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Mediation Research: Studying Transformative Effects

Joseph P. Folger

MEDIATION RESEARCH: STUDYING TRANSFORMATIVE EFFECTS

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Good afternoon. Today's lecture is one event in a larger two-day symposium, being held here at Hofstra University, entitled *Transformative Mediation: On the Cutting Edge.* This symposium is being co-sponsored by Hofstra University School of Law and the Institute for the Study of Conflict Transformation. The goal of the symposium is to bring together theorists and practitioners who are interested in the development of transformative approaches to mediation practice. The conference has focused on the nature of conducting transformative mediation—what it looks like—as well as methods for assessing mediator's development in using the approach. It has also examined some of the policy implications of transformative practice within the field of mediation in general.

This lecture approaches the topic of transformative mediation from yet another perspective—the perspective of social science research. There is a history of research on mediation that is important and useful to consider in obtaining a full understanding of the development of transformative theory and the evolution of transformative mediation practice. Specifically, it is important to recognize the relationship between ideology and the development of social science research that focused over the years on the study of mediation.

This lecture will focus on three related areas. First, I would like to suggest how an underlying ideology that shaped most of mediation practice also shaped the research on mediation. Second, I want to explain how ideological shifts prompted alternative ways of studying

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mediation. These shifts in research stemmed from the same underlying shifts that laid the groundwork for transformative mediation practice itself. Finally, I want to provide an overview of a recent research project conducted by researchers at the Institute for the Study of Conflict Transformation that was an attempt to document transformative outcomes of transformative practice in one workplace.

Let me start by providing a historical perspective on the relationship between ideology and the way this ideology shaped social science research on mediation during the first fifteen years of what has come to be known as the Alternative Dispute Resolution Movement. It is often acknowledged in the philosophy of science that research is not value free, that it is driven by values and ideological impulses. One of the most well-known statements of this relationship between ideology and scientific research was made by Thomas Kuhn in his classic volume, *The Structure of Scientific Revolutions.*[1] Kuhn demonstrated how research paradigms—ways of thinking about what can and should be studied—prevail because they are ideologically rooted.[2] Research paradigms hold values that are shared by a community of scholars and practitioners.[3] Once a research paradigm is accepted, it becomes powerful, as it dictates research agendas, research questions, methodologies, and even what studies can be published.[4] Kuhn also demonstrated how prevailing ideologies block vision and do not raise possible research questions that could have been asked and answered within a different research paradigm, a different way of thinking about what can be studied and how it can be examined.[5]

When a prevailing research paradigm is in place, attempts at raising alternative research questions are often publicly debunked, de-legitimized, or even ridiculed. Kuhn focused mostly on "hard" science and the research paradigms that have prevailed in that arena—paradigms that made major differences in the way we have seen the physical world.[6]

I am sure you are all familiar with some of the current research (and debates) in the study of medicine, with conflicting paradigms of traditional and what has come to be called "alternative medicine." This debate is very much in a stage of paradigm challenge, in the way that

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1. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).
2. *See generally id.*
3. *See id.* 43-51.
4. *See generally* KUHN, *supra* note 1.
5. *See generally id.*
6. *See generally id.*

Kuhn describes such clashes. Just last year, I was in a university faculty meeting in the health sciences where clashing paradigms reverberated through the room. The dean of a health school at a large university had just heard that some of his faculty were interested in studying the use and effects of some alternative approaches to medicine, specifically homeopathy. For approximately twenty minutes, he berated the faculty in the public setting, claiming that homeopathy was akin to voodoo and that he would be embarrassed to have any faculty in his college studying the practice. This dean was obviously rooted in a deeply entrenched and prevailing ideological set of assumptions that clearly dictated what was even worthy of study in the first place. A prevailing paradigm allowed him to feel justified in ridiculing other research questions—not simply belittling the alternative practice, but belittling the possibility of researching an alternative way of thinking about treatment.

I have always noticed how the link between ideology and research paradigms played out in social sciences over the past thirty years and in the study of mediation in particular. Within the study of mediation and the mediation movement, the same influence of a prevailing research paradigm is present in the first half of the Alternative Dispute Resolution movement. Most observers of this movement would say that it really started to take shape in the mid-1960s and early 1970s. From the beginning of the movement in this period until approximately the mid-1980s, there was an existing research paradigm that set the agenda for what was studied about the development and use of mediation in different conflict arenas. This paradigm was based on a well-developed theory of what productive conflict could be seen as. There was actually no specific theory of mediation as a basis for the development of alternative dispute resolution, but rather a theory of conflict that grew out of a bargaining and negotiation framework, often described as a problem-solving orientation to conflict intervention.

