

Course 9, Mediation Mastery

Module 1: Mediation Topologies

Lesson 1A: Facilitative Mediaton

Facilitative Mediation: The Classic Approach Retains its Appeal

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Since January 1999, Rule 24.1 of the *Rules of Civil Procedure* requires mandatory mediation in all case-managed actions in the Regional Municipality of Ottawa-Carleton. In this new step in civil litigation in Ontario, the mediator is assigned a primarily ‘facilitative’ role. This paper advances the position that mandatory mediation in Ontario was not designed as a process where a third party would offer an evaluation of the legal merits of a dispute. Instead, the goals of mandatory mediation are best achieved, and the parties know what to expect, when a mediator takes on the role of a neutral third party who facilitates communication, and takes an interest-based approach to problem-solving.

This paper further posits that the mandatory mediation process, which requires the attendance of clients as well as counsel,¹ presents a challenge for counsel who are used to the traditional adversarial structure. In particular, as a result of increased client participation, the lawyer may not have the same degree of control over the civil litigation process as in the traditional adversarial system. Several results from a recent study of lawyers’ reactions to mandatory mediation in Ontario are suggestive of an emerging trend among lawyers to attempt to re-shape the interest-based mandatory mediation process into a more familiar adversarial process by encouraging the adoption of a more evaluative style of mediation. This response may be more comfortable for, and possibly beneficial to, members of the Bar, but it is not necessarily the approach that

best achieves the goals of the mandatory mediation process in Ontario, or the needs of clients.

In Ontario, our experience with mandatory mediation is, as yet, new. As our experience matures, it may become apparent that certain types of disputes may require, or certain clients desire, a more evaluative procedure. However, these evaluative services should be clearly labelled as distinct from, and remain independent of, the mandatory mediation process.

The Substance: Rights-Based v. Interest-Based Mediation

There are many different normative approaches which can be applied to resolve disputes in the context of mediation. A ‘rights-based’ approach focuses on the legal rights of the parties and attempts to achieve a resolution which meets the relevant legal criteria of the dispute in a manner that is consistent with resolutions achieved in a traditional court setting. An ‘interest-based’ approach focuses on the underlying needs or interests of the parties and encourages a broader range of solutions or resolutions to the dispute which address the underlying interests, business or otherwise, of the parties instead of, or in addition to, legal interests. ² This approach may yield an outcome that satisfies the parties, yet may not be congruent with legal norms.

Before focusing on the mediator’s role, it is useful to examine some of the arguments in favor of taking an interest-based approach to problem-solving. The interest-based approach appears to have had its genesis in negotiation theory; indeed, mediation has been described by Leonard L. Riskin, a leading scholar in mediation theory, as facilitated negotiation.³ The theory underlying the interest-based approach is advanced by authors Roger Fisher, William Ury and Bruce Patton in their seminal book *Getting to Yes: Negotiating Agreement Without Giving In*,⁴ as follows. If the parties to a dispute are encouraged to explore their underlying interests,

which are the needs that motivate any position taken, they are in effect defining the problem. 5 Thus, by exploring parties' interests, the problem to be solved takes on new dimensions. By focusing on interests, parties who are at an impasse may discover several possible solutions to their problem, and may also discover shared compatible interests. 6 Finally, the authors note that these interests must be communicated if negotiation is to serve the parties' interests. 7 This last observation suggests that a mediator who facilitates communication would fit nicely with an interest-based approach to problem-solving.

The Process: Evaluative v. Facilitative Mediation

In assisting parties to reach a mutually acceptable resolution of their dispute, mediators take many different approaches. One useful means of classifying these approaches or styles is to employ the now-classic construct of mediator orientations first advanced by Leonard L. Riskin in a 1996 article published in the Harvard Negotiation Law Review.8 Riskin defines mediation as *"a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction."* 9 He employs a four-quadrant grid to categorize and discuss mediation styles, from facilitative to evaluative.10 (See Annex A) Along the horizontal axis, Riskin places the different approaches to defining the problem to be resolved, from a narrow definition of the problem which focuses on the strengths, weaknesses and likely outcomes of litigation, to a broad definition of the problem which considers increasingly broad arrays of interests.11 The vertical axis focuses on the mediator's style with, at one end of the continuum, techniques that facilitate negotiation and, at the other end, strategies employed to evaluate the matter at hand based on a particular set of standards. Riskin describes these facilitative and evaluative orientations generally as follows:

"The mediator who evaluates assumes that the participants want and need her to provide some guidance as to the appropriate grounds for settlement - based on law, industry practice or technology - and that she is qualified to give such guidance by virtue of her training, experience, and objectivity.

The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can create better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do."

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Riskin's use of these concepts and this terminology has served as a focal point in the continuing debate over the optimal style of mediation.

Riskin's categorization of mediation as including evaluative as well as facilitative approaches has not been universally embraced. Many academics and practitioners take the position that a facilitative approach is the essence of mediation and that any evaluative process should be identified not as mediation, but as a distinctly different type of alternative dispute resolution, such as "neutral evaluation". Lela P. Love of the Mediation Clinic, Cardozo Law School in New York City writes:

"Evaluating, assessing, and deciding for others is radically different than helping others evaluate, assess, and decide for themselves. Judges, arbitrators, neutral experts, and advisors are evaluators. Their role is to make decisions and give opinions...In contrast, the role of mediators is to assist disputing parties in making their own decisions and evaluating their own situations." 13

Love adopts the classic description of the mediator's role as one of facilitating communication, promoting understanding, focusing on interests, seeking creative solutions to problems, and enabling parties to reach their own agreements. 14 She notes that evaluators and facilitators require different competencies, training, and ethical guidelines to perform these divergent roles. 15

Similarly, Joseph B. Stulberg, Professor of Law, University of Missouri-Columbia Law School, writes:

"Mediation is neither a process designed to marshal evidence leading to an advisory opinion by a third party, nor a rehearsal trial in front of judge or jury. Rather, mediation is a dialogue process designed to capture the parties' insights, imagination, and ideas that help them to participate in identifying and shaping their preferred outcomes." 16

He asserts that *"any orientation that is 'evaluative' as portrayed on the Riskin grid is conduct that is both conceptually different from, and operationally inconsistent with, the values and goals characteristically ascribed to the mediation process."* 17 Thus, it is important to consider whether an evaluative approach should really be considered as a style of mediation, or a completely separate process. However, as it appears that evaluation does at times occur in the Ontario mandatory mediation process, for the purposes of discussion the terms 'facilitative' and 'evaluative' mediation will be employed.

