



Integral Mediation

Brian Jarrett, J.D., LL.M., Ph.D. University of Alaska Fairbanks

Introduction

From a sociological perspective, *branding* can produce a much needed counterweight to the institutional inertia that resists positive change in an established social field (Abbott, 2001). *Branding* can help marshal energies that challenge the existing social order by offering legitimated alternatives. In the contemporary mediation field brands have emerged that have challenged the existing legal order. For example, the Harvard facilitative or interest-based method has produced a much needed alternative to the standard positional bargaining approach common in the legal field (Fisher and Ury, 1981). The Harvard Method frees disputants from their oft-overly constrictive legal positions, allowing them to explore a wider array of solutions, based on the parties' underlying interests. Branding has helped this method emerge as a prominent approach to mediation which has proven both theoretically simple and robustly applicable to a host of disputing environments.

Nevertheless, there is a potential dark-side to branding and the mediation community is now confronting it. Branding can engender unsavory bickering and fatuous claims of supremacy, supplanting a genuine debate about the relative merits of each approach. Moreover, the finely-textured and fluid nature of social conflict and its associated multi-causality resists any exclusive a priori approach. Accordingly, it is unlikely that any mediation approach can make a legitimate claim of superior exclusive application. Yet, several practitioners attempt to do just this, espousing an unwavering commitment to their chosen approach across various disputing contexts and throughout the mediation process.¹

To understand why mediators claim to use

one espoused approach despite practice evidence to the contrary it is important to understand the sociological and marketplace forces influencing mediators, as social actors. Because mediation arose more as a practice than a theoretically-derived discipline, its theoretical base has not developed in a consistent nor coherent fashion (Deutsch, 2000). This is largely because practitioners have had little time to document and even less motivation to share their practices with academicians, with whom they have little in common (Deutsch, 2000). Academicians, for their part, have often demonstrated a greater deference to theories generated in the hallowed halls of academe over folk-wisdoms, intuitions, and mediator narratives emerging directly from practice (Deutsch, 2000). The net effect has been a continuing disconnect between theory and practice. Consequently, in the absence of careful documentation and robust, coherent theory development mediation organizations have simply sought market advantage by promoting their particular approach over alternatives.

To break out of this self-limiting trajectory, it is imperative for the mediation community to explore theory-to-practice connections and potential syntheses among competing approaches where such reflects the realities of practice. Equally the community needs to identify and acknowledge differences between approaches where they truly exist. Perhaps it is time to turn this whole *brand* supremacy phenomenon on its head. Mediation's clients would surely be the principle beneficiaries of such an exercise, as they tend to be more concerned with effective practice and positive results over mediator claims of brand distinction and supremacy. The mediation community should therefore consider a discussion aimed at exploring a diversity of approaches and potential integration based on actual practice, i.e., an *integral* approach.

Arguably, this discussion must start with a practice-derived theory of mediation. I have spent the last few years actively facilitating such a discussion among practitioners; a project I christened *The Integral Mediation Project*. Its focus is both the integration of theory and practice as well as the reconciliation among approaches where appropriate. It is the intention of the project to see this integral approach grow as a viable *open-source* option at the various mediation centers and universities providing mediation training. The project provides a kind of professional space akin to Jurgen Habermas' *public sphere* for the mediation community in which to explore a plurality of approaches emerging in the rigors and throes of various practices (Habermas, 1980, 1984, 1987, 1990).²

In the mediation field, there is evidence that brand bickering has engendered a stifled discourse replete with expedient commercial and political speech which, in turn, has produced blind spots, theory-to-practice gaps, marginalization, alienation, and rules for professional ethics that are out of step with the exigencies of everyday mediation practice (Farned, 2010, Jarrett, 2007, 2009; Riskin, 1994, 1996, 2003). This result is highly ironic in a field whose *raison-d'être* purports to be the effective resolution of conflicts through a free exchange of ideas. The mediation community therefore needs a *public space* for free debate; a professional discourse which bridges various approaches while respecting differences where such emerge in the mediator's practice experience. Moreover, such an approach could serve to bridge the theory-to-practice gaps and other ailments that currently bedevil the mediation field.

