

Chapter Two

Introduction to the Literature on Mediation

Introduction

This chapter provides an introduction to the field of mediation. In particular, it contrasts various ideologies and approaches to mediation found in the extant literature. Many of the authors whose works are cited have presented mediation in bipolar dichotomies leaving readers to expect that there are two sets of mediation approaches. As will become apparent, the poles in the various dichotomies are not always defined the same way.

In its early years, mediation was relatively easy to define. As it has moved beyond experimentation toward institutionalization there is less consensus on what constitutes mediation. This may be due in part to the expansion of mediation into new dispute arenas and to the increasing involvement of individuals from other professions (most recently, law). It may also be a result of the growing number of books and journals that discuss mediation from competing standpoints. And, to the proliferation of academic courses and professional development training programs.

Mediation is said to be a communication process that reflects the context in which it occurs (Taylor and Beinstein Miller, 1994). Attention to contextual factors in the mediation literature has, however, been sadly lacking

with the exception of some recent writings on the influence of culture¹⁸ and gender on conflict and its resolution. Some of the literature on conflict and gender is reviewed in this chapter because gender is one of four the contextual factors used to examine the data in this study. The other three factors are 1) the dispute sector in which respondents most often work, 2) their educational background, and 3) the number of years they have been a practicing mediator. These four contextual differences were decided upon for various reasons. For one, there have been substantial, and at times contentious, discussions in the mediation community regarding differences in how mediation is practiced by those who are lawyers and those who are not. While there is much talk, there has been little research on this topic. It seemed timely to examine if, and how, these differences might impact on Canadian mediators' understandings of mediation. Attention has also been paid to distinguishing the approaches used by labour and non-labour mediators. Thus, including dispute sector as a contextual factor was also timely and relevant. The absence of an amount of research on mediation and gender, in combination with studies that suggest men and women negotiate differently, were reasons for including gender as a contextual variable. Finally, it seemed prudent to include time as a variable given that one of the

¹⁸ For a discussion of conflict and culture see Lederach, John Paul, *Preparing for Peace: Conflict Transformation Across Cultures*. Syracuse University Press (1995); Ross, Marc Howard, *The Culture of Conflict*. New Haven: Yale University Press (1993); Avruch, Black, and Scimecca (eds.) *Conflict Resolution: Cross Cultural Perspectives*. Westport, Greenwood Press (1991) LeBaron, Michelle, "Mediation, Conflict Resolution and Multicultural Reality: Culturally Competent Practice," in E. Kruk, *Mediation and Conflict Resolution in Social Work and the Human Sciences*. Chicago: Nelson-Hall, 1997: 315-335.

assumptions underlying this study is that mediation is changing as a result of its growth and institutionalization. Furthermore, economic, political and social influences are known to impact social attitudes so it is to be expected that mediators trained in past years might have different attitudes than those of today. There are many other important contextual variables that could be included in a study designed to uncover differences in how mediation is understood. These could have included differences in race, social class, life experience, status, power, age, mediation training, characteristics of the parties, type of dispute and the nature of the conflict situation, to name some. These variables are left for other studies to examine.

The chapter begins with an overview of the history of mediation followed by some of its defining features.

I. The Rise of Mediation

Mediation is an old and common form of conflict resolution (Kressel, Pruitt and Associates, 1989). Like many modern practices, it is an adaptation of something that existed in other countries and other times. In ancient China, mediation was the principle means of resolving disputes. It was based on Confucian beliefs about the existence of a natural harmony in human affairs that should not be disrupted. Adversarial proceedings were seen as the antitheses of harmony (Folberg and Taylor, 1984). Mediation in China continues to be widely practiced today through the People's Mediation

Committee¹⁹. In Japanese law and customs mediation also has a rich history, and in parts of Africa the *moot* or neighbourhood meeting has long provided an informal mechanism for resolving interpersonal disputes. In England, mediation has existed since Anglo-Saxon times.

The transplanting of alternative dispute settlement systems to North America is thought to have come from Europe by way of the Quakers (Whiting, 1982). Their settlement procedures handled disputes ranging from commercial transactions to marital disagreements, and coexisted with the English system of law providing disputants with a choice for how to deal with their disputes. The use of alternative forms of dispute resolution was, however, not limited to the Quakers. The Dutch and Scandinavian settlers also utilized private means of dispute resolution. In fact, mediation has long been seen as a “natural” way to deal with conflict. Extended families, elders, clan members, religious leaders, friends, and neighbours have all offered their wisdom and skills to assist in the resolution of social conflicts.

