A mediation renaissance?

For years, there has been a concern that mediation disserves parties who are powerless and disadvantages members of society. Is it changing?

By Nancy Neal Yeend

For the past 30 years, race theorists and researchers have raised questions regarding equity and fairness of the mediation process. In the last 10 years the number of studies has accelerated with researchers now taking a much closer look at the mediation process, with its underlying American societal assumptions. These cultural norms center on how mediations are conducted, who manages the mediation process, settlement equity and participant satisfaction. According to one study, mediation "disserves parties who are powerless and disadvantages members of society."[1] With the world ever evolving socially and politically, is mediation, as practiced in U.S. state and federal courts beginning to change? Is the renaissance just around the corner?

Mediation evolution in the U.S.

Mediation gained a popular foothold during the 1960s when community-based mediation programs surged in popularity from approximately 300 organizations to over 3,000. These local mediation programs became the primary method for resolving neighbor-to-neighbor, landlord/tenant and related community-based disputes. In the late 1970s and early 1980s criminal courts began getting clogged with the first wave of drug-related cases, and civil courts saw a large uptick in cases involving condominium-related issues. Due to the enormous number of criminal cases, in 1982 Los Angeles County courts had a wait time of seven years to schedule a civil case for trial. The judiciary soon began to consider mediation as a viable case-management tool. In 1987 Florida and Texas became the first states to pass statutes creating comprehensive court-ordered mediation.

In 1990 the federal government joined the growing trend for using mediation when Congress passed the Civil Justice Reform Act, CJRA. It required all federal district courts to initiate ADR programs, including mediation, to reduce costs and delays for litigants.[2] At the same time mediation models expanded from the familiar evaluative and facilitative to those that incorporated more of the participants' personal norms, such as transformative, restorative, narrative and others.

Issues prompting a closer look

Now that mediation is ensconced throughout communities and courts, and as a variety of social events, including the Black Lives Matter movement have happened, mediation is getting a closer look – specifically regarding inequities related to minorities and women. In addition, following recent census figures that show a steady increase in the percentage of people listed as minorities, questions have surfaced regarding the fact that mediators predominantly have been and still are white, older and male.

Researchers are looking into if the concept of white superiority has created mediation inequities.[3] Press and Deason explore the premise that the "white race is inherently superior to other races" and if this hypothesis influences mediation outcomes in either community mediation programs, or in state and federal courts.[4] Many studies, focusing on inequities to minorities, use the term BIPOC, which includes black, indigenous and people of color, and other research also analyzes whether gender, religious affiliation, and socio-economic status are additional influencing factors.[5] A lower socio-economic status is often directly correlated to BIPOC.[6]

There are many aspects of the mediation process that have been studied in the past, and are currently being studied to determine if mediators and/or the process are placing some of the participants at a disadvantage. Some of the aspects of mediation, which are currently being reviewed include: how the process is managed, mediator bias, mediator training, mediator panel composition, and how mediators are chosen. For purposes of this article, these five elements are grouped into two categories: process management and mediators.

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Process management

When considering how the mediation process is managed, bias becomes a significant contributing factor to producing results that disadvantage minorities and women.[7] One of the frequently used terms associated with process management is "tone policing," or the approach the mediator uses to guide the flow of information: how people are talking to one another and behave during mediation. A basic mediation management tool of ground rules, which provides guidelines on how people talk and interact with one another during the mediation, may contribute to the perception that the process is not fair, or that the mediator is not impartial. For example, if the mediator does not discuss the fundamental guidelines of "no interruptions" or "treat each other with respect," and the mediator only announces the ground rules after one of the parties has interrupted the other person, it may appear that the mediator is taking sides. Some research has suggested that ground rules tend to disadvantage minorities and those unfamiliar with the mediation process.

If the mediator attempts to orchestrate the discussion to primarily focus on getting the dispute resolved and deprives one of the parties of the opportunity of explaining what happened or addressing the history associated with the controversy, then again, the mediator's neutrality as the process manager comes into question. Research has found that mediators, unconsciously, use fundamental mediation management tools to favor one side over the other. Mediator statements like, "I mediated 100 cases and I settled 99 of them," indicates that these mediators are more interested in their personal statistics rather than managing the process in a way in which the parties are satisfied with the outcome. This flaw in how the process is managed is a major contributing factor to lower settlement compliance rates.