This paper represents an invitation toward an integral approach. *Integral Mediation* is pragmatic. It explores strategies and techniques that work best in the moment they are needed, even if they contradict *a priori* theoretical commitments. Its focus



is on function over form. As soon as a strategy or technique becomes ineffective, the *integral* mediator must let it go, in favor of more effective ones. Indeed, such flexibility and adaptation lies at the very heart and soul of mediation. The *integral* approach is motivated by the discovery of maximum value in any mediated exchange. Recognizing that social interaction is always shifting, the *integral* approach must pursue adaptive strategies rather than a fixed theoretical frame. *Integral Mediation* must therefore be grounded in adaptive practice.

Importantly, the integral approach does not seek to exclude or denigrate alternative approaches. Rather, it simply acknowledges the reality that certain mediation approaches are becoming increasingly entrenched and institutionalized. By denigrating or, alternatively ignoring the institutionalized approaches the integral method would simply create yet another competing *brand*, which risks reproducing the same brand-bickering exchange that now beleaguers mediation practitioners. Instead, the integral approach represents a true alternative—an open-source meta-practice available to any practitioner committed to exploring and expanding integration.

Part I of this essay presents the policy rationale for *Integral Mediation* and invites the mediation community to consider a protocol for developing integral practice. Part II provides an analytical schema acknowledging and comparing prominent contemporary approaches. Part III explores, in particular, the difficulties with the neutrality and impartiality ethics and suggests how to develop ethics more integral to actual mediation practice.

I. The Policy Rationale for *Integral Mediation*

Standard IX³ of the jointly-adopted mediator ethics code of the Association for Conflict Resolution (ACR), the American Bar Association (ABA), and the American Arbitration Association (AAA) provides the rational basis for the integral approach. Pursuant to Standard IX mediators should foster diversity within the mediation field, make mediation accessible to clients, as-

sist the public in developing an improved understanding of, and appreciation for, mediation, and to demonstrate respect for differing points of view within the field. See Standard IX.

“Standard IX. Advancement Of Mediation Practice

A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:

1. Fostering diversity within the field of mediation...

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.”⁴

Standard IX provides the aspiration that mediators should advance the practice of mediation, by fostering diversity and respect for different approaches within the mediation field. If respect for diversity and differing points of view in the mediation field is to be meaningful both academics and practitioners need a professional space in which they can engage in critical debate. Arguably, Standard IX therefore countenances and even supports a professional space in which mediators work out compatibilities and incompatibilities through a good faith dialogue.

Over the last five years, having interviewed 155 practitioners, I have concluded that this does not appear to be happening with the vigor one would hope for an emerging professional field. Instead, the field is often deadlocked by claims of brand distinction and supremacy (Farned, 2010; Jarrett, 2009). Not infrequently, the voices of various devotees seek to distinguish and even, in some instances, exclude alternative mediation approaches on both philosophical and theoretical grounds (Farned, 2010; Jarrett, 2009; Riskin, 1994, 1996, 2003). In the past few years, I reported evidence that seemingly mutually exclusive approaches are often driven, in significant part, by a strong desire to create a marketing edge (Farned, 2010; Jarrett, 2007, 2009).

Market competitors seek to distinguish themselves in their espoused uniqueness. Seeking distinction through exclusion may be good for the career of the particular proponent(s) making such claims, but arguably detrimental to discovering best practices in mediation. Moreover, claims of brand distinction and supremacy that attempt to exclude alternatives often thwart the possibilities of an authentic practice-based discourse. The result is a dead-end debate based on marketing and political concerns that will ultimately lead to the impoverishment and contraction of mediation as valuable service for the community.

In light of aspiration, and perhaps, ethical imperative contained in Standard IX, the mediation community needs a forum to actively develop integrative possibilities.⁵ But a truly integral approach cannot simply be an exercise in which mediators simply throw together divergent approaches in an arbitrary and capricious manner. Rather an integral approach must work out the practical logic of each approach and its associated claims to distinction in order to demonstrate both authentic difference and potential integration. The integral approach, while seeking genuine goodness of fit between theory and practice and amongst various practices, must not dismiss genuine incompatibilities where these flow naturally from practice. Otherwise the integral approach will likely produce the same stifling dead-end debate that has befallen other approaches.

Nothing in Standard IX requires integration at the expense of unique practical applications. *Integral mediation* consistent with Standard IX should permit a myriad of approaches that further unique goals and objectives in mediation, often associated with divergent disciplines of origin, such as law, social work, psychology, counseling, sociology, and business, etc. In fact, the added value of *integral mediation* is that it expressly recognizes and acknowledges divergent approaches to mediation. Moreover, it challenges those who assert the supremacy of one approach over others to demonstrate such supremacy in the circumstances in which it is practiced. *Integral mediation* seeks meaningful synthe-



sis between approaches at a practical level, where possible, without sacrificing the underlying commitments upon which these approaches are based. In short, any synthesis must flow organically from the logic of practice.