The Role of the Facilitative v. Evaluative Mediator

The facilitative mediator's role is to assist disputing parties to make their own decisions and evaluate their own situations. Facilitative mediation is based on two guiding principles: firstly, that of self-determination of the parties with respect to resolution of their disputes and, secondly, that of the neutral third party facilitator who facilitates communication among the parties, promotes

understanding of the issues, focuses the parties on their interests and seeks creative problem-solving, including creative solutions outside the legal normative box, in order to enable the parties to reach their *own* agreements and resolutions to their problems.

In contrast, the classic role of the evaluator is to make decisions and give opinions with respect to the merits and likely outcomes of disputes, using predetermined criteria to evaluate evidence and arguments presented by adverse parties. The evaluative mediator's tasks include finding facts by properly weighing evidence, judging credibility and allocating burden of proof, determining and applying relevant law, rules or customs and rendering an opinion. The evaluator's tasks not only divert the mediator away from facilitation, but can also compromise a mediator's neutrality in actuality and/or in the eyes of the parties to the mediation by virtue of providing an evaluation or opinion of the case.

Ultimately, evaluation promotes positioning and polarization which is antithetical to the goals of mediation. In the evaluative context, where the parties go to the mediation anticipating an evaluation of their case, they are more likely to take a positional rather than a collaborative approach to the mediation process. They are more likely to not fully

disclose their positions, despite the fact that the information provided in the mediation is clearly confidential and not to be used in subsequent proceedings unless it is otherwise discoverable. They also tend to perceive the lawyers' versus the parties' roles in a classic light, namely the lawyer as decision-maker controlling the process and the client as a passive party who does not participate in the decision-making process.

It is of note that early settlement efforts which include interest-based bargaining and mediation imply not only a different analysis of the conflict itself and its appropriate resolution, but also a

reconceptualization of the traditional role of the lawyer as advocate. While the lawyer-advocate conceptualizes an action from a win/lose of point of view and approaches mediation with a tendency to guard information, not reveal adverse facts and maximize gains for his or her client, the role of the lawyer as negotiator in a mediation requires a win/win approach to the problem and calls for creativity, focusing on the opposing sides' interests and on a broadening rather than a narrowing of the issues. 18 Moreover, early settlement efforts require a reconceptualization of the lawyer/client relationship. While the traditional relationship posits a client who is passive, with the lawyer controlling the process, the interest-based approach envisages a client who plays a more active, participatory role in the decision-making process.

The Ontario Mandatory Mediation Program: A Facilitative Approach

In Ontario, the statutory framework for mandatory mediation, as well as the guiding principles to which mediators are expected to adhere while fulfilling their role, strongly suggest that facilitative rather than evaluative mediation is the approach to be applied in the court-connected mediation process.

Based on the provisions of Rule 24.1 of the *Rules of Civil Procedure*, the *Canadian Bar Association-Ontario [now Ontario Bar Association] Model Code of Conduct for Mediators* 19 and the *Rules of Professional Conduct*, it appears that mediation in Ontario was designed by the Rules Committee as a facilitative process. While these provisions do not appear to clearly prohibit evaluative mediation techniques, the overall tone of the guiding principles suggests a facilitative orientation.

The purpose of Rule 24.1.01 of the *Rules of Civil Procedure* is set out in the Rule itself: "*This Rule establishes a pilot project for mandatory mediation in case managed actions, in order to reduce cost and delay*

in litigation and facilitate the early and fair resolution of disputes." While the inclusion of the phrase *"to facilitate a fair resolution of disputes"* may arguably suggest some evaluation against an external or party-specific standard of fairness, the next subsection, which provides more guidance as to how to achieve a resolution to the dispute, suggests otherwise. Subrule 24.1.02 describes the nature of mediation: *"In mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution."* While it may be argued that the language is broad enough to permit a legal evaluation where the parties request such "assistance" of the mediator in "reaching a mutually acceptable resolution", the rule does *not* explicitly encourage a mediator to offer an evaluation, but *does* explicitly encourage the mediator to be a neutral third-party, to facilitate communication, and to assist the parties to reach a resolution acceptable to *them*, not a resolution based on the prevailing legal norms governing the dispute.

The timing of the mandatory mediation is also suggestive of a facilitative approach. Rule 24.1.09(1) of the *Rules of Civil Procedure* states that *"a mediation session shall take place within 90 days after the first defense has been filed, unless the court orders otherwise."* At such an early stage, usually before discoveries have been completed and often before documentary discovery has occurred, it is unlikely to be possible and indeed, may be problematic, for a mediator to offer an accurate evaluation of the legal merits of the case. As discussed later in this paper, lawyers are making use of Rule 24.1.09 to seek a court order to postpone the mandatory mediation, which suggests, at least in some cases, a preference for delaying mediation until there is a greater possibility for an evaluative approach. However, in the absence of an extension of time, the default rule is to have mediation occur at a very early stage in the litigation process, which is consistent with a facilitative approach to mediation.

The *OBA Mediation Code of Conduct*²⁰ also has a strong facilitative emphasis. (See Annex 2) The principle of party self-determination is fundamental,²¹ and, in this regard, the *Code* provides as follows:

"Self-determination is the right of parties in a mediation to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute. It is a fundamental principle of mediation which mediators shall respect and encourage." ²²

One might argue that the parties may choose voluntarily to have an evaluative mediator, yet this may be at odds with another provision in the *Code* which states that: *"Mediators shall not provide legal advice to the parties."*²³ Similarly, The Law Society of Upper Canada *Rules of Professional Conduct*, commentary to Rule 4.07, provides: *"In acting as mediator, generally a lawyer should not give legal advice as opposed to legal information to the parties during the mediation process."* These provisions appear to limit the evaluative parameters of the mediator's role. It must be questioned whether a mediator who offers an opinion on the likely legal outcome of a dispute, may be seen to be offering a type of legal advice.

Insight into the orientation of Ontario mandatory mediation may also be gleaned from examining what the Law Society of Upper Canada is teaching law students about the nature of this process. The 2002 Bar Admission Course materials state that mediation is *"a co-operative, interest-based approach to conflict resolution."*²⁴ The mediator is one *"whose role it is to facilitate the negotiation process"*,²⁵ and further:

"It is important to recognize that the mediator serves a different purpose than that of an arbitrator or a pre-trial judge. It is not the mediator's role to provide an expert evaluation of the case or to predict the outcome at trial (though some mediators will do so anyway)." ²⁶

Thus, the process is clearly explained as a facilitative, interest-based exercise in dispute resolution.

