

National Mediator Accreditation System: In Search of an Inclusive Definition of Mediation

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Abstract

Mediation has developed into an important aspect of our legal system and is used widely in business and community disputes. Recently a draft proposal for a National Mediator Accreditation System has been released. This proposal relies upon the National Alternative Dispute Resolution Advisory Council (NADRAC) description of mediation. There has been ongoing debate regarding the definition of mediation and this debate has become more complex due to the articulation of different models of mediation, such as the transformative model. Arguably, NADRAC's description does not adequately address diverse models of mediation, such as the transformative model and thus some models are in danger of being marginalized under the proposed scheme. This paper explores definition concerns in mediation and points to the need to provide an inclusive definition of mediation in any attempt to introduce a national system of mediator accreditation.

Introduction

After approximately 15 years of discussion there is now a concrete proposal for a National Scheme of Mediator Accreditation.² This proposal was released in mid-November 2005 and consultations with the community are presently being undertaken. A final proposal will be submitted to the Attorney-General's Department, which has funded the facilitation process. There will be further consultation at the 8th National Mediation Conference, in Hobart in May 2006, and participants at the conference will be asked to approve the proposal in its final form.³ The proposal draws upon the important work of the National Alternative Dispute Resolution Council (NADRAC), in providing a framework⁴ for accreditation and standards and options for the introduction of a scheme.⁵ A voluntary, base level degree of accreditation for mediators may well be introduced if the proposal does not falter due to the mediation industry being unable to reach consensus. A recent attempt to establish a peak body for mediators was unsuccessful largely because of internal competition and a lack of unity in the mediation industry.⁶

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2 The Accreditation Sub-Committee of the National Mediation Conference Pty Ltd, *National Mediator Accreditation System. Draft Proposal for Public Consultation*, 2005 <http://www.mediationconference.com.au/html/Accreditation.html> accessed at 21 February 2006.

3 *Ibid.* 4.

4 National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR: Report* (Canberra 2001).

5 National Alternative Dispute Resolution Advisory Council, *Who Says You're a Mediator: Towards a National System for Accrediting Mediators* (Canberra 2004).

6 Dale Bagshaw and David Baker, 'And the Cobbler's Children Have No Shoes...Promoting National Collaboration Between Dispute Resolvers in a Climate of Competition' (2003) *Australasian Dispute Resolution Journal* 57.

In essence the proposal at present is one of minimum change. There will no requirement for the establishment of a peak accrediting body, rather mediators will be accredited by a number of organisations to be known as Recognised Mediator Accreditation Bodies (RMABs). These bodies will certify mediators according to National Mediation Standards. RMAB's will need to provide information to an overseeing body to ascertain compliance in relation to teaching and learning strategies of courses in mediation, the credentials of those who teach, duration of the course and content, references, topics and time spent on each area, the Code of Mediator Conduct that is the underlying philosophy of the course, assessment and assessment instruments, history of education and training and any other matter relating to the credentials of the institution. Course content is described in detail in the proposal and included are examples of likely assessment practices.⁷ Each RMAB would also provide continuing professional development. There are a number of contentious matters related to the proposal including for instance the advisability of the scheme, the appropriate body to administer the system, which organisations would be accredited as RMAB's, the development of a uniform code of ethics and the nature of any proposed complaints handling mechanism.

The issue I wish to explore in this article is the model of mediation that would be utilised to accredit mediators.⁸ The proposal refers to NADRAC's description⁹ of mediation that was issued by the Council in an attempt to create some consistency in terms. As the proposed accreditation framework will be based on this description it is necessary to consider carefully the parameters of NADRAC's efforts. The use of this description of mediation may mean that widely practised models, such as the facilitative model, will be the basis for testing in the new scheme. If that is the case then models of mediation that presently have less of a following in Australia,¹⁰ such as the transformative model,¹¹ may not be seen as an appropriate method of practice. Potentially, a transformative mediator may not pass the tests set in the national scheme and thus the practice of this kind of mediation may become less attractive. In the USA there have been concerns raised about the danger of orthodoxy in mediation regulation. Premises for testing potential mediators may be based upon one approach to mediation. One of the founders of transformative mediation, Robert A Baruch Bush, argues that the transformative model approaches practice in fundamentally different ways to models such as the facilitative model. Therefore those trained in transformative approaches may be disadvantaged when tested in relation to

