Moving Beyond Brands: Integrating Approaches to Mediation

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Moving Beyond Brands: Integrating Approaches to Mediation

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Abstract: *Mediation has become a competition among brands vying for distinction based more on market concerns than genuine difference. This is not a positive development for a professional field of endeavor. Mediation has much more to offer than competing claims of superiority that attempt to deride and disparage the competition. This article, which is written from a sociological viewpoint, challenges these claims and suggests that the mediation community should develop instead a broader integrated approach to mediation that is pragmatic, flexible, open-source, and based on a robust theoretical foundation.*

Introduction

Within the larger discipline of alternative dispute resolution is the specific process called mediation. Mediation has been a growing field over the past few decades and encompasses a number of approaches. It is a method of settling disputes outside of the traditional court litigation system and involves a mediator who facilitates the process. The parties may be represented by attorneys who also participate. The mediator assists the parties in coming to an agreement and typically develops an agreement document which is then signed by both parties. The mediator may be a psychologist, a financial planner, attorney, retired judicial officer, or other trained professional who has studied the theory and process of mediation. There is no national licensing of mediators; however, individuals may receive certification from a training organization or may be required to meet minimum hours of training or certification from a state agency depending on the state in which they practice. (Alaska does not currently have any licensing requirements for practicing as a mediator.) Mediation is increasingly looked to as a way of dealing with the crushing case load of the court system and the rising cost of litigation.

An agency or organization offering mediation training may focus on a particular approach to the mediation process. Though in the mediation field it is unlikely that any one approach to dispute resolution can make a legitimate claim of being the "best" approach, several approaches attempt

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to do just this. In fact, it is not unusual for mediators to advocate an unwavering commitment to their chosen method across a host of disputing contexts. There has been *brand* development of different approaches — such as *evaluative* which focuses on providing an assessment to the parties, *facilitative* which focuses on assisting the parties in identifying and recognizing their interests or goals, *narrative* which focuses on discovering the story behind the dispute and establishing a shared understanding or story, and *transformative* which focuses on assisting the parties to feel recognized and empowered in resolving the dispute (Bush and Folger, 1994; Jarrett, 2009; Riskin, 1994, 1996, 2003, 2004; Winslade and Monk, 2000). While this brand development has helped mediators promote their particular practices, there is nevertheless, a potential dark side to it which the mediation community is now confronting. Branding can engender meaningless claims of distinction and superiority, and can often supplant genuine debate about the relative merits of any particular approach.

Table 1. Mediation Approaches

	Evaluative	Facilitative/ interest-based	Narrative	Transformative
Mediated interaction	Competition for most persuasive *legal position*	Conflict over competing *interests*	Conflicting *narratives*	Conflict as a *failure to recognize fellow humanity*
Brand type	Establish and apply *precedent*	Focus on *interests*	Deconstruct/ reconstruct *narratives*	Provide opportunities for mutual *empowerment* and *recognition*
Recommended practices	Provide parties with an *assessment*	Move parties from *positions* to *interests*	Uncover *dominant* and *subordinate narratives* and establish functional *shared narrative*	Encourage and reinforce instances of *empowerment* and *recognition*

But this result is not inevitable. In fact, mediators have an opportunity to turn this whole *brand* superiority phenomenon on its head. The mediation profession has reached a moment where it is not only possible, but also advantageous, to explore a diversity of approaches and potential integration of those approaches based on actual practice, i.e., an *integral* approach, rather than one based on advocated fixed commitments and often tenuous distinctions. Such an approach would acknowledge theory-to-practice connections and a potential combination of competing approaches which could reflect the realities of practice. At the same time, it would identify and acknowledge actual differences among approaches. The integral approach is above-all a brand-free, pragmatic method. It invites mediators to consider the possibility of bridging other approaches through *reflexive* practice—a practice in social science which recognizes adaptation through self-awareness, a concept developed by the French sociologist Pierre Bourdieu (Bourdieu, 1977; Bourdieu and Wacquant, 1992).

