

# The Mediation Metamodel: Understanding Practice

NADJA ALEXANDER

*The mediation metamodel provides a systematic framework for understanding mediation as it is practiced in a variety of professional and cultural contexts. Six mediation practices are introduced within the framework of the metamodel: settlement mediation, facilitative mediation, transformative mediation, expert advisory mediation, wise counsel mediation, and tradition-based mediation. The relationships of these different practices to one another are explored and the assumptions underlying them are examined with reference to the literature. The metamodel provides orientation in the dispute resolution field not only for mediators, parties, and their lawyers, but also for regulators, referring bodies, researchers, and students of mediation.*

This article introduces a metamodel for thinking about mediation practice. The model provides a structure for identifying different mediation approaches and how they relate to one other, thereby extending the existing literature on this topic. It makes no claim to universal application. Rather, it offers a conceptual road map for an increasingly complex and sophisticated array of practices that share the name *mediation*.

NOTE: *Thanks go to the Alexander von Humboldt Foundation in Germany for its support of the writing of this article, and to Laurence Boulle, George Fox, and two anonymous reviewers for their comments on early drafts. For research and editorial assistance at various stages of preparing this paper I wish to thank Josh Underhill, Mizzi Walker, and Serge Loo de. Finally, I am grateful to Ken Fox for a thoughtful and inspiring conversation about the metamodel while walking in Rome several years ago.*



## Why Are Models Useful?

Systems and models can never replicate reality, because they systematize the real world in abstract form. However, they are useful in ordering our thinking about a particular topic and highlighting how theories and values influence mediator behavior. Mediator orientation—that is, mediators' worldviews, paradigms, behaviors, and the manner in which they conduct the process—has an impact on mediation dynamics. It can set an example for participant behavior, can influence the content of the agenda, and affect the range of outcome options that are considered at the mediation table (Menkel-Meadow, 1984). For mediators, models provide a framework for understanding where their own practice fits within the wider world of mediation and ADR, and how they may be able to enhance their own professional skills base. For legal and other professional advisors and their clients, models provide an orientation to the field and in particular to the range of approaches taken by mediators. A systematic approach helps mediation participants make smart choices about mediators. It also assists them in their preparation for mediation. In the context of mandatory mediation programs, courts and other referring bodies have a responsibility to inform mediation users about the dispute resolution processes to which they are being referred. Mediation models assist these bodies in clarifying the type of mediation they want to promote and conveying this message to consumers.

## Existing Mediation Models

In 1950 the German sociologist Georg Simmel identified the ubiquitous role of the mediator—sometimes formally recognized and sometimes not—across all cultures. Highlighting the key features of nonpartisanship of the mediator and the nondeterminative nature of the process, he distinguishes between, on one hand, mediators as disinterested neutral third parties (outsider mediators) and, on the other hand, mediators actively and equally concerned with the interests of all parties, such as family members and community elders (insider mediators) (Wolff, 1964). Also adopting a cross-cultural perspective, anthropologist Philip Gulliver locates mediators' roles on a continuum according to their level of intervention. Beginning with the very passive mediator, the roles become increasingly active and interventionist. They include chairing the process, enunciating

rules and norms, and prompting and leading parties towards solutions (Gulliver, 1979).

Reflecting on practice, mediation scholars have built on this distinction to develop specific mediation models. Riskin's original grid of mediator orientations provides a systematic approach to categorizing mediation practice and, in particular, the range of approaches used by mediators (Riskin, 1994). It identifies two intersecting dimensions: the role of the mediator (from evaluative to facilitative) and how the problem is defined (from narrow to broad). These two dimensions and the resulting four quadrants of Riskin's original grid (evaluative–narrow, evaluative–broad, facilitative–narrow, and facilitative–broad) have framed much of the academic discussion on mediation models since its publication in the mid-1990s.

In 2003 Riskin revisited his original grid. The result of his critical reappraisal is a revised grid in which he replaces “evaluative–facilitative” with the terms “directive–elicitive” to capture a wider range of behavior. According to Riskin, the “directive–elicitive” dimension of mediator behavior focuses on the extent to which “almost any conduct” by the mediator “directs” the process or the participants toward a particular procedure, perspective, or outcome, or alternatively “elicits” the parties' perspectives and preferences (Riskin, 2003). The revised grid is known as the (New) Old Grid. At the same time Riskin recognizes the limitations of a single grid with two fixed dimensions that focus only on the influence of the mediator. Consequently, he introduced the New New Grid System, a system of grids focusing at one level on the influence not only of the mediator but of other participants in the mediation, and on a another level on three categories of mediation decision making: procedural, substantive, and metaprocedural (Riskin, 2003). The New New Grid System allows the dynamic of mediation to be analyzed in greater detail, at specific points in time, and from a broader range of perspectives than the (New) Old Grid. However, despite its focus on mediator influence and its perceived static quality, the revised original grid remains a useful tool to systematically consider approaches to mediation.

In a similar vein to Riskin's grid approach, Boulle identifies four paradigm models of mediation: therapeutic, facilitative, settlement, and evaluative mediation (Boulle, 2005). The author explains the features of each model and identifies their areas of application. However, unlike Riskin, he does not analyze the relationship of the various conceptual models to one another within a systematic framework. There is some overlap between

these two approaches to labeling mediation practices. Boulle's settlement mediation corresponds to Riskin's facilitative–narrow (now called elicitive–narrow) quadrant. However, he bundles the grid's evaluative–narrow (directive–narrow) and evaluative–broad (directive–broad) approaches together as evaluative mediation. Conversely, Boulle's therapeutic and facilitative models both fall within the facilitative–broad (elicitive–broad) quadrant of Riskin's grid.

