

What Do Mediators Do That Creates Trust?

- **Ava J. Abramowitz, GW Law School, Professorial Lecturer in Law**
- **Jennifer Shack, Resolution Systems Institute (RSI), Director of Research**

We have all been brought up on *Getting To Yes* and it has stood us well at the negotiation table. For those of us who think of mediation as facilitated negotiation, the segue of “GTY” thinking to the mediation table has been a logical step. But what if mediation is not just facilitated negotiation? What if it is more? Less? Maybe just different? Are there new things to be learned? To be taught?

Our research builds on the Neil Rackhamⁱ research most known to the negotiation academy through his and John Carlisle’s 1978 paper “The Behaviour of Successful Negotiators.” <https://www.emerald.com/insight/content/doi/10.1108/eb002297/full/html> In that paper, they report on the differences between skilled and average negotiator communication behaviors, gleaned by them from direct observations of real negotiators negotiating real problems. They found, for example, that skilled negotiators seek information more than twice as much as average negotiators, test the Other’s understanding more than twice as much as average negotiators, and summarize more than twice as much as average negotiators. On the other hand, the skilled negotiator uses terms like “fair,” “generous,” and “reasonable” – terms the authors labeled “irritators” as they serve only to annoy the Other -- five times less often than average negotiators.

Are there similar findings in mediation? Our research plans to find out. Using the same methodology as Rackham and Carlisle, Behaviour Analysis, we hope in time to provide answers to such pivotal questions as “What exactly do mediators do to build trust?” Does that answer differ if the mediation involves a commercial dispute or a family dispute?”

And, we want to use the data we collect to help the mediation community inch its way to shared clarity and ultimately consensus on those few critical issues that demand it, in particular, What exactly is success in mediation? <https://www.keymediationllc.com/wp-content/uploads/2021/02/toward-a-definition-of-success.pdf>

With the answers to these and scores of other questions, we can teach mediation more easily, as we would finally have tested science, replicable science, backing up theory.

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Some background on Behavior Analysis

Behavior Analysis breaks down the dynamics of interactive behaviors by identifying the individual communication behaviors used by the participants to discover which correlate with, if not cause, success. The idea is that if you can record, in an objective and clear way, exactly how many times certain identified behaviors occur in a specific setting, you can begin to connect those behaviors to outcomes. In Behavior Analysis, the coding is done by trained observers who do not participate in the activity other than to note what happens when. Each behavior is closely and objectively defined, so there is no overlap and no need to guess the intent of the speaker. In short: in Behavior Analysis, the language speaks for itself and is coded accordingly. Kenneth Webb and I began this research in 2019. Our goals were simple. We wanted to:

- Review studies that evolved from live observation, including Huthwaite's studies on negotiation, persuasion, and sales.ⁱⁱ
- Explore with mediators the communication behaviors they use or have seen parties and counsel use.
- Develop a list of mediation communication behaviors and then test them, refine them, test them, refine them, and test them again and again, and, yes, again until we had a list of behaviors that:
 - do not overlap;
 - are objectively defined, eliminating the need to guess speaker intent;
 - are measurable with a high degree of accuracy and inter-rater reliability;
 - are easily understood by parties, students, and specialists;
 - are teachable and usable;
 - and which ultimately correlate to demographics, expectations, perceptions, and outcomes.ⁱⁱⁱ
- Make sure each behavior is sufficiently differentiated to achieve a high-enough degree of inter-rater reliability (for example, with a score of .8 or above using Cohen's kappa, the yardstick for inter-rater reliability) that we can confidently report our findings to the dispute resolution profession.
- Make each behavior clear-cut and actionable so they can be taught and learned, easily put to use by researchers, teachers, and trainers to advance their studies and their students' skills and understanding.

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Communication behaviors first in negotiation, and then, in mediation

We know from other studies and from experience that for a group to make a good decision, someone has to put an idea on the table. Then the group has to explore that idea thoroughly enough to understand it, its upsides and downsides, its implementation challenges as well as its short- and long-term implications. Only then does the group have sufficient information to intelligently react to the idea. That process, in Behavior Analysis terms, translates into the major activities of *Initiating*, *Clarifying*, and *Reacting*.

