

Zeitschrift: Studies in Communication Sciences : journal of the Swiss Association of Communication and Media Research

Herausgeber: Swiss Association of Communication and Media Research; Università della Svizzera italiana, Faculty of Communication Sciences

Band: 6 (2006)

Heft: 2

Artikel: Towards a multidisciplinary contextdependent model of mediation practice

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DOI: <https://doi.org/10.5169/seals-791126>

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TOWARDS A MULTIDISCIPLINARY CONTEXT-DEPENDENT MODEL OF MEDIATION PRACTICE

This paper relies on a communicative and argumentative account of the conflict resolution practice of *mediation*. The relevance of the institutionalised and interpersonal dimensions of the communication context of mediation is showed in relation to the design of arguments for conflict resolution.

Keywords: mediation, conflict, argumentation.

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Relevance of mediation in the present-day society

Nowadays mediation is attested as widespread practice of conflict resolution applied in various contexts, not only as an informal type of interaction, but also as a professional practice (a proper job). Mediation has established since it has been recognized as a valid alternative to other 'traditional' forms of dispute resolution; this acknowledgement has given rise to the category of the Alternative Dispute Resolution (ADR) techniques, where the term *alternative* refers to the opposition to the ordinary juridical system. Under this label, techniques such as negotiation, arbitration, mediation itself, and "hybrids" as med-arb, are included (Moffitt & Bordone 2005). In mediation, in particular, a third party (the mediator) intervenes in a conflict, in order to facilitate a reasonable discussion between the conflicting parties, who are no longer capable of negotiating directly, but are nevertheless committed to trying to find a solution.

ADR practices have spread since the '60s (Menkel-Meadow 2005: 17-19); they generally have a positive response from the society, and some governments have started fostering their introduction. Reasons of different nature explain such a success. A first set of intrinsic reasons are bound to the specific consideration of each person's deep interests and desires allowed by such practices in comparison to the ordinary juridical system; in the case of mediation, this is particularly relevant, since parties remain responsible for their decisions. Moreover, a mediated solution is often a win-win solution, whereas a judge's decision tends to create winners and losers, and, in this sense, it blocks the conflict without really solving it. Finally, some more extrinsic reasons depend on the fact that in several countries juridical systems result overwhelmed by an excessive number of procedures, and that those procedures impose an extremely high economic burden on involved parties (Breidenbach 1995: 30; Cutler & Summers 1988).

However, the story of the practice of mediation is longer than the one of the ADR movement. In the European history, in particular, two institutions have successively been involved in mediation processes: the Venetian Republic and the Vatican. Amongst a wide range of interventions at various levels, it is worth signalling the mediation process following the Thirty Years War. This process, eventually concluded with the Westphalia treatise in 1648, was enabled by the tight collaboration between the Venetian ambassador Alvise Contarini and the Pontifical

envoy Fabio Chigi, both officially sent there as mediators (Contarini 1864; Duss-von Werdt 2005)¹.

Though a long history of mediation in international and interpersonal disputes is to be found, not only in Europe, but also in many other countries, the majority of the present day studies concerning mediation are focused on *formal*² practices, in particular applied to *interpersonal*³ conflicts (Herrman, Hollett & Gale 2006: 21).

Centrality of the argumentative approach for the study of mediation

Mediation can be distinguished from other ADR methods thanks to the particular nature of the mediator's intervention, which is qualified by a particular *thirdness*. The mediator, lacking all juridical power of imposing decisions to the parties, can only help them discuss, being confident that "verbalising individual positions and stories provides the speaker and listener with an opportunity to develop a greater understanding of underlying needs and to stimulate higher-level reasoning" (ibid.: 22). In order to help parties reach the most reasonable solution possible, mediators can only rely on their communicative competences (Greco 2005). Indeed, the large majority of scholars consider communicative interaction as the core of the mediation practice (Folger & Jones 1994: ix). In more specific studies, it has been shown that the mediator's intervention within the critical discussion between the parties is *argumentative* in nature. Firstly, because mediators are in charge of managing the parties' discussion in order to render it as reasonable as possible (van Eemeren et al. 1993); and, secondly, because they indirectly⁴ suggest the parties to verify the

¹ Contarini (1864: 25) describes his collaboration with Chigi in terms of complete trust: "...E passò poi tra di noi nel rimanente pienissima la confidenza, così religiosamente conservata nell'uno e nell'altro, che le parti non hanno potuto giammai favi breccia, ancorché l'abbiano più volte tentato: onde si sono talvolta espressi, maggior esser l'unione tra i mediatori che quella dei plenipotenziari d'un medesimo principe, che tutti con li loro colleghi ebbero brighe e diffidenze, con altrettanto pregiudizio dei proprî padroni, quanto l'unione dei mediatori fu profittevole ai trattati".

² Informal practices of mediation are generally not considered, mainly for the lack of information, which makes it difficult to approach them scientifically.

