

C 2nd **AMA** **CONFERENCE**
Sheraton Imperial Hotel
Kuala Lumpur
24-25 February 2011
**Rediscovering Mediation
in the 21st century**

TRIAL OR THERAPY; RIGHTS OR INTERESTS?

JOEL LEE
ASSOC PROF
FACULTY OF LAW
NATIONAL UNIVERSITY OF SINGAPORE

Date:	25 February 2011 (Day 2)
Time:	3:50 pm to 5:00 pm
Venue:	Nusantara Ballroom 3 (L2)

Sponsored by



CLJ

Malaysia's leading Law Publisher

Trial or Therapy; Rights or Interests?*

Introduction

Discussions about mediation are sometimes reminiscent of the story of the blind men and the elephant. In one telling of the story¹:

“Once upon a time, there were six blind men in a village. One day the villagers told them, ‘Hey, there is an elephant in the village today.’

They had no idea what an elephant is. They decided, ‘Even though we would not be able to see it, let us go and feel it anyway.’ All of them went where the elephant was. Every one of them touched the elephant.

‘Hey, the elephant is a pillar,’ said the first man who touched his leg.

‘Oh, no! It is like a rope,’ said the second man who touched the tail.

‘Oh, no! It is like a thick branch of a tree,’ said the third man who touched the trunk of the elephant.

‘It is like a big hand fan’ said the fourth man who touched the ear of the elephant.

‘It is like a huge wall,’ said the fifth man who touched the belly of the elephant.

‘It is like a solid pipe,’ Said the sixth man who touched the tusk of the elephant.

They began to argue about the elephant and every one of them insisted that he was right.”

This teaching tale is often used to illustrate notions of relativity, multiple perspectives, harmonious living or even wave-particle duality². For our purposes, it sets the stage nicely for our discussion on “Trial or Therapy; Rights or Interests?”

This paper seeks to explore the conceptual distinctions hinted at by this title and to provide some guidance in navigating through these distinctions. The first conceptual distinction we need to make is to note that the notions of “Trial and Therapy” and “Rights or Interests” are separate, albeit interrelated, concepts as they relate to mediation.

Trial or Therapy

* © Joel Lee, Associate Professor, Faculty of Law, National University of Singapore.

1 Modified from <http://www.jainworld.com/literature/story25.htm> (last accessed 7 December 2010).

2 See http://en.wikipedia.org/wiki/Blind_men_and_an_elephant (last accessed 7 Dec 2010).

Looking at the first distinction, “Trial” and “Therapy” are 2 ends of a descriptive continuum that serve different purposes. On one end of the continuum, the word “Trial” brings to mind a courtroom setting with the implication of some form of examination, testing or putting something to the proof³. In terms of dispute resolution, the idea would be to examine the facts and circumstances with a view to coming to some kind of conclusion or settlement. It is important to note that while the purpose may be settlement and closure, the word “trial” also implies that the decision does not lie with the parties. Instead, it implies that a decision is imposed on, or at the very least strongly recommended to, the parties. There is therefore a “settlement” aspect to this end of the continuum.

At the other end of the continuum, the word “Therapy”, when taken narrowly, refers to the treatment of an illness or disability⁴. One would therefore speak of undergoing therapy for a physical medical condition or for a psychological condition. In terms of the latter, while not the same, the term “counseling” is sometimes used synonymously with “[psycho]therapy”. The purpose or desired outcome would be some form of healing *with the focus on the challenges and needs of the individual*⁵. At first blush, this would not seem to fit at all with the notion of conflict resolution or mediation.

Boulle and Teh identify a number of differences between Mediation and Counseling⁶. First, counseling seeks to address long-term issues of behavior, growth or moral development while mediation seeks to make practical and efficient decisions about disputes. Secondly, counseling has a “past-orientation” and looks at the causal factors for the presenting problem whereas mediation tends to deal with the present and the future. Finally, counseling usually involves one party with an intra-personal challenge whereas mediation deals with inter-personal challenges.

It is this last point where we may find some common ground between mediation and therapy. If we were to expand its definition to encompass the treatment of physical, mental, or social disorders or disease⁷, one can see how mediation can be described as a method of treating conflict as a social disorder or as a form of dis-ease. With this expanded definition, the purpose remains healing although *the focus is now on the interaction between the parties and each party's contribution to that dynamic*. There is therefore a “transformative” aspect to this end of the continuum.