The decision process most people use in the real world is not so precisely delineated. Often in meetings lots of ideas are put forward — in other words, there is a lot of *Initiating* — but politics, culture, or proclivities dictate no *Reacting*. These are usually meetings in which no real progress is made because most attendees couldn't assess what the group was thinking or feeling. Any action anyone took after the meeting they took at their own peril.

A meeting high on *Initiating* but low on *Clarifying* would fare no better. Most attendees would leave the meeting with different ideas about what happened and what should happen next. Without *Clarifying* behaviors, even good meeting notes won't resolve such a discrepancy — especially if the gap between attendees' notes is big.

A meeting too high on *Clarifying* has its own share of problems. Some speakers “strut,” certain their speeches are crucial. Other attendees, given the absence of proposals to consider, focus undue attention on details. Many attendees leave these meetings shaking their heads, thinking, “What a waste of time.”

We also know from research and experience that as helpful as the *Initiating-Clarifying-Reacting* process is, people don't always use it. Perhaps that is why we have disputes. Someone *Initiates* by offering a suggestion. Another instantaneously *Reacts* without a full understanding of the suggestion. With no *Clarifying*, the parties are talking about apples and oranges, each one certain that the Other's offering is rotten.^{iv} It's only a matter of time before both sides dig in their heels and no one moves.

In short, for an implementable decision to be reached, you need all three classes of communication behaviors at work during the decision-making process. You need all three to build common ground. You need all three to help parties move toward agreement.^v We

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believe that the *Initiating*, *Clarifying*, and *Reacting* framework can also be a useful overarching model for understanding mediation dynamics.

After extensive coding, here are the 23 mediation communication behaviors we have identified so far.^{vi} As you consider them, please keep a few things in mind about our research.

- Any participant in a mediation can use any of the behaviors. No behavior belongs solely to the mediator.
- Twenty-three behaviors are too many for a trained observer to code in a live mediation. Without the use of Artificial Intelligence, only a researcher who is coding recorded mediations can code all 23 reliably, by stopping the recording, thinking, and making the coding decision. In real time, choosing from such a large menu is impossible. For live coding we had to winnow this list down to the 10 to 14 most impactful behaviors.
- There may be other communication behaviors, ones that have not surfaced in any of our investigations to date. Nothing here is written in stone.
- We have not correlated any of these behaviors to participant demographics nor to dispute demographics. Nor have we correlated these behaviors with outcomes or participant satisfaction. These studies are being planned now by RSI's Jennifer Shack who is picking up the gauntlet and would welcome WIP participant input.

INITIATING behaviors express actionable ideas. The Initiating categories we identified are:

Proposing: Process/Procedures: Statements that put forward a *new* suggestion, proposal, or course of action regarding how the mediation could proceed. "Let's deal with that tomorrow."

Proposing: Substance/Content: Statements that put forth a *new* suggestion, proposal, or course of action specific to topics or issues related to the mediation. "If you could see your way to releasing us from all liability, we could increase our offer to \$1 million."

Building on the Idea of Another: Statements that extend or develop a proposal made by another person. "Yes. An underground garage is a great sales point, especially if we have the architect concentrate on lighting and safety."

Introducing Possibilities: Statements that put forward a *new* actionable idea or course of action, but neutrally, without ownership, commitment, or endorsement. "One possibility could be to include them in ownership rather than just pay them off."

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REACTING behaviors express approval, support, or disagreement with the Other's ideas or positions. The Reacting behaviors we examined are:

Agreeing: Makes a conscious and direct declaration of agreement or support specific to another person's contribution related to issues or outcomes, which can include positive assessments. "I agree. I rather like the idea of proceeding with caucuses."

Disagreeing: States a direct disagreement or raises obstacles and objections to another person's contribution regarding issues or outcomes, which can include negative assessments. "I don't think their position is tenable. And my board would agree with me."

Defending/Attacking: Attacks another person, either directly or through defensiveness. "...and your third point is either incompetent or a lie designed to damage and denigrate."