II. An Analytic Framework for Contemporary Mediation

It is imperative that we vigorously explore the connections between ontology (social reality), epistemology (knowledge of social reality), and social interaction to move beyond bickering mediation factions. As discussed in the introduction, the mediation field, an activity of otherwise great promise, remains bedeviled by theory-to-practice gaps. Arguably, because we have been too quick to accept claims of espoused practice without due critical analysis we have failed to map out and develop clear connections between ontology, epistemology, and mediated social interactions.

From the interpretive paradigm in social science, the very nature of social reality implies that epistemology is always negotiated in any mediated interaction. Accordingly, mediators, along with their clients, engage in a process in which they co-create social reality and determine relevant facts in each and every instance of mediation. One simple reason that mediators often denigrate alternative approaches is that they do not accept other versions of ontology, epistemology, and interaction. Unfortunately, this refusal to integrate approaches thwarts the potential for mediation because it denies the very fact that mediated interactions can be, by their very nature, uncertain and chaotic.

In truth, there is no *one-size-fits-all* in mediation. Mediators often make the mistake of claiming they have found the *one-size* approach but this ignores the nature of social reality. At mediator conferences one often hears mediators promoting their *a priori* fixed model, arguing that their chosen model not only describes social interaction but also defines ontology and epistemology in the *very* terms of the model they have produced. From the interpretive sociological paradigm, no mat-

ter how great its accuracy, a map should never be confused with the territory it purports to describe. Accordingly, no matter how good the mediation brand is, it is still limited precisely because it is just a brand.

Arguably, we also need to acknowledge mediation is essentially a complex adaptive system, and as such, must always adjust to successfully navigate new situations (Ruhl, 2009). There is simply far too much complexity in social interactions for mediators to steer those interactions based on unnecessary self-imposed constraints. As practitioners readily attest knowledge of disputant reality and interaction can shift at any given moment in mediation, based on a host of interacting social factors, e.g. changes in the relative power of the parties, shifting social location in the larger community, increasing knowledge, shifting attorney influence, and the like. In short, by its nature, social reality tends to be negotiated and emergent in mediated social interactions. It therefore seems puzzling why mediators would be so quick to espouse a fixed *a priori* approach in the face of such realities. Arguably, they do so because market-forces compel them to do so. Branding is the result.

While the integral approach, as an alternative, is eclectic, one cannot simply throw different approaches together and hope they will somehow fit. This eclectic tack would not do justice to the unique texture of each approach. In addition, doing a mediation-light version of several differing approaches would be unproductive because it would likely produce a poor rendition of the original approaches, resulting in their muddling. This is because interactions associated with each approach may connect to differing and oft-mutually exclusive ontologies and epistemologies. Logical consistency is required.

Mediation brand proponents often confuse interaction with ontology and epistemology and insist that their particular interactive method proves their slant on social reality and its relevant facts. This can result in a reification of the particular approach. The integral approach avoids this by reminding us negotiated ontology and epistemology determine social interaction

and vice versa in each instance of mediation. *Integral mediation* simply recognizes that coherent ontology, epistemology, and interaction emerge in mediation and that the mediator's role is to help the parties develop and maintain coherence between them. Correspondence and convergence between these elements is what produces meaning and adds value for the parties, as they struggle with their dispute, in any given instance. The integral approach recognizes the role of the mediator is to help the parties discover instances of shared meaning.

A. Acknowledging Contemporary Mediation Approaches

After surveying the opinions of 155 mediators over five years, I discovered surprisingly that a significant number (61) would simply prefer to ignore the existing contemporary *brands* and develop an empirically based alternative. Yet to ignore existing approaches would do the very thing the branding process has already done, i.e., to dismiss the alternatives. For this reason, it is important to recognize other contemporary approaches and acknowledge how they differ with respect to ontology, epistemology, interaction and mediator interventions.

The four prominent contemporary approaches are facilitative/interest-based, evaluative, transformative and narrative (Bush and Folger, 1996; Jarrett, 2009; Riskin, 1994, 1996, 2003; Winslade and Monk, 2000). Each claims a different ontology and epistemology. From each flow the logical mediator interventions, strategies, and tactics. For the sake of convenience the focus is limited to these four, although one could conceivably use this schema for any mediation approach that comes along. See *Figure 2*.