The *Rules of Civil Procedure*, the *OBA Mediation Code of Conduct* and the *Rules of Professional Conduct* do not explicitly prohibit evaluative mediation, but the orientation clearly is intended to be facilitative. It is of interest to compare the orientation of Ontario's court-connected mediation to that of the United States, where it has been used since the 1970s. While the majority of States have no specific statute relating to the issue of the propriety of evaluative mediation, in those States that have mediator rules and standards regarding self-determination, impartiality, and the giving of advice and opinions, the language of these provisions and the associated explanatory comments seem to put in question the propriety of evaluative mediation. 27

Lawyers' Reactions to Facilitative Mediation in Ontario

Facilitative mediation has not been universally accepted among lawyers in Ontario. Indeed, there appears to be some reluctance to embrace the facilitative, interest-based mediation model, with an apparent trend emerging in certain sectors of the Bar to reshape the mediation process in order to make it fit more comfortably into a traditional adversarial setting. Dr. Julie MacFarlane's recent study of commercial litigators' reactions to mandatory mediation in Ottawa and Toronto uncovered a range of attitudes toward mediation, from acceptance and acknowledgement of the benefits of the facilitative approach with greater client participation to rejection and the apparent longing for a return to the traditional adversarial lawyer-dominated model. 28

Facilitative mediation seems to have been more readily accepted in Ottawa than in Toronto to date. Dr. MacFarlane has observed:

"Generally, it can be noted that the norms of mediation usage are both more settled, and more accepting of the use of mediation in Ottawa than they are in Toronto. ... Ottawa counsel were also more likely to talk about a positive active role that they had seen the client taking in mediation, and to suggest a deeper sense of comfort with this. This contrast between prevailing views at the two sites recurs throughout the data..." 29

Those who embraced the mandatory mediation process saw it is a useful early opportunity for exploring settlement more expeditiously and less expensively to the benefit of the client.30 Some welcomed the more active involvement of clients in the negotiation and settlement of their action. Others highlighted the great benefit to clients of an early resolution of their action. 31 Indeed, the more sophisticated institutional and business clients welcome the opportunity of a business solution that may offer a commercially viable end to a dispute without the accumulation of excess legal fees. 32 In the end, a resolution to a legal action in which the client is an active participant and, in some cases, in which the client actually engineers the resolution, is not only a benefit to clients but to the judicial system at large.

On the other end of the spectrum were those who rejected the facilitative mediation model or simply perceived it as a tool to be "captured" and used (*e.g.* as early discovery or a fishing expedition) to advance their clients' mostly unchanged adversarial goals.33 Other counsel sharing these attitudes indicated that they simply went to mediation, unprepared, with the intent of staying no more than 20 minutes to simply get the process over and move on to the next stage in the traditional adversarial model. 34 These attitudes and strategies were more prevalent among Toronto counsel, whereas Ottawa counsel seemed to regard such tactics and strategies as displays of bad faith.35

Dr. MacFarlane found a preference for evaluative mediators among the sample of the 40 commercial litigators canvassed, which was particularly strong in Toronto.³⁶ For those groups most negative toward mediation, she observed that:

"mediation appears to be relatively "safe" when it is evaluative (emphasizing the known, that is, anticipated legal outcomes) and especially "risky" when it is facilitative (emphasizing the unknown, that is, other factors in settlement besides legal evaluations)." ³⁷

In those groups, lawyers expressed a preference for lawyer-mediators and for an evaluation from a credible third person in order to assist in overcoming inflated client expectations in achieving settlement. ³⁸

While there appeared to be a preference for an evaluative style among those canvassed, some counsel expressed a more nuanced view, in which they generally wanted facilitative mediation, but with the ability to call on an evaluative mediator in certain circumstances:

"Moreover, while lawyers in Toronto and Ottawa expressed a strong preference for evaluative mediators, it is less clear that they see the function of these mediators as simply running a judicial-style settlement conference. Rather, many comments suggested that lawyers wanted the mediator to have a legal evaluation in their back pocket if all other efforts at settlement failed." ³⁹

This attitude suggests an openness to facilitative mediation, with evaluation of the action, if necessary, at a later stage in the mediation process. This expressed preference for a mediator who could employ an evaluative style, where required, may signal a desire among some lawyers to move closer to the more familiar traditional rights-based model.

Disadvantages to the evaluative mediation model expressed among the lawyers participating in the study included the limited ability for an evaluator to accurately predict the outcome of a case; the tendency for a client to take a more positional approach in an evaluative mediation which tended to deter compromise and settlement; the inability of an evaluative mediator to find alternative principled bases for settlement when the traditional "legal" basis for settlement was not accepted by the parties; and a view expressed among a number of lawyers that while senior mediators and former judges could offer expertise and authority in an evaluative mediation, they were often ineffective at facilitating dialogue and compromise among parties. 40

Emerging from Dr. MacFarlane's study is the suggestion that certain sectors of the Bar would like to re-shape the mediation process to at least offer the possibility of more evaluation. Dr. MacFarlane noted the tendency of some lawyers to change the timing of mandatory mediation. She observes that, *"the problem of being obliged to attend mediation before counsel feel "ready" is obviated in Ottawa by the willingness of the Ottawa Case Management Master to be flexible in adjourning mediation until after discoveries."* 41 This approach has served to reduce resentment toward being obligated to mediate before discoveries, and appears to be a critical element of Ottawa's local legal culture in relation to mandatory mediation. 42 Dr. MacFarlane noted, *"the same dispensation appears to be much less accessible in Toronto, and this contributes to a general sense of resentment about the mandatory mediation program."* 43 She found that in Toronto, the difficulty in obtaining adjournments sometimes leads to the "20-minute mediation" where counsel agree to attend the mediation, but with no preparation and only to leave again after twenty minutes. 44

These two different responses suggest that while counsel are adapting to the mediation process, they are attempting to re-shape

the process into one which occurs at a later stage, where evaluation is more of a possibility, or as sometimes occurs in Toronto, to simply continue with the dominant adversarial model. The degree to which requests for a later mediation date reflect a desire for an evaluation, or simply provide the parties in a facilitative mediation with more information, is an interesting question to consider.