7 Accreditation Sub-Committee, above n 2, 9-12.

8 Ibid, 7.

9 A definition was first given in the paper, National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution Definitions* (Canberra 1997) and was then revisited in the later paper National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms*, (Canberra 2003). Note that NADRAC preferred in the later paper to use the term 'description' rather than 'definition'. 'NADRAC sees 'descriptions' as an indication of how particular terms are used, whereas 'definitions' refers to essential nature and features of a specific process.'" at 2

10 Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia*. (2nd ed, Sydney: LexisNexis Butterworths 2002) 152.

11 Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (revised ed, San Francisco: Jossey-Bass, 2005).

standards and accreditation.¹² Additionally, a uniform code of ethics may not cover the differing approaches of the varying models of mediation.¹³

Such a narrow view of mediation practice, based only on the facilitative model, would mean that the industry would be less able to respond to the differing kinds and contexts of conflict in our society.¹⁴ Advocates of the proposal might argue that the scheme will be voluntary¹⁵ and thus mediators who practice the transformative approach will not be negatively affected. However, the new scheme, if adopted, may well become the benchmark for practice and less well-known models of mediation may become marginalised and fail to flourish in Australia. The proposal states:

*The main objectives of the National Mediator Accreditation System are the creation of a practical and credible system for the uniform recognition, certification or accreditation of mediators in Australia in order to improve mediator knowledge, skills and ethical standards, to promote quality of mediation practice, to serve and protect the needs of consumers of mediation services and provide accountability where they are not met, to enable mediators to gain external recognition of their skills, and to broaden the credibility and public acceptance of mediation.*¹⁶

These are laudable objectives, but it should be noted that an endeavour of this kind will have profound influence upon the practice of mediation in this country. For example, if the development of knowledge, skills and ethical standards is focussed exclusively on the facilitative model,¹⁷ then this model will be privileged. It will be confirmed as the norm in mediation practice and any other models, with differing theory and techniques, will be seen as deviating from the norm.¹⁸ Such an undertaking needs to be inclusive of all major models of mediation practice, particularly where the aim is to also create '...some commonality in educational and training standards and competency assessment.'

In this paper I will outline NADRAC's description of mediation and canvass some traditional definition concerns. Next, I will discuss the unresolved issue of neutrality, problem-solving models of mediation and the transformative model. I will then advocate for a change in the definition that will form the basis of the proposed mediation accreditation scheme.¹⁹

12 Robert A B Bush, 'One Size Does Not Fit All. A Pluralistic Approach to Mediator Performance Testing and Quality Assurance' (2004) 19 *Ohio State Journal on Dispute Resolution* 67.

13 It may be that different models of mediation will require different codes of ethics: see Katherine A Mills, 'Can a Single Ethical Code Respond to All Models of Mediation?' (2005) *Bond Dispute Resolution News*, 5 <http://www.bond.edu.au/law/centres/drc/newsletter/Vol21Dec05.pdf> a 22 February 2006.

14 Ibid.

15 Note that the proposal states that 'As this stage of Accreditation is voluntary and does not involve mandatory licensing, the proposal does not deal with many of the potentially problematic definitional issues in ADR field', The Accreditation Sub-Committee of the National Mediation Conference Pty Ltd, above n 2, 7.

