Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists

Lisa B. Bingham
Tina Nabatchi

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol18/iss2/4

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
TRANSFORMATIVE MEDIATION IN THE USPS REDRESS™ PROGRAM: OBSERVATIONS OF ADR SPECIALISTS

Tina Nabatchi and Lisa B. Bingham*

I. INTRODUCTION

The transformative model of mediation, although well established in the mediation of family and community disputes, is a relatively new approach to dispute resolution in employment settings.1 In contrast to traditional mediation approaches that focus on problem-solving, transformative mediation seeks to provide opportunities for empowerment and recognition among the disputing parties. To this end, the transformative mediation model calls for the use of non-traditional mediator behaviors and communication techniques. In 1998, the United States Postal Service ("USPS") implemented a nation-wide mediation program called REDRESS™ (Resolve Employment Disputes Reach Equitable Solutions Swiftly) based on this model.

This study takes the form of a process evaluation. It focuses on the question: How well does employment mediation practice in the USPS reflect the transformative model of mediation? Additionally, the paper is a qualitative study on how transformative mediation manifests itself and functions in an employment setting.

This article examines transformative mediation "at work" and thus is valuable to both researchers and practitioners. To this end, the article first briefly summarizes the literature on employment mediation.


* The authors would like to thank the USPS EEO ADR Coordinators and Specialists for their assistance with this research, and members of the REDRESS™ Task Force for their continuing collaboration and support. In particular, the authors thank Cynthia J. Hallberlin, Kimberly Brown, Lisa Sharp, Traci Gann, and Kevin Hagan for their assistance with this work. This study was supported in part by a grant from the William and Flora Hewlett Foundation.
Second, it describes the transformative model of mediation. Third, it explains the design for the USPS mediation program. Fourth, it addresses process evaluation in relation to this study. Finally, it presents the analytic methods used and the results found. We conclude that there is substantial evidence that the USPS is implementing REDRESS using the transformative model as designed.

II. EMPLOYMENT DISPUTE RESOLUTION

Mediation is one of the oldest forms of conflict resolution, and its practice may even predate recorded history. Although the modern roots of mediation in the United States can be found in the context of labor-management grievances, in the narrower field of employment dispute resolution, there is a relatively limited body of research. The traditional and, until recently, dominant approach to mediation is that of problem-solving and the general goal is settlement. Problem-solving and settlement, as primary goals of mediation, have been the subject of most mediation research.

In their review of negotiation and mediation, Peter J. Carnevale and Dean G. Pruitt argue that most research calculates effective mediation as measured by the reaching of agreements. In addition, research agendas highlight the fact that mediators are often driven by the desire to achieve settlement, and that in this pursuit, they are willing and able to exert strong influence over the outcomes of cases. Although in theory, decisions are left to the disputants, Professors Robert A. Bush and Joseph P. Folger note that mediators do in fact play a large role in developing agreements and crafting settlement terms.

---

5. See BUSH & FOLGER, supra note 1, at 33-64.
7. See Carnevale & Pruitt, supra note 6, at 532.
8. See Peter J. D. Carnevale, Strategic Choice in Mediation, 2 NEGOTIATION J. 41, 42 (1986).
9. See BUSH & FOLGER, supra note 1, at 65-77.
the sessions and direct parties toward a mutually acceptable settlement of the immediate dispute by focusing on areas of consensus and avoiding areas of disagreement. Mediators tend to decide what the case is about and label it in a recognizable and manageable way. In doing so, mediators use directive behaviors, techniques and strategies in order to “control the relationship” in terms of “perceptions” and “communications” to produce outcomes (hopefully settlement) for the parties.¹⁰ For example, Carnevale has developed a strategic choice model of mediator tactics, where the outcome of mediation is a function of the strategies employed by the mediator to move parties toward agreement. Among the strategic choices available to mediators are integration (finding a solution of common-ground), pressing (reducing the set of nonagreement alternatives), compensation (increasing the set of agreement alternatives), and inaction (letting the disputants handle the conflict themselves).¹¹ Likewise, Kenneth Kressel’s taxonomy of mediator tactics discusses reflexive tactics (those that set the stage and orient the mediator), substantive tactics (those that deal with dispute issues, such as suggesting settlement) and contextual tactics (those that assist parties in finding solutions) as ways that mediators control the process.¹² Rodney Lim and Peter J. D. Carnevale further developed this taxonomy, suggesting that substantive tactics include pressing and suggestion (coercive tactics to move a party from one position to another) and face saving (retaining a positive image for a party).¹³

As early as 1985, some suggested that mediation could be a preventative measure—one that not only resolves conflicts, but also prevents subsequent ones.¹⁴ However, efforts to understand or assess the long-term impacts of mediation have been limited.

III. TRANSFORMATIVE MEDIATION

The premise of transformative mediation is that “the mediation process contains within it a unique potential for transforming people—engendering moral growth—by helping them wrestle with difficult circumstances and bridge human differences, in the very midst of

¹⁰. See Wall, Jr. & Lynn, supra note 2, at 165.
¹¹. See Carnevale, supra note 8, at 42-47.
Conflict. Its potential as a means of transformation lies in its power to give people control over resolving their own conflicts. The goals of transformative mediation are empowerment and recognition. Empowerment is achieved when parties "grow calmer, clearer, more confident, more organized, and more decisive—and thereby establish or regain a sense of strength and take control of their situation." Recognition is achieved when parties "voluntarily choose to become more open, attentive, sympathetic, and responsive to the situation of the other party, thereby expanding their perspective to include and appreciation for another's situation."

Through its capacity to generate empowerment and recognition for the parties, mediation can help participants learn how to better address future conflict. Empowerment and recognition often result in an agreement. However, this is only a secondary effect. The theory is that experiencing empowerment and recognition will improve each party's ability to approach and resolve both current and future problems. In this respect, Bush and Folger argue that transformative mediation can create opportunities to improve individuals, workplaces, and society. However, it is important to distinguish the transformative model from therapeutic mediation. In the transformative model, the mediators do not provide therapy for the parties. Rather, they help create opportunities for the parties to take control of their own decision-making.