CLARIFYING behaviors help people develop shared clarity by examining the meaning of ideas, positions, and feelings shared at the table. Huthwaite's research gave us four such behaviors — *Giving Information, Seeking Information, Testing Understanding, and Summarizing* — which was a good but insufficient starting point. Watching mediators help parties get to yes convinced us that mediation requires more behaviors than just these four.

This induced us to redouble our efforts to break the molecules of *Clarifying* communication behaviors down into its atoms. Our goal was to provide all participants with increased means to negotiate amicably and effectively and enjoy successful agreement implementation without fear of future disputes. We suspect that finely tuned *Clarifying* behaviors will play a significant role in mediation and will be particularly helpful to mediators who have been trained not to react.

These are the *Clarifying* behaviors we surfaced with their definitions and with examples in quotes:

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Giving Information: Facts Statements about facts or issues that can be independently seen or verified by others, that is “External Information.” “I remember a case like that last year – Jones v. Smith. It would be the relevant authority here as we see it.”

Giving Information: Feelings Statements by a party regarding their own inner feelings or personal challenges and concerns, that is, “Internal Information.” “If we go that way, I have to lay off people, and that would just kill me.”

Giving Information: Positions/Interests Statements about outcomes, including what a party wants to achieve or avoid, as well as the reasons why that outcome is important to them. “It is important to me that he pay penalties for not paying on time. That allows me to pay my own bills and should stop him from messing with me.”

Seeking Information: Facts Questions that seek information about facts or issues that can be independently seen or verified by others, that is, “External Information.” “How can we make sense of the difference?”

Seeking Information: Feelings Seeking information from a party regarding their inner feelings or personal challenges and concerns, that is, “Internal Information.” “What concerns you most about their proposed terms?”

Seeking Information: Positions/Interests Questions about outcomes, including what a party wants to achieve or avoid, as well as the reasons why that outcome is important to them. “How responsive is their current position to your needs?”

Testing Understanding Questions that seek to establish whether an earlier contribution has been understood. “I said a lot, and I’m not sure I made sense. What did you hear me say?”

Acknowledging A statement that demonstrates, without agreeing, that a person’s perspective has been heard and understood. “You feel there is an imbalance in this mediation, with him having all the power and you having none.”

Summarizing Summarizes or otherwise restates, in a *compact* form, the content of previous discussions or events. “So far, all of you have agreed to (a) take legal action, (b) take it before February, and (c) file a complaint in both your names to encourage that other company to join this mediation.”

BALANCING: PROCESS/CONNECTING BEHAVIORS Research makes clear: How well the mediator manages the *mediation process* is critical to the parties. The better the mediator does, the higher the parties rate their satisfaction. (Guthrie and Levin, 1998).^{vii} The converse is equally true. Our challenge was obvious: What communication behaviors could Behavior Analysis uncover that would make process management more effective?

These are the *Balancing*, the *Connecting*, behaviors that we, building on Huthwaite’s research and adding our observations, discovered with definitions and examples in quotes:

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Small Talk: Remarks or discussion unrelated to the mediation that do not disparage any person, idea, or group. “You were at the first Beatles concert? You are so lucky. I had to watch it on TV. What was it like?”

Explaining the Process: Remarks or discussion describing the purpose of mediation and how the mediation will proceed. “Mediation provides the parties the opportunity to retake control over the dispute and not cede that power to strangers.”

Setting the Rules: Remarks or discussion concerning how the lawyers and disputants should handle themselves so the mediation can proceed in a productive way. “Anyone can call a time-out anytime if they need to.”

Bringing In: A behavior that invites views or opinions from a member of the group who is not actively participating in the discussion. “Karl, you’ve been watching and listening for a while now. Have you any suggestions for us to consider?”

Shutting Out: A behavior that excludes another person or reduces their opportunity to contribute. Nancy: “What is important here....” Joe: “Before we go there, we need to address.....”

Labeling Behavior: A behavior that gives advance warning of a behavior. “If you don’t mind, let me just check to make sure I understand what you’ve proposed.”

Encouraging: A statement that actively affirms the party’s or parties’ hard work or their progress toward settling the dispute. “I hope you’re really pleased with the progress you’ve made today.”