16 Ibid. 5.

17 For an acknowledgement of the primacy of the facilitative model, shared to some degree with evaluative mediation, see Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd ed, Sydney: LexisNexis Butterworths, 2005). 43

18 See Sharyn L Roach Anleu, *Deviance, Conformity and Control*, (4th ed, Longman 2005).

19 The Accreditation Sub-Committee of the National Mediation Conference Pty Ltd, above n 2, 5.

NADRAC'S Descriptions of Mediation

NADRAC has stated that the mediation industry needs to come to a recognisable and acceptable understanding of the term 'mediation' to ensure that mediators adhere to some degree of uniformity for the purposes of mediation liability, funding from the government and product recognition from the public. Referrals by various agencies will be enhanced if there is clarity regarding the meaning of different ADR processes, including mediation. Matching of disputes to processes will also be facilitated by an understanding of what each process is and clarity regarding what is meant by the term 'mediation'. When evaluating mediation there needs to be an understanding of the meaning of the process.²⁰ With the introduction of a concrete proposal for accreditation the need for an appropriate definition (or description) of mediation becomes more pressing.

NADRAC organises different kinds of ADR into a number of categories. Mediation is said to be a facilitative process, similar to negotiation and facilitation, and distinguished from processes that empower a third party to decide a dispute such as arbitration. In their glossary of dispute resolution terms, dealing with a range of alternative dispute resolution processes, NADRAC provides two descriptions of mediation and does so with the caveat that the descriptions be seen as a resource and are not prescriptive. NADRAC states that a description is an indicator of how a term is used:

Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

*An alternative is 'a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator) negotiate in an endeavour to resolve their dispute.'*²¹

NADRAC is cautious about a definition of mediation due to the particular nature of the mediation process. There is still confusion between various alternative dispute resolution terms,²² such as the difference between conciliation and mediation.²³ Tillett has pointed to the plethora of mediation definitions that are used in court-connected and private mediation.²⁴ The range of mediation practice is

20 National Alternative Dispute Resolution Advisory Council. *Terminology: A Discussion Paper*. (Canberra 2002).

21 See National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms*. (Canberra 2003) 9.

22 Research regarding the Primary Dispute Resolution in the Federal Magistrates Court and the views of Federal Magistrates indicate that there is confusion between mediation, counselling and conciliation. Additionally the Magistrates do not give credence to the NADRAC definitions: see Neil Paulsen, David Rooney and Peta Ashworth, *An Evaluation of the Primary Dispute Resolution Services of the Federal Magistrates Court*, (Communication Partners, Melbourne, 2004), 14.

23 Astor and Chinkin point out that conciliation and mediation have been seen as synonymous by some agencies and in other contexts, often statutory, there has been a distinction drawn between the two, above n 10, 85.

24 Gregory Tillett, 'Terminology in Dispute Resolution: A Review of Issues and Literature' (2004) 15 *Australasian Dispute Resolution Journal* 178.

varied and wide. Approaches by writers of mediation literature have been numerous²⁵ and include a focus upon facilitation, settlement, evaluation,²⁶ and transformative models.²⁷ The richness of the diversity in the mediation field is one of the most interesting and rewarding parts of the mediation industry, but this very diversity presents problems in establishing a universal definition. However, a definition that meant that mediation as a process was constrained to a set format would rob this dispute resolution option of some of its appeal. For instance an emphasis upon facilitative mediation, even in a description that is described as non-prescriptive, may mean that this kind of practice is seen as the acceptable model for mediators. This may have the effect of reducing interest in other models and the development of the mediation field may be circumscribed.

In the next section of this article I will canvass some of the approaches to defining mediation and then relate this analysis to the NADRAC description.

Traditional Difficulties of Defining Mediation

A frequently quoted definition of mediation comes from Folberg and Taylor:

*...the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.*²⁸

Boulle, a prominent writer regarding mediation, identifies difficulties with the definition provided by Folberg and Taylor. He refers to their approach as conceptualist in that there is an element of what mediation should be rather than acknowledgment of the variety of different ways mediation is practised.²⁹ For instance it may be the case that the needs of the parties are not addressed in the mediation, but that a result is reached which all the parties agree is the best possible solution to the problem. Time consuming determination of issues may be sacrificed for quick and easy solutions.

An alternative is to take a descriptive approach and narrow the definition to a short general encapsulation of mediation, for example '... a process of dispute resolution in which the disputants meet with the mediator to talk over and then attempt to settle their differences'.³⁰ However, such a descriptive approach is of limited use³¹ when trying to formulate a working model of mediation.

