

Mediator Background, Style And Behavior: What You See And What You Get

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INTRODUCTION

The question as to the appropriate use of facilitative and evaluative techniques in mediation has resulted in a great deal of academic and practitioner debate. This study provides insights into the ‘mediator style’ debate by examining and comparing the experience and professed orientation of mediators with their actual behavior during mediation. In the study, mediators from the EEOC mediation program were asked to complete a survey designed to classify their mediation orientation as evaluative, facilitative, or a hybrid of the two styles. Part A of the study examines the relationship between mediators’ professed orientation and their professional background and mediation experience, and asks the following questions. First, what factors influence the professed style of the mediators? Second, are attorney mediators more likely than non-attorneys to view themselves as evaluative? Third, are the professed mediation styles of attorney-mediators different from mediators who are not attorneys?

In addition to the background questions, the survey also asked the mediators to describe the tactics and behaviors they used in specific mediation sessions. Part B of the study seeks to determine whether mediators’ professed style is consistent with their conduct by comparing the mediators’ reported orientations to their actual conduct during mediation. This section answers two questions in the evaluative-facilitative debate. First, are mediators’ self-reported styles consistent with their actual conduct in mediation? Second, are mediators who report using a facilitative style also engaging in evaluative behavior?

I. BACKGROUND

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A. FACILITATIVE OR EVALUATIVE: WHAT FACTORS INFLUENCE PROFESSED MEDIATION STYLE?

As the practice of mediation as an alternative to litigation has developed, there has arisen a debate over mediator style.¹ Over the years, this debate has centered on the appropriateness and effectiveness of three generally recognized styles: facilitative,² transformative,³ and evaluative,⁴ and, more pointedly, whether an evaluative style is ever appropriate in mediation. Mediation purists, who believe that mediators should never engage in evaluative conduct, argue that using evaluative techniques can be viewed as unethical, the unauthorized practice of law, or at the least a subversion of the unique role of mediation under the law as a *per se* facilitative process.⁵ Practitioners opposing this view argue that it is unrealistic to demand that mediation be purely facilitative in nature.⁶ Adherents to this less orthodox view generally see mediation as a mixed process, often involving both facilitative and evaluative conduct. In fact, in light of the latest research, there is clear evidence that practitioners quite often describe themselves as

¹ Even the definition of “style” is difficult to pin down. There is no consensus from practitioners or scholars on the meaning of style labels. See Dorothy J. Della Noce, *Mediator Style and the Question of “Good” Mediation: A Call for Theoretical Development*, 5 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH 396, 397 (2012). One straightforward definition is “the characteristic pattern of behaviors or tactics that mediators employ when assisting people in a controversy,” Kenneth Kressel & James Wall, *Introduction to the Special Issue on Mediator Style*, 5 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH 334 (2012). A previous definition, by the same author, ties style to strategies rather than tactics. Kenneth Kressel, *Mediation Revisited* in *The Handbook of Conflict Resolution*, 726 (2006). Whether related to tactics or strategies, it is the mediator behaviors that are the focus of this article.

²With a facilitative style, the mediator does not provide or impose opinions, predictions or solutions. Conduct that encourages or assists the parties to resolve the dispute without reliance on the mediator, but rather by their own interaction, is paramount. See Jennifer L. Schulz, *Mediator Liability – Using Customs to Determine Care*, 65 SASK. L. REV. 163, 165 (2002) (discussing the various theories of what constitutes facilitative mediation); See also Dean G. Pruitt, *Commentary 1*, 5 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH, 384 (2012) (viewing the facilitator as a guide to help the parties understand the issues, underlying interests, and possible solutions).

³The goal of a transformative style of mediation is not settlement, but rather to have the parties improve their relationship and capacity to communicate, and thereby be empowered with self-reliance. Pruitt, *supra* note 2. See also Lisa Blomgren Bingham, *Transformative Mediation at the United States Postal Service*, 5 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH, 354, 358 (2012), stating that settlement is a by-product in the transformative process. Due to the focus on settlement of the mediations in this study, transformative behaviors are not identified or measured in our analyses. Rather, the authors utilize Riskin’s evaluative/facilitative dichotomy. See Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO THE HIGH COST OF LITIGATION 111 (1994).

⁴For this study an evaluative mediation style is one in which the mediator opines, challenges, suggests, predicts, or otherwise attempts to influence a party’s perception or position. See generally Brian Wessner, *A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs*, 4 CARDOZO ONLINE J. CONFL. RESOL. 1 (2002). The evaluative mediator also often offers solutions and presses the parties to reach agreement, with the goal primarily focused on settlement. Pruitt, *supra* note 2.

⁵ See Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71 (1998)(arguing that evaluative mediation should not be classified as mediation).

⁶ See Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371, 375 (2000). James H. Stark, *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals From an Evaluative Lawyer Mediator*, 38 S. TEX. L. REV. 769 (1997) (noting that mediators with knowledge of the law should inform participants of their legal rights).

eclectic, shifting from style to style as needed,⁷ rather than utilize a one-size-fits-all approach.⁸ Furthermore, it has been proposed that style should not be defined as either facilitative or evaluative. Rather, a more nuanced approach would view the use of facilitation and evaluation as independent dimensions of a mediator's style, rather than styles that are characteristic of some mediators but not others.⁹

Integral to this debate over appropriate mediator style is the role of the attorney in mediation. It has been posited that lawyers, as a result of their education and experiences in the legal field, tend to engage in evaluative conduct, and therefore, as Guthrie observes, "mediation is highly unlikely to be a purely facilitative process as long as lawyers serve as mediators."¹⁰ This conclusion is based on the belief that lawyers are unlikely "to possess the personalities, predispositions, skills, and training necessary to mediate in a purely facilitative, non-evaluative way."¹¹ This echoes Riskin's claim that evaluative mediators are less likely to have the skills to mediate in a facilitative framework.¹²

This study attempts to empirically test the assertion that attorney-mediators tend to view themselves as more evaluative than non-attorneys, and to determine whether there are other background or experiential factors that influence the professed style of a mediator.¹³

B. IS SELF-REPORTED STYLE CONSISTENT WITH ACTUAL MEDIATOR BEHAVIOR?

This facilitative-evaluative debate is far from academic. Opinions about appropriate mediator style have been translated into proposals concerning the regulation of the entire practice of mediation. For example, it has been argued that there should be a uniform system for training mediators and that such a system must exclude evaluative mediation.¹⁴ Critics of evaluative mediation have even gone so far as to assert that such conduct constitutes the unauthorized practice of law.¹⁵ On the other hand, Stempel and others argue that mediation necessarily

⁷ Kenneth Kressel & James Wall, *Introduction to the Special Issue on Mediator Style*, 5 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH 334, 336 (2012).

