

Defining mediation

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Recently, talking to a very experienced mediator, we started to describe a particular practice of an attorney-mediator during one of his cases. At the end, we asked: was that mediation? Our friend told us that no, it wasn't mediation. We asked why and a long silence fell over our table. Then he confessed that it cannot tell exactly why, but somehow he felt uncomfortable with the practices we described and certainly he would not attempt to use them during his own cases. But he also agreed that, in extremis, those kinds of practices can be considered as being part of the mediation process and there were a lot of mediators using them.

Now, let's assume we were just two regular citizens, totally unaware of the whole body of literature on mediation written in the last 50 years, and we were just trying to make up our mind about using mediation in the near future. What would have been the message we had received? We would probably be shocked to learn that there was no common understanding of what mediation was and that there was no consistent body of practices enveloped by the term mediation. Do you think we would be persuaded to put our money in the game and give it a try?

We think not. When you pay for a service, you expect at least a minimum of consistency of its concepts and procedures. You do not want just a service, you want a service of quality. If there is no clear distinction between what mediation is and what is not, how can you be sure you were offered the quality stuff, not just something? Or that you have really received what you were paying for, at all? And, at least, you would expect that, if you randomly call different mediators, you'd receive the same definition of their trade.

This heterogeneous understanding of what mediation is constitutes one of the major causes of the failure to generate trust with people and thus limiting its use. Mediation will not create significant impact until this transitory stage will be globally overcome and a clear, consistent definition and description of its fundamentals will be sorted out by mediators themselves.

In 2011, in a provocative and very instructive article, Michael Leathes aimed to open a discussion about the proper definition of mediation. The reason was the lack of a universal, simple-to-use and easy-to-understand way of conveying to the public what mediation is. The problem was not that there was no definition of mediation, but rather the multiplicity of definitions, some of them vague, some long and opaque, others too limitative in their description of the process. Most of them do not tell what mediation is, but rather attempt to describe the process. Even worse, in Mr Leathes' words, "many service providers tend to see the world more through their own private lenses than from the vantage point of their customers. They wind up describing what they do, rather than properly defining mediation itself. Consequently, many institutions and mediators that have attempted to define mediation have achieved the unfortunate result of unwittingly limiting what mediation is, or could be, by virtue of the narrow comfort zone within which they operate."

Nothing is truer. Unfortunately, two years after, the problem still stands. There is still no general agreement for a universal definition of mediation. Or, the issue of defining something is usually (and logically) the first step towards making that "something" achieve an autonomous existence. As mediators, we don't stop complaining that the public is unaware of our trade, that lawyers tend to confiscate the process and turn it in something they understand and like and, thus, deviating from the true meaning and purpose of mediation, or that mediation is not regarded as a serious profession, but rather an after-hours activity, meant to solve petty disputes of people lacking the resources to use the regular venues of proper justice. Of course, it is always easier to blame others (lawyers, judges, legislators, and citizens) for our failures, but, this time, the failure is of our own making. Our inability to clearly stipulate, in very few words, what exactly mediation is and what we are doing is the very first reason why there is so much confusion about mediation and why it is so easy for others to deviate and manipulate the process to meet their own ends.

While in total agreement with Mr Leathes' analysis of the problem, we failed to understand how his initial proposed definition will solve it. Defining mediation as "consensus facilitated by a trusted neutral person" didn't bring the much-sought clarification of the issue. Does identifying mediation with consensus imply that, if there was no consensus/agreement at the end of the mediation process, the process isn't mediation? We assume that mediation is about jointly exploring interests, needs, relationship, options, choices, all with the general purpose of giving the parties as much accurate information they need in order to make educated, comprehensive decisions concerning their issues. Yes, it would be great if, at the end, the parties made a consensual decision about how to manage their dispute, but this doesn't mean that, if there is no consensus at the end, the process can't qualify as mediation. Mr Leathes' initial definition confused the means with the ends. Mediation is rather the process through which consensus is sought and achieved (if possible), not the consensus itself.