There is preliminary evidence that mediation can have transformative effects at the workplace. For instance, Jonathan Anderson and Lisa Bingham show that traditional, facilitative mediation in the REDRESS™ program contributed to improving supervisors' conflict management skills. Bingham found that this early facilitative REDRESS™ mediation model provided a positive alternative to the traditional adversarial Equal Employment Opportunity ("EEO") complaint process in that participants were highly satisfied with the

References:
15. BUSH & FOLGER, supra note 1, at 2.
16. See id. at 84-95.
17. Id. at 85.
18. Id. at 89.
19. See id. at 81-95.
21. See BUSH & FOLGER, supra note 1, at 95-99.
process and mediators, and generally satisfied with the outcome. This research supports the procedural model of justice, which holds that participant satisfaction with outcomes is a function of opportunities to control and participate in the process, present views, and receive fair treatment from the mediator. Moreover, there is evidence that participants have higher satisfaction with the fairness of the mediation process when an outside neutral is used as opposed to when an inside neutral is used. These opportunities for procedural justice are also embedded in the transformative model.

IV. OVERVIEW OF THE USPS REDRESS™ PROGRAM

With over 800,000 employees, the USPS is one of the world’s largest civilian employers. In recent years, USPS employees have filed over 25,000 informal EEO complaints annually, alleging discrimination under various statutes. In 1997, almost half of the USPS EEO complaints were appealed beyond the informal counseling stage, becoming formal complaints that require a lengthy and costly process of investigation and adjudicative hearings. The USPS launched a significant effort to bring mediation to employees in 1994. REDRESS™ was initially established as a pilot program, providing voluntary, outside neutral, facilitative mediation for any EEO complaint in the Florida


26. See id. at 10.


28. See Employment Dispute Resolution, supra note 27, at 507; Indiana Conflict Resolution Institute supra note 27, at 9.

The USPS began to regard REDRESS™ not only as an opportunity to address employment disputes, but also as an opportunity to improve communication between supervisors and employees. By fostering active listening and direct communication, mediation would build skills for handling conflict, and thereby improve the organization’s culture and workplace climate.

Based on the evaluation results of the USPS Law Department presented in fall 1997, the USPS decided to implement the REDRESS™ program on a nation-wide basis. The national roll-out of REDRESS™ was based on transformative mediation as proposed by Professors Bush and Folger in their book, *The Promise of Mediation*. The USPS identified experienced, outside neutral mediators and provided them with free training in the REDRESS™ model and transformative mediation practice in exchange for an agreement to mediate one case pro bono. Professors Bush and Folger, with Sally Pope and Dorothy Della Noce, designed the training program.

To help ensure that the implementation of REDRESS™ was consistent with the transformative model, the USPS trained a special staff of EEO ADR Specialists (“Specialists” or “ADR Specialists”) and delegated them the job of ensuring that mediation practice conforms to theory. These Specialists monitored the degree to which each mediator applied the transformative model by observing at least the first mediation (and often more) conducted by each mediator on the roster. They use an evaluation tool to screen out those mediators who are unwilling or unable to use transformative practice. When mediators are borderline, the evaluation tool allows the Specialists to give feedback so mediators can better learn the model. They are then given another opportunity to improve their skills before being allowed to mediate again.

---

30. See Bingham, supra note 23, at 20; Employment Dispute Resolution, supra note 27, at 515-19; Indiana Conflict Resolution Institute supra note 27, at 15-18.
32. See Bingham et al., supra note 25, at 5; See Employment Dispute Resolution, supra note 27, at 521-22; Indiana Conflict Resolution Institute supra note 27, at 21-24.
33. See Employment Dispute Resolution, supra note 27, at 515-16; Indiana Conflict Resolution Institute supra note 27, at 15-19.
34. See BUSH & FOLGER, supra note 1.
36. Interview with Cynthia J. Hallberlin, supra note 35.
37. Id.
38. Id.
opportunity to mediate a session. However, many mediators are screened out of the program after the observation process. In fiscal year 1999, the Specialists observed and screened approximately 3,000 mediators, reducing the national roster to about 1,500 mediators. More that 14,000 REDRESSTM mediations have taken place since the national roll-out of the program, making REDRESSTM the largest employment mediation program in the world. Other research shows that implementation of the program correlates with a drop in formal EEO complaint filings at the USPS.

V. PROCESS EVALUATION

This study takes the form of a process evaluation to answer the question of whether REDRESSTM is implemented in accordance with the transformative model. Process studies are “evaluation activities related to identification of targets and assessment of a project’s conformity to its design.” Process evaluation specifically is the “use of empirical data to assess the delivery of programs” to verify “what the program is, and whether or not it is delivered as intended to the targeted recipients.” In other words, process evaluation is a conscious and purposeful assessment of a program to determine if its reality is compatible with its design. The reason for process evaluation is that “[e]xamination of program operations and results may reveal that program reality is far from the program design envisioned by those at higher management.”

To determine whether REDRESSTM was implemented as designed, it is important to verify that the Specialists understand and enforce the use of the transformative model. Accordingly, the research question is: Do the ADR Specialists understand, apply, and use the transformative model of mediation in their observations of mediator behaviors?

The logic is that if Specialists are enforcing the use of the

39. Id.
41. Id.
transformative model, then their observations of mediators should reflect an understanding of transformative theory. If ADR Specialists understand and enforce the transformative model, then this is some evidence that implementation of REDRESS™ follows design. To begin to answer these questions, we turn to the observations of USPS EEO ADR Specialists.

A. Methods

The Specialists were surveyed with a series of open-ended questions asking for their observations of specific mediator behaviors. The questions were designed for three purposes. First, they were designed to see if the Specialists would consistently connect mediator behaviors with transformative theory, demonstrating an understanding of the model. Second, they were designed to elicit evidence on whether Specialists are enforcing the model. Finally, they were designed to provide a preliminary look at how mediators generate empowerment and recognition between the parties, and how they use the transformative model in general.

The electronic survey was emailed to seventy-two Dispute Resolution Specialists in the USPS. At that time in summer 1999, this was the entire population of USPS ADR Specialists. The survey was preceded by comments describing the purpose of the survey and how the information would be used. It asked eight open-ended questions concerning the Specialists' observations of mediators in the REDRESS™ Program. Although the Specialists' job involves reporting observations of the mediations to EEO ADR Coordinators, for purposes of this survey, researchers garnered confidential responses. Researchers

47. E-mail survey from Indiana Conflict Resolution Institute to USPS Specialists (Summer 1999) (on file with researchers at Indiana Conflict Resolution Institute).
asked that Specialists not include any information about the mediators, participants, or others whom they observed and no responses were traceable to the Specialists themselves.