⁸ *Id.* at 335.

⁹ Dean G. Pruitt, *Commentary 1*, 5 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH 385, 385 (2012).

¹⁰ See Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEG. L. REV., 145, 149 (Spring 2001).

¹¹ *Id.* See also Jonathan M. Hyman, *Slip-Sliding into Mediation: Can Lawyers Mediate Their Clients' Problems*, 5 CLINICAL L. REV. 47, 87 (1998) (observing that lawyers are most comfortable with a narrow, evaluative approach to mediation.)

¹² Riskin, *supra* note 2 at 113.

¹³ This self-professed style has important consequences, as subscribing to a particular style gives the mediator a roadmap on how to behave, and how to make decisions about what to do next in the mediation session. James Wall & Kenneth Kressel, *Research on Mediator Style: A Summary and Some Research Suggestions*, 5 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH 403, 404 (2012).

¹⁴ Wessner, *supra* note 1; See also Maureen E. Laflin, *Preserving The Integrity of Mediation Through The Adoption of Ethical Rules For Lawyer-Mediators*, 14 ND J. L. ETHICS AND PUB POL'Y 479 (2000) (discussing evaluation in mediation and the regulation of lawyer-mediators).

¹⁵ See Kovach & Love *supra* note 2; see also Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 4 (1997) (giving ten reasons why evaluative mediation is inconsistent with Love's view of mediation).

includes evaluative conduct.¹⁶ The importance of this debate has far-reaching implications into such important matters as quality assurance for mediation programs, and ethical obligations to the consumers of mediation services.¹⁷ Courts and agencies offering mediation services are often urged to subscribe to a particular style of mediation,¹⁸ even though no consensus on the practical meaning of style labels even exists.¹⁹ As the debate over appropriate mediation style continues, McEwen and Wissler have observed that policy choices concerning civil mediation should be informed by empirical data rather than by assumptions or adjudication ideologies.²⁰ This study attempts to meet this charge.

While some would rush to bar evaluative mediation, the limited applied research in this debate to date has found that mediator style is a complex concept. Golann noted that there has been little inquiry by legal scholars into actual mediator style at mediation.²¹ Golann found that “the issue of mediator style is more complex and the styles themselves more variable than is often supposed.”²²

More recently, the Negotiation and Conflict Management Research journal dedicated an entire issue of mediator style.²³ A consistent theme throughout the issue was the lamentable lack of actual observational studies of mediators in mediation sessions,²⁴ and concern that mediator self-reports about mediation style do not accurately report the behaviors that are occurring.²⁵ While observational studies that include behavior coding by researchers in real-time would be optimal,²⁶ much good data can nevertheless be obtained by asking mediators to describe their behaviors in mediation, rather than only their styles.

Before adopting policies that would evaluative behaviors from the practice of mediation, it is important to gain some insight into whether those mediations classified as “facilitative” or “transformative” by program coordinators and mediators include evaluative behaviors as well, despite their labels. If evaluation is being utilized, it would add credence to Golann’s findings, to those who believe that pure facilitative mediation is a “purist” theory not found in actual mediation, and to those who oppose regulating mediation to exclude evaluation. This study

¹⁶ Stempel, *supra* note 3.

¹⁷ Wall & Kressel, *supra* note 13 at 405.

¹⁸ Kressel & Wall, *supra* note 7 at 334.

¹⁹ Della Noce, *supra* note 1; Lorig Charkoudian, *Just My Style: The Practical, Ethical, and Empirical Dangers of the Lack of Consensus about Definitions of Mediation Styles*, 5 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH 367, 376 (2012).

²⁰ Craig A. McEwen and Roselle L. Wissler, *Finding Out If It Is True: Comparing Mediation and Negotiation through Research*, J. DISP. RESOL. 131 (2002).

²¹ Dwight Golann, *Variations in Mediation: How—and Why—Legal Mediators Change Styles in the Course of a Case*, J. DISP. RESOL. 41 (2000).

²² *Id.* at 61; see also E. Patrick McDermott and Ruth Obar, “What’s Going On” in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit, 9 HARV. NEGOT. L. REV. 75 (2004); Della Noce, *supra* note 1.

²³ See 5 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH 325 (2012).

²⁴ Wall & Kressel, *supra* note 13 at 417; Thomas A. Kochan, *Commentary 2*, 5 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH 392, 393 (2012);

²⁵ *Id.* at 407.

²⁶ Charkoudian, *supra* note 17 at 381.

attempts to answer this question, as well as to examine the consistency of self-reported orientation with actual mediation conduct.

II. THE RESEARCH

This research is based on data from a comprehensive study of the EEOC mediation program.²⁷ The participants in that study include all charging parties, respondents, and mediators who conducted a mediation session for the EEOC under the supervision of the 50 EEOC field offices for a six-month period. The sampling technique captures all mediations conducted during this period to ensure that the profile of the sample is the same as the profile of the overall population of the EEOC cases. The results from the first study verify that the profile of this sample is completely consistent with the overall profile of EEOC mediations.

A. DATA SOURCE

The study uses the results from the two surveys that mediators completed during the survey period: the Mediation Results Survey²⁸ and the Mediator Background and Style Survey.²⁹ Mediators were required to complete the Mediation Results Survey at the end of each mediation session. The Mediator Background and Style Survey, which was developed by McAdoo and Krivis to assess whether mediators are oriented to facilitative or evaluative conduct³⁰ was completed only once during the entire survey period (soon after their first mediation session).

