Kluwer Mediation Blog

Stop Shovelling Smoke! Give users a classic definition of mediation

Michael Leathes (Corporate counsel & author) · Thursday, September 1st, 2011

The first woman to win the Pulitzer Prize for Literature was Edith Wharton in 1921, for her novel *An Age of Innocence*. Addressing what is, and is not, *classic*, Wharton wrote: *A classic is classic not because it conforms to certain structural rules, or fits certain definitions … It is classic because of a certain eternal and irrepressible freshness.*

Mediation needs a *classic* definition of itself. One does not exist. It also needs to be universal. In a field widely populated by lawyers, professionals who the great jurist Oliver Wendell Holmes Jr. noted *spend a great deal of time shovelling smoke*, we have literally hundreds of different published definitions of mediation. It's brain-curdling.

Some are complicated, dogged by long, qualified sentences, confusing those who just want to know what mediation really is. 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.

Edith Wharton's delicate yet powerful quality of *eternal and irrepressible freshness* is notably absent. No definition inspires those who know little or nothing about mediation. Most convey the sense that mediation is about dispute resolution. None is really short. A *classic* definition needs to be an assault of thought on the unthinking.

Does a *classic* definition matter? Yes! More than that, it is vital to the growth of the field and its positive perception by those that consume its services. Everyone knows what dentistry is, or architecture, accountancy, law and medicine. Popular familiarity renders these professions above the need of definition. Not so with mediation, at best an emerging (but not yet emerged) profession, one most people have yet to encounter.

Every mediation institution has its own definition. Most are 20 to 60 words strung in segmented, sometimes complex, sentences. Almost all suggest mediation is a dispute resolution process, which implies that using a mediator to help negotiate, say, a pre-nuptial agreement or any other kind of contract, is somehow not "mediation". The word "trust" is notably absent – despite educators falling over backwards emphasising its importance to mediation. There is no consistency. It all

underscores the fragmentation of the mediation field that holds back its progression into an independent global profession.

As this balkanised field tiptoes toward a set of international professional norms, voluntary standards and a consistent code of ethics, surely mediation's leaders can at least agree a *classic, universal definition of mediation*, for the benefit of the users out there. That straightforward task cannot elude the field's extraordinary talents. Can it?

Richard Buckminster Fuller is remembered for two things: patenting the geodesic dome, and his advice to the world at large – *Dare to be naïve*. Let's accept his challenge: to be naïve enough to offer a seven-word definition of mediation based on four key words – Consensus, Facilitation, Trust and Neutrality – aimed at achieving a *classic* definition of mediation that can work for everyone, everywhere – and especially for the demand side – the users, the parties and their advisers. If widely adopted, if everyone started using it, the world's leading dictionaries could be informed. If this happened, the impression created in the minds of potential users of mediation services would be electric. Here, for the first time, and not soon enough, would be something the entire mediation field could buy into, set aside market-driven one-upmanship and present a single professional identity to the world, something that can really inspire users. As Alexander Pope put it: *There is a certain majesty in simplicity which is far above the quaintness of wit*.

A possible *classic* definition is: **Consensus facilitated by a trusted neutral person**.

Consensus (Latin *sentio*: "feel") is achieved through a communication that survives the personalities, behavior, positions, assumptions, obfuscation, indecisions, tactics, half-truths, lies, misunderstandings, blame, history, exaggerations, counter-claims, threats, hidden agendas, confusion between wants and needs, distractions, cultural differences and other interferences that often characterize discussions, negotiations and dialog. The involvement of a suitable, competent neutral can help the parties "feel" their way through this quagmire to a higher quality consensus than is likely in a conventional negotiation, whether in a dispute context or not. The dynamic of a neutral presence can influence the communication in ways that transcend the capacity of the parties, individually or jointly, to achieve alone – namely, to render it more interest-based, focus on exploring options for mutual gain and enhance the parties roles as consensus-seekers.

Facilitation (Latin *facilis*: "make easier") is the act of providing assistance to ease the parties quest to achieve their goal. Facilitation can take passive and active forms, and can be facilitative, evaluative, transformative and normative. Evaluative mediators facilitate by expressing their own opinions, if that's what the parties want them to do. Mediation can be, but need not be, purely facilitative. The mediator's opinions can break deadlocks and ease the path forward. We should not trip over our own pre-dispositions, habits, cultures and philosophical approaches when defining mediation.

Trust (Old Norse *traustr*: "strong") requires acceptance by the parties that the neutral person has the competency to facilitate the discussion effectively, including skills to manage process, communicate, maintain confidentiality, question, build relationships, listen, analyze, identify issues and generate options for mutual gain. Trust also assumes that, during mediation, the neutral is felt by all parties to be the right person to facilitate the discussion in terms of competency, experience, expertise, standing and personality.

Neutrality (Latin *neuter*: "neither") involves those chosen to mediate being impartial and not

having conflicts of interests that are not known to and accepted by the parties.

Both **Trust** and **Neutrality** involve respect, a heady mixture of how mediators are perceived, their standing, competency, knowledge, wisdom, history and many other subtle and often unexpressed characteristics. Mediators have to earn trust as the mediation progresses. Impartiality, and absence of conflicts of interests, are often claimed to be vital characteristics of a mediator, but I have seen occasions where parties used a mediator who was paid and even employed by one of them – with the full support, of course, of the other party. There are situations where using a theoretically partial mediator, one with an apparent conflict of interest, can be the golden key to a successful mediation, provided the mediator is trusted by everyone to *act* impartially. There are many cases in the political arena where this has occurred. The over-arching consideration is – can the mediator be trusted and respected all round, and act neutrally?

In his April 2009 thought provoker in Mediate.com, *The End of Mediation: An Unhurried Ramble On Why The Field Will Fail And Mediators Will Thrive Over The Next Two Decades!*, Peter Adler helpfully described mediation as a *meme*. Interesting idea, and no doubt mediation is a meme, but that still does not say exactly what mediation is to the average user. All the more reason, in fact, for a short, *classic, universal* definition. Users really need this. If the service side keeps shovelling smoke around the issue, favouring one definition or another, mediation's agonising lack of clear identity in the eyes of its customers will perpetuate. What a waste of opportunity that would be.

Someone has to be naïve enough; dare to put it forward and expect constructive comment from the world's mediation stakeholders. I humbly submit that a classic, universal definition is: **Consensus facilitated by a trusted neutral person**. Please don't stay silent – please take a moment to let me know how you feel about it, supportive or otherwise. I aim to publish a follow up consolidating the thoughts that are expressed.

And when we have arrived at a classic, universal definition of mediation, we need a collective noun for mediators. It's more than a bit of fun; it might also encourage less fragmentation and more cross-institutional gatherings of mediators to share experiences, and a collegial drive for higher practice standards and more transparent professionalism. So, as a possible collective noun, how about a ***branle** of mediators*? True professionals are ambassadors for their calling. In French, *un branle* is a swing; *se metre en branle* is to swing forces into motion – as ambassadors should do. Edith Wharton lived in France, spoke fluent French, and her final resting place is the American Cemetery in Versailles. Were she alive today, might she rejoice in its ***eternal and irrepressible freshness***?

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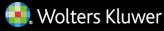*To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please subscribe here.*

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