This view of conflict is premised on the assumption that conflicts are problems in need of resolution and that problems are defined by competing interests of individuals who are part of the conflict. This view offers a conception of what a problem is, how it should be resolved, and what is needed to address conflict. Specifically, parties need to find a creative solution that they can agree to—solutions to problems they have defined in the process. Although this is a somewhat oversimplified summary of the prevailing model of conflict resolution during the early period of the mediation movement, it captures the crux of it. The agreements that came out of mediations were very much seen as summaries of problem-solving solutions to parties' negotiated issues.

Agreements were encouraged to be reached based upon the common ground that parties could reach as the defined and solved problems.

This underlying ideology of conflict not only shaped the goals of mediation practice but also shaped the type of research that was done on mediation from the beginning of the movement to the mid-1980s. Almost all of the research that was conducted during this period was focused on input/output models of mediation practice. Research looked at input variables (i.e., characteristics of the disputing parties, the characteristics of the mediator, the types of cases) and their relationship to output variables (most frequently agreement rates and the nature of the agreements). This input-output approach to research placed a heavy emphasis on both determining and documenting rates of agreement for mediation programs because that is what the underlying model of practice earmarked as important. This approach to studying mediation was also consistent with the prevailing model of social science research that had started in the late 1940s in social psychology, an approach which was very much an input/output model, used in research areas such a small group decision-making, leadership and attitude change.

The implications of this reliance on a specific approach to researching mediation practice were important for several reasons. Most importantly, it dictated what was studied. The focus was on agreements but also on a certain conception of what agreements should be— agreements had to be centered on items that could easily be addressed by the parties in a problem-solving approach to conflict resolution. The data that these studies generated frequently became a basis for determining whether or not mediation programs would be funded. These studies were conducted and often paid for by courts and other administrative offices so that the value of the mediation program could be established. In the judicial context, this approach to research has continued through the today. Many mediation programs place a heavy emphasis on agreement rates as defined by a problem solving approach to conflict. Funding is often contingent on setting baselines on the percentage of agreements that need to be reached to consider the program as sufficiently cost effective or valuable for the courts.

In divorce mediation in Ireland, mediators who are in training programs must, as part of their final certification process, conduct twelve mediations. They are told that unless they achieve agreements in six of the twelve cases, they will not be certified to practice. This type of training and certification process offers more evidence of how the measurement of success in mediation has been determined by a model of practice that places an emphasis on settlement outcomes—the end result

of negotiated problem-solving.

What was not studied during this period of input-output research was what actually occurred during the session itself. There was little descriptive information about how the documented agreements were produced or what went on among the parties and the mediators. Research was not designed or conducted to address questions such as: How were outcomes constructed during the interaction as the session unfolded? What did the mediators do? What role did the parties have in the way that outcomes were produced? The rhetoric describing the mediator's role—what mediators were assumed to be doing in a session—was clearly articulated. It centered on party self-determination and mediator neutrality. These characterizations have always been part of the professed values of mediation and the assumption was that these values were active influences in shaping the interaction or the mediation process. But in reality, there was almost no research that documented what really went on during the mediation.

Starting in the mid-1980s, there was an ideological shift in the social sciences that occurred at about the same time that some in the mediation field began questioning what mediation practice should be. I will focus first on the shift in ideology as it affected research methodology and then show how it has an interesting connection with the evolution of mediation itself.

At the core of the social science shift was a move away from input-output approaches to studying communicative events. The change was prompted by the challenge posed to researchers to broaden their conception of what is important to study about human behavior and human interaction. Critics of social science research claimed that human beings needed to be seen in a much more complex way. They argued that research would be more insightful and useful if human beings were viewed as actors who interpret messages, interact with each other, continuously create meaning, and respond to interpretations as they communicate with each other.

This was a movement in the social sciences that was called by many different names in many areas of practice and thinking. A "social constructionist view" is one term that is often used to capture the way people construct meanings. Others have referred to this shift as a "rhetorical turn in the social sciences." The new assumption was that there were multiple meanings always at play in any communicative event and if researchers were not tracking those multiple meanings in some way they were missing critical aspects of human interaction.