Bush and Folger adopt yet another approach. Although their focus is on transformative mediation, they have identified three practice models of mediation differentiated according to ideology: problem-solving, relational, and harmony mediation (Bush and Folger, 1994). Problem-solving mediation is based on an individualist worldview and a psychological-economic view of conflict. It draws heavily on negotiation theories of distributive-positional and integrative or interest-based bargaining, and relies on well-known negotiation concepts such as zero-sum thinking, prisoner's dilemma, issue fragmentation, best alternative to negotiated agreement (BATNA), and risk analysis (Fisher and Ury, 1981). Transformative mediation adopts a different perspective framed within a relational ideology. It adopts a social-communicative view of human conflict and focuses on parties' abilities to transform their relationship through empowerment and recognition, so that they are able to communicate with each other in a more useful and constructive manner. Finally, harmony mediation is based in "organic" ideology and is found mostly in non-Western contexts. It draws on a collectivist view of the world holding that conflict is an issue for the community and not just the individuals involved. Here the aim of mediation is restoration of harmony in the sense of social stability and status quo to the community affected by the conflict.

Whereas Riskin proposes that transformative mediation can be viewed within his facilitative–broad (elicitive–broad) category, he also acknowledges that proponents of that model may not be comfortable with such a categorization (Riskin, 2003). Indeed, according to Bush and Folger's categorization, Riskin's entire grid falls within the problem-solving mediation ideology. Harmony mediation as defined by Bush and Folger finds no counterpart in any of the models of Riskin and Boulle described earlier.

Other commentators distinguish between problem-solving and therapeutic mediation (Breidenbach, 1995; Merry, 1987). Although differences emerge in the literature regarding the definition of problem-solving mediation, commentators agree that it assumes a practice in which the mediator facilitates a negotiation process. Some explanations of problem-solving

mediation highlight what is referred to as its “dispute settlement” objective, and others focus on problem-solving mediation as a “conflict resolution” practice in terms of addressing parties’ concerns, interests, and motivations (Newberry, 2004; Spangler, 2003). Conversely, therapeutic mediation rejects negotiation paradigms in favor of systemic therapeutic interventions to address behavioral and emotional difficulties experienced by the parties (Udovic, 2008).

Currie criticizes models based on mediator orientations and suggests taking the emphasis away from what he identifies as the unpredictability of mediator behaviors and refocusing on the more constant qualities of mediators (Currie, 2004). These are identified as qualifications, relationship to the parties (insider versus outsider mediators), content bias (level of expertise in the subject matter of the dispute), and authority bias (authority status and level of influence over the parties). Within this framework Currie distinguishes between “traditional” mediators and “professional” mediators. He argues that “traditional” mediators have existed throughout history as community elders and that in contemporary times they also include managers, lawyers, therapists, and other leaders or technical specialists. They draw on a high level of authority and content bias and tend to adopt a more directive approach. Furthermore, traditionalists are frequently insider mediators known to both parties who do not necessarily have formal mediation qualifications. Conversely, according to Currie, “professional” mediators have formal mediation qualifications and a high level of knowledge of and skill in managing conflict. They are typically outsider mediators with limited content and authority bias and therefore tend to adopt a more facilitative process-focused approach consistent with their formal qualifications. However, despite claiming to rely on stable criteria relating to mediator qualities, the traditional–professional model dichotomy still relies on interpreting the behavior likely to flow from the criteria; for example, mediators with high authority status are likely to be directive and evaluative.

### Introducing a Mediation Metamodel

Building on the insights of the previous writers, this article introduces a mediation metamodel within which mediation practices can be represented. It is based on two dimensions: (1) the basis of the interaction within the framework of the mediation (interaction dimension) and

(2) the type of mediator intervention in the resolution of the dispute (intervention dimension).

### *The Interaction Dimension*

The interaction dimension refers to the type of discourse that occurs in the mediation. It consists of three categories: positional-distributive bargaining discourse; interest-based or integrative negotiation discourse; and transformative, restorative, and healing dialogue discourse. In each case the objective of the discourse and therefore the nature of the desired outcome differs.

The objective of distributive bargaining is to achieve a mutually acceptable settlement of the dispute as defined in legal or positional terms: dispute settlement. In other words, distributive bargaining—also called positional bargaining—emphasizes linear concession making, in which parties move from opening positions in ever-decreasing incremental concessions towards compromise. The opening position of the parties sets the parameters for what is assumed to be a battle of finite resources—a zero-sum game.

Integrative bargaining discourse is also known as interest-based negotiation. It encourages parties to move beyond the distributive paradigm and challenge assumptions about finite resources. This is typically done by focusing on parties' underlying interests, needs, motivations, and concerns rather than their positions, demands, legal rights, or claims. In doing so, parties engage in negotiation that goes beyond the substantive problems in dispute and includes personal, procedural, and future-focused issues. The objective of integrative negotiation is conflict resolution. Here resolution refers to an outcome that goes beyond simple settlement to address the deeper underlying interests and needs of the parties. The term *conflict* denotes an understanding of the problem in a broader and deeper sense than the term *dispute*, which is typically defined by positions, as indicated earlier. Conflict resolution therefore represents a different type of outcome from the dispute settlement associated with the first discourse.

