The Mediation Meta Model: Understanding Practice Around the World

By Nadja Alexander[1]

This article introduces a meta-model for thinking about mediation practice. The model provides a structure for identifying different mediation approaches and how they relate to one other, thereby extending the existing literature on this topic. It makes no claim to universal application. Rather it offers a conceptual road map for an increasingly complex and sophisticated array of practices which share the name mediation.

Why are Models Useful?

Systems and models can never replicate reality since they systematize the real world in abstract form. However they are useful in ordering our thinking about a particular topic and in highlighting how theories and values influence mediator behavior. Mediator orientation, that is mediators' world-views, paradigms, behaviors and the manner in which they conduct the process, has an impact upon mediation dynamics. It can set an example for participant behaviour, can influence the contents of the agenda and affect the range of outcome options that are considered at the mediation table.[2] For mediators models provide a framework for understanding where their own practice fits within the world of mediation and ADR, and how they may be able to enhance their own professional skills base. For legal and other professional advisors and their clients, models provide an orientation to the field and in particular to the range of approaches taken by mediators. A systematic approach helps mediation participants make smart choices about mediators. It also assists them in their preparation for mediation. In the context of mandatory mediation programs, courts and other referring bodies have a responsibility to inform mediation users about the dispute resolution processes to which they are being referred. Mediation models assist these bodies to be clear about the type of mediation they want to promote and to convey this message to consumers.

Existing Mediation Models

In 1950 the German sociologist, Georg Simmel, identified the ubiquitous role of the mediator – sometimes formally recognized and sometimes not – across all cultures. Highlighting the key features of non-partisanship of the mediator and the non-determinative nature of the process, he distinguishes between, on one hand, mediators as disinterested neutral third parties (outsider mediators), and, on the other hand, mediators actively and equally concerned with the interests of all parties, such as family members and community elders (insider mediators).[3] Also adopting a cross-

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[2] C. Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of the Problem-Solving' (1984) 31 *UCLA Law Review*, 754 at 760.

[3] K.Wolff (ed), *The Sociology of Georg Simmel* (USA: Free Press Paperback 1964) I11 at 146–149. Note the similarities with Currie's distinction between professional and traditional mediators: C.

cultural perspective, the anthropologist Gulliver, locates mediators' roles on a continuum based on their level of intervention. Beginning with the very passive mediator, the roles become increasingly active and interventionist. They include chairing the process, enunciating rules and norms, and prompting and leading parties towards solutions.[4]

Reflecting on practice, mediation scholars have built on this distinction to develop specific mediation models. Riskin's original grid of mediator orientations provides a systematic approach to categorizing mediation practice and, in particular, the range of approaches used by mediators.[5] It identifies two intersecting dimensions: the role of the mediator (evaluative–facilitative) and how the problem is defined (narrow–broad). These two dimensions and the resulting four quadrants of Riskin's original grid (evaluative–narrow, evaluative–broad, facilitative–narrow, facilitative–broad) have framed much of the academic discussion on mediation models since its publication in the mid-1990s.

In 2003 Riskin revisited his original grid. The result of his critical reappraisal is a revised grid in which the author replaces 'evaluative–facilitative' with the terms 'directive–elicitive' to capture a wider range of behaviour. According to Riskin, the 'directive–elicitive' dimension of mediator behaviour focuses on the extent to which 'almost any conduct' by the mediator 'directs' the process or the participants, towards a particular procedure, or perspective or outcome, or alternatively 'elicits' the parties' perspectives and preferences.[6] The revised grid is known as the (New) Old Grid. At the same time Riskin recognizes the limitations of a single grid with two fixed dimensions, which focus only on the influence of the mediator. Consequently he introduces the 'New New Grid System', a system of grids focusing at one level on the influence not only of the mediator but of other participants in the mediation, and on a another level on three categories of mediation decision-making: procedural, substantive and meta-procedural.[7] The New New Grid System allows the dynamic of mediation to be analyzed in greater detail, at specific points in time and from a broader range of perspectives than the (New) Old Grid. However, despite its focus on mediator influence and its perceived static quality, the revised original grid remains a useful tool to systematically consider approaches to mediation.

In a similar vein to Riskin's grid approach, Boulle identifies four paradigm models of mediation: therapeutic, facilitative, settlement and evaluative mediation.[8] The author explains the features of each model and identifies their areas of application. However, unlike Riskin he does not analyze the relationship of the various conceptual models to

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Currie, 'Mediating off the Grid', (2004) 59 (2) *Dispute Resolution Journal* 11, at 11-14. See discussion of Currie's model below.

[4] P. Gulliver, *Disputes and Negotiation: A Cross-Cultural Perspective* (New York: Academic Press 1979) 200–225.

[5] L. Riskin, 'Mediator's Orientations, Strategies and Techniques', (1994) 12 *Alternative to High Cost Litigation* 111; 'Understanding Mediator's Orientations, Strategies and Techniques: A grid for the Perplexed', (1996) 1 *Harvard Negotiation Law Review* 7. See also the following mediator style index based on Riskin's work: J. Krivis and B. McAdoo, 'A Style Index for Mediators' (1997) December, *Alternatives*, also available at www.mediate.com. For criticism of the facilitative–evaluative distinction see K. Kovach and L. Love 'Mapping Mediation: The Risks of Riskin's Grid' (1998) 3 *Harvard Negotiation Law Review* 71.

[6] L. Riskin, 'Decision-Making in Mediation: The New Old Grid and the New New Grid System', (2003) 79 (1) *Notre Dame Law Review*, 1 at 30.

[7] Above Note 6 at 34–49.

[8] L. Boulle, *Mediation: Principles, Process, Practice* (Sydney: Lexis Nexis 2005) at 43–47.

one another within a systematic framework. There is some overlap between these two approaches to labeling mediation practices. Boulle's settlement mediation corresponds to Riskin's facilitative–narrow (now called elicitive–narrow) quadrant. However he bundles the grid's evaluative–narrow (directive–narrow) and evaluative–broad (directive–broad) approaches together as evaluative mediation. Conversely Boulle's therapeutic and facilitative models both fall within the facilitative–broad (elicitive–broad) quadrant of Riskin's grid.