Why Facilitative Mediation Remains the Optimal Model for Many Civil Disputes

In this section, many of the critiques of both facilitative and evaluative mediation will be explored. It is suggested that, overall, there are many reasons to favor mediations based on the facilitative model. At the same time, it is important to consider the arguments made by proponents of evaluative mediation and to ensure that valid concerns are addressed within the mandatory mediation program.

- 1. Facilitative, interest-based mediation offers a greater possibility for creative solutions to disputes than does a purely legal evaluation.**

When a broader range of interests are considered, a broader array of possible outcomes can be created, with the potential for finding an outcome that is more satisfactory to both parties than any rights-based solution imposed by a third party. By focusing on their underlying needs and interests, the parties may create a unique solution which is most appropriate for their situation.

Proponents of evaluative mediation may argue that justice is better served and fairness ensured where decisions are based on legal rights and entitlements and in accordance with legal norms. Without embarking on an exploration of the nature of justice, it must be asked whether a settlement is necessarily more fair simply because it accords strictly with legal norms or

reflects the remedies available at trial. Our system of civil litigation should strive to achieve justice, yet there appear to be a broad range of solutions falling outside the traditional legal solutions and remedies that may be considered fair by disputants. While knowledge about relevant and applicable legal norms shapes the process, congruence with legal norms does not appear to be the sole concern of parties, nor the only standard against which to measure the fairness of a solution that emerges from a mediated settlement.

- 2. An evaluative opinion may hinder communication between parties and between the parties and the mediator.**

Instead of facilitating communication, which is one of the goals of subrule 24.1.02 of the *Rules of Civil Procedure*, the parties to a mediation who anticipate an evaluation from the mediator may only put their best case forward, without acknowledging complexities or weaknesses in their positions. They are more likely to approach the mediation with a positional bargaining stance rather than being willing to think outside the legal box and explore their underlying needs and interests. 45

- 3. An evaluative, rights-based approach can lead to greater positional bargaining and may shut down discussion and the possibility of settlement.**

An evaluation of an action provided by a mediator may serve to entrench positions and to prevent a final resolution of the matter, instead of facilitating negotiation. Once an evaluation is given in the context of a mediation, the party in whose favor the evaluation is given may decide not to compromise further and the party against whom the evaluation goes may perceive the mediator as biased or may dismiss the opinion as not well founded. One lawyer in Dr. MacFarlane's study expressed this idea as follows:

"I've discovered to my astonishment, that it (a legal evaluation) doesn't help both ways in terms of trying to settle a case. If you're the one he (the evaluator) has told "You're going to win, you'd say, why should I compromise? And if you're the one he's told "You're going to lose", you say, "What does he know"?" 46

4. A mediator may not be able to maintain the key quality of neutrality, especially in the eyes of the disputants, once an evaluation is offered.

Scott H. Hughes explored this idea in a recent article, and his comment follows nicely the observation made above about the parties' reactions to an evaluation. He writes that any opinions or valuations threaten the mediator's impartiality as *"the natural tendency of those whose 'ox is being gored' by a mediator opinion is to discount its validity and to attribute it to mediator bias."* 47

Once a mediator is perceived as biased, the entire process is undermined. It is a central feature of Rule 24.1 of the *Rules of Civil Procedure* that a mediator be a neutral third party.

5. There are concerns about the quality of an evaluative opinion, especially one that is offered at an early stage of the process, before discoveries have been completed.

It is clear that a fully-informed evaluation can only occur after discovery, or at least after the main facts in dispute have been established or agreed upon. In Ontario, the *Rules of Civil Procedure* provide for mandatory mediation to occur early in the process prior to examinations for discovery and prior to a full canvassing of the facts.

Even where mediation occurs after discovery, there is reason to doubt the ability of an evaluative mediator to predict likely

outcomes of litigation. Murray S. Levin's article on the propriety of evaluative mediation cites numerous studies that measure the outcome of negotiations and the predictability of jury trials, which all highlight the highly unpredictable outcomes of some legal disputes.⁴⁸ Also, if a mediator offers an evaluation that influences the settlement of a case which is based on incomplete information or an incomplete understanding of the law, how will she or he be held accountable? Would issues of liability arise? What kind of training and expertise must an evaluative mediator possess? These questions must be confronted.

6. Non-lawyers may be disqualified from practicing evaluative mediation.

It is self-evident that if someone offers an evaluation they must be qualified to do so. Where evaluative mediation is adopted or incorporated into the mandatory mediation process, this will, of necessity, eliminate non-lawyers from the field of mediation.⁴⁹ If evaluation is to be a standard part of the mediation process, then non-lawyers who may be excellent at facilitative mediation would not be qualified to render the evaluative aspect of the service.

Mandatory Mediation in Ontario: Lessons from the Past and Suggestions for the Future

Although we do not as yet have statistics that compare the rates of settlement between facilitative and evaluative approaches to mediation in Ontario, we do know that the Mandatory Mediation Program is leading to settlements. The 2002 Bar Admission Course materials state that in 1997, the pilot mediation project resulted in 66 percent of cases settling within 60 days after mediation.⁵⁰ Similarly, Dr. MacFarlane, in her recent study, reports several results of the Hann, Barr, and Associates Evaluation of the Ontario

Mandatory Mediation Program,⁵¹ which found that 41% of mediations in Ottawa, and 38% of Toronto mediations reported a full settlement within seven days of the mediation session. Also when partial reported settlements were added, the overall rate was 59% in Toronto, and 54% in Ottawa. ⁵² While something in the process is clearly working to achieve settlements, it is not, at this juncture, possible to determine whether one mediator style is predominantly responsible for these settlement outcomes.

It would appear from Dr. MacFarlane's study that there is some demand for a rights-based evaluation of actions in Ontario as opposed to the interest-based facilitative approach conceived by the Rules Committee for mandatory mediation. It would further appear that there is a growing trend among some mediators toward a mixed or hybrid form of dispute resolution being used under the rubric of mediation in the Ontario Mediation Program. A similar trend appears to have emerged in the United States experience of court-connected mediation.