This is line with the observation that both counseling and mediation belong to the “helping professions” and that there are clear parallels between the structure of counseling and mediation

3 See <http://www.thefreedictionary.com/trial>. (last accessed 7 Dec 2010).

4 See <http://www.thefreedictionary.com/therapy> (last accessed 7 Dec 2010).

5 “Counselling and Psychotherapy” (COSCA, 2004), page 3 (<http://www.cosca.org.uk/docs/86.pdf>, last accessed 8 Dec 2010). For further distinctions between mediation and counselling, see http://en.wikipedia.org/wiki/Mediation#Mediation_and_conciliation (last accessed 8 Dec 2010).

6 L Boulle and Teh HH Mediation: Principles, Process, Practice (Singapore Edition) (Butterworths, Singapore, 2000), 69.

7 See <http://www.thefreedictionary.com/therapy> (last accessed 7 Dec 2010).

processes⁸. Further, it is recognized that even if mediation does not set out to explicitly counsel or conduct therapy, there are counseling effects in mediation such as assisting parties to relate differently to one another.

Rights or Interests

“Rights” and “interests” are concepts that a mediator has to use in a mediation to achieve his/her purpose. Rights can be defined as what the law provides for in terms of entitlements and what another might be obligated to provide. In the context of a dispute, parties generally have a sense that their rights of some sort have been breached and that they are entitled to some kind of vindication. They will then construct demands based on their understanding of what the law provides for. In the vernacular of dispute resolution, these are usually termed “positions”.

The definition of Interests follows from this. The premise is that every demand or position is motivated by a need or concern which is referred to as an interest. Seen this way, a position is simply a means to an end, the end being the interest. If one can identify the interest behind any position, one can then generate other ways of satisfying that interest which may be more acceptable to the parties involved.

While it is tempting to look for a correlation between the continuum from “Trial” to “Therapy” and “Rights” and “Interests”, it is submitted that in reality, rights and interests are part and parcel of mediation. When parties refer a dispute to mediation, they will generally start with demands and positions based on what they perceive to be their rights. What distinguishes the models of mediation is what the mediator does with these demands and positions.

Models of Mediation

This requires us to look at the different models of mediation to examining their definition, objectives and the role of the mediators. Limiting our discussion to processes that may be properly encompassed within mediation, there are 4 models of mediation to explore. Before looking at these models, it is useful to make two points.

First, the 4 models of mediation to be discussed as “ideal” or “pure” types⁹. In other words, there will be exceptions to each model and overlap between models.

⁸ L Boule and Teh HH Mediation: Principles, Process, Practice (Singapore Edition) (Butterworths, Singapore, 2000), 70.

⁹ An ideal type is an idea-construct used to make sense of the complexity of reality. An ideal type is formed from the characteristics or elements common to most cases of any given phenomena. It is not meant to correspond to all of the characteristics or elements of any one particular case. See http://en.wikipedia.org/wiki/Ideal_type (last accessed 8 Dec 2010).

Secondly, for each of these models, it is possible to rate them on a number of scales. One scale rates how “low”, “medium” or “high” the “settlement” and “transformative” aspects of each model are. A second scale rates how much attention is paid to “rights” and “interests”. A final scale rates how “low” or “high” the amount of intervention undertaken by the mediator.

The first model is Evaluative Mediation¹⁰. This can be defined as a mediation process whereby the mediator listens to the parties present their side of the story and then provides an evaluation of the strengths and weaknesses of their legal position. Apart from making an evaluation, the mediator may also suggest what s/he thinks is the solution to the problem or the proper outcome. The parties then decide whether they should settle or not and on what terms. The objective of this model of mediation is to assist the parties to reach a settlement based on their legal rights and entitlements. In this model of mediation, the mediator often plays a role characterized by content matter expertise and a **high level of intervention** over the parties and the process¹¹. Parties are **not empowered** in that while the locus of decision making stays with the parties and the mediator’s evaluation is not usually binding, it is often highly persuasive. The Evaluative model therefore has a **high “settlement”** and a **low “transformative”** function. **Further, attention is primarily paid to “rights” and very little attention to “interests”**.

The second model is Facilitative Mediation¹². This can be defined as a mediation process whereby the mediator facilitates a negotiation between both parties. Parties are asked to first present their side of the story. The mediator then assists them in identifying and exploring the interests underlying their positions. Parties are guided to explore mutually acceptable solutions before having them agree on one solution. The objective of this model of mediation is to assist the parties to reach a settlement based on their underlying needs and interests instead of their strict legal rights¹³. During this process, the mediator does not suggest potential solutions. Instead, parties are responsible for and **empowered** to come up with possible solutions. In this model of mediation, there is a **low level of intervention** and the mediator functions as a process

10 This model bears similarities to Settlement Mediation although some authors maintain a conceptual distinction between the two. See L Boulle and Teh HH Mediation: Principles, Process, Practice (Singapore Edition) (Butterworths, Singapore, 2000), 28-30.