The final discourse is called dialogue. Unlike the first two discourses, which are outcome oriented, the immediate focus of this discourse is on the nature of the interaction among participants. The essential idea behind dialogue-based mediation is that once parties are able to communicate constructively and with respect, they are much better placed to resolve conflicts and settle disputes themselves. Accordingly, specific forms of

mediation dialogue have been developed to encourage changes in communication patterns and relationships among affected parties. The objectives of dialogue-based mediation vary. They include transformation of relationships, reconciliation, healing, and social transformation of an affected group or community. These are explored in greater detail below.

### *The Intervention Dimension*

Mediators are said to intervene predominantly either in relation to the problem or to the process (Haynes, Haynes, and Sun Fong, 2004). This is a useful conceptual distinction, although, as will be demonstrated later, it is not always readily recognizable and is sometimes blurred in practice. In reality problem interveners manage the procedure at various levels, and process interveners may indirectly advise on the problem. Nevertheless, the process-problem dichotomy remains useful for identifying a dominant intervention approach for individual mediators.

In the context of mediator interventions, problem orientation refers to intervention in the subject matter and on the merits of the dispute—whether of legal, commercial, social, financial, organizational, personal, or other nature. Problem interventions may include providing technical, legal, or more general information, advising the parties on options outside the mediation, evaluating and even suggesting options for agreement within the mediation, and proposing terms of agreement between the parties. Conversely, process interventions refer to all aspects of the mediation structure and its dynamics. In terms of structure, process interventions include the use of joint and separate sessions, setting the agenda, and seating arrangements. In terms of mediation dynamics, they refer to interventions that directly affect how parties communicate with and relate to each other in the mediation—for example, how mediators reframe party statements, how communication is channeled among parties and mediators, and the order of speaking.

The professional background and education of mediators is a significant factor in determining their intervention style. Mediators who take a predominantly process-intervention approach to their practice tend to work systematically in accordance with well-recognized principles drawn from their diverse training and education backgrounds. They follow the principle that mediators direct the *process*, leaving the problem to the parties. Mediators act as facilitators and coaches, educating and empowering the parties to make their own decisions with respect to the conflict.

Process-oriented mediators are usually selected for their process skills and their lack of connection and outsider status in relation to the parties and the conflict. The focus on process sits particularly well with the mediation goals of individual autonomy and self-determination. It also reflects the theory that parties are more likely to stick to an agreement they have constructed themselves than one that has been imposed upon them (Moore, 2003). Finally, a focus on process clearly distinguishes mediation from advisory ADR processes such as conciliation and neutral evaluation. The process approach minimizes the risks of mediator liability, as the Australian case of *Tapoohi v. Leewenberg* (2003) demonstrates.

While the process focus forms the basis of most mediation training and literature, mediation practices that favor problem intervention have also flourished. Mediators with technical–legal or judicial–arbitration backgrounds tend to intervene in the substantive aspects of the problem and adopt a more directive style. Linden maintains that the primary difference between process and problem (or content) experts in mediation lies in subject experts’ specialization in one area, as opposed to serving as generalists covering several areas. These mediators are selected not only for their substantive knowledge but also for their high status (Linden, 2004). Here status can relate to the substantive field of expertise or to the specific industries or networks involved in the case. Accordingly, problem interveners may be well known or have a high level of connection to the parties for whom they are mediating. Moore (2003) refers to such mediators as “social network mediators,” in contrast to “independent mediators.” The content expertise and status of these interveners is the source of their power. The positive correlation between the power of mediators and their directive nature has been confirmed by research (Watkins and Winters, 1997).

The institutionalization and legalization of mediation have contributed to the development of problem-based approaches to mediation. Mediation laws, practice directions, and legislation specifying, for example, that mediators may generate options or call witnesses encourage a problem orientation in mediation, as do the following factors: the use of a flat-rate payment schedule for mediations regardless of time; the assessment of mediation success according to settlement rate; and the institutionalization of blended processes such as med-arb, where the same third party (often a dispute resolution practitioner more experienced in arbitration than mediation) takes on mediator and arbitrator roles.

Process orientation is frequently associated with elicitive techniques, and problem orientation with directive techniques. Mediators who use an



elicitive approach view themselves as a catalyst or facilitator, rather than a substantive expert. They use curiosity to encourage participants to discover and create. Conversely, mediators who see themselves as experts tend to use a directive approach, and their task is to impart this expertise to the mediation participants. These are useful generalizations, and it is important to recognize that skilled mediators command a range of techniques, regardless of their dominant process or problem orientation.

While it is helpful to distinguish problem interventions from process interventions, it is equally important to recognize that the conduct of the process can significantly influence how the problem is discussed. Where mediators intervene in the *process* to support the parties' conversation, they may also—knowingly or not—intervene in the *problem*. Mediator interventions in agenda setting illustrate this point well. Just as agenda items can be framed as questions, phrases, or words, they can also be framed to reflect parties' positions, their interests and concerns, or their needs. In this way process interventions will influence what is put on the table for discussion and what falls off the mediation table; for example, a positional bargaining discourse led by a lawyer-mediator will tend to focus on the legal issues, rather than the relational ones. Currie refers to two studies indicating that lawyer-mediators tend to avoid emotional aspects of conflicts and instead rely on their legal knowledge (Albert, 1985; Marcel and Wiseman, 1987).

