

The Psychology of Mediation

By Fradely Delacruz

Monmouth University (2022)

Abstract

This essay presents my research and perspective on mediation and the role the psychology of mediation plays throughout the mediation process on its participants. Through statistical evidence and peer-reviewed sources, I will explain the overview of mediation and the process of “getting participants to the finish line” in a positive manner. In addition, concepts of the effectiveness of a mediator, qualities that mold a mediator, and advice for future mediators are explored. After informative evidence and suggestions on mediation, the psychology of mediation, and mediators are presented I will detail the approaches some mediators may take and rank their commonality. Lastly, the goal of this analysis is to understand the impact psychology has on mediation and how it can help heal involved participants of the process.

Introduction

Sociology is the study of society as it analyzes the social issues, norms, and structure of a society (i.e. groups of people) instead of focusing on the injustices that an individual may face. Whereas the U.S legal system resolves cases on an individual basis through legal procedures, trials, admissible evidence, and the Constitution, there is an intersection between society and the U.S legal system as the social norms and structure in place influence court rulings and legal

ideology around social issues. For instance, the Supreme Court case, *Brown v. Board of Education* marked a historic win for people of color as the court stripped away constitutional barriers for segregation by race and legally guaranteed that race wouldn't impede in educational integration of white students and students of color.

Even after this court ruling, some states felt that students of color did not have the constitutional right to experience educational integration. A prime example of this was the Little Rock Nine. Nine Black students from Little Rock, Arkansas had to have the U.S military and National Guard successfully escort them into the school because the Governor of Arkansas felt that this integration was not the social norm. The Little Rock Nine case demonstrated that social norms around social issues can be unjust and reinforced by the legal system because society's belief system influences the legal system; the law tells you what is permissible and what it is not, and sometimes the law creates an acceptance of an unfair action (i.e racism in educational institutions).

Hypothetically, what would have happened if mediation and a peaceful dispute resolution were used for both parties for the Little Rock Nine? Would the U.S military and National Guard still need to be called upon? This potentially depends upon whether the state was willing to participate in mediation to agree to adhere to the U.S Supreme Court's decision in the *Brown v. Board of Education* and recognize the students' rights. I used the *Brown v. Board of Education* case to highlight a social and institutional issue that has impacted millions of lives over so many decades: racism. Racism and discrimination have resulted in a slew of people of color taking their lives, being killed, abused on various levels, intellectually undermined, and robbed of living their American dream.

Personal Observation Statement

Physical and mental tolls rooted in racism and prejudice beliefs have overwhelmingly and negatively impacted people of color. Observing and personally living through these tolls and

much more is what made me interested in sociology, specifically in community development and human rights consultancy. I was raised on the values of community and helping those who cannot help themselves. Often these values in practice required me to learn how to listen to others, be able to empathize, and understand their perspective of the situation. These practices became more difficult the older I got because I realized that every situation isn't black or white. There are so many grey areas in all situations making neutrality difficult, especially if the situation emotionally resonates with you. I also learned that non-resolution is possible when the other party doesn't see an issue in the situation or doesn't want to solve the situation with you.

I first experienced non-resolution when a friend who I knew very well was disowned by one of her close and beloved family members at fourteen. It was right before her 8th grade ceremony and she did not understand why this family member was leaving let alone disowning her. She grabbed her loved one's keys because she knew they couldn't leave without them and demanded a reasonable reason for being disowned. Quickly, she grasped that nothing would make the decision justifiable or make the pain go away from the separation. The conversation went nowhere, but the feeling stayed with my friend for many years.

What was taken from the moment was to never force a conversation. This is similar to mediation. Both parties should voluntarily want to talk about the issue at hand and be open-minded to seeing each other's perspective, something that wasn't present for my friend's loved one as they had made up their mind before the conversation started. Seven years later, however, my friend and her family member who left had an extensive conversation and rebuilt their relationship through therapy. Their therapist was a mediator who guided them in raw and peaceful debates, which explored the events of a painful past. The therapist taught that vulnerability and truth are markedly needed for any dispute to be solved and yelling at each other with negative intentions will never solve anything.

This life experience was a full-circle moment because my friend had to learn to forgive herself for all the negativity and selfish intentions she set for the beginning of this mediation process. Self-awareness, open-mindedness, accountability, acceptance of her past, and the ability to forgive in order to move forward are benefits and skills she gained from this peaceful mediation resolution. It taught her to take a holistic approach in humanizing the person and their experiences to understand the roots of the situation to create a solution instead of villainizing the person.

Overview of the Psychology of Mediation

I chose to research and study how the psychology of mediation influences people to say “yes” because I wanted to understand how people are persuaded and why some attach a negative connotation to mediation in the legal system. To reiterate, while there may be people who have negative experiences, I don’t want to over generalize and assume that everyone does. This overview of the psychology of mediation relates various types of psychological influences that influence professionals (i.e., salespeople, attorneys, or politicians) use to persuade the average person to say “yes.” Also, this overview will detail the social and legal relevance of the research topic while exploring vital questions, facts, and evidence.

