Toward a Definition of Success in Mediation

A work in progress

By Ava J. Abramowitz

A friend recently caught me struggling to solve a complex problem, one with multiple layers, all intertwined and difficult to sort out. I explained the nature of the problem and the great benefits to be had by solving it. His advice: "Inch by inch, life's a cinch. Yard by yard, it's very hard. Take it inch by inch."

I thought of this when I read the American Bar Association Dispute Resolution Section's Task Force report "Research on Mediator Techniques," which was released last June, after four years of investigation.[1] While the "mediation academy" had explored some of what makes a good mediator and a successful mediation, the Research Task Force, appointed by the ABA Section of Dispute Resolution Council, was asked to go a step further and explore whether there was empirical evidence linking specific mediator actions to predictably good, or bad, results.

The report states: "The Task Force's review of the studies found that none of the categories of mediator actions has clear, uniform effects across the studies — that is, none consistently has negative effects, positive effects, or no effects — on any of the three sets of mediation outcomes." The outcome categories are "(1) settlement and related outcomes, (2) disputants'

perceptions and relationships, and (3) attorneys' perceptions."

The Task Force concluded this after examining empirical studies of mediators produced over the last 40 years. I suspect that when the Task Force started out, its members had no idea that after analyzing 47 studies, the question of what makes mediation successful would remain largely unanswered. Among other things, few cross-comparisons were possible because the original researchers had studied different aspects of mediator behaviors, all in different ways. While the Task Force discovered some maybes, all it could settle on with certainty was the need for more and better research.

Ending up with a report that recommends more research — after four years of investigation — must have been frustrating for the Task Force. Mediation is confidential, and getting access to live mediations is difficult. This difficulty can dictate research approach and thus affect the findings. Small sample sizes, for example, impede quantitative findings and the certainty with which they can be delivered. Qualitative research, though often intriguing, also suffers from too-small subject numbers and thus offers suggestive findings, not definitive ones. It is also often contextual. Researchers may have access to some industries that use mediation and be excluded from others. This leads to concerns about whether findings in one context can apply to another. For instance, are findings on labor-management mediations applicable to public-dispute mediations?

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Beyond these research constraints, mediation has evolved simultaneously (and often contradictorily) both from judge-driven settlement conferences and from *Getting to Yes* negotiation theory. Mediators have thus been free to draw from both column A and column B and fashion mediation practices that they believe work for them. Moreover, mediation is a tree with many branches — classifying anything along a spectrum as wide as mediation's is more than challenging. As Task Force member Jennifer Shack pointed out, the profession does not yet have agreed-upon definitions and metrics that enable comparisons.[2]

Even if we could resolve the issues of definitions and metrics, mediation will remain too complex to be easily quantified. The reasons are well-known, if not well understood: mediation involves people, often angry people. It also usually involves a disagreement or dispute that is daunting enough for the parties, sometimes including their lawyers, to make them seek a neutral's help. It involves a process that is undefined and flexible. And it can take place at any moment in the lives of the parties and their dispute. I could go on; there are many layers — an onion probably has fewer. No single research methodology can provide definitive insights into such a cyclical, complicated, multi-peopled phenomenon, often private, sometimes involving courts. The kinds of "rules" scientists have gleaned from studying physics cannot be replicated in the mediation world — and even if they could, few mediators would welcome them.

Should we throw up our hands and scream, "Uncle?" Of course not. But we can parse out what is objectively measurable and can be studied and start from there. For example, the field of mediation has never attained a shared, accepted, and acceptable definition of "success." We know intuitively that if the parties leave the table angrier than when they sat down and with no settlement in hand, the mediation was a failure. On the flip side, we know that if the parties come to an agreement, successfully implement that agreement, and feel that the mediator was "fair," we have a success. But there are many gradations along the continuum from failure to success. Can we devise a series of measures to cover the in-between? Can these measures be objectively defined and

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uniformly applied so that the high-end commercial mediator and the family mediator both agree when "success" has been achieved? If yes, we would have the first cornerstone to building understanding.