The Specialists emailed or faxed their responses to the Indiana Conflict Resolution Institute ("ICRI"). The responses were stored in an electronic database. To maximize response rates, participants were contacted three times with contact information supplied by the USPS, which sent communications to participants asking for assistance with the research. The first contact was via electronic mail. Several weeks later, those Specialists who had not yet responded were faxed a copy of the survey. The third and final contact was also by email. Of the seventy-two participants contacted, forty-two responded, yielding a response rate of fifty-eight percent. It must be kept in mind that this voluntary survey was conducted during a period when this relatively small handful of people was implementing a nation-wide employment mediation program, which turned out to be the largest in the world, under very tight time constraints. In the context of their workload, this response rate is good.

The survey yielded rich, qualitative data about the Specialists’ perceptions and understandings of the use of the transformative model in REDRESS™. This allowed for a general comparison between the theoretical model of transformative mediation and how it is actually understood, viewed, and practiced in the Postal Service. Qualitative research is “research that produces findings not arrived at by means of statistical procedures or other means of quantification.” The specific method of qualitative research used in this analysis was grounded theory. “A grounded theory is one that is inductively derived from the study of the phenomenon it represents.” In this approach, “data collection, analysis, and theory stand in reciprocal relationship with each other” and what is relevant to the area of study “is allowed to emerge.”

During the initial review of the Specialists’ responses, researchers wrote extensive memos to help inform the process of coding. In qualitative analysis, memos refer to written records other than field notes, transcription, and coding, that are done in relation to the research.

48. The Specialists’ responses are on file with the authors, and maintained as confidential documents, pursuant to The Human Subjects Committee research rules at Indiana University. Response from USPS Specialists to Indiana Conflict Resolution Institute (Summer/Fall 1999) (on file with the authors).


50. Id. at 23.

51. Id.
with the intent of helping to formulate theory. Memos represent a contextualizing strategy employed to analyze data. After this stage of analysis was complete, researchers turned to the process of coding the survey responses.

Codes are "tags or labels for assigning units of meaning to the descriptive or inferential information compiled during a study." The process of coding is essentially the process of analysis. "Coding represents the operations by which data are broken down, conceptualized, and put back together in new ways. It is the central process by which theories are built from [qualitative] data." The goal in coding is to "fracture" the data and rearrange it into categories that facilitate the comparison of data within and between these categories and that aid in the development of theoretical concepts.

To provide an operational framework within which to code and analyze the data, we turned to Folger and Bush’s article on the ten hallmarks of transformative mediation practice. Each of the hallmarks reflects, in part, the work of the mediator using transformative practice and what attitudes or mindsets the mediator must carry into the mediation. These hallmarks are reflected below:

1. "The opening statement says it all": Describing the mediator’s role and objectives in terms based on empowerment and recognition.
2. "It’s ultimately the parties choice": Leaving responsibility for outcomes with the parties.
3. "The parties know best": Consciously refusing to be judgmental about the parties’ views and decisions.
4. "The parties have what it takes": Taking an optimistic view of parties’ competence and motives.
5. "There are facts in feelings": Allowing and being responsive to parties’ expression of emotions.
6. "Clarity emerges from confusion": Allowing for and exploring parties’ uncertainty.
7. "The action is ‘in the room’": Remaining focused on the here and

53. MILES & HUBERMAN, supra note 52, at 56.
54. STRAUSS & CORBIN, supra note 49, at 57.
55. MAXWELL, supra note 52, at 78-79 (internal citation omitted).
57. See id. at 266.
now of the conflict interaction.

8. “Discussing the past has value to the present”: Being responsive
to parties’ statements about past events.

9. “Conflict can be a long-term affair”: Viewing an intervention as
one point in a larger sequence of conflict interaction.

10. “Small steps count”: Feeling a sense of success when
empowerment and recognition occur, even in small degrees.\(^{58}\)

We analyzed the responses and designated each of the categories of
responses as positively or negatively reflecting each of the hallmarks.
We determined whether or not the observations were consistent or
inconsistent with the transformative model. The coded responses to each
question were then entered into a database. For example, if the Specialist
said: “the mediator asks the parties how they would like to proceed,” the
response was coded as a positive hallmark two (responsibility is left with
the parties) and as being consistent with the model. If the Specialist said
“the mediator drafted settlement language,” the response was coded as a
negative hallmark two (responsibility is taken away from the parties) and
as being inconsistent with the model. A content analysis of the questions
was performed and the frequency of the reflected hallmarks was
analyzed. With this procedure, we were able to see how the Specialists’
observations of USPS mediation practice related to the tenets of
transformative mediation theory.

B. Results

It should be noted that although the responses came from what
could be considered an expert or trained group, none of the questions led
the participants toward answering in terms of the hallmarks of
transformative mediation. For purposes of clarity, analysis of the data is
broken down into four sections. First, empowerment is explored by
combining the responses to the two relevant questions (question one—
what fostered, and question three—what interfered with—
empowerment). Likewise, the second portion of analysis combines the
two questions about recognition (question two—what fostered and
question four—what interfered with—recognition). In the third section,
responses about directive approaches to mediation are explored
(question five) and in the final section, responses about evaluative
approaches (question six) are explored. Responses about the strengths
and weaknesses (question seven) and suggested improvements (question

\(^{58}\) See id. at 266-76.
eight) for REDRESS™ are reserved for future analysis.

C. Empowerment

Bush and Folger define empowerment as enabling the parties to define their own issues and to seek their own solutions and state that it is achieved “when disputing parties experience a strengthened awareness of their own self-worth and their own ability to deal with whatever difficulties they face, regardless of external constraints.” 59 When asked what mediators did to show empowerment of the parties, the responses reflected each hallmark except hallmark eight (“discussing the past has value to the present”). 60 When asked what interfered with empowerment, the negative or the reverse of all of the hallmarks except hallmark ten (“small steps count” or feeling a sense of success from instances of empowerment or recognition) 61 was reported. All responses to both questions were consistent with the transformative model. Table One below demonstrates the frequency and percentage of responses to the questions about empowerment as related to each of the hallmarks.