At first, this vein of qualitative, descriptive research was

controversial as it began to be adopted by isolated groups of researchers in many areas of study across the social sciences. As Kuhn described, it was very much a paradigmatic shift.[7] As a paradigm shift, it held many difficulties for researchers who began working within the new framework. This new paradigm posed a new set of values on which research should be based. As a result, it threatened scholarly egos, and created a range of strong positive and negative reactions.

I had several colleagues who moved from the traditional social psychological view of research into this more meaning-based interpretive approach. They developed and relied on new methodologies such as interaction coding, discourse analysis and conversation analysis in their work. These methods attempted to capture how interaction gets built—what actually occurs between inputs and outputs in many different communicative settings. These new methodologies focused on different aspects of interaction and reported findings in a form that captured the over-time development of interaction, the influence that people had on each other and the ultimate interpretive processes they were relying on in their communication.

These research methodologies caused considerable controversy. Some researchers who employed them in their studies had trouble obtaining tenure when their research studies frequently were not publishable. Journals in some fields would not publish studies using the methods for several years. New journals needed to be created.

One example of the personal and professional challenges this shift posed for researchers might be useful to convey the real difficulties of being at the center of a research paradigm shift. When I was a graduate student, a student colleague of mine was conducting research on the effects and uses of television by families. At the time mass media research was heavily based in input-output models that relied on quantitative methodologies, mostly survey research. My colleague wanted to do his dissertation research using a qualitative, interpretive approach to studying television use in the home. It was an in-depth ethnographic study in which I and two other researchers lived with different families for an extended period to observe the way the family used the television, how they interacted about it, and what meaningful impact the use of it had on their family dynamics. Because this research was based in the emerging, interpretive paradigm of research and was different from the standard input-output approaches to studying effects of television, my colleague had great difficulty finding committee

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7. *See generally* KUHN, *supra* note 1.

members who would serve on his doctoral dissertation committee.

When he did finish the dissertation and his degree, he had difficulty obtaining a faculty position at a first rate university program. Despite these problems early in his academic career, over the years as the new research paradigm became increasingly accepted, he was able to publish his work and he is now seen as a highly significant contributor to research on mass media within this new paradigm.

This evolving research orientation was interesting in the way that it connected to research in the mediation field. Several researchers in the interpersonal communication field who began working within this new paradigm began studying mediation. In several instances this was not because they had a specific interest in mediation, but because the study of mediation offered high interest data that journal editors would be interested in publishing for its readership. Scholars wanted to conduct research to demonstrate the new approach and transcripts of mediation were an excellent and interesting source of data to serve as a publishing vehicle for this work. As a result, there were serendipitous effects for the mediation field as the interest in these new research methods were employed in the study of third party conflict intervention work. A body of research studies grew throughout the 1980s and 1990s that began to poke away at the rhetoric of what mediators thought they did as they interacted with the parties. Some of this research is summarized in Professor Bush and Folger's The Promise of Mediation.[8]

One example was the research conducted by William Donohue.[9] He conducted close analyses of transcripts of actual divorce mediations.[10] Donohue compared mediations where the divorcing couples reached agreements with mediations in which the parties did not reach agreement.[11] He also studied the tapes with an interaction coding method and found that in cases where parties did not reach agreement, it was because the parties wanted to talk about one set of issues (usually the less tangible issues such as perceptions of each other's competence as parents) and the mediators wanted to talk about another set of issues (usually concrete issues such as time commitments).[12] When agreements were not reached, it was not because the parties could not agree. Rather

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8. *See* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).

9. *See generally* WILLIAM A. DONOHUE, COMMUNICATION, MARITAL DISPUTE, AND DIVORCE MEDIATION (1991) (discussing research conducted at Michigan State University in the communication field).

10. *See generally id.*

11. *See generally id.*

12. *See generally id.*

it was because the parties were focusing on one set of issues and the mediators were focusing on another. This research and others studies like it began to provide a picture of mediation practice that was considerably different from what mediators professed or thought practice was actually like. The rhetoric of parties' self-determination was shown to be more a belief about what practice should be then a description of what practice actually was.