Why has mediation become popular again and why now? Golberg, Green and Sander (1985) speculate on the confluence of events that led to the renewal of interest in mediation. They describe the 1960’s as a time of

¹⁹ According to Dr. Yan Ling Chang from the Law School of Su Zhou University, in 1988 China had six million mediators and one million committees to deal with civil disputes, which included quarrels, property rights, assault, fraud, and theft. In that same year, mediators, who are unpaid and locally elected, dealt with 7.255 million cases. Less than one million of these ended in court appearances. (This information came from a talk by Dr. Chang at Carleton University in 1991.)

considerable strife and conflict emanating in part from civil rights struggles, protests over the Vietnam War, student unrest, growing consumer awareness, gender role re-examination, and acceptance of divorce as a common event. Each of these gave rise to reduced tolerance for perceived wrongs and grievances, which were turned into legal disputes. Conflicts that in the past might have been resolved by deference, avoidance, or resignation were directed to the courts resulting in the statutory creation of many new causes of action. Cries for equal access to justice on behalf of minority groups resulted in even greater reliance on formal legal structures. The shift from an industrial society to one of technology and information created new social problems, over-reliance on existing institutions and a demand for new avenues of dispute settlement. Thus, the growth of mediation has been fed by a growing dissatisfaction with formal adversarial processes (Burger, 1982; Auerbach, 1983). Also by reports which indicate that the cost of court-administered justice has risen sharply, and that long courtroom delays are becoming the norm²⁰. Various social goals are said to undergird mediation's development. They include: community empowerment (Wahrhaftig, 1982); court reform (Zuber, 1987); restorative justice (Wright, Martin, and Gallaway, 1989); self-determination (Bush and Folger, 1994); and, the preservation and enhancement of relationships (Folberg and Milne, 1988).

²⁰ See, for example, the work of the *Civil Justice Review First Report*. Ontario Court of Justice, 1995 and the *Supplemental and Final Report*, 1996; Hon. T. G. Zuber, *Report of the Ontario Courts Inquiry*. Ministry of the Attorney General, 1987; *Report of the Canadian Bar Association Task Force on Alternative Dispute Resolution: A Canadian Perspective*, 1989.

Defining Mediation

In its simplest form, mediation can be defined as a process of assisted or facilitated negotiation. A fuller definition is put forward by Chris Moore.

Mediation is the intervention of an acceptable, impartial and neutral third party who has no authoritative decision-making power to assist contending parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute (1986:6).

Lon Fuller believes that the central quality of mediation is:

...its capacity to reorient the parties towards each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and disposition toward one another (1971:325).

The practice of mediation is subject to interpretation and debate; however, there do appear to be elements common to most mediation models. Mediators assist negotiation. They do not hold decision-making power. They help disputing parties understand each other through effective communication. Parties need to go beyond positions to uncover interests (Fisher and Ury, 1981). Parties are best able to generate options for settlement. And, mediation is future, more so than past, oriented. A number of assumptions underlie most mediation approaches. It is a consensual process. Parties should be empowered to resolve their own disputes to the greatest extent possible. Parties will be more compliant with an agreement they have themselves constructed. Parties need to vent emotions and they need to feel heard. It is the nature of mediation that is said to set it apart from

more traditional dispute resolution processes. It is more commonsense-based, less bureaucratic, more humane, and more efficient.

Mediators serve a number of functions including that of catalyst, educator, translator, expander of resources, bearer of bad news, agent of reality, and scapegoat. To meet these and other functions, a mediator should be capable of appreciating the dynamics of the environment in which the dispute is occurring. He or she should be an intelligent and effective listener, as well as articulate, patient, non-judgmental, flexible, forceful and persuasive, imaginative and resourceful. A mediator should also be a person of professional standing or reputation. They should be reliable and capable of gaining access to necessary resources, non-defensive and a person of integrity. As well as, being humble, objective and neutral with regard to the outcome of a dispute (Stulberg, 1981:94).

Mediators are called into negotiations for a variety of reasons. Their services are requested when the emotions of the parties prevent a settlement, when communication between the parties is poor, when misperceptions or stereotypes hinder productive exchange, or when repetitive negative behaviors create barriers. They may also be called in when there are serious disagreements over data, there are multiple issues in dispute and parties disagree on how to address them, there are perceived or actual incompatible value differences that divide the parties, or the parties have

reached an impasse (Moore, 1986). Some writers assume the objective of mediation is to make parties aware of the “social norms” applicable to their relationship, and to persuade them to accommodate themselves to the structure imposed by these norms (Goldberg, Green and Sander, 1985). In other words, the authors suggest that the difference between mediation and adjudication would be that whereas a judge *orders* the parties to conform, a mediator *persuades* them to do so. There are others who suggest that mediation is not directed toward achieving conformity to norms, but toward the creation of relevant norms. They believe that mediation processes can produce new structures. This led proponents of community-based models to argue that mediation brings about neighbourhood empowerment, social change, equal distribution of power among citizens, and reductions in reliance on services provided by the government (Wahrhaftig, 1982; Shonholtz, 1984). They see the goal of mediation as promoting a just society in which power is more evenly distributed. Also as a means for neighbourhood residents to resolve their own disputes without recourse to state institutions. Mediation is claimed to be faster, less expensive, and better suited to tailoring outcomes to the needs of the parties. This in turn is said to lead to greater satisfaction with resolutions, higher levels of compliance than with adjudicated decisions, and improved capacity for resolving future disputes without external intervention. Other positive qualities of mediation are said to include: that solutions reached are more flexible than those of the other mechanisms, that it avoids the win-lose syndrome, and that the process involves inquiry into

what parties want to talk about, not only what the judge wants to hear (Kressel, 1989:40).