In December 2012, the article was updated to reflect stakeholder comments. We agree with the updated proposed definition of mediation as „negotiation facilitated by a trusted neutral person“. This definition correctly identifies mediation with the facilitation process of a negotiation by a trusted neutral person and not with the consensus that the process is aiming for.

Before submitting our version, let's try to better understand what a definition is and what it stands for. First, let's agree that a definition is a statement explaining the meaning of a term. Second, let's bring to attention the fact that there are, *grosso-modo*, two major types of definitions: intentional and extensional. An intentional definition contains the necessary and sufficient conditions for a thing being a part of a certain category or set. An extensional definition is a list of all things part of a specific category or set. It is obvious that what we are looking for falls into the first category. There are several rules to be followed when attempting to set up an intentional definition: it should clearly identify the specific attributes of the thing defined, it should not be circular, it should not be obscure, it should be rather positive than negative (a thing is rather than a thing *is not*) and it must strike a balance between being too wide or too narrow. Having these in mind, let's see what we can offer.

Building upon Mr Leathes' proposal, we should say that **mediation is a negotiation process facilitated by a trusted neutral person having no power of decision**. Mediation is, in fact, facilitated negotiation – a special kind of negotiation, but nonetheless negotiation. This clearly suggests the necessary self-determination of the parties and also the voluntary character of the process. It means that we can easily disqualify as being mediation processes where the parties are forced to attend and take part against their own will, where the parties cannot decide over the issues at stake or where a decision is imposed on the parties (this includes the situations when parties are presented just one viable option, thus leaving them without a real choice).

The word "facilitated" conveys the special character of mediation as a negotiation process. The parties do not attempt to solve their problem on their own, but rather with the help of a third party. This makes mediation part of a specific set of or category of dispute resolution methods – those based on the third-party intervention. It puts mediation in the same set with arbitration or litigation. But our definition makes mediation distinctive within the set by stipulating that the third party has no power of decision, in total contrast with an arbiter or a judge. **The very fact that the mediator has to facilitate consensus-building by not having the power to impose her/his own decisions upon the parties makes mediation special and unique within the set.**

Also, the definition underlines another distinctive feature of mediation as a method of solving disputes based on the intervention of a third party, which is the fact that not everyone can act as that third party and be called mediator. In order to qualify as mediator, the third party has to be a trusted neutral, meaning a person that is trusted by the parties and has no stake in their dispute (a fact that excludes extra-judicial transactions done by lawyers from being labelled mediation). So, negotiations between employees facilitated by their managers, transactions between parties facilitated by their lawyers, communication between spouses facilitated by their parents do not fall into within the range of the mediation concept.

Finally, this definition gets rid of terms that are self-defeating in marketing mediation: "attempt" and "try". We've seen literally dozens of definitions of mediation where the mediator or the parties "attempt" or "try" to find a mutually acceptable solution to a dispute. Nobody's going to trust someone just "trying" – we pay others to deliver, not to "try to deliver". Will you pay a barber who's telling you that he "is going to try to cut your hair", thus conveying to you his own doubts that a certain result can be achieved? As mediators, we do not "try" or "attempt" – we deliver. **Our trade is to facilitate negotiations**, and this is what we deliver and this is why parties pay us for. **It is the parties' job to find a solution to their dispute; our job is to facilitate that process.**

Building a not too-wide-not-too-narrow definition of mediation that tells what mediation is (as opposed to how it works or what mediators and parties do during mediation meetings) and what makes it distinctive within the specific set it belongs to is an essential step towards making mediation a mainstream method of dispute resolution. It helps it acquire a stature and a status of its own. It helps mediators offer a better understanding of their trade to potential users. It helps mediators understand their trade and promote it. And it stops others shoveling smoke with regard to mediation.

The mediation is a **negotiation process facilitated by a trusted neutral person having no power of decision**.

So now, one question still stands: should the mediator be a specially trained professional or can be anyone that has the abilities and experience to successfully facilitate a negotiation process?