Bush and Folger adopt yet another approach. While their focus is on transformative mediation, they have identified three practice models of mediation differentiated according to ideology: problem-solving, relational and harmony mediation.[9] Problem-solving mediation is based on an individualist world-view and a psychological/economic view of conflict. It draws heavily on negotiation theories of distributive/positional and integrative/interest-based bargaining and relies on well-known negotiation concepts such as zero-sum thinking, prisoner's dilemma, issue fragmentation, BATNA and risk analysis. Transformative mediation adopts a different perspective framed within a relational ideology. It adopts a 'social/communicative' view of human conflict and focuses on parties' abilities to transform their relationship through empowerment and recognition, so that they are able to communicate with each other in a more useful and constructive manner. Finally harmony mediation is based in 'organic' ideology and is mostly found in non-western contexts. It draws on a collectivist view of the world, namely that conflict is an issue for the community and not just the individuals involved. Here the aim of mediation is restoration of harmony in the sense of social stability and status quo to the community affected by the conflict.

While Riskin proposes that transformative mediation can be viewed within his facilitative–broad (elicitive–broad) category, he also acknowledges that proponents of that model may not be comfortable with such a categorization.[10] Indeed according to Bush and Folger's categorization, Riskin's entire grid falls within the problem-solving mediation ideology. Harmony mediation as defined by Bush and Folger finds no counterpart in any of the above models of Riskin and Boulle.

Other commentators distinguish between problem-solving and therapeutic mediation.[11] While differences emerge in the literature in relation to the definition of problem-solving mediation, commentators agree that it assumes a practice in which the mediator facilitates a negotiation process. Some explanations of problem-solving mediation highlight what is referred to as its 'dispute settlement' objective and others focus on problem-solving mediation as a 'conflict resolution' practice in terms of addressing parties' concerns, interests and motivations.[12] Conversely therapeutic

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[9] R. Bush and J. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco: Jossey-Bass Publishers 1994) at 236-248. See also D. J. Della Noce, R. Bush and J. Folger, 'Clarifying the Theoretical Underpinnings of Mediation: Implications for Policy and Practice' (2002–2003) 3(39) *Pepp. Disp. Resol. L. J.* at 47–53.

[10] L. Riskin, above note 6 at 23-24.

[11] See also Breidenbach who distinguishes between problem-solving and therapeutic forms of mediation: S. Breidenbach, *Mediation: Chancen und Risiken* (Köln: Dr Otto Schmidt Verlag 1995) at 139, and Merry, who distinguishes between therapeutic mediation and bargaining mediation: S. Merry, 'Book Review: Disputing without Culture', (1987) 100 *Harvard Law Review* at 2065.

[12] See the following articles, which highlight different understandings of problem-solving mediation: H. Burgess, 'Transformative Mediation' available www.colorado.edu/conflict/transform/tmall.htm, S. Newberry, 'Problem Solving Versus Transformative Mediation?' (2004) available at

mediation rejects negotiation paradigms in favor of systemic therapeutic interventions to address behavioral and emotional difficulties experienced by the parties.[13]

Currie criticizes models based on mediator orientations and suggests taking the emphasis away from what he identifies as the unpredictability of mediator behaviors and refocusing on the more constant qualities of mediators.[14] These are identified as: qualifications, relationship to the parties (insider versus outsider mediators), content bias (level of expertise in the subject-matter of the dispute), and authority bias (authority status and level of influence over the parties). Within this framework Currie distinguishes between what he calls 'traditional' mediators and 'professional' mediators. He argues that 'traditional' mediators have existed throughout history as community elders and that in contemporary times they also include managers, lawyers, therapists and other leaders or technical specialists. They draw on a high level of authority and content bias, and tend to adopt a more directive approach. Furthermore traditionalists are frequently insider mediators known to both parties who do not necessarily have formal mediation qualifications. Conversely, according to Currie, professional mediators have formal mediation qualifications and a high level of knowledge and skill in relation to managing conflict. They are typically outsider mediators with limited content and authority bias and therefore tend to adopt a more facilitative process-focused approach consistent with their formal qualifications. However, despite claiming to rely on stable criteria relating to mediator qualities, the traditional–professional model dichotomy still relies on interpreting the likely behaviour to flow from the criteria – for example mediators with high authority status are likely to be directive and evaluative.

Introducing a mediation meta-model

Building on the insights of the previous writers, this article introduces a mediation meta-model within which mediation practices can be represented.[15] It is based on two dimensions:

1. The basis of the interaction within the framework of the mediation (interaction dimension), and
2. The type of mediator intervention in the resolution of the dispute (intervention dimension).

The interaction dimension

The interaction dimension refers to the type of discourse that occurs in the mediation. It consists of three categories, namely positional/distributive bargaining discourse, interest-based/integrative negotiation discourse, and transformative, restorative and

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www.mediate.com/articles/redwing1.cfm, B. Spangler, 'Problem-Solving Mediation' (2003) available at www.beyondintractability.org/essay/problem-solving_mediation.

[13] See above note 11 and also D. Hoffman, 'Executive Summary of Intensive Therapeutic Mediation: Impasse-Directed Mediation as a Family Court Service and An Attempt to Develop an Intensive Therapeutic Mediation Program for the Family Court System of Santa Cruz County', *Divorce Impasse Project* available at www.courtinfo.ca.govprograms/cfcc/pdffiles/theram.pdf.

[14] C. Currie, 'Mediating off the Grid' (2004) 59 (2) *Dispute Resolution Journal* 11, at 11–14. For an analysis of professional and traditional mediators see also Nabil N. Antaki, 'Cultural Diversity and ADR Practices in the World', in J. C. Goldsmith, A. Ingen-Housz, G. H. Pointon (ed), *ADR in Business: Practice and Issues across Countries and Cultures*, (Alphen aan den Rijn: Kluwer Law International 2006).

[15] Note Riskin's reservations on the use of the term 'meta-process' in Riskin 2003, above note 6, at 3 footnote 3.

healing dialogue discourse. In each case the objective of the discourse and therefore the nature of the aspired outcome differs.

The objective of the discourse called distributive bargaining is to achieve a mutually-acceptable settlement of the dispute as defined in legal or positional terms: dispute settlement. In other words distributive – also called positional – bargaining emphasizes linear concession-making in which parties move from opening positions in ever-decreasing incremental concessions towards compromise. The opening position of the parties sets the parameters for what is assumed to be a battle of finite resources, a zero-sum game.

The integrative bargaining discourse is also known as interest-based negotiation. It encourages parties to move beyond the distributive paradigm and challenge assumptions about finite resources. This is typically done by focusing on parties' underlying interests, needs, motivations and concerns rather than their positions, demands, legal rights or claims. In doing so parties engage in negotiation which goes beyond the substantive problems in dispute and includes personal, procedural and future-focused issues. The objective of integrative negotiation is conflict resolution. Here resolution refers to an outcome that goes beyond simple settlement to address the deeper underlying interests and needs of the parties. The term 'conflict' denotes an understanding of the problem in a broader and deeper sense than the term 'dispute', which, as indicated above, typically is defined by positions. Conflict resolution therefore represents a different type of outcome to the dispute settlement associated with the first discourse.