The social relevance of the psychology of mediation often has to do with the self-identity and the internal relationship one has with themselves. This influences the parties’ decision-making during the mediation process. As research has stated, “each party comes to the table seeking benefits for the ego, that is, for the self as he or she conceives of it. Yet, it is also true that parties can have a more or less expanded sense of who they are during the process. They can lock in, psychologically, to one or more of the items on the bargaining table, or they can let go” (Bader 19). An individual’s ego can be affected by a slew of external factors such as their environment, race, ethnicity, gender, childhood experiences, and ability to hold healthy relationships. In other words, each mediation process will be different for each case because it

cannot be foreseen how involved parties will take to the process, but psychologically their ego will impact the process.

I focus on how meditation brings to light our sense of self and creates an emotional-psychological experience which can allow many to heal from past experiences. Mediation holds a social significance because this approach to legal cases allows for all parties involved to learn to have a holistic perspective about the issue at hand and each other. The holistic perspective involved parties gain requires them to be able to identify with a self-image or a psychological structure of self-representation (Bader 18). The ability to see and accept the image a person holds for themselves increases the ability to have some level of self-reflection increases. The con of this, which cannot be accounted for beforehand, is the individual's self-image and ego, which can sometimes impede the progress of mediation because they may not be able to recognize themselves independently of the psychological structure of self they have created. This conveys that the self-image we have of ourselves, often influenced by external factors, impacts our ego and becomes a barrier for us to be able to reflect on ourselves as human beings.

Pride can stop people from seeing someone else's perspective through a holistic lens and self-reflecting on the role played in those past experiences. Psychologically, this is impacted by self-esteem because we as humans want to protect our self-esteem when experiencing psychological pressure from a conflicting event (Rumbaut). During the mediation process, people often confront the conflicting event that occurred and the parties involved that negatively impacted the way a person felt about themselves. Hence, the more mediation is normalized through social structures and formal systems (i.e the legal system) people may feel more comfortable stripping themselves of their ego, self-image, and past mistakes.

The psychology of mediation is vital in legal institutions because legal cases are decision-based, as attorneys may influence incorporated parties to conform or settle for a decision. Author

Barry Goldman of *The Psychology of Mediation* noted that our “internal, instinctive decision-maker judges that it is in your interest to make the choice made by so many other members of the tribe and buy the same brand” (11). Applying it to attorneys working a jury trial, they understand that jurors make a group decision, but if the attorneys analyze and pin where the jurors are swaying in favor, attorneys can better prepare for the next court session. This indicates that attorneys, and at times jury consultants, understand the potential decision the jury will make because the decision is consensus-based and many will go with the majority. Research has shown that mock trials have repeatedly and consistently demonstrated that deliberations where three or four individuals account for as much as 90% of the conversation (Bradshaw 2018).

Psychological studies support this as they state that the floor person usually has some social influence or elevated title because people gravitate towards their social status. This influence shows the mediation process would give the parties a voice of their own to shape the result of the case without putting their fate in the hands of twelve strangers, or more if you include attorneys and the judge.

Mediation guides the parties to focus on the primary aspects of the agreement and disagreement to mold a solution to which they would both agree. Yet, this is all voluntary as no one can force both parties to accept mediation or consistently come to the mediation sessions. This leads me to ask the first question significant to my research topic: What are the issues that involve parties’ psychology in mediation? A potential issue is that the mediator is human, and their own biases and issues of self and identity can affect how effectively they do their job and thus the outcome of the mediation process. For instance, “knowledge of one's relationship to narcissistic defenses, such as aggression, is important. It is also helpful to have a sense of the nature of one's usual projections on others” (Bader 20).

Other relevant questions regard the role of the attorney in the mediation process, and what their participation should be. Often when we think of mediation, we think of the mediator

and the parties involved in the mediation process, but no one knows what the attorney's role is in this process. Leonard Riskin expressed in the *Ohio Law Journal* that for mediation in American society to reap its benefits while being self-aware of risks, "many lawyers must come to understand mediation and a significant number must develop an ability and willingness to mediate a variety of matters that are currently pushed through the adversary mill" (30). Although this journal article was published over 30 years ago, the media has demonstrated that legal mediation is mainly used for divorce and child custody cases as well as disputes between neighbors, business partners, family members, landlords, and tenants.

The last question about the psychology of mediation is: Does mediation have a connection to the restorative justice model in the criminal justice system? After doing plenty of research, mediation and this model are heavily interrelated but are used as two different processes and approaches to a case. Similarities they both allow for a holistic point of view of both parties and their issue at hand.