59. BUSH & FOLGER, supra note 1, at 84.
60. Folger & Bush, supra note 56, at 273.
61. Id. at 275.
### Table One: Specialists’ Observations of Mediator Conduct Regarding Empowerment (n=42)

<table>
<thead>
<tr>
<th>Mediator Conduct in Relation to the Hallmarks of Transformative Mediation</th>
<th>Mediator Conduct Observed to Foster Empowerment</th>
<th>Mediator Conduct Observed to Interfere with Empowerment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Consistent</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>1) Describing mediator’s role in terms of empowerment and recognition</td>
<td>27 (64%)</td>
<td>8 (19%)</td>
</tr>
<tr>
<td>2) Leaving responsibility for outcomes with the parties</td>
<td>23 (55%)</td>
<td>24 (57%)</td>
</tr>
<tr>
<td>3) Not being judgmental about parties’ views, options, and choices</td>
<td>4 (10%)</td>
<td>14 (33%)</td>
</tr>
<tr>
<td>4) Being optimistic about parties’ competence and motives</td>
<td>7 (17%)</td>
<td>3 (7%)</td>
</tr>
<tr>
<td>5) Allowing and being responsive to expressions of emotion</td>
<td>4 (10%)</td>
<td>2 (5%)</td>
</tr>
<tr>
<td>6) Allow parties to explore their uncertainty</td>
<td>4 (10%)</td>
<td>4 (10%)</td>
</tr>
<tr>
<td>7) Remaining focused on the here and now of the conflict interaction</td>
<td>6 (14%)</td>
<td>17 (40%)</td>
</tr>
<tr>
<td>8) Being responsive to parties’ statements about past events</td>
<td>0</td>
<td>2 (5%)</td>
</tr>
<tr>
<td>9) Viewing intervention as one step in the conflict interaction</td>
<td>2 (5%)</td>
<td>1 (2%)</td>
</tr>
<tr>
<td>10) Feeling success when empowerment and recognition occur, even in small degrees</td>
<td>2 (5%)</td>
<td>0</td>
</tr>
</tbody>
</table>

When asked what mediators did to show empowerment (question one), 64% of the respondents (n=27) observed something that reflected...
hallmark one ("[t]he opening statement says it all"). These were primarily observations of the mediator's description of the process to the parties. Most of these observations reflected the mediators "[a]cknowledging the party's right to do with the session what they want and when they want, including ending it." For example, one Specialist remarked "[t]he mediator tells the parties that the mediation belongs to them and any decisions (settlements, ground rules, etc.) will be determined by the parties." Another example is that "[h]e/she introduced the objectives and goals of the process to all parties, emphasizing it is not a court proceeding, that he/she is not the judge, and that he/she is not there to decide what should or should not be done."

Similarly, 55% (n=23) of respondents observed behaviors reflecting hallmark two ("[I]t's ultimately the parties' choice" or letting the parties have responsibility for the outcomes). The essence of these observations is that "[w]hen the mediator 'gives' answers, they disempower participants; when they encourage parties to answer questions for themselves, particularly when they do so by increasing one another's awareness of the other's perspective through reflection & summary, this is empowering." For example, one Specialist noted that:

I have observed mediators help the parties feel relaxed in communicating to each other and then sit back and allow the parties to engage in conversation (without the assistance of the mediator). I have observed mediators let the parties seek their own areas of agreement for a potential settlement agreement.

Another observed that "[w]hen the mediator says, '[i]f a settlement is reached, it must be what both parties, here at the mediation table are in agreement to." One Specialist's observation succinctly states that "[v]irtually every decision the mediator leaves to the parties is with the intention of increasing their sense of empowerment."

When asked what mediators did that interfered with empowerment (question three), 57% (n=24) gave an answer that negatively reflected hallmark two ("[I]t's ultimately the parties' choice") in that they observed the mediator take responsibility for outcomes away from the parties. For example, Specialists stated that a mediator interfered with empowerment when he or she "focused and/or fixed on settlement, to the point of forgetting the party's needs." Several other behaviors were

62. Id. at 266.
63. See id. at 267.
64. See id.
noted to interfere with empowerment. Among them were: “Telling one participant that they must do some particular action;” “Not letting the idea come from the participant, but from the mediator;” and “When they tell the parties they must be kind and courteous to one another. They must listen when the other speaks. That they must speak to the other party.” One Specialist gave an especially interesting account of this:

A mediator was attempting to help the parties get clear on terms of settlement when he let his own values and judgments taint the session. Essentially, the parties had hammered out terms with which both were satisfied. The mediator, however, suggested they consider an additional term concerning what to do in the event the counselee’s medical status changed. When they resisted, he repeated his belief that they should reconsider, stating: ‘I really want to get something in here about this...’ Although he meant well, he meant well only within the context of what he determined to be important to the parties, despite both telling him that they had no interest in his suggestion.

Another 40% (n=17) of the Specialists observed mediator behaviors that negatively reflected hallmark seven (“[t]he action ‘is in the room’” or remaining focused on the here and now of the conflict interaction).\(^6\)\(^5\) In other words, the mediators were not focused on the here and now. The responses can, for the most part, be separated into two categories. The first pertains to mediator interruptions. For example, Specialists noted that “interrupting meaningful discussion” and “interrupting the flow of conversation” reduces empowerment of the parties. Similarly, one Specialist said “I have observed that on occasion when the parties become engaged in conversation, although the parties are progressing in both empowerment and recognition, the mediator will at times interject. It appears to be an inherent part of this process, based upon the human need to ‘do something’ or ‘facilitate.’”

The second category of responses related to hallmark seven (“action is ‘in the room’”)\(^6\) concerns about caucusing during mediation. The Specialists indicated that caucusing takes the action out of the room by relocating the discussion of the conflict. “Over utilization of caucus and keeping the parties in caucus too long” and “[s]huttling mediation by use of caucus” was observed by the Specialists to interfere with empowerment. Also mentioned several times, but less clearly stated was that when the mediator misses out on, or fails to recognize specific

\(^{65}\) See Folger & Bush, supra note 56, at 273.

