PART I
THE PRACTICE OF MEDIATION

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Mediation: Its Definition and History

Introduction

Mediation is a form of dispute resolution, found outside the adjudicative space of the court-room or tribunal, where parties in dispute or conflict utilise the assistance of a third-party neutral to attempt to resolve their dispute. It is different from other forms of 'alternative' dispute resolution – such as negotiation, conciliation, arbitration, and early-neutral evaluation – in that the third-party neutral, the mediator, is present and assigned a number of qualities that are not as evident, or strictly adhered to, in the other forms of dispute resolution.

Many commentators and adherents to traditional mediation practices maintain that a mediation is comprised of five distinct philosophies (confidentiality, voluntariness, empowerment, neutrality, and a unique solution), and that without these core components the mediation is impoverished, or not a true mediation. We explore these philosophies further in Chapter 3.

Why is mediation so important? Why do we use mediators and why do we mediate? Simply, many disputes cannot be resolved by the parties involved. This may be because of impasses to communication as a result of power or cultural differences between the parties. Impasses may also be due to historical factors such as a previous animosity and distrust between the parties or the absence of a relationship between the parties prior to the dispute arising. A mediator is someone who is able to assist the parties who are 'stuck' in their dialogue with each other to get together, communicate in a relatively polite and semi-structured way, and exchange information.

Defining mediation

There is some debate as to what mediation really is, or should be. In the following extract from Associate Professor Michael Moffitt, Associate Director of the Appropriate Dispute Resolution Program within the University of Oregon's School of Law, we can see that a simple definition of mediation may not be a straightforward device to discover (Moffitt 2005, pp 70–2, 82–91). Moffitt's article is valuable because, when read in conjunction with later extracts within this chapter covering the history of mediation, it makes clear that mediation, as a concrete process, is far from finalised. Indeed, from the way Moffitt explains issues of definition it is clear that, depending on interpretation and stance, the idea of mediation is a fluid concept. During the course of Moffitt's article there are references to 'transformative mediation'. This and other theoretical analyses of mediation will be explained in more depth in Chapter 3.

Schmediation and the dimensions of definition

Introduction

In the Fall of 2002, a series of apparently random shootings occurred in the Washington, D.C. area. The shooter's tactics and weaponry led many to refer to these as "sniper" attacks. In a CNN interview prior to the arrest of any suspects, Stuart Meyers, an expert with years of personal experience as a police sniper declared, "This person is not a true sniper. This person is a murderer."

Definitions present both perils and opportunities when applied to complex human activities. Implied in the comment from Meyers is the idea that the term "sniper" has, by definition, a set of practice parameters. Some of the parameters are technical descriptions of practice. Had the killer used a handgun or a crossbow, one could imagine a sniper expert going on television to pronounce that the killer was not a sniper because some aspect of his practice fell outside the technical parameters of the definition. In this case, however, the killer's actions bore many of the hallmarks of the technical practice of being a sniper. The expert was not asserting that the killer was using an inappropriate weapon, inappropriate ammunition, or failed to deliver a lethal shot. Instead, Meyers' assertion illustrates that definitions often imply parameters that are moral constraints on practice. Even if the actions were otherwise consistent with those a sniper might take, the fact that the targets were morally unjustifiable meant that the entire enterprise ceased to be the actions of a "sniper," according to the definition prescribed by Meyers.

The literature describing mediation is filled with examples of similarly prescriptive definitions, and the debate surrounding these assertions is often heated. A mediator is someone who is X. A mediator does Y, and never does Z. "Mediators are impartial." "Mediators are trained professionals." "Mediators facilitate communication and negotiation." "Mediators never evaluate or provide legal advice." Despite the definitional voice in such statements, they are virtually never descriptive, empirical assertions. Speakers who assert that "Mediators never do Z" are not saying, "Those who hold themselves out to be mediators never engage in practice Z, according to my research." Instead, those who offer prescriptive definitions are asserting their vision of what they wish were

the popularly accepted boundaries of the practice in question. Perhaps their argument calls for the recognition of a new boundary. Perhaps their argument calls for the reinstatement of a currently disfavored boundary. They want either the technical or the normative concept of "mediation" to be understood in a particular way. Just as Meyers decried the murderer's actions as not being those of a "real sniper," one hears voices within the mediation community calling for – and even more frequently, asserting – an understanding of what "real mediation" is and who "real mediators" are.

