appropriateness of mediators' interventions depends on a long list of factors including but not limited to the decision-making competence of the parties under the circumstances, whether some or all of the parties are represented by lawyers, relative power of the parties, and whether the parties ask to hear the mediators' opinions. It may also depend of the timing, amount, quality, and projected confidence of mediators' statements. For example, a mediator's strong pressure on an unsophisticated self-represented tenant to accept an unfair settlement with a well-represented landlord is very different from a tentative suggestion in a commercial dispute between two Fortune 500 companies that are represented by big law firms. Most mediators' expressions of their opinions probably are somewhere in between these two extremes.

You might debrief your simulations to help students test these ideas. What was the mediator's tone in making statements? How tentative or confident were the statements? Did the parties and lawyers feel that the statements help or hurt their decision-making? What about the mediators' interventions were helpful or problematic?

All this theory is great, but how do you prepare students for the real world so that, after they graduate, they don't think that what you teach them is just a bunch of bunk?

Teach Students to Strategically Combine Unbundled Techniques

How will you fill the void in your brain where the traditional models used to live before you were neuralyzed?

To help students communicate with each other and to plan, perform, and analyze their actions, consider focusing on clearer, specific unbundled behaviors like:

- 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, associates, or others
- Providing information and resources
- Assessing intangible interests, issues, possible court outcomes, tangible litigation costs, and options
- Coaching and giving advice

- Making suggestions or proposals
- Predicting court outcomes and effects on parties' interests
- Applying pressure

Mediations involve a series of interactions that include many or all of these behaviors in each case. You and your students can analyze the appropriateness and effectiveness of particular interventions in response to the situation at various points in the process. When you focus on the advocates' role in mediation, you can discuss how advocates can elicit the most helpful mediator interventions and client decision-making.

Teach Students How to Manage the Counteroffer Process

Concerns about evaluative techniques generally relate to mediations of legal cases where lawyers do most of the talking in the "positional negotiation" game. Both sides start with extreme offers supposedly based on assessments of the likely court outcome, and then they make a series of counteroffers designed to reach the most favorable possible settlement for their side.

Mediators can consider why lawyers use this "game" and develop strategies addressing lawyers' motivations. The "game" can make sense to lawyers for several reasons. The process may be the default in their practice community, and they would feel like suckers if they didn't use it. When a lot of money is at stake, they may worry that their clients might settle for a much less favorable outcome than they would get in court. They may believe that the process reflects a power struggle, and they don't want to get overpowered by the other side. Professionals – not just the parties – may be really mad at each other, as Jeff Trueman documents, and they may use mediation to stick it to each other. They may fear losing financial rewards and professional opportunities if they don't get good results for clients, particularly getting cases settled.

You can teach students how to address these concerns, both as mediators and advocates in mediation.

I suggest that you teach them that, before undertaking the counteroffer process, they should focus on the parties' intangible interests, which lawyers and mediators often ignore or discount. This post includes a list of questions eliciting information about these interests. Mediators presumably discuss them in private meetings (aka caucuses) and, ideally, in conversations before convening mediation sessions.

Here's a set of questions to help parties and lawyers improve their assessments of the likely court outcome. It includes a question about what negotiation process to use. Some media-

tors may be reluctant to ask this question because the counteroffer process is so deeply institutionalized that some lawyers would consider mediators naive merely for asking the question. On the other hand, the question could lead to a productive conversation about the process, similar to John Wade's anecdote in this post.

You might teach techniques from publications like Dwight Golann's book, *Sharing A Mediator's Powers: Effective Advocacy in Settlement*, or J. Anderson "Andy" Little's book, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes*. As the titles suggest, Dwight's book focuses on advocates' perspective and Andy's book focuses on mediators' perspective.

Include Lawyer-Client Relationships in Simulations

I strongly recommend including roles for both clients and lawyers in simulations. The recent study, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, finds that new lawyers are "woefully unprepared" to work with clients, and it recommends that students take at least three credits to develop their ability to interact effectively with clients. Having students enact lawyer-client relationships provides an extremely valuable lesson for students playing both roles.