Consequently, I learned that the psychology of mediation not only impacts society on an emotional and mental level, but the processes individuals undergo in decision-making, self-reflection, and self-representation, as well as the application of their decision-making that analyzes what to choose and why. The informative branding of mediation needs to be promoted more in the legal system by those within the system (i.e., attorneys, law enforcement, judges). Besides, I hope for more research to be done in the future on how the restorative justice model and mediation can be processes that American society can benefit from in conflict resolution as there is a lot of research of both concepts separately.

Tips for Future Mediators

I think that in many instances, it is helpful for mediators to have some type of certification or history of study in areas such as sociology, social work, law, finance, or

psychology to understand how people are affected by society and formal systems like the criminal justice system. Even if the mediator doesn't have any of the above certifications in those fields, research has shown that mediators do receive some degree of training, but the training varies. There is no universal "mediation license," and people are free to select generally whoever they want to guide the mediation dispute. There are many respected organizations that offer ongoing training and education to both new and experienced mediators on how to consistently improve. This can affect how the involved parties feel about the mediation process, how smooth the process could be, and if those involved feel satisfied by the outcome of the process.

I would like to comment on a published article entitled "Mediation: Three Ways of Getting to Yes," which addresses the different approaches to mediation to effectively negotiate a settlement.¹ One of the first takeaways from this article is understanding mediation style and approach taking to a case is crucial. There are three mediation approaches that Doug DeVries (2013), the author and a mediator, conveyed that mediators utilize as an adaptive measure to a case, but not all mediators have a style or specific approach. The facilitative, evaluative, and directive approaches psychologically aid in guiding involved parties in settling. The facilitative and evaluative approaches are often used in the legal system within the mediation process, whereas the directive approach is an outlier in the group. Whilst an outlier, the directive approach is preferred at times when people have in the past been to mediators with a different approach that was unsuccessful. DeVries expresses that for a mediator to have a positive influence on the mediation process through the facilitative approach, they must be a skilled mediator in the application of the approach with a high level of engagement to foster trust and hope between all of the parties involved. The centralizing process calls for a mediator

¹ To note, the transformative approach is another popular style of mediation, but we don't detail it in this research paper. Further reads on this approach:
<https://onlinelibrary.wiley.com/doi/epdf/10.1002/crq.3900130407>

prioritizing confidentiality while being informative and observant enough to identify issues, interests, and participants' characteristics. These components are vital for future mediators who use this approach because facilitation requires detecting positive moments that can shape the success of the process. It also requires prompt implementation of tactical influences on the mediation process and parties alike (DeVries). This molds the persuading influence that the mediator has while juggling multiple elements of the mediation process.

For future mediators, another piece of advice many researchers expressed is to view participants with a holistic lens, meaning that there is always more than one side to the story and the mediator should not take anyone's side. A good mediator should be able to understand the emotions and communication invoked by the situation at hand as the participants may not know how to process the mediation, or peacefully convey their feelings. Therefore, the mediator needs to objectively judge the case. Both the facilitative and evaluative methods signal that a future mediator succeeds when the participants, "confront and acknowledge uncertainty, vulnerability or weakness in their positions and correspondingly soften their negotiating stances" (DeVries).

The main difference between mediation approaches is that the facilitative approach tends to present value-neutral inquiries that psychologically stimulate self-examination of their interests and how it affects those involved (DeVries). Compared to the evaluative method, the future mediator would be motivated to state positional assessments of the parties cementing their role as a direct influence on the assessments. Generally, facilitation is viewed as a more guiding force through interest-based assessments instead of rights-based assessments of involved participants signifying for evaluative mediators that they are more ready to regard the facts and legal matters of the case in detail to comprehend how it is affecting the parties, ultimately challenging the parties to defend their positions.

Accordingly, an essential tip for future mediators in terms of the psychology of mediation is understanding that this process is voluntary, indicating that many mediators can combine the facilitative and evaluative approaches to evolve in communication and progress within the mediation process. The issue that future mediators may face is balancing one of the styles because even if the evaluative mediator assumes to be correct about a party's position, it doesn't mean that the person wants to hear that they are wrong, or willing to accept a third person's point of view in a personal situation. This denotes that balance is key in juggling parties' feelings, given background history, possible triggers, traumatic experiences, and communication levels.

Likewise, the directive approach is the third approach not commonly utilized as a mediation method. Why is the directive approach such an outlier? It is not the standard or desirable approach to mediation as mediators are not trained to use this approach (DeVries). Researchers reveal that this approach plays on a mediator's personality. For instance, if a future mediator saw themselves as a deal maker who can bend the rules of mediation and the result to their analysis of the dispute, then the parties can leave unsatisfied. The parties may never receive the opportunity to learn how to emotionally and effectively communicate what they are feeling about the dispute. Also, the parties may result in an unresolved settlement, or one they do not agree to, which can legally and disproportionately impact one party more than the other.