How other fields have addressed the challenge

Since we mediators haven't wrestled this problem to the mat, are there similar fields that have? Fortunately, the answer is yes. In the fields of negotiation (in 1978)[3] and sales (in 1988),[4] working and objectively measurable definitions of a successful negotiator and a successful seller have been published. Each of these definitions was solidified by correlating the end result with participant perceptions and with negotiator- and seller-communication behaviors to determine what the successful do differently from the average. No such quantitative research has been conducted regarding mediation, and in its absence, no alternative definitions of success in mediation have taken hold. So let us look to the definitions of success gleaned from research on negotiation and sales and see whether they can help us define "success" in mediation.

Both in negotiation and sales, the definitions of success arose out of the application of behavioral analysis[5] to actual — not simulated — negotiations and sales. A brief explanation: behavioral analysis (BA) is the systematic collection of real-time data gathered by trained coders directly observing one-on-one or group interactions. The idea is to use the data collected as feedback to help those observed improve their performance. Because coders often work alone, inter-rater reliability is vital if the observations of different coders are to be combined into a statistically

significant sample. This is especially so because coding is immediate — there are no tapes to rewind and play over until the viewers reach consensus on what they saw. Thus the coding system must be very clear, with mutually exclusive choices that cover all the possibilities. In addition, the coding system has to be simple enough to use but complex enough to reflect reality.

Behavioral analysis was first applied to negotiation in the 1970s. In his 1978 study, "The Behaviour of Successful Negotiators," psychologist Neil Rackham (who happens to be my husband) and his colleagues used BA when they sat in on 103 negotiations involving 49 negotiators and coded their communication behaviors as they occurred. In each negotiation, a negotiator with a history of successful negotiations was pre-selected by a non-coder. These "expert negotiators" had measured track records of:

- Routinely coming to agreement;
- Shaping agreements that were routinely implemented successfully; and
- Leaving the others at the table willing to negotiate with them again.

The Rackham researchers, who took no part in the sample selection, then analyzed the results of their coding, comparing and contrasting communication behaviors and correlating them with participant perceptions, negotiator expertise, and negotiation outcomes.

The non-pre-selected negotiators' behaviors were similarly coded. They came to the table because both parties needed to reach a deal. Typically, they were average negotiators in that their track records lacked one or more of the three measures listed above. For example, some could come to agreement, but

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the agreements were not always successfully implemented. And some could come to agreement, but the other negotiator did not want to negotiate with them again. This differentiation between successful and average negotiators allowed the researchers to develop models of negotiators as well as comparisons of communication behaviors used and their impact on the negotiation.

Without reporting on all the differences between successful and average negotiators, of which there were many, it is worth noting that the findings had legs — even today, the paper is much read in negotiation classes. But it is the definition of "successful negotiator" that merits our attention. Extend it to mediation. Would we agree that a "successful mediator" has a measured track record of:

- Routinely helping disputants come to agreement;
- Helping the parties shape agreements that are routinely implemented successfully; and
- Leaving the others at the table satisfied with the process and result, even willing to recommend the mediator to others?

Don't answer yet. Let's go on to sales.

In studying sales, the behavioral analysis setup was different. Unlike negotiation, where a group of social scientists and negotiators could define a "successful" negotiator, sales were too messy. Indeed, sales were more like mediation: too many variables. Was a seller a success because of his or her territory? Maybe the product was superior — or the competition's inferior. Did a successful seller of expensive products to Fortune 500 companies sell the same way as a winery's head of sales? Did the sales process affect the outcome? Was any cross-industry, cross-product, or cross-buyer study even feasible? In each, the outcome — a sale — might be the same, but were the behaviors of successful sellers different from those of average sellers?

In studying sales, the Rackham researchers had two things going for them. First, the outcome was clear. You had an order or a "no, thank you." If the sale required more meetings, and most did, you had again a binary outcome — an "advance," in which the parties agreed to do something to advance the likelihood of a sale, or a "continuation," in which the buyer and seller agreed to meet again, but in the interim

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neither did anything to advance the sale. Second, as companies were dependent on successful sales forces for profits, research money flowed and access to sales calls was hardly ever an issue. The return on investment of this research was obvious.