B. THE SURVEY INSTRUMENTS

1. *The Mediation Results Survey*

The Mediation Results Survey has 11 significant questions. These questions address the characteristics of the mediation session and, more importantly, the conduct of the mediation participants. Mediators were asked to describe their own conduct, the tactics they employed to resolve the dispute, and for mediations that did not end in resolution, what they would have done differently. These questions were all open-ended, and designed to maximize mediator feedback. Mediators provided a wide range of personal opinions, insights, comments and ideas that expose numerous non-obvious patterns that would not have been discovered if the survey utilized closed ended questions.

2. *The Mediator Background and Style Survey*

To identify the mediators' self-reported style, the Mediator Background and Style Survey developed by Krivis and McAdoo was utilized.³¹ The survey consists of 26 statements describing various perspectives, strategies, objectives regarding mediation in general. The

²⁷ See E. Patrick McDermott, et. al., *An Evaluation of the Equal Employment Opportunity Commission Mediation Program*, EEOC Order No. 9/0900/7632/2: September 20, 2000, <http://www.eeoc.gov/mediate/report/index.html>; *The EEOC Mediation Program: Mediators' Perspective on the Parties, Processes, and Outcomes*, EEOC Order No. 9/0900/7632/G, July 31, 2001.

²⁸ Appendix A, *infra*.

²⁹ Appendix B, *infra*.

³⁰ Jeffrey Krivis and Barbara McAdoo, *A Style Index for Mediators*, 15 ALT HIGH COST LITIG., 157 (1997).

³¹ *Id.*

mediators express their agreement or disagreement to each statement by choosing a number on a 10-point scale. The survey questions were then classified in a manner that draws out the facilitative versus evaluative orientations of the mediators. In addition to the 26 style questions, information regarding the professional and mediation background of the mediators was also obtained. This information included the number of cases mediated, the number of EEOC cases mediated, the type of cases mediated, mediation training obtained on EEOC cases, whether the mediator is an attorney, mediator experience as an advocate in employment litigation and the mediator's self-reported resolution rate.

All of the measurements in this study reflect outcomes that are observable at the time of the mediation. A reported successful outcome, then, would be defined as a "short term success."³² Long term outcomes, such as compliance with the agreement, improved relations between the parties, and the absence of new problems between the parties³³ are not measured.

C. DATA CODING AND ANALYSIS

Each mediator was asked to complete the Mediation Results Survey for every one of his/her mediations performed during the time period of the study. The data from the open-ended questions were then team coded. In order to ensure greater inter-coder reliability, the coders worked side-by-side throughout the seven months of the coding process.³⁴

D. THE DATABASES

For comparison of the mediators' self-reported style with background characteristics, the database consists of 220 mediators. For comparison of the mediator's self-reported style with actual reported conduct during mediation, the database consists of 181 mediated cases.

III. RESULTS FOR PART A – WHAT FACTORS INFLUENCE PROFESSED MEDIATION STYLE?

A. The Mediator's Self-Reported Style

To begin, the results from the Mediator Background and Style instrument were analyzed. The statements were sorted based on the focus of each statement and grouped so as to be most probative of whether or not a mediator is facilitative or evaluative. These statements and groupings are listed in Appendix B.

The average rating is used as the benchmark for characterizing mediator style. Some questions were reverse-coded so that lower average ratings (i.e., averages closer to one) correspond to an evaluative style and average ratings closer to 10 correspond to a facilitative style. The following criteria are then used: If the average rating is 4 or less, the mediator is classified as evaluative. If the average rating is 7 or greater, the mediator is classified as facilitative. An average rating of greater than 4 but less than 7 indicates the mediator embraces a "hybrid style" incorporating both evaluative and facilitative conduct. Table 1 reports the

³² See Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW AND HUMAN BEHAVIOR 313, 314 (1993).

³³ *Id.*

³⁴ While this data does not meet Wall & Kressel's clarion call for observational studies of mediator conduct in real-time (see note 16 *supra* at 417), it does get one step closer by having the mediators report on individualized case-based conduct that is then coded into style categories by the researchers.

frequency distribution using this criterion applied to the grouping of statements relating to the mediators' principal technique or strategy.³⁵

It is important to note that the mediations being studied were conducted pursuant to the EEOC program requiring facilitative mediation. Not surprisingly, very few mediators profess to have an evaluative style, and a substantially large proportion of mediators are report using a facilitative style.³⁶ What is noteworthy is the percentage of mediators with a "hybrid style." The data show that a number of mediators may not only practice a hybrid type of mediation, they also profess a style that relies on both evaluative and facilitative strategies.³⁷

Table 1. Mediator's Self-Reported Mediation Style

Self-Reported Mediation Style	All Mediators	
	Number	%
Total mediators	220	100.0%
EVALUATIVE: Average rating ≤ 4.00	19	8.6%
HYBRID: $4.00 < \text{Average rating} < 7.00$	100	45.5%
FACILITATIVE: Average rating ≥ 7.00	101	45.9%

B. The Mediator's Self-Reported Style as related to Experience and Professional Background

The relationship between self-reported mediation style and the mediators' mediation experience and professional background was then analyzed. The data show how one's self-reported mediation style relates to the number of cases that one has mediated in their career, the number of EEOC cases mediated, the variety of cases mediated, whether one was trained to mediate by the EEOC, whether one is an attorney or not, whether or not the mediator has served as an advocate in employment litigation, and the mediator's self-reported resolution rate. Table 2 summarizes these results.

³⁵ See Appendix B, Set A, *infra*. The authors believe that these 7 statements, of the 26 total, are most probative of the mediators' professed style.

³⁶ See Charkoudian, *supra* note 17 at 376 (discovering a similar result, where no mediator participating in a 'transformative' mediation program self-identified as evaluative, despite admitting to using evaluative behaviors).

³⁷ This result lends credence to the view that mediator style should and does shift between evaluative and facilitative as the circumstances warrant. See E. Patrick McDermott, *Discovering the Importance of Mediator Style – An Interdisciplinary Challenge*, 5 NEGOTIATION AND CONFLICT MANAGEMENT RESEARCH 340, 350 (2012) (positing that the goal of mediation is problem-solving, and a good mediator will do whatever is necessary to solve the problem; in effect, 'the person trumps the style.');

see also Pruitt, *supra* note 9 at 386 (proposing that mediator style should, and perhaps does shift between facilitation and evaluation as the mediation progresses and conflict intensity ebbs and flows).