Other research also followed similar methods to examine the role of the mediator. This work suggested that mediators were being selectively facilitative in their handling of topics that parties put on the table for discussion.[13] Mediators were found to be selectively facilitating which issues would stay on the table for discussion and which ones would be dropped from further consideration. This practice led, rather than followed, where the parties wanted to go with their dispute. Research was also conducted by Janet Rifkin, Jonathan Millen and Sara Cobb, again from a communication viewpoint, which looked at mediation from a narrative point of view.[14] These researchers suggested that the storytelling that mediators typically encourage the parties to do at the beginning of the session has a significant impact on the way that conflict eventually gets defined in the session.[15] This research established how the first person that tells his story in the usual opening of problem-solving mediation sets the frame for what the conflict will be defined as.[16] The other party has to penetrate through that first story in order to gain the same discursive ground in defining the conflict. This research questioned the entire premise that the mediators control of the process is independent of the "content" of the conflict. Control over process—such as establishing storytelling at the beginning of the session—shapes the substance of the conflict itself. Studies like this that focused (within the new research paradigm) on actual interaction during mediation sessions again revealed that mediators were having considerable influence on disputes despite the espoused values of third party neutrality and party self-determination.

In summary, what I am suggesting is that the change in research focus—from an emphasis on outcomes to a focus on the actual interaction that occurs during a session—started raising serious

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13. *See, e.g.,* David Greatbach & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators,* 23 L. & Soc. R. 613 (1989)

14. See Janet Rifkin et al., *Toward a New Discourse for Mediation; A Critique of Neutrality,* 9 MEDIATION Q. 151 (1991).

15. *See generally id.*

16. *See generally id.*

questions about the assumptions that were operative about practice. This new line of research began to question whether mediation practice was actually unfolding the way people thought. It is somewhat fortunate that this research was developed because researchers chose to study mediation because of the interesting source of data it offered.

As this research was being presented and published in the mediation field, Professor Robert A. Baruch Bush and I began asking the core questions about what mediation should be and what would make mediation practice consistent with the values the field professed. Our effort was aimed at aligning practice with an underlying ideology that would preserve its core values. This ideology about mediation practice stems from the same ideological roots as the ideology that has influenced social science research. The transformative model of practice is a shift away from the problem-solving vision of what practice is to a much more interactive, communication-based view of what conflict is and what productive changes in conflict look like. This shift is like the shift in social science research because it moves to a more interaction-based view, rather than a more global outcome-based view.

In the transformative approach to practice, the emphasis is on shifts in parties' interaction, shifts from relative weakness to greater strength (the empowerment dimension) and movement from self-absorption to openness (the recognition dimension). These are changes within interaction which are identifiable and can be documented in research, if the focus of the study is kept on them. The shifts have long been observed by many mediators who see them unfolding to whatever degree they happen to occur during mediation sessions. The theoretical framework Professor Bush and I drew on to articulate the transformative vision of practice was being articulated by many theorists from various disciplines across the social sciences and humanities. This shift toward a more transformative view of human interaction was itself a paradigmatic shift. We were enacting it within the mediation arena.

It is interesting that when a colleague, Dorothy Della Noce, and I were speaking and training the transformative approach to practice in New Zealand in the spring of 2000, we discovered that a major university in Wellington which had a fairly large graduate program in conflict resolution process was outspokenly against the transformative model. In fact, the book *The Promise of Mediation*[17] was not allowed in the library and students in the program could only write papers about the approach if they were going to be critical of it. In some ways this is quite

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17. *See* BUSH & FOLGER, *supra* note 8.

shocking, but in other ways expected given what Kuhn had written about social resistance to shifts in paradigms. There are political, ideological and identity impacts of the paradigm. A lot is at stake for many scholars and practitioners who are committed to a well-entrenched paradigm.

What has happened is that the research methods that focus on interactions are parallel to the shifts in practice that the transformative model is interested in developing in mediation. The underlying ideological premises of these shifts (in research and mediation practice) are quite closely tied. We have a situation where the research methodology is aligned with the goals and practices that are valued by the transformative model. But research and publishing the studies was not easy at first. Fortunately, the research methodologies have been more widely accepted. There are now entire journals that publish work in these interaction-based approaches. There is a great deal of interest across disciplines in interpretive shifts in interaction and the way they occur.

Given this state of research and practice, the Institute for the Study of Conflict Transformation has become involved in important research on the model. There is a need to document what the interaction looks like in a transformative process and how it is different from mediation that is done in a problem-solving approach. Dorothy DellaNoce is currently conducting her dissertation research on the discourse and rationales of practitioners who practice in a problem solving and transformative models. A great deal of research is needed in this vein to clarify the differences between the approaches and to dispel myths about what transformative practice is and how it is similar or different from standard problem-solving approaches to practice.

Another important set of research questions merge from assessing the impact of transformative practice. Such research looks at what impact transformative practice has on the parties as well as the upstream effects of having participated in a transformative intervention. We know that empowerment and recognition happen in small and large degrees in mediation sessions but these have not been adequately documented in sufficient studies.