25 For example new models of mediation including mediation as storytelling, Sara Cobb, 'Empowerment and Mediation: A Narrative Perspective' (1993) 9 *Negotiation Journal* 245 and narrative mediation John Winslade and Gerald Monk, *Narrative Mediation* (San Francisco: Jossey-Bass 2000). There are also writers contributing to practice in innovative ways such as mindful mediation, Leonard Riskin, 'Mindfulness in the Law and ADR: The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Schools, Lawyers and their Clients.' (2002) 7 *Harvard Negotiation Law Review* 1.

26 See Boulle. n 17, 44-47.

27 Bush and Folger, above n 11.

28 J Folberg & Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* (Jossey-Bass, San Francisco, 1984) 7.

29 Boulle, above n 17, 6.

30 M Roberts, 'Systems or Selves? Some Ethical Issues in Family Mediation' (1992) 10 *Mediation Quarterly* 11 as cited in Boulle above n 17, 7.

31 *Ibid.*

Legislation introducing mediation into various courts and tribunals is often vague or avoids the difficulties of what is an appropriate definition by leaving the term undefined, particularly in regard to whether the mediator can provide an evaluation of the parties likely success in court.³² However, the appeal of the descriptive approach is in the number of models of mediation that can be encapsulated by the one statement.

Arguably, the NADRAC description attempts to have the best of both worlds. The first part of the description, with its detail about the process and the role of the mediator, is a conceptualist approach. The second part of the description, offered as an alternative, is a generalist statement that is descriptive in nature.

There were other options available to NADRAC. One way of approaching the wide variety of practice that occurs in mediation is a mediation abacus.³³ This is an attempt to catalogue the different approaches utilised and the range of different combinations of models that occur. For instance some mediators would take a therapeutic approach, with co-facilitators of different genders, with no pre-mediation meetings, in a compulsory setting, without private caucus and with confidentiality assured. Other mediations may be based on a non-therapeutic model, with one mediator who is a lawyer, in a non-compulsory setting, where there has been significant pre-mediation meetings with document exchange, with private caucus utilised and where the mediation's confidentiality cannot be assured due to a lack of legislative protection. A mediation abacus visually captures the range of possibilities.

The variables possible in the mediation abacus are numerous and are affected by a number of different factors:

- cost
- time available to parties
- time available to mediator
- degree of hostility
- wishes of parties
- educational level of parties
- inequality of bargaining power
- facilities accessible to mediator
- training of mediators
- lack of adherence to a theoretical framework.³⁴

Boulle provides his own definition of mediation, perhaps finding the mediation abacus comprehensive but cumbersome:

*Mediation is a decision-making process in which the parties are assisted by a third party, the mediator, who attempts to assist the parties in their process of decision-making and reach an outcome to which each of them can assent without the mediator having a binding decision-making capability.*³⁵

32 Tania Sourdin, *Alternative Dispute Resolution*, (2nd ed, Sydney: Thomson Lawbook Co, 2005) 19.

33 John Wade 'Mediation — The Terminological Debate' (1994) 5 *Australian Dispute Resolution Journal* 204.

34 *Ibid.* 206.

35 Boulle, above n 17, 13.

Boulle argues that this definition avoids many of the pitfalls of the Folberg and Taylor definition by emphasising the decision-making process of mediation. Not all mediations end with settlement (there may be merely a narrowing of the issues in dispute or there may be no progress at all, but parties have vented their feelings on the matter) and even where settlement is reached there may not be a sense shared by the parties that the matter has satisfactorily come to an end. According to Boulle describing the process as one of decision-making is less threatening to the parties, less combative and removes the pressure to 'succeed' with a settlement. It is not negotiation because of the presence and role of the mediator, whose function is different to a negotiator, but it may be that on the occasions where settlement is not reached the mediator has helped the parties to a decision which could be described as 'assisted decision-making'.³⁶ The parties will generally have made some decision, which might include entering an agreement, but may include gaining further advice, investigating other options or taking the matter to court. The definition also highlights the role of the mediator as a third party who intervenes in the dispute; a person/s skilled in dispute interaction.³⁷

Clearly, this definition is less capable than the mediation abacus of including the various nuances of mediation, but Boulle overcomes this difficulty by describing the above definition as including 'core features' of mediation, and providing secondary features of mediation, with a discussion of its variable features, to supplement the core.