"The Integral Mediation Project" describes the process I have engaged in over the last few years to actively facilitate such a discussion among practitioners. Its focus is both the integration of theory and practice, as well as the reconciliation among approaches where appropriate. It is the intention of the project to see this integral approach grow as a viable *open-source* alternative at the various mediation centers and universities providing mediation training. The project encourages mediators to collectively develop a public professional space in which to explore a plurality of approaches that are emerging in the rigors and throes of practice, without fear of losing favored status among fellow practitioners, and without the need to adhere to fixed theoretical ideologies (Habermas, 1984, 1987, 1990). Importantly, the integral approach does not seek to exclude or denigrate alternative approaches. Rather, it simply acknowledges the reality that certain mediation approaches are becoming increasingly entrenched and institutionalized. By denigrating, or alternatively ignoring, the institutionalized approaches, the integral method would simply create yet another competing brand, which risks reproducing the same brand-bickering exchange that now beleaguers the field. Instead, integral mediation represents a true alternative to branding, creating an open-source meta-practice available to any practitioner committed to exploring and expanding integration.

This article focuses on the following: (1) the rational and pragmatic basis and need for integral mediation, (2) the exploration of mediation as a reflexive practice and the need to be aware of and to observe our actions and role in the mediation process — and our impact on the process, and (3) the argument for the development of ethics based on the integral approach and the difficulties with the neutrality and impartiality ethics put forth in contemporary mediator ethics codes.

I. The Need for Integral Mediation

Standard IX of the jointly-adopted mediator ethics code of the American Bar Association (ABA), Association for Conflict Resolution (ACR), and American Arbitration Association (AAA) (2005) provides the underpinnings for the integral approach. Pursuant to Standard IX, mediators should foster diversity within the mediation field, make mediation accessible to clients, assist the public in developing an improved understanding of mediation, and demonstrate respect for differing points of view within the field.

> Standard IX. Advancement of Mediation Practice
>
> A. A mediator should act in a manner that advances the practice of mediation. A mediator promotes this Standard by engaging in some or all of the following:
>
> 1. Fostering diversity within the field of mediation.
> 2. Striving to make mediation accessible to those who elect to use it, including providing services at a reduced rate or on a pro bono basis as appropriate.

3. Participating in research when given the opportunity, including obtaining participant feedback when appropriate.
4. Participating in outreach and education efforts to assist the public in developing an improved understanding of, and appreciation for, mediation.
5. Assisting newer mediators through training, mentoring and networking.

B. A mediator should demonstrate respect for differing points of view within the field, seek to learn from other mediators and work together with other mediators to improve the profession and better serve people in conflict.

If respect for diversity and differing points of view in the mediation field is to be meaningful, both academics and practitioners need a professional space in which they can engage in critical debate. Arguably, Standard IX therefore allows for and even supports a professional space in which mediators work out compatibilities and incompatibilities through a good faith dialogue.

Yet this does not appear to be happening with the vigor one would hope for in an emerging professional field such as mediation. There are several troubling developments that have surfaced. The field appears to be plagued by, and at times, even deadlocked by, claims of brand distinction and superiority (Farned, 2010; Jarrett, 2009). Mediators have reported that these purportedly exclusive approaches are often driven in significant part by a strong desire to create a marketing edge (Farned, 2010; Jarrett, 2006, 2009). They note that it is not unusual to hear colleagues marginalizing and even denigrating approaches other than their own. Researchers in the field of mediation have seen this repeatedly (Farned, 2010; Jarrett, 2009).

One would expect market competitors to seek to distinguish themselves by their uniqueness. This by itself might even be good for the development of the mediation field. The problem is where exaggerated claims of brand distinction and superiority work to thwart the possibilities of an authentic practice-based discourse. These claims tend to produce a pseudo-debate that risks constricting and thereby impoverishing mediation as a valuable service to society. Mediators I have interviewed over the past several years overwhelmingly agreed that this was an unproductive development in the mediation field, and that they would welcome a more practice-based open debate.

