

A Call for Respect and Collaboration by Proponents of Rival Mediation Philosophies
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In ideological terms, mediation theory and practice is in the middle of a tug of war.

The market for mediation services is quite diverse and is now in the process of institutionalization. Theorists and market participants are struggling to develop what they hope will become a generally accepted vocabulary reflecting distinctions within the market. This institutionalization process entails both the conscious activity of "intellectual entrepreneurs" (such as promoters of mediation services, policy makers, and academic theorists and researchers) and the less-conscious interactions of individual buyers and sellers in the market.

Over time, some ideas predominate, while others fall into disuse. Institutionalization processes occur in relatively unsettled situations with bursts of ideological activism in which ideologies compete for dominance. After these ideological contests are settled, actions are guided by taken-for-granted traditions and what is perceived as common sense.

Right now, there is a lot of activity. We clearly are in the middle of a period of ideological contest.

Debates and Practices

Arguments over terminology are not just academic exercises. These debates shape actual practices of mediators regarding what it means to be a good practitioner, referring to shared meanings and norms within one's practice community. For example, if the facilitative-evaluative distinction described below gains currency, mediation shoppers may base their selection of mediators on perceptions along this dimension.

Accordingly, mediators may feel compelled to define and enact their techniques to comport with what they believe to be good facilitative or evaluative practice, as the case may be. Many practitioners want to follow the predominant norms of their practice community (e.g., use an evaluative or facilitative approach if everyone else seems to be doing it), though some practitioners may wish to create a niche in the market by offering an alternative to the majority practice. Whatever one's strategy and however conscious it may be, a practitioner's professional

activities are likely to be affected by the particular conceptions commonly used in their practice communities.

A fundamental issue in the institutionalization of mediation is whether there should be a single, relatively pure, conception of mediation that is appropriate for all mediators--which I call the "single-school" view--or whether a variety of conceptions should be accepted as legitimate, which I refer to as the "pluralist" view. In this article, I advocate a pluralist conception of mediation and suggest some steps to enhance the value of differing approaches in mediation.

Single-School Perspectives

The "single-school" view seems to be quite popular among mediators, judging from casual conversations I have heard at gatherings of mediators, though single-school mediators differ as to just what that school should be. One of the common distinctions is between facilitative and evaluative styles of mediation. See Riskin, "Mediator Orientations, Strategies and Techniques," 12 *Alternatives* 11 (September 1994). There also is an important debate about the merits (or lack thereof) of these two styles. See Kovach and Love, "'Evaluative' Mediation is an Oxymoron," 14 *Alternatives* 31 (March 1996), and Bickerman, "An Evaluative Mediator Responds," 14 *Alternatives* 70 (June 1996). Although this distinction is better conceived as a continuum rather than a dichotomy, the polar distinctions can be a useful tool if not taken too literally. I have heard numerous mediators distinguish what they believe to be "good mediation" or "real mediation" from what they consider substandard mediation practice.

Advocates of a facilitative philosophy raise serious concerns about disputants' confusion stemming from what to expect from mediation, the quality of dispute resolution processes using evaluative techniques, and the potential for coercion. Some adherents of this view reluctantly accept the legitimacy of what they view as substandard mediation practices but plead "Just don't call it mediation!" They prefer instead terms such as "mediation-arbitration," "nonbinding arbitration," "neutral case evaluation," or "private settlement conferences."

More colloquially, evaluative mediators are sometimes called "muscle mediators," "Rambo mediators," "Attila the mediators," or mediators who will "knock some sense" into the negotiators by "banging their heads together" or "twisting their arms."

On the other hand, advocates of an evaluative style of mediation raise serious concerns that a significant proportion of negotiators do not want and would not respond well to a facilitative mediation style. Proponents of this view note that it may be difficult to accurately characterize a process with a single word when the process may vary between cases and even within a single case. Evaluative mediators sometimes dismiss proponents of a facilitative approach as being out of touch with the way the world really works. They describe a facilitative

style as soft, weak, "touchy-feely," "therapeutic," "new-agey," and even a "potted plant" approach to mediation.