The secondary features include issues such as narrowing the matters in dispute between the parties, improving communication, identifying needs and interests, using the needs and interests to promote negotiation that canvasses a broad range of settlement options, helping the parties to feel less stress and feel empowered so that informed and rational decision-making can take place, encouraging responsibility for the decision-making, providing a normative framework based on criteria or community values, trying to improve relations between the parties and providing a model for future decision-making which can occur without the need of a third party.³⁸

Variables identified by Boulle are similar to, but also extend, the variables identified by Wade in his mediation abacus. They include the degree to which participation is voluntary, choice of mediator, mediator qualifications, expertise and style, the independence and neutrality of the mediator, degree of party participation, differing degrees of interventions by mediators, for instance in relation to advice or evaluation, mediator responsibility for fairness in any agreement negotiated, degree of consensus in the decision-making, whether the mediation has therapeutic or educative elements, confidentiality, differing process, the degree past matters are canvassed and the degree future matters are addressed, the enforceability and legality of a settlement and finally the role of the public interest in the dispute.³⁹

This extended definition of mediation also includes the various uses to which mediation is put including defining problems, settling disputes, managing and preventing conflicts, negotiating contracts and formulating policy. In addition disputed definitional areas of mediation are canvassed such as the voluntariness of mediation, mediator neutrality, the distinction between process and content in mediation, the different kinds of mediator interventions and problems with the idea of consensus in mediation. Boulle describes these areas as unresolved issues of definition.⁴⁰

36 Ibid. 14.

37 Ibid. 13-14.

38 Ibid. 15.

39 Ibid. 16.

40 Ibid. 22-43.

Lastly, Boulle acknowledges the difficulties of his attempt to provide a comprehensive definition and instead analyses models of mediation:

Because of the difficulties in defining and describing mediation and because of the diversity in mediation practice, it is useful to talk in terms of four models of mediation. These are the settlement, facilitative, transformative and evaluative models. They are referred to as paradigm models in that they are not so much discrete forms of mediation practice but rather ways of conceptualizing the different tendencies in practice. Nor are they distinct alternatives to one another in that in practice a mediation might display features of two or more of the paradigm models. It might commence in the facilitative mode, but later develop into the settlement or evaluative model.

I will discuss these four different models later in this paper, categorising the settlement, facilitative and evaluative models as problem-solving models and placing the transformative model in a separate category.

What then can we draw from the murky waters of the definitions of mediation? Firstly, what constitutes mediation is not clear. Secondly, even a definition that attempts to cover the field, as does Boulle's, has a number of unresolved issues that the mediation industry has not as yet addressed. In the next section of this paper I will briefly discuss one⁴¹ of these unresolved issues of definition — the concern of neutrality.

The Unresolved Issue of Neutrality

There has been long a history of critique of the idea of the neutral mediator.⁴² The capacity of the mediator to influence outcomes through choices made by the mediator in the process has been debated. Briefly,⁴³ the term neutrality can have a number of meanings, relating to disinterest in the outcome of a dispute, independence from the parties and impartiality in the way the dispute resolution process is conducted relating to issues of fairness and evenhandedness.⁴⁴ Astor and Chinkin see neutrality not as a binary distinction, but as an issue dependent upon context:

The extent of mediator influence depends on a number of factors, including a mediator's understanding of her or his role, of the importance of neutrality, of power and its dynamics in mediation, and of her or his own ideologies and behaviour.⁴⁵

41 A discussion of all the unresolved issues of definition identified is beyond the scope of this paper.

42 See the discussion of this history in Astor and Chinkin, above n 10, 149.

43 For a detailed discussion of neutrality see Hilary Astor, 'Rethinking Neutrality. A Theory to Inform Practice Part 1' (2000) 11 *Australasian Dispute Resolution Journal* 73; Hilary Astor, 'Rethinking Neutrality: A Theory to Inform Practice Part 2' (2000) 11 *Australasian Dispute Resolution Journal* 145; Hilary Astor, 'Rethinking Neutrality Again' (2003) 14 *Australasian Dispute Resolution Journal* 125.