We need a forum for this open debate. Standard IX provides the aspiration and, arguably, an ethical imperative for it by expressly encouraging diversity and respect for differing points of view.[i] It is as if the drafters of Standard IX anticipated a need to foster a continuing discussion about the relative contribution and integration of the various approaches. In light of this, the mediation community needs a forum to actively develop integrative possibilities. But a truly integral approach cannot simply be an exercise in which mediators simply throw together divergent approaches in an arbitrary and capricious manner. Rather, an integral approach must work out the practical logic of each approach in order to demonstrate both authentic difference and potential integration. The integral approach, while seeking genuine goodness of fit between theory and practice and amongst

various practices, must not dismiss genuine incompatibilities where these flow naturally from practice. Otherwise it would produce false integration.

Nothing in Standard IX requires integration at the expense of unique practical applications. Integral mediation consistent with Standard IX should permit a myriad of approaches that further unique goals and objectives in mediation, often associated with divergent disciplines of origin, such as law, social work, psychology, counseling, sociology, and business, etc. In fact, the added value of *integral mediation* is that it expressly recognizes and acknowledges divergent approaches. Moreover, it challenges those who assert the superiority of one approach over others to demonstrate such superiority in the circumstances in which it is practiced. Integral mediation seeks meaningful synthesis between approaches at a practical level, where possible, without sacrificing the underlying commitments upon which these approaches are based. In short, any synthesis must flow organically from the logic of practice.

II. Mediation As A Reflexive Practice

Whether they are aware of it or not, mediators are tapping psycho-social processes within their clients and within themselves whenever they engage in the mediation process. If mediator interventions both respond to and produce psycho-social events during mediation, then mediators have the power and responsibility to act as change agents in their clients' lives. Reflexive practice can help guide the mediator in these endeavors.

Reflexive practice differs from theory development in traditional social science because it countenances an actor who influences the social world, as he or she acts *in* and *on* that world. Contrast this approach with the classical view of science, in which researchers develop a theory, derive several hypotheses, and then test those hypotheses empirically (Ellis, 1998). Accordingly, the observer adjusts the theory based on the empirical evidence, and then starts the cycle anew, incrementally adjusting and refining theory, as a disinterested bystander.

While this classic model of knowledge development is not without merit, it is not as robust as the reflexive approach in the social sphere, precisely because the social field is continually shifting and social actors within the field are self-aware agents. Perhaps, because the classic model has been the dominant paradigm in numerous academic disciplines up until recent times many in the mediation community have tended to frame practice in the terms of this classic worldview. Unfortunately, finely textured, multi-layered, and self-organizing human interactions tend to elude this classic theory development. Mediation is filled with these human interactions.

Within this classic paradigm, mediation brands have tended to become self-affirming, reproducing their own logic for any given conflict. For example, *evaluative* mediators tend to construct theory relying on the evaluative framework, which invokes precedent and previous authority. Accordingly, good mediation for evaluative practitioners tends to look like instances of evaluation. *Interest-based* mediators construct theory based on the interest-based framework.

Good mediation for interest-based practitioners tends to look like instances of interest-exploration that move the parties from legal positions to underlying interests. Further, *narrative* mediators build theory based on the narrative or story-development framework. Good mediation for this group tends to look like the unpacking of narratives. Lastly, *transformative* mediators build theory based on the humanistic framework. Good mediation for this group tends to look like encouragement of mutual recognition and empowerment. The point in each of the above is that mediators construct events in mediation based on their respective frameworks.

In contrast, reflexive practice, while acknowledging the value of theory, requires the mediator, as social actor, to recognize his or her own influence on the disputing dynamics and the potential distortion the mediator produces (Bourdieu, 1977; Bourdieu and Wacquant, 1992). The process is a dialogue, in which all parties are constantly negotiating the meaning of what is happening with the help of the mediator. The mediator does not presume to be an external observer — the mediator is as involved as the parties. Admittedly, the narrative approach also acknowledges this negotiated nature of social interaction, but the narrative method insists that language itself produces meaning. The narrative approach does not recognize the structural aspects of social reality that may be present without language — the feeling within a room and body language also affect the process. In contrast, the integral approach does acknowledge this possibility.