It is submitted that while an evaluation rather than facilitative mediation may better suit the needs of some clients and achieve settlement in certain circumstances, it should be obtained in the context of a clearly labelled alternative process that is separate and distinct from mediation. An evaluation should be clearly recognized as an entirely different activity, requiring a focus and technical skills different from those employed in a mediation. As previously indicated, while the mediator assists others in evaluating, assessing and deciding upon their own resolution to disputes, an evaluator assesses and provides a decision or opinion with respect to the merits of a dispute. These two activities require not only different mental processes, techniques and skills, but also require or should require different rules, regulations, guidelines and standards to regulate the mediators and evaluators' roles and actions. By clearly distinguishing among different dispute resolution processes of

mediation or evaluation, a consumer of legal services would know what they are getting and clarity and definition would be given to the dispute resolution process. 53

It must also be remembered that other, traditional, evaluative steps in the litigation process are currently available, including the settlement conference and, upon request, the judicial pre-trial. Further, opportunities exist to seek a neutral evaluation from a former judge or other qualified person working in the field of alternate dispute resolution, whose services are clearly labelled as those of a "neutral evaluator". The parties to a legal dispute should know what to expect out of the process, and an accurate labelling rather than a mixed or hybrid form of evaluative mediation will help to achieve this goal.

Lela P. Love and Kimberlee K. Kovach argue strongly in favor of permitting an array of dispute resolution processes which are clearly labelled and defined:

"Having an eclectic mix of processes from which parties and counsel can choose will promote party choice and self-determination. A range of processes will promote different values and allow for refinement of different paradigms and skill sets. ...

However, allowing an eclectic mix of neutral activities to all be deemed mediation creates a process which is amorphous and rudderless." 54

As we continue to learn from our experience of mandatory mediation in Ontario, several alternative dispute resolution processes may begin to emerge. Ensuring that each is clearly identified with respect to process and approach will help to better serve all parties and the system of justice generally. If evaluative services are clearly labelled, it will also assist in the task of ensuring that those who offer such services are adequately qualified and trained in practicing evaluative mediation.

Further study may yet discern a pattern as to which cases are most likely to be usefully resolved at an early stage using facilitative mediation, and which may benefit from an evaluation. Cases where there is an ongoing relationship between the parties, such as employment matters, or business/commercial relations would lend themselves well to facilitative mediation. In complicated personal injury cases, where the long-term prognosis of the plaintiff is in doubt, it may be better to wait until after time has passed and discovery has occurred before any meaningful discussions can begin. In cases involving a very specific monetary dispute, a more evaluative approach can be useful in achieving a settlement. With time, it will become apparent whether there are indeed certain classes of cases which are better suited to one particular style of mediation.

Conclusion

With all of the problematic aspects of an evaluative approach to mediation, it seems that the facilitative approach has earned its place as the preferred model for the Ontario Mandatory Mediation Program. It may well be that in time we will come to recognize that certain classes of cases are not well-suited to facilitative mediation and some element of an evaluation will be employed in order to encourage settlement. It is submitted that evaluation should be offered as a separate form of dispute resolution, and should be clearly labelled, for example as "neutral evaluation", rather than as a hybrid form of 'evaluative' mediation, so that all parties know what to expect out of the process. This evaluative process should be subject to separate rules and guidelines within the context of court-connected dispute resolution.

Facilitative mediation responds to the needs and interests of the parties, and does require lawyers to give up some of the traditional control that they have had over the conduct of a civil action. The natural reaction of the litigator is to attempt to re-shape this new

step in the civil litigation process to fit into a traditional adversarial model. It may well be that with time an array of dispute resolution processes will be established in Ontario. However, mediation should not be re-shaped into a more familiar and comfortable adversarial rights-based process before facilitative mediation has been given the opportunity to develop its own unique place in civil litigation in Ontario.

End Notes

1 Rule 24.1.11 (1) of the Rules of Civil Procedure: The parties and their lawyers if the parties are represented, are required to attend the mediation session unless the court orders otherwise.

2 S. Goldberg, F. Sander, and N. Rogers, Dispute Resolution: Negotiation, Mediation and Other Processes, (Aspen Law & Business, 1992)

3 Leonard L Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" (1996) 1:7 Harv. Neg. L.R. 7 at 13.

4 R. Fisher, W. Ury, B. Patton, Getting to Yes: Negotiating Agreement Without Giving In 2nd ed. (New York: Penguin Books, 1991).

5 Ibid., at p. 40.

6 Ibid., at p. 42.

7 Ibid., at p. 50.

8 Supra note 3 at 8.

9 Ibid., at 8.

10 Ibid., at 35.

11 Ibid., at 17.

12 Ibid., at 24.

13 Lela P. Love. "The Top Ten Reasons Why Mediators Should Not Evaluate" (1997) 24: 4 Florida State University Law Review 937 at 938.

14 Ibid., at 939.

15 Ibid.

16 Joseph P. Stulberg, "Facilitative Versus Evaluative Mediator Orientations: Piercing the "Grid" Lock" (1997) 24: 4 Florida State University Law Review 985 at 1001.

17 Ibid., at 986.

18 Julie MacFarlane, "Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation" Revised August 2002, Forthcoming Journal of Dispute Resolution (2002) at 10.

**19 Website of the Ministry of the Attorney-General:
<http://www.attorneygeneral.jus.gov.on.ca/html/MANMED/codecnct.htm> [hereinafter OBA Mediation Code of Conduct]**

20 Ibid.

21 Other key principles include impartiality, confidentiality, refraining from situations involving a conflict of interest, and ensuring the quality of the process.

22 Ibid.

23 Ibid.

24Law Society of Upper Canada: Civil Litigation Materials.
Chapter 17: Alternative Dispute Resolution, Case Management and
Mandatory Mediation at 17-5

25Ibid., at 17-12.

26Ibid.,

27Murray S. Levin, "The Propriety of Evaluative Mediation:
Concerns About the Nature and Quality of an Evaluative Opinion."
(2001) 16 Ohio St. J. on Disp. Resol. 267 at 286.

28 Supra note 18. In her study, Dr. MacFarlane conducted
interviews with forty commercial litigators, twenty in Ottawa and
Toronto respectively, who had participated in a minimum of ten
mediations.

29 Ibid., at 51.

30 Ibid., at 38.

31 Ibid., at 33.

32 Ibid., at 39.

33 Ibid., at 22.

34 Ibid., at 37.

35 Ibid., at 23.

36 Ibid., at 60 and 61.

37 Ibid., at 60.

38 Ibid., at 60 and 61.

39 Ibid., at 94.

40 Ibid., at 62 and 63.

41 Ibid., at 54.

42 Ibid.

43 Ibid., at 102.

44 Ibid., at 54 and 37.

45 See also Riskin, supra note 3 at 45.

46 Supra note 18 at 62.

47 Scott H Hughes, "Alternative Dispute Resolution: Facilitative Mediation or Evaluative Mediation: May Your Choice be a Wise One" (1998) 59 Ala. Law 246 at 247.