\(^{66}\) See id.
statements that could embody an opportunity for empowerment and recognition, this interfered with empowerment.

Finally, 33% (n=14) of the Specialists observed behaviors that interfered with empowerment as related to hallmark three ("[t]he parties know best"). In other words, the mediators appeared to be judgmental about the parties' views, options and choices. For example, it was observed that when a mediator gives deference to one party, empowerment is reduced. "Sometimes I get the feeling the mediator may appear sympathetic to the employee's situation or management's depending on whose opinion they are rephrasing or trying to get across." Another observed that the mediator "used words which implied more and demonstrated a bias...taking away their empowerment with the perception of taking sides." Several Specialists mentioned that when mediators interject personal opinions such as "I think," they interfere with empowerment. Others suggested that empowerment is interfered with when mediators judge the views of participants, for example by saying, "[t]his is not a valid EEO complaint." One Specialist recounted an interesting example of this:

A mediator was well into a session when she asked a manager 'How do you think this is going to look to a judge at EEO?' in reference to the matters that brought them to the table. It clearly showed her opinion as one that the manager was 'wrong' and defenseless (and it mattered not that he was, only that she expressed her opinion on it).

D. Recognition

Recognition means enabling the parties to see and understand the other person's point of view—to understand how they define the problem and why they seek the solution that they do. It is achieved "when given some degree of empowerment, disputing parties experience an expanded willingness to acknowledge and be responsive to other parties' situations and common human qualities." Table Two shows the frequency and percentage of responses to questions two and four about recognition as related to each of the hallmarks. When asked what mediators did to foster recognition among the parties, the responses reflected all of the hallmarks except for

67. See id. at 268.
68. See BUSH & FOLGER, supra note 1, at 89-94.
69. Id. at 84-85.
hallmark ten ("[s]mall steps count"); when asked what interfered with recognition, the negative or the reverse of all ten hallmarks was reported. These responses are consistent with the transformative model.

One interesting variation concerns hallmark two ("[i]lt's ultimately the parties' choice"). In response to this question, two Specialists suggested that using hallmark two as set forth by Bush and Folger interfered with recognition; however these two responses are not necessarily inconsistent with the model. This distinction is noted in Table Two.

**Table Two: Specialists' Observations of Mediator Conduct Regarding Recognition (n=42)**

<table>
<thead>
<tr>
<th>Mediator Conduct in Relation to the Hallmarks of Transformative Mediation</th>
<th>Mediator Conduct Observed to Foster Recognition</th>
<th>Mediator Conduct Observed to Interfere with Recognition</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Consistent</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>1) Describing mediator's role in terms of empowerment and recognition</td>
<td>3 (7%)</td>
<td>0</td>
</tr>
<tr>
<td>2) Leaving responsibility for outcomes with the parties</td>
<td>27 (64%)</td>
<td>0</td>
</tr>
<tr>
<td>3) Not being judgmental about parties' views, options, and choices</td>
<td>5 (12%)</td>
<td>0</td>
</tr>
<tr>
<td>4) Being optimistic about parties' competence and motives</td>
<td>2 (5%)</td>
<td>0</td>
</tr>
<tr>
<td>5) Allowing and being responsive to expressions of emotion</td>
<td>11 (26%)</td>
<td>0</td>
</tr>
<tr>
<td>6) Allowing parties to explore their uncertainty</td>
<td>3 (7%)</td>
<td>0</td>
</tr>
<tr>
<td>7) Remaining focused on the here and now of the conflict interaction</td>
<td>1 (2%)</td>
<td>0</td>
</tr>
<tr>
<td>8) Being responsive to parties' statements about past events</td>
<td>2 (5%)</td>
<td>0</td>
</tr>
<tr>
<td>9) Viewing intervention as one step in the conflict interaction</td>
<td>2 (5%)</td>
<td>0</td>
</tr>
<tr>
<td>10) Feeling success when empowerment and recognition occur, even in small degrees</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

In response to the question about what shows recognition, 64%...
(n=27) of the Specialists responded with observations that reflected hallmark two ("the parties' choice"). These responses were largely about asking clarifying questions or prompting parties to consider the implications and questions that follow from a statement. For example, the Specialists noted that "paraphrasing by the mediator validates and gives recognition to both parties" and that "paraphrased statements" can help "a disputant shift [to] see the other party's conduct in a more favorable light." One Specialist remarked that "at times one of the participants may not get the point the other participant is trying to make, and the mediator jumps in, paraphrases, summarizes, and sometimes just repeats it and then asks 'isn't this what you just said?' or 'did I understand right, that this is what you said?' Many times, there is instant recognition from the other party."

Another Specialist elaborated on how slowing down the conversation to pick up on a specific statement can help promote recognition: "Many times there is a statement made by one party which significantly affects the outcome of the mediation. Some mediators will recognize a window of opportunity and derive the most benefit from it." Another Specialist told a story that also reflected this phenomenon:

During the mediation the issue of a prior investigation arose. The manager mentioned that he had not initiated the investigation, and that it was initiated at a higher level. The mediator then turned to the complainant, and asked 'Is this new information?' The complainant stated yes. He/she state[d] that all along he/she thought the manager had initiated the investigation, and had no idea that the manager was not the person that requested the investigation. Clarification of this incident changed the overall perspective of the party.

Still another noted that "[w]hen the mediator surfaced a point that was made by one of the parties about the other party's good job performance . . . [it] allowed both parties to open up, acknowledge, and be more responsive to the other's point of view."

Hallmark five ("[t]here are facts in feelings" or being responsive to emotions) also received considerably more attention in this question than in the others. Of the Specialists, 26% (n=11) said something to the effect that "acknowledging emotions," "not discouraging tears or other appropriate shows of emotion" and "making acknowledging comments when emotional statements are made" showed recognition. It was noted

72. See id.
73. See id. at 271.
that when a mediator asks either "[h]ow did that specific action make you feel? How do you think it made him/her feel? What would you have done under similar situations?" he or she promotes recognition. Another Specialist remarked that "[r]estating the comments of the parties, particularly when remarks seem to reveal great emotion with the party speaking" promotes recognition.