Another major consideration of how the process is managed is "color blindness." Determining color blindness explores if mediators are impartial and neutral when mediating cases involving minorities. Researchers are looking to see whether mediators are color blind, or are they unconsciously operating under the assumption that "white anger is righteous" and that "black anger is aggression"?[8] When mediators have the implicit bias of stereotyping minorities, the cornerstone of mediation, neutrality, goes out the window and the process is managed in a way that often disadvantages minorities and women.

Mediators

Understanding who serves as the mediator, the extent of their training and experience, and how they are selected, all influence if the mediation process favors some over others. The composition of mediator panels does not represent the national demographic. Most mediators associated with court panels are white and male, so they typically do not represent the public they serve. In addition, many mediators are of a higher socio-economic class and are more educated than the mediation participants.[9] Western culture is based on an assumption that individuals need to decide for themselves what is the solution that best meets their personal interests and needs. The majority of cultures are not based on this individualistic concept, but rather the impact of the settlement on the community. These are referred to as collective cultures, and are associated with Asian and Latin American countries.[10] When the mediator's decision-making criteria are based on what is best for the individual and one of the parties believes they have an obligation to their community, mediation satisfaction ratings are lower.

Researchers are looking into whether mediator-training programs increase outcome inequities. More and more courts are requiring a 40-hour mediation course to serve on a court panel, and in some states even more training is necessary to serve as a family mediator. In addition to the amount of mediation training a person receives, is: "Does the course provide sufficient skills, so a mediator will become aware of his/her personal biases, learn to work with people with different ethnic backgrounds and belief systems?" Some courses do not even address the subject of bias, or only provide a single hour to address this complex topic.

A related question is "What do mediators do when they see inequities in representation, social status, resources or other significant factors?" Do they withdraw from mediating the case? If they do, then the question currently being posed is, "Does this action place neutrality above fairness and justice?" A related term linked to this situation is "white silence." According to many noted academics, including Larry Suskind of Harvard, who have written extensively on this topic, mediators have an obligation to make sure agreements are fair. The results from studying these and similar issues will certainly influence how mediation is practiced.

Some research has identified that the mediator selection process often favors white males. Some courts do rotate the mediators on their rosters; however, few take into consideration the ethnicity or gender of the mediation participants. Is this disparity due to the fact that the majority of judges are white males? A related question is, "Are the monetary outcome ratios, MORs, lower for minorities and people of color?" Researchers have found that in fact women and minorities do not do as well when monetary outcome ratios are compared to white males.[11]

Renaissance and change

As questions have arisen and research has probed into the mediation process regarding its underlying principles with potential inequities, suggestions are surfacing. Most people believe that more research is necessary, and that there may not be a "one size fits all" solution.[12]

With respect to who should mediate, most are suggesting using the co-mediation model to create a balanced team with respect to gender and ethnic or cross-

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cultural understanding.[13] Training standards need to be reviewed to identify areas where topics need to be added, or skills and technique need to be expanded. In addition, mediators need to make sure that all participants understand the mediation process, and are prepared prior to the start of the mediation.

Another suggestion following research is that mediators need to be observed, not just doing roleplays, but as they mediate cases for the courts. It has been suggested that courts initiate programs that will not severely limit the amount of time that may be spent in a mediation. Some courts have imposed time limits of only one hour to complete a mediation. Participants need an opportunity to evaluate the mediator and the fairness of the process.[14]

When considering who should mediate, more courts and agencies are actively recruiting women and minorities to join their panels. The American Arbitration Association's National Center for Dispute Resolution recently stated that in 2020 just over 50 percent of new panelists were women and minorities, which brings their total number to 27 percent. In some instances, people have said that mediation training is too expensive and therefore prevents those who are economically challenged, especially minorities, from becoming mediators. This situation has prompted some programs, especially community- based programs and a few academic institutions to provide scholarships to underserved communities.

The process used to select mediators is also of concern for some. In addition to training and requiring continuing education, mediation programs need to establish strong ethical standards for their panelists. In many instances the court appoints the mediator, and in those situations, it is important to develop specific criteria for selecting the mediator: trained, experienced, understands the subject matter associated with the case, and is experienced and understands the cultural, national origin or ethnicity issues associated with the participants or the case.[15]

Conclusion

Over time, things change and so do processes – even mediation. Focus needs to prompt a return to reducing discrimination and promoting self-determination in mediation. Change is the number one cause of conflict, so mediators will need to practice what they preach.

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