11 Z Zumeta “Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation” (<http://www.mediate.com/articles/zumeta.cfm>, last accessed 8 Dec 2010); “Different Types of Mediation Styles” (<http://www.peoples-law.org/node/994>, last accessed 13 Dec 2010).

12 Sometimes also referred to as Problem-Solving Mediation and Interests-Based Mediation. The term “Facilitative Mediation” is often used interchangeably with “Interests-based Mediation”. It is the generally held view that for this model, there mediator merely facilitates the process. There is a contrary view suggestion that for cultures where hierarchy and status are important, there is a higher level of intervention needed on the part of the mediator. This however is quite separate from whether the mediator utilizes the interests-based paradigm. Put another way, one can practice interests-based mediation without only being facilitative. See generally An Asian Perspective on Mediation (J Lee & Teh HH (eds), Academy Publishing, Singapore, 2009). It is therefore submitted that this model is more appropriately named “Interests-Based Mediation”.

13 L T Lim & J Lee “A Lawyer’s Introduction to Mediation” (1997) 9 SAclJ 100, 106.

expert who guides the parties to create their own solutions¹⁴. The Facilitative model therefore has a **high “settlement”** and a **medium “transformative”** function. **Attention is primarily paid to the interests of the parties and attention is paid to rights only as a starting point to identify interests.**

The third model is Transformative Mediation¹⁵. This can be defined as a mediation process whereby the mediator focuses on fostering *Empowerment*¹⁶ of and mutual *Recognition*¹⁷ between the parties. In this model, settlement of the problem, while not unwelcome, is not the mediator's primary focus. In fact, the hope is that in the long run, resolution, as opposed to just settlement, of the dispute is the outcome. *Empowerment* is achieved by the mediator assisting parties in gaining clarity about their goals, resources, options and increasing their skills in resolving conflict, communicating and decision-making. *Recognition* involves assisting parties to consider the views, perspective and experiences of the other party¹⁸. In this model of mediation, the mediator functions as a teacher, mentor and coach to better equip parties to resolve their own disputes, both present and future. It can therefore be said that there is a **high level of intervention** on the part of the mediator and **empowerment** is highly valued. It follows that there is a **high “transformative” and a low “settlement”** function. **While attention is paid to rights and interests as a starting point, these serve only as entry points for the mediator assist the parties in developing their own and joint abilities to resolve the conflict through the twin heads of empower and recognition.**

The final model is Narrative Mediation¹⁹. In this model, the mediator does not focus on settling the problem instead focusing more on how parties create and perpetuate the problem through their ways of constructing their reality. The mediator assists parties in deconstructing their conflict stories, and creating the conditions for the reconstructing and growth of an alternative story which is more constructive and incompatible with conflict²⁰. The methods by which the mediator does this are varied but draw primarily on post-modern thinking. There is a **high level of intervention** and parties are **empowered** through that intervention. It follows that there is a **high “transformative” and a low, if not none-existent, “settlement”** function. **While attention is paid to rights and interests as a starting point, these serve as entry points for**

14 Z Zumeta “Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation” (<http://www.mediate.com/articles/zumeta.cfm>, last accessed 8 Dec 2010); “Different Types of Mediation Styles” (<http://www.peoples-law.org/node/994>, last accessed 13 Dec 2010).

15 RAB Bush & JP Folger *The Promise of Mediation* (Jossey-Bass, San Francisco, 1994).

16 *Empowerment* is used here as a technical term and should be distinguished from the general use of the term. When used as a technical term, the words will be represented in italics.

17 Similarly, when *Recognition* is used as a technical term, it will be represented in italics.

18 “Transformative Mediation” (Conflict Research Consortium, University of Colorado, USA), <http://www.colorado.edu/conflict/peace/treatment/tmedtn.htm> (last accessed 8 Dec 2010).

19 J Winslade and G Monk *Narrative Mediation* (Jossey-Bass, San Francisco, 2001).

20 J Winslade and G Monk “A Narrative Approach to Mediation” (http://narrative-mediation.crinfo.org/documents/mini-grants/narrative_mediation/Context_narrative_mediation.pdf, last accessed 8 Dec 2010); T Hansen “The Narrative Approach to Mediation” (<http://www.mediate.com/articles/hansenT.cfm>, last accessed 8 Dec 2010).

the mediator to identify and deconstruct the parties' stories of entitlement and create and foster a new story.