Were this argument merely semantic, few would lose sleep over the question. In application, however, how one draws the boundaries around practices carries enormous stakes. This article does not suggest that definitions are unimportant. Indeed, it suggests the contrary – definitions can be very important. However, not all types of definitions are helpful in identifying appropriate boundaries.

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II. When definitions and practice collide: the case of mediation

Defining even a relatively simple word is no easy task. One might be able with relative precision to define something like the word "yardstick." When the word in question involves behavior, however, the task takes on at least two additional complications. First, any time humans are involved, it is reasonable to expect greater variation. If it were easy to describe human activity in simple, clear terms, the field of sociology would be far less rich and demanding. Second, most human practices worthy of description also raise normative questions that risk clouding the descriptive effort. To describe what a human does almost inevitably invites consideration of whether a human ought to do whatever is being described.

Despite the challenges facing those who seek to craft a definition of mediation, I suggest that the two aspects of definition-crafting I described at the end of the last section remain important. Definitions of mediation are either prescriptive or descriptive, and they are either acontextual or contextual.

A. prescriptive–acontextual definitions

Some definitions of mediation are purely prescriptive–acontextual in character. That is, they include components at odds with observable practice and usage. They also include no qualifiers or contextual parameters. The definitions at least appear to apply to all uses of the word equally.

"Evaluative mediation is an oxymoron." The article by this title, written by Lela Love and Kim Kovach, has received extraordinary attention – surely some of it due to the article's catchy, definition-suggesting title. The article appeared as part of a broader debate about the propriety of mediators assessing likely court outcomes – so-called "evaluative mediation." Prior to this article, most of the voices on each side of the facilitative–evaluative debate had limited their arguments to why the practice of evaluation was or was not appropriate. The arguments were largely in the nature of trying to define the "best practice" for mediators. The Love and Kovach article, or at least its title, raised the stakes in a sense, by suggesting that evaluation falls outside of the proper definition of mediation. One can almost hear the suggestion embedded in the authors' argument that those who evaluate should be labeled schmediators – or something else.

"Evaluative mediation is an oxymoron" is a component of a prescriptive definition, as opposed to a descriptive one. Love and Kovach were not contending that no practitioners are providing evaluations. Indeed, it was the very fact that some practitioners were evaluating that caused the authors to write their piece. Instead, what troubled the authors was that there were practitioners out there evaluating and calling themselves mediators. This practice, under the name of mediation, offends their normative vision of the proper definition of mediation practice. Hence, their definitional assertion is prescriptive. Their assertion is also acontextual. If one is to trust the face of the authors' rhetoric, evaluation falls outside of the scope of mediation, no matter the context. Recall the earlier set of self-proclaimed "mediators" I listed: retired judges, international diplomats, seventh-grade peer mediators, and therapists dealing with family disputes. The authors almost certainly intended their piece primarily for the retired judges. Yet their assertion on its face suggests a more universal aspect.

A second example of prescriptive-acontextual definitions related to mediation is found in many explorations of mediation ethics. "Mediators are neutral." Some scholars use the term impartial, some use the term neutral. Many, however, include one or the other in even the most basic definition of mediation. Not all of those who call themselves mediators are neutral. This fact alone does not make it prescriptive to define mediators as neutrals. What makes it prescriptive is that this practice variation regarding neutrality is not just a matter of variation-by-error. It is not merely that some people who call themselves mediators mess up and slip out of neutrality. What makes the inclusion of neutrality in a definition of mediation prescriptive is that not all scholars and mediators embrace the underlying idea that mediators should be neutral.

Perhaps the most vivid example of this disagreement over the proper role of neutrality comes from those interested in mediation in the context of international diplomacy. Jimmy Carter was in no way neutral, nor did he view it as integral to his role that he try to be (or even try to pretend to be) neutral. The definition "mediators are neutral" would suggest that Jimmy Carter was not a mediator, a conclusion that is unsatisfying for those who concern themselves with the descriptive aspects of definitions. If one took a poll on the street, asking passers-by to "name a mediator," Jimmy Carter would probably be among the most frequently named. How then, the descriptivists would ask, could we possibly craft an acontextual definition that does not include him?

B. Prescriptive contextual definitions

Not all prescriptive definitions are acontextual. Some of those who offer definitions limit the scope of their prescriptive definitional assertions by adding some type of practice parameter. Rather than saying "mediation is . . ." for all purposes, they say "in this context, mediation means . . ." or "this kind of mediator does. . . ." Their definitions remain prescriptive, however, because not all of those who practice within the particular context ascribe to the definitional parameters being offered.

