1 Introduction

Approaches to Mediation

Minor disagreements and occasional conflicts between people are a common experience and a normal part of life. While such disagreements are typically handled or resolved informally by those involved, there are times when help must be obtained from others. In some cases, individuals utilize the legal system (for example, by filing a law suit or filing a case in small claims court). Other disputants may choose to utilize alternative dispute resolution approaches such as mediation or arbitration.

Mediation is an alternative to litigation which provides a nonadversarial approach to the resolution of conflicts and is used in a wide range of civil disputes.[1] The legal system and mediation both bring a third party into the dispute resolution process, have specific rules and procedures which must be followed, and give participants specific rights and obligations. However, institutionalized methods of conflict resolution such as these differ in several ways. First, disputants using mediation have the autonomy to negotiate their own agreements. While they have the help of the mediator in attempting to resolve their conflict, the mediator does not have the authority to make a decision for them.[2] When compared to adjudication, mediation empowers the disputant and provides them with a greater opportunity to express themselves and to represent their own interests (Charkoudian, Eisenberg, and Walter 2017; Ewert et al. 2010; Moore 1986). Second, mediation programs are designed to facilitate cooperation and compromise. Third, the help of the mediator and the design of the process work to lessen intensity of the conflict. When disputants choose traditional legal avenues such as lawsuits to resolve their conflicts, those modalities of dispute resolution may exacerbate the

[1] See Bishop et al. (2015); Borg (2000); Boulle, Colatrella, and Picchioni (2008); Conley and O'Barr (2005); Doneff and Ordover (2014); Ewert et al. (2010); Felstiner and Williams (1978); Folberg and Taylor (1984); Frenkel and Stark (2012); Moore (2014); Woolford and Ratner (2008). In the case of divorce mediation, McGowan (2018) argues that instead of offering mediation as an alternative to litigation, it should often be used in conjunction with litigation.

[2] See Boulle et al. (2008); Cobb and Rifkin (1991b); Doneff and Ordover (2014); Merry and Silbey (1986).

antagonism between the disputants.[3] Mediators believe that mediation can help disputants reach an understanding of each other's positions while reducing conflict between them and increasing the chances of reconciliation.[4]

Over the last two decades, mediation has become an increasingly prevalent method of conflict resolution (Gewurz 2001). Mediation is used in a wide range of conflicts, including divorce and family conflicts, small claims cases, and neighborhood, consumer, business, and workplace disputes. It has also been used to help resolve disputes in educational institutions and medical settings, and for victim–offender reconciliation and international conflicts.[5]

Mediation is used in many countries around the world including Canada, China, Denmark and other Scandinavian countries, Great Britain, Israel, Liberia and several other African countries, and the United States.[6] Mediation is likely to maintain its popularity, as it is more cost effective than many of the alternatives. In addition, disputants may learn skills for avoiding and resolving conflict by participating in mediation, and may be more likely to maintain relationships with the person with whom they were engaged in conflict if a mutually agreeable resolution is reached (Boulle et al. 2008).

In this chapter I first briefly describe mediation and its history. I then describe several types of mediation currently in use in the United States and other countries around the world. This is followed by a review of previous literature which investigates the effectiveness and fairness of mediation. I then describe the data sets to be analyzed in this book. The chapter concludes with brief chapter summaries.

Roots and Varieties of Mediation

Although only coming into common use by the general public since the 1960s and 1970s, mediation has a long history. It initially developed both in ancient China and Africa, and the idea has spread to many countries around the world.[7] In the United States, the first use of mediation was probably among Puritan

[3] See Cahn (1992); Carper and LaRocco (2016); Girdner (1985); Worley and Schwebel (1985).
[4] See Bottomley (1985); Boulle et al. (2008); Charkoudian et al. (2017); Dingwall (1986); Folberg (1983); and Roberts (1988) on the benefits of mediation for disputants. There are also benefits for the mediators (Malizia and Jameson 2018).
[5] See Alberts, Heisterkamp, and McPhee (2005); Bishop et al. (2015); Cohen (1995); Doneff and Ordover (2014); Edwards and Stokoe (2007); Irving and Benjamin (2002); Kressel (2007); Little (2007); McKenzie (2015); Pines, Gat and Tal (2002); Polkinghorn and McDermott (2006); Presser and Hamilton (2006); Saposnek (1983); Sellman (2008); Stokoe and Hepburn (2005); Stoner (2018); Szmania (2006); Szmania, Johnson, and Mulligan (2008); Trachte-Huber and Huber (2007); Wallensteen and Svensson (2014).
[6] See de Vera (2004); Liebmann (2000); Mikkelsen (2014); Pogatschnigg (2012); Savoury, Beals, and Parks (1995); Uwazie (2011); Zamir (2011).
[7] See Brown (1982); Folberg (1983); Gibbs (1963); Liebmann (2000).