### Mediation Objectives

A frequently overlooked factor in examining different approaches to mediation is mediation objectives (Breidenbach and Glässer, 1999). Mediators and mediation programs may have different objectives. Consider the situation where the mediator is committed to maximizing the self-determination of the parties, and the funding of the mediation program depends on high settlement rates. Here there is a potential clash between the objectives of party autonomy and those related to outcome-driven service delivery. Moreover, participants in mediation may have different expectations of the process. One party, on advice from her lawyer, may expect the mediator to deliver concrete advice pointing to a quick way out of the dispute, whereas another party expects a forum in which his voice will be heard and acknowledged and in which negotiations can ensue. Yet another party might come to mediation expecting “justice,” which can be defined in any variety of ways. Where objectives differ in a mediation setting, success is

difficult to define. There is no single definitive list of mediation objectives; however, mediation objectives frequently include efficient settlement of disputes, access to justice, conflict resolution, reaching an agreement that meets the needs of the parties and other stakeholders, self-determination, transformation of destructive behavior into a constructive conversation, reconciliation and healing of relationships, and restoration of stability to communities affected by the dispute.

Where dispute settlement is the goal, the combination of problem orientation (the intervention dimension) and positional bargaining discourse (the interaction dimension) is common. Conversely, reconciliation and restoration of relationships require process orientation in dialogue-based models. In yet another situation parties may seek mutually satisfying outcomes that address their interests and concerns. Here an interest-based bargaining discourse supported by strong guidance in relation to the process is recommended.

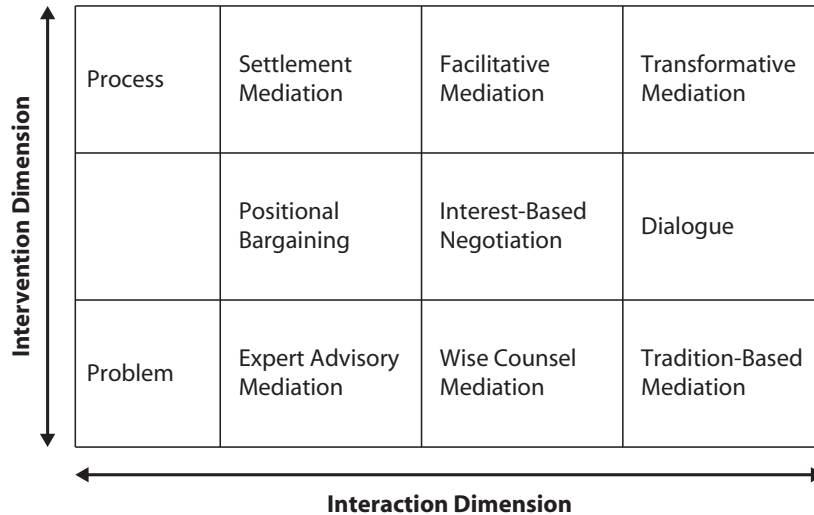
### The Mediation Metamodel: A Model of Models

The mediation metamodel presented in Figure 1 demonstrates the relationship between the interaction and intervention dimensions in mediation. The horizontal dimension moves from an interaction basis of distributive bargaining discourse on the left side of the figure toward an integrative negotiation discourse in the center and then extends to a dialogue-based discourse on the right side. In the vertical dimension, the top row represents interventions that are primarily process-oriented and the bottom row those with a dominant problem orientation. The combination of the two dimensions allows different mediation models to be identified. However, mediations and mediators rarely fit within one category, and it is important to recognize the flexibility within and overlap among the individual models. The metamodel assists in recognizing the dominant frame in a given mediation.

Six contemporary practice models of mediation are represented in the mediation metamodel:

- Expert advisory mediation
- Settlement mediation
- Facilitative mediation
- Wise counsel mediation

Figure 1. Mediation Metamodel



- Tradition-based mediation
- Transformative mediation

These six mediation practice models are explored in the sections that follow.

*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 goals of this form of mediation are efficient delivery of settlements (service delivery) and access to justice. These goals support the pursuit of speedy and legally or technically oriented settlements, which in turn encourage a distributive 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 the dispute and their seniority, rather than their process skills. As expert advisors, mediators can provide participants with technical or legal information and benchmarks, advice on the merits of the case, suitable settlement terms, and likely outcomes if the matter proceeds to a determinative proceeding such as arbitration or adjudication. In terms of the interaction basis, a distributive approach in the mediation keeps parties focused on

positions and rights, thereby allowing the problem to be defined in a narrow and legalistic manner and excluding broader issues from the agenda (Riskin, 1996). It is not uncommon for parties to be accompanied by legal representatives in expert advisory mediation. Mediated settlements usually fall within the range of outcomes that a court could have ordered.

Expert advisory mediation may be useful in the following situations:

- Where the parties themselves are not expert in the complex or technical matters of the dispute
- Where the parties are not motivated to attend mediation—for example, when mediation is mandatory
- Where clients have unrealistic views of the (legal) merits of the case
- Where the parties require the objective opinion of an experienced and specialized professional
- Where the relational aspects of the dispute are not a priority
- Where the parties are seeking a quick resolution of their dispute

Expert advisory mediation is criticized on the following grounds:

- There is no clear distinction between expert advisory mediation, conciliation, case appraisal, and neutral evaluation.
- Mediators in this model do not coach the parties in conflict resolution skills to help them help themselves.
- The mediator assumes much responsibility on behalf of the parties.
- Direct participation by the parties in the process is low, which may lead to party dissatisfaction with the result (L. Bingham, as cited in Rendon and Dougherty, 2000).
- By focusing on rights and positions, the interests of the parties may be neglected.
- Settlement proposals by mediators may not support the parties' long-term interests or the improvement of their relationship (Carnevale, Lim, and McLaughlin, 1989).
- Knowing that mediators will provide an expert opinion may encourage parties to withhold information that they believe would not enhance their case (Brown, 2003–2004).