One prominent example of prescriptive-contextual definitional work is found in the descriptions and applications of so-called "transformative" mediation. The term "transformative mediation" gained popular attention with the publication of *The Promise of Mediation* by Robert A. Baruch Bush and Joseph Folger. At the heart of this vision of mediation is the idea that a mediator's function is limited to two essential tasks: searching for opportunities to empower the disputants to exercise self-determination and self-reliance in solving their own problems (empowerment), and searching for

opportunities to help the disputants acknowledge each other as fellow human beings (recognition). The work of Bush and Folger is clearly contextual – the authors are not asserting that this is the only definition of any mediator's tasks. Instead, they create a subcategory of mediators – transformative mediators – and assign the definition to this more limited set of practitioners. What I wish to highlight is that their definition, though contextual, is also prescriptive.

Bush and Folger present the reader with two different prescriptive definitions in their treatment of mediation. First, they offer a prescriptive definition of "transformative." A mediation is transformational, according to their definition, if it helps the parties to achieve a particular form of human moral development. That is the only meaning of "transformative" consistent with the authors' construction. Within their view, therefore, a mediation that enabled a party to resolve an issue and put it behind her would not be properly labeled "transformative." Nor would a mediation be deemed "transformative" if it caused a massive collapse in the relationship between the parties, a marked escalation of rhetoric, or a fundamental shift in the nature of the dispute. An outsider might report that the mediation session was "transformative," in that it transformed the dispute, but Bush and Folger's definition includes a more limited view of the term. It is, therefore, a prescriptive definition.

Second, Bush and Folger appear to attach a procedural definition to an adjective that is facially focused on the outcome. That is, Bush and Folger define a mediation's transformative components by reference to the mediators' actions, rather than by reference to the impacts on the parties. The question that follows is this: can a mediator achieve the goals of transformation – that is, of promoting human moral development in mediation – through some other set of practices? In a comprehensive examination of the underlying assertions Bush and Folger make about the adult developmental impacts of this form of mediation, Jeff Seul has argued persuasively that other sets of mediator practice have at least as good a claim of "transforming" disputants. If Seul is correct, as I suspect he is, then Bush and Folger's definition of what is "transformative" is at most prescriptive. They define one path to transformative mediation as the path – a prescriptive definitional move.

The authors' definition of transformative mediation is also prescriptive in its treatment of mediators and their practices. Unlike Love and Kovach, however, Bush and Folger offer a contextual definition. They do not claim that only transformative mediators are mediators. Instead, they assert that all transformative mediators are engaged in a particular practice. And yet, in practice, one sees more variation among even those who profess to be "transformative mediators" than the authors would presumably countenance. Concerned with the prospect of such variation, some program designers have gone so far as to impose relatively rigid structures and practice parameters on their mediators. For example, the United States Postal Service has explicitly adopted the "transformative" model of mediation in its REDRESS program. My anecdotal interviews with REDRESS mediators, however, suggest strongly that actual practices in that program vary considerably from the singular model presented in program trainings. The mediators with whom I spoke varied not only as a matter of mis-step, but of practice. In the words of one, "I don't go strictly by the book, but I still consider myself transformative." This sort of practice variation helps to illustrate why the definitions offered by Bush and Folger are contextually prescriptive, rather than descriptive. Outside of a prescriptive definition of "transformative mediation," no mediator who is otherwise inclined to describe his or her practice as transformative would need to hesitate in adopting the label.

C. Descriptive definitions

What can those who would prefer not to craft prescriptive definitions offer with respect to **defining mediation**? Theirs is a more challenging enterprise, in many ways. The variety of things people do while calling themselves mediators is extraordinary. And yet a good descriptivist would search for the essential and common in those practices. Consider the definition, "Mediators are third parties, not otherwise involved in a controversy, who assist disputing parties in their negotiations." The treatise from which this definition is drawn is almost certainly the most comprehensive, thorough treatment of mediation available today. That the authors of these volumes chose to offer a descriptive definition makes sense, given the breadth of audiences to whom they speak.

This definition has the effect of drawing certain behavioral boundaries. Under this definition, it is not that anything one might do is considered mediating. A mediator's job is to assist the parties with their negotiations – not to design their building, or treat a disease, or fix their car. Intuitively, such behavioral boundaries make sense. And yet, if one examines closely the work of architects, doctors, and mechanics, pieces of their jobs are surely at least related to mediation. No architect practices for long without recognizing the need to help satisfy a range of different interested parties' desires. No doctor practices for long without recognizing the complicated decision making processes at play in families in which one member is seriously ill. And no mechanic goes without seeing disagreements arise within households regarding car repair expenditures and practices. Should they be considered mediators?