settlers in the colonial period, while in the United Kingdom, mediation began to be used historically as early as in the 1600s (Roebuck 2017), for industrial and employment disputes in the 1960s, and for family conflicts in the 1970s (Liebmann 2000; Woolford and Ratner 2008). Mediation was used in industry as early as the late 1800s in the United States for labor issues and contract disputes (Kolb 1983). During the mid 1900s, an increase in the number of civil cases began burdening the legal system, resulting in a push to increase utilization of mediation as an alternative conflict resolution procedure (Folberg and Taylor 1984). Social and cultural changes during the 1960s and 1970s also made mediation an attractive alternative to adjudication (Folberg and Taylor 1984).

A burgeoning of organizations and services occurred during this period with the goal of providing mediation services to a wider range of people and types of civil disputes. For example, national organizations such as the American Arbitration Association, the Association of Family and Conciliation Courts, the Family Mediation Association, and the Federal Law Enforcement Assistance Administration began providing mediation and educating the public about mediation in the 1960s and 1970s.[8] Local and regional organizations also appeared, which provided mediator training and community and neighborhood mediation services, such as Community Boards in San Francisco and the Institute for Mediation and Conflict Resolution in New York City (Zondervan 2000). Mediation programs and philosophies have never been monolithic; each program had its own approach to mediation and used different techniques and procedures to conduct mediation sessions (Woolford and Ratner 2008).

There is a wide variety of approaches to mediation and perspectives on its purpose and goals (Goldberg, Brett, and Blohorn-Brenneur 2017; McEwen 2006). These include the shuttle diplomacy, conciliation, and panel approaches, as well as the deal-making and orchestration approaches to mediation. The Institute for Mediation and Conflict Resolution in New York City used the shuttle diplomacy approach.[9] Their mediations were run by a panel of mediators (Felstiner and Williams 1978). The mediation sessions they ran began with an opening phase in which mediators conducted introductions and described the mediation philosophy and process. The mediators then held a joint session during which the disputants communicated the problems that brought them to mediation. The panel of mediators then held a private conference among themselves to discuss the case, and then brought in each disputant

[8] See Brown (1982); Folberg and Taylor (1984); Frenkel and Stark (2012).
[9] See Boulle et al. (2008), Ewert et al. (2010), and Wahrhaftig (1983) for historical information; see Shun (2018) for a discussion of contemporary uses of similar approaches.

in turn for private conferences with the mediators. The disputing parties were only brought back into a joint session when the panel believed a possible resolution had been identified (Felstiner and Williams 1978; see also Woolford and Ratner 2008).

While the shuttle diplomacy approach consists almost entirely of individual caucuses, other mediation programs conduct mediation in a joint session, using individual caucuses only when necessary. For example, the Community Board in San Francisco practiced what they call the "conciliation" model of mediation (Wahrhaftig 1983). The Community Board mediation program strived to not just resolve specific conflicts but to teach disputants how to resolve conflicts themselves. The joint session model of mediation was considered more beneficial than the shuttle diplomacy model for achieving this goal.

Most mediation programs encouraged or required disputants to represent themselves (Greenwald 1978), but there were some which required disputants to be represented by attorneys. For example, in mediation sessions run by the Philadelphia County Court of Common Pleas, panels of three attorneys served as the arbitrators and the disputants were represented by attorneys (Cerino and Rainone 1984). Some contemporary mediation programs also use attorneys as mediators, representatives of the disputants, or both (see, for example, Abramson 2005; Frenkel and Stark 2012; Mantle 2017).

There are also variations in mediation procedures which depend on the nature of the dispute being mediated. Consumer disputes may be resolved effectively in a relatively short mediation session of an hour or two in length (Cerino and Rainone 1984), while more complex disputes such as divorce and child custody mediations may require a series of sessions in order to reach agreement (Thoennes and Pearson 1985). While divorcing spouses typically have attorneys representing them, the attorneys usually play a behind the scenes role rather than attending the mediation sessions (Bahr 1981). This is one reason why mediation is a less expensive method of divorcing.

Differences in mediator style result in different degrees and types of intervention in the dispute resolution process. The "orchestrating" style of mediation was found in the context of state and federal labor mediation (Kolb 1981). The orchestrating mediator works as a facilitator or go-between, working to represent the positions of one side of the dispute to the other side. Kolb found that the "deal-making" style of mediation involved more intervention. This type of mediator engaged actively in the process, at times arguing with disputants, taking positions on issues or proposals for resolution, and working to achieve a fair outcome.

