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# The Problematics of Representation in Community Mediation Hearings: Implications for Mediation Practice

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*Empowering disputants to represent themselves and create their own agreement is a frequently cited goal of community mediation programs. This paper explores how disputants' positions and interests are represented in mediation, and investigates the implications of such representation for the negotiation process. This narrative analysis of transcripts of videotaped community mediation hearings shows that disputant self-representation in mediation is never unconstrained. The interactional organization of mediation and the actions of mediators work to limit and define how disputants formulate their utterances. Mediator representation of disputants varies in the degree of intervention or coercion applied. Mediators may limit themselves to rephrasing, restating, or elaborating a disputant's position. However, in some cases mediators take the place of disputants in negotiations. The implications of these various types of representation for disputant autonomy, mediator neutrality and agreement compliance are discussed.*

## Introduction

Mediation is a non-adversarial conflict resolution procedure which provides an alternative to litigation in divorce and child custody cases (Saposnek, 1983), civil disputes, juvenile cases, and even criminal cases (Felstiner and Williams, 1978). Rather than handing authority for making a decision over to a judge, disputants in mediation hearings retain that authority and negotiate an agreement with the help of a third party (Merry and Silbey, 1986; Cobb and Rifkin, 1991, p. 47). Mediation emphasizes cooperation and compromise (Worley and Schwebel, 1985; Cahn, 1992), and de-emphasizes the adversarial nature of disputing

which tends to be exacerbated in litigation (Girdner, 1985). Mediation practitioners believe this approach reduces the antagonism between disputants, gives them the opportunity to listen to and understand each other's position, and promotes reconciliation (Bottomley, 1985, p. 162; Dingwall, 1986, p. 10; Roberts, 1988, p. 538; Folberg, 1983, p. 9). When compared to adjudication, mediation strives to empower the disputants, to allow them to represent themselves, and to limit the authority of the mediator (Moore, 1986, p. 14).

However, some critics have suggested that the very characteristics of mediation that provide these advantages over more legalistic approaches to conflict resolution also create some potential problems (e.g., Merry, 1989). Bottomley (1985) argues that although intended to empower the powerless, informal justice may be less just than traditional processes. The informality of the process allows more powerful interactants to gain the upper hand, and allows the powers that be to define and impose community norms and moral standards (Bottomley, 1985).

Cobb and Rifkin's (1991) study of community-based mediation hearings shows that although there is a rhetoric of neutrality among mediation practitioners and advocates, the nature of the mediation process militates against actual neutrality. The first storyteller in the mediation hearing uses that opportunity to set the moral stage for the hearing: characterizing their own position as right and good, and that of the opposing disputant as wrong and bad. Mediators unwittingly aid in the process of reaffirming the "primary narrative" by orienting to the issues raised by the first story as they facilitate the hearing. Unless mediators successfully aid the second disputant in promoting an "alternative narrative" which challenges the moral framework established by the primary narrative, they have failed in their goal of constructing the mediation hearing as a "neutral" process (Cobb and Rifkin, 1991). In fact, Cobb and Rifkin argue that the possibility of a neutral mediation process may be a chimera because of the power of narratives to create moral frameworks, establish positions, and define right and wrong.

Greatbatch and Dingwall (1989) discovered in their study of British divorce mediation hearings that mediators can exert a great deal of control over the outcome of the hearing by controlling

what topics are discussed. Even without explicitly violating neutrality (e.g., by taking a position relative to a disputant's complaint or proposed solution) a mediator can shape that complaint or proposal by shifting the discussion from one topic to the next. Greatbatch and Dingwall (1989) refer to this strategy as "Selective Facilitation." In the example they cite in their paper, the mediator moves talk away from the proposal supported by one disputant to the other disputant's favored proposal. The second proposal gets adopted, in part because the first one was not discussed. Mediators' actions thus shape the narrative which is conjointly produced by the coordinated actions of the participants.