Each in its own way contributes to good process. There are probably others. Keep the foregoing discussion in mind as you review them. We welcome your insights and feedback.

The observation process

Now the big question: How do we collect data *and* maintain the confidentiality principles intrinsic to mediation? The coding sheet that follows should offer reassurance to those who, like me, worry about confidentiality. One number will be used by each of the data collection instruments – expectations, perceptions, outcomes, and the like, so that the appropriate demographics, expectations, perceptions, and outcome data can be correlated with the corresponding communications behavior data. The research number will substitute for any people-identifying, specific data. The observer will record communication behaviors only by role, that is, **M** (the Mediator), **P** (the Plaintiff), and **PA** (the Plaintiff’s Attorney), and so on.

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They say a picture is worth a thousand words. Here is our coding sheet of a videotaped mediation.

| | Mediator | P | PA | D | DA |
|---|----------|----|----|----|----|
| Initiating | | | | | |
| Proposing Process/Procedures | 22 | | 3 | | 5 |
| Proposing Substance/Content | | 1 | 1 | 1 | 4 |
| Building | | | | | |
| Introducing Possibilities | 2 | | | | |
| Clarifying | | | | | |
| Giving Information: Facts | 83 | 37 | 47 | 18 | 42 |
| Giving Information: Feelings | | 1 | | | |
| Giving Information: Positions/Interests | | 4 | 14 | 2 | 1 |
| Seeking Information: Facts | 26 | 11 | 6 | | 5 |
| Seeking Information: Feelings | | | | | |
| Seeking Information: Positions/Interest | 1 | 1 | 1 | | |
| Testing Understanding | 11 | 1 | 1 | | |
| Summarizing | 4 | 1 | 1 | | |
| Acknowledging | 6 | | | | |
| Reacting | | | | | |
| Agreeing | | 4 | 2 | | 3 |
| Disagreeing | | | 4 | 2 | 5 |
| Defending/Attacking | | | | 2 | 1 |

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| Balancing: Process/Connecting | | | | | |
|--|---|---|---|---|---|
| Small Talk | 3 | | | | 1 |
| Explaining the Process | 4 | | | | |
| Setting the Rules | 2 | | | | |
| Bringing In | 1 | | | | |
| Shutting Out | 7 | 9 | 2 | 2 | 6 |
| Labeling Behavior | 1 | | 1 | | 1 |
| Encouraging | | | | | |

What does any one coding sheet tell us? Sometimes not much, especially where, as here, the coding sheet is at its simplest for ease in demonstration. The power of coding rests in creating large samples, allowing us to put all the powerful tools of big data together to work for the benefit of the profession and the people it serves. But even at its simplest, this coding sheet has a story to tell.

Here you have a mediator whose **Initiating** behaviors use *Proposing* quite a bit, but only to suggest process, never substance or content. Instead the mediator used *Introducing Possibilities* to get new content on the table, neutrally and without mediator ownership. A deeper look-see tells us that this mediation was a fact-driven one, with **Clarifying** behaviors consisting mostly of *Giving* or *Seeking Information* about facts. There seems to have been some heat during the mediation, with 11 instances of party *Disagreeing*, 3 instances of party *Defending/Attacking*, and 26 instances of *Shutting Out*. Interestingly, the mediator uses no **Reacting** behaviors. Instead, the mediator relies on *Testing Understanding*, *Summarizing*, and *Acknowledging* to demonstrate to the parties that they have been heard. Perhaps those compensating behaviors helped the case settle. Had we the other data collection tools, we could have correlated all to find out the impact the mediator's choices had on party perceptions of trust and neutrality.

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The Decision to Study Trust First

Which brings us to the next point. If 23 behaviors can only be observed “live” with the use and speed afforded by Artificial Intelligence, and 14 behaviors maximum can be live-coded accurately, on what basis could we excise nine behaviors so that the observations of real mediations could provide a sufficient picture to afford insight? It was a multi-step process. First, based on our review of the literature, we surmised that the Academy viewed Trust in the mediator as a critical element to dispute resolution, if not the key element to successful dispute resolution. To provide the profession a study worth reading, we decided to first explore the impact of mediator choice in communication behaviors on Trust.