Some other interesting responses should be also noted. One Specialist said that "[b]y allowing the parties to tell their story, the parties especially the complainants, become very comfortable in the process" thereby promoting recognition. Finally, one Specialist said "I think this [recognition] occurs most often during the caucus where they get to the heart of what is at issue."

Analysis of the responses to the question "what interferes with recognition" is a bit more difficult, as most of the responses encompassed features of several different hallmarks. Perhaps this is because, as one Specialist observed "[i]f you can't get past empowerment, you most likely cannot spawn recognition." However, several general themes did emerge.

As noted earlier, one of the most interesting areas of discussion is that concerning hallmark two ("the parties' choice"). Of the Specialists, 50% (n=21) observed mediator behaviors that negatively reflected hallmark two, or behaviors that took responsibility for outcomes away from the parties. For example, many said that not summarizing and providing clarifying remarks resulted in missing opportunities to foster recognition. Some said that mediators failed to "slow down the moment" when a comment is made that has the potential to foster recognition. However, whereas missing opportunities to pick up on a participant's comments to promote recognition was the primary theme of responses, 5% of the Specialists (n=2) noted that even employing hallmark two as it proposed could interfere with recognition. For example, one Specialist said "[w]hen one party 'recognizes' another, then the mediator turns to the other party and says 'Is there something you would like to share with so & so about their good qualities?' But, the other party does not want to, (or does not have anything good to say about that individual). It makes the first person feel worse. [This effort] backfired."

Another response is worth noting despite its length:

An example I observed is after about an hour and a half, the mediator engages like so. . . . "So, I hear you say that the way 'John' spoke to

74. See id. at 267.
you made you upset, because you felt he was talking down to you, and John, I hear you to be saying that you didn’t mean to talk down to ‘Jill’, you just felt she was ignoring you...” So Jill, in this case, never has a chance to see if John was going to recognize her perspective about being spoken down to, because the mediator jumps right from that to [reflection and summary in regard] to what John said in response. This is a common problem that mediators must come to grips with. Simply stated, just because the parties are talking without arguing does NOT mean they are gaining any better perspective on the matter, or that they are gaining any more of an understanding of their ability to resolve the dispute by themselves.

These two Specialists make the valid point that calling attention to opportunities for empowerment and recognition at the wrong moments can actually hinder progress.

There are some other interesting responses to the question of what interferes with recognition; 38% (n=16) of the Specialist responses negatively reflected hallmark seven (“[t]he action is ‘in the room’”). In other words, they observed that not remaining focused on the here and now of the interaction interfered with recognition. For example “directing the conversation to another topic,” “referring/directing questions to non-involved representatives when the two parties were in an exchange” and “stopping conversation when they (the mediator) fails to understand exchange/terms/operational language” impeded recognition. Also, the use of “caucusing to shuttling mediation” was said to interfere with recognition.

Hallmark three (“[t]he parties know best”) was also negatively reflected by 33% (n=14) of the Specialists (i.e., several of the Specialists remarked that not remaining neutral, showing deference, or giving more attention to one party, interfered with recognition). For example, “framing most of the complainant’s statements, but only a few of managements,” “allowing one side or the other to do all of their talking to the mediator instead of each other,” and “imposing their [the mediator’s] own ideas” were all said to interfere with recognition. Another negative reflection of hallmark three is that “[w]hen a complainant made an admittedly outrageous demand, the mediator laughed and said, ‘you’ve got to be kidding!’” Finally, one Specialist observed that a “[m]ediator commented on an exchange by the parties, as ‘a nice moment.’ [The parties] felt uncomfortable because it was

75. See Folger & Bush, supra note 56, at 273.
76. See id. at 268.
"blessed' when they were being nice to each other, with the unspoken message that the not so nice exchanges did not have value. Also it didn’t allow [the] parties to do their own recognition or to define what would be recognized.”

Hallmark five (“[t]here are facts in feelings”)77 also received a lot of attention; 14% (n=6) of the Specialists observed behaviors that negatively reflected this hallmark. In other words, the mediators did not acknowledge the parties’ emotions. Consider the following observations: “One party was extremely angry. The mediator, in order to diffuse the high emotion I think, shifted conversation to asking the parties to talk about how they could interact more peacefully in the future. This ignored the party’s strong emotion... shifted the conversation to the mediator’s agenda and did not allow the other party to respond to the emotion.”

Mediators inhibit recognition “by appearing to be disturbed by tears and shows of emotion. I had one mediator who stopped mediation and sent complainant to the bathroom to ‘compose’ himself when he saw tears.” Another Specialist said “I have observed a mediator fail to acknowledge the emotions of the moment or acknowledge area(s) of agreement. During one mediation a mediator overlooked the disputant’s tears and sounds of emotion.”

Finally, 14% (n=6) of the Specialists observed behaviors that did not allow the exploration of uncertainty and therefore negatively reflected hallmark six (“[c]larity emerges from confusion”).78 They observed that telling participants: “We have been through this already, and I don’t see any agreement on this issue, let’s move on to another subject,” “we aren’t talking about that right now, we are talking about this,” and “you are going in circles and keep going over that. Is there anything else?” did not allow the parties to sort through their confusion regarding the conflict, and therefore interfered with recognition.

E. Directive Approaches

The directive approach to mediation “translates into a kind of four-step version of practice, in which the mediator ‘hears the case,’ diagnoses the problem, formulates what he or she sees as a good solution, and tries to persuade the parties to accept this solution.”79

---

77. See id. at 271.
78. See id. at 272.
79. BUSH & FOLGER, supra note 1, at 69.
Directive approaches to mediation are not compatible with the transformative model, and all but one of the Specialists’ observations negatively reflected the hallmarks. Therefore, Specialists’ responses were consistent with the model. Table Three shows the frequency and percentage of responses to the question about directive approaches as related to the hallmarks.

