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**Models of mediation and ADR**

The Mediation Meta-Model — the realities of mediation practice

Nadja Alexander

Introduction

It is well known in Australian mediation circles that mediation practice does not always correspond to the dominant facilitative training model—even though, on the face of it, the formal accreditation of mediators might suggest otherwise. In 2003 judicial attention was drawn to non-facilitative mediation practices in the case of *Tapoohi v Lewenberg*. The case demonstrated that differences in mediator styles matter as an issue of professional practice. The National Mediator Accreditation System (2008) recognises the advisory nature of certain practices called mediation and defines them as ‘blended processes’, thereby differentiating them from mediation proper which is defined in facilitative and non-advisory terms: on blended processes see Practice Standards, sections 2(7), 3(4)(g)(i) and 10(5) and Approval Standards sections 2(4), 3(4) and 4(2), 5(4).

While the facilitative–advisory distinction is an important one, approaches are more varied than this. Writers such as Riskin (2003), Boulle (2011), Currie (2004), Antaki (2006) and Bush and Folger (1994) have identified different models of mediation. In this article, I expand on the literature and present a meta-model for thinking about mediation practice. The Mediation Meta-Model is a structure for identifying different mediation approaches and how they relate to one other. It makes no claim to universal application. Rather, it offers a conceptual road-map for an increasingly complex and sophisticated array of practices which share the name mediation. The theoretical foundations and analysis for the Meta-

Model have been included in previous work (2008). Here a practitioner’s overview is offered.

The Mediation Meta-Model

Six contemporary practice models are represented in the Mediation Meta-Model (visually represented in Figure 1). They are:

- expert advisory mediation
- settlement mediation
- facilitative mediation
- wise counsel mediation
- tradition-based mediation
- transformative mediation.

The Mediation Meta-Model is based on two dimensions:

- the interaction dimension
- the intervention dimension.

The interaction dimension refers to the way in which parties interact with each other in mediation. The interaction dimension (horizontal in the figure) moves from positional bargaining on the left side of the diagram towards interest-based negotiation in the centre and then extends to a dialogue-based discourse on the right side. Interest-based negotiation and positional bargaining are both negotiation discourses and therefore outcome-oriented in nature; by contrast, the focus of dialogue is relational development and perspective sharing, rather than settlement or resolution. The parties’ interaction dimension may be influenced by numerous factors including the parties’ individual goals in mediation and the way the mediator intervenes in and manages the process.

The intervention dimension (vertical in the figure) focuses on the dominant mode of intervention by the mediator. It draws on Haynes’ (2004) classic separation of:



- process interventions
- interventions in the substance of the dispute (problem interventions).

In Figure 1, the highest point on the vertical dimension represents interventions that are primarily process-oriented, while the lowest point represents a dominant problem-orientation.

Putting the interaction and intervention dimensions together

The combination of the two dimensions allows six different mediation models to be identified. However, mediations and mediators rarely fit within one category, and it is important to recognise the flexibility and overlap of individual models. In terms of the horizontal dimension, many mediations are hybrids of both dialogue-based and negotiation-based (whether interest-based or positional) interactions. Even in restorative justice, which is primarily dialogue-based, people may need to find concrete solutions in mediation. For example, where an offence has been committed by a youth, dialogue may integrate elements of interest-based negotiation in order to yield community-based and supported sanctions for his or her behaviour and a plan to prevent recidivism. Similarly, on the vertical dimension, the process–problem distinction is often blurred in practice.

To this end, both the horizontal and vertical dimensions of the Meta-Model operate as a sliding scale that allows mediators to recognise not only the dominant frame in a given mediation, but also the influence of other frames that contribute to their mediation practice. So, for example, the highest point on the vertical dimension represents an extreme process orientation with no intentional intervention in the problem. Moving down the process–problem sliding scale, there is increasing intervention in the problem, although the dominant frame remains the process until we slide into the bottom half of the scale. Similarly, the horizontal dimension slides from a positional focus of the parties, on the extreme left side of the scale, and becomes increasingly interest-based until that is the dominant frame, and then moves eventually into dialogue on the right side of the horizontal scale.

Introducing the six models of the Meta-Model

Here, the six practice mediation models of the Meta-Model are briefly introduced. For a critical analysis of each model, highlighting disadvantages and risks of each, see Alexander (2008).