It is evident from this discussion that both the Transformative and Narrative models of mediation have a significant transformative effect. However, there are certainly differences between the 2 models²¹ and there is some suggestion that the Narrative model intersects with both the Transformative and Facilitative models at various points in its process²².

The discussion above can be represented graphically thus:

	Evaluative	Facilitative	Transformative	Narrative
Focus of Mediation	Legal Rights	Interests	Empowerment Recognition	Story
Intervention by Mediator	High	Low	High	High
Empowerment of Parties	Low	High	High	High
Settlement Function	High	High	Low	Low
Transformation Function	Low	Medium	High	High

Readers will be familiar with the proverb “Give a man a fish and will eat for a day; teach him how to fish and you feed him for a lifetime”. Expressing the various models of mediation in these terms:

- The Evaluative Model is giving the parties a fish;
- The Facilitative Model is helping the parties to fish;
- The Transformative Model is teaching the parties how to fish; and

21 J A Waxman “A Nuanced Comparison Of Transformative, Insight And Narrative Mediation” (June 2009), <http://www.mediate.com/articles/waxmanJ1.cfm> (last accessed 13 Dec 2010).

22 T Hansen “The Narrative Approach to Mediation” (<http://www.mediate.com/articles/hansenT.cfm>, last accessed 8 Dec 2010).

- The Narrative Model is helping the parties see that the story doesn't have to be about a fish.

Choices, Choices, Choices

It is clear then that depending on which part of the mediation elephant one feels, a different perspective of mediation is obtained. Unlike the blind men arguing about who is right about the elephant, it would be far more profitable for us to consider which model of mediation is appropriate for different purposes. The writer suggests that there are a number of factors to consider:

- Purpose

It is often said that one should begin with the end in mind²³. When selecting a model of mediation, it is useful to consider what is sought to be achieved. If settlement of the dispute is the primarily desired outcome, then the Evaluative and the Facilitative models would be more appropriate.

If the primarily desired outcome is conciliation or resolution (as opposed to settlement) of the dispute, then the Facilitative, Transformative and Narrative models may be indicated.

If transformation and empowerment are the desired outcomes, then clearly the Transformative and Narrative models would suit better.

- Time, Efficiency and Cost

No matter how noble one's purpose may be, practical realities often impinge upon our considerations. The time taken, of course, is one of these considerations. As a rule of thumb, mediation models that have a high settlement function tends to take less time than those models that have a high transformative function. Of course, time itself should not be the determining factor. Time simply refers to how long something, in this case the mediation process, takes.

A related and it is submitted more relevant consideration is efficiency. Efficiency is more than just the time taken to complete the process. Efficiency takes into account time by measuring against it the benefits (and this will depend on one's purpose) arising out of the process in question.

Time and efficiency can be a concern if, for example, in the context of court-annexed mediation, there is a backlog of cases and there is a need to clear it. Combined with the desired outcome of settlement, then the Evaluative model would seem most appropriate.

In this context, even the Facilitative model might seem to take too long. Another example would be where the parties want a speedy settlement to their problem. Time therefore becomes a significant consideration and the Evaluative model is indicated.

If we were to hold on to settlement as a primarily desired outcome and take away some of the time pressure as a concern, the Facilitative model may become more appropriate. This is where the difference between time and efficiency becomes more apparent. A Facilitative mediation may take up to a day but this may still be considered efficient because for the time taken, the benefits of the Facilitative mediation process justifies the time taken. The benefits of a Facilitative mediation process would include value-created outcomes that tend towards a win-win paradigm and the preservation or even improvement of the relationship between the parties.

A similar analysis can be applied to the Transformative and Narrative models of mediation. These models of mediation have a high transformative function and have the potential to not only settle the dispute but to resolve it. If this is a primarily desired outcome, then even if the process may take a week, it may still be considered efficient.

It is difficult to comment definitively on the cost of different models of mediation. At one level, one can say that cost is directly proportional to the time taken. On the assumption that a private mediator charges on a time basis, it is reasonable to conclude that models that take more time i.e. with a high transformative function, will cost more.

In some jurisdictions however, mediation is provided without charge as part of court services. For example, in Singapore, mediation services provided by the Subordinate Court's Primary Dispute Resolution Centre (PDRC) and the Family Court are without charge. Similarly, mediation services provided by the Community Mediation Centres are also without charge. By way of contrast, mediation services provided by the Singapore Mediation Centre come with charges payable. In these examples, they have varying settlement and transformative functions. As such it is difficult to find a correlation between the model of mediation used and the cost of engaging those services.

