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Lengthy ABA study suggests better way to conduct mediation

A handful of mediators and attorneys have long been enthusiastic about the benefits of holding short meetings or "caucuses" with each side in advance of the mediation session where the mediator can build trust with the parties and attorneys and discuss the process that will be used to resolve the dispute. It turns out that there is more than anecdotal evidence to support this technique.

The Task Force on Research on Mediator Techniques of the American Bar Association Section of Dispute Resolution recently completed its mission of reporting on what existing scientific studies can tell us about the effectiveness of one mediation technique or process over another.

The Dispute Resolution Section instituted the task force because while lawyers and mediators frequently offer opinions on what does or does not work, and training programs typically describe best practices, empirical information has not been well understood or widely available to practicing professionals.

After eliminating a number of studies that did not meet the review standards, the task force analyzed 47 studies to see if specific actions taken by the mediator had an impact on mediation outcomes — including settlement — and other important results, such as party and attorney perceptions of the process and mediator and improved party understanding and communication.

The task force used rigorous criteria and concluded that while it could not definitively state that any category of mediator actions had "clear, uniform" effects across all studies, it could report that a few mediator actions have a greater potential for positive or negative outcomes. (Full disclosure: I served on the task force but a few lead scholars did almost all of the analysis.)

One of the more useful findings is that premediation meetings, or caucuses, have the potential to go a long way to get the case resolved if they are used properly.

The studies show that if a premediation caucus with the mediator is used to establish trust and build a relationship with the parties, the likelihood of settlement is increased and post-mediation conflict is decreased. It is important, however, to keep the discussion limited to trust and process issues.

If a premediation meeting with the mediator is used to talk about the substance of the dispute or settlement proposals, the technique can sometimes have a negative effect on settlement and post-mediation conflict.

This finding aligns with a recent study at Chicago's Center for Conflict Resolution that successfully used premediation meetings as well as my own experience in my mediation practice and the neurobiology of mediation and decision-making.

When people are confronted by a social threat, they respond as they do when confronted with a physical threat and the resulting fight or flight stress response is not optimal for good decision-making.

BEYOND DISPUTE

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Holding a premediation meeting or series of meetings seems to give people the time they need to enter the negotiation phase without being overwhelmed by the physical and cognitive impacts of the stress response.

Other potentially positive mediator actions noted by the task force (keeping in mind the caveat that some of the studies showed there might be no effect), include eliciting the parties' suggestions or solutions; giving more attention to disputants' emotions, relationships and sources of conflict; working to build trust and rapport; expressing sympathy; praising the disputants; and structuring the agenda.

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These findings are interesting because in a typical mediation in a personal-injury or business dispute in Illinois, there are no pre-mediation meetings, emotions are not explicitly acknowledged and relationships are given minimal attention.

It might be tempting to think that these findings on potentially successful techniques only apply to certain types of cases, such as family or community disputes.

However, the task force looked at a wide variety of cases. Of the 47 studies reviewed by the task force there were 13 studies on general civil cases, three studies on small claims cases, nine studies on domestic relations cases, four studies on community mediations including minor criminal disputes, three studies on employment disputes and one study on construction disputes.

Other studies included collective bargaining and international disputes. There were also five studies involving simulations. Studies included both cases where a lawsuit had been filed and disputes that had not yet gone to court. Thus, the nature of the underlying claim did not dictate whether the particular mediator actions were useful.

The bar section's executive committee recently approved the final task force report, which is expected to be adopted by the ABA Council and posted on the ABA website in the coming weeks.

In the report, the task force acknowledges the necessity of additional research and proposes the development of a research agenda and guidelines.

In the meantime, it makes sense to consider a premediation meeting focused on trust building and process design for your next mediation.