Expert advisory mediation

Expert advisory mediation involves a high level of mediator intervention in

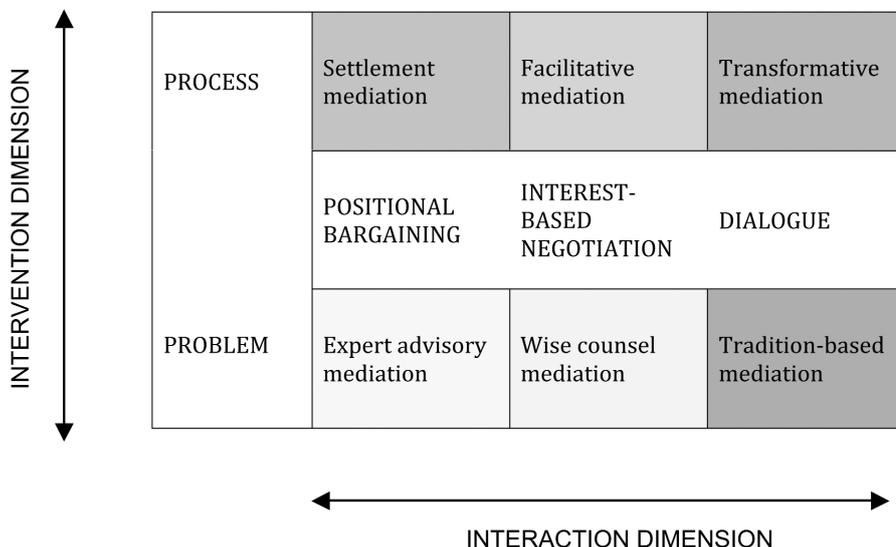
the problem and adopts a predominantly positional bargaining approach. The primary objectives of this form of mediation are efficient delivery of settlements (service-delivery) and access to justice. These goals support the pursuance of speedy, legally- or technically-oriented settlements, which in turn encourages a positional negotiation discourse and advice-giving by mediators.

Expert advisory mediators are usually senior lawyers or other professionals selected on the basis of their expertise in the subject-matter of a dispute and their seniority, rather than their process skills. As expert advisors, mediators can provide participants with technical/legal information and benchmarks; further, they can provide advice on the merits of a case, suitable settlement terms, and likely outcomes if the matter should proceed to arbitration or adjudication. In terms of the interaction basis, a positional approach in the mediation keeps parties focused on positions and rights, thereby allowing the problem to be defined in a narrow and legalistic manner, excluding broader issues from being placed on the agenda. It is not uncommon for parties to be accompanied by legal representatives in expert advisory mediation. Mediated settlements often fall within the range of outcomes that a court could have ordered.

Expert advisory mediation may be useful:

- in complex or technical matters where parties themselves are not experts and do not have access to expertise
- where parties are not motivated to attend mediation, for example where it is mandatory
- where clients have unrealistic expectations in relation to the (legal) merits of the case
- where parties require the objective opinion of an experienced and specialised professional and do not have (competent) professional advisers that fulfil this function
- where there is a power imbalance between parties: for example, where only one party is legally represented, where parties have unequal negotiating ability in terms of

Figure 1. The Mediation Meta-Model





literacy and language or where they are otherwise unable to negotiate equally

- where addressing relational aspects of a dispute is not a priority
- where the parties are seeking a quick resolution of their dispute
- from a plaintiff's perspective, where both parties are represented, because monetary settlements are higher for plaintiffs in advisory compared with facilitative mediation models: McDermott and Obar (2004).

Settlement mediation

In contrast to expert advisory mediation, the dominant intervention frame in settlement mediation is process-orientation, although some settlement mediators tend to intervene directly in the content of the dispute as well. However, the basis of party interaction is the same as in expert advisory mediation, namely positional bargaining. The objectives of settlement mediation are service-delivery and access to justice and these largely overlap with the objectives of expert advisory mediation. Consistent with its focus on process, settlement mediation promotes the value of party autonomy and does so to a greater extent than expert advisory practices. Parties frequently have legal representatives in attendance at settlement mediations. With competent legal representatives in a positionally-focused mediation, the mediator's role becomes one of a positional bargaining coach. The mediator is responsible for establishing an encouraging environment for settlement negotiations to occur between the parties. In reality, however, encouragement by settlement mediators can quickly become interventionist and directive as mediators urge parties to make concessions.

Despite its process-orientation, settlement mediators are frequently selected for their technical/legal knowledge and parties feel comfortable that they will understand the technical aspects of the dispute. As a result, most settlement mediators offer a mix of process and problem interventions. Viewing the vertical process–problem dimension as a continuum, much

settlement practice is located towards the centre of the dimension. As a matter of common (but by no means exclusive) practice, mediators move parties into separate sessions fairly early in the process and may not reconvene in joint session for the duration of the mediation. In these situations, the settlement mediator shuttles back and forth between the parties with offers, counter-offers, concessions, agreements and draft documents. This technique is known as shuttle mediation. It highlights the process-intervention of the mediator and can also be found in expert advisory models.

