Performance-based Testing of Mediators (a lightning-speed tour)

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Long, long ago (1984)
in a galaxy far, far away...

In a world of its own…

the only place in the known universe where every mediator was also an arbitrator and an administrative law judge…

Chicago is that way ➘

…there was a hardy band of mediators.

- A long-established mediation culture: by 1936, this group was already at work.
- By 1984, there was a recognition that existing selection methods had produced inconsistent results.
- Was it possible to do better?
  - If a study could be designed to let an observer
    - watch some good, but very different, mediators
    - in cases selected to be as similar as possible
  - Some common factors might be deduced.

The cases studied shared a number of characteristics, and were all in the same geographic region, about 100 miles in each direction.

Five mediators studied (out of 20+)

- Mediators were selected according to conventional ideas of "good"
  - High settlement rate
  - High acceptability to parties
  - High reputation among peers
- And within that:
  - Maximum possible variance among approaches and character
- Case assignments were structured to give these five mediators the closest workable equivalent to the *same case,* over and over.

Initial results

(Honeyman, C., "Five Elements of Mediation"
Negotiation Journal, April 1988)

- Central finding: all five mediators were showing the same skills---but in very different ways.
- Key conclusion: a rebuttable presumption that these skills were central to effective mediation ***in the setting studied.***

Subsequently:

(Honeyman, C., "On Evaluating Mediators", and Honoroff, B., Matz, D., and O'Connor, D., "Putting Mediation Skills to the Test", both in *Negotiation Journal*, January 1990)

- Practical effects:
  - A new way of directing training toward individual skills
  - A new way of examining mediators, using actors in role plays where the candidate plays the mediator
    - First round: 1987, Wisconsin, labor mediators, for State of Wisconsin
    - Second round: 1989, Boston, commercial mediators, for the Superior Court mediation program
    - Since then: Many variations, including CEDR (London), San Diego Mediation Center, Family Mediation Canada, Bar Association of New South Wales (Australia), United Airlines and U.S. State Dept. internal mediation programs, etc.

What does "good" really mean?

- Definitions of "good" skill and ability in mediation have a ***cultural component***.
- Evaluation scales developed for one setting ***must be re-examined*** for any other, and tailored where necessary.
- For IMI, a balance is necessary:
  - Too much standardization robs tests of cultural validity
  - Too little runs up costs and threatens inconsistent levels of proficiency.

Croatian adaptation of several scales (2002)

Formular za ocjenu rada miritelja [1]

Sedam pokazatelja djelotvornosti: A) istraživanje, B) empatija, C) inventivnost i rješavanje problema, D) sposobnost uvjeravanja i prezentacije, E) odvraćanje pozornosti, F) rukovođenje interakcije, G) dublje znanje. Koristite prostor uz svaki od pokazatelja pri ocjenjivanju miritelja kojeg promatrate. Zaokružite odgovarajući broj i navedite pojašnjenje.

A. Istraživanje: Učinkovitost pri identificiranju i pribavljanju informacija od važnosti za određeni slučaj:

1. Postavljena većinom nevažna pitanja
2. Postavljena očigledna pitanja
3. Postavljena mnogobrojna važna i pronicljiva pitanja, posebno na početku postupka

B. Empatija: Primjetno razumijevanje i svijest o potrebama ostalih

1. Postavljeno niz nepoštenih, zbunjujućih, pristranih pitanja
2. Slušanje drugih bez izražavanja antagonizma
3. Izbjegavanje negodovanja ili favoriziranja na štetu ili u korist bilo koje strane

C. Inventivnost i rješavanje problema: Potraga za rješenjima na temelju suradnje stranaka, te osmišljavanje ideja i prijedloga vezanih za slučaj i korisnih za stranke u sporu

1. Forsiranje preuranjenog donošenja rješenja, zaključujući prije utvrđivanja esencijalnih činjenica
2. Uvažavanje nekih prijedloga i pristanak na kompromise obzirom na drugu stranu
3. Izbjegavanje donošenja odluka na samom početku procesa

Example 1: Wisconsin

- Four scales, used for evaluating *trainee* mediators:
  - Investigation
  - Empathy
  - Persuasion
  - Invention
- Original scales presumed mediators would be
  - new to the field
  - assertive, to avoid wasted time
    - mediators had heavy caseloads---and were not paid by the hour.
- Some qualities deliberately omitted from testing, as impractical or too much to expect from trainees

Example 2: Boston courts

- Mediator candidates in Boston were expected to be experienced, and able to take on vigorously disputed Superior Court commercial cases with minimal training
- "Managing the Interaction" was added to the Wisconsin evaluation scales
- "Distraction" was incorporated into "Managing the Interaction"
- Various other detail changes

Example 3: Test Design Project

(Honeyman, C. et al as Test Design Project, *Performance-Based Assessment: A Methodology, for use in selecting, training and evaluating mediators* (1995, U.S. National Institute for Dispute Resolution.)

- 1990-1995 project, with many participants including representatives of federal and state courts, federal and state government, academia, private practice and membership organizations
- U.S. National Science Foundation supported a project feasibility study, conducted by two leading testing organizations (AIR and HumRRO)
  - Reported conclusions:
    - Performance-based testing of mediators was scientifically feasible
    - But it was not *politically* feasible within the field, at that time.

Example 3, continued: Test Design Project

- Numerous changes to scales by 1995, e.g.
  - "Gathering information" replaced "Investigation"
  - "Empathy" separated from "Impartiality"
  - "Inventiveness" redefined as "Generating Options"
  - "Persuasion" redefined as "Generating Agreements"
  - A new subset added of "Variant 2" scales, designed for "transformative" mediation

Example 4: Penn SEMS

- A Pennsylvania statewide special education mediation program; 20 mediators, all of whom were already employed; group wanted to rethink quality
- New scales drafted, by C. Honeyman and Penn SEMS director Grace D'Alo
  - One objective: to allow for the coexistence of "facilitative" and "transformative" mediators *within the same program.*
- Scales published in "Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice?" (D'Alo, G., 2003; 8 Harvard Negotiation Law Review 201)

Conclusion: In Designing Mediator Evaluation Scales, Culture Matters

- The variations described here all took place within what most people think of as *the same culture* (US mainstream.)
- Beyond US culture, the variations are certainly greater.
- They can only be determined
  - country by country (or smaller scale)
  - primarily by a local committee
    - though experts can assist.