By comparing and contrasting each, we can see why there is often tension and dissonance between them. The social world is framed differently in each. Moreover, mediators see their role differently in each. For facilitative/interest-based mediators the world is a modernist reality in which observations can reveal essential interests motivating legal positions (Fisher and Ury,



Application - Hierarchy of Integration

Category	Sociological Frame	Facilitative/ Interest-based	Evaluative	Transformative	Narrative
Ontological	Social Reality	Essentialist	Historical	Humanist	Post-modern
Epistemological	Knowledge of Social Reality	Interest-Oriented	Precedential	Relational	Social Constructivist
Disputant Behavior	Social Interaction	Conflict over competing interests	Competition for most persuasive legal position	Conflict as a Failure to recognize fellow humanity	Conflicting Narratives
Mediation Approach	Brand Commitment	Focus on Interests	Establish and apply Precedent	Provide opportunities for mutual empowerment and recognition	Deconstruct/ Reconstruct Narratives
Chosen Intervention - Declared Goals, Strategies and Tactics	Espoused Practice	Move parties from Positions to Interests	Provide parties with an assessment	Encourage and Reinforce instances of empowerment and recognition	Surface dominant and subordinate narratives and establish functional shared narrative

Figure 2

1981, Moore, 1996). For these mediators, revealing underlying interests diffuses disputes, producing interest-based solutions (Fisher and Ury, 1981, Moore, 1996). For evaluative mediators conflicts are resolvable through the application of precedent and previous authority through which one guides the parties (Levin, 2000-2001; Stark, 1997). Accordingly, providing evaluations to the parties is the best way to resolve disputes (Levin, 2000-2001; Stark, 1997). For transformative mediators the world is a humanist challenge in the face of which humans and communities can evolve morally (Bush and Folger, 1995). For this approach, encouraging in a non-directive way moments of mutual *empowerment* and *recognition* to encourage moral growth is the best-practice for mediators (Bush and Folger, 1995). For narrative mediators the world is socially constructed through language. Therefore narrative mediators strive to enter the *language game* leading parties from conflict-saturated narratives to conflict-reduced narratives (Winslade and Monk; 2000).

In sum, we may have put the cart before the horse. That is, each approach seems to have first established its own interaction rituals and corresponding method and then proceeded to map out a social world based on the requirements of the method. The chosen ritualized intervention *becomes* the social frame or world-view for any and every social conflict. A truly integral approach must surely work the other way around, first unpacking ontology and

epistemology in a self-critical fashion before seeking methods that seek to address them. Only then will we effectively tackle conflict in all its complexity.

B. Sourcing Many Disciplines of Origin

A struggle has emerged between competing disciplines of origin in the mediation field (Abbott, 2001; Jarrett, 2007, 2009). In particular, there appears to be a struggle over the relative value of fundamental skills associated with each source discipline. For example, lawyers often claim knowledge of the law and the legal system as a special claim of distinction in the mediation marketplace. Similarly, social worker, sociologists, psychologists, and counselors often claim special skills regarding knowledge of social processes and socially-useful interventions. Further, anthropologists claim specialized knowledge about the parties' cultural backgrounds and disputing contexts. Still further, labor relations experts, managers, business professionals, and accountants claim respective skills in management, appraisal, and evaluation.

In fact, divergent disciplines of origin naturally contribute diverging ideas about ontology, epistemology, and corresponding skill sets. Some see this as a problem because they are concerned one source-discipline, in a struggle over turf, may come to dominate mediation practice at the expense of others. However, this result can be avoided by acknowledging a host of

useful skills sets associated with each discipline of origin. The integral approach can add value by integrating and improving mediation through inclusion of these skill sets and the process of their continual refinement.

Any successful inter-disciplinary dialogue cannot privilege one discipline over others but rather must acknowledge the unique value-added component of each approach. In so doing, it provides a strong basis for mediator educational development. For example, it may be that some legal training is useful for mediators dealing with particular disputes, where legal issues play a prominent role. We could then work to identify the legal knowledge most useful to mediators and build this knowledge base into mediation training. Similarly, certain counseling intervention skills might also be useful where continuing co-disputant interaction is important. This knowledge could also be identified and included in mediation training. The same is true for each of the disciplines of origin. Moreover, as new disciplines emerge, as in, for example, On-line Dispute Resolution (ODR), new internet emerging communication technologies, video-conferencing, etc. the integral approach would also welcome their added-value components. By adopting this on-going value-capture approach mediation can continue to evolve, improve, and effectively redefine itself.