- Expert advisory mediation does not encourage parties to acknowledge the perspective of the other side; rather, it encourages the parties to focus on their case only (Brown, 2003–2004).
- Expert advisory mediators seem to focus on a limited number of solutions that have worked in the past, rather than addressing the multidimensional and unique facts of each case; opportunities for a suitable outcome can be lost as a result (Neilson, 1994).
- When mediators provide opinions, it can be difficult to maintain the perception of impartiality. Parties who find the expert opinion unacceptable may subsequently consider the mediator biased (Honeyman, 2006).
- Mediators who intervene in the legal or technical aspects of the dispute expose themselves to a higher risk of legal claims brought against them for the advice-giving aspect of their role. (In the United States, this is referred to as the unauthorized practice of law.)

### *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 interaction is the same as in expert advisory mediation—namely, positional bargaining discourse. The objectives of settlement mediation—service delivery and access to justice—overlap largely with those of expert advisory mediation. In addition, and consistent with its focus on process, settlement mediation promotes party autonomy to a greater extent than expert advisory practices. Parties frequently have legal representatives in attendance at settlement mediations. With competent legal representatives in a distributive-oriented mediation, the mediator's role moves into 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 move in the direction of coercive techniques to urge parties to make concessions.

Despite their process orientation, settlement mediators are frequently selected for their technical or 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 center of the dimension. As a matter of common, but by no means exclusive, practice, mediators move parties into separate sessions fairly early in the mediation process and may not reconvene in a joint session for the duration of the mediation. In these situations the settlement mediator shuttles back and forth between the parties with offers, counteroffers, concessions, agreements, and draft documents. This technique is known as shuttle mediation. It highlights the process intervention of the mediator.

Settlement mediation may be useful in the following situations:

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

Settlement mediation is criticized on the following grounds:

- Settlement mediation styles tend to overlook the needs and interests of the parties and their relationship. They may therefore miss chances to identify suitable options for all parties—short, medium, and long-term.
- The stronger, more experienced positional bargainer will always be at an advantage.
- When legal representatives are present, a focus on legal positions encourages (and arguably requires) them to take over negotiations for their clients (Welsh, 2001).
- Parties are unlikely to learn how to negotiate constructively with each other in the future.

- Settlement mediators add little, if anything, to the positional settlement techniques—including threats, tricks, and bluffs—traditionally used by lawyers.
- Deadlocks may be more difficult to break in the absence of creative problem-solving techniques and lateral options (Brown, 2006).

### *Facilitative Mediation*

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

This form of mediation is also known as interest-based mediation. Facilitative mediation goals are party autonomy and self-determination. 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 neither advise the parties on the problem—that is, the merits of the dispute—nor provide them with legal information. They tend to be selected for their process and communication skills and their lack of connection to the parties, rather than their subject matter expertise. When 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.

Facilitative mediation may be useful in the following situations:

- When the parties want to continue their relationship—whether business, social or familial—after the resolution of the dispute
- When the 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
- When there are opportunities for creative and future-focused solutions to address the needs and interests of the parties
- In multiple-issue disputes, especially where the issues comprise legal and nonlegal elements (Whiting, 1992; Mack, 2003)

Facilitative mediation is criticized on the following grounds:

- In the absence of a mediated settlement, there is a risk that information or an opinion shared at the mediation table may subsequently be used to the disadvantage of the party who revealed it. Although mediation is a confidential process, once the other party is aware of new information, the balance of power between the parties may change, and new information may be independently sourced and subsequently used in arbitration or adjudication proceedings.
- Facilitative mediation may not be suitable in situations where one or more parties have inadequate negotiation ability—for example, where one of the parties has language or literacy difficulties (Cumming, 2000).
- Facilitative mediation requires greater investment of time than positional bargaining approaches.

### *Wise Counsel Mediation*

Wise counsel mediation combines a problem-oriented mediator intervention with an integrative approach. In other words, mediators evaluate the merits of the case focusing not on the parties' rights and positions, as in expert advisory practice, but 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 integrative 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. Although the final decision remains with the parties, the mediator assumes a certain level of responsibility for the options generated and the shape of the mediated agreement. Wise counsel mediators are typically selected for their high standing in the community, 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 it is that the lawyers will play a consultative role with respect to the legal aspects of the dispute only.



Wise counsel mediation may be useful in the following situations:

- In multiple-issue disputes with various parties requiring 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
- Where there is a power imbalance between the parties; for example, when only one party is legally represented, when the parties have unequal negotiating ability in terms of literacy and language, or when they are otherwise unable to negotiate equally

Wise counsel mediation is criticized on the following grounds:

- Although this form of mediation may provide the parties with an integrative solution, it does not show them how to manage the agreement after the mediation.
- It can be difficult to maintain the perception of impartiality when mediators express views and opinions, even if they are pitched at the level of the parties’ interests and concerns.
- The mediator takes on much responsibility on behalf of the parties.
- Depending on the level of input by the parties, the mediator is making assumptions about the interests of the parties and the dynamic of their relationship. If these assumptions are incorrect, they could have serious consequences for the parties.

### *Tradition-Based Mediation*

Tradition-based mediation has much in common with wise counsel mediation. Mediators are problem-oriented and are usually sought out for their wisdom, status, and persuasive presence rather than their

technical expertise. The main differences between these two models of mediation relate to the objectives of the mediation and the nature of party interaction.

The primary aim of tradition-based mediation is restorative justice—to restore stability and harmony to the community, industry, or group. The system maintenance function and *community* orientation—as opposed to *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 view the values of the community as taking priority. Community members are considered stakeholders in the conflict, and mediations may be conducted in front of and with the participation of members of the group. Confidentiality plays a less significant role in tradition-based mediation compared with other models of mediation. Tradition-based mediators generate an open-ended dialogue among participants, rich in ritual, focusing on restoration of relationships within the group, reconciliation, the interests and values of the community and, frequently, public symbolism.