The final discourse is called dialogue. Unlike the first two discourses, which are outcome-oriented, the immediate focus of this discourse is on the nature of the interaction among participants. The essential idea behind dialogue-based mediation is that once parties are able to communicate constructively and with respect, they are much better placed to resolve conflicts and settle disputes themselves. Accordingly specific forms of mediation-dialogue have been developed to encourage changes in communication patterns and relationships among affected parties. The objectives of dialogue-based mediation vary. They include transformation of relationships, reconciliation, healing and social transformation of an affected group or community. These are explored in greater detail below.

The intervention dimension

Mediators are said to intervene predominately either in relation to the problem or to the process.[16] This is a useful conceptual distinction although, as will be demonstrated later, it is not always readily recognizable and is sometimes blurred in practice. In reality problem-interveners manage the procedure at various levels and process-interveners may indirectly advise on the problem. Nevertheless the process/problem dichotomy remains useful for identifying a dominant intervention approach for individual mediators.

In the context of mediator interventions, problem-orientation refers to intervention in the subject-matter and on the merits of the dispute – whether of a legal, commercial,

[16] J. Haynes, G. Haynes and L. Sun Fong, *Mediation: Positive Conflict Management* (New York: SUNY 2004) at 14–15. See also L. Boulle 2005 above note 8 at 46 in relation to facilitative mediators. For critique on the process/problem distinction, see R. Ingleby, 'ADR's Claims 'Unproven'' (1992) 27 *Australian Law News* 7.

social, financial, organizational, personal or other nature. Problem interventions may include providing technical, legal or more general information, advising the parties on options outside the mediation, evaluating and even suggesting options for agreement within the mediation and proposing terms of agreement between the parties. Conversely process interventions refer to all aspects of the mediation structure and its dynamics. In terms of structure, process interventions include the use of joint and separate sessions, setting the agenda and seating arrangements. In terms of the mediation dynamics, they refer to interventions that directly impact upon how parties communicate with and relate to each other in the mediation – for example how mediators reframe party statements, how communication is channeled among parties and mediators, and the order of speaking.

The professional background and education of mediators is a significant factor in determining their intervention style.[17] Mediators who take a predominantly process-intervention approach to their practice tend to work systematically in accordance with well-recognized principles drawn from their diverse training and education backgrounds. They follow the principle that mediators direct the process, leaving the problem to the parties. Mediators act as facilitators and coaches, educating and empowering the parties to make their own decisions with respect to the conflict. Process-oriented mediators are usually selected for their process skills and their lack of connection and outsider status in relation to the parties and the conflict. The focus on process sits particularly well with the mediation goals of individual autonomy and self-determination. It also reflects the theory that parties are more likely to stick to an agreement they have constructed themselves than one which has been imposed upon them.[18] Finally a predominant process-focus clearly distinguishes mediation from advisory ADR processes such as conciliation and neutral evaluation. This approach minimizes the risks of mediator liability.[19]

While the process-focus provides the basis of most mediation training and literature,[20] mediation practices which favor problem-intervention have also flourished. Mediators from a technical–legal or judicial–arbitration background tend to intervene in the substantive aspects of the problem and adopt a directive style. Linden maintains that the primary difference between process and problem (content) experts in mediation is that subject-experts are specialized in one area rather than being generalists in several. These mediators are selected not only for their substantive knowledge but also for their high status.[21] Here status can relate to the substantive field of expertise or to the relevant industries or networks involved. Accordingly problem-interveners may be well-known or have a high level of connection to the parties for whom they are mediating. Moore refers to such mediators as 'social network mediators' as distinct from 'independent mediators'.[22] The content expertise and status of these interveners

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[17] See N. Alexander, 'Global Trends in Mediation: Riding the Third Wave' in *Global Trends in Mediation* (Alphen aan den Rijn: Kluwer Law International 2006) at 33 and C. Currie, above note 14 at 3.

[18] C. Moore, *The Mediation Process: Practical Strategies for Conflict Resolution* (San Francisco: Jossey Bass 2003) at 349.

[19] On issues of liability for mediators who intervene in the problem, see the Australian case *Tapoohi v Leewenberg* [2003] VSC 410 (21 October 2003).

[20] See, for example, Haynes et al, above note 16; Boulle, above note 8; and Moore, above note 18.

[21] See J. Linden, 'The Expert Mediator versus the Subject Expert' (2004) at http://www.mediate.com/article/lindon20.cfm at 3–4.

[22] C. Moore, above note 18 at 43–45.

is the source of considerable power. The positive correlation between the power of mediators and their directive nature has been confirmed by research.[23]
The institutionalization and legalization of mediation has contributed to the development of problem-based approaches to mediation. Mediation laws, practice directions and legislation specifying, for example, that mediators may generate options or call witnesses encourage a problem-orientation in mediation as do the following factors: the use of a flat rate payment schedule for mediations irrespective of time, the assessment of mediation success according to settlement rate, and the institutionalization of blended processes such as med-arb where the same third party (often a dispute resolution practitioner more experienced in arbitration than mediation) takes on the mediation and arbitration roles.[24]

Process-orientation is frequently associated with elicitive techniques, and problem-orientation with directive techniques.[25] Mediators who use an elicitive approach view themselves as a catalyst or facilitator rather than a substantive expert. They use curiosity to encourage participants to discover and create. Conversely mediators who see themselves as experts tend to use a directive approach and their task is to impart this expertise to the mediation participants. These are useful generalizations and it is important to recognize that skilled mediators command a range of techniques regardless of their dominant problem- or process-orientation.