Criticisms of Mediation

There are those who do not support the use of mediation in the resolution of social conflict. Women's rights activists are concerned that through mediation women may lose their leverage in bargaining and receive less in the way of settlement than would be offered through formal court processes (Rachofsky, 1985; Hart, 1990). They also argue that a more sophisticated understanding of power is required for mediation to serve the interests of women (Shaffer, 1988). And, that mandatory mediation is especially harmful to women (Grillo, 1991). Others are concerned that mediators may try to reduce tensions by altering perceptions, thus promoting the illusion of harmony and a false spirit of agreement (Nader, 1991). The concern is that resulting agreements may push aside tension surrounding dispute for a time, only to emerge later causing more serious conflict situations. A number of legal scholars have expressed concerns about mediation as "second class justice". These were based on the potential for violating legal rights (Tomasic and Freeley, 1982), exploitation of the less powerful and use of coercion (Jaffe, 1983), and expansion of state control into private lives (Abel, 1982). Their arguments suggest that power differentials may result in the more powerful party refusing to participate in mediation or dominating to the point of intimidating the less powerful one into a potentially

inequitable agreement. In her article, *Myth And Practice In The Mediation Process*, Merry (1989) refutes the belief that mediation enhances social justice, and she emphasizes the need to take a hard look at what mediation is and, is not. She goes on to say that even though mediation may be more humane, responsive, and participatory, it does not have any long-range impact on the distribution of power, or on the social and economic pressures of working-class family problems.

The use of third-party neutrals is no longer associated only with labour or international disputes. Mediators are increasingly called upon to resolve disputes about family relations, child custody, contractual obligations, defective automobiles, professional malpractice, waste disposal sites, noise, and playground squabbles. And while clergy, elders, and community leaders continue to assume the role of mediator, an increasing number of “professional” mediators are now part of the dispute resolution community. As will be seen, not everyone subscribes to the same approach toward mediation practice. Expansion in the use of mediation and in those who act as mediators is changing the character of mediation. No longer is there agreement on what mediation is, or, should be.

II. Contrasting Approaches to Mediation

Mediation is a varied concept. Differing philosophies and approaches guide it and these differences have been analyzed in various ways. The

common practice when classifying approaches to mediation has been to situate them as polar opposites. Or, as Nader (1984) would say, as binary positions. Early studies of mediation classified mediators' approaches as being either *content* or *process* interventions. Content interventions focused on substantive issues while process interventions focused on communication and relationship factors. Other examples of dualistic notions of mediation include Schwerin's (1995) work, which classified interventions as contrasting schools of thought about a mediator's role - one as facilitator, the other as activist. Similarly, Riskin (1996) described mediators as facilitative or evaluative. Bush and Folger (1994) contrasted styles of mediation as transformative or problem-solving. And, Kolb (1983) characterized mediator functions as dealmaker or orchestrator. These typologies characterize mediators as being either passive facilitators or active shapers of solutions. Other theorists seeking to order the diverse methodologies of mediation also created dualistic classification systems. They include broad versus narrow, open versus closed, positional versus interest-based, settlement versus process-oriented, and individualistic versus relational. Four often cited mediation classification schemes are depicted in summary form on the following table (Table 1). They include the work of Silbey and Merry (1986), Bush and Folger (1994), Kolb and Associates (1994), and Riskin (1996).

Table 1. Four Mediation Classification Schemes

Silbey & Merry 1986	BARGAINING STYLE	THERAPEUTIC STYLE
	<ul style="list-style-type: none"> - purpose of mediation is to reach settlement - job of mediator is to look for bottom-lines, narrow issues, control process, be an agent of reality - structured - frequent use of caucus - settlement based on parties "wants" - claim authority based on expertise in managing process and in law - less direct communication between parties - agreements written without parties present 	<ul style="list-style-type: none"> - purpose is to help parties reach understanding - disputes viewed as communication problems - focus is on communication and relationships - parties encouraged to express feelings and attitudes - emphasizes mutuality - claim authority based on expertise in managing relationships - explore past relations - less discussion of legal issues - agreements written with parties present
Bush & Folger 1994	PROBLEM-SOLVING APPROACH	TRANSFORMATIVE APPROACH
	<ul style="list-style-type: none"> - individualist worldview - disputes viewed as problems to be solved - focused on reaching agreement - mediators decide what case is about, drop issues that cannot be handled, directive style - conflict emerges from unmet and incompatible needs - solutions maximize joint satisfaction 	<ul style="list-style-type: none"> - relational worldview - disputes viewed as opportunity for moral growth and transformation - greater sense of own efficiency - two dimensions: <ol style="list-style-type: none"> 1) empowerment – strengthening of self to reflect, make choices and act 2) recognition – ability to move beyond self to relate to others
Kolb & Assoc. 1994	SETTLEMENT FRAME	COMMUNICATION FRAME
	<ul style="list-style-type: none"> - mediators work to uncover elements of a deal and convince parties to accept - directive, activist role, "deal-maker" - evaluative – provide case precedent and risks to non-settlement - make suggestions, persuade and influence - make judgments about good and bad agreements 	<ul style="list-style-type: none"> - goal is to help understand conflict - influence how issues are framed and understood - conversation fosters agreements - settlement secondary to attaining mutual understanding - less directive, - "orchestra leader"
Riskin 1996	EVALUATIVE APPROACH	FACILITATIVE APPROACH
	<ul style="list-style-type: none"> - urges parties to accept settlement - develops and proposes settlement - predicts court outcomes and impact of not settling - assesses strengths and weaknesses of legal claims & probes parties interests 	<ul style="list-style-type: none"> - helps parties evaluate proposals - helps parties develop proposals - asks about likely court outcomes - helps parties understand issues and interests - asks about strengths and weaknesses of legal claims and focuses discussion on underlying interests