Kolb (1981) found that mediators differ in the amount of control they attempt to exercise over the dispute resolution process. Kolb's (1981) research on state and federal labor mediators identified two strategies of mediation: deal-making and orchestration. Kolb characterizes the orchestrating mediator as one who sees his or her role primarily as that of facilitator or go-between. His or her job is to represent each side's position to the other. The deal-making mediator, on the other hand, takes a much more active role in the process. He or she will argue with disputants, state opinions relative to proposals, decide what is a reasonable solution and try to achieve that outcome.

Kolb's study shows how state and federal labor mediators are able to help disputants create an agreement. However, because the philosophy and goals of community-based mediation programs differ from that of labor mediation, mediator strategies such as the "deal-making" role Kolb (1983) identifies may not be appropriate in this context. A primary goal of community mediation is to provide a mode of conflict resolution which empowers disputants to make their own decisions instead of having a third party impose a solution on them. Do mediators in community mediation programs employ roles similar to the "deal-making" role state labor mediators use? If so, is this an appropriate use of power in the community mediation context?

In this paper I address this issue by analyzing how disputants' positions are represented in mediation hearings. While disputants do have opportunities to represent themselves in mediation, their options for self-expression are limited in terms of when, to whom, and about what they may speak. When mediators represent

disputants, which occurs frequently, there are three types of representation possible. First, mediators may represent a disputant's expressed position by repeating or rephrasing it. Second, mediators may make statements consistent with a disputant's expressed position, but which go beyond merely rephrasing what was actually said. Third, mediators may create their own arguments, without specific reference to what the disputant has stated. In this case the mediator is not simply representing the position of a disputant, she or he is taking the place of the disputant and acting as if she or he were a first party to the dispute rather than a neutral third party.<sup>1</sup> When mediators replace a disputant in an exchange with the opposing disputant, they are also engaged in intervening in that disputant's *self* representation.

Thus, the types of representation which occur in mediation may be described as a continuum, with disputant self expression providing the most autonomy, and mediators replacing the disputant providing the least. In the concluding section I discuss the implications of these findings for the practice of mediation.

### Data

The setting I analyze is a mediation program sponsored by a California county. This program serves as an alternative to small claims court for cases such as landlord-tenant disputes, consumer complaints, monetary disputes, and disputes between neighbors or family members.

I videotaped all nine hearings held during a six month period. The hearings ranged from forty minutes to almost three hours in length. The entire collection consists of over twenty hours of tape, and involves forty-three participants. Audio tapes were transcribed using a modified version of Gail Jefferson's transcription system (see Atkinson and Heritage, 1984).

In the program I study, each hearing is chaired by two mediators.<sup>2</sup> The disputants (referred to as "complainant" and "respondent") represent themselves, and may bring witnesses or written statements from witnesses to support their case. If a mediated agreement is not reached, the mediators become arbitrators and make a decision for the disputants. Mediation proponents see arbitration as a less desirable alternative because the decision is made by a third party rather than the disputants (Girdner, 1985).

## Methods

I conduct a narrative analysis of the tapes and transcripts of these hearings. I also draw upon ethnomethodological conversation analytic research on the organization of interaction and mediation. Conversation analysis involves a detailed, qualitative study of talk in its sequential context (see, for example, Heritage, 1984; Sacks, Schegloff and Jefferson, 1974).

Although much previous research addresses mediation and related topics such as negotiation and bargaining, there are two major gaps in these bodies of research. The first is a lack of focus on the mediation hearing as an interactional event. For example, evaluation studies of mediation tend to treat mediation as a "black box," studying the impact of various variables (e.g., difficulty of dispute, skill of mediator) on outcomes (e.g., Bahr, 1981; Felstiner and Williams, 1978; Girdner, 1985; Thoennes and Pearson, 1985; Kelly and Gigy, 1989). But as Dingwall (1986) argues, such survey or questionnaire-based research doesn't capture what actually happens in the hearing. Such studies neglect the process of mediation, or only study it indirectly via post hoc reports of participants.