While it is helpful to distinguish problem from process interventions, it is equally important to recognise that the conduct of the process can influence significantly how the problem is discussed. Where mediators intervene in the process to support the parties' conversation, they may also – knowingly or not – intervene in the problem. Mediator interventions in relation to agenda setting illustrate this point well. Just as agenda items can be framed as questions, phases or words, they can also be framed to reflect parties' positions, their interests and concerns, or their needs. In this way process interventions will influence what is put on the table for discussion and what falls off the mediation table; for example a positional bargaining discourse led by a lawyer-mediator will tend to focus on the legal issues rather than the relational ones. Currie refers to two studies indicating that lawyer-mediators tend to avoid emotional aspects of conflicts and instead rely on their legal knowledge.[26]

Mediation objectives

A frequently overlooked factor in examining different approaches to mediation is that of mediation objectives.[27] Mediators and mediation programs may have different objectives. Consider the situation where the mediator is committed to maximizing the self-determination of the parties and the funding of the mediation program is

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[23] M. Watkins and K. Winters, 'Intervenors with interests and power' (1997) 13(2) *Negotiation Journal* 119–142 and S. Silby and S. Merry, 'Mediator Settlement Strategies' 1986 8(1) *Law and Policy* 7–32, also cited in Currie, above note 14.
[24] For a discussion of these and other structural factors that influence the mediation process, see N. Alexander 'Global Trends in Mediation: Riding the Third Wave' (Alphen aan den Rijn: Kluwer Law International 2006) at 19–26.
[25] See, for example, J. Linden, above note 19.
[26] R. Albert, 'Mediator expectations and professional training: Implications for teaching dispute resolution' (1985) *Missouri Journal of Dispute Resolution* 73–87 and K. Marcel and P. Wiseman, 'Why we teach law students to mediate' (1987) *Missouri Journal of Dispute Resolution* 77–87 cited in Currie, above note 14 at 4.
[27] S. Breidenbach und U. Glässer, 'Selbstbestimmung und Selbstverantwortung im Spektrum der Mediationsziele.' (1999) 4 *KON:SENS - Zeitschrift für Mediation*, 207–212.

dependent on high settlement rates. Here there is a potential clash between objectives of party autonomy and those related to outcome-driven service-delivery. Moreover participants in mediation may differ in terms of their expectations of the process. One party, on advice from her lawyer, may expect the mediator to deliver concrete advice on a quick way out of the dispute, whereas another party expects a forum in which his voice will be heard and acknowledged and in which negotiations can ensue. Yet another party might come to mediation expecting 'justice', defined in any variety of ways. Where objectives differ in a mediation setting, success is difficult to define. There is no definitive list of mediation objectives; however mediation objectives frequently include efficient settlement of disputes, access to justice, conflict resolution, reaching an agreement which meets the needs of the parties and/or other stakeholders, self-determination, transformation of destructive behaviour into a constructive conversation, reconciliation and healing of relationships and restoration of stability to communities affected by the dispute.

Where dispute settlement is the goal, the combination of problem-orientation (intervention dimension) and positional bargaining discourse (interaction dimension) is common. Conversely, reconciliation and restoration of relationships require process-orientation in dialogue-based models. In yet another situation parties may seek mutually satisfying outcomes which address their interests and concerns. Here an interest-based bargaining discourse supported by strong guidance in relation to the process is recommended.

The Mediation Meta-Model: A Model of Models

The mediation meta-model presented here demonstrates the relationship between the interaction and intervention dimensions in mediation. The horizontal dimension moves from an interaction basis of distributive bargaining discourse on the left side of the diagram towards an integrative negotiation discourse in the centre and then extends to a dialogue-based discourse on the right side of the diagram. In terms of the vertical dimension, the top row represents interventions that are primarily process-oriented and the bottom row those with a dominant problem-orientation. The combination of the two dimensions allows different mediation models to be identified. However mediations and mediators rarely fit within one category and it is important to recognise the flexibility within and overlap among the individual models. The meta-model assists in recognizing the dominant frame in a given mediation.

Six contemporary practice models of mediation are represented in the mediation meta-model. They are:

- Expert Advisory mediation,
- Settlement mediation,
- Wise Counsel mediation,
- Tradition-based mediation,
- Facilitative mediation, and
- Transformative mediation.

These six mediation practice models are explored below.

Insert Table 1 About Here

Expert Advisory Mediation

Expert advisory mediation involves a high level of mediator intervention in the problem and adopts a predominantly positional bargaining approach. The primary goals of this form of mediation are efficient delivery of settlements (service-delivery) and access to justice. These goals support the pursuance of speedy, legally- or technically-oriented settlements which, in turn, encourages a distributive negotiation discourse and advice-giving by mediators.

Expert advisory mediators are usually senior lawyers or other professionals selected on the basis of their expertise in the subject-matter of the dispute and their seniority, rather than their process skills. As expert advisors, mediators can provide participants with technical/legal information and benchmarks, and with advice on the merits of the case, on suitable settlement terms, and on likely outcomes if the matter should proceed to a determinative proceeding such as arbitration or adjudication. In terms of the interaction basis, a distributive approach in the mediation keeps parties focused on positions and rights, thereby allowing the problem to be defined in a narrow and legalistic manner and excluding broader issues from being placed on the agenda.[28] It is not uncommon for parties to be accompanied by legal representatives in expert advisory mediation. Mediated settlements usually fall within the range of outcomes that a court could have ordered.

Expert advisory mediation may be useful:

- In complex or technical matters where the parties themselves are not experts;
- Where the parties are not motivated to attend mediation, for example where it is mandatory;
- Where clients have unrealistic expectations in relation to the (legal) merits of the case;
- Where the parties require the objective opinion of an experienced and specialized professional;
- Where addressing relational aspects of the dispute is not a priority; and
- Where the parties are seeking a quick resolution of their dispute.
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This model is criticized on the following grounds:

- There is no clear distinction between expert advisory mediation, conciliation, case appraisal and neutral evaluation;
- Mediators in this model do not coach the parties in conflict resolution skills to help them help themselves;
- The mediator takes on much responsibility on behalf of the parties;
- Direct participation by the parties in the process is low, which may lead to subsequent party dissatisfaction with the result;[29]

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[28] L. Riskin, 1996, above note 5 at 42. On evaluative mediation as a substitute for arbitration see R. Baruch Bush, 'Substituting Mediation for Arbitration and the Growing Market in Evaluation Mediation, and What it Means for the ADR Field' (2002) 3 *Pepp Disp Resol. L. J.* 111.