The frustration with a fixed approach can be seen in reports from newly-trained mediators. They often comment on their disillusionment with the stultifying nature of much mediation training. Among these individuals, there is a shared sense of disappointment about what the fixed-framework approach has produced. In many cases, mediators feel a lack of resonance between their training and their subsequent experience in mediation. Some report feeling alienated from mediation service-provider organizations because they could not make an unwavering commitment to the organization's particular mediation *brand*.

Fortunately, the reflexive approach is extremely helpful to mediators. It teaches them to pay attention to their moment-to-moment micro-interactions during mediation. With this approach the mediator has the opportunity to catalogue his or her inner experiences while working through various social conflicts with mediation participants, noting patterns, themes, and tendencies. In this way, theory development is tied much more closely to the mediator's own inner experience and the production of shared-meaning as opposed to the cataloguing of general rules and protocols. In short, reflexivity ties together experience with observation in a meaningful way.

For reflexive practitioners, it is not just the inner psychological events that are important, but their connection to activity within the "social field." From a methodological perspective, practitioners work to define the boundaries in any field of social activity and experience associated with that field. The notion of "social field" is central to reflexive practice because all meaning is thought to emerge within it. With regard to conflict analysis, the field provides the objective unit of analysis within which the practitioner determines the relevance of various social facts.

Importantly, for reflexive practitioners, practice logic is unique to each field because it emerges within particular structural, political, and cultural constraints (Bourdieu, 1977; Bourdieu and Wacquant, 1992). Thus reflexive practitioners always work to map out and catalogue inner experience not in isolation, but in relation to the constraints of the social field. This method provides far greater insight into social conflict.

Reflexive practice attempts to tackle the problem of interpretation. In order for social actors or speakers (e.g., mediators) to convey their understanding of any social situation to an interested listener or reader, they must first interpret it as they see it. To understand a speaker's message, the listeners or readers must further re-interpret the speaker's message within their own social context (Smith, 1998). With particular regard to mediation, this means the mediator, who is removed from the initial social facts in any dispute, must now attempt to gauge the degree to which each party's interpretation shapes those facts, and the extent to which the mediator's own interpretation shapes those facts still further. Each party has a distinct story which is in turn interpreted by the mediator through the mediator's own lens of experience and training.

Reflexive practice is predicated on this notion of first admitting the biases that make up one's worldview — a concept called *verstehen* by the German sociologist Max Weber (1978). Accordingly, practitioners must constantly strive to understand their own biases regarding any situation they hope to understand. This is often a demanding task, as practitioners must examine their own core assumptions and pre-suppositions in any social situation.

In mediation, the problem of reinterpretation — the mediator's reinterpreting what is transpiring during mediation — is exacerbated by back-and-forth interactions between the mediator and the parties, making matters even more difficult. In the mediation process, it is not uncommon to experience feedback loops, as information travels back and forth between various parties in all directions. It is more useful to emphasize the inter-relation between observation and experience based on moment-to-moment interactions, rather than on *preconceived* notions. In this way, reflexive practice can support mediation to develop as a complex adaptive system. Mediation requires constant reinterpretation and reassessment of what is happening with and between the parties and with the mediator him/herself.

Social conflict between social actors is, by its nature, rife with instances of increased complexity and chaos. People hire mediators because mediators are willing and able to manage the complexity and chaos of the conflict. Therefore, integral mediation, which seeks to integrate potential practices, as well as to bring practice to theory, necessitates methods capable of navigating such social complexity. Reflexive practice can produce those methods. Any meaningful attempt at integration requires some kind of reflexivity on the part of the mediator. Reflexive practice simply acknowledges that the mediator and the parties are always negotiating the very nature of social reality itself in any given conflict. Through reflexive awareness, knowledge that the integral approach taps.

