

ABSTRACT

Debates about mediator styles in civil and commercial disputes have obscured the multi-faceted role that mediators could play in helping parties involved in civil or commercial disputes resolve their differences. By imagining the resolution of such disputes as involving three distinct but inter-linked phases – the planning, negotiation and post-negotiation phases – mediators could play diverse roles in helping disputants resolve their disputes in a manner that is both efficient and cost effective.

INTRODUCTION

Civil justice systems have traditionally promised justice through law. The promise of mediation is different: '[J]ustice is derived, not through the operation of law, but through autonomy and self-determination' (Nolan-Haley, 1996:49). However, I would argue that mediation is not living up to this promise or to its purpose, which is to provide parties with 'the best possible result at the lowest cost' (Lurie, 2014) largely because it has been straitjacketed into distinct 'styles' that essentially try to 'fit the problem to the process' instead of the other way around.

In this contribution I do not intend to try and resolve the controversy over mediator styles, a controversy that probably and in any event has been overtaken by the reality of mediation practice (Baharvar, 2015). Still, some reference to the debate will be made for the sake of context. As Riskin (2003) points out, the debate about mediator styles has significant real-world implications as it affects 'training, regulation and practice, evaluation, as well as who mediates, how mediation is presented to the public, and mediators' self-identities' (Riskin, 2003:8).

My primary focus in this contribution is rather on the broader range of roles that a mediator might be able to play in civil and commercial disputes to assist the disputing parties in arriving at a *resolution* instead of a mere *settlement* of their dispute. In helping parties resolve their dispute, the mediator could flexibly employ a variety of 'styles' or approaches during the mediation itself, depending on the nature and context of the dispute, provided certain conditions are met. These are that (a) the parties must be informed about and understand the different roles the mediator could play in their dispute, (b) they must have given their consent to a particular role or roles being played, (c) the mediator must have the necessary training and experience and (d) the principle of disputant self-determination must be honoured, i.e., the mediator cannot *impose* a solution (but could *propose* one). Here the mediator's process options lie on a continuum between least interventionist to most interventionist approaches.

It is also possible for the mediator not only to apply the full range of styles during the mediation process itself but he or she could also 'swop' hats during the different phases of the dispute resolution process between different roles in an effort to help the disputants achieve what they want from a dispute *resolution* process, provided the conditions mentioned earlier have been met.

The style debate

Background

Disputes typically involve three dimensions: the substance ('problem') dimension, the process dimension and the 'people' (relationship) dimension (Boulle Nesic, 2009; Moore, 2003). Should a mediator, depending on the situation, be concerned with only some or with all of the dimensions of a dispute? Different 'practice styles' of mediation have developed over the years around these dimensions, each one adopting a more or a less interventionist approach towards involvement in the substance and relationship aspects of a dispute (Menkel-Meadow 1995; Boulle & Nesic, 2009).

A mediator's style determines the extent of the mediator's involvement in the process and substance of a dispute (Stempel, 1997). Each practice style claims to meet special needs and purposes that the protagonists believe to be unique and set it apart from others. They also form interest groups that lobby for recognition, assert the need for special training and expertise and seek to establish exclusive certification processes (Stempel, 1997).

Terminology

The term 'evaluative' mediation refers to the extent to which a mediator assesses the strengths and weaknesses of the disputants' legal positions or predicts (or makes formal or informal recommendations about) outcomes in court or arbitration (Kovach & Love, 1996; Zumeta, 2015). 'Evaluative' mediation is the most settlement-oriented of the styles. Generally, evaluative mediators are quite directive as far as the process is concerned and often make formal or informal suggestions to the parties as to how to resolve the substance of their dispute, often based on legal norms. Their focus therefore is on process as well as substance (Zumeta, 2015).

A 'facilitative' mediator assists the parties' negotiations without evaluating the merits of the dispute. Instead, he or she facilitates the disputants' own evaluation of the merits and subsequent decision-making (Kovach, 2005). 'Facilitative' mediators generally focus on managing the mediation process while remaining aloof of the substance of the dispute. They view the process as a collaborative problem-solving endeavor aimed at moving (but not pushing) the disputing parties to a settlement based on the integration of their common, different and conflicting interests (Baharvar, 2015). This is done by assisting the parties in developing a range of options to facilitate integration. Some (e.g., Kovach & Love, 1996) would attach the label of 'mediation' exclusively to a 'facilitative' style.

'Transformative' mediation, an approach originally proposed by Bush and Folger (1994), is based on the value of 'empowering' each of the disputants by getting them to recognise each other's needs, interests, values and points of view. Generally speaking, 'transformative' mediators place the focus of their endeavors squarely on the parties' relationship (the 'people' dimension) in an attempt to 'transform' their conflict into an opportunity to rebuild their relationship. It emphasises the need to 'empower' the parties with a stronger sense of self-respect, self-reliance and self-confidence. Agreement on the outcome of the current dispute or conflict is not the primary goal. Transformative mediators, therefore, focus on the process and relationship dimensions of a conflict, not on its substance. Hard core proponents of this approach believe that a transformative style is closest to the pure heart of the mediation process and its core values of party self-determination and mediator impartiality (Stempel, 1997).

Drawbacks of pigeon-holing mediator styles

Mediators tend to have strong feelings about the various styles of mediation, yet the emphasis on style masks the more fundamental question about the potential scope of the mediator's role in the resolution of civil and commercial disputes, i.e. should a mediator, depending on the situation, be concerned with only some or with all of the dimensions of a dispute? Each of these styles has also come in for strong criticism. Amongst others, none of the three primary styles (and there are others too, e.g., 'narrative' mediation, 'therapeutic' mediation, etc.) in themselves provide a holistic approach to the resolution of a civil or commercial dispute that encompasses its process, problem and people dimensions (Stulberg, 1997; Zumeta, 2015).