[29] A study conducted by the Indiana Conflict Resolution Institute in 1999 found that postal workers who participated in mediation were generally more satisfied with the process, the mediator and the outcome when transformative mediation was used by an external mediator, as opposed to when a directive/problem-solving model was used by an internal mediator. External mediators represented a higher level of impartiality than internal mediators. Furthermore, the more direct party participation in transformative models led to greater satisfaction with the process compared with lower participation levels in more directive forms of mediation. See L. Bingham, 'The National Redress Evaluation Project

- By focusing on rights and positions, the interests of the parties may be neglected;
- Settlement proposals by mediators may not support the parties' long-term interests nor the improvement of their relationship;[30]
- Knowing that mediators will provide an expert opinion may encourage parties to withhold information that they do not think will enhance their case; [31]
- Expert advisory mediation does not encourage parties to acknowledge the perspective of the other side. Rather it encourages the parties to focus on their case only;[32]
- Expert advisory mediators seem to focus on a limited number of solutions that they know to have worked in the past, rather than paying attention to the multi-dimensional and unique facts of each case. As a result opportunities for a suitable outcome may be lost;[33]
- Where mediators provide opinions, it can be difficult to maintain the perception of impartiality. Parties who find the expert opinion unacceptable may subsequently consider the mediator biased;[34] and
- Mediators who intervene in the legal or technical aspects of the dispute expose themselves to a higher risk of legal claims being made against them in relation to the advice-giving aspect of their role.[35] In the United States this is referred to as the unauthorized practice of law (UPL).[36]

Settlement Mediation

In contrast to expert advisory mediation, the dominant intervention frame in settlement mediation is process-orientation, although some settlement mediators tend to intervene directly in the content of the dispute as well. However the basis of interaction is the same as in expert advisory mediation, namely positional bargaining discourse. The objectives of settlement mediation, namely service-delivery and access

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Annual Update: Is Mediation Transforming Workplace Conflict at the United States Postal Service?' Unpublished paper, Indiana University, cited in J Rendon and J Dougherty, 'Going Postal: A New Definition and Model for Employment ADR', (2000) 57(4) *The Houston Lawyer* 22.

[30] P. Carnevale, R. Lim and M. McLaughlin, 'Contingent mediator behavior and its effectiveness' in K. Kressel and D. Pruitt (eds) *Mediation Research* (San Francisco: Jossey-Bass 1989) at 237.

[31] C. Brown, 'Facilitative Mediation: The Classic Approach Retains Its Appeal', (2003-04) 4 *Pepperdine Dispute Resolution Journal* 279 at 282.

[32] See above note 31.

[33] L. Neilson, 'Mediators' and lawyers' perceptions of education and training in family mediation' (1994) 12(2) *Mediation Quarterly* 165–184.

[34] C. Honeyman, 'Understanding Mediators', in A. Kupfer Schneider and C. Honeyman eds, *The Negotiator's Fieldbook* (Washington: American Bar Association, Section of Dispute Resolution 2006) at 583. Moreover research shows that parties are more likely to be satisfied with the outcome of a dispute resolution procedure and more likely to view the overall experience as just, if it was generated by a fair procedure conducted by impartial professionals: E. A. Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum 1988) at 242.

[35] See, for example, the Australian case of *Tapoohi v Leewenberg* [2003] VSC 410 (21 October 2003).

[36] For a general discussion on UPL see David A. Hoffman and Natasha A. Affolder, *A Well-Founded Fear of Prosecution: Mediation and the Unauthorized Practice of Law* (2000) at www.acrnet.org/pdfs/hoffman-affolder.pdf. In an unreported 1996 Virginia case a non-attorney mediator was held to have engaged in UPL by drafting legal documents and giving legal advice to his clients – see www.courts.state.va.us/drs/upl/preface.html. Some states have developed guidelines in order to assist mediators in avoiding liability for unauthorized practice of law. See, for example, the Supreme Court of Virginia's *Guidelines on Mediation and the Unauthorized Practice of Law* and the North Carolina Bar's *Guidelines for the Ethical Practice of Mediation and to Prevent the Unauthorized Practice of Law*.

to justice, overlap largely with those of expert advisory mediation. In addition, and consistent with its focus on process, settlement mediation promotes party autonomy to a greater extent than expert advisory practices. Parties frequently have legal representatives in attendance at settlement mediations. With competent legal representatives in a distributive-oriented mediation, the mediator's role moves into one of a positional bargaining coach. The mediator is responsible for establishing an encouraging environment for settlement negotiations to occur between the parties.[37] In reality, however, encouragement by settlement mediators can quickly move in the direction of coercive techniques to urge parties to make concessions.

Despite its process-orientation, settlement mediators are frequently selected for their technical/legal knowledge and parties feel comfortable that they will understand the technical aspects of the dispute. As a result most settlement mediators offer a mix of process and problem interventions. Viewing the vertical process-problem dimension as a continuum, much settlement practice is located towards the centre of the dimension. As a matter of common, but by no means exclusive, practice, mediators move parties into separate sessions fairly early in the mediation process and may not reconvene in a joint session for the duration of the mediation. In these situations, the settlement mediator shuttles back and forth between the parties with offers, counter-offers, concessions, agreements and draft documents. This technique is known as shuttle mediation. It highlights the process-intervention of the mediator.

Settlement mediation may be useful:

- In situations in which positional bargaining is preferred over interest-based bargaining;
- When the outcome is more important than the relationship or where the parties want no future relationship;
- When only the parties' legal representatives attend the mediation. While lawyers may be informed as to the legal and commercial aspects of the dispute, they are less likely to be able to participate in integrative bargaining without further input from their clients;
- When parties are negotiating over a 'fixed pie'; and
- In single issue disputes.

Settlement mediation is criticized on the following grounds:

- Settlement mediation styles tend to overlook the needs and interests of the parties and their relationship. They may therefore miss the opportunity to identify suitable options for all parties – short, medium and long-term;
- The stronger, more experienced positional bargainer will always be at an advantage;
- Where legal representative are present, a focus on legal positions encourages (and arguably requires) them to take over negotiations for their clients;[38]
- Parties are unlikely to gain insights as to how to negotiate constructively with each other in the future;

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[37] See C. Moore, above note 18 at 70, and H. Astor and C. Chinkin, *Dispute Resolution in Australia*, 2nd Ed. (Sydney, LexisNexis Butterworths 2002) at 137.

[38] N. Welsh, 'Making Deals in Court-connected Mediation: What's Justice Got to Do With It?', (2001) 79 *Washington University Law Quarterly* 787 at 802.

- Settlement mediators add little, if anything, to the positional settlement techniques, including threats, tricks and bluffs, traditionally conducted by lawyers; and
- Deadlocks may be more difficult to break in the absence of creative problem-solving techniques and lateral options.[39]
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Facilitative Mediation

Facilitative mediation combines process-intervention with an integrative approach to bargaining. Like settlement mediators, facilitative mediators are responsible for creating an optimal environment for negotiation and coaching the parties through a negotiation process. However the focus of the facilitative mediator is on integrative interest-based negotiation rather than on distributive, positional-based bargaining.