48 Supra note 27 at 287.

49 See e.g.: Love, supra note 13 at 939.

50 Supra note 24 at 17-5.

51 Supra note 18 at 101, footnote 62: Hann, R., Barr, C. and Associates "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1) Final Report- the First 23 Months" Queen's Printer 2001.

52 Ibid.

53 See e.g.- Lela P. Love and Kimberlee K. Kovach, "ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process" (2000) 2 Journal of Dispute Resolution 295.

54 Ibid., at 306.

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Lesson 1B: Narrative Mediation

Narrative Mediation: A Transformative Approach to Conflict Resolution

by Linda Price

Introduction

The purpose of this paper is to illustrate the value of narrative mediation as an effective approach to working with conflict in the South African context. The paper will begin with a brief perspective on the role of mediation in relation to the South African experience and it will then move on to outline the central principles of narrative mediation and its relevance to this context.

The discussion will show how the integration of narrative therapy within mediation creates a practice that has the capacity to be both empowering and transformative. It must be clear from the outset that the paper does not purport to offer a comprehensive or critical review of this wide-ranging topic. It relies heavily on the seminal work of Winslade and Monk (2000) to describe a working model for the practice of narrative mediation, with the intention of stimulating thought and debate amongst practitioners in the field. Dunn's (2004) article titled "Narrative mediation and workplace conflict dissolution" also provides a valuable source of insight into how narrative can be used for effective conflict mediation.

Mediation within the South African experience: Transformation and Restorative Justice

As a country in transition, South Africa faces the ongoing challenge of how to generate and maintain processes that restore dignity, create political and economic equality, and promote a culture of human rights (Doxtader and Villa-Valencio, 2004). The 1994 elections signaled a crucial turning point in the history of South Africa through the abolishment of race as a means to organize society and thus laid the foundation for political equality (Daniel, Southall and Lutchman, 2005).

The result of this juncture, over a decade later, is that South Africa is a fundamentally improved country. The concept of the ‘developmental state’ has emerged which prioritizes the need for facilitated human processes to empower citizens to access and use the goods of democracy to their own benefit (Soal, 2005).

This is evident in government’s commitment to creating a cadre of community development workers at local levels and business’ increasing interest in measuring its value in relation to human well-being and its social role in relation to globalization (ibid).

There remain, however, extensive social and economic inequalities that require redress. The demands of productivity that call for efficiency and speed to the neglect of human and social well-being sadly predominate. As practitioners in the field of conflict resolution, we are frequently called on to expedite quick and effective ‘solutions’ to problems. We therefore face the challenge of designing mediation processes that will forge effective resolutions to the conflict and drive the transformation agenda.

Restorative justice processes that aim to restore social equity and to transform the fabric of South African society are integral to this endeavor. The potential of conflict mediation to contribute towards transformation is extensive provided it is able to instill social relationships that are based on equality and respect. As such, the creation of a mediation practice that advances social cohesion based

on justice, must also tackle the wider context of social and economic conditions that underlie inequality and exclusion (De Feyter, 2005). The integration of narrative within mediation has the capacity to achieve this as it extends the understanding of conflict into social, political and economic realms. This involves the incorporation of wider discourses around culture and power into the mediation process.

This expansive view involves a shift from the traditional interest based approach to mediation that locates conflict within individuals, to a perspective that considers how the experience of conflict is shaped by relationships between individuals. A mediation practice that embraces conflict as a fluid entity that is shaped by relationships within and beyond organizations and communities can easily be infused with restorative justice principles. Just as transition is an ongoing process, so too is restorative justice. It is based on the notion that human beings are constructed through their relationships with others and any attempt to restore justice must therefore take this relational construct into account (Llewellyn, 2004).

The harm that results from violations of social justice is primarily felt at the level of relationships between individuals (Sampson, 1983). The concern of justice from a restorative perspective is therefore to address this harm by restoring equality and dignity amongst these relationships (Llewellyn, 2004).

The objective is not therefore to return relationships to the way they were prior to the conflict, but rather to restore their social equality. The constantly changing nature of relationships makes this a lengthy process which, when seen in the light of a wider attempt to restore social justice, locates it firmly within the country's overall transformation process (ibid).

Narrative mediation provides a framework for conflict resolution that is able to incorporate transformation according to restorative justice principles. Conflict is not viewed as an event in and of itself, but as part of a complex dispute over entitlement and the allocation of resources. As the paper unfolds it will become evident how narrative mediation actively engages with these power relations.

Narrative mediation: Theoretical Understandings

Mediation presents the opportunity to work through problems that have become obstacles to building what Dunn (2004) refers to as ‘preferred relationships’ and to resolve these problems directly with the other party in respectful ways (ibid). Parties seek mediation because they recognize that they need a third person to facilitate the resolution of their conflict through a safe and contained process.

Mediation also provides an opportunity for parties to consider what they would like their preferred relationship to look like and what needs to be put into place for this to evolve. It remains, however, *their* process and as mediators we occupy privileged positions as witnesses to the stories people share about their experiences of the conflict. This privilege is accompanied by the responsibility and accountability that we hold as mediators (ibid).

The stories people convey are infused with emotion that both fuel the conflict and reflect the cultural discourses that have informed peoples’ approach to the conflict in the first instance. A dominant cultural discourse is the belief that we need authoritative individuals with professional knowledge to identify and work through the problems that have given rise to the conflict, and to determine which party is right and which party is wrong (ibid). This approach overlooks the social inequalities that have informed the conflict and it prevents parties from actively resolving their difficulties.

Working from Flacks' (1990) definition of power as the capacity to influence the conditions and terms of everyday life of a community or society, any practice aimed at transformation and empowerment must challenge historical forces and contribute to the future. This active engagement with power relations is incorporated within narrative mediation.

It is informed by narrative therapy practices that take the poststructuralist view that identity is socially constructed and not intrinsic to the individual. This concern with the complex ways in which selves mediate the worlds they inhabit operates from the premise that "one of the primary ways human beings make sense of their experience is by casting it in a narrative form" (Gee, in Mishler, 1986, p. 67). People, as social beings, organize their experiences in terms of stories. Each narrative arranges experience into temporally meaningful episodes which in turn provide a structure for thinking, perception, imagination and moral decision-making (Sarbin, 1986).