Table 2. Mediators' Background and Self-reported Mediation Style

Mediator Background	Mediator Style		
	Evaluative	Hybrid	Facilitative
Mediators' Mediation Experience			
Average number of cases mediated (Number of mediators responding)	77 (16)	90 (95)	116 (93)
Average number of EEOC cases mediated (Number of mediators responding)	48 (18)	27 (98)	32 (98)
Types of cases mediated			
(Number of mediators responding)	(18)	(97)	(93)
Employment cases	100.0%	93.8%	91.4%
Family cases	11.1%	25.8%	39.8%
Business/Commercial cases	22.2%	21.6%	34.4%
General civil cases	5.6%	28.9%	34.4%
Mediators' Professional Background			
EEOC training			
(Number of mediators responding)	(19)	(99)	(101)
With EEOC training	68.4%	49.5%	55.4%
Without EEOC training	31.6%	50.5%	44.6%
Legal background/profession			
(Number of mediators responding)	(19)	(99)	(101)
Mediator is an attorney	47.4%	66.7%	43.6%
Mediator is not an attorney	52.6%	33.3%	56.4%
Advocacy in employment cases			
(Number of mediators responding)	(18)	(97)	(99)
Has served as an advocate	50.0%	48.5%	31.3%
Has not served as an advocate	50.0%	51.5%	68.7%
Self-reported resolution rate			
(Number of mediators responding)	(12)	(85)	(75)

1. Number of Cases Mediated

Mediators who self-reported as having a facilitative mediation style have mediated more cases compared to mediators who tended to be evaluative.

2. Number of EEOC Cases Mediated

Mediators who self-reported a facilitative style have, on average, mediated fewer EEOC cases compared to mediators who reported an evaluative style. This is surprising given the EEOC's facilitative requirement. This result is further investigated in Section III C, *infra*, where the results of a regression analysis to investigate the relationship of the mediator's experience (as measured by the number of EEOC and other cases they have mediated) on the mediator's self-reported mediation style are presented.

3. Variety of Cases Mediated

The next area is the relationship between self-reported style and the breadth of cases one mediates. It appears that mediators with a facilitative orientation are more likely to mediate outside of the employment law area; a little over one-third report mediating family cases, business and commercial cases, and general civil cases. In contrast, mediators with an evaluative orientation are less likely to mediate family cases (11%) and general civil cases (6%). There is an old saying at the racetrack of "horses for courses," meaning that certain horses perform better at certain tracks. It may be that there are types of disputes where a certain mediation style is more effective and thus more prevalent.³⁸ More research is needed on this topic.

4. EEOC Training

Next the influence of EEOC training on mediator style is explored. While the EECO is a mandatory facilitative program, it appears that training in the EEOC facilitative methods does not result in the mediator changing his or her self-reported style. In fact, there were more self-reported evaluative mediators who had completed EEOC training (68%) compared to the proportion of self-reported facilitative mediators who had done the same (55%). This result suggests that perhaps evaluative mediator conduct is "the horse for the course" when it comes to employment cases. It also indicates that training to ensure the use of a facilitative mediator style may not accomplish its purpose.

5. Whether the Mediator is an Attorney

Many have surmised that being an attorney would cause one to be more evaluative than a nonattorney. There is some evidence in support of this assertion. A greater number (47%) of evaluative mediators are attorneys as compared to the proportion of facilitative mediators (44%) who have the same background. While the difference is not statistically significant, the regression analysis in the next section provides compelling evidence to suggest that mediators with legal background are more evaluative compared to those without any legal training.

6. Experience as an Advocate in Employment Cases

³⁸ See Daniel Druckman & Carmela Lutmar, *Jacob Bercovitch: Understanding Hands Across the Divide*, 5 Negotiation and Conflict Management Research 325, 327 (2012), stating that facilitative strategies are least effective in both high- and low-intensity conflicts; see also Kressel & Wall, *supra* note 7 at 336 (citing Kolb's belief that the mediator style used is a function of the setting, in that inhospitable circumstances will lead to evaluative behavior, and benign circumstances to facilitative behavior. DEBORAH M. KOLB, THE MEDIATORS, (1983)).

The study also examines whether one's experience as an advocate in employment cases influences self-reported mediation style. The data show that those mediators who have an evaluative style are more likely to have served as advocates in employment cases (50%). In comparison, the percentage of mediators with a reported facilitative style who have served as advocates in employment cases is substantially lower (31%). Conversely, 68% of the mediators who report a facilitative style have not served as an advocate in an employment dispute. Table 3 gives further insight into the effect of the role of advocate on reported mediation style.

Table 3. Experience as an Advocate

	All Mediators		Mediator Style					
			Evaluative		Hybrid		Facilitative	
	#	%	#	%	#	%	#	%
Total number responding	214	100.0%	18	100.0%	97	100.0%	99	100.0%
Served as an advocate	87	40.7%	9	50.0%	47	48.5%	31	31.3%
Represented Plaintiffs	23	10.7%	2	11.1%	15	15.5%	6	6.1%
Represented Employers	21	9.8%	3	16.7%	13	13.4%	5	5.1%
Represented both sides	12	5.6%	3	16.7%	4	4.1%	5	5.1%
No information provided	31	14.5%	1	5.6%	15	15.5%	15	15.2%
Has not served as an advocate	127	59.3%	9	50.0%	50	51.5%	68	68.7%

7. Self-Reported Resolution Rate

Finally, the study examines whether self-reported mediation style is related to self-reported resolution rate. The data show that mediators across all styles have about the same self-reported percentage of resolved cases.

C. Mediator Style Determinants

In order to measure the impact and importance of each of the background and experience variables discussed above, a regression analysis was used. The dependent variable is the mediators' average style rating and the independent variables consist of the variables discussed in the previous section. Table 4 presents the regression results. In this analysis, a negative coefficient implies that the corresponding variable contributes to the likelihood that a mediator has an evaluative style. Conversely, a positive coefficient implies that the corresponding variable contributes to the likelihood that the mediator will self-report a facilitative style.