To do that, we re-coded the videotaped mediations yet again, but this time solely to determine how often each of the 23 behaviors were used. We figured if a behavior was not used often enough to make the top 14 usage list, we could set it aside for the purpose of hypotheses building, aware that future research might prove this decision wrong. We then applied the same reasoning to the “live mediation” observations. Fortunately, the results did not differ.

These are the 14 behaviors that made the Communication Trust Behaviors list:

1. Proposing: Process/Procedures
2. Proposing: Substance/Content
3. Introducing Possibilities
4. Agreeing
5. Disagreeing
6. Defending/Attacking
7. Giving Information – Facts
8. Giving Information – Feelings
9. Seeking Information – Facts
10. Seeking Information – Feelings
11. Testing Understanding
12. Acknowledging
13. Summarizing
14. Behavior Labeling

Using this list, we then developed Trust Hypotheses, using the communication behaviors as pivot points, as follows:

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1. The specific behaviors used by a mediator during face-to-face mediations (including video-conferenced mediations) are an important, perhaps the most important, element in determining whether a case will settle.
 2. The use of specific behaviors by the mediator will influence the parties' perceived trust in the mediator.
 3. The use of specific behaviors by the mediator will influence the parties' perceived trust in the mediation process.
 4. Low perceived trust in the mediator reduces settlement rates.
 5. Low degrees of trust in the mediation process reduces settlement rates.
 6. Mediations where the parties do most of the talking result in higher settlement rates than mediations where the mediator or the lawyers do most of the talking.
 7. Mediations where the parties do most of the talking result in more successful implementations than mediations where the mediator or the lawyers do most of the talking.
 8. Mediators with high levels of **Agreeing** or **Disagreeing** behaviors receive lower marks for trust than mediators with low levels of **Agreeing** or **Disagreeing** do.
 9. Exceptionally low levels of **Agreeing** and **Disagreeing** by the mediator may reduce Trust. Extremely high levels of these behaviors will have the same effect.
 10. High mediator levels of **Introducing Possibilities** will not adversely affect participants' ratings of trust, while high Mediator levels of **Proposing Substance/Content** will adversely affect perceptions of trust.
 11. High mediator levels of **Proposing Process/Procedures** behavior will not adversely affect participants' ratings of trust, while high Mediator levels of **Proposing Substance/Content** behavior will adversely affect perceptions of trust.
 12. Mediators who have an exceptionally low level of **Reacting** behaviors may create unintended or adverse behavioral or perceptual reactions. Specifically, these low-reacting mediators may induce a higher degree of **Disagreeing** and of **Defend/Attack** behaviors from the parties. Maybe even impasse.

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13. The adverse effects of low levels of reacting behavior in mediators can be avoided or reduced by mediators using behaviors which include **Seeking Information: Facts, Seeking Information: Feelings, Testing Understanding, and Acknowledging.**
 14. **Giving Information: Feelings** by the Mediator will have a positive correlation with perceived Trust, while **Giving Information: Facts** by the Mediator will not.
 15. Mediators that use **Labeling Behavior** receive higher marks for trust than those mediators who do not use **Labeling Behavior.**
 16. **Seeking Information: Feelings** by the Mediator will have a positive correlation with perceived Trust, while **Seeking Information: Facts** will not.
 17. Trust is not the issue. How the mediator handles the human risks facing the disputants is. If the mediator **Acknowledges** the risk and **Seeks Information**, and if the disputant is then forthcoming, the mediator will receive higher marks for trust than those mediators who fail to acknowledge the human risk facing the disputant.

And this is where Ken and I stopped. It was time to call in the Marines.

America's RSI joins the research effort as does England's Huthwaite International

We asked RSI, that is Resolutions Systems Institute, Inc., to join us due to its research expertise and its access to court disputes. We also asked for its help because of its self-generated interest in studying Trust. As RSI put it:

"Party trust in the mediator is considered to be an essential element in successful mediation. Despite its importance, little research has been done to determine whether any particular mediator behaviors help to engender party trust. We believe that the best way to conduct such research is to code the behaviors and to capture both quantitative and qualitative data from the parties."