Within the notion that mediators are "third parties . . .who assist disputing parties in their negotiations," we see a structural component (this is who a mediator is) and a behavioral component (this is what a mediator does). In a dispute between two parties, according to this definition, one of the two parties cannot suddenly claim to be "the mediator." Instead, the mediator is said to be a "third party." Intuitively, this sort of structural limitation makes sense. As one pushes the definition a bit, one quickly sees that there are ways in which this aspect of mediation may be overstated from a descriptive perspective. For example, in a circumstance involving absent clients or constituents, the representative of one side might take on a mediative role, mediating between her constituents and her counterpart – assisting in their negotiations. A manager in an organization may not have an immediate stake in a particular fight, and may step in to help the disputants resolve their issue. The mediating manager is not entirely removed, however, from interest in the outcome or in the process by which the disputants resolve their differences.

Still, the descriptive accuracy of this definition of mediation is relatively high. The vast majority of people out there who are calling themselves mediators are trying to help disputants with their negotiations. And the vast majority of them enter the dispute as a mediator, rather than as an initial disputant. Therefore, if descriptive definitions aim only for accuracy, a definition such as this may hit the mark. To one who is interested in learning more about the term being defined, however, accurate descriptive definitions tend to be relatively less helpful. If all we can say about mediators is that they are third parties who try to help disputants as they negotiate, we have said painfully little . . .

The move toward categorization is important because strong categorization may ultimately help us better to understand and advance the field. Without good descriptions, observational research is virtually impossible. One cannot test theories about the efficacy of different approaches unless one has the tools with which to differentiate the approaches. Distinguishing one practice from another is important – not for purposes of honing a definition, but for purposes of learning . . .

Despite the problems of definition identified by Moffitt the National Alternative Dispute Resolution Advisory Council has defined mediation (NADRAC, n.d.), and it is a definition regularly cited in the research literature and the profession.

> ***Mediation*** is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.
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> An alternative is 'a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute'.

Mediation and negotiation

As we have mentioned the role of the mediator is, in part, the encouragement of the parties to negotiate their own conclusion to their dispute. Thus, negotiation is a key component of mediation. In this section we briefly define negotiation and contrast it to mediation before considering how it fits into the overall mediation framework.

Negotiation defined

If negotiation is a fundamental component of mediation then what is negotiation? Negotiation is the process whereby two or more parties work through their conflict or dispute (usually) with a view to coming to some agreement, or settlement, about that conflict or dispute. Like the many different forms of mediation there are many different forms of negotiation. Mediators need to be aware of the different forms of negotiation so that they are better able to understand the dynamic process unfolding before them, and can better deal with the consequences of the mediated negotiation when different negotiation styles come into conflict. What follows is a brief overview of the different forms of negotiation.

Adversarial negotiation

Adversarial negotiation is a method of conflict resolution where the parties in dispute negotiate from stated, or set, positions, aiming to gain concessions from the opposing party, before agreeing to a compromise solution. Adversarial negotiation is a form of negotiation that comes easily for many people and is one frequently used in litigation. A standard example of adversarial negotiation (and, here, adjudication) from the practical literature will best provide a clear picture of this form of negotiation. Imagine two young children fighting over an orange. One child wants the full orange so as to be able to make orange juice, and the other wants the whole orange to make a colour change to some paints the child is using. A parent of the children comes upon the dispute, hears both children say 'I want

the orange' – representing their positions about the dispute – and cuts the orange in two, giving each child half an orange. This is a fair and equitable resolution to the problem as both children wanted a finite resource, neither wanted to give the other the orange and so a compromise position was reached. Unfortunately, as is often the case in compromise solutions, neither child was particularly happy at only gaining half of what they wanted.

Carrie Menkel-Meadow, Professor of Law at Georgetown University and Director of the Georgetown Hewlett Fellowship Program in Conflict Resolution and Problem-Solving, provides a more academic perspective in the next extract and in so doing makes pertinent comment about the true reason for the so-called adversarial 'tactics' (Menkel-Meadow 1984, pp 764–83).