Settlement mediation may be useful:

- in situations where positional bargaining is preferred over interest-based bargaining
- when the outcome is more important than the relationship or parties want no future relationship
- when only the parties' legal representatives attend mediation; while lawyers may be informed on legal and commercial aspects of disputes, they are less likely to be able to participate in interest-based bargaining without further input from their clients
- when parties are negotiating over a 'fixed pie'
- in single issue disputes.

Facilitative mediation

Facilitative mediation combines process-intervention with an interest-based approach to bargaining. Like settlement mediators, facilitative mediators are responsible for creating an optimal environment for negotiation and coaching parties through a negotiation process. However, the focus of the facilitative mediator is on interest-based negotiation rather than on positional-based bargaining.

Facilitative mediation values centre on self-determination and client satisfaction and the process aims to offer parties access to a participatory justice forum. Accordingly, facilitative mediators restrict themselves primarily to process interventions. Parties are encouraged to reveal their needs and interests in relation to the conflict and to acknowledge the dispute from the other party's perspective. Facilitative



mediators are trained to refrain from advising parties on the problem (that is, the merits of a dispute). They tend to be selected for their process and communication skills and lack of connection to the parties rather than their subject-matter expertise. Where legal representatives are present, they play a consultative rather than an advocacy role. In other words, the parties speak for themselves with the support of their legal representatives.

The National Mediator Accreditation System promotes a facilitative approach to mediation.

Facilitative mediation may be useful:

- when parties want to continue their professional or personal relationship beyond the dispute's end
- where parties have the capacity to negotiate on a level playing field but have experienced difficulty starting the process or have reached an impasse in negotiations
- where there are opportunities for creative and future-focused solutions to address the needs and interests of the parties
- in multi-issue disputes, especially where the issues comprise legal and non-legal elements.

Wise counsel mediation

Wise counsel mediation combines a problem-oriented mediator intervention with the parties engaging in interest-based negotiation. In other words, mediators evaluate the merits of the case by focusing not on the parties' rights and positions as done in expert advisory practice, but rather on the broader interests and concerns of the parties. The primary objective of this mediation model is access to justice in the sense of a fair forum, efficient conflict management and long-term interest-based solutions. Although advisory, this form of mediation will typically require a greater time investment than expert advisory mediation because mediators

must probe beyond the surface to the level of underlying interests. However, rather than coaching the parties through an interest-based negotiation approach as in the facilitative model, mediators intervene to provide advice on the problem in terms of identifying interests, options, walk-away alternatives and solutions. While the final decision remains with the parties, the mediator assumes a certain level of responsibility for the options generated and the shape

- where there is a power imbalance between the parties.

Tradition-based mediation

Tradition-based mediation has much in common with wise counsel mediation. Mediators are problem-oriented; they are usually sought out for their wisdom, status and persuasive presence rather than their technical expertise. The main differences between these two models

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of the mediated agreement. Wise counsel mediators are typically selected for their high standing in the community, their communication ability, wisdom, sense of fairness and ability to understand all aspects of the conflict. The role of lawyers in wise counsel mediations varies. The more interventionist the wise counsel mediator, the more likely that the lawyers will play a consultative role only.

Wise counsel mediation may be useful:

- in multiple issue disputes in which various parties require substantive advice on how to resolve their dispute and manage the future
- where parties are reluctant to initiate constructive suggestions for resolution due to feelings of pride, the need to save face or sheer stubbornness
- where parties are seeking wise or moral guidance
- where parties are seeking to allocate moral responsibility for the outcome to a 'legitimate' third party
- where parties have unrealistic expectations and are seeking a practical solution

of mediation relate to the objectives and values of the mediation and the nature of party interaction.

The primary aim of tradition-based mediation is restorative justice—that is, the restoration of stability and harmony to the community, industry or group. The system maintenance function and *community* (as distinct from *party*) orientation of tradition-based mediation distinguishes it from wise counsel mediation. Whereas wise counsel mediators focus on the negotiation of party interests, tradition-based mediators regard the values of the community as having priority. As a result, individual voices may effectively be silenced. Community members are considered stakeholders in the conflict and mediations may be conducted in the presence of and with the participation of members of the group. Confidentiality can play a less significant role in tradition-based mediation compared with other models. Tradition-based mediators generate an open-ended dialogue among participants that is rich in ritual, while focusing on restoring



relationships and reconciliation among members of the group, promoting the interests and values of the community, and using public symbolism (where appropriate) to communicate certain outcomes.

Mediators are usually leaders, chiefs or elders who are known by all and carry authority, not only in the eyes of the disputants but also in the eyes of the community. As problem-interveners, they enjoy an insider status vis-à-vis the parties and the conflict. Their position and life experience are thought to imbue them with the wisdom and insight to lead the disputants to an outcome consistent with community norms.