³ However, the application to the context of international mediation is not excluded in principle.

⁴ Questions are a typical communicative tool at the mediator's disposal in order to suggest hypotheses for conflict resolution (see Greco Morasso 2006). Other triggers of mediators' contributions to the argumentative discussion are presented in Greco Morasso (forthcoming).

validity of possible arguments for conflict resolution (Greco Morasso 2007). The study of the argumentative intervention, thus, turns out to be a relevant component for interpreting the whole activity of mediation⁵.

Towards a context-dependent model of mediation

If the argumentative perspective is central for the study of mediation, the need for an interdisciplinary study of this practice emerges *from inside* the argumentative analysis. In fact, as research conducted within the project Argumentum⁶ has showed, since argumentation is always an applied activity (Rigotti & Greco 2006), the analysis of any argumentative intervention necessarily presupposes the definition of its *communication context*. I refer to the model presented in Rigotti & Rocci (this volume), which considers two dimensions of context, characterized as *institutionalized* and *interpersonal* respectively. Both dimensions emerge as relevant for understanding the dynamics of mediation. Considering the institutionalized dimension first, mediation and other *communicative practices* (arbitration, negotiation, deliberation, problem-solving...) are to be considered as *interaction schemes* aimed at fulfilling particular goals of a specific *interaction field*, i.e. of “that piece of social reality where the argumentative interaction takes place” (ibid.); examples of interaction fields may range from families and various other institutions, to enterprises, etc. An interaction field is defined by a hierarchy of shared goals, which shape the inter-agents’ mutual commitments. The interaction scheme of *mediation* is always activated in response to a sub-ordinate goal of an interaction field: *the resolution of a conflict*. As conflicts may arise in any interaction field, a number of specific applications of mediation have developed, such as family mediation, business mediation, labour grievances mediation, community mediation, environmental mediation, etc⁷.

⁵ By the way, several concepts that have been identified as crucial in the literature on mediation, such as *trust* (Herrman, Hollet & Gale 2006: 34), remain unexplained if they are not analyzed through argumentative categories.

⁶ Argumentum (www.argumentum.ch) is an eLearning project involving the universities of Lugano, Neuchâtel and Geneva, and funded by the Swiss Virtual Campus.

⁷ Different disciplinary perspectives contribute to shed light on the application of mediation to specific interaction fields: in particular, law studies, political sciences, psychology, business studies, argumentation theory, etc.

The implementation of mediation within the interaction fields generates a network of *roles* that are linked to each other through correspondent *communicative flows*. These roles are covered by real *implementing subjects* that can be individual or collective. The desires, interests, and personal goals of the implementing subjects always exceed their institutional roles depending on the interaction fields where they are involved⁸. In Rigotti & Rocci's account, this corresponds to the second dimension of the context: the *interpersonal dimension*. For instance, imagine a conflict between two colleagues (*institutionalized dimension*) who are also husband and wife (*interpersonal dimension*): it is easy to imagine that both components of the context will be extremely relevant for the development of the mediation process.

How the context influences the development of argumentation

The communication practice and the interaction field in which the argumentative discussion takes place condition the development of interaction in different ways. The communicative practice influences the argumentative activity under two main aspects. Firstly, it provides the boundaries between which argumentation develops (van Eemeren & Houtlosser 2005); secondly, the practice provides a series of communicative and non-communicative tools established in its tradition. Amongst mediators' tools⁹, *questions* and *reformulations* have been extensively studied in their communicative and argumentative value (van Eemeren et al. 1993, Jacobs 2002, Aakhus 2003, Jacobs & Aakhus 2002a and 2002b, Greco 2005 and Greco Morasso 2007).

It is worth noticing that knowledge on the communication context, in mediation, is generally asymmetric; whereas knowledge on the interaction field and on conflict history is, at least at the beginning of the process, almost exclusively the parties' prerogative, knowledge of the communicative practice is normally held by the mediator, especially when the parties enter a mediation process for the first time. It is one of the mediator's tasks, then, to reset boundaries of the argumentative discussion, recalling the aim of the practice. Consider the following pas-

⁸ This gives rise to typical situations of *agency relationship* (Eisenhardt 1989).

⁹ Several studies and handbooks on mediation list tools for the experienced mediator. A detailed review of all the techniques which have been identified in the literature is provided in Wall 1981; Wall & Lynn 1993; and Wall, Stark & Standifer 2001.

sage¹⁰: the mediator, whose opinion on the most reasonable solution has been requested by one of the parties, refuses to answer, explicitly reasserting the communicative practice's boundaries: "Let me just ask you more questions because (...) I think what's more important is (.) *what you two find reasonable*".