This form of mediation is also known as interest-based mediation. Facilitative mediation goals are party autonomy and self-determination. Accordingly facilitative mediators restrict themselves primarily to process interventions. Parties are encouraged to reveal their needs and interests in relation to the conflict and to acknowledge the dispute from the other party's perspective. Facilitative mediators neither advise the parties on the problem, that is the merits of the dispute, nor provide them with legal information. They tend to be selected for their process and communication skills, and their lack of connection to the parties rather than their subject-matter expertise. Where legal representatives are present, they play a consultative, rather than an advocacy role. In other words, the parties speak for themselves with the support of their legal representatives.

Facilitative mediation may be useful:

- When the parties want to continue their relationship, whether it be business, social or family-related, beyond the resolution of the dispute;
- Where the parties have the capacity to negotiate on a level playing field but have experienced difficulty starting the process or have reached an impasse in the negotiations;
- Where there are opportunities for creative and future-focused solutions to address the needs and interests of the parties; and
- In multi-issue disputes, especially where the issues comprise legal and non-legal elements.[40]
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Facilitative mediation is criticized on the following grounds:

- In the absence of a mediated settlement, there is a risk that information or opinion shared at the mediation table may subsequently be used to the disadvantage of the party who revealed it. Although mediation is a confidential process, once the other party is aware of new information, the balance of power between the parties may change and new information

[39] J. Brown, 'Creativity and Problem-Solving', in A. Kupfer Schneider and C. Honeyman eds, *The Negotiator's Fieldbook* (Washington: American Bar Association, Section of Dispute Resolution 2006) at 407.

[40] See R. Whiting, 'The Single-Issue, Multiple-Issue Debate and the Effect of Issue Number on Mediated Outcomes' (1992) 10 *Mediation Quarterly* 57. However Mack summarizes the empirical evidence on this point and finds it conflicting: K. Mack, *Court Referral to ADR: Criteria and Research* (Canberra: NADRAC and AIJA 2003) at 62–63.

may be independently sourced and subsequently used in arbitration or adjudication proceedings;
- Facilitative mediation may not be suitable in situations where one or more parties have inadequate negotiation ability, for example where one of the parties has language or literacy difficulties;[41] and
- Facilitative mediation requires greater investment of time than positional bargaining approaches.

Wise counsel mediation

Wise counsel mediation combines a problem-oriented mediator intervention with an integrative approach. In other words mediators evaluate the merits of the case focusing not on the parties' rights and positions, as in expert advisory practice, but on the broader interests and concerns of the parties. The primary objective of this mediation model is access to justice in the sense of a fair forum, efficient conflict management and long-term interest-based solutions. Although advisory, this form of mediation will typically require a greater time investment than expert advisory mediation because mediators must probe beyond the surface to the level of underlying interests. However rather than coaching the parties through an integrative negotiation approach as in the facilitative model, mediators intervene to provide advice on the problem in terms of identifying interests, options, walk-away alternatives and solutions. While the final decision remains with the parties, the mediator assumes a certain level of responsibility for the options generated and the shape of the mediated agreement. Wise counsel mediators are typically selected for their high standing in the community, their communication ability, wisdom, sense of fairness and ability to understand all aspects of the conflict. The role of lawyers in wise counsel mediations varies. The more interventionist the wise counsel mediator, the more likely it is that the lawyers will play a consultative role with respect to the legal aspects of the dispute only.

Wise counsel mediation may be useful:
- In multiple issue disputes in which various parties require substantive advice on how to resolve their dispute and manage the future;
- Where parties are reluctant to initiate constructive suggestions for resolution due to feelings of pride, the need to save face or sheer stubbornness;
- Where parties are seeking wise or moral guidance;
- Where parties are seeking to allocate moral responsibility for the outcome to a 'legitimate' third party;
- Where parties have unrealistic expectations and are seeking a practical solution; and
- Where there is a power imbalance between the parties. Typical examples include where only one party is legally represented, where the parties have unequal negotiating ability in terms of literacy and language or where they are otherwise unable to negotiate equally.[42]

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[41] J. Cumming, 'Literacy Demands of Mediation' (2000) 2 (10) *ADR Bulletin*, 93 at 96. Australian research indicates that 'vulnerable consumers' that is, consumers who live in low socio-economic, geographical regions or rural areas are more likely to experience difficulty in accessing ADR schemes compared to disputants with other demographic backgrounds: T Sourdin, *An Alternative for Whom? Access to ADR Processes*, NADRAC Research Forum available at www.nadrac.gov.au.

[42] On the inability of the structures of mediation to protect vulnerable or less powerful disputants see Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: The Transformative*

Wise counsel mediation is criticized on the following grounds:

- While this form of mediation may provide the parties with an integrative solution, it does not educate the parties in terms of how to manage the agreement beyond the mediation;
- It can be difficult to maintain the perception of impartiality where mediators express views and opinions, even if they are pitched at the level of the parties' interests and concerns;[43]
- The mediator takes on much responsibility on behalf of the parties; and
- Depending on the level of input by the parties, the mediator is making assumptions about the interests of the parties and the dynamic of their relationship. If unchecked these assumptions may be incorrect and therefore have serious consequences for the parties.

Tradition-based Mediation

Tradition-based mediation has much in common with wise counsel mediation. Mediators are problem-oriented; they are usually sought out for their wisdom, status and persuasive presence rather that their technical expertise. The main differences between these two models of mediation relate to the objectives of the mediation and the nature of party interaction.

The primary aim of tradition-based mediation is restorative justice, namely to restore stability and harmony to the community, industry or group. The system maintenance function and *community*– as distinct from *party*–orientation of tradition-based mediation distinguishes it from wise-elder mediation. Whereas wise-elder mediators focus on the negotiation of party interests, tradition-based mediators view the values of the community as having priority. Community members are considered stakeholders in the conflict and mediations may be conducted in front of and with the participation of members of the group. Confidentiality plays a less significant role in tradition-based mediation compared with other models of mediation. Tradition-based mediators generate an open-ended dialogue among participants, rich in ritual, focusing on restoration of relationships within the group, reconciliation, the interests and values of the community and – frequently – public symbolism.

Mediators are usually leaders, chiefs or elders who are known by all and carry authority not only in the eyes of the disputants but also in the eyes of the community. As problem-interveners they enjoy an insider status vis-à-vis the parties and the conflict. Their position and life experience are thought to imbue them with the wisdom and insight to lead the disputants to an outcome consistent with community norms.[44]

Arguably the oldest form of mediation dating back to ancient forms of dispute resolution, tradition-based mediation continues to exist in many traditional indigenous societies such as those in Australia,[45] New Zealand,[46] Asia, the Pacific,[47] the

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Approach to Conflict (Revised ed 2005) at 15-17 and H. Astor & C. Chinkin, *Dispute Resolution in Australia* (Sydney: Butterworths 2002) at 280.