**Table Three: Specialists’ Observations of Directive & Evaluative Approaches** (n=42)

<table>
<thead>
<tr>
<th>Mediator Conduct in Relation to the Hallmarks of Transformative Mediation</th>
<th>Directive Approaches</th>
<th>Evaluative Approaches</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Inconsistent</td>
<td>Consistent</td>
</tr>
<tr>
<td>1) Describing mediator's role in terms of empowerment and recognition</td>
<td>1 (2%)</td>
<td>-7 (17%)</td>
</tr>
<tr>
<td>2) Leaving responsibility for outcomes with the parties</td>
<td>0</td>
<td>-30 (71%)</td>
</tr>
<tr>
<td>3) Not being judgmental about parties' views, options, and choices</td>
<td>0</td>
<td>-17 (40%)</td>
</tr>
<tr>
<td>4) Being optimistic about parties' competence and motives</td>
<td>0</td>
<td>-5 (12%)</td>
</tr>
<tr>
<td>5) Allowing and being responsive to expressions of emotion</td>
<td>0</td>
<td>-2 (5%)</td>
</tr>
<tr>
<td>6) Allow parties to explore their uncertainty</td>
<td>0</td>
<td>-6 (14%)</td>
</tr>
<tr>
<td>7) Remaining focused on the here and now of the conflict interaction</td>
<td>0</td>
<td>-13 (31%)</td>
</tr>
<tr>
<td>8) Being responsive to parties' statements about past events</td>
<td>0</td>
<td>-1 (2%)</td>
</tr>
<tr>
<td>9) Viewing intervention as one step in the conflict interaction</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>10) Feeling success when empowerment and recognition occur, even in small degrees</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

80. For a complete analysis of the ten hallmarks of transformative and their relation to Specialists’ observations, see *infra* Table Three at 420.
The majority of Specialist responses, 71% (n=30), to the question what shows a directive approach concerned a negative reflection of hallmark two ("the parties' choice"). In most cases, the Specialists observed directive behaviors that took responsibility and control away from the parties. Most of the responses regarded settlement. For example, "insisting on settlement," "suggesting specific options for resolve," "suggesting how parties can improve their settlement" and "pushing parties toward a settlement the parties don't want" were common responses. Likewise, another Specialist said that a directive approach to mediation occurred when the mediator "tells the parties to draft the settlement language—actually hands them the settlement sheets and sits back." Another reported: "I had a mediator who on his pro bono case sent the parties, including me, out of the room while he composed a settlement agreement that he thought would be good for the parties."

Other Specialists observed behaviors that negatively reflected hallmark two in regard to controlling communications. For example, Specialists reported that "trying to force a party to respond to a question," "badgering the witness" and "telling the parties that representatives cannot talk" were signs of a directive approach. One Specialist said that a directive approach occurs "when the mediator doesn't let the parties talk openly to one another and tries to talk for them." Another said "[a]fter parties speak, mediator summarizes and acknowledges common ground. This feels like peacemaking and doesn't allow parties to draw their own conclusions." Finally, another remarked "[i]n essence, when mediators take away the opportunity for participants to decide for themselves any matter(s) concerning the mediation, they are directing how the session proceeds."

A negative reflection of hallmark three ("[t]he parties know best") (i.e., being judgmental about the parties), was also observed by 40% (n=17) of the Specialists. In the majority of these, Specialists observed mediators expressing personal opinions about the case. For example, "[t]elling the parties they won't get anywhere in court with the issue at hand" or "you don't have a case you can win" were considered directive. "Using the word 'I'" and "offering opinions based on the mediation of a similar issue at an earlier date" were also seen as directive.

About 31% (n=13) of the Specialists observed behaviors that negatively reflected hallmark seven ("[t]he action is 'in the room'").

---

81. See Folger & Bush, supra note 56, at 267.
82. See id. at 268.
83. See id. at 273.
The mediators did not focus on the here and now of the conflict interaction. These observations came primarily in two forms. The first centered on cases of mediator interruption. For example “[s]teering the parties in another direction when the parties are trying to discuss their differences and dialogue is flowing smoothly,” “asking questions that move parties away from topics they were discussing,” and saying things such as “just hold that thought until we finish discussing this other issue” were regarded as directive. A second form centered on caucusing. For example, mediators were considered to be directive “when they direct the parties into caucus” or “caucus without parties’ permission.”

About 17% of the Specialists (n=7) observed behaviors that negatively reflected hallmark one (“[t]he opening statement says it all”). These observations suggested that a directive approach was used when the mediator failed to establish ground rules in terms of empowerment and recognition and instead determined for the parties how the process would proceed. For example “[s]tarting from the opening and outlining the process step by step, rather than getting feedback for options on how the parties would like to proceed” and “[m]ediators that lay out specific ground rules prior to a mediation rather than letting the parties decide on their own ground rules” were seen as directive. However, one Specialist felt that the approach suggested by hallmark one actually constituted a directive approach and said that mediators were being directive when they said “[y]ou do not have to prove anything to me about your case. I am not here to judge who is right and who is wrong. I am here as a mediator to help you both clearly understand the issues and hopefully help you both come to an agreement in regards to this issue.”

Some 14% (n=6) of the Specialists’ observations of directive behaviors negatively reflected hallmark six (“[c]larity emerges from confusion”), not allowing for the exploration of uncertainty. One Specialist stated that “I have observed a tendency to ask pointed questions which transcend an effort to give clarity and enter the realm of making the parties address matters the mediator clearly believes are important for them to address.”

Only one Specialist’s observations negatively reflected hallmark eight (“[d]iscussing the past has value to the present”), noting that in one case a “complainant continually brought up past issues. [The]
mediator kept making the comment of needing to deal with the "now" issues—also in paraphrasing the mediator would omit and ignore anything that has to do with past issues and reiterate the issue that brought about the mediation." None of the Specialists' observations reflected hallmarks nine ("[c]onflict can be a long-term affair") or ten ("[s]mall steps count").

Finally, although only three Specialists said they had not observed directive approaches, the following response indicates there may have been some limited confusion about the meaning of this term:

I have no examples to give you of a directive approach enacted by any of the mediators that I have observed. In fact, I believe that in some instances of mediations I have observed, a flavor of a directive approach is warranted. For example: When an employee enters a room with a chronology of his postal life history, proceeds and is allowed to read and address them all as a lead into the current EEO problem. His postal history was supervised by a number of supervisory personnel other than the management official at the table. This was time consuming and costly in as much as what he feels was done to him prior to the supervisory tenure of his current supervisor cannot be addressed by him or her.

This Specialist is suggesting that the employee not be allowed to recount his postal history when, in fact, the model clearly encourages this behavior.