Hence, 12 years, 23 countries, and 35,000 sales calls later, the Rackham researchers could correlate the success of the sales effort with customer satisfaction with the seller and the sale, and, most important, with the communication behaviors of both the buyer and the seller. The researchers also looked at other factors, such as demographics of the seller and the buyer, corporate data about territories, and sellers' prior expertise, but these latter items proved non-determinative of seller success.

The study produced three key findings, which are remarkably similar to those for negotiators: The first is that successful sellers could be differentiated from average sellers.

- The best sellers routinely made sales.

- These sales were routinely implemented successfully.

- The buyer expressed high customer satisfaction with the seller and each was willing to work with the other again.

Second, the researchers discovered the "magic bullet" that allowed both outcome and relationship to flourish and, ultimately, average sellers to be trained more effectively. The best sellers sold not by *giving* information but by *seeking* information. They were intent on meeting the buyer's needs. Accordingly, the best sales people posed more and better questions than the average, and their questions helped both buyer and seller understand the problem dogging the buyer. To them, the goal was not a "sale" but providing the buyer a *bona fide* and implementable

solution to an important problem — one that the buyer identified.

Finally, sequence mattered. Successful sellers started by asking questions, and only after they had helped the buyer analyze and identify their own needs did they make a proposal for a sale that met those needs.

Now go back. Compare the two definitions of successful negotiator and successful seller. Note how success is dependent on each of the "intermediaries" routinely helping the parties solve a problem with a solution that is implemented effectively and with the other party willing to work with the intermediary again. If we translated those "price points" into mediation, would we have a working definition of mediator success? For the purposes of this paper, let us assume yes and revisit it later.

How might this work in mediation?

With that successful mediator definition in mind, let's turn to the definition of a successful mediation. We know our challenge: Whatever the definition, it must be equally meaningful in all mediations regardless of the parameters. Further, it must reflect what we expect of a successful mediator. So the definitions of a successful mediator and a successful mediation must inter-relate or they won't work to advance the profession. Mediation is hard enough without bathing it in inconsistent metrics.

Not an easy feat. Let's take it on anyway.

The first reality we have to accept is that not everything should be mediated. A lawsuit seeking to declare a practice unconstitutional may beg for a hearing. That's arguably simple enough, but what happens during the course of a mediation when the mediator discovers that one party is using the mediation purposely to hurt the other? Should the mediator persist with the mediation, hoping for a settlement, any settlement, to keep his or her metrics high? Of course not. Mediators are human, though, and bad performance-measurement systems can twist even the most ethical person. So the second reality to keep in mind is that metrics have to bring out the best in mediators, not induce the worst. The metrics'

Measuring Mediation Results

Best Achievable Result (BAR)	Full settlement reached and implemented successfully.
	Partial settlement reached and implemented successfully.
	Full settlement reached but falls apart in implementation.
	Partial settlement reached but falls apart in implementation.
	Parties meet but do not settle. Agree to meet again. An "advance" is planned and carried out.
	Parties meet but do not settle. Agree to meet again. No "advance" is planned or carried out. A "continuation."
Worst Achievable Result (WAR)	Parties meet but do not settle then or later and refuse to meet again.

purpose, after all, is — or should be — to help mediators improve.

Easy to say, but will a definition of success and a performance-measurement system based on it provide enough guidance? Of course not. We need to hear from the parties and their counsel. Indeed, one critical component of the system will be how the participants, the parties, and their lawyers, as well as the mediator, feel about the process. In other words, perception — another "inch by inch" issue. Was the process perceived as "fair?" Did all feel listened to? Heard? Did the parties understand the result? Like it? And so on. Any survey instrument must reliably correlate perception and outcome. But for now, let's set aside perception studies and communication behaviors for future articles and focus again on the results of mediation.