[43] See above note 34.

[44] Compare Cris Currie's 'traditional mediator' who appears to encompass qualities of expert advisory, wise counsel and tradition-based mediators, above note 14 at 13.

[45] On indigenous Australia, see L. Behrendt, *Aboriginal Dispute Resolution* (Sydney: Federation Press 1995) at 16.

Americas and Africa.[48] Many of theses societies feature a network of strong kinship ties throughout the entire community, which lends itself to a collectivist approach to conflict resolution and healing where the best interests of the community rather than the individual remain paramount. Tradition-based mediation is also practiced in religious communities where a religious elder will act as mediator. Finally mediation practiced in socialist legal-political systems emphasizes the political ideals of the community. Here mediations are conducted by community and district leaders and frequently involve public dimensions.

Tradition-based mediation may be useful:

- In easily definable communities with strong social, cultural, religious and political norms that wish to deal with their conflict internally and consistently; and
- In industries, and professional and business communities where group norms are more influential than legal norms, for example in an interpersonal dispute between office-holders in a global professional association.
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Tradition-based mediation is criticized on the following grounds:

- In post-colonial communities, community norms as interpreted by tradition-based mediators may not correspond to what minority groups such as women and youth see as appropriate standards;[49]
- It may confirm the dominant culture and narratives in the group at the expense of other voices; and
- It does not offer a space for individual party autonomy.

Transformative mediation

The primary goals of transformative mediation include transforming how parties relate to each other, healing and reconciliation of relationships, and restorative justice. Mediators are selected on the basis of their process and relationship skills and their knowledge of causes of conflict, psychology and behavioral science. In transformative mediation the mediator's role is to create an environment in which the parties can engage in a transformative dialogue, that is one through which the parties are empowered to articulate their own feelings, needs and interests and to recognise and acknowledge those of the other party.

In his analysis of the Vienna Airport mediation, Horst Zillessen describes the transformative nature of a multi-party mediation involving government, corporations and community groups. Initially the large number of participants and lack of trust

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[46] I. MacDuff, 'What you do with *Taniwha* at the table?' (2003) *Negotiation Journal* 195.

[47] See, for example, B. Goh, *Negotiating with the Chinese* (Dartmouth 1996), S. Lubman (ed.), *China's Legal Reforms* (Oxford: Oxford University Press 1996) at 1286, and A. Black, 'Alternative Dispute Resolution in Brunei-Darussalam: the Blending of Imported and Traditional Processes' (2001) 13(2) *Bond Law Review* 305.

[48] On Africa see C. Buehring-Uhle, *Arbitration and Mediation in International Business: Procedures for Effective Conflict Management* (The Hague: Kluwer Law International 1996) at 275-276, N. Shucker, 'The Role of Law in Development and Investment in Sub-Saharan Africa' (1999) 30 *Law and Policy in International Business* 667.

[49] J. Corrin Care, 'Negotiating the Constitutional Conundrum' (2006) 5 *Indigenous Law Journal* 51 at 61; for an example relating to customary debate, see L. Lindstrom, 'Straight Talk ton Tanna', in G. White and K. Watson-Gegeo eds., *Disentangling: Conflict Discourse in Pacific Societies* (Stanford: Stanford University Press 1990).

between participants made communication and decision-making difficult, lengthy and cumbersome. In an attempt to balance process efficiency with process inclusivity, the mediation structure was streamlined.

> 'This serious slimming-down of the mediation structure was made possible by changes in the attitudes and approaches of the mediation participants, which can be described as a learning process in the sense of transformative mediation. In the many work-intensive meetings they had learnt to understand and respect each other in their various, sometimes diametrically opposed interests. They had developed a sense of trust that nobody wanted to trick anybody else and for this reason they were able to accept that they would no longer take part in all meetings, because they no longer feared that this would impair their ability to defend their interests. At least equally important was the trust in the fairness of the mediation, which had developed in the course of the process and which had given almost all the participants the assurance that a decision to the detriment of a third party who was not represented at the negotiation table would not be accepted.'[50]

Therapeutic mediation is dialogue- and process-based and therefore falls within the transformative mediation category. As the name suggests, it refers to mediation practices that are drawn from systems and techniques found in therapy.[51] Typically therapeutic models have very rigorous processes – hence process-orientation – which aim to get the parties involved in a dialogue with transformative or reconciliation goals. One of the better known forms of therapeutic mediation is narrative mediation developed by Winslade, Monk and Cotter,[52] which draws upon narrative therapy.[53] Narrative mediation focuses on the stories people tell that construct their world view and accordingly their reality. Stories about conflict typically involve protagonist/victim (the storyteller) on one hand and antagonist/ victimizer (the other party) on the other. Storylines also typically involve blame and responsibility and are about what happened in the past. Different stories create different realities. Narrative mediation assists participants to deconstruct their conflicting current stories and find their own voices. It creates a space for safe storytelling and opens up opportunities for new shared stories, which give participants power to create new dialogues and identify relationships and futures by writing a new narrative. In writing their new scripts for the future, parties in narrative mediation may also engage in the option generation and problem-solving techniques emphasized in the facilitative model of mediation.

Transformative forms of mediation may be useful:

- Where the dispute is a (recurring) symptom of an underlying conflict and the parties are prepared to address it before making decisions about the dispute itself;
- In conflicts about the parties' relationship, whether of a personal, professional or business nature;
- Where significant emotional and/or behavioral issues are at stake;

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[50] H. Zillessen, (2004) 7(5) ADRB at 82.

[51] On the difference between mediation and therapy see S. Haynes, 'Mediation and Therapy: An Alternative View' (1992) 10 *Mediation Quarterly* 21 at 22–24.

[52] See Winslade, Monk and Cotter, 'A Narrative Approach to the Practice of Mediation' (1998) 14(1) *Negotiation Journal* at 38-39.

[53] On narrative therapy see M. White and D. Epston, *Narrative means to therapeutic ends* (New York: Norton 1990) M. White, *Selected papers* (Adelaide: Dulwich Centre Publications 1989), and M. White, 'Deconstruction and therapy' in D. Epston and M. White (eds) *Experience, contradiction, narrative and imagination* (Adelaide: Dulwich Centre Publications 1991).

- Where parties are arguing on the basis of values and principles; and
- Where the parties may benefit from opportunities for personal development.