Toward another view of legal negotiation: the structure of problem solving

1. Assumptions of the Traditional Model: Adversarial Negotiation

Much of the legal negotiation literature emphasizes an adversarial model, implying an orientation or approach that focuses on "maximizing victory." This approach is based on the assumption that the parties desire the same goals, items, or values. It is assumed that the parties must be in conflict and since they are presumed to be bargaining for the same "scarce" items, negotiators assume that any solution is predicated upon division of the goods. In the language of game theorists, economists, and psychologists, such negotiations become "zero-sum" or "constant-sum" games and the bargaining engaged in is "distributive" bargaining. Simply put, in the pure adversarial case, each party wants as much as he can get of the thing bargained for, and the more one party receives, the less the other party receives. There is a "winner" in the negotiation, determined by which party got more.

Legal negotiations, at least in dispute resolution cases, are marked by another adversarial assumption. Because litigation negotiations are conducted in the "shadow of the law," that is, in the shadow of the courts, the negotiators assume that what is bargained for are the identical, but limited, items a court would award in deciding the case. Typically, it is assumed that all that is bargained for is who will get the most money and who can be compelled to do or not to do something. Indeed, it may be because litigation negotiations are so often conducted in the shadow of the court that they are assumed to be zero-sum games.

In transactional negotiation, the "common business practice" or "form provision" may serve the same limiting function. If the parties cannot resolve a particular point but still prefer to consummate the transaction, they may permit a form provision or common business practice to decide the issue. This may be true even where an unusual provision would more closely meet the parties' needs. Clauses which assign or allocate risks routinely to one side of a transaction are one example. Although transactional negotiations differ from dispute negotiations because in the former no court can force a solution, the two types of negotiation may be analogous where the shadow of the court or the "shadow of the form contract" encourage a habit of mind in the negotiators to rely on common solutions, rather than to pursue solutions which may be more tailored to the parties' particular needs.

These basic adversarial assumptions affect not only the conceptions of negotiations that their proponents assert, but the behaviors that are recommended for successful negotiation. Indeed, a good portion of the negotiation literature focuses principally

on behavioral admonitions, but never examines with any sophistication the sources or assumptions of such tactical injunctions and what their limitations might be.

The next section describes these admonitions and the process they produce so that their underlying assumptions may he examined in the succeeding sections. The basis of the description is the negotiation literature; there is at the present time little empirical data on how lawyers actually behave, though the existing literature seems to assume that most lawyers either already do or need to behave in adversarial ways to accomplish their goals. The purpose in beginning with these behavioral admonitions is not to focus on negotiation strategies but to illustrate how the literature implicitly, if not explicitly, assumes a unidimensional conception of negotiation goals.

A. The Structure and Process of Adversarial Negotiation

The literature of negotiation presents a stylized linear ritual of struggle-planned concessions after high first offers, leading to a compromise point along a linear field of pre-established "commitment and resistance" points. In such legal negotiations the compromise settlement point is legitimized by comparing it to the polarized demands of plaintiff and defendant and the relatively improved "joint gain" of the compromise point in comparison to the "winner take all" result achieved in court. In the most reductionist form of this adversarial model, analysts predict that the final outcome of any distributive bargaining problem will be at the "focal point" midway between the first offers of each party.

This section reviews the descriptions and prescriptions of adversarial negotiation found in the literature in order to demonstrate their weaknesses and limitations in achieving the types of solutions which might better meet the evaluation criteria suggested above. Several preliminary caveats are in order. First, much of this literature confuses the descriptive and prescriptive aspects of negotiation. It is unclear, for example, whether the negotiator should make a high first offer because that is what is commonly done and therefore expected, or because a high first offer assures a "focal point" or "compromise" closer to the negotiator's beginning point. Second, descriptions of the structure of negotiation with its "bargaining range" and offer and counteroffer "concession patterns" should be distinguished from the rather specific tactical exhortations commonly found in the literature. While the former may serve an explanatory purpose, such as describing what zero-sum negotiations look like, the tactical literature has limitations even within its own assumptions. This is explored more fully below.

1. The Structure of Adversarial Negotiation: Linear Concessions on the Road to Compromise

Most disputes are settled out of court. Describing how this majority of cases is settled, writers depict a remarkably uniform negotiation model. Because the parties fear the cost, the length of time to judicial resolution, and the winner-take-all quality of the judicial result, most cases are settled somewhere mid-range between each party's initial demand. Thus, the structure of adversarial negotiation consists of: 1) the setting of "target points" or "aspiration levels" – what the parties would like to achieve (target points may be set at the initial demand in the complaint or reduced slightly by a more realistic appraisal of what is possible); 2) the setting of "resistance points" or "reservation points," the points below which the party seeks not to go (preferring to risk the possibility of winning the polarized game in court); and 3) the ritual of offer and demand with patterns of "reciprocal concessions." The process results in 4) a compromise