i) *The Bargaining versus Therapeutic Approach*

Silbey and Merry (1986) carried out one of the early observational studies that examined mediators at work. After observing one hundred and seventy-five mediation sessions involving forty different mediators, they concluded that bringing cases to settlement required mediators to develop a repertoire of strategies. To organize their observations of patterns within various strategies, they constructed a classification scheme that consisted of two ideal-type descriptions of mediator styles - the bargaining style and the therapeutic style. They differentiated the two styles on the basis of a number of factors. How mediators present themselves and the mediation process, how they control the mediation process. The control they have over the substantive issues to be mediated. And, how they activate commitments to encourage settlement. Silbey and Merry note that their styles describe regular patterns of dealing with problems rather than the categorizing of mediators, and that a single mediator uses both styles to some extent.

In their typology, the bargaining style is one where mediators show a greater measure of control on the process and where they focus on settling the dispute based on what parties “want”. Mediators claim authority based on their expertise in process, law, and the court system, and they define the purpose of mediation as reaching settlement. This style tends toward a structured process with overt control over the proceedings, use of private caucuses, and less direct communication between parties. The job of the

mediator is “to look for bottom lines, to narrow issues, to promote exchanges, and to side-step intractable differences of interest” (Silbey and Merry, 1986:20); in other words, to become an “agent of reality”. Bargaining mediators typically write agreements without parties present.

The therapeutic style focuses more on communication and relationships and less on settlement. It assumes that disputes are more a result of miscommunication than differences of interests. Thus, parties are encouraged to fully express their feelings and attitudes as a means of resolving their differences. Mediators claim authority based on expertise in managing relationships. They describe the purpose of mediation as helping people to reach mutual understanding through collective agreement. They expand the discussion by exploring past relations and issues not directly related to the dispute. There is less discussion of legal norms than in the bargaining style. The therapeutic style emphasizes the mutuality, reciprocity, and self-enforcement of agreements; agreement writing is a collective activity.

Silbey and Merry tell us that “mediation strategies develop through interaction with the parties who come with sets of expectations, wants and skills” (p.19). And, that “neither the relationship of the parties, not the type of case (small claims, spouse abuse, neighbourhood dispute), not the sex of the mediator seems to determine which style eventually predominates” (p.19).

They go on to suggest, however, that with increased experienced mediator strategies become more pronounced toward one mode or the other.

ii) *The Problem-Solving versus Transformative Approach*

A more recent account of how mediation is approached has been put forward by Bush and Folger (1994) in their book, *The Promise of Mediation*. They describe current mediation practice as encompassing a directive and problem-solving approach where reaching agreement is paramount. The problem-solving approach is based on an individualist worldview where conflict is seen to emerge as a result of unmet and incompatible needs. Disputes are viewed as problems to be solved and solutions are sought that maximize joint satisfaction. Bush and Folger contrast this approach with a transformative model of mediation that gives individuals a greater sense of their own efficacy and a greater openness to others. This approach is based on a relational view of others, which views individuals as possessing an inherent form of consciousness that connects them to each other as well as having diverse needs and desires. Disputes are viewed, not as problems to be solved, but as opportunities for moral growth and transformation. Two dimensions make up the transformative approach – empowerment and recognition. Empowerment involves the strengthening individuals' abilities to reflect, make choices and act in a conflict situation. Recognition involves "becoming more open, attentive, sympathetic and responsive to the situation of the other party" (p.89). As with Silbey and Merry's typology, Bush and

Folger's problem-solving and transformative constructs represent opposite ends of a continuum of mediation practice.