Table 4. Determinants of the Mediators' Self-Reported Style

Variable	Coefficients	Standard Error	t-stat*	p-value*
Intercept	7.4992	0.524	14.309	1.21E-29
Number of cases mediated	0.0013	0.001	1.158	0.249
Number of EEOC cases mediated	-0.0017	0.003	-0.597	0.552
Case type – Employment	-0.9199	0.431	-2.137	0.034
Case type – Family	0.3842	0.300	1.279	0.203
Case type – Business/Commercial	0.0927	0.289	0.321	0.748
Case type – General Civil	0.5290	0.303	1.748	0.082
EEOC training	0.4516	0.248	1.819	0.071
Attorney	-0.8498	0.293	-2.904	0.004
Employment case advocate	-0.2314	0.286	-0.810	0.419
Self-reported resolution rate	-0.1029	0.480	-0.214	0.831
Observations = 158				
R-square statistic = 0.1946				
ANOVA F-statistic = 3.55 (degrees of freedom = 10,147)				

* Numbers in bold correspond to statistically significant coefficients/variables when evaluated at the 95% significance level.

The results indicate only two statistically significant variables: 1) experience in mediating employment cases, and 2) whether or not the mediator is a lawyer. Mediators with employment litigation experience tend to be more evaluative and lawyers tend to be more evaluative. The regression results offer very strong and convincing support of the previously presented assertions. First, employment law cases are predisposed to evaluative mediator conduct³⁹ and, second, persons trained as attorneys are more evaluative as mediators.⁴⁰ It is also important to note that there is no evidence to suggest that mediator's experience, as measured by the number of cases they have mediated, is related to his or her preference for an evaluative or facilitative mediation style.

D. Mediation Style and Context

Two questions were added by the authors to the Mediator Background and Style Survey to determine if 1) the mediators believe that their style remains consistent over time and 2) whether they adjust their style in the presence of counsel. First the mediators were asked if they would have answered the questions differently if the questionnaire was completed on another date. Table 5 shows that most mediators believe their answers would be similar and their mediation style would be consistent.

³⁹ Section III B 4, *supra*.

⁴⁰ Section III B 5, *supra*.

Table 5. Mediator Style Consistency*

	Evaluative	Hybrid	Facilitative
Total number of mediators responding	17	100	99
1 - Strongly Agree	17.6%	27.0%	37.4%
2	29.4%	28.0%	28.3%
3	17.6%	17.0%	17.2%
4	5.9%	6.0%	2.0%
5	23.5%	7.0%	3.0%
6	5.9%	5.0%	4.0%
7	0.0%	2.0%	1.0%
8	0.0%	3.0%	4.0%
9	0.0%	5.0%	1.0%
10 - Strongly Disagree	0.0%	0.0%	2.0%
Mean Rating	3.06	3.06	2.62

*Mediators' response to the statement: I believe that if I completed this survey on another date the answers concerning my style would be similar to those today.

The results of Table 5 support the conclusion that self-reported facilitative mediators are more committed to their style regardless of context.⁴¹

The mediators were also asked whether they would change their style if one or both parties was represented by counsel. The results are shown in Table 6. For all three classifications, the results indicate that these mediator orientations would not be related to this context. In general, a substantial proportion of mediators across the three mediator classifications strongly disagree (ratings of 8, 9, or 10 in a 10-point scale) with the statement "I believe that my mediator style answers would be different depending on whether one or both of the parties were represented by counsel versus being unrepresented." However, a closer analysis demonstrates a difference in the pattern of responses. A substantially larger proportion of facilitative mediators (57%) strongly disagree with the statement compared to the proportion of evaluative mediators who did the same (41%). This data may indicate that evaluative mediators are implicitly acknowledging the important role that attorneys play in the mediation process. Furthermore, perhaps it is an indication that evaluative mediators more context driven than facilitative mediators. More research in this area is needed to answer these questions.

⁴¹ This finding supports the assertions that mediators tend to report the use of the same style from case to case, despite variety in issues and dynamics, and do not mix facilitative and evaluative strategies within a given case. Charkoudian, *supra* note 19 at 378.

Table 6. Changes in Mediator Style in the Presence of Party Representation*

	Evaluative	Hybrid	Facilitative
Number of mediators responding	17	100	99
1 - Strongly Agree	5.9%	6.0%	3.0%
2	5.9%	11.0%	3.0%
3	23.5%	13.0%	5.1%
4	11.8%	11.0%	12.1%
5	5.9%	14.0%	13.1%
6	5.9%	8.0%	5.1%
7	0.0%	5.0%	2.0%
8	0.0%	13.0%	17.2%
9	29.4%	13.0%	12.1%
10 - Strongly Disagree	11.8%	6.0%	27.3%
Mean Rating	5.82	5.45	7.02

* Mediators' response to the question: I believe that my mediator style answers would be different depending on whether one or both of the parties were represented by counsel versus being unrepresented.

IV. RESULTS FOR PART B: IS SELF-REPORTED STYLE CONSISTENT WITH ACTUAL BEHAVIOR?

The next part of the study addresses the question of whether a mediator's self-reported style is consistent with the actual behaviors reported by the mediator in a particular mediation. In each case, the mediator's behavior and tactics, as reported by the mediator in the Mediation Results Survey,⁴² was analyzed and classified as either evaluative, facilitative, or hybrid.

The instrument used to obtain these data consisted of consecutive questions that sought to capture all relevant mediator conduct used to facilitate the resolution of the dispute. The first question was "If the dispute was resolved, describe the conduct you believe facilitated resolution." This question was structured so that the mediator first described the conduct of the other parties to the proceeding, followed by a description of his or her own conduct. The next survey question was "If the dispute was resolved, identify any major acts or conduct that you used as mediator to facilitate resolution." This second question deliberately echoed the first, (*i.e.*, a "belt and suspenders" approach) to ensure as rich a database as possible. This worked well as sometimes conduct not captured by the first question was identified by the second. The answers were team-coded as described previously. The coding process ensured that we could identify all mediator conduct that the mediators believed facilitated the resolution of the dispute.