This represents a departure from the traditional interest based approach to mediation that is based on the structuralist assumption that identity and human behavior are derived from within individuals. As such, the goal of mediation is to reach resolution in the context of win/win and this is achieved by separating the process from the content. Mediation typically involves sharing individuals' accounts of the conflict, brainstorming issues and negotiating agreements (Dunn, 2004).

Narrative mediation reverses the common logic in both popular and academic psychology that derives explanations for events from qualities or circumstances that reside within the person (Winslade and Monk, 2000). It creates valuable distance between the parties and the problem by encouraging people to speak about the conflict as if it were an external object or person exerting an influence on

them. Practical ways to elicit these externalizing conversations will be explained at a later stage.

Story-telling and Discourses

Dominating discourses are ideas and beliefs that operate as truths, informing our actions in the world (Carey, in Dunn, 2004). They serve as a map against which we understand our own and others' thought, language, action and interaction (Gee, 1999). As such, discourses are both mental attributes and social practices.

We are all members of a variety of discourses (for example, gender; class; race; family) and we use discourses to explain our behavior in the world, as well as the behavior of others (Gee, 1999). Discourses change over time and people alter the way they see themselves in line with changing discourses. When we excuse or justify seemingly inappropriate behavior, our explications are informed by discourses (Potter and Wetherell, 1987). Peoples' accounts of the conflict they are experiencing are infused with discourses and the role of the narrative mediator is to create an awareness of how discourses shape these understandings of conflict.

This emphasis on the relational domain frames conflict in terms of a socially constructed contest over entitlement. This entitlement is informed by the meaning given to discourses that operate to privilege the voices of those who are seen to hold the power over those who do not (Dunn, 2004). Conflict when viewed in this light is no longer seen as the outcome of unmet interests or needs.

The question is not about who is right and who is wrong. Rather, it asks how the meanings given to the conflict relate to the shared understanding of what a more preferred relationship would look like (ibid). It is through the telling and linking of meaning between the teller and larger stories of the community to which he/she belongs that this consensus is reached.

By locating story-telling at the heart of mediation, people experience a non-threatening culturally-sensitive environment in which they can share their experiences of the conflict and actively work towards its resolution. Stories are a comfortable medium to work with because people grow up amidst a variety of competing narratives that shape how they see themselves and others in the world. They constantly tell stories about themselves and about others. By acting both out of and into these stories, they shape the direction of the unfolding story-line (Winslade and Monk, 2000).

Emphasis is placed on the understandings that people attribute to their own experiences. By viewing people as experts of their own lives, narrative mediation offers a respectful and non-blaming approach. Problems are seen as separate from people, and it is assumed that people possess the capacities and commitment to work through their own difficulties. It aims to create a relationship between the disputing parties that is based on trust, to develop an understanding of how the past has impacted on the present, and to construct a joint narrative with solutions for the way forward (ibid).

Narrative mediation privileges the person's own understanding of his/her story over the 'facts'. The value of the story lies in its telling and interpretation, essentially how the teller understands the impact of the story on his/her life. This emphasis on how the stories create reality means that events cannot be understood separately from the dominant narratives that are held by both teller and the listener. It is not the role of the mediator to deduce the 'truth-value' of the stories. The pursuit of truth is seen as an irrelevant endeavor and the focus is on how stories construct the world rather than how they exist independently prior to their description.

This incorporation of the complexity of human experience within the practice of mediation has the potential to reach solutions that have long-standing effects. The paper will now move on to consider some implementation techniques.

Story-telling and Mediation: Linking Content and Process

The centrality of story-telling within narrative mediation involves the mediator in a process of assisting people to uncover their numerous understandings of the conflict. The process invariably shapes the content that emerges, and also privileges some content issues over others. This recognition of the connection between content and process negates any notions of neutrality on the part of the mediator.

The mediator co-narrates the stories because his/ her own interpretation of the conflict guides the line of enquiry and thus contributes towards how parties themselves understand the conflict. Redekop (2004) asserts that the mediator cannot step out of the narrative just as a fish cannot step out of water. Instead the mediator must remain conscious of his/ her own narrative, and share it with parties to a dispute in a way which “invites an alignment of narratives, in order to create a new, transformative narrative that they can share” (ibid. p. 1).

Redekop cautions that the mediator must also be careful not to step out of the narrative form to adopt an analytical stance. It is the mediator’s own understanding of peoples’ experiences in terms of narratives that helps parties to realign their narratives in meaningful ways. The mediator must be aware of how his/her own construction of the mediation process, as informed by his/her own beliefs, shapes the conversation and significantly influences the outcome. The kinds of questions that are asked are severely constrained by his/her own cultural location (Winslade and Monk, 2000) The mediator opens the stories of conflict through what is termed ‘expressions of curiosity’. Discursive listening or listening for the discourse enables the mediator to express curiosity in ways that uncover the discourses that have allowed conflict to consume the relationship (Dunn, 2004). These ‘externalizing conversations’ involve talking about both the problem-saturated story (how parties

describe the conflict) and the preferred story of relationship (the story that contains opportunities for parties to work through the conflict and create a meaningful future). The problem-saturated story frequently frames the opposing partner in a one dimensional, fixed way and is held as the only ‘true’ description of the events of the conflict (Winslade and Monk, 2000). Externalizing conversations thus help disputing parties to stop identifying with the problem story and to begin to develop shared meanings, understandings and solutions. Once this shift has occurred the mediator takes a future orientation by assisting the parties to find ways to meet their respective needs or interests in relation to the conflict.

By separating the problem from the people, and asking parties to make a judgement about the effect of the conflict, the space is opened for an understanding in which blame and shame are less significant. The parties begin to co-author a story about the functions of conflict in everyone’s lives and they are invited to work towards a more trusting relationship that will ultimately change the direction of the conflict (ibid).

As a more trusting dialogue emerges, participants begin to hear one another’s story of the problem and its effects, and to reflect on both the position they have taken and the relationship they have with the problem. They begin to identify times of agreement in relation to the problem-saturated story and also moments when the problem has not fully taken over the relationship (Dunn, 2004). These insights help to further articulate the preferred story of relationship that is in harmony with the hopes and objectives of all participants.