Bush and Folger contribute to our understanding of mediation through their characterization of the different accounts or, as they put it, "stories" of the mediation "movement". They portray the *Satisfaction Story* as a tool to reduce court congestion. The *Social Justice Story* is portrayed as a vehicle for organizing people and communities to obtain fairer treatment. The *Oppression Story* signals the presence of covert means of social control and oppression. The *Transformation Story* is said to be a way to foster a qualitative transformation of human interaction (1994:15). The presence of these "stories" give Bush and Folger confidence that mediation is pluralistic, not monolithic, and that it has different impacts on society as a result of value choices determined by the setting of goals for mediation. They go on to suggest that:

... not all mediators follow the practices described by any one story of the movement. Rather, there are different approaches to mediation practice, with different and varied impacts, and the different stories depict these different approaches. Therefore, at a factual level, none of the stories is "the true story", each is probably a valid account of the practices of some number of mediators working in the field today (p.25).

While they acknowledge the diversity of mediation, Bush and Folger believe it is impossible to achieve all of the goals at one time. They argue that the dominant pattern of practice which has emerged focuses on solving problems

and getting settlements, and that little attention is being given to coalition building or transforming disputants. They are not alone in reaching this conclusion. Nolan-Haley said, “much of what passes for mediation today resembles evaluative services, hybrid settlement processes or rough justice” (1995:149). Bush and Folger are concerned about the direction that mediation has taken. They argue strongly that moral growth and transformation are the most important goals of mediation and should become the “guiding vision of the movement” (p.28). And, they use this evaluative emphasis on transformation or settlement as an analytic tool for classifying mediation approaches.

iii) *The Settlement versus Communication Approach*

Deborah Kolb and Associates (1994) used the metaphor of “framing” to characterize the interpretive schemes that mediators use to organize their activities. Based on their study of twelve influential mediators from different sectors²¹, two primary frames, settlement and communication, reflected the tendency of mediators to define their roles and structure their activities.

In Kolb’s typology, mediators who frame their role as settlement tend to work toward uncovering the elements of a possible deal and convincing the

²¹ Sectors included family, divorce and child custody, special education, environmental, labour, community, international, business, public policy and public housing.

parties to accept the deal, leading them to be seen as “dealmakers”²².

Settlement mediators are directive, taking an activist view of the role of the mediator. They frequently provide evaluative information based on case law, precedence and risks to non-settlement. They also make judgments about good and bad agreements, offer suggestions, persuade and influence parties.

Mediators whose frame is characterized as enhancing communication work to keep the parties talking so that they can better understand their conflict.

Reaching a settlement is considered secondary to attaining mutual understanding. Communicative mediators are less directive seeing their role as the “orchestra leader” causing them to influence the ways parties talk, how issues are framed, the way the problem is understood, and the flow of information. They are much less directive than settlement mediators.

Although frames translate into specific actions, Kolb suggests that they do not appear to be preset and often reflect on-the-spot decision making (1994:470).

iv) *The Evaluative versus Facilitative Approach*

Riskin (1996) tackled the problem of representing what mediation is and what mediators do by proposing a system for classifying mediator orientations. His grid for evaluating the character of mediation styles emphasizes two contrasting features: how mediators view the role of the

²² Also see other works by Deborah Kolb, “To Be a Mediator: Expressive Tactics in Mediation,” 1985:11-26; “Strategy and The Tactics of Mediation,” 1983:247-268; “Roles Mediators Play: State and Federal Practice,” 1981:1-17; *The Mediators*, 1983.

mediator (evaluative or facilitative) and how mediators define the problem (narrow or broad). The evaluative mediator assumes that the participants want and need the mediator to provide direction while the facilitative mediator assumes the parties are capable of developing better solutions than those a mediator might create. An evaluative-narrow approach to mediation practice would involve a mediator assessing the strengths and weaknesses of parties' claims, predicting court outcomes, developing and proposing a settlement, and pushing parties to settle based upon his or her assessment. An evaluative-broad perspective also seeks settlement but uses a process, which emphasizes interests over positions, with the mediator's proposed solutions attempting to accommodate these interests. A facilitative-broad approach helps the parties understand and define the problems they wish to address, and facilitates a discussion of underlying interests rather than positions. The parties are encouraged to generate and assess proposals designed to accommodate those interests. A facilitative-narrow mediator helps parties become "realistic" about their situation, but does not use his or her own assessments, predictions, or proposals to construct agreements. Riskin's typology is designed to help disputants determine what kind of mediation they wish to undertake and what type of mediator to seek.

One of the contributions of the Riskin typology is the notion that mediation approaches are not tightly contained – that there is some fluidity within the concepts. That being said, Riskin also states that mediators

usually have a predominant orientation that is based on a combination of his or her personality, experiences, education, and training (1994:113). He also suggests that mediators may depart from their orientation to respond to the dynamics of the conflict situation.