While it is difficult to describe exactly what constitutes evaluative versus facilitative behavior,⁴³ there are broad lines that can be drawn. For this study facilitative conduct is defined

⁴² Appendix A, *infra*.

⁴³ Hyman *supra* note 11 ("There is no clear division between facilitative and evaluative methods..."); Alison E. Gerencser, *Dispute Resolution In The Law School Curriculum: Opportunities And Challenges, Part II: Alternative Dispute Resolution Has Morphed Into Mediation: Standards Of Conduct Must Be Changed*, 50 FLA. L. REV. 843, 848 (1998) ("The issue of what 'facilitation' includes is highly controversial, and has been debated by scholars on all sides."); *see also* Della Noce, *supra* note 1.

as that which does not provide or impose opinions, predictions or solutions.⁴⁴ This includes conduct that encourages or assists the parties to resolve the dispute without reliance on the mediator but rather by their own interaction. Borrowing from Riskin’s analysis,⁴⁵ evaluative behavior is defined as conduct that opines, challenges, suggests, predicts, or otherwise attempts to influence a party’s perception or position.⁴⁶ This evaluative conduct may be based on mediation externalities such as the law, the likelihood of prevailing in litigation, and other outcome related variables. Any conduct engaged in for the sole or mixed purpose of influencing a party’s position at mediation is classified as evaluative. This includes reality checking.⁴⁷ The authors recognize that the classifications may not be in agreement with some theories that include evaluation in their concept of facilitative mediation, and leave it to others to argue whether certain evaluative tactics are permissible in a facilitative mediation, and thus, the impact of the findings of this study.

Appendix C sets forth our classifications of evaluative and facilitative behaviors. A third “hybrid” classification was created for tactics that may be either facilitative or evaluative in their applied context. These are “too close to call” based on the written description as they must be observed in the context of their usage.⁴⁸ Table 7 reports these results.

Table 7. Actual Mediator Behavior and Self-Reported Mediation Style

Actual Mediator Behavior	Self-Reported Mediation Style		
	Evaluative	Hybrid	Facilitative
	%	%	%
Total cases with responses	15	56	50
Incidence of Mediators Engaging in Any Evaluative, Facilitative, and Hybrid Behavior			
Used evaluative technique(s)	53.3%	71.4%	36.0%
Used facilitative technique(s)	53.3%	44.6%	76.0%
Used hybrid techniques(s)	20.0%	23.2%	30.0%
Summary of Mediator Behavior			
Used evaluative technique(s) only	33.3%	39.3%	8.2%
Used facilitative technique(s) only	26.7%	19.6%	42.9%
Used hybrid technique(s) only	13.3%	7.1%	12.2%
Used both evaluative and facilitative technique(s)	20.0%	23.2%	26.5%
Used evaluative technique(s) and hybrid technique(s)	0.0%	8.9%	2.0%
Used facilitative technique(s) and hybrid technique(s)	6.7%	1.8%	8.2%

⁴⁴ Schulz, *supra* note 2.

⁴⁵ Wessner, *supra* note 4 (adopting Riskin’s definition of facilitative versus evaluative mediation).

⁴⁶ *Id.*

⁴⁷ While facilitative advocates may permit the use of this tactic in mediation they also see it as evaluative conduct. *See* Kovach & Love, *supra* note 5.

⁴⁸ In addition, mediators identified other conduct that resulted in behavior codes that did not fit in the facilitative, evaluative or hybrid classifications. This data is not included in the analysis.

The data show that mediators do not report an overall style that is always consistent with their tactics at mediation. A wide array of mediator conduct is evident, supporting the view that mediation is an eclectic process.⁴⁹ Most interesting to the authors, 27% of mediators who report being evaluative used only facilitative techniques, and 8% of mediators who report being facilitative used only evaluative techniques. This suggests that what you see is not what always what you get.

Delving further into this issue, Table 8 identifies the exact behaviors and their frequency by mediator style.⁵⁰ An analysis of these specific behaviors shows that mediators who have an evaluative orientation are likely to use facilitative techniques that involve acknowledging the party’s feelings and listening. On the other hand, facilitative mediators who use evaluative techniques are likely to report using reality checking to ensure resolution of the case.

Table 8. Mediator Behavior that Facilitated Case Resolution and the Mediators’ Self-Reported Mediation Style

	Evaluative	Hybrid	Facilitative
Total mediators responding	15	54	50
	%	%	%
EVALUATIVE BEHAVIOR			
Reality checking/testing; played devil’s advocate; introduced hypotheticals; engaged in outcome probing conduct	33.3%	48.1%	20.0%
Knowledge of the law, technical information; distinguished illegal from unfair	0.0%	14.8%	10.0%
Proposed/explored options	13.3%	14.8%	4.0%
Described other possible outcomes; used “what ifs”; explained parties’ rights if not settled; explored “watna”/ “batna”	13.3%	11.1%	2.0%
Evaluated the strengths and weaknesses of the case	6.7%	7.4%	2.0%
FACILITATIVE BEHAVIOR			
Listened; facilitated catharsis/discussion; paraphrased/restated answers/issues; used reflexive questions	13.3%	16.7%	8.0%
Encouraged/pushed openness/honesty; let parties talk directly; allowed for venting dialogues/exploration of options/fairness/negotiation; demanded offer	6.7%	16.7%	6.0%
Kept parties focused on mutual desire for resolution, on what was important to the parties, on issues; kept track and summarized their options; convinced parties that they were heard	6.7%	9.3%	12.0%
Acknowledged feelings and positions; use of empathy/validation; relaxed party	26.7%	1.9%	10.0%
Provided process information; gave procedural choices	0.0%	1.9%	18.0%
Helped/asked parties to see others’ vantage point; move past positions/”no-fault”	6.7%	1.9%	10.0%
Gained trust/rapport	0.0%	7.4%	4.0%
Defused/managed emotion and feelings	0.0%	5.6%	4.0%
Kept parties talking	0.0%	3.7%	6.0%

⁴⁹ Golann, *supra* note 21 at 42 (“the use of evaluative techniques is also frequent, even among mediators who favor a broad, facilitative approach.”).