Overall, the point is that a future mediator's goal in the psychology of mediation is to get to know those involved in the dispute enough to help both sides negotiate and compromise to mold a resolution both parties agree to without the implementation of the mediator's own biases, feelings of the dispute, and ideologies. Mediation is the underlying basis of promoting fairness through a restorative perspective on legal disputes for all parties involved. Therefore, the directive approach is not highly favored for its promotion of self-injecting oneself as the

mediator into the substance of the dispute to create a negotiation, instead of managing the negotiating through the wants and needs of the parties.

Mediator Effectiveness

This section is examining how the psychology of mediation influences the mediator's effectiveness in the mediation process, and how a mediator can be ineffective as well. I will be measuring the effectiveness of mediators through a comparative analysis of effective and ineffective mediators through the qualities they possess.

To commence, we need to evaluate what makes a competent mediator. Over time many researchers have pointed to the fact that a skilled mediator spotlights the interconnection of human beings while strengthening the parties' self-awareness of their emotions, traumas, or triggers. This is foundational for an effective mediator to understand and practice as "these sensitivities can, of course, make the mediator better able to perceive the parties needs and, on a purely instrumental level, to work more effectively with all manner of people" (Riskin 58). Riskin denotes that a holistic approach is highly recommended to be effective as a mediator no matter what style in the approach one uses to mold the mediation process.

Oftentimes, a mediator is not the issue in the mediation process. Rather, the parties themselves can make the process harder than it has to be. In studying the psychology of mediation, evidence demonstrated that the issue that can make a mediator ineffective (i.e., unsuccessful completion and satisfaction of the process) is the parties "differing assessments of liability and potential damages (because of such factors as overconfidence bias, status quo bias, and endowment effects) cause them to disagree about the expected value of the case" (Hoffman & Wolman 801). Yet, an effective mediator will have the planning and critical analysis skills to deal with parties who have conflicting ideologies and emotions in the same case. Research shows that a strategy a competent mediator would use to confront these differing narratives

accounts for the identification of documents and other independent indicia of what occurred. Mediators can also remind the parties that it is normal and natural for people to have differing recollections and settlements can be reached when we give up all hope of a better past and focus instead on the future (Hoffman & Wolman 801). An effective mediator would only see the parties not meeting eye to eye as one of the levels of emotional communication where the parties are presently instead of viewing the conflict as a barrier to experiencing a satisfactory and healing mediation process. We can especially see this in family matters that seek dispute resolution such as matrimonial and probate litigation. Patience and adaptability are deemed as softer skills that are just as vital as having organizational, analysis, and strategy development skills to be an effective mediator. Overall, we see that an effective mediator requires an open mind to explore and adapt to different styles of the involved participants while guiding their decisions based on the needs and wants within the case.

For an ineffective mediator, we can assume quite the opposite, as this type of mediator can be too passive throughout the facilitation of the conversation. This may lead the participants to feel like they are getting nowhere, which creates a barrier for them to reach an adequate settlement. By being too passive, an ineffective mediator may lack negotiation skills and in turn use aggressive, demeaning, or judgmental tones and words to speed the process along, or apply pressure for the participants to make decisions to lead to the settlement. Thus, an ineffective mediator requires neutral problem-solving skills, communication skills, and the aforementioned soft skills to have a successful mediation process.

Conclusion

In the final analysis, I learned that mediation is a voluntary process that grants emotional healing capabilities for involved participants of the mediation process. A mediator is willingly chosen by those who seek a peaceful dispute resolution and it is cheaper than going to trial.

Central points of mediation include consistent participation, patience, and open-mindedness from both the attendees and the mediators themselves. A key finding is that a mediator is influenced by the psychology of mediation through their self-awareness of triggers and past experiences to be able to guide the participants through their own issues. Often, I am seeing that the mediation process is as good as the chosen mediator. Finally, mediation is the underlying basis of promoting fairness through a restorative perspective on legal disputes for all parties involved.

References

- Bader, E. E. (2010). "The psychology of mediation: Issues of self and identity and the IDR cycle." *Pepperdine Dispute Resolution Law Journal*, 10(2), 183-214.
- Bradshaw, B. (2018). "Identifying Leaders on the Jury." *Litigation Commentary & Review*, Spring Issue, 1-2. litigationcommentary.org
- DeVries, D (2013). "Mediation: Three Ways of Getting to 'Yes.'" *Plaintiff Magazine*.
- Hoffman, D. A., & Wolman, R. N. (2013). "The psychology of mediation." *Cardozo Journal of Conflict Resolution*, 14(3), 759-806.
- Riskin, L. L. (1982). "Mediation and lawyers." *Ohio State Law Journal*, 43(1), 29-60.