44 Boulle, above n 17, 32.

45 Astor and Chinkin, above n 10, 153.

Ideology can be an important part of any discussion of mediation definitions and the issue of neutrality. We should not pretend that there is uniform ideology present in the mediation industry.⁴⁶ Some models of mediation, such as the transformative model, utilise theory from the communication and social science disciplines.⁴⁷ For instance poststructuralist theory has identified the inability for those in power, such as mediators, to be truly objective. Reality is constructed through the stories of the society in which we live. The mediator will perceive truth or reality by reference to his/her cultural background and the norms of the society as experienced by that person. As such the choices that are made by the mediator in the mediation process are affected by the mediator's worldview and these choices impact upon the way that the mediation unfolds. Mediator interventions in relation to issues such as who is allowed to speak and when, the agenda to the discussion, when to move to private meetings and the kinds of issues raised in private, what kinds of solutions are canvassed and which are given priority and when to consider termination, affect the content of the mediation. Therefore, it is erroneous to claim that the mediator affects the process and not the content of the mediation.⁴⁸ Some mediators will have unconscious biases about how people should behave in mediation. For instance they may have particular views regarding women⁴⁹ and ethnic groups⁵⁰ which affect their choices in mediation. A mediator can strive to be evenhanded in their approach to the parties, by giving equal time and attention throughout the process, but their own view of the world will affect how they see the parties and how they conduct the mediation.⁵¹

The NADRAC description does not include the attribute of neutrality for the mediator. Earlier definitions of mediation provided by NADRAC did include the word neutral⁵² and were revised in more recent glossary of terms.⁵³ However, the distinction between the process of mediation and the content of the mediation seems to be implicit in the emphasis on a lack of advice or determination regarding anything but process. This false distinction puts the NADRAC description at odds with the transformative model. The transformative model supports party choices, but acknowledges that mediators do have an impact.⁵⁴ Boulle's definition of mediation also does not include the attribute of neutrality.

Adding to Definition Complexity: Problem-solving Models

Another important issue in terms of mediation definitions is categorising models according to their theoretical underpinnings. Many writers in the mediation field group together models of mediation, which are focused upon solutions to problems. Theorists refer to solution-focused models as problem-solving models of mediation.⁵⁵

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- 46 Dorothy J Della Noce, Rober A Baruch Bush and Joseph P Folger, 'Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy' (2002) 3 *Pepperdine Dispute Resolution Law Journal* 39.
- 47 See Joseph P Folger and Robert A Baruch Bush, 'Ideology, Orientations to Conflict, and Mediation Discourse' in Joseph P Folger and Tricia S Jones (eds), *New Directions in Mediation: Communication Research and Perspectives* (California: Sage Publications, 1994).
- 48 Dale Bagshaw, 'Language, Power and Mediation' (2003) 14 *Australasian Dispute Resolution Journal* 130.
- 49 Trina Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale Law Journal* 1545.
- 50 Isabelle Gunning 'Diversity in Mediation: Controlling Negative Cultural Myths.' (1995) *Journal of Dispute Resolution* 55.
- 51 Sara Cobb and Janet Rifkin, 'Neutrality as A Discursive Practice: The Construction and Transformation of Narratives in Community Mediation' (1991) 11 *Studies in Law, Politics and Society* 69.
- 52 National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution Definitions*. (Canberra 1997).
- 53 Sourdin above n 32.
- 54 Boulle above n 17. 46 states that the transformative model allows for a neutral mediator. I would argue that the mediator in the transformative model acknowledges their effect upon the mediation with the aim of achieving moral growth: see Della Noce et al. above n 46, 57.
- 55 Della Noce, et al. above n 46. 49.
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The problem solving approach to mediation arguably encompasses the settlement, evaluative and facilitative models of mediation. Many advocates of mediation, such as NADRAC,⁵⁶ focus upon solution-based approaches to mediation.