These 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 (Antaki, 2006).

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 such as those in Australia (Behrendt, 1995), New Zealand (MacDuff, 2003), Asia, the Pacific (Goh, 1996; Lubman, 1996; Black, 2001), and Africa (Buehring-Uhle, 1996; Shucker, 1999). Many of these societies feature a network of strong kinship ties throughout the entire community, and such a network lends itself to a collectivist approach to conflict resolution and healing, where the best interests of the community rather than the individual remain paramount. Tradition-based mediation is also practiced in religious communities where a religious elder will act as mediator. Finally, mediation practiced in socialist legal-political systems emphasizes the political ideals of the community. Here mediations are conducted by community and district leaders and frequently involve public dimensions.

Tradition-based mediation may be useful in the following situations:

- Easily definable communities that have strong social, cultural, religious and political norms and that wish to deal with their conflict internally and consistently
- Industries and professional and business communities where group norms are more influential than legal norms; for example, an interpersonal dispute between officers in a global professional association

Tradition-based mediation is criticized on the following grounds:

- In postcolonial communities, community norms as interpreted by tradition-based mediators may not correspond to what minority groups such as women and youth see as appropriate standards (Corrin Care, 2006).
- It may confirm the dominant culture and narratives in the group at the expense of other voices.
- It does not offer a space for individual party autonomy.

### *Transformative Mediation*

The primary goals of transformative mediation include transforming how parties relate to each other, healing and reconciliation of relationships, and restorative justice. Mediators are selected on the basis of their process and relationship skills and their knowledge of conflict causes, psychology, and behavioral science. In transformative mediation the mediator's role is to create an environment in which the parties can engage in a transformative dialogue—one through which the parties are empowered to articulate their own feelings, needs, and interests and to recognize and acknowledge those of the other party.

In his analysis of the Vienna Airport mediation, Horst Zilllessen describes the transformative nature of a multiparty mediation involving government, corporations, and community groups. Initially the large number of participants and lack of trust between participants made communication and decision making difficult, lengthy, and cumbersome. In an attempt to balance process efficiency with process inclusivity, the mediation structure was streamlined. As Zilllessen describes:

This serious slimming-down of the mediation structure was made possible by changes in the attitudes and approaches of the mediation participants, which can be described as a learning process in the sense of transformative mediation. In the many work-intensive meetings they had learnt to understand and respect each other in their various, sometimes diametrically opposed, interests. They had developed a sense of trust that nobody wanted to trick anybody else and for this reason they were able to accept that they would no longer take part in all meetings, because they no longer feared that this would impair their ability to defend their interests. At least equally important was the trust in the fairness of the mediation, which had developed in the course of the process and which had given almost all the participants the assurance that a decision to the detriment of a third party who was not represented at the negotiation table would not be accepted [Zillessen, 2004].

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. Typically, therapeutic models have very rigorous processes—hence process orientation—that aim to get the parties involved in a dialogue with transformative or reconciliation goals. One of the better-known forms of therapeutic mediation is narrative mediation, which draws upon narrative therapy (Winslade, Monk, and Cotter, 1998). Narrative mediation focuses on the stories people tell to construct their worldview and, accordingly, their reality. Stories about conflict typically involve protagonist-victim (the storyteller) on one hand and antagonist-victimizer (the other party) on the other. Story lines typically involve blame and responsibility and are about what happened in the past. Different stories create different realities. Narrative mediation assists participants to deconstruct their conflicting current stories and find their own voices. It creates a space for safe storytelling and opens up opportunities for new shared stories, which give participants power to create new dialogues and identify relationships and futures by writing a new narrative. In writing their new scripts for the future, parties in narrative mediation may also engage in option-generating and problem-solving techniques emphasized in the facilitative model of mediation.

Transformative forms of mediation may be useful in the following situations:

- 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
- Conflicts about the parties' relationship, whether of a personal, professional, or business nature
- Where significant emotional or behavioral issues, or both, are at stake
- Where parties are arguing on the basis of values and principles
- Where the parties may benefit from opportunities for personal development

Transformative mediation is criticized on following grounds:

- Transformative forms of mediation demand a greater time investment than other mediation models.
- There are few protective mechanisms in transformative models of mediation for less empowered and weaker parties.
- If not conducted well, transformative forms of mediation can waste a lot of time and potentially take parties into areas where neither they nor the mediator is sufficiently skilled to deal with the underlying issues and anxieties that may arise.
- The use of transformative forms of mediation can make the dispute (as distinct from the underlying conflict) more difficult to settle, because extraneous issues are put on the mediation table.

### The Mediation Metamodel as a Tool for Researchers and Practitioners

The mediation models outlined in the metamodel 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 realizing 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 determine 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 recognize the variety of styles within each of the six types. Wise counsel mediation, for example, can involve varying levels of party input. At one extreme the mediator will assume a great deal about the parties' needs and interests and what an outcome in their best interests would look like. At the other extreme, the mediator, while still maintaining a dominant problem orientation, would also use a range of process interventions to elicit input from the parties about what is important for them in finding resolution for the dispute. Similarly, the nature of the interaction among participants in wise counsel mediation may stray from pure integrative negotiation in the direction of distributive bargaining for some issues and toward dialogue for others. Consider this example in settlement mediation. At one extreme a settlement mediator may put the legal representatives in a room by themselves to sort out a settlement, making him- 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 on 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, in a shuttle process approach with some problem-oriented interventions by the mediator.