C. Affirming The Role of Culture

Culture is attaining a position of greater importance in conflict resolution as social interactions in the world become increasingly inter-connected and globalized (Fernando, 2010). So too is the need to learn methods that help us understand the variance in culture and its differential effects on settlement processes (Fernando, 2010). It is wholly unrealistic to expect the cultural environment to adjust to the mediator. But this is what a number of mediators currently do when they apply their respective methods to conflicts arising in a cultural environment that differs from the one in which their methods originate. It is therefore important that our mediation interventions recognize and adjust to suit the particular cultural context



in which the dispute emerges.

From a sociological perspective, changes in the cultural *field* affect the mutually agreed-upon aspects of ontology, epistemology, and social interaction, in mediation (Bourdieu, 1977, 1992). The integral approach must continually adjust itself to shifts in the cultural *field*. Arguably, no fixed-commitment approach can adjust adequately to the finely textured shifts produced by cultural forces. In fact, it is not unreasonable to expect mediation approaches lifted from one cultural milieu to be naturally disconnected from practice in the other cultural *fields* in which they are applied. Accordingly, a priori commitments to any of the approaches in *Figure 2* might actually work against value shifts consonant with human experience, depending on the particular cultural *field*.

Cultural and collective identity can loom large in many so-called resource-based disputes (Rothman, 1997; Volkan, 1997). In fact, such issues can dwarf the relative importance of resource-based interests in these matters (Rothman, 1997). Jay Rothman (1997) has aptly developed this theme and demonstrated its application in his work. Cultural and identity-based values shape epistemology and social interaction. Identity is particular to each society (Volkan, 1997). The *integral* approach must recognize that participants from different cultures must first acknowledge each others' differing value commitments before attempting to address other issues, including economic interests. This is precisely because the very nature of social reality, including symbolic meaning, is negotiated in mediation. Even though the parties do not share their respective cultural values they must at least accept that they are real and meaningful for their respective parties—these values reflect and carry cultural capital.

D. Exploring Practice Sectors

The majority of interviewees were in favor of preserving the larger mediation field as a distinct identity. Most argued that if we allow mediation to simply splinter into each of the sectors in which it is applied, it risks becoming just another constrained, bureaucratized activity (Weber, 1947,

1976). In effect, what we then call 'mediation' risks losing its vigor and potential for human emancipation. On the other hand, idealizing social conflict in a *one-size-fits-all* analysis with no recognition of sectoral contingencies is naïve. This approach would also ultimately and ironically impoverish mediation, because it would not fully acknowledge the realities of modern bureaucratic life in which people have to live (Weber, 1947, 1978). In the extreme it would become an idealistic exercise without a materially-based connection. Therefore, the integral approach must lie somewhere between these two extremes—capable of both autonomy from and connection with recognized bureaucracies and supporting legal processes.

Despite differences, it is evident that certain sectors and associated practice groups are situated much more closely to certain others. In fact, it is a useful exercise to consider potential groupings where practices might share similar themes. After interviewing 155 practitioners, I noticed that several distinct practice-group categories emerged based on shared practice themes. Consider the following sector groupings. Family, estate, elder, and child protection mediation tend to share common concerns about the best interests of vulnerable family members. Victim-offender mediation, school, peer mediation, family-group conferencing, and talking circles often focus on the rehabilitation and socialization of young people. Commercial, construction, consumer, and personal injury mediation often resolve contract rights and industry-norm violations and attendant compensation. Community and Neighborhood-Justice mediation, despite an apparent myriad of conflict themes share the common goal of restoring on-going relations and peace in local neighborhoods. Employment, workplace civil rights, and mediated labor relations focus on resolving disputes in the workplace and promoting industrial peace.

While one might disagree as to the exact groupings, it becomes evident natural affinities exist that may benefit from common practice development. It becomes equally evident that natural differences exist which require caution in migrating

logic and practice from one sector to another. Future research that explores the essence of various sectors and mediator adaptations would be of great value. This is a theme that is yet to be fully developed in the mediation community.

III. Identifying *Integral Practice Ethics*

In order to develop ethics more integral to mediation the mediation community must develop its own more unambiguous practice-based ethics—*integral ethics*. In a survey of mediator ethics codes I discovered that almost all of them require the mediator to be either *neutral* and/or *impartial* (Jarrett, 2006). On the surface this sounds well and good and even desirable. As part of this study, when mediators were asked what they meant by *impartiality* and *neutrality*, it appeared that mediators had several divergent and sometimes contradictory notions of what these terms actually mean. Therefore, before we can even attempt to adopt these ethics we need to figure out what exactly they mean. Moreover, even if we could determine what these two terms actually mean, they may still not represent best practices in mediation.