The issue of mediator evaluation stirs fervent passions of theorists and practitioners alike. The unflattering characterizations clearly rankle proponents committed to the differing views. For example, I have heard facilitative mediators take umbrage about such characterizations of their approach. Facilitative-style mediators complain that lawyers press them to tell the disputants "how much the case is worth" and get quite frustrated if they do not do so.

There also are related differences regarding the appropriate goals of mediation. Some mediators believe that disputants are primarily interested in ending their disputes, and thus settlement is the only or primary goal of mediation. In this view, any settlement is a success and not settling is, inherently, a failure. Some believe that other values are more important than simply whether a dispute is settled. Some hold that the unique values of mediation are its potentials to empower individual disputants and to encourage mutual recognition between disputants. Yet others argue that the goal of mediation should be to assist disputants to craft not just any settlement but one that optimally and jointly satisfies their underlying interests. Others focus on enhancing relationships and protecting disputants and third parties from harm. While this is probably not an exhaustive list of what mediators see as the primary goals of mediation, it does reflect some of the major, and strongly-felt, differences about what the goals of the enterprise should be.

Respect for Different Styles and Philosophies

I am skeptical of a single-school approach for both philosophical and pragmatic reasons. My mediation philosophy preference leans toward a facilitative approach that promotes negotiators' exercise of responsibility in decision-making. But I am a pluralist because I believe that it is important to have a diverse market that offers a wide variety of legitimate options for mediation buyers and sellers.

As a practical matter, I doubt that it is possible either to limit the style of mediator practices or to enforce a single-school usage of the term mediation. Rather than trying to maintain distinctions about what is and isn't real mediation, I think that it would be more productive to try to concretely define distinct varieties of mediation in ways that are clearly recognizable by participants in the mediation market. While this would be no easy task in itself, I believe that it is more likely to be successful and productive.

I encourage mediators to embrace a great diversity of practices. Mediators of various persuasions have good reasons to hold their values and also have legitimate concerns about the implications of other philosophies. I believe that there is some merit to most mediation

philosophies and that we should resist the temptation to elevate our own approach as "real" mediation and denigrate others as false substitutes that should not share the mediation franchise. Though disparaging other approaches may feel satisfying temporarily, I am convinced that it is a counterproductive long-term strategy. It is unlikely that any camp will prevail completely and if perchance one did, mediators and, most important, disputants, would lose the precious values of diversity and choice.

Instead, I suggest that it would be much more helpful for adherents of differing mediation philosophies in local mediation communities to respectfully work together to concretely classify their differences as an aid to mediation consumers. There are various ways that mediators could do this. One would be to observe and then discuss each other's work. Another way would be to participate in peer consultation groups to discuss mediation cases, styles, and techniques. A third way would be to operate a speaker's bureau or other public education program. I participated in a group that developed a training for speakers and directory of local mediators. The discussions to decide how to present mediation to our community helped identify relevant distinctions between mediation services.

I suggest that mediators primarily committed to a facilitative philosophy appreciate the values of settlement and efficiency in mediation, especially for disputants making informed choices to select mediators with those orientations. If mediators provide reasonable disclosure to principals about their procedures and get consents to use the procedures, these are legitimate choices that should be respected. See Mazadoorian, "Disclosure Questions for ADR Counsel to Ask When Choosing Neutrals or Provider Groups," 14 *Alternatives* 95 (September 1996).

At the same time, I hope that evaluation-oriented mediators will appreciate that disputants may have goals that they value as much as or more than settlement itself. Rather than assuming that settlement is the only or primary goal, these mediators should assess and respect the disputants' goals and priorities.

All mediators should become more aware of their own mediation styles and philosophies and describe them clearly, both in the hiring process and the mediation process itself.

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