As stated earlier, most mediators — and probably most disputants, too — would view achieving an implementable agreement without undue discord as the Holy Grail of mediation. If the parties also felt good about the mediator and the process, we would have a trifecta. That much is clear, and this definition of success is universal in scope, equally applicable to the largest and smallest disputes.

The gradation to failure is not as easy. To be usable, the "grades" should be few in number and easily demarcated. To be nuanced, there should be enough to fashion intelligent public and public-policy understanding. To be reliable, they should reflect not only the outcome but later correlate with the perceptions and behaviors of all involved. To be useful, they should help the mediator — and the profession — improve.

Let's look again to both negotiation and sales research for ideas. Can we use the negotiation-research focus on implementability as a mediation-success measure? After all, a mediated settlement that has the disputants back in court does no one a favor. Can we also use the sales concepts of "an advance" (where an action is mutually agreed upon to move the process forward) and "a continuation" (where a future meeting is agreed to, but without a mutually agreed-upon action taking place in the interim) as success measures? Sales research found that an advance increased the likelihood of a sale while a continuation did not. Perhaps those findings also apply to mediation.

Logic suggests that they should. The parties agreeing to and implementing an advance are enjoying an agreement, a trust-building opportunity, and a low-risk step toward getting to "yes." Link a group of helpful advances together, and both disputants may find their commitment to settlement increasing

in the process. Alternatively, they may discover they finally have the knowledge base necessary to know their BATNA, their Best Alternative to a Negotiated Agreement, is calling. Either way, the disputant has control over the decision to settle. Perhaps a measurement system that includes the already-tested sales concepts of advances and continuations can also serve the disputants and the profession.

So try this on for size. See if this proposal works as is or with modifications:

Perhaps this spectrum might work for legal disputes, but would it work for restorative mediation? Transformative mediation? Or maybe it would work with complicated issues, but would it work for a small-claims court case? Taking an "inch-by-inch" approach, I would note the value of all these questions and be open to whatever answer the data provides. In the first two cases, it may be yes, if a word could be substituted for settlement. In the third case, it may work with greater latitude given to the mediator, especially those serving under court rules. The point is that, while defining success for the process and for the mediator is fraught with difficulty, no research study will ever be comparable if each study defines success differently. If we are to advance the profession, the proposed definitions — or, for that matter, any definitions — must be tested and, when found both universal and useful, secured. The costs of research

are too high, the money for research too slight, for every researcher to promulgate his or her own frame. If we are to free ourselves to gather empirical data about mediation in all its complexities, let's first come together and define success.

The stakes here are high for more than the profession. Disputants choose mediators with the belief that mediators know how to help them resolve their disputes. The system works buoyed by the belief that mediation training helps produce effective and ethical mediators. Perhaps the belief is more than experience-based because somehow mediation works. Cases settle. Disputes resolve. So let us agree that while there is no research correlating mediation training with mediator effectiveness, there should be. Mediation is risky enough for all involved. Knowing that the training received supports the endeavor would provide everyone a degree of comfort.

Let us start by "inching" forward and agreeing that we must define success. Future steps, small though they might be, could analyze communication behaviors of mediators and, of course, the perceptions of the disputants and their counsel.[6] Rest assured: As we come to closure on both of those issues, other issues will arise. Ultimately though, all will come together. From that new and deeper understanding, we can then develop education and training geared to producing success. ∎

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Endnotes

1   The Task Force Report is available at https://www.americanbar.org/groups/dispute_resolution.html.

2   Jennifer Shack, *Which Mediator Techniques Are Most Effective?*, Just Court ADR (Oct. 3, 2017), http://blog.aboutrsi.org/2017/uncategorized/which-mediator-techniques-are-most-effective-report-points-to-some-with-potential.

3   Neil Rackham, *The Effective Negotiator — Part I: The Behaviour of Successful Negotiators*, 2 J. Eur. Indus. Training 6, 6-11 (1978).

4   Neil Rackham, *SPIN Selling* (1st ed. 1988).

5   Neil Rackham, Peter Honey, & Michael J Colbert, *Developing Interactive Skills* (1971).

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