Today, a variety of new programs, organizations, and approaches to mediation have emerged. While the most common approach is facilitative mediation, the narrative and transformative approaches to mediation also have adherents and advocates and will be discussed here as well.

Facilitative Mediation

Facilitative mediators try to help disputants resolve their conflict while working to maintain disputant autonomy. While they may at times provide advice and information, they try to stay neutral and let disputants reach their own agreement.[10] They work to facilitate the mediation process and the interaction that occurs within the session. The stages of facilitative mediation typically include "opening the session, setting ground rules, gathering information, defining issues, exploring options, generating movement by forceful persuasion, and achieving agreement" (Bush 2013: 434).

The mediator role is stronger in facilitative mediation than in transformative mediation (see below). Woolford and Ratner (2008) note that facilitative mediators take active steps to encourage cooperative communication between the disputants rather than arguing. They note that mediator techniques such as summarizing disputants' positions or reformulating their statements may be effective. The mediation sessions that are analyzed in this book follow a facilitative approach to mediation.

A videotaped role play of a workplace mediation provides an example of a facilitative mediation (Merchant Dispute Resolution Center 2006). The two co-mediators in this session use a facilitative approach to resolving a dispute between a supervisor and one of the midlevel managers who works under him. The mediators begin with ground rules and a description of the mediation process. They ask the disputants not to interrupt each other, and to take notes instead. They ask them to avoid name-calling. The mediators state that they will work to be unbiased. Each party begins with a brief opening statement (they start with the complainant) in which they describe their issues. When one disputant interrupts the other, a mediator sanctions them for interrupting, and reminds them to take notes if there is anything they want to respond to later. They then begin the information-gathering phase. The mediators ask the disputants to describe the situation they are in and how it has affected them. The mediator uses paraphrases to reframe disputants' complaints in a more constructive direction. At one point a disputant speaks directly to the opposing disputant to make an accusation. The opposing disputant immediately denies the accusation. This initiates a short argumentative exchange. The mediator intervenes, but uses questions to redirect the conversation rather than sanctioning them for arguing or interrupting. The mediators help the disputants articulate their problems and the underlying interests each disputant has. They write the problem statements on an easel and ask the disputants to brainstorm ideas for resolution. They specify that the ideas can be anything they can think of,

[10] See Bishop et al. (2015); Boulle et al. (2008); Ewert et al. (2010); Frenkel and Stark (2012); Seaman (2016); Xu (2018).

and that they will not be held to anything they may suggest. After they have generated a list, the mediator asks them to see if any would work. The disputants select the solutions they prefer, and the mediators help the disputants write up the agreement. During the agreement-writing phase the ideas for resolution are clarified and elaborated as necessary.

Narrative Mediation

Narrative mediation is an approach based on the premise that listening to and understanding the stories disputants tell provides the key to resolving the conflict and improving the relationship between them.[11] The role of the mediator is to assist the disputants in telling their stories and understanding the nature of the problems they face. The belief is that this experience will help them create a more positive relationship with each other (Winslade and Monk 2008). Ewert et al. (2010) describe the narrative approach as follows:

> LeBaron's view is that every person's self-image, belief system, and sense of meaning are based on the stories that have surrounded him or her since birth. These formative stories are endlessly diverse and equally valid. The narrative mediator deals with a conflict situation by trying to discover the formative stories belonging to each disputant. Having done that, the mediator helps each party break down their stories into their main elements and then reconstruct these elements into a larger narrative that integrates their own and the other party's interests. The mediator's main activity, in this scenario, is to gain the parties' trust and build rapport between them, so they can understand one another's stories. Through this process, parties are freed from the trap of their own socialization stories. (Ewert et al. 2010: 62)

The result of the narrative mediation process should be for the mediator to help participants construct a new story which is more positive and beneficial for both sides of the dispute (Bishop et al. 2015). This narrative model is more likely to be useful for disputes involving participants with ongoing relationships (such as divorce and family mediation), rather than problems between those with temporary or short term relationships (such as those typically resolved in small claims court mediations).