The settlement, evaluative and facilitative models all focus upon ways to find a solution to the parties' problems, but each have a different approach. The settlement model of mediation achieves consensus through an emphasis upon incremental bargaining techniques. Mediator interventions tend to focus parties upon a central point of compromise and the negotiation phase of the mediation often includes a trading approach to achieve settlement. The evaluative model⁵⁷ uses the likely court outcome of the dispute to inform the negotiation and the mediator uses his expertise in the area to bring about an agreement between the parties. The facilitative model draws upon negotiation theory to identify parties' underlying needs and interests. The legal rights of parties are not the main priority as needs and interests, including substantive, procedural and psychological interests, are the main concern. Creative problem solving is used and mediators may try to help participants focus upon a wider range of solutions than was first envisaged.⁵⁸ All three models are however limited in their theoretical basis. Reflection upon neutrality, and the impact upon the mediators' practice of this core idea, does not appear to be a priority⁵⁹ in these models.

An unreflective approach⁶⁰ to neutrality may occur because practitioners are focused upon the process of mediation and have been slow to grapple with theory. Mediators have been criticised for their evident preference for a 'how to' approach to mediation.⁶¹

*They fail to encourage a serious examination of the reality that mediator practices can and do influence the parties' conflict, the questions of what kinds of influence are appropriate and why, the nature of differences in mediators' motives and orientations, and how different underlying ideologies shape mediators' goals, and therefore, their influence on the conflict, in very different ways.*⁶²

In each of these models the priority of solving the problem that brings the parties to the mediation table leads the mediators to be unreflective of the issue of neutrality and to selectively sideline elements of the dispute that do not advance the cause of settlement. The next model that I will discuss, the last of Boulle's paradigms, has a different approach and thus differing mediation interventions and strategies.

56 The literature generated by NADRAC often assumes a problem-solving orientation: see for example NADRAC above n 4

57 Riskin, who originally articulated a grid with the evaluative and facilitative categories, has revised the grid and the concepts and renamed them directive and elicitive: see L Riskin, 'Decisionmaking in Mediation: The New Old Grid and the New New Grid System' (2003-2004) 79 *Notre Dame Law Review* 2.

58 Boulle, above n 17, 44-45.

59 Boulle points to a growing realisation amongst mediators of their influence upon the content of the mediation and that neutrality is an aspiration rather than a reality: see Boulle, n 17, 35.

60 This lack of reflection may also extend to aligned issues such as concerns relating to power in the mediation setting: see Hilary Astor, 'Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner' (2005) 16 *Australasian Dispute Resolution Journal* 30.

61 Della Noce et al, above n 46, 45.

62 *Ibid.* 47.

Transformative Model of Mediation

In contrast to problem-solving models of mediation the transformative model does not primarily focus upon solutions to disputes. The aim of this model for participants is to achieve moral growth. Growth may occur through the process of mediation and the aim of the mediator is to increase both empowerment and recognition amongst the participants. The ultimate aim of the process is to achieve conflict transformation that is the unique contribution that mediation can make to society:

Other dispute resolution processes, like adjudication or arbitration, can probably do as good a job as mediation, or even better, in satisfying needs and ensuring fairness. But by the very nature of their operation, those other processes are far less capable than mediation (if at all) of fostering in disputing parties greater confidence and understanding, and thus producing conflict transformation.⁶³