The interaction field in which the mediation process takes place also influences the argumentative interventions, as it is the source from which arguments for conflict resolution can be taken. More specifically, both the institutionalised and the interpersonal dimension of the interaction field can provide the foundations (higher values, shared goals, possible alternatives...) on which arguments for conflict resolution are built. In argumentative terms, this corresponds to the task of the *opening stage* of a critical discussion (van Eemeren & Grootendorst 2004), in which parties look for the shared premises on the basis of which they can develop their arguments. The role of the opening stage in mediation is so crucial that a specific temporal phase of the process is explicitly devoted to accomplish this task: at the beginning of all mediations, a phase of *information gathering and issues and interests identification* (Menkel-Meadow 2005) is always foreseen. During this phase of the process, mediators ask explorative questions to the parties, aiming at eliciting the institutionalized and interpersonal dimensions of the interaction field, which thus provide the shared premises from which arguments can be developed. A set of tools are devoted to this specific aim. For instance, when a family is involved, a visualization system has been developed, which is known as *family genogram* (Parkinson 1997; Marzotto & Tamanza 2003), whereby a visual representation of the institutional and interpersonal roles within the family is designed together with the parties, and serves as an acknowledgement of the interaction field¹¹. A tool with a similar function, called "conflict mapping guide" has been proposed by Wehr (1979) for the study of international disputes.

During the proper *argumentation stage* (van Eemeren & Grootendorst 2004), the mediator suggests to the parties possible arguments for conflict resolution, based on the common premises derived from the institutionalised and interpersonal dimensions of the interaction field. The par-

¹⁰ The example is taken from a corpus of opening sessions within mediation processes mediated either by John Haynes or by Larry Fong. A detailed analysis of the corpus is provided in Greco Morasso (forthcoming).

¹¹ Mediators often employ a flipchart or analogous visualization tools in order to represent the progressive reconstruction of parties' interaction field.

ties, on the basis of the “public” acknowledgement of their reciprocal commitments in the opening stage, evaluate the mediator’s suggestions and make decisions for the resolution of the conflict.

In order to briefly show how knowledge about the interaction field allows developing the mediation discussion, I will select two examples taken from a case of *business mediation*¹², relying on a particular kind of argument that mediators may propose to parties, which is based on the *argumentative locus from termination and setting up* (Rigotti & Greco 2006). A general rule, corresponding to one of the *maxims* of this locus, is evoked as a premise in all three cases: “If a certain (institutionalized or interpersonal) relationship is positive, it should not be interrupted”. This maxim, however, would remain inactive, and would have no persuasive force, if it were not combined with already shared propositions (*endoxa*) and *data* emerging from the interaction field, which guarantee that the parties’ relationship is really a positive one. The following table shows which elements emerging from the interaction field are relevant in the construction of the argument:

¹² See footnote 10.

Table 1: How the institutional and interpersonal dimensions of conflict contribute to argument construction

	Interaction field (institutionalized dimension)	Interaction field (interpersonal dimension)
1	<p>M¹³: A:nd (.) and all the time, I think, keeping in mind (.) that (.) one of the things you really want to do is - you've got a golden goose here. And it would be <u>crazy</u> to kill the golden goose (..).</p> <p>P1: That's what I've tried to tell him.</p> <p>M: It's laying the golden eggs. You've got a <u>golden</u> goose.</p>	<p>- A business which makes good profit is very precious [endoxon]</p> <p>- Both P1 and P2 are involved in an institutional relationship, being co-owners of a business making a very good profit [datum]</p>
2	<p>M: So you've got a double issue [here].</p> <p>P1: [Oh yeah.]</p> <p>P2: [Oh yeah.]</p> <p>M: You want to (.) keep the good social relationship as well as keep a good [business relationship].</p> <p>P2: [Yes.]</p> <p>P1: [Well certainly.] Yeah, we - we recognize that. That's why we've (.) come to see somebody like [yourself.]</p> <p>P2: [We-] we were friends before we were partners.</p>	<p>- Friendship is a very positive human interpersonal relationship [endoxon]</p> <p>- Parties "were friends before being partners", and are above all committed to their friendship [datum]</p>

¹³ I refer to the mediator with "M" and to the parties with "P1" and "P2".

A few remarks must be made on these examples (complete argumentative analyses are provided in Greco Morasso, forthcoming):

- Due to the practice constraints, the mediator cannot arrive to a conclusion by himself. Notice, in fact, that the mediator and the parties construct the arguments together;
- In example (1), the characterization of a business, whereby making good profit is considered a particularly important goal, distinguishes it from other kinds of interaction field. The same endoxon (*a business which makes good profit is very precious*) could not be so appropriately transferred to institutions such as hospitals, or universities... The metaphor of the “golden goose” used by the mediator is thus particularly effective in the business sphere.
- All the three proposed arguments bring to the conclusion “this shared reality – be it interpersonal or institutionalized – must not be interrupted”. Such a conclusion will serve as a premise for obtaining further conclusions about the fact that the conflict, which damages the relationship, should be solved (see Greco Morasso 2007).

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