These depictions of mediators at work have a number of things in common. For one, they posit mediators as having either a settlement goal or a relational goal; mediators are rarely seen to use both sets of goals. In fact, the assumption is that if you follow one set of goals you are not following the other. Silbey and Merry's bargaining style, Bush and Folger's problem-solving approach, Kolb's settlement role, and Riskin's evaluative typology are similar in that they describe mediators as valuing the goal of reaching a settlement. In turn, these goals are reflected in a mediator's style of mediation, which is characterized as structured, directive, and focused on making a deal. In these characterizations, mediators are seen to take an activist role, to propose solutions, and to be less concerned about direct communication between the parties. These approaches to mediation are contrasted with the therapeutic, transformative, communicative, and facilitative typologies, which are also quite similar. In general, they emphasize relationship building, mutuality, understanding, empowerment, and recognition. In these approaches mediator styles are described as less directive, focused on feelings and emotions, and more communicative.

The result of these analytical typologies is to understand mediation in dichotomous terms. This dichotomous way of analyzing this field leads us to believe that, for the most part, there are only two sets of mediation meanings. While this form of binary placement analysis may be instructive for demonstrating conceptual differences, it has major weaknesses. For one, dichotomous positioning pits one concept against another and gives it “pride of place” by allowing it to become the standard that measures the other. For another, it tends to be rigid and over-simplistic thus, preventing more varied approaches to mediation practice from being revealed and legitimated. As with most dichotomies this positioning also tends to mask what are often complex forms of interaction between concepts.

The research being reported on in this dissertation supports the view that characteristics from both poles in a dichotomy can be present in a single mediation approach. The analysis also suggests that these characteristics interact in different ways to yield different patterns of understandings about mediation. Individual mediators, as well as groups of mediators, often used more than two patterns of meanings when conceptualizing mediation. Patterns of meanings are also linked to various internal and external contextual factors.

Before moving to look at gender as a contextual influence on mediation, one other typology for understanding mediation is briefly

mentioned. This typology was constructed by Ellen Waldman (1996). It is discussed here because, while it is not a dichotomous representation of the nature of mediation, her research was used to construct the scenarios used in the data collection instrument. Furthermore, various questions on the instrument were coded using her typology and have been included in the variable-ordered matrix table used in the analysis found in Chapter 7.

v) *The Social Norm Approach*

According to Waldman, categorizations of mediation such as the four discussed previously share a common theme in that they distinguish approaches that make reference to social norms and those that do not. This observation led her to devise a typology that focused explicitly on the role of social norms in mediation. Waldman's typology includes three mediation models: norm-generating, norm-educating, and norm-advocating. Each of the models is believed to share common assumptions, follow similar procedural routes, and employ many of the same mediative techniques. The distinguishing features of the three models are as follows. The norm-generating model is inattentive to social norms and seeks above all else to give maximum autonomy to the disputants. The norm-educating model is premised on the belief that knowledge of social norms is a precondition to autonomous decision making. In the norm-advocating model the mediator assumes responsibility for ensuring certain societal principles are included in an agreement in addition helping the parties reach an agreement that

satisfies their individual needs. Waldman believes that diversity could be assured if legislation made clear that all three models were embraced in their appropriate contexts.

III. Taking Context into Account

As mentioned previously, conflict takes place within a context and is influenced by that context. Social, economic, political and cultural contextual factors each influence how an individual perceives a conflict situation and interacts with it. To illustrate this point, Merry (1993) tells us that individuals with lower class status have more faith in adversarial than consensual processes preferring the former because they are believed to be fair and impartial. As well, some ethnocultural groups prefer not to use mediation programs because they wish to keep their conflicts private (LeBaron, 1997). Furthermore, mediation has been heavily criticized for producing “second class justice” when it was found that a disproportionate number of clients diverted to mediation programs were poor, black and predominantly female (Jaffe, 1983; Tomasic and Freeley, 1982). Questions about the transferability of mediation across cultural boundaries are increasingly attracting the interest of scholars and practitioners. The influence of gender on the mediation process, the parties involved, and the mediator is also receiving increased attention. Attempts to look at gender and conflict have been stimulated by the belief that gender shapes conflict issues as well as conflict management processes (Taylor and Beinstein Miller, 1994; Kolb, 1994; Dewhurst and Wall, 1994;

Weingarten and Douvan, 1985). There is, however, agreement that significantly more attention needs to be paid to contextual considerations in both the practice and evaluation of mediation. This was confirmed in the lack of literature that took into account any of the four contextual factors being examined in this study. While some studies did indicate that mediators strategic choices were linked contextual factors, no analysis was undertaken to link particular strategies with specific contexts. Instead emphasis was given to examining the nature of the strategies. It is worth briefly mentioning some of these studies on strategies in mediation before turning to a more lengthy discussion of gender and mediation.