Empowerment refers to the fact that the process of mediation gives parties the opportunity to grow through increasing feelings of self-worth and their capabilities in relation to the difficulties they face. Recognition refers to the potential for greater empathy with other parties through acknowledging and responding to the stories of the other parties, their difficulties and challenges and to feel a common bond of humanity.⁶⁴ Bush and Folger outline techniques to follow in their process that allow participants to explore the conflict that brings them together without a focus upon finding 'answers' to the dispute. These answers may come but the emphasis is upon the mediator looking for opportunities to shift the parties from a negative spiral of conflict⁶⁵ to one of positive interaction; making their own decision about the process they are participating in and the dispute itself. The role of the mediator is supportive, but not directive and arguably acknowledges the impact of the mediator, but with the normative orientation of achieving moral growth. Additionally, the mediator intervenes in ways that encourage, but does not demand, shifts in perception regarding the other party and the development of a degree of empathy. Bush and Folger define transformative mediation, in an extended manner, as:

Mediation is defined as a process in which a third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for resolution.

The mediator's role is to help the parties make positive interactional shifts (empowerment and recognition shifts) by supporting the exercise of their capacities for strength and responsiveness, through their deliberation, decision-making, communication, perspective taking and other party activities.

The mediator's primary goals are (1) to support empowerment shifts, by supporting — but never supplanting — each party's deliberation and decision making, at every point in the session where choices arise (regarding process or outcome) and (2) to support recognition shifts, by encouraging and supporting — but never forcing — each party's freely chosen efforts to achieve new understandings of the other's perspective.⁶⁶

63 Bush and Folger, above n 11, 37.

64 Ibid. ch 2.

65 Ibid. 45-53.

66 Ibid. 66.

Considering the NADRAC Description and the Boule Definition

Has the NADRAC description the capacity to be inclusive of diverse models of mediation, such as the transformative model? The NADRAC description tries to deal with many of the issues regarding definitions identified by Boule. As indicated the first part of the description is conceptualist and the second part is descriptive. The first part of the description arguably privileges a particular model of mediation, the facilitative model. NADRAC's description makes a distinction between a model that evaluates or advises and a model that focuses upon party consensus and thus favours facilitative mediation.⁶⁷ This first part of the description also seems to be aimed at court-connected mediation, allowing as it does for mandatory mediation under court direction and the context of mediation regarding contractual disputes.

The alternative second part of the description is broader, but provides little input in respect of models. Arguably, this broad descriptor could encompass the practice of transformative mediation more effectively than the first part. However, the focus upon 'settlement of the dispute' is at odds with the stated objective of the transformative model to avoid the trap of concentrating upon problem-solving.

In contrast Boule's definition of mediation does not present the same degree of privilege for problem-solving models. I would argue that the framing of the definition is wide enough to include the transformative model. Significantly, the term decision-making, rather than settlement, is common to Boule's definition and the definition provided by Bush and Folger. Boule's emphasis upon party assent has some resonance with the transformative model's emphasis upon party choice. However, the Bush and Folger definition is more detailed and directive in relation to the mediator supporting party choice both in process and outcome. Clearly, the distinguishing difference between the two definitions relates to the transformative model's stated objective of moral growth.

Overall, although not ideal in terms of the transformative model, the Boule definition is at least wide enough to include this model of mediation. It is preferable to the NADRAC description as the basis of a national accreditation system. It would allow more models of mediation to be included in that system and encourage the use of a variety of testing methods, standards and codes for mediator accreditation.

Conclusion

Without an inclusive definition of mediation that provides for diverse models, such as transformative mediation, accreditation initiatives in relation to mediators will be fundamentally flawed. In order for the mediation industry to grow in both theory and practice we need to acknowledge the contribution of diverse models. The mediation industry needs to decide upon an inclusive definition of mediation, that allows for models such as transformative mediation. In this paper I have argued that Boule's definition of mediation is capable of including transformative mediation. Additionally, after deciding upon an inclusive definition the industry will need to ensure testing, standards and mediation codes that relate to mediator accreditation include the context of the transformative model. If these changes are made to the proposal for mediator accreditation, the industry and the community, will benefit from acknowledging the diversity of practice available in mediation.

67 There has been considerable critique of the evaluative model of mediation, see for example Lela P Love, 'The Top Ten Reasons Why Mediators Should Not Evaluate' (1997) *Florida State University Law Review*, 937.