The capacity of these ‘externalizing conversations’ to decrease the intensity of the conflict is dependent upon the creation of a trusting environment where alternative stories can begin to emerge (Winslade and Monk, 2000). Attentive and respectful listening on behalf of the mediator involves taking stories seriously and redirecting any assumptions about underlying deficiencies in people

towards understandings of how the conflict impacts on lives and relationships (ibid). This shifts the conflict into the inter-personal realm.

When people feel hurt from the actions of others, they channel a lot of energy into reworking the conflict story in such a way that reinforces their own feeling of injustice. The mediator uses externalizing descriptions to focus parties on the impact of the conflict without becoming overwhelmed by perceived character flaws and blaming. This also allows the mediator to grasp the meaning of their distress without appearing to conspire with one party's problem-saturated description over the other (ibid).

A more detailed unravelling of how the conflict is experienced by parties involves tracing the accounts to the origin of the conflict. This is based on the notion that people in conflict with one another are likely to have had experiences that were not completely dominated by the history of the conflict. The value of this historical perspective is two-fold. It reveals the pattern of the conflict which in turn helps people to gain clarity about how the conflict is changing and possibly escalating. The mediator is then able to ask about experiences that exist beyond the conflict, thus opening up possibilities for mutual trust (ibid).

Engaging carefully in a conversation about preferred experiences that lie outside the domain of the problem opens up new discursive possibilities. It also allows the mediator to illustrate how dominant cultural discourses can entrap people into particular behaviors that in turn influence the nature and direction of the conflict. For example, power relations that operate to define relationships in the workplace are shaped by wider dominant discourses, as well as discourses that pervade management thinking. Privileged voices are typically based on hierarchy; professional qualifications and length of time with the organization (Dunn, 2004). As people develop a clearer understanding of how dominant cultural messages have

affected them and influenced their relationship to the other party, they become less constrained by guilt and self-blame (Winslade and Monk, 2000).

Once one party states clearly that he or she does not want to participate in the escalating conflict, the opportunity arises for a very different conversation to begin. The mediator is then able to ask if there have been any periods when trust was increasing rather than diminishing (ibid). Once parties recognize that a cooperative relationship is necessary to resolve the conflict it becomes possible to begin to co-author an alternative, non-problem-bound narrative that contains the basics upon which to build a resolution.

This deconstruction of the dominant story lines enables parties to map out the territory from which ways out of the conflict can be found. Winslade and Monk explain how the weaving of stories that contain discursive statements that both parties feel comfortable about can also be achieved by widening the conversation to include the voices of other people who have also been effected by the conflict, for example co-workers or children.

The preferred story that emerges must be held by the mediator as parties begin to disengage from totalizing descriptions of each other as hurtful and destructive. A key task of the mediator at this point is to create contexts in which parties have opportunities to reflect on their positions. By reflecting on the changes they are making to their relationship, parties support the growth of the alternate story. This re-negotiation of meaning creates a distance in the relationship between parties and the problem. It builds a narrative that no longer fits with the conflict story, thus allowing the co-authorship of the preferred story of relationship (Dunn, 1994).

This new story based on greater understanding must be integrated into participants' lives. The mediator encourages this integration by asking people to reflect on how they are able to work so well

together, and to identify some of the strengths that are emerging and the direction the relationship will take in the future (Winslade and Monk, 2000). Follow-up sessions with parties in which they examine the problem-solving abilities that they have developed provide valuable opportunities to build on the new story and to strengthen the relationship between the parties.

In Summation

Narrative mediation relates to the broad national agenda of transformation and restorative justice in its focus on the ongoing and ever-changing nature of inter-personal relationships. Conflict is not viewed as an end in itself, but is extended beyond the specific encounter to consider implications for peoples' lives. It considers what work needs to be done after the immediate conflict has been resolved, and what mechanisms (structural and relational) need to be set in place in anticipation of potential conflict in the future.

Personal empowerment is inherent to narrative mediation as it involves participants in joint problem-solving to create a preferred story of relationship that fits with their values, beliefs and commitments. The mediation process raises consciousness and creates organizational and community cultures that are reflective of their conduct (Manganyi, 2004). This represents a more empowering approach to the traditional 'outsourcing' one which is premised on the belief that people are unable to sort out their problems for themselves. Dunn (2004) maintains that the ultimate objective of mediation should be to bring people closer to the possibility of sorting out problems for themselves – without the need for a third person.

Narrative mediation is informed by the poststructuralist understanding that identity is socially constructed. The focus on how people make sense of dominant discourses, where they are contested, shows how conflict infiltrates and takes over relationships

(ibid). Through the deconstruction of discourses that have informed this sense of entitlement, the impact of the problem or conflict story is revealed and the preferred story begins to emerge. The final test of the success of mediation is the extent to which new understandings are carried into future relationships.

The centrality of story-telling within narrative mediation resonates with wider conflict resolution and transformation initiatives in South Africa. There is abundant evidence of the powerful ways in which story-telling has effectively shifted individuals and communities. Story-telling offers a means to process painful memories and to help people to find the personal strength to confront their experiences, as well as the courage to confront each other's pain and discomfort (Abdullah, 2003).

When people share their stories, emotions are effectively channeled and trust is encouraged. It is this inter-connectedness that enables people to empathize and feel at one with their fellow humans (ibid). Story-telling also harnesses peoples' capacity for personal reflection which is integral to bringing about a new history through which to view the present, and upon which to build the future.

Given the distinct differences in South African society, as well as our unique history, it is sometimes necessary to resolve the differences within ourselves before we can resolve our conflicts with others. People frequently hold contradictory positions which present the potential for inter-personal conflict. The process of narrative mediation, through a constant emphasis on unravelling and broadening out peoples' understandings of the conflict they are engaged in, throws up endless opportunities for the kind of reflection that will deliver this outcome.

Finally, it seems apt to consider the role of the mediator within the context of development practice. Practitioners in the field of conflict are working at the interface of a polarity, where apparent opposites

meet, and people are forced to make choices (Soal, 2005). Narrative mediation engages this polarity. It frees the mediator from the domain of imperatives and impartiality and encourages the raising of consciousness on behalf of both mediator and parties.

The capacity of the mediator to hold the paradox of competing discourses of entitlement will determine the extent to which people and communities reflect on their actions and shift their behavior. It is only when we bring about interventions that are empowering, sustainable and transforming that the real contribution of development practice will be made. Effective conflict mediation requires mediators to actively reflect on their own lives and practice so that they, along with the people they are working with, are engaged in a conscious process of ongoing development.

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