The Institute is finding opportunities to do this important work. James Antes, Dorothy Della Noce, and I have recently conducted a study of the transformative mediation program that was designed for the United States Postal Service REDRESS™ mediation program. We attempted to document some of the changes that occur for the parties during these EEOC mediations. Specifically, we were interested in addressing questions such as: How does the communication between the

disputing parties change during these REDRESS™ mediations and what do these changes look like during a session as the interaction unfolds? We also tried to assess the challenges that mediators faced in working with the transformative model.

This research was conducted as an extensive focus group study of forty-five mediators and eleven EEO specialists who had observed mediations as part of the implementation of the program. Each of the mediators who participated in the study had conducted at least two mediations, although many had conducted numerous sessions. The mediators were from three geographical regions in the country. In the focus group discussions, we asked mediators to describe significant moments in their cases when they felt that something important or positive changed in the parties' interactions. As a result, this research is based on narrative accounts from the mediators and the EEOC specialists about cases that they had either mediated or observed. The ideal would have been to have actual transcripts of mediation sessions but confidentiality restrictions prohibited the collection of this type of data. However, mediators and specialists were able to provide numerous, vivid case examples and they were able to provide sufficient detail about the changes they saw in the parties' interaction during mediation sessions. From the focus group data, we were able to compile a total of thirty four separate mediation case summaries. Based on these cases, we were able to identify key themes that the examples demonstrated. I will provide an example of one of the themes that emerged from the study and one of the actual cases that illustrates the theme.

The case examples suggested that parties in the mediations gained new and important understandings about the other party and their actions. This recognition element was very powerfully illustrated in the data—it was at the heart of the changes that occurred for the parties and the conflicts they were embroiled in. The following case illustrates how an important new understanding radically altered the conflict interaction between a manager and an employee.

> A Hispanic employee and other members of their unit were at a meeting with their manager about upcoming changes in their unit. At one point in the meeting the frustrated manager slammed a stack of papers on to the table. The employee immediately got up and left the room. He was then disciplined by the manager for leaving the meeting. The employee went to the doctor complaining that the actions of the manager had hurt his ears and he filed an EEP complaint against the manager.

This is how the case came to mediation.

"The beginning of the mediation was intense. The manager was especially angry and could not understand how slamming papers on the table could cause an injury to why the employee would leave the building. Following a caucus the employee explained a concept which his culture called 'bad wind.' He said it is like a curse on you and your family and when you experience it, you need to get away from it as soon as possible. When the manager slammed papers on the desk he said all of this 'bad wind' hit me. After he left the meeting, he did not feel comfortable explaining his beliefs to the manager or his coworkers; so to save face, he claimed that the manager's actions hurt his ears. This revelation in the mediation led to a tremendous discussion that went on for hours. The manager and the employee apologized and the complaint was withdrawn."

If research from the prior paradigm was conducted on this case that only identified what the issues were going in and what the outcome of the case was (i.e., closure), the study would not have provided a sense of what the conflict was really about. It would not have identified where the interaction between the parties had shifted with respect to an understanding of one key event in the conflict—the slamming of papers on a table. This dispute had the elements of an escalating conflict but the conflict interaction between the parties was transformed during the mediation session because of the new level of understanding that was reached. The transformative process allowed for and facilitated significant recognition to occur—recognition that radically altered the interaction and ultimately the relationship between this manager and employee.

What is important to note about this type of interpretive research is that it, too, is built on its own set of values and ideology. It sets an agenda for what should be studied about mediation and puts a focus on some things about the process but not on others. In short, it is its own paradigm of research with its own lens. The research is, however, consistent with the values that the transformative approach to practice is built on. It can capture what the model of transformative practice values, what it assumes is important about productive conflict intervention.

The larger and perhaps most important point to conclude with is that mediators and the field of conflict intervention at large needs to recognize that there is not one type of mediation. It is not all the same process with the same underlying values. Mediation is practiced from several different ideological stances. I have discussed the two most prominent approaches—problem solving and transformative practice.

Given these different approaches to practice, it should also be recognized that some approaches to research will be more suitable to specific forms of practice because the different research models capture and document what the approach to practice says is important and valuable. Research models carry implicit images of what practice is assumed to be about.

These broad insights are important in understanding the ideology of mediation research. It is crucial that we constantly see the connection between ideological assumptions, research paradigms, and mediation practice as we move ahead with the important work of conflict intervention. Otherwise we may be falsely convinced by our own rhetoric.

Thank you.