Role Call: Towards a Taxonomy of the Third Party

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Abstract
This paper argues that the current terminological and conceptual confusion in the field of mediation and the associated divisiveness amongst scholars and practitioners may be ameliorated through sociological analysis and research. Legal and psychological frameworks for mediation and ideological lenses on dispute resolution have resulted in individualist descriptions and interpretations of mediation that often ignore its social context and embeddedness. A sociological approach to understanding mediation leads to new perspectives including the concept of “species” of mediators uniquely adapted to distinct institutional, organizational, and social settings. We might then speak of different “kinds” of mediators, such as community, court, family, and commercial in the same way as we talk about kinds of lawyers or doctors, with more precision and less pejorativeness.

Introduction
In recent years mediation research and scholarship has been dominated by lawyers and psychologists who have brought a liberal individualist approach to describing and critiquing mediation. This has resulted in a focus on the mediator alone to the exclusion of even the disputants in the process. When the mediator is considered together with the parties they are viewed as an assemblage of individuals rather than as a purposely formed group. One result of this individualist perspective is much attention to the philosophy, approach, skills, techniques and goals of the mediator, culminating in the debate over mediator “styles”. The literature on this issue is now substantial and includes (Refs forthcoming).

From somewhat innocuous beginnings as attempts to understand and categorize what mediators actually do, the concern over “styles” has snowballed to the point where it threatens to split mediators into feuding camps. This paper will consider the question of “styles” with the intent to reconceptualize the issue in such a way that dispute resolution can continue to make progress towards the goals it originally set. Thus, a feature of current controversies over mediation is a perceived need for definition which has become enmeshed in ideological divisions over mediation principles. Definitional arguments often proceed without reference to actual practice in particular contexts. When practice is actually studied commonly used descriptive terms for mediation such as “facilitative” and “evaluative” seem ambiguous at best and misleading at worst (Picard, 2002; Charkoudian, De Ritis, Buck, and Wilson,
This points to the need to reconsider our concepts about mediation and the words we use to express them.

Sociological perspectives on dispute resolution were present at the birth of the modern mediation movement but have not been influential in recent years. Inattention to the social context of disputing practices and the relationship between disputes and social conflict has led to conceptual confusion. This may be seen as vindication of the critiques of dispute resolution advanced by Cain and Kulcsar (1981) who noted its theoretical weakness, and by Harrington and Merry (1988) who revealed its ideological blindness. To the extent that mediation has adopted some of the assumptions of the law (universality and equality) and promoted an ideology of peace and harmony it has been found lacking in responsiveness to concrete problems for which “resolution” is perhaps inappropriate, or indeed, unjust. Further, as mediation has spread throughout society it has become absorbed in ideologies that have obscured both its strengths and weaknesses. Studies that might correct misperceptions and misconstruals of mediation as a social practice have been lacking.

Dispute resolution as an object of theory and research is largely a product of law and society scholars, so this situation must be disappointing to them. How has the project of imagining alternative ways of addressing social conflict ended up in such a confused and conflicted state? How may it be retrieved?

A sociological approach to mediation, in the words of Deutsch (1994), “is one that seeks to understand its regularities in terms of the interacting, reciprocally influencing contributions of both situational and dispositional determinants” (1994: 16). Let us then turn to the social contexts in which mediation is now found and thus gain a better perspective on the place of mediation in society and its relationships to social conflict.

**Disputing ecologies**

Scholars have noted in passing that social contexts may have bearing on the practice of mediation but these suggestions have rarely been carefully conceptualized and tested. We should rather look closely at the circumstances in which mediators enter on the scene and think of them as occupying a role in a particular disputing or conflict “ecology” that occupies a certain niche in society. That niche is the environment in which their abilities, predispositions and preoccupations must either flourish or flounder.

The number of social factors that may comprise a disputing ecology is large. Some which have been identified are: institutional training for mediators which may include ideological indoctrination resulting in what one observer describes as a “microculture” (Goldstein; Silbey and Merry); economic incentives and disincentives for the mediator considered as market forces (Riskin; Lande; Goldfien); material resources available to the mediator (office, etc) (Kolb); characteristics of the disputing parties including status, power and degree of intimacy relative to the mediator ( ); organizational structure within which mediation services are provided ( ); degree of interdependence of the parties and the mediator ( ); pattern of entry into the mediation (McEwen); time pressures (Kressel; Lande); institutional goals and objectives (Kressel; Wissler); evaluation processes and pressures ( ); crisis or chronic context
From a sociological perspective the interaction of distinct conflict and disputing ecologies with individuals filling the role of “mediator” results in a process of adaptation such that the role becomes differentiated in accordance with the contextual pressures. This may be described as an evolutionary process which arguably has resulted in different “species”, or kinds of mediator well adapted to the social contexts in which they work. In the next section we will look at this evolution.