The great majority of the observations that negatively reflect the hallmarks of transformative mediation are consistent with the model. Directive conduct is generally contradictory to the transformative model; the consistency between the Specialists' responses and the hallmarks demonstrates that the Specialists understand the model.

F. Evaluative Approaches

In this last section of analysis, we look at what mediator behaviors Specialists observed that they felt showed an evaluative approach to the mediation. Table 3 shows the frequency and percentage of responses as correlated to the hallmarks. The majority of Specialist responses to this question (40%, n=17) negatively reflected hallmark three ("[t]he parties know best"). The Specialists described mediators as being evaluative

87. See id. at 273-74.
88. See id. at 268.
when they exercised judgment about the case or about the parties' options, views, or decisions. Some Specialists noted that giving personal experiences or analogies was evaluative. For instance, one Specialist commented “[b]ecause one party was in the military and a Marine, which the mediator was also at one time, the mediator evaluated or judged the former Marine to have certain values and mores.” Another noted that “[a] mediator described a work situation as stressful and hostile when the two powerful words never exited the mouth of the counselee.” Most of the observations, however, referred directly to settlement issues. For example, one Specialist observed a mediator tell the parties “[i]t sounds like a miscommunication problem . . . rather than offering it to the parties to evaluate for themselves.” Another Specialist said he had seen a mediator “eluding [sic] to the fact that he could tell if a case was a winner.” Another said “[a] mediator listened to a counselee’s issues and thought for a moment. Then the mediator told the counselee that they didn’t have a valid EEO complaint, and didn’t understand why they were here.”

Several of these comments also negatively reflected hallmark two (“the parties choice”).

90. See id. at 267.

91. See Folger & Bush, supra note 56, at 275.
VI. DISCUSSION

The Specialists seem to understand what engenders empowerment and recognition. They consistently described mediator comments and behaviors that accurately reflect the ten hallmarks of transformative mediation.92 Although Specialists give a number of detailed stories of actions that violate the hallmarks, they use their observations to screen mediators and determine assignments to future cases. As noted earlier, the Specialists observe at least the first mediation performed by each mediator after training, and based on their observations, determine whether or not the mediators will be used again in the program.

There are hundreds of USPS REDRESS™ mediators who are called upon only after “passing the test” of the Specialists. The Specialists work with mediators to ensure transformative practice. Moreover, a number of Specialists noted that the mediators described as being directive or evaluative, or acting in such a way as to interfere with empowerment or recognition, are no longer being used by the USPS.93 However, although the Specialists correctly understand directive and evaluative mediator tactics as generally contradicting the transformative model, some of the Specialists’ specific observations indicate that there may be limited confusion about these terms.

Some of the Specialists’ observations point to directions for future research. First, some of the mediators mentioned time as an issue in mediation. While many Specialists criticized it when mediators “rushed” “or shuttled” the mediation, several also said the mediator “took too long” and “dragged things out.” Some REDRESS™ participants note time as an issue in open-ended questions on exit surveys, specifically reporting that the mediation took too long. However, Professors Bush and Folger suggest that mediators should be comfortable with allowing the parties to take a considerable amount of time to explore their uncertainty.94

We know from an independent dataset of mediator reports that the mediation sessions average about four hours in duration.95 Some critics have suggested that the transformative model would take too long to be

92. See generally id.
93. It should be noted that mediators screened from the roster are undoubtedly excellent in other forms of mediation practice. The transformative model is very different from the model of mediation in most civil litigation settings.
94. See generally BUSH & FOLGER, supra note 1 (discussing mediator techniques in allowing parties to explore their doubts); Folger & Bush, supra note 56 (discussing mediator techniques in helping parties gain clarity about goals, resources, options, and preferences).
95. See generally Indiana Conflict Resolution Institute, supra note 27.
efficient at the workplace. It is encouraging that Specialists are mostly criticizing mediators for rushing and that parties are more concerned with mediation taking too long. This is indirect evidence that practice is following the transformative model. The unresearched question therefore is, at what point does duration begin to interfere with party empowerment?

Second, several mediator behaviors such as the use of reflection and summary, caucusing, and body language, were noted to both foster and interfere with empowerment and recognition, and were designated as constituting both directive and evaluative behaviors. The interesting question that arises from these observations is, when are these behaviors consistent with the transformative model, and when are they not?

Finally, there was a consistent lack of observations reflecting hallmarks eight (“past has value to the present”), nine (“[c]onflict can be long-term”) and ten (“[s]mall steps count”). Since hallmark ten reflects a mediator’s ability to be satisfied and feel success from small steps of empowerment and recognition, it would be difficult for the Specialists to observe. Thus, the absence of mediator conduct reflecting this hallmark is not surprising. However, hallmarks eight and nine concern the conflict in the context of a long-term relationship. It is difficult to determine whether the absence of these hallmarks suggests that these disputes involve parties who do not have a long history of working together, or reflect the need for further mediator training to emphasize the appropriateness of considering past events and context. This certainly warrants further research.

In sum, the results of this study support the conclusion that the REDRESS™ program, as implemented by the Specialists, generally follows transformative mediation theory. This is an important finding for purposes of process evaluation. Nevertheless, these data tell only part of the implementation story. Although they observe every mediator on the roster at least once, Specialists observe only a portion of the total number of mediation sessions occurring in REDRESS™. A fuller evaluation of the transformative mediation process and participant outcomes is in progress. Future research will examine the exit surveys of participants (of which ICRI has collected over 60,000) as well as surveys of the mediators. One goal of the research reported here was to assist in the construction of that mediator survey. It is only through analysis of

96. Interview with Cynthia J. Hallberlin, supra note 35.
98. These exit surveys are on file with the authors at the Indiana Conflict Resolution Institute, School of Public and Environmental Affairs, Indiana University, Bloomington, Indiana.
several sources of data that we can confirm whether transformative mediation is actually occurring and what the effects of it are on the USPS. This study is a first step.

VII. CONCLUSION

The transformative model of mediation is relatively new to the field. Likewise, the USPS REDRESS™ program is also new. However, the current study suggests that the REDRESS™ program will provide a meaningful opportunity to evaluate the performance of transformative mediation in practice, in an organization's employment dispute resolution program.