Strategies employed by mediators are thought to be influenced by past experience, instruction and training as a mediator and expectations regarding the probable success of different techniques. Wall and Lynn (1993) believe a mediator's choice of strategy is also governed by rules and standards, common ground and concern for parties outcomes, dispute characteristics, the mediation context, and a mediator's ideology. Kochan and Jick (1978) suggest that mediators employ three general strategies²³. Similarly, Kressel (1977) constructed a scheme involving three general strategies - reflexive, directive and non-directive. Simkin (1971) also developed a scheme

²³ Their three strategies include: 1) non-contingent strategies, which are process-oriented and aimed at gaining the trust of the parties and gathering information; 2) contingent strategies, which are content-oriented and involve the mediator in decision-making, and 3) an aggressive strategy, which is a more extreme form of a contingent strategy.

consisting of three tactics: 1) communication 2) substantive and 3) procedural. A fourth taxonomy, provided by Sheppard (1984), consists of process, content, and motivational control strategies. Of significance in Sheppard's control strategies is that they were illustrative of mediator strategies in both labor-management and non-labor-management situations. In a study undertaken by Ross (1989), Sheppard's classification scheme was used to test the viability of classifying a range of interventions for both mediators and arbitrators. After surveying close to three hundred members of the Society for Professionals in Dispute Resolution (SPIDR), Sheppard found that mediators and arbitrators believed content control strategies were effective, and that both would use motivational and process techniques. Finally, Carnevale, et al (1989) identified four basic mediation strategies - integrate, press, compensate and inaction, as manifestations of different forms of social power. Each of his strategies is considered to be a strategic problem that is determined by a mediator's assessment of the cost and benefits.

As can be seen, strategies used by mediators have been examined using various classification schemes. And while the authors infer that contextual factors such as background, training, professional discipline and arenas of conflict may influence use of certain tactics, few have fully examined these links. This study has examined how contextual factors are linked to differences in mediators' understandings of mediation practice and

will be reported on in later chapters. Some of the research that looks at gender and mediation is now reviewed.

Gender as a Contextual Influence

Gender is said to be a social construction²⁴. It is said to organize social life, social structure, and social beliefs. Some of the conflict literature supports the argument that there are differences in the ways men and women perceive and react to conflict (Kolb, 1994). There is also literature that suggests that gender influences the way we process information about the world; hence it influences communication in and about conflict (Taylor and Beinstein Miller, 1994:5). Studies have shown that female talk is inclined toward intimacy and inclusion while men's talk is more competitive (Gourley, 1994:77). Gilligan's (1982) work shows a tendency from early childhood for females to value relationships, cooperation, and an ethic of care, whereas males tend to value rules, rights, competition, and an ethic of justice. Dewhurst and Wall (1994) found male mediators used formulations that enhanced their control of the mediation process more often than did females. Conversely, females were found to use formulations that enhanced integration between disputants by clarifying their points of agreement and disagreement more often than did males (p.297). The authors conclude that

²⁴ There is considerable debate in feminist writings about conflating gender and biological sex, as they are considered not to be equivalent, and, according to Taylor and Beinstein Miller (1994), the two concepts should not be used as if they were.

formulations to facilitate dispute resolution were used differently by male and female mediators. Based on comparisons of resolved disputes, Dewhurst and Wall did not find evidence that male and female mediators differed in perceived effectiveness. They did, however, find that in unresolved disputes men were considered to be somewhat more competent than female mediators, but that greater satisfaction with the process was expressed when mediators were female. They also found a tendency for mediators to use more formulations with same-sex disputants suggesting that males may be more inhibited when both disputants are female than when at least one is male, and vice versa. It follows that male and female mediators might want to become aware of the potential differences in their use of communication management acts, and that they would want to strive to utilize the full spectrum of formulations. In other words, men might attempt to use more integrative types of formulations and women more control formulations. Dewhurst and Wall also suggest that “male and female mediators should most definitely be sensitized to the potential differences in they ways they communicate with all-male, all-female, or mixed-sex disputants” (p.298).

Other empirical research supports the notion that male and female mediators are likely to interpret conflicting parties' communication quite differently. For example, Weingarten and Douvan (1985) found evidence supporting the contention that male and female mediators differ in the construction and interpretation of the mediation process (p.357). Female

mediators were found to envision the mediator role as collaborative and as a process of transformation and change affecting all the parties, including the mediators. Male mediators were more likely to look at their personal performance and to envision their role as one of acting on the other parties. Men used the terms neutral and objective to define themselves whereas women saw themselves as a bridge between the parties. A study by Maxwell (1992) tentatively puts forward the suggestion that gender is a surrogate variable for style and that some elements of style have a latent impact on the effectiveness of mediation. His findings indicate that “male and female mediators are equally effective at reaching an agreement, however, female mediators are significantly more effective at mediating binding settlements. The greatest gender difference occurs in emotionally charged disputes” (p.353).

There is a need to learn more about the diversity of skills and communication patterns men and women mediators bring to the mediation process. And to examine the effects these have on mediation outcomes and participants in the mediation process. At this point in time, little is known about the differential success of males and females as mediators.