To help it in their research, RSI has set up an Advisory Board:

- **Alyson Carrel, Clinical Associate Professor at Northwestern Pritzker School of Law and Co-Director of their Center on Negotiation and Mediation**
- **Timothy Hedeem, Professor of Conflict Management in the School of Conflict Management, Peacebuilding and Development at Kennesaw State University**

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- Art Hinshaw, John J. Bouma Fellow in Alternative Dispute Resolution and a Clinical Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University
- Cassandra Lively, Executive Director of the Center for Conflict Resolution
- Donna Stienstra, formerly Senior Researcher at the Federal Judicial Center
- Nancy Welsh, Frank W. Elliott, Jr. University Professor, Professor of Law, Director of Aggie Dispute Resolution Program at Texas A&M University

Collectively, they are now finetuning Trust hypotheses to be studied and draft interview questionnaires to be used.

We then sought out the participation of Huthwaite International in Sheffield England. It, too, has joined the endeavor. Founded by Neil Rackham in the Seventies, Huthwaite was grounded in Behaviour Analysis and is known today for its research and education and training impact on advanced interactive skill building from negotiation, collaboration, team building, persuasion, to sales. They will bring this expertise to studying mediation and advancing mediator communication options using the same communication behaviors, interview questionnaires, and methodologies as RSI and they co-develop.

All of us hope that this melding of minds, experience, and expertise will bring additional research avenues to the mediation world and additional understandings of mediation to mediators. We welcome any and all input that WIP attendees have to strengthen this research endeavor.

ⁱ In full disclosure, Neil Rackham is my husband.

ⁱⁱ Huthwaite, founded in the Seventies by Neil Rackham, used Behavior Analysis full tilt to discover what went on in interactive settings. Since the original Huthwaite research, there has been very little written research that only uses objectively and closely defined, mutually exclusive, and empirically tested verbal communication behaviors to code each of the participants, including counsel, in face-to-face mediations where none of the participants is role-playing, the observer is present witnessing all live, and the mediation involves a complex, often high stakes dilemma for the disputants and their counsel.

ⁱⁱⁱ For other approaches to identifying and then measuring the use, frequency, and sequence of communication behaviors, see Charkoudian, L., C. De Ritis, R. Buck, and C. L. Wilson. 2009. Mediation by any other name would smell as sweet—or would it? The struggle to define mediation and its various approaches. *Conflict Resolution Quarterly* 26(3): 293–316, and see Blake, O. E. Turning points in mediations: An examination of disputant resolution behaviors in mediations. (PhD diss., Claremont Graduate University, 1999).

^{iv} I use “Other” to convey that the person sitting across the table is neither a friend nor an enemy, simply an Other person with their own view of the problem, its causation, and its best resolution. In my book, *The Architect's Essentials of Negotiation* (2.ed.) (New York: John Wiley & Sons, Inc., 2009), I developed the term “Other” to counteract nascent negotiators’ tendency to put their egos front and center on the negotiation table, especially by personalizing their relationship with the other party. “Other,” I found, helps the negotiator recognize that the person sitting across the table is not a friend or an enemy, just an Other person with their own view of the problem, how it occurred, and how to resolve it.

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^v Knowing this dynamic, a mediator can fill the vacuum when a behavior is missing. “There are two ideas on the table. I’m not sure I understand each well enough to be of help. May I ask you to clarify each of your ideas so we are all on the same page?”

^{vi} These definitions were hard to come by. First, Ken and I had to come to agreement. Then Neil, Ken, and I had to come to agreement. Then we had coders apply the behaviors to transcripts with the definitions in hand. When there was *any* inter-rater inconsistency, we either tightened the definitions to ensure mutual exclusivity or we created decision rules to better address coder issues. Then we returned to step one. You do not want to know how often we went through this process. Suffice it to say, solidifying the 23 behaviors took more than four years.

^{vii} See also, Nancy A. Welsh on perceptions of procedural fairness. Do You Believe in Magic? Self-Determination and Procedural Justice Meet Prejudice in Court-Connected Mediation. 70 SMU LAW REVIEW 721 (2017).