⁵⁰ This detailed table is important as it allows those who disagree with the classification of certain conduct as facilitative or evaluative to consider how these classifications have influenced the results.

Reframed	13.3%	3.7%	0.0%
Clarification of facts or areas of agreement; highlight positives	0.0%	5.6%	2.0%
HYBRID TECHNIQUES			
Use of caucuses (includes brainstorming w/I caucus), long joint caucuses, timeouts, including Q 10/40 conduct	13.3%	11.1%	14.0%
Caucus with attorneys/esquires only	6.7%	5.6%	14.0%
Maintained control of the process; police the process	0.0%	7.4%	6.0%
Controlled introduction of "evidence" to facilitate resolution; worked parties slowly	0.0%	5.6%	0.0%

V. CONCLUSIONS AND RESULTS

A. MEDIATOR BACKGROUND AND EXPERIENCE RELATE TO MEDIATION STYLE

An analysis of the factors that influence the professed style of mediators indicates that attorney-mediators were more likely to engage in evaluative conduct. As posited by Guthrie and others, the nature of legal training does appear to cause attorneys to engage in more evaluative conduct than non-attorneys.⁵¹

The data also show that mediators with a facilitative orientation were more likely to have participated in a broader range of mediation cases. Those with an evaluative orientation were more likely to mediate only in the field of employment law.

Finally, many mediators who reported themselves as facilitative on the Mediator Background and Styles Survey also report that they used evaluative techniques in a particular mediation, which they credit with helping to resolve the dispute. Thus, similar to the assertion of Golann, a fair and accurate portrayal of mediator style requires a nuanced investigation.⁵² It is clear that one's claim to be facilitative, or even receiving a rating of facilitative on the Mediator Background and Style Survey, is not a reliable indicator of the tactics that a mediator will actually use to resolve a dispute.

B. MEDIATORS' SELF-REPORTED STYLES OFTEN DIFFER FROM TACTICS USED

While mediators may report a facilitative style, they are often using evaluative tactics to resolve the dispute. Likewise, mediators who report an evaluative style nevertheless use facilitative tactics to resolve the dispute. This supports the conclusion that mediation is an eclectic process, and that one embraced style will often include some behavior from another style.

This study has provided some insight into the influence of mediator background on mediator style and the disparity between professed mediator style and mediator tactics. Additional research is necessary to determine if the conclusions from the study are limited to the field of employment mediation and possibly even more narrowly limited to the EEOC mediation program.

⁵¹ Guthrie, *supra* note 10; Hyman, *supra* note 11.

⁵² Golann, *supra* note 21.

Appendix A
Mediator - Mediation Results Survey

We are independent researchers (college professors) working under a grant competitively bid by the EEOC. Your assistance in completing this survey will allow us to fully analyze the EEOC's mediation process. In addition, this information will allow the EEOC to determine the type of training programs and other support that can be provided to mediators. Please return the survey to us in the enclosed envelope.

1. Is this the first time that you mediated this dispute with the parties?

YES

NO

If you answered "YES", please answer a – d below. If you answered "NO" skip to question #2.

a. How many separate days have the parties met before?

b. How long were the mediations on each of these earlier days?

c. Where these prior mediations held on consecutive days?

YES

NO

d. If "NO" was there a reason that the mediation did not continue on consecutive days?

2. How long did today's mediation last?

3. Was there a resolution of this dispute?

YES

NO

IF YOU ANSWERED "YES" SKIP TO QUESTION # 8
IF YOU ANSWERED "NO" ANSWER BELOW (#4-#7):

4. If the dispute was **not resolved**, list and explain in detail the 3 main reasons why you believe that no resolution was reached. (explain in detail)

5. If the dispute was not resolved, please describe any conduct that you think interfered with the reaching of agreement engaged in by:

A. The Charging Party:

B. The Charging Party's attorney or other representative:

C. The Respondent:

D. The Respondent's attorney or other representative:

6. If the dispute was not resolved please list the five most important barriers to resolution. List in order of importance with #1 being the greatest barrier to resolution.

1.

2.

3.

4.

5.

7. Now that the case is completed, is there anything that YOU would have done differently to enhance the chances for agreement? Please describe in detail.

8. If the dispute **was resolved**, describe the conduct you believe facilitated resolution by:

A. The Charging Party:

B. The Charging Party's attorney or other representative:

C. The Respondent:

D. The Respondent's attorney or other representative:

E. By **You** as the mediator:

9. In addition to your answer at 8E above, were there any particular mediation tactics that you used as the mediator to facilitate resolution.

10. If attorneys or other representatives were involved in this mediation please rate the dispute resolution skills of the attorneys on a scale of 1 to 5 with "1" being minimal skills and "5" being excellent skills:

CHARGING PARTY'S ATTORNEY:

1	2	3	4	5
minimum skills				excellent skills

RESPONDENT'S ATTORNEY:

1	2	3	4	5
minimum				excellent
skills				skills

CHARGING PARTY'S NONLEGAL REPRESENTATIVE:

1	2	3	4	5
minimum				excellent
skills				skills

RESPONDENT'S NONLEGAL REPRESENTATIVE:

1	2	3	4	5
minimum				excellent
skills				skills

11. List and explain anything that you think the EEOC could do to improve the mediation process?

THANK YOU!

(A REMINDER - HAVE YOU COMPLETED THE COMPREHENSIVE MEDIATOR BACKGROUND/STYLE SURVEY? PLEASE MAKE SURE THAT WE HAVE YOUR SURVEY ON FILE.)

**Appendix B
Mediator Background and Style Survey⁵³**

⁵³ Mediators used a 10-point scale to express their degree of agreement or disagreement to each of the statements. A rating at or close to one end of the scale suggests an evaluative (E) or facilitative (F) orientation. Adapted from Krivis & McAdoo, *supra* note 30.

