Escape from the Laboratory:

Ethnographic Methods in the Study of Elder and Family Court Mediation

By Alexandra Crampton

Abstract: The randomized control trial and pre/post research designs are commonly used in applied research and provide common standards for mediation evaluation research. These approaches have many benefits, particularly for evaluating whether mediation as an experimental intervention works or not.

Scholars and practitioners, however, want to know not only whether mediation can work as expected but also how it works in a range of real-world contexts over time. In these contexts, ideal experimental conditions are less likely to occur. Challenges include such circumstances as the following: the number of cases suitable for statistical comparison is insufficient; researchers lack control over how mediation is implemented; researchers lack clear, objective variables to measure; and the variability of mediation outcomes when studied over time makes it difficult to draw conclusions about them.

My research has involved each of these challenges, and I have used ethnographic research as a way to evaluate mediation in these contexts. In this article, I explain ethnographic methods and present two studies as examples of mediation evaluation research that began with a standard program evaluation design, and then incorporated ethnography to allow more complete data collection and analysis. My purpose here is not to argue that experimental methods in mediation evaluation research should be displaced but rather to demonstrate how ethnographic methods can be used when the conditions necessary for standard evaluation cannot be met. The two studies used as examples are from an elder mediation study in Ghana and a family court mediation study in the United States.

Article Excerpts:

Introduction

As mediation has become a professionalized practice, mediation researchers have focused on establishing and evaluating the state of that practice. For example, in their recent literature review, James Wall and Timothy Dunne (2012) assessed how well mediation research has helped identify best practices. They argued that mediation researchers should do more testing of and less testifying about the benefits of mediation. They also called for more empirical research to test best practices with control groups and for direct observation of actual cases.

At the same time, mediation practice has grown to extend beyond the boundaries of what has been explored by existing empirical research. In U.S. family courts, mediation was originally

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tested as an alternative to litigation to resolve child custody disputes. Pilot efforts were so successful that mediation is now commonly mandated through family courts as a court process run by court staff; and caseloads have expanded from first-time divorces to post-divorce and nonmarital cases.

Challenges for researchers, which I explore in this essay, are that larger social contexts may influence mediation processes and outcomes, and programs may use mediation in ways researchers have not anticipated. While a standard evaluation research design can assess how well the mediation program fits best practice standards, it may not fully capture how else the program works in practice given local, cultural contexts. …

Study Two: Child Custody Mediation in the United States

Background

Mediation was first pilot-tested in family court as a means to reconcile couples and then to help them separate more amicably. The focus was on nuclear families in which this was a first divorce for both parties. As I noted previously, one of the foundational studies of family court mediation was a randomized controlled trial (RCT) study, and this helped establish both the efficacy of mediation in these contexts and also established what have become the standard measures of success: satisfaction, cost, and settlement.

Family court evaluation literature continues to use a comparative frame. That is, a central question is whether mediation is better for parents than the court process — as if these two processes can and should be separated. This question presumes that "court" equates to adversarial and attorney-based processes while mediation allows parties to negotiate openly and therefore more freely and amicably.

In addition, mediation scholars have begun to consider complications that disputants bring to mediation, such as mental health and substance abuse problems, that were not factored into earlier, experimental studies (Emery 2012). Continuing contextual considerations in terms of relationship dynamics include domestic violence, "high conflict" patterns of interaction, and the intensely personal emotional and psychological reasons why people choose to marry and raise children in today's social contexts (Salem 2009; Crampton 2015).

Because of the contextual complexities that can potentially affect mediation processes and outcomes, I chose to expand an original research design of the family court mediation case study (in which individual cases were evaluated based on standard measures of success) by adding ethnographic data collection and analysis, and by extending mediation case study beyond

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observation and recording of individual mediation sessions within individual cases. This helped me analyze and interpret the experiences and insights of family court professionals and disputants as mediators and court staff sought to bring rational decision making into an often emotional and highly subjective enterprise.

Research Setting

My study, which I began in 2012, focused on the Milwaukee County Child Custody Mediation Program. In Wisconsin, mediation is mandatory for parents who file disputes over child custody or placement. Custody is legal decision making regarding such areas as health and education, while placement refers to child residence as measured by how many nights per week each child stays with a parent. In the Milwaukee program, parents referred to mediation must first attend an evaluation session, which serves to screen for domestic violence or substance abuse issues that would make mediation inappropriate, before they agree to continue to mediation.

Parents who choose mediation pay a one-time fee of $200 that can be waived for low-income litigants. If mediation fails or is otherwise terminated, a guardian ad litem (GAL) is appointed to investigate and make a recommendation to the court on behalf of the children. The majority of case filings are "paternity cases" (PA) in which parents have not married and the first step is determination of paternity. "Family cases" (FA) include never- married parents with no question about paternity, divorce cases, and postjudgment divorce cases.