The evolution of mediation

In the last two decades mediation has gone from being “alternative” to mainstream. This movement has usually been described as the institutionalization of mediation and has included court-annexed programs, corporate programs, and community service agencies. It is no wonder that mediation as a practice of individuals has been profoundly affected by insertion into powerful, established institutions.

This paper suggests that the ADR “movement” should be viewed in evolutionary terms as a sociological phenomenon that has spread through the use of theory and ideology to “colonize” various niches in society where it has taken hold and adapted itself to new conditions. One of the consequences is that the original “genetics” of the movement have become diluted and have mutated to allow practitioners to better adapt to new environments. Weaknesses in the original conceptions of the movement have thus been exposed, and in some cases replaced by other ideas.

For this reason, typologies of mediation and mediators are no longer sufficient to explain the phenomenon of modern dispute resolution. Instead, it is necessary to adopt a taxonomic approach to encompass evolving practice. Such an approach allows us to better see mediation in perspective as a branch on the tree of intervention in human affairs.

It was recognized early on that mediators do not all act in the same way, even faced with similar situations. This seemed an uncomfortable truth for those who envisaged universal dispute resolution according to consistent principles and methods. The search for explanations of the observed phenomena took a number of forms. Some identified personal qualities of the mediator that may impact the mediation process and some observers focused on learned attitudes, techniques and skills acquired by mediators. Very few researchers attempted to relate mediators’ variable behavior to factors in the environment in which they worked such as the nature of the parties and their disputes and the structure and purpose of the organizational setting.

Accordingly a large number of typologies of mediators and the mediation process have been generated and it is a measure of the incoherence of the field that it is difficult to compare many of them with each other. Terminology is inconsistent and theory is practically non-existent. Instead these typologies reflect the often self-serving descriptions of themselves by mediators or agreement by clients with descriptors provided for them. The result is a proliferation of ideological propositions which often conflict.

One thread, however, runs through the styles debate. It is that the behavior of mediators is primarily due to personal characteristics. Riskin (1996) puts this viewpoint in categorical terms:
It is true that most mediators – whether they know it or not – generally conduct mediations with a presumptive or predominant orientation. [footnote omitted] Usually, this orientation is grounded in the mediator’s personality, education, training, and experience. (1996: 35)

Modern mediation has its roots in the labour relations field where it played a unique role in the response of society to industrial conflict. Mediators inhabited a contested space at the nexus of law and economics which had many of the characteristics of power politics.

As “mutations” of labour mediation began to appear in other sectors such as criminal justice, family law and community disputes the ADR movement generated explanations, justifications and prognostications of the benefits to society. Thus began the ideology of dispute resolution as a de-legalized, informal, comfortable but effective alternative to litigation.

However, in true evolutionary fashion, practitioners of mediation have adapted to the environments they found themselves in, whether or not their methods strictly followed the precepts of “ideal mediation”. The proliferation of mediation throughout society is therefore best described as a complex interaction between individual mediators with varying backgrounds, education and training (their “genetic inheritance”) and the organizational or institutional settings in which they practice (the colonized “ecosystems”) resulting in adaptation for success (survival of the institutional role and personal achievement).

Some of the most significant environments in which mediation has taken hold are the courts, family agencies, community services, and international organizations. Each situation has had a significant impact on shaping the practice of mediators and tensions have arisen between the ideology of dispute resolution and the requirements of effective provision of mediation services. Some of these tensions are examined here.

There are some mediation practices and ideologies that to date have not found a secure institutional home – the most prominent being transformative mediation. This reflects the bald fact that dispute resolution has not achieved the level of mass awareness and acceptance that would support sizeable numbers of independent practitioners. Nevertheless, non-institutionalized practices have the potential to continue to contribute to the growth and maturation of the field as will be discussed below as we look at the future of dispute resolution.

Many typologies of mediators and mediation processes have been constructed during this expansion phase of dispute resolution. Most have been based on self-reports by participants and thus contribute to ideological production and promotion. A few have relied on close observation and analysis of mediation practices and they allow us to see the degree to which adaptation has occurred.

Sociological frameworks that help us to understand social conflict can also be used to make sense of the interaction of mediators with the social contexts in which they practice. Deutsch (1994) outlines a way of looking at individuals in particular social situations that can be applied to mediators. In trying to explain behavior of individuals in social contexts he suggests there is a complex interdependence between personal characteristics and influences in the social environment. How individuals will act is
affected by social factors including: the congruence, evocation or discouragement of personal
tendencies in the social situation; perceptions of the relative importance of the context or the individual
in the particular environment; and the extent to which the social context stimulates or discourages self
focused and internally motivated behavior. This theoretical framework allows us to generate hypotheses
that may be empirically tested such as: in contexts where there is less emphasis on the individual than
on social concerns such as justice (court annexed mediation?) there will be less variability in behavior
amongst mediators; in situations where the focus is primarily on the individual (family conflict?) the
converse will be true. There may also be competing or confounding hypotheses such as: mediators with
certain behavioral traits are drawn to congruent contexts in which those behaviors are valued and this
leads to a high degree of conformity in their mediation practices.