- **Nature of the Dispute and the Parties**

The nature of some matters lend themselves better to one model of mediation than another. Where the dispute involves no real issues of liability and deals only with determining compensation, the Evaluative model may serve well especially if the principles for determining compensation are clear and there is no likelihood or need for an ongoing relationship. Examples of these would be motor vehicle accident cases (without injury) or property division in family matters where there are no maintenance/custody issues.

There may be situations where the relationship between the parties have been acrimonious and have broken down to a point where there is an unwillingness to mediate. In these cases, all the parties may want is their pound of flesh and it may not be worth the time of the parties or the mediator to attempt anything other than the Evaluative model. Perhaps one way to think about it is where the parties seek vindication, at least according to the law, the Evaluative model is indicated.

It may also be that one or both of the parties are unable to mediate either because the principals or constituents they represent have no desire to mediate. Or it may be that there is a power differential between the parties that prevents them from mediating on equal terms. In both these cases, the Evaluative model may be more appropriate.

Having said that, it is important not to assume that all cases with these dispute or party characteristics should only be dealt with using the Evaluative model. An advantage of the Facilitative model is that its processes allow for the possibility of value creation. Sometimes, value is not created not because there is none to be had but because parties fail to see the possibilities and miss the opportunities to create value²⁴. Further, considering that Facilitative mediation has on average a 70% success rate and that most parties going to mediation have already tried to resolve their dispute to no avail, it must mean that despite the broken down relationships, Facilitative mediation is able to work in situations where one might think only Evaluative mediation would work.

What then are situations where value creation is possible? Generally, in matters where there are multiple issues, multiple interests (other than money), lack of clarity as to liability (whether due to evidentiary lapses on unsettled law), emotional aspects to the conflict and the need for an ongoing personal or professional relationship, there is potential for value creation. Even where there is a power differential, a skillful Facilitative mediator can assist in providing balance to parties and the process. Put another way, where the parties are seeking a solution to the problem, rather than a victory or vindication, the Facilitative model may be indicated.

Most parties and legal systems would be satisfied with having a matter be settled or solved. However, there may be times where a settlement or solution does not address what gave rise to the problem in the first place. What needs to be sought instead is resolution or even transformation. For this, we would look to the Transformative or Narrative models of mediation.

What factors would indicate that these models would be appropriate? One indication would be where there is a history of repeated difficulties or conflict between the parties. Previous attempts at Evaluative or Facilitative mediation may not have succeeded or even where they have, settling or solving that particular problem may not have been sufficient.

24 RJ Lewicki, DM Saunders & JW Minton Negotiation (McGraw Hill, Singapore, 3rd Edition, 1999), 136.

Using a medical analogy, Facilitative or Evaluative mediation may have addressed the symptoms of the presenting problem but did not resolve the underlying cause. A party characteristic of this kind of situation is where the parties seem particularly entrenched in their positions and views almost to the point of seeming objectively irrational. In a sense, it has become personal for them. While not necessarily excluding disputes in commercial contexts, this type of dispute is likely to be found in community, neighbour or family disputes. In each of these cases, there is significant emotional baggage, unwillingness on the part of the parties to engage and a need for an ongoing personal or professional relationship. In these circumstances, the Transformative or Narrative would be indicated.

Interestingly, many commentators might suggest that situations manifesting most of these factors would indicate that they would be unsuitable for mediation and should be referred to litigation. This would not be incorrect if their notion of mediation or availability of mediation services are only limited to the Evaluative or Facilitative models. When we take into account the Transformative or Narrative models, we can see that there is an alternative to litigation in these sorts of cases and that mediation can still assist.

Conclusion

This paper has been the writer's attempt to provide conceptual clarity regarding the different models of mediation, their purposes and characteristics. There has also been an attempt to provide some guidance for ADR professionals to decide between one model of mediation and the other. These conceptual distinctions are useful to assist in thinking about and developing mediation.

Of course, in reality, a skillful mediator would have to engage in various transformative aspects of mediation before it is even possible for the parties to consider a settlement or solution. This then brings us full circle. The story of the blind men and the elephant makes many points but a key point is that regardless of what the blind men think, the elephant is more than that and in reality all those things. The value of mediation is that it has the potential to achieve both settlement, solution and resolution. While it is possible then to talk of conceptual distinctions, it is therefore important to realise that mediation is not only more than the conceptual distinctions we can make but in reality all of them.