Statements in Background/Style Survey	Strongly Agree (1)	Strongly Disagree (10)
Set A: Principal technique or strategy		
My principal strategy is to help parties understand the strengths and weaknesses of their legal positions.	E	F
The principal technique I use is to encourage the parties to explore the likely outcomes at trial.	E	F
A principal strategy I use is to suggest a particular settlement proposal or range to the parties.	E	F
I focus on the process as opposed to the outcome of a mediation.	F	E
To help parties negotiate realistically, I find it helpful to give an advisory opinion about the likely outcome of a case.	E	F
The focus of the mediation session is on legally relevant issues.	E	F
I provide parties with direction as to the appropriate grounds for settlement (e.g., law, industry practice or technology)	E	F
Set B: Extent of the mediator's responsibility/involvement		
The interests of the parties are more important to me than settling the case.	F	E
Developing options for settlement is the responsibility of the parties, not the mediator.	F	E
I do not consider it my responsibility to protect legal rights and responsibilities of the parties.	F	E
I do not have to understand the legal posture of the case to serve as the mediator.	F	E
Set C: Emphasis on the legal aspects of the case		
I encourage the parties to focus on resolving the specific, legal problems.	E	F
I prefer to look beyond the legal issues in defining the problem to be resolved.	F	E
I am inclined to consider the parties' interests more important than the legal issues in defining the problem to be resolved at the mediation.	F	E
My role is to help parties understand and reach settlement on the issues set forth in the legal documents.	E	F

Appendix B (continued)
Mediator Background and Style Survey

Statements in Background/Style Survey	Strongly Agree (1)	Strongly Disagree (10)
Set D: Emphasis on the parties' perceptions, situations, case impact		
Even when the lawyer is present at mediation, I ask the client to discuss the personal impact of the case.	F	E
The parties' perception of the conflict is not as important to me as the actual evidence of the case.	E	F
I view the mediation as an opportunity to help the parties understand each other's perception of the dispute.	F	E
Set E: "Neutral" statements		
In learning about the issues of the case, it is important to understand the legal posture of the case.	E	F
I urge the parties to compromise on narrow issues.	E	F
I tend to decide how I will approach a case based on the legal documents, technical reports or legal briefs.	E	F
Generally, parties are more capable of understanding their situations than either lawyers or mediators.	F	E
I use the parties' relevant documents, pleadings, reports and legal briefs to help them look realistically at their case.	E	F
I use private caucuses early to help the parties understand the weaknesses of their case.	E	F
I prefer joint sessions over private caucuses.	F	E
I must have expertise in the subject matter of the dispute.	E	F

Appendix C
Mediator Conduct That Facilitated Case Resolution

	Number	%
Total cases with responses	452	
Evaluative Behavior	206	45.6%
Reality checking/testing; played devil's advocate; introduced hypotheticals; engaged in outcome probing conduct	123	27.2%
Evaluated the strengths and weaknesses of the case	40	8.8%
Described other possible outcomes; used "what ifs"; explained parties' rights if not settled; explored "watna"/ "batna"	35	7.7%
Proposed/explored options	24	5.3%
Knowledge of the law, technical information; distinguished illegal from unfair	23	5.1%
Encouraged a party or parties to compromise; "the gambit" (got each party to make a final offer toward the difference that then existed)	13	2.9%
Negotiation	2	0.4%
Requested that party contact key person(s) not in attendance; mediator contacted a key person	2	0.4%
Remove person from process	1	0.2%
Include support person (company expert) as part of the process	1	0.2%
Facilitative Behavior	255	56.4%
Listened; facilitated catharsis/discussion; paraphrased/restated answers/issues; used reflexive questions	56	12.4%
Kept parties focused on mutual desire for resolution, on what was important to the parties, on issues; kept track and summarized their options; convinced parties that they were heard	43	9.5%
Encouraged/pushed openness/honesty; let parties talk directly; allowed for venting dialogues/exploration of options/fairness/negotiation; demanded offer	42	9.3%
Kept parties talking	26	5.8%
Helped/asked parties to see others' vantage point; move past positions/"no-fault"	23	5.1%
Acknowledged feelings and positions; use of empathy/validation; relaxed party	22	4.9%
Reframed (issues?)	22	4.9%
Defused/managed emotion and feelings	17	3.8%
Clarification of facts or areas of agreement; highlight positives	17	3.8%
Provided process information; gave procedural choices	16	3.5%
Encouraged resolution (almost cheerleading); "win-win"	14	3.1%
Use of probing questions to identify interests; identified interests; moved from position to interest	14	3.1%

Appendix C (continued)
Mediator Conduct That Facilitated Case Resolution

	Number	%
Facilitative Behavior (continued)		
Use of a long joint session; kept parties together/face to face	14	3.1%
Gained trust/rapport	13	2.9%
Mediator “step backs”	10	2.2%
Gave parties time to consider options; did not rush; let parties fashion the remedy	6	1.3%
Transformative or quasi-transformative tactics (“end and rebuild”)	5	1.1%
Showed concern for parties’ problems	3	0.7%
Steered away from the legal aspects/legal rulings/debate	3	0.7%
Brainstorming in mediation (outside of caucus)	2	0.4%
Taught one side how to deal with other	2	0.4%
Face saving	2	0.4%
Allowed party (charging party) to tell story	1	0.2%
Storytelling	1	0.2%
“Hybrid” Behavior⁵⁴	106	23.5%
Use of caucuses (includes brainstorming w/I caucus), long joint caucuses, timeouts, including Q 10/40 conduct	48	10.6%
Maintained control of the process; police the process	25	5.5%
Neutrality (even if party is entitled to more); restraint; deflected personal comments	20	4.4%
Controlled introduction of “evidence” to facilitate resolution; worked parties slowly	7	1.5%
Charging party and respondent meeting without attorneys/esquires	5	1.1%
Caucus with attorneys/esquires only	4	0.9%
Used premediation conference call; lengthy premediation discussion	3	0.7%

⁵⁴ We note that in the pure facilitative model, caucuses are considered to be evaluative. Similarly certain process control conduct, controlling the introduction of evidence, and any premediation conduct are also considered by purists to be more evaluative than facilitative. However, we do not believe that the conduct fits our definition of evaluative conduct and thus place it in the hybrid category.