III. Identifying *Integral* Practice Ethics

In any discipline, developing ethics codes that are unambiguous and consistent with best practices helps to create a foundation for that discipline. Conversely, adopting ethics purely for political expedience can undermine the discipline in the long run. In a rush to mimic other source disciplines such as law, mediator organizations have promulgated ethics codes that often clash with best practice in mediation. The legal field has played a prominent role in this adoption of certain counter-productive mediator ethics (Jarrett, 2006). Bourdieu (1986) has demonstrated that the legal field produces significant sociological forces through the dispersion of professional capital through social networks. For instance, lawyers and judges act as gatekeepers in referring clients to mediation. These actors are much more likely to refer clients to mediators whose practices fit their own respective worldviews. In the aggregate, these referrals put pressure on mediators to conform their practices to legal expectations. To gain access and continued participation, mediators soon find themselves espousing ethics that resonate with lawyer best practices.

Mediators do not ascribe malicious motives to the actors involved in these processes. Individual actors are often unaware of these effects. It is understandable that lawyers and judges would support practices they recognize and that mediators would feel the pressure to conform to juridical expectations. The problem lies in mediators' failure to recognize these influences. If the mediation community does not acknowledge them as it searches for best practices, then it hamstrings itself from determining the legitimate ways in which mediator ethics diverge from legal ethics. In order for the mediation profession to advance, mediation organizations must develop more unambiguous practice-based ethics—integral ethics.

Two legally-derived ethics stand out as particularly problematic: *impartiality* and *neutrality*. An examination of mediator ethics codes reveals that almost all of them require the mediator to be either *neutral* and/or *impartial* (Jarrett, 2006). On the surface this sounds well and good, and even desirable, but such ethics are unfitting based on the following. When I asked what mediators actually meant by "*impartiality*" and "*neutrality*," mediators provided several divergent, and sometimes contradictory, notions of what these terms mean. In fact, there was no consensus among mediators on the exact meaning of these terms. Before we can begin to meaningfully adopt these ethics we need to determine what exactly they signify.

Even if we could determine what these two ethics mean unambiguously, they still arguably do not represent best practices in mediation. The *neutrality* and *impartiality* ethics appear to have migrated from the juridical field, emerging from legal doctrines that require judges to maintain the appearance of disinterest and objectivity. It is important for litigants to view the judge's authority as fair and legitimate. This perception of legitimacy results in greater acceptance and compliance with unfavorable decisions (Bourdieu, 1986; Jarrett, 2006).

Mediation organizations appear to have un-reflexively adopted these notions completely (Mayer, 2004). This is an unintended consequence of the fixed doctrinal approach to mediation which produces blind-spots and mimicry. Unfortunately, adopting legalistic ethics will ultimately impoverish and institutionalize mediation because it renders mediation "Court Lite," preventing it from developing organically as its own independent practice. If legally-derived ethics worked without mediation, we wouldn't need mediation in the first place. Mediation came along because there was an obvious need for it as a complement to the standard litigation map. We are now ironically in danger of thwarting the potential of mediation through excessive deference to legalistic ethics.

To make matters worse, *impartiality* or *neutrality* in any abstract sense in mediation may well be impossible, so as to make such a requirement absurd and meaningless (Jarrett, 2006, 2009; Mayer, 2004). Paradoxically, exploring and admitting one's own biases is the only way one can hope to see social reality in an unbiased fashion (Weber, 1978). The problem is that imposing the *neutrality* and *impartiality* ethics on the mediator means that the practitioner cannot openly admit bias and partiality without risking potential denunciation, poor evaluations, and condemnation by the parties and their lawyers. If the mediator could admit and explore bias reflexively with the parties, the mediator may well come to gain a far more impartial view of their conflict and provide greater assistance to the parties in their efforts to resolve their dispute.

Imposing *neutrality* and *impartiality* may not only weaken the potential of mediation practice, it might even exclude certain forms of mediation, contrary to Standard IX promulgated by the Association for Conflict Resolution, the American Arbitration Association, and the American Bar Association, discussed above. It would indeed appear that the *neutrality* and *impartiality* ethics contradict the diversity ethic contained in Standard IX. Certain mediation practices that do not align themselves with standard legal doctrine may be the casualties of imposing ethics without modification from originating source disciplines. For example, researchers have noted that Hawaiian practitioners of *ho'oponopono*-reconciliation, and Native groups in North America and South East Asians who practice peace-making mediation, among other groups, have reported that imposing *neutrality* and *impartiality* requirements would actually work to undermine effective practice (Honeyman, et al., 2004; Jarrett, 2009).