Contrary to the above studies, there is research that shows little difference between men's and women's conflict behavior. The results of these studies suggest that gender may be a poor predictor of conflict

management style and that stereotypes persist because of the influence of social situations, not gender alone (Watson, 1994; Ruble and Schneer, 1994). Based on her review of selected studies on gender and conflict, Keashly (1994) shows the inconsistency of results from empirical studies, and she demonstrates that other variables besides gender account for differences in conflict behavior. She goes on to argue that “processes and outcomes of conflict depend on the nature of the relations between conflicting parties (including intimacy and relative statuses, the specific situational context in which they conflict, and the beliefs they hold about conflict” (p.167). Watson (1994) supports Keashly’s conclusion and she states that situational power based on social roles is a better predictor of negotiator behaviour and outcome than gender. Kolb (1994) cites Catherine MacKinnon (1982) to point out that because women have occupied lesser positions of influence they have had to learn ways of thinking about the world that emphasize maintaining good relationships and deference.

To sum up this section, there are many opinions, contradictory studies and few conclusive answers about the influence of gender on conflict. The fact that some research indicates there may be differences in male and female behaviour and in the way mediators perceive and respond to mediation, means that mediators should be knowledgeable about how gender (along with other contextual variables such as age, race, and class) may influence their mediation behaviour. They also need to be aware of the

philosophical base from which they practice mediation so that their biases are made clear to themselves and the parties in mediation. At the very least, these studies remind us as mediators that generalizations about gender and negotiation are difficult, complex, and oftentimes contribute to the creation of stereotypes about men and women. They also point out that inconsistencies in studies of gender could be due to other contextual factors or combinations of factors and that there is a need for more research in these areas. Studies such as this one encourage further investigation on how contextual factors shape ones thinking about mediation and, ultimately, how it shapes their practice.

Conclusion

This review of the mediation literature has shown that approaches to mediation are often presented in dichotomous classification and organizing schemes. It has also shown that allegiance to a particular ideological approach has an impact on the role a mediator assumes, the goals they set, and the strategies they use to help parties resolve their disputes. Four commonly cited typologies were highlighted to show the characteristics of each. What stands out most from this review are the similarities between the schemes. Each is constructed as a bipolar phenomenon. In each typology a pragmatic settlement-type goal is found at one pole while a relational communicative-type goal is at the other. From the depictions of these classification schemes, inferences can be drawn that a mediator's actions

place him or her at one or the other pole, not both. The authors in each of the four schemes made note that a single mediator may use some of the traits from either pole. But they also stated that mediators seem to have a dominant style and that this style can be characterized by its proximity to one or another of the two poles. Silbey and Merry (1986) take this further by suggesting that a mediators' style becomes more pronounced over time. The authors studied here seem to give little attention to how internal or external contextual factors influence a mediator's approach or call for a shift in their overall style. They do however, suggest that context does influence a mediators' choice of tactics.

Clarity about the form and function of various mediation styles, models of practice, and ideological orientations is expected to be of increasing importance as the mediation community moves toward becoming more "professionalized", and the need for an established system of knowledge heightens. This need is likely to become even stronger given that many practice-related issues have come into question as different styles of mediation present themselves – issues regarding neutrality, confidentiality, advice giving, the use of caucus, and being directive. Mediators are increasingly consumed with debates about the best and right way to practice. One of the growing concerns is that the expansion of mediation into legal and quasi-legal matters and the adoption of the role of mediator by lawyers and judges are causing mediation to become more "rights-based" than "needs-

based". Measuring success based on settlement alone is also of concern as it encourages evaluative over communicative models of practice to be valued. Another concern is that as an increasing number of newly trained mediators are drawn to work in court programs because they offer opportunities for paid work. This may yield a crop of new mediators trained in evaluative-models unaware or uninterested in the fact that different mediation modalities exist.

The literature is not consistent on whether gender accounts for differences in conflict behaviour. Some studies indicate that there may be gendered perceptions of the mediator role (men being more competitive and women more collaborative). Other studies argue that social situations, not gender, are better predictors of negotiation behaviours.

Studies conducted on what it is that mediators "do" have relied on observational studies, survey research, experiments, and content analysis. This research uses another methodology. It examines mediators' conceptualization of their actions through the patterns of meanings found in descriptions of their approach to mediation. This form of interpretive inquiry provides insight into how mediators understand their work. Variations in these understandings are then linked to contextual factors to examine further differences. As will be seen in the following chapters, this work shows elements of similar depictions of mediation to those found in the extant literature. It builds and expands upon their dichotomous presentations by

suggesting that a more complex portrait of mediation exists. A portrait that reveals that traces of understandings of mediation from both poles can be present in the same mediator. This portrait also shows the influence of gender, experience, educational background, and the dispute sector in which mediators primarily work.

This chapter has provided a backdrop for arguments presented in this dissertation. The next chapter is designed to familiarize the reader with sociological theories of professions. The desire to become recognized as a profession is one of the tensions motivating this research. Theories of professionalization indicate that some of the activities taking place within mediation are shared by other “professions in the making”. They also lead us to expect complex activities to be taking place that require methodological tools in order to understand these activities. Respondents views on the licensing of mediators and setting of standards, along with concerns about the direction the field is taking also presented in the following chapter.