A “species problem”
Much of the disagreement and divisiveness in the dispute resolution field today revolves around
debates over the proper definition of mediation and how it differs from other practices such as legal
services, therapy and management.

This paper suggests that such debate is mistaken because it has overlooked the possibility that
mediation is no longer (if it ever was) a single well-defined, theoretically consistent practice but, through
the evolutionary process described above, has produced several distinct “species” of mediator. These
distinct practices may share some of the foundational principles and ideas of the dispute resolution
movement but also differ from each other in important respects.

A “species” approach to understanding mediation today means that we should no longer be talking
about “types” or “styles” of mediator, but rather asking the question “what kind of mediator?” in the
same way as we would ask “what kind of lawyer (or doctor)?”.

Some of the kinds of dispute resolution practitioner that can now be identified are: court mediator,
family mediator, community mediator, commercial mediator, and international mediator (with sub-
species commercial and political). This paper examines what we know about these kinds of mediator,
how they differ from one another and how they are similar.

Taxonomy of the third party
The following chart presents some of the hypotheses I advance as to the adaptation of mediators to
particular social environments, resulting in a substantial differentiation of the role of mediator.
An Evolutionary Tree of Modern Mediators
For example, here is one classification of a kind of mediator from a taxonomic perspective: **Phylum** – Third Party; **Class** – Intervener; **Order** – Authorized Intervener; **Family** – Mediator; **Genus** – Authorized; **Species** – Court Mediator; **Sub-species** – Civil Court Mediator.

Source of authority has been chosen as a dominant characteristic because it reflects reality in two ways. First, it has been clearly shown that mediators exercise power in multiple ways in mediation and one of the chief sources of power is institutional affiliation or representation. Second, the rapid expansion of mediation programs and mediators in organizational and institutional contexts, compared to the stagnation of private mediation service provision, suggests that the organizational factor is a key one in the evolution of mediation. Such a taxonomy allows us to make progress in identifying the common ground in dispute resolution as well as the distinct differences without needless debate about the normativeness of practice.

Here are some characteristics that have been identified of some kinds of mediators shown above:

**Community mediator** – mediator role is important to their identity; feel closeness to other mediators; use mediation techniques outside of their formal role; found mediation techniques familiar (Harrington and Merry, 1988; Goldstein, 1998).

**Court mediator** – settlement orientation; sensitive to party satisfaction; sensitive to time and cost considerations; narrow problem definition; use risk analysis and prediction; react to high goals; evaluate plaintiffs more critically (Riskin and Welsh, 2008; Wall and Chan-Serafin, 2009; Hollett, Herrman, Eaker, and Gale, 2002).

**Commercial mediator** – provides information; uses facilitation and evaluation; acts as “agent of reality”; uses experience, reputation and respect (Salomon and Sharp, 2006; Roberts, 2007).

**International diplomat mediator** – interested in the dispute; has power and leverage; may be biased; interdependence with parties (Touval, 1985; Smith, 1985; Bercovitch, 1992; Saunders, 1995).

**The future of dispute resolution**
As suggested by Cain and Kulcsar, the promise of dispute resolution can be retrieved through a combination of research and theorizing. Such research should take the form of observation of actual mediations in a variety of contexts, close attention to records of such interactions, such as discourse analysis, and realistic experiments. Theory needs further development to reconceptualize disputes in relation to conflict, to refine intervention concepts such as mediator and moderator, and to theorize the adaptiveness of mediator behaviors to the contexts in which they are found.

We will then be in a better position to see how dispute resolution may make a contribution to creating a better life for a wider number of people than have been touched by it to date.

**Conclusion**
Dispute resolution has a future as both an academic project and as a progressive practice, but not the future that was originally anticipated. The evolution of mediation has brought to light the complexity of
disputing and its many connections with other practices and structures in society. That complexity calls into question universal prescriptions for responses to disputes. We need to take another look at how disputes manifest as expressions of conflict and the options for humane responses to them. One goal of this renewed project will be a more holistic vision of disputes and conflict in society based upon integration of structure, system, process and agency.

The field of mediation is a contested one, but that conflict presages new insights and adaptations which have the potential to contribute to the betterment of society. Perhaps such development will be the turning point at which society more fully embraces alternative ways of responding to conflict. Scholars and practitioners can look forward to such a future with some hope.