Each year, approximately eight hundred cases are referred to mediation by court commissioners, judges, attorneys, or by parent request. The PA cases outnumber FA cases. Roughly half the cases in which parents agree to continue to mediation end in agreements. For example, according to mediation program statistics, in 2012 (the bulk of cases in my sample), 874 cases were referred to the mediation program. Of those cases, 386 were mediated, and of those mediated cases, 191 reached agreement (that number includes forty-two cases in which parents reported that they reached agreement after court referral and/or evaluation session and before mediation sessions). This results in a 55 percent agreement rate for mediated cases, which is consistent with previous studies of family court mediation (Kelly 2004; Emery, Sbarra, and Grover 2005; Ballard et al. 2011).

Study Design, Study Sample, and Data Collection

I began my research using presumptions found in the mediation evaluation literature. I thought my biggest problem would be gaining research access and consent, which, interestingly, turned out to be the case with mediators more often than with disputants. For logistical reasons, my

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research sample was a "convenience sample," that is, it comprised subjects who were available and not necessarily representative. This was necessary in part because mandatory mediation programs do not allow for random sampling. Another complication was that only half of the cases referred to the mediation result in a full mediation session, and it was not uncommon for disputants to postpone or cancel. Thus, it was time-consuming both to be available for mediation sessions and to attend for the purpose of observation and recording. Consequently, the best way to collect mediation cases was through mediators who were willing to contact me after they had scheduled a session.

I collected data between 2012 and 2015. The study sample for mediation case evaluation comprises forty-two mediation cases with sixty mediation case sessions and ten different mediators. (Each set of disputants met for one to four mediation sessions).

The sample comprises thirty-one FA cases and eleven PA cases. (As noted above, PA cases typically outnumber FA cases, so this proportion is clearly unrepresentative.) It includes fourteen first-time divorces (33 percent), twelve postjudgment divorce cases (29 percent), and sixteen nonmarital cases (38 percent). I conducted interviews with each of the five mediators whom I observed during mediation sessions, and six interviews with mediators whom I observed during evaluation sessions. I also conducted thirty-six interviews with parents. Of those, thirty were conducted with pairs of parents in mediation; one could only be conducted with one parent, and five were conducted with parents who never continued beyond the initial evaluation session.

I paid parents $30 per semi-structured interview, but otherwise research participants were not paid. I audio-recorded most of the mediation sessions, twenty-seven parent interviews, and eleven mediator interviews. The agreement rate for the study sample was about the same as in the court program as a whole: that is, it included twenty-three mediated agreements and nineteen mediation terminations, which is an agreement rate of 54.7 percent.

Because I observed cases directly and got to know mediators over time, I became skeptical of some of the basic unmarked presumptions I had been using to evaluate the program. My presumptions thus became my research questions. Two of these questions were: Is mediation truly voluntary? And, is domestic violence an unambiguous variable?

The data I used to address each of these questions came from my immersion in the court context as well as my exposure to the personal concerns that disputants brought to their mediation sessions but did not express there. Instead, I learned these through informal conversation and post-mediation interviews with them. I hung out as an observer of court hearings that might lead to mediation referral, mediation evaluation sessions, mediation sessions, and follow-up court

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hearings. The latter gave me an excuse for maintaining ongoing contact with disputants and enabled an extension of case study analysis as part of a court process that continued after mediation case closure.

I also immersed myself within larger mediation program contexts by attending a training session that mediators often take to qualify for the court roster, by attending roundtable discussions in which mediators discuss cases with a court commissioner and family court judge, and by observing mediation evaluation sessions. In all cases, I recorded field data through field notes and periodically summarized emergent insights through analytic memos (Corbin and Strauss 2014). I also collected program brochures, copies of program paperwork forms, court forms, mediation training materials, the program manual created for the court mediators, and study sample mediation case court files.

What I learned through additional hanging out and subsequent ethnographic data collection is that typical mediation evaluation research designs reflect the perspectives of mediation professionals. That is, for those whose only contact with family court is through the mediation program, the entire case consists of the court case referral, process and outcomes of the orientation sessions, and then process and final outcomes of any mediated sessions. By following cases over time, I gained additional relevant perspectives on mediation from court staff, legal professionals, and parents. The more frequent contact with parents that I made by following their cases also helped me to develop rapport and trust with the parents that in turn helped me better interpret observed interactions during mediation as well as parental interview responses following mediation sessions. In two cases, parents who had previously declined to be interviewed following mediation sessions changed their minds. As one said, “Now I will talk to you.” In general, parents were often frustrated and felt unheard and so were more than willing to talk to a sympathetic and uninvolved third party. One parent stated that the postmediation interview was more helpful than the mediation.

Postmediation interviews have been especially helpful; I used them to check the interpretive validity of my mediation observations and also uncovered what information parents withheld from the session but found important.