The *neutrality* and *impartiality* ethics appear to have emerged from the juridical doctrine that judges must maintain the perception of impartiality so that litigants will view the judge's authority as legitimate and more freely comply with unfavorable decisions (Bourdieu, 1986; Jarrett, 2006). Mediation organizations appear to have un-reflexively adopted these notions in whole cloth, rather than establishing their own ethics that respond to the finely textured needs of mediation practice (Mayer, 2004). This is an unintended consequence of the fixed doctrinal approach to mediation, which produces these kinds of blind-spots and mimicry. Arguably, merely adopting juridical ethics will ultimately impoverish and institutionalize mediation because it renders mediation *court-light*, preventing it from developing organically as its own independent practice. If legally derived ethics worked without mediation then we wouldn't need mediation in the first place. Mediation came along because there was an obvious need for it as a



complement to the standard litigation map and now we are ironically in danger of thwarting its potential through excessive deference to legalistic ethics.

To make matters worse, *impartiality* or *neutrality* in any abstract sense in mediation may well be impossible, so as to make such a requirement absurd and meaningless (Jarrett, 2006, 2009; Mayer, 2004). We know, from the reflexive and interpretive-science perspective, observers are always working to understand and explore their own biases. Ironically, for *verstehen*, a key concept of Max Weber's sociology, mentioned above, exploring one's own biases is the only way one can truly see social reality in an unbiased fashion (Weber, 1947, 1976). The problem is that imposing the *neutrality* and *impartiality* ethics on the mediator means that that practitioner cannot openly admit bias and partiality without risking potential condemnation, poor evaluations, and even potential reprisal by the parties. If the mediator could admit and explore bias reflexively with the parties she may well come to gain a far more impartial view of the social conflict and be of greater assistance to the parties in their efforts to resolve their dispute.

Imposing *neutrality* and *impartiality* may not only weaken the potential of mediation practice it might even exclude certain forms of mediation, contrary to Standard IX promulgated by ACR, AAA, and ABA, discussed above.⁶ It would indeed appear that the *neutrality* and *impartiality* ethics contradict the diversity ethic contained in Standard IX. Certain mediation practices that do not align themselves with standard legal doctrine may be the casualties of imposing whole-cloth ethics without modification from originating source disciplines. For example, ho'oponopono practitioners in Hawaii, Peace-making mediation among Native groups in North America, and South East Asians have reported that imposing *neutrality* and *impartiality* requirements would actually work to undermine effective practice (Honeyman, 2004; Jarrett, 2009).

Often indigenous protocols work best through the mediation work of wise and

respected *Elders*. These *Elders* are often effective precisely because they are connected to the parties by relation or social proximity. To require such a practitioner to have no prior relations with parties or biases toward certain issues including family, community, and health might well prove counter-productive to the mediation process (Honeyman, 2004; Jarrett, 2006, 2009). Yet the Uniform Mediation Act, adopted in several states, like many organizational ethics codes prescribes *impartiality*, unless expressly waived by the parties.⁷ Do we simply redefine and exoticize their practices to exclude them from the reach of mediation's logic and debate? This may well effectively eliminate Wise-Elder Mediation as a form of practice because it cannot be so narrowly constrained.

One can apply the same logic to several sectors of practice including, among others, victim-offender mediation, family mediation, child-protection mediation. For example, in family disputes, it would be unreasonable to require the family mediator to remain neutral and unbiased toward the interests of the child. Like-wise, in victim-offender mediation cases it would be unreasonable to expect the mediator to remain issue-neutral on matters of serious crime. Surely, in these areas, we would reasonably expect the mediator to be expressly biased and evidently partial. Crime victims have a right to be free of crime and children have a right to good parenting, respectively. In the vignette, for example, we would surely all hope that the mediator would favor the best interests of the child and depart from neutrality on this issue, where necessary.