Indigenous protocols often work best through the mediation work of wise and respected Elders. Many times these Elders are effective precisely because they are connected to the parties by relation or social proximity. To require such practitioners to have no biases or prior relations with parties would likely prove counter-productive to the mediation process (Honeyman, et al., 2004; Jarrett, 2006, 2009). Yet the Uniform Mediation Act, adopted in several states, like many organizational ethics codes, requires *impartiality*, unless expressly waived by the parties.[ii] This prescription fixes impartiality as the base line for practice. Do we simply redefine and romanticize

Wise-Elder mediation to exclude it from the reach of mediation's logic and debate? This may well effectively eliminate it as a form of practice because it cannot be so narrowly constrained.

One can apply similar logic to several sectors of practice including, among others, victim-offender mediation, family mediation, and child-protection mediation. For example, in victim-offender mediation cases it would be unreasonable to expect the mediator to remain issue-neutral on matters of serious crime. Surely, in these areas, we would reasonably expect the mediator to be expressly biased and evidently partial. Likewise, in family disputes, it would be unreasonable to require the family mediator to remain neutral and unbiased toward the interests of the child. Crime victims have a right to be free of crime and children have a right to good parenting, respectively. We would surely all hope that the mediator would favor the best interests of the child and would be sympathetic toward victims of crime.

In sum, these simple examples quickly demonstrate the problem of imposing inappropriate ethics on the practice of mediation. Placing unnecessary and misleading restrictions on mediators impairs their ability to engage in effective practice. The problem is that mediation cannot be easily normalized as a dispute-resolution process. We need integral ethics that represent the finely textured variations associated with each manifestation of practice. The integral approach allows for ethics that permit a variety of approaches. An integral code would simply define mediators broadly as those third parties who assist others to negotiate their conflicts. It would work out directives for particular areas of practice and applications. Regarding the *neutrality* and *impartiality* ethics, the integral approach would pursue ethics that support mediation fairness, so that all sides are fully informed and have a reasonable chance to communicate their respective interests, rather than imposing judicial ethics based on courtroom norms. Fairness could be maintained, for example, by requiring mediators to encourage the parties to engage in full participation, and to seek independent legal advice regarding any mediated settlement. Whatever one's views are on this issue, at the very least, the integral approach requires us to re-think our notions of what constitutes good mediation ethics.

Conclusion

Mediation can succeed as a valuable multi-disciplinary practice, despite the emerging tendency toward brand development. This requires an integral approach. The basis for this approach is evident in Standard IX of the American Bar Association, Association for Conflict Resolution, and American Arbitration Association respective ethics codes. Currently in the dispute-resolution field, mediation is becoming needlessly constrained. A significant part of the problem stems from a reluctance on the part of the mediation community to challenge emerging claims of brand distinction and superiority. While branding may serve to increase market-share for its respective brand proponents, unchallenged, it risks unduly restricting and thereby impoverishing mediation as a coherent and integrated professional activity. The challenge for the mediation community

is both modest and ambitious at the same time. It is modest in that it requires the mediation community to acknowledge and validate what is already happening in the practice of mediation. It is ambitious in that it invites the mediation community to explore and clearly articulate integral possibilities which call into question claims of brand exclusivity and superiority. Essentially, *integral mediation* represents the brand-free open-source alternative. As such it invites both scholars and practitioners to work in concert to explore, expand, and inter-relate various aspects of mediation theory and practice in order to unlock mediation's vast potential.

Endnotes

[i] *Model Standards of Conduct for Mediators*, approved by the House of Delegates of the American Bar Association (August 9, 2005), Board of the Association for Conflict Resolution (August 22, 2005), and the Executive Committee of the American Arbitration Association (September 8, 2005). See http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf. Retrieved February 14, 2013.

[ii] *Uniform Mediation Act*, promulgated by the National Conference of Commissioners on Uniform State Laws. Approved and recommended for enactment August 2001; amendments approved August 2003. See http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf. Retrieved February 14, 2013.

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