Arguably the oldest form of mediation, dating back to ancient forms of dispute resolution, tradition-based mediation continues to exist in many traditional indigenous societies around the world. Many of these societies feature a network of strong kinship ties through the entire community that lends itself to a collectivist approach to conflict resolution. Tradition-based mediation is also practised in religious communities where religious elders act as mediators. Finally, mediation practised in socialist legal-political systems emphasises the political ideals of the community. In these systems, mediations are conducted by community and district leaders and frequently involve public dimensions.

Tradition-based mediation may be useful:

- in easily definable communities with strong social, cultural, religious and political norms that wish to deal with their conflict internally and consistently
- in industries and professional and business communities where group norms are more influential than legal norms, for example in an interpersonal dispute between office-holders in a global professional association.

Transformative mediation

The primary goals of transformative mediation include transforming how parties relate to each other, healing and reconciliation of relationships, and restorative justice. Transformative

mediation processes typically have very rigorous and systematic process requirements. Mediators are usually selected on the basis of their process and relationship skills and their knowledge of causes of conflict, psychology and behavioural science. In transformative mediation, the mediator's role is to create an environment in which parties can engage in a transformative dialogue—that is, one through which they are empowered to articulate their own feelings, needs and interests and to recognise and acknowledge those of the other party. Transformative mediation processes are often used where people have strong views and emotions such as environmental and community conflict, victim-offender matters and disputes involving family members.

Therapeutic mediation is dialogue- and process-based and therefore falls within the transformative mediation category. As the name suggests, it refers to mediation practices that are drawn from systems and techniques found in therapy, such as narrative mediation developed by Winslade, Monk and Cotter (1998).

Transformative forms of mediation may be useful:

- where the dispute is a (recurring) symptom of an underlying conflict and the parties are prepared to address it before making decisions about the dispute itself
- in conflicts about the parties' relationship, whether of a personal, professional or business nature
- where significant emotional and/or behavioural issues are at stake
- where parties are arguing on the basis of values and principles
- where the parties may benefit from opportunities for personal development.

Conclusion

The mediation models outlined in the Meta-Model provide useful theoretical constructs that both reflect and inform practice. In reality the models are fluid in their application. A mediator may start with a facilitative approach and then, upon realising that the parties are seeking more guidance and that one party has



relatively poor negotiating skills, move to a wise counsel approach. In another situation, the facilitative mediator, after probing for further interests and concerns of the parties and engaging in issue fragmentation, may decide that a settlement model is more appropriate for what has shown itself to be a single issue dispute between parties who have no interest in maintaining any sort of relationship into the future.

Moreover, it is important to recognise the variety of styles within each of the six boxes. Consider the following example in settlement mediation. At one extreme, a settlement mediator may put the legal representatives into a room by themselves to sort out a settlement, making himself or herself available as and when necessary. Here, the mediator provides the negotiation environment and process support with a minimum of intervention. Another settlement mediator will move the parties and their lawyers between joint and private sessions, gradually breaking down their global positions into smaller, more manageable ones and accepting input from the parties in relation to issues broader than their legal positions. Here, the dominant paradigm remains positional bargaining but integrative elements are present. Yet another settlement mediator will shuttle between parties, motivating, encouraging and suggesting possible zones of agreement: a shuttle-process approach with some problem-oriented interventions by the mediator. Thus, in practice, many mediations are hybrids of negotiation and dialogue-based models with variations in process and problem interventions by the mediator.

The Mediation Meta-Model provides a framework. Anything more would be antithetical to the flexibility and creativity that mediation is said to offer. It offers signposting and orientation in the mediation world, not only for mediators, parties and their lawyers, but also for regulators, referring bodies, researchers and students of mediation.

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ADR RECENT DEVELOPMENTS

Conciliation at ICSID

The International Centre for Settlement of Investment Disputes (ICSID) has appointed its first panel of Conciliators to complement its long-established panel of Arbitrators to deal with disputes between foreign investors and host countries.

The appointments coincide with the current search for new forms of dispute resolution in the cross-border investment area in the light of extensive criticisms of private arbitration.

Among the ten new international appointees to the ICSID Conciliator Panel are two members of the Faculty of Law at Bond University, Adjunct Professor Lawrence Boo and Professor Laurence Boulle. The appointments are for a six-year term.

Recent publication

Professor Laurence Boulle's 3rd edition of *Mediation: Principles, Process, Practice* was launched on 29 July at the Watermark Hotel, Surfers Paradise, by The Hon Murray Kellam.

Copies are available from LexisNexis
<www.lexisnexis.com.au>