In sum, these simple examples quickly demonstrate the problem of imposing inappropriate ethics on the practice of mediation. Placing unnecessary and misleading restrictions on mediators only impairs their ability to engage in effective practice. The problem is that mediation cannot be easily normalized as a dispute-resolution process, so we need integral ethics that represent the finely textured variations associated with each manifestation of practice. The integral approach must therefore develop conduct codes that permit a variety of approaches. Integral codes could

define mediators broadly as those third parties who assist others to negotiate their conflicts and then work out directives for particular applications. Regarding the *neutrality* and *impartiality* ethics, in particular, the integral approach would pursue ethics that support mediation fairness, so that all sides are fully informed and have a reasonable chance to communicate their respective point of view, rather than imposing judicial ethics based on courtroom norms. Fairness could be maintained, for example, by requiring mediators to encourage the parties to seek independent legal advice regarding any mediated settlement. In conclusion, the integral approach requires us to re-think our notions of what constitutes good mediation ethics.

Conclusion

If mediation is to succeed as a valuable multi-disciplinary practice, it is imperative that the mediation community acknowledge and support the *integral approach* implied in Standard IX of the ABA, ACR, and AAA respective ethics codes.⁸ Currently there is a substantial gap between theory and practice and an unduly constrained conception of what mediation can be. A significant part of the problem stems from a reluctance on the part of the mediation community to challenge claims of brand distinction emerging in the mediation field. While branding may serve to increase market-share for its respective brand proponents, unchallenged, it risks unduly restricting and thereby impoverishing mediation as a coherent and integrated professional activity. The challenge for the mediation community is both modest and ambitious at the same time. It is modest in that it requires the mediation community to acknowledge and validate what is already happening in the practice of mediation. It is ambitious in that it invites the mediation community to explore and clearly articulate integral possibilities which call into question claims of brand exclusivity and superiority. In a nutshell, *integral mediation* represents the brand-free open-source alternative. As such it invites both scholars and practitioners to work in concert to explore, expand, and inter-relate various aspects of mediation theory and practice in order to unlock mediation's great potential. ♣



References

- Abbott, A.** (2001). *Chaos of Disciplines*. Chicago: University Of Chicago Press.
- Abramson, H.** (1997). *Selecting Mediators And Representing Clients In Cross-Cultural Disputes*. *Cardozo Journal of Conflict Resolution*, 7, 253-275.
- Bourdieu, P.** (1977). *Outline of a Theory of Practice*. Cambridge and New York: Cambridge University Press.
- _____. (1986). *The Force of Law: Toward a Sociology of the Juridical Field*. *Hastings Law Journal*, 38 (5), 814-853.
- _____. (1992). *Invitation to a Reflexive Sociology*. Chicago: University of Chicago Press.
- Bush, R. A. B. and Folger, J.** (1995). *The Promise Of Mediation: Responding To Conflict Through Empowerment And Recognition*. San Francisco: Jossey-Bass Ltd.
- Deutsch, M. and Coleman, P. T. (Eds.)**. (2000). *The Handbook of Conflict Resolution: Theory and Practice*. San Francisco: Jossey-Bass Publishers.
- Farned, D.** (2010). *The Unauthorized Practice Of Counseling: Renewing A Much Needed Discussion For Mediators*, *Rutgers Conflict Resolution*. 8(1):1-13.
- Fernando, S. (Ed.)** (2010). *"Glocal" Working: Living and Working Across the World with Cultural Intelligence*. Milan: Franco Angeli.
- Fisher, R. and Ury, W.** (1981). *Getting to Yes: Negotiating Agreement Without Giving In*. New York: Houghton Mifflin Company.
- Guthrie, C., Rachlinski, J.J., and Wistrich, A.J.**, (2007). *Blinking on the Bench: How Judges Decide Cases*. *Cornell Law Review*, 93, 1-44.
- Honeyman, C. et al.** (2004). *Skill is Not Enough: Seeking Connectedness and Authority in Mediation*. *Negotiation Journal* 20, 489-511.
- Jarrett, B.** (2006). "Mediators as "Neutrals" in Dispute Resolution: A Case of Contested Identity 1-6. May 25, 2006 Ph.D. Dissertation, University of Hawai'i at Manoa.
- Jarrett, B.** (2009) "The Future of Mediation" *Journal of Dispute Resolution*. 2009, 49-75.
- Levin, M. S.** (2000-2001). *Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion*. *Ohio State Journal of Dispute Resolution*. 16, 267.
- Labell, M.K & Scholz, J.T.** (2001). *Cooperation, Reciprocity, and the Collective Action Heuristic*. *American Journal of Political Science*. 45:1, 160-178.
- Mayer, B.** (2004). *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*. San Francisco: Jossey-Bass.
- Moore, C.** (1996). *The Mediation Process: Practical Strategies for Resolving Conflict*, 2nd ed., San Francisco: Jossey-Bass Publishers.
- Nisbett, R. E. & DeCamp, W.T.** (1977). 'Telling More Than We Can Know: Verbal Reports on Mental Processes', *Psychological Review*, 84, 231-259.
- Harper-Collins Publishers. Riskin, L.** (1994). *Mediator Orientations, Strategies and Techniques, Alternatives to High Cost Litigation*. 12:111.
- _____. (1996). *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, *HARV. NEGOT. L. REV.* 1:7.
- _____. (2003). *Decision-making In Mediation: The New Old Grid And The New New Grid System*, *Notre Dame Law Review*. 79:1.
- Rothman, J.** (1997). *Resolving Identity-Based Conflict: In Nations, Organizations, and Communities*. San Francisco, CA: Jossey-Bass Publishers.
- Ruhl, J. B.** (2009). *Thinking of Mediation as a Complex Adaptive System* *Brigham Young University Law Review*, March 5, 2009. Available at SSRN: <http://ssrn.com/abstract=1354171>. Retrieved August 8, 2011.
- Smith M.J.** (1998). *Social Science in Question*. London, Thousand Oaks and New Delhi: Sage Publications.
- Stark, J. H.** (1997). *The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Questions from an Evaluative Lawyer-Mediator*, *S. TEX. L. REV.* 38, 769.
- Volkan, V. D.** (1997.) *Bloodlines: From Ethnic Pride to Ethnic Terrorism*. New York: Farrar, Straus and Giroux.
- Volpe, M. & Chandler, D.** (2001). *Resolving and Managing Conflicts in Academic Communities: The Emerging Role of the 'Pracademic'*. *Negotiation Journal*, 17(3), 245-255.
- Weber, M.** (1947) "Legitimate Authority and Bureaucracy." In D. S. Pugh (Ed.) *Organization Theory*, London: Cox & Wyman Ltd.
- _____. (1978). *Economy and Society: An Outline of Interpretive Sociology California: University of California Press (Translation 1978)*.
- Winslade, J. & Monk, G.** (2000). *Narrative Mediation: A New Approach to Conflict Resolution*. San Francisco: Jossey-Bass Publishers.