In general, parents clearly understood the intent of mediation. At the same time, it became clear that many experienced the process as involuntary. Despite programmatic efforts to fulfill state law mandating mediation through the evaluation session and then make continuation to mediation sessions voluntary, most parents interpreted court referral as a requirement. And it was indeed true that commissioners and judges were free to assign (and sometimes did) greater responsibility for paying the GAL fee to a party who had refused mediation. Although mediation

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is technically voluntary in terms of program structure and policy, participants often experience it as involuntary because mediation referral is embedded within a court process that remains prominent in the minds of parents even as they are told that mediation is kept separate and confidential.

Because the legal process as a whole was experienced as involuntary, mediation was experienced as involuntary by extension. That is, petitioners who filed (i.e., the parent bringing the other parent to court) often perceived that they had been forced by circumstance, particularly by the unreasonable behavior or attitudes of their ex-partner. In response, the respondents brought to court often perceived that they had been forced by the petitioner. To then be referred to a process in which parties can voluntarily engage in direct negotiations was sometimes experienced as an inconvenience at best and a cost of time and resources that exacerbated conflict at worst. This was particularly true for parents who expected the court process to provide answers and resolution. For example, one parent in divorce proceedings argued that mediation was not really possible until financial negotiations were completed because the placement (the term for what was previously known as custody and visitation) schedule was tied to child support, which in turn would determine whether the other parent could afford to stay in the marital home. For these parties, mediation was only useful if it became part of court decision making, such as an enforceable court order. Voluntary yet unenforceable mediation did not address these interests.

Following cases over time also revealed the difficulty of operationalizing such variables as domestic violence. Two examples illustrate how domestic violence is a relationship dynamic that can change over time and be re- interpreted over time. In the first example, my observations began with the first mediation session. The parents were so amicable during mediation that they teased the mediator for having posted a list of ground rules. “Is that really necessary?” they asked. The follow-up mediation session never took place, however, because of a domestic violence incident reported to the police. The domestic violence case was later dropped, and the mother complained that consequently she received less help with parenting and incurred additional legal costs. After the domestic violence case withdrawal, the divorce was suspended so that the parents could attempt reconciliation. One attorney requested a copy of a draft agreement that had come from the first session in case the reconciliation failed, which it eventually did.

The mediated agreement was then used in negotiations for the final marital settlement agreement. The day of the divorce, the mother explained that there would always be disagreement about the domestic violence incident, and both parents suggested that the court should offer counseling to help save marriages. Assessing both domestic violence and agreement — their occurrence, their impacts, their meanings — in a case like this is complicated.

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The second example is a post-divorce case. During the evaluation session, the mediator screened for domestic violence and determined that the case was appropriate for mediation. After three amicable sessions, parties signed an agreement. In post-mediation interviews, both parents spoke positively of their mediation experience. They praised the mediator, comparing their experience favorably to previous mediation experiences. Two years later, however, they were back in court, and a GAL and then a social worker were appointed to assess the case. Both professionals later testified in a trial that the case should not have been mediated because of one of the disputant's coercive controlling behavior. Neither party had reported differently when asked about domestic violence but the professional interpretation of the dynamic changed. Conclusions about whether the case was "mediatable" because of domestic violence as well as whether the mediated agreement was successful both changed over time.

My results suggest that success may be a more elusive goal within less than ideal contexts of parenting in cases of domestic violence and/or substance abuse. How to best conduct case evaluation then becomes an ongoing question for research analysis. In this way, the ideal of mediation and the need for intervention persists, even as assessment becomes a "wicked problem" that may not have clear answers or solutions. While such cases can be frustrating to evaluate—and to mediate—ethnographic methods can be used to clarify underlying complexities and provide data that can be used to evaluate case outcomes over time. …

Conclusion

Mediation practitioners and those who use mediation services understandably prefer clear options, and mediation as a profession has grown, in part, because mediators offer it as an intervention with clear benefits. As James Wall and Timothy Dunne wrote, mediation has been proposed as a solution to so many problems that "Many scholars and practitioners consider mediation to be an industrial grade Swiss army knife — capable of accomplishing any task" (Wall and Dunne 2012: 10). Experimental methods can be an ideal way of testing whether mediation works. They require operationalizing variables in objective terms, clearly stating the problem to solve, isolating the intervention from other intervening factors, and defining clear evaluation measures. Just as entrepreneurs "incubate" innovations before fully launching in local markets, researchers can make sure that mediation works through experiments using a range of variables before implementation.

My interest as a field-based researcher, however, lies in analyses of how interventions work over time as they are implemented across ever-broadening fields of practice. As the study results presented in this article illustrate, contexts shape interventions such that mediation is not the same thing when experienced by different parties experiencing different conflicts.

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