The mediation metamodel provides a framework. Anything more would be antithetical to the flexibility and creativity that mediation is said to offer. The metamodel provides 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.

Regulatory bodies need to be clear about the definitional scope of their regulation. Where mediation is defined, it is important to be aware not only of the practices that fall within the definition of mediation but also of those

that fall outside it. What are the consequences for those mediation models that lie beyond the mediation definition? Does the regulation effectively prohibit other practices called mediation? Or does it merely fail to extend its provisions—including rights and obligations attached to diverse participants in the mediation process—to parties involved in them? Moreover, how do regulatory definitions affect the issue of unauthorized practice of law?

The Australian National Mediator Standards highlight one way these issues can be addressed. A voluntary set of standards, it does not and cannot prohibit the mediation practices that fall outside its facilitative definition. The self-regulatory provisions specifically provide for circumstances in which mediators provide expert information or advice to disputing parties. This practice in mediation is referred to as a “blended process” and can be further defined as “conciliation,” “advisory mediation,” or “evaluative mediation.” Mediators engaging in blended processes are required to have appropriate expertise and obtain clear consent from the participants before moving into an expert advice-giving role (Australian National Mediator Standards, 2008). Here the mediation metamodel can provide a guide not only for regulators but also for mediators and other process participants seeking clarity on their various rights and obligations.

For mediators themselves, the metamodel is a tool for self-reflection. Mediators are encouraged to explore the entire space within each of the six boxes and to reflect on where they find themselves from time to time in each of the individual models. As such the metamodel can form a useful basis for monitoring self-development and for mentoring and coaching. For students, the metamodel is a useful learning tool that assists in the identification of their own intuitive styles. Students frequently struggle with the gap between the reality of mediation practice and the model of mediation presented to them in training. The mediation metamodel can assist with students’ understanding of where they and other mediators are situated on the mediation landscape and in which direction they would like to develop their skills.

Parties and lawyers looking for a mediator may also find the metamodel a useful starting point for mediator selection. Articulate parties with a weak legal case but strong moral and business case may seek a facilitative mediator who encourages parties to focus on interests rather than legal positions and who maximizes the parties’ opportunities to negotiate the outcome themselves. In contrast, lawyers who consider their clients to have a strong legal case and no real interest in continuing a relationship with the other side may prefer a settlement mediator. Where, however, parties or their legal

advisers (or both) have unrealistic expectations, an expert advisory mediator may be more appropriate. Wise counsel mediators are suitable for cases with parties who for various reasons are seeking wise, moral, or simply common-sense advice as part of a practical, long-term outcome to their dispute.

From a consumer perspective, the mediation metamodel provides a guide to better understanding the range of mediation products available and the nature of the mediation process selected.

In addition, the metamodel supports the development of systematic client feedback and data collection in relation to mediation and mediators. A “bad” mediation, for example, may have multiple contributing factors, including a poor fit between the mediation model on the one hand and the characteristics of the dispute and the disputants on the other. Repeat users of mediation such as major law firms and insurance companies may find the metamodel a useful tool to debrief, analyze, and share their mediation experiences.

For researchers, the metamodel offers a structure for research design and analysis. In addition to systemizing data collection, the metamodel offers a conceptual map for identifying the relationship, if any, between specific mediation models on the one hand, and settlement rates and longevity of settlements on the other.

Referrers of mediation services such as courts, ADR organizations, and professional advisers provide a crucial link between consumers and mediation service providers. As sources of information about mediation, including its regulatory requirements, referral bodies have a responsibility to inform clients about the features of the mediation process to which they are being referred (Astor and Chinkin, 2002).

Finally, the mediation metamodel adds a new level of complexity to the question of whether or not disputes are suitable for mediation. It is no longer a question of “to mediate or not to mediate”—rather, as this article has shown, fitting the appropriate mediation forum to the fuss is a sophisticated undertaking in its own right. Here the mediation metamodel provides a useful selection, planning, and strategy tool for referral bodies, professional advisers, intake officers, parties, and others involved in making dispute resolution choices.

## References

- Albert, R. “Mediator Expectations and Professional Training: Implications for Teaching Dispute Resolution.” *Missouri Journal of Dispute Resolution*, 1985, pp. 73–87.