Transformative Mediation

The main goal of transformative mediation is to accomplish social change by empowering disputants through a process which enables them to learn how to resolve their own disputes (Bishop et al. 2015; Seaman 2016; Woolford and Ratner 2008). The transformative mediator works to

[11] See Boulle et al. (2008); LeBaron (2002); Seaman (2016); Winslade and Monk (2008).

help the parties recognize their interests and to help them develop their skills in communication and problem solving. Thus empowered, they can make appropriate decisions for themselves. This approach emphasizes mediation's educational function, and how mediation can transform individuals, groups, and society as a whole. (Ewert et al. 2010: 61)

In transformative mediation "the mediator's work focuses not on guiding the parties toward a solution to specific problems, but on supporting them in a constructive interaction about their situation and disagreements without focusing on problem solving per se" (Bush 2013: 431).[12] Transformative mediators are something like interactional coaches, as they work to help participants shift toward more positive interactional styles (Bush 2013). Bush (2013) writes that in transformative mediation, instead of controlling the process through facilitating disputants' progress through the stages of mediation, the mediator supports their communication by reflective listening (without rewording or reformulating their statements). Transformative mediators believe that they should be providing summaries of issues and arguments, and "highlighting decision points – but letting the parties decide" (Bush 2013: 444). In addition, transformative mediators are trained not to suppress arguing or interrupting between the disputing parties (Bush 2013).

There are several ways in which the transformative mediation session differs from the facilitative sessions described above (and from the data analyzed in this book). A videotaped example of a transformative mediation session provides an example of transformative mediation (Institute for the Study of Conflict Resolution 2011). Instead of describing the mediation procedure and setting ground rules in her opening, the transformative mediator tells the disputants, who are parents, that they will have a conversation to help them get a better understanding of their situation and their issues, and to give them the opportunity to listen to each other. The mediator's role is to support them and help them have the best conversation they can. The disputants are allowed to speak directly to each other. The mediator does not interrupt them, even if the discussion gets a little heated, but does take advantage of pauses or breaks in the discussion to summarize each disputant's position and perspective.

The summary work this transformative mediator does is different from that typically done by facilitative mediators in that she will more often reflect back the person's statements using the exact words and phrases that they used. She is much less likely to paraphrase or reframe their perspectives, and instead acts as a "mirror," holding each parent up to themselves so that they can clearly see their own position as well as the other parent's position. The mediator avoids making suggestions or sharing her own ideas for resolution. She uses caucuses

[12] See also Bush and Folger (2004); Bush and Pope (2002).

during the session in which she speaks to each parent privately. The mediator also highlights emotions when they are displayed and labels them for the disputants (Institute for the Study of Conflict Resolution 2011).

The mediation sessions studied in this book fit squarely in the facilitative mediation model as opposed to a transformational or narrative model (Hanley 2010). There is individual variation between mediators in their approach to the session, and in the degree to which disputants are allowed to deviate from the official structure of the mediation session. For example, as the analysis in this book will show, divorce mediation tends to provide disputants greater interactional autonomy and self-direction within the sessions than does small claims mediation.

Previous Research on Mediation

While mediation is marketed as empowering disputants to resolve their disputes in a nonadversarial setting, there are several factors which may impede the ability of mediators to achieve this goal. For example, the extent of mediator control over the production of ideas for resolution of the dispute as well as the challenge of potential power imbalances or differing levels of interactional competence between disputants, are potentially problematic for the fairness and utility of mediation as a conflict resolution procedure.[13] Such findings about the sources of mediation's strengths and weaknesses are important for mediation practitioners and for researchers evaluating the effectiveness of mediation.

Of the many types of disputes that can be resolved via mediation, the two most well known are divorce mediation and small claims mediation. The analysis in this book will cover both of these types of mediation and will explore the similarities and differences between them. Small claims mediation sessions tend to be comparatively brief, and typically require only one mediation session. They often involve disputants who will not necessarily have contact with each other after the conflict is resolved (e.g., a shopkeeper and a customer). With divorce mediation, on the other hand, the participants know each other well and the issues typically take several sessions to resolve. If the couple has children, the issues should be resolved such that the parents can remain on speaking terms after the divorce. These differences in the nature of the disputes and the relationships between the parties are reflected in and reflexively shape the interactions that occur in the two settings.

[13] See Cobb and Rifkin (1991a); Garcia (1995; 2010); Greatbatch and Dingwall (1989); Mayer (2004).

While advocates of mediation are very enthusiastic about its benefits, some argue that the strengths of mediation are also to some extent its weaknesses.[14] For example, although mediation attempts to protect the autonomy of disputants, less powerful disputants may be more disadvantaged in mediation than in other legal processes. The informality of the process of mediation may enable more forceful or otherwise powerful disputants to have an advantage (Bottomley 1985; Wing 2009). Some also question the possibility or desirability of true mediator impartiality.[15]

Mediation programs see fairness and neutrality of the mediator and the autonomy of the disputant as core values of the process.[16] These goals may be achieved through a variety of different methods and within a range of different styles and modes of mediation. While mediation programs differ in the degree of active intervention of the mediator in the interaction, there is consensus that mediators should not pressure disputants or treat them differently; these actions can lead to perceptions of bias on the part of the disputants. In all types of mediation:

> [Mediators should] remain – and *appear* to remain – impartial and balanced with respect to competing positions, and disinterested and nondirective with respect to the content of any agreement. Mediators may influence the *process* – for example, seeing to it that both parties have equal opportunities to tell their stories, that both parties understand the perspective of the other, that both parties treat one another with civility, or that neither party is coerced into agreement – but mediators should not leave their mark on the *content* of the resolution . . . According to the official ideal of neutrality, [mediators] must resist the impulse to agree or disagree with one or the other party, to refute or support positions, to challenge and contradict, or to bolster and confirm. (Jacobs 2002: 1406)

Mediators are trained to avoid taking sides in the dispute, but there are several ways that bias could be conveyed unconsciously.[17] For example, unequal attention could be unintentionally displayed through talk, tone of voice, or body language (Shailor 1994). Because mediation is less formal and more flexible than court proceedings, inequality of treatment of the disputants can occur more readily.

[14] For example, see Bottomley (1985); Cobb and Rifkin (1991a); Garcia (1995); Merry (1989).
[15] For example, see Bishop et al. (2015); Kishore (2006); Mayer et al. (2012); Mulcahy (2001).
[16] See American Arbitration Association et al. (2005); see also Alberts et al. (2005); Boulle et al. (2008); Burton (1986); Center for Dispute Settlement (1988); Doneff and Ordover (2014); Donohue (2006); Douglas (2012); Frenkel and Stark (2012); Folberg and Taylor (1984); Jacobs (2002); Kressel (2000); Maggiolo (1985); Menkel-Meadow et al. (2011); Poitras and Raines (2013); Shailor (1994); Zetzel and Wixted (1984); Zumeta (2006).
[17] See Garcia et al. (2002); Jacobs (2002); Poitras (2013); Poitras and Raines (2013); Roberts (2008); Shailor (1994).

In spite of these potential challenges, research shows that mediation is perceived as fair and unbiased by the majority of participants. For example, Polkinghorn and McDermott (2006) found very high rates of agreement with statements that the mediator was neutral and the mediation procedures were fair. Wissler (2002) found similar results, with strong majorities believing that the process was fair and that mediators were neutral and impartial. However, studies show that at least some participants report dissatisfaction with the fairness of the process or neutrality of the mediator.[18]

In sum, a significant number of disputants in mediation perceive at least some degree of unfairness and mediator bias during the process. In addition, some of these studies may tend to overestimate the rates of satisfaction, for example by combining the "somewhat satisfied" and "very satisfied" categories (e.g., Bingham et al. 2009). This approach may obscure some of the disputant experiences that were problematic – something about the fairness of the mediation process led the client to check the "somewhat satisfied" box instead of the "very satisfied" box; it is not clear that these two experiences are equivalent. Although the dissatisfied clients are clearly in the minority, they are a significant portion of mediation clients. A disputant who perceives bias or unfairness might not choose mediation in the future or may not recommend it to others. In this instance, the mediator's goals of providing a fair and unbiased process have not been met.

Research on how disputant react when they experience bias during a mediation session reveals that these perceptions are rarely shared with the mediator, and rarely revealed during the mediation session.[19] On the rare occasions on which a disputant revealed perceptions of bias during a mediation session, it resulted in the termination of the mediation (Garcia, Vise, and Whitaker 2002; Jacobs 2002). These two studies used a conversation-analytic approach to directly examine the interaction in the session. This approach enables researchers to study mediation techniques directly and to examine how disputants respond to actions they perceive as unfair or biased. Most research on bias and unfairness in mediation uses survey or interview methods and therefore does not examine the interaction itself or the specific mediator actions that may have led to these perceptions.[20]

[18] See Bahr (1981); Benjamin and Irving (1995); Brett et al. (1996); Chandler (1990); Depner, Cannata, and Ricci (1994); Gaughan (1982); Gaybrick and Bryner (1981); Herrman et al. (2006); Irving and Benjamin (1992); Kelly (1989); Kelly and Duryee (1992); Meierding (1993); Neves (2009); Pearson and Thoennes (1985); Saposnek et al. (1984); Waldron et al. (1984).

[19] For example, see Charkoudian and Wayne (2010); Polkinghorn and McDermott (2006); Wall and Dewhurst (1991); Wissler (1995; 1999; 2002; 2004; 2006).

[20] For example, see Alberts et al. (2005); Brett et al. (1996); Donohue, Drake, and Roberto (1994); Herrman et al. (2006); Wissler (2002; 2006).