Including lawyer-client relationships increases the realism of simulations. In real life, lawyers almost always have to work with clients, which often is very challenging. Lawyers sometimes commiserate with each other that their cases would be so much easier if they didn't have to deal with their clients, who they consider too "emotional" and "unreasonable."

I included roles for clients in my multi-stage simulations, and the "clients" often ABSOLUTELY HATED how their "lawyers" treated them. Clients often focus on their intangible interests much more than lawyers, and clients often feel frustrated when lawyers try to shush them into ignoring things that courts can't provide. Indeed, sometimes lawyers instruct clients not to say anything except in caucus – and even then to be tight-lipped. In simulations without clients, lawyers are more likely to ignore clients' intangible interests because they don't have clients who regularly express them.

Use Longer Simulations, Including Preparation for Mediation Sessions

Many faculty use a lot of short simulations to illustrate various issues and provide students with opportunities to play more roles.

Students who don't do any longer simulations lose opportunities to have more realistic experiences. Short simulations don't provide enough time for discussion of both expected

court outcomes and intangible interests, nor to allow students to deeply inhabit their roles and have good interactions between lawyers, clients, and mediators. This is particularly problematic because students often race to reach agreement before the end of the simulation rather than working through the issues in detail and focusing on the effects of particular interactions. Using longer simulations can counteract these problems.

Everyone agrees that parties' preparation generally improves the quality of the process and their decision-making. Longer simulations provide opportunities to practice this preparation at some length. The ABA Section of Dispute Resolution developed helpful preparation guides for cases generally as well as versions for family and complex civil cases. These guides are written for clients but "lawyers" and "mediators" in your simulations can use some of the questions. Of course, practitioners should ask only relevant questions and should not feel obligated to ask all the questions in the checklists in this post.

Longer simulations also provide opportunities for students playing lawyers to practice writing effective mediation memos and having productive conversations with mediators before the mediation convenes. Here's a list of issues that mediators and lawyers might cover.

So students would benefit from a combination of shorter and longer simulations.

For longer simulations, you might add material to your tried-and-true short simulations. You might adapt the format of the month-long negotiation practicum that Debra Berman organizes, and have these simulations take place outside of synchronous class time. Some mediators now are using multi-stage mediation processes because of the pandemic, and this practice may grow as people appreciate the benefits of conducting mediations over a period of time rather than trying to shoehorn them into a single day.

You could require that students perform certain steps such as having conversations early in the simulation to plan the process, drafting short mediation memos, conducting one or more joint sessions, doing some legal research, and/or using of particular communication modes such as email, phone, and/or video.

You might leave students on their own for the entire simulation, set deadlines for performing certain tasks, provide additional information during the simulation, and/or plan for interim debriefs during synchronous class sessions in addition to conducting a debrief at the end of the simulation.

To assess students' learning, you could require students to provide specified work-products, videos of interactions, and/or written analyses of the interactions. You might require

students to keep a log listing all their interactions with brief analyses of each interaction and plans for the next interactions.

To make it easy logistically, all the student role-players would be from your course. Alternatively, you might find a colleague "buddy" in a negotiation course or a course at another school to do the simulations together so that students would role-play with others who aren't in their class.

To provide more opportunities for students to play different roles, you might do two longer simulations – perhaps one in March and one in April.

Adapt These Principles for Negotiation Courses and Trainings

This post focuses on teaching mediation courses, but you could use the same principles in negotiation courses and in trainings.

In particular, it would be helpful to use additional unbundled concepts instead of the traditional bundled models.

You could apply these principles in simulations of transactional negotiations and criminal cases.

This post provides suggestions for dealing with problems of "positional negotiation."

And you might want to have students watch the half-hour "They Should Call it Negotiation School, Not Law School" or other videos, which are relevant for mediation too.

Some day in a post-neuralyzed world, you may tell your students rumors about how people used the bundled models and watched black and white TVs in the olden days.

FOR TEACHERS AND STUDENTS MEDIATION NEGOTIATION RESOURCES SIMULATIONS
SKILLS AND TECHNIQUES STUDENT ASSESSMENT AND GRADING