- Antaki, N. "Cultural Diversity and ADR Practices in the World." In J. C. Goldsmith, A. Ingen-Housz, and G. H. Pointon (eds.), *ADR in Business: Practice and Issues across Countries and Cultures*. Alphen aan den Rijn, Netherlands: Kluwer Law International, 2006.
- Astor, H., and Chinkin, C. *Dispute Resolution in Australia*. Sydney: Butterworths, 2002.
- Australian National Mediator Standards. Approval Standards, articles 2(4) and 5(4); and Practice Standards, articles 2(5), (6), (7), and 10. 2008.
- Behrendt, L. *Aboriginal Dispute Resolution*. Sydney: Federation Press, 1995.
- Black, A. "Alternative Dispute Resolution in Brunei-Darussalam: The Blending of Imported and Traditional Processes." *Bond Law Review*, 2001, 13(2), 305–336.
- Boulle, L. *Mediation: Principles, Process, Practice*. Sydney: LexisNexis, 2005.
- Breidenbach, S. *Mediation: Chancen und Risiken*. Cologne: Dr. Otto Schmidt Verlag, 1995.
- Breidenbach, S., and Glässer, U. "Selbstbestimmung und Selbstverantwortung im Spektrum der Mediationsziele." *KON:SENS—Zeitschrift für Mediation*, 1999, 4, 207–212.
- Brown, C. "Facilitative Mediation: The Classic Approach Retains Its Appeal." *Pepperdine Dispute Resolution Journal*, 2003–2004, 4, 279, 280–283, 290–292.
- Brown, J. "Creativity and Problem-Solving." In A. Kupfer Schneider and C. Honeyman (eds.), *The Negotiator's Fieldbook*. Washington, D.C.: American Bar Association, 2006.
- Buehring-Uhle, C. *Arbitration and Mediation in International Business: Procedures for Effective Conflict Management*. The Hague, Netherlands: Kluwer Law International, 1996.
- Bush, R., and Folger, J. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*. San Francisco: Jossey-Bass, 1994.
- Carnevale, P., Lim, R., and McLaughlin, M. "Contingent Mediator Behavior and Its Effectiveness." In K. Kressel and D. Pruitt (eds.), *Mediation Research*. San Francisco: Jossey-Bass, 1989.
- Corrin Care, J. "Negotiating the Constitutional Conundrum." *Indigenous Law Journal*, 2006, 5, 51–81.
- Cumming, J. "Literacy Demands of Mediation." *ADR Bulletin*, 2000, 2(10), 93.
- Currie, C. "Mediating off the Grid." *Dispute Resolution Journal*, 2004, 59(2), 11–14.
- Fisher, R., and Ury, W. *Getting to Yes*. New York: Penguin Books, 1981.
- Goh, B. *Negotiating with the Chinese*. Aldershot, U.K.: Dartmouth, 1996.
- Gulliver, P. *Disputes and Negotiation: A Cross-Cultural Perspective*. Orlando, Fla.: Academic Press, 1979.
- Haynes, J., Haynes, G., and Sun Fong, L. *Mediation: Positive Conflict Management*. Albany: State University of New York Press, 2004.

- Honeyman, C. "Understanding Mediators." In A. Kupfer Schneider and C. Honeyman (eds.), *The Negotiator's Fieldbook*. Washington, D.C.: American Bar Association, 2006.
- Linden, J. "The Expert Mediator Versus the Subject Expert." Nov. 2004. [www.mediate.com/articles/linden20.cfm](http://www.mediate.com/articles/linden20.cfm).
- Lubman, S. (ed.). *China's Legal Reforms*. New York: Oxford University Press, 1996.
- MacDuff, I. "What You Do with *Taniwha* at the Table?" *Negotiation Journal*, 2003, 195–198.
- Mack, K. *Court Referral to ADR: Criteria and Research*. Canberra: NADRAC and AIJA, 2003.
- Marcel, K., and Wiseman, P. "Why We Teach Law Students to Mediate." *Missouri Journal of Dispute Resolution*, 1987, 77–87.
- Menkel-Meadow, C. "Toward Another View of Legal Negotiation: The Structure of the Problem-Solving." *UCLA Law Review*, 1984, 31, 754–842.
- Merry, S. "Book Review: Disputing Without Culture." *Harvard Law Review*, 1987, 100, 2057–2073.
- Moore, C. *The Mediation Process: Practical Strategies for Conflict Resolution*. San Francisco: Jossey-Bass, 2003.
- Neilson, L. "Mediators' and Lawyers' Perceptions of Education and Training in Family Mediation." *Mediation Quarterly*, 1994, 12(2), 165–184.
- Newberry, S. "Problem Solving Versus Transformative Mediation?" 2004. [www.mediate.com/articles/redwing1.cfm](http://www.mediate.com/articles/redwing1.cfm).
- Rendon, J., and J. Dougherty, J. "Going Postal: A New Definition and Model for Employment ADR." *Houston Lawyer*, 2000, 57(4), 22.
- Riskin, L. "Mediator Orientations, Strategies and Techniques." *Alternatives to the High Cost of Litigation*, 1994, 12, 111.
- Riskin, L. "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed." *Harvard Negotiation Law Review*, 1996, 1, 7–51.
- Riskin, L. "Decision-Making in Mediation: The New Old Grid and the New New Grid System." *Notre Dame Law Review*, 2003, 79(1), 1–53.
- Shucker, N. "The Role of Law in Development and Investment in Sub-Saharan Africa." *Law and Policy in International Business*, 1999, 30, 667.
- Spangler, B. "Problem-Solving Mediation." 2003. [www.beyondintractability.org/essay/problem-solving\\_mediation](http://www.beyondintractability.org/essay/problem-solving_mediation).
- Tapoohi v. Leewenberg*. 2003. VSC 410.
- Udovic, F. "Therapeutic Mediation." Paper presented at the Second Mediation Days Conference, Kranjka Gora, Slovenia, June 2008.
- Watkins, M., and Winters, K. "Intervenors with Interests and Power." *Negotiation Journal*, 1997, 13(2), 119–142.
- Welsh, N. "Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?" *Washington University Law Quarterly*, 2001, 79, 787–861.
- Whiting, R. "The Single-Issue, Multiple-Issue Debate and the Effect of Issue Number on Mediated Outcomes." *Mediation Quarterly*, 1992, 10, 57–74.

- Winslade, J., Monk, G., and Cotter, A. "A Narrative Approach to the Practice of Mediation." *Negotiation Journal*, 1998, 14(1), 21–41.
- Wolff, K. (ed.). *The Sociology of Georg Simmel*. New York: Free Press, 1964.
- Zillessen, H. "The Transformative Effect of Mediation in the Public Arena." *ADR Bulletin*, 2004, 7(5), 82.

**Nadja Alexander** is professor of dispute resolution at the Australian Centre of Peace and Conflict Studies, University of Queensland, and adjunct professor at Murdoch University, Australia.