Transformative mediation is criticized on following grounds:

- Transformative forms of mediation demand a greater time investment than other mediation models;
- There are few protective mechanisms in transformative models of mediation for less empowered and weaker parties;[54]
- If not conducted well, transformative forms of mediation can waste a lot of time and potentially take parties into areas where neither they nor the mediator are sufficiently skilled to deal with the underlying issues and anxieties that may arise; and
- The use of transformative forms of mediation can make the dispute (as distinct from the underlying conflict) more difficult to settle because extraneous issues are put on the mediation table.

The Mediation Meta-Model as a Tool for Researchers and Practitioners

The mediation models outlined in the meta-model provide useful theoretical constructs that both reflect and inform practice. In reality the models are fluid in their application. A mediator may start with a facilitative approach and then, upon realizing that the parties are seeking more guidance and that one party has relatively poor negotiating skills, move to a wise counsel approach. In another situation the facilitative mediator, after probing for further interests and concerns of the parties and engaging in issue fragmentation, may determine that a settlement model is more appropriate for what has shown itself to be a single issue dispute between parties who have no interest in maintaining any sort of the relationship into the future.

Moreover it is important to recognize the variety of styles within each of the six boxes. Wise counsel mediation for example, can involve varying levels of party input. At one extreme the mediator will assume a great deal about the parties' needs and interests and what an outcome in their best interests would look like. At the other extreme, the mediator while still maintaining a dominant problem-orientation, would also use a range of process interventions to elicit input from the parties about what is important for them in terms of finding resolution for the dispute. Similarly, the nature of the interaction among participants in wise counsel mediation may stray from pure integrative negotiation in the direction of distributive bargaining for some issues and towards dialogue for others. Consider this example in settlement mediation. At one extreme a settlement mediator may put the legal representatives into a room by themselves to sort out a settlement, making him or herself available as and when necessary. Here the mediator provides the negotiation environment and process support with a minimum of intervention. Another settlement mediator will move the parties and their lawyers between joint and private sessions gradually breaking down their global positions into smaller, more manageable ones and accepting input from the parties in relation to issues broader than their legal positions. Here the dominant paradigm remains positional bargaining but integrative elements are present. Yet another settlement mediator will shuttle between parties motivating, encouraging and suggesting possible zones of agreement: a shuttle process approach with some problem-oriented interventions by the mediator.

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[54] On this point see Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Revised ed 2005) at 15-17.

The mediation meta-model provides a framework. Anything more would be antithetical to the flexibility and creativity that mediation is said to offer. The meta-model provides signposting and orientation in the mediation world not only for mediators, parties and their lawyers, but also for regulators, referring bodies, researchers and students of mediation.

Regulatory bodies need to be clear about the definitional scope of their regulation. Where mediation is defined, it is important to be aware not only of the practices that fall within the definition of mediation but also of those which fall outside it. What are the consequences for those mediation models, which lie beyond the mediation definition? Does the regulation effectively prohibit other practices called mediation or does it merely fail to extend its provisions – including rights and obligations attached to diverse participants in the mediation process – to those involved in them? Moreover how do regulatory definitions affect the issue of unauthorized practice of law?

The Australian National Mediation Standards highlights one way in which these issues can be addressed. A voluntary set of standards, it does not and cannot prohibit the mediation practices that fall outside its facilitative definition. The self-regulatory provisions specifically provide for circumstances in which mediators provide expert information or advice to disputing parties. This practice in mediation is referred to as a 'blended process', and can be further defined as 'conciliation', 'advisory mediation' or 'evaluative mediation'. Mediators engaging in 'blended processes' are required to have appropriate expertise and obtain clear consent from the participants before moving into an expert advice-giving role.[55] Here the mediation meta-model can provide a guide not only for regulators, but also for mediators and other process participants seeking clarity on their various rights and obligations.

For mediators themselves the meta-model is a tool of self-reflection. Mediators are encouraged to explore the entire space within each of the six boxes, and to reflect on where they find themselves from time to time in each of the individual models. As such the meta-model can form a useful basis for monitoring self-development and for mentoring and coaching. For students the meta-model is a useful learning tool that assists in the identification of one's own intuitive style. Students frequently struggle with the gap between the reality of mediation practice and the model of mediation presented to them in training. The mediation meta-model can assist with students' understanding of where they and other mediators are situated on the mediation landscape and in which direction they would like to develop their skills.

Parties and lawyers looking for a mediator may also find the meta-model a useful starting point for mediator selection. Articulate parties with a weak legal case but strong moral and business case may seek a facilitative mediator who encourages parties to focus on interests rather than legal positions and who maximizes the parties' opportunities to negotiate the outcome themselves. In contrast lawyers who consider their clients to have a strong legal case and no real interest in continuing a relationship with the other side may prefer a settlement mediator. Where, however, parties and/or their legal advisers have unrealistic expectations, an expert advisory mediator may be more appropriate. Wise counsel mediators are suitable for cases with parties, who, for

[55] Australian National Mediator Standards 2008, Approval Standards, articles 2(4) and 5(4) and in the Practice Standards articles 2(5), (6) and (7) and 10.

various reasons, may be seeking wise, moral or simply common sense advice in their search for a practical, long-term outcome to their dispute.
From a consumer perspective, the mediation meta-model provides a guide to better understand the range of mediation products available and the nature of the mediation process selected.

In addition the meta-model supports the development of systematic client feedback and data collection in relation to mediation and mediators. A 'bad' mediation, for example, may have multiple contributing factors including a poor fit between the mediation model, on one hand, and the characteristics of the dispute and the disputants, on the other. Repeat users of mediation such as major law firms and insurance companies may find the meta-model a useful tool to debrief, analyze and share their mediation experiences.

For researchers the meta-model offers a structure for research design and analysis. In addition to systemizing data collection, the meta-model offers a conceptual map for identifying the relationship, if any, between specific mediation models, on one hand, and settlement rates and longevity of settlements, on the other.

Referrers of mediation services such as courts, ADR organizations and professional advisers provide a crucial link between consumers and mediation service providers. As sources of information about mediation, including its regulatory requirements, referral bodies have a responsibility to inform clients about the features of the mediation process to which they are being referred.[56]

Finally the mediation meta-model adds a new level of complexity to the issue of whether or not disputes are suitable for mediation. It is no longer a question of 'to mediate or not to mediate'. Rather, as this paper has shown, fitting the appropriate mediation forum to the fuss is a sophisticated undertaking in its own right. Here the mediation meta-model provides a useful selection, planning and strategy tool for referral bodies, professional advisers, intake officers, parties and others involved in making dispute resolution choices.

[56] H. Astor & C. Chinkin, *Dispute Resolution in Australia* (Sydney: Butterworths 2002) at 278.

Table 1: Mediation Meta-Model