- 1 In numerous case interviews (155), I found mediators would initially report their espoused approach only to reveal later in private that they had serious doubts about being able to maintain their given approach throughout the entirety of any given mediation. In fact, mediators would often reveal that they felt the need to maintain a public commitment to one approach to continue to receive referrals from various groups, organizations, and institutions.
- 2 Jurgen Habermas defines the public sphere as follows.
"...a discursive space in which individuals and groups congregate to discuss matters of mutual interest and, where possible, to reach a common judgment. ...a theater in modern societies in which political participation is enacted through the medium of talk" and "a realm of social life in which public opinion can be formed."

- 3 Standard IX Code of Ethics for Mediators. Adopted by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution. <http://www.mediate.com/pdf/ModelStandardsOfConductForMediatorsfinal05.pdf> Retrieved August 8, 2011.
- 4 Ibid.
- 5 Ibid.
- 6 Ibid.
- 7 Uniform Mediation Act, promulgated by the National Conference of Commissioners on Uniform State Laws. Website: <http://www.mediate.com/articles/umafinalstyled.cfm> Retrieved August 8, 2011.
- 8 Ibid.

ADR Institute of Canada Annual National Conference -

ADRIC 2012: Guiding Beacon to Best Practices in ADR, October 25-26, 2012 Halifax

Join our list of generous SPONSORS:

Diamond Level

- FMC Law - Fraser Milner Casgrain LLP

Gold Level

- Deloitte & Touche LLP
- Insurance Bureau of Canada
- PricewaterhouseCoopers LLP

Silver Level

- Borden Ladner Gervais LLP
- Cox & Palmer
- MNP LLP
- Marsh Canada Limited
- Osler, Hoskin & Harcourt LLP
- Saint Mary's University
- University of New Brunswick / Canadian Institute for Conflict Resolution

Bronze Level

- Burnet, Duckworth & Palmer LLP
- Centre for Conflict Resolution Studies, Centre for Life-Long Learning, University of PEI
- William G. Horton Professional Corporation

To inquire about the benefits of Sponsorships, please call Janet: 416-487-4733 or 1-877-475-4353, ext 105



ADR Institute of Canada, Inc.
Institut d'Arbitrage et de
Médiation du Canada Inc.