Research on negotiation is concerned with predicting the effect of various negotiation strategies (e.g., Pruitt, 1991) and negotiator characteristics and perspectives (e.g., Carrol and Paynes, 1991; Pinkley, 1990; Rubin, Kim, and Peretz, 1990) on outcomes. This generally experimental research also neglects to explore the interactional process. Research on bargaining exchanges focuses on power differences between participants in different positions in networks, but does not study the process of bargaining itself, and does not study the participants' role in creating social structure and bargaining outcomes through their actions (e.g., Cook and Emerson, 1978; Cook, Emerson, Gillmore, and Yamagishi, 1983; Molm, 1987; Skvoretz and Willer, 1991). By analyzing the interactional process of these hearings the current paper will show how the actions of mediators affect negotiations.

The second gap is failure to make the connection between the interactional organization of talk in an institutional setting and how participants accomplish the goals of that setting. Studies that do focus on the interactional process, and conduct direct examinations of participants' behavior in mediation hearings

(e.g., Greatbatch and Dingwall, 1989; Kolb, 1983; Cobb and Rifkin, 1991; Garcia 1991) have not as yet addressed the question of how disputants' positions are represented.

### The Interactional Organization of Mediation

In these data a mediator opens the hearing, explains the mediation process, makes introductions, and then solicits the complainant's story. The complainant's story thus precedes the respondent's. Disputants do not begin their stories until after the mediator solicits them. After the initial stories are completed, mediators may solicit second or even third stories from the disputants. The disputants may not interrupt each other during their stories, but the mediators may interrupt to ask questions or refocus the topic.

The turn-taking system of mediation differs in several respects from that of ordinary conversation (Garcia 1991).<sup>3</sup> While disputants have the floor to tell their stories, they are free to self-select as next speaker, and to speak even when not selected by a mediator. However, they do not use the full range of turn-taking options that would be available to them in ordinary conversation. Specifically, disputants generally refrain from selecting an opposing disputant to speak. However, they may select a mediator by asking a question. Disputants rarely speak during the opposing disputant's story (Garcia 1991).

These hearings also have extended periods of discussion, primarily comprised of question-and-answer sequences. The organization of the discussion phase differs from ordinary conversation in that mediators control the topic of discussion and who participates. The mediators use directed questions to switch the talk from one disputant to the other (Garcia 1991).

While participants in ordinary conversation are not restricted as to when they can be the recipient of an utterance or select specific others to speak (Sacks et al., 1974), disputants' participation statuses in mediation hearings are predetermined.<sup>4</sup> Disputants address their utterances to the mediators rather than to their co-disputants. The mediators can address utterances to either disputant, and can conduct dyadic exchanges with each disputant in turn. The disputants, on the other hand, address their utterances to mediators, not the other disputant (Garcia 1991).

In sum, the speech exchange system of mediation provides for specific types of actions by disputants and mediators. The next sections show how this interactional organization affects the representation of disputants' positions.

### Disputant Self-Representation

Disputants participate in mediation because they were not able to resolve their dispute informally. Thus the less restrictive type of speech exchange system, that of ordinary conversation, is not likely to be productive in the mediation context. Disputants rarely use the format of ordinary conversation during mediation hearings, but when they do, they often argue (Garcia 1991). These types of exchanges may be counter-productive to the dispute resolution process. Disputants expressing themselves without regard to mediation format are generally sanctioned by mediators (Garcia 1991).

For example, consider Excerpt 1 from a dispute between a divorced couple over custody, child support, and visitation arrangements for their three children.<sup>5</sup> In lines 1–3 the complainant explains why he doesn't want to give up some of his visitation time with the children. The respondent, his former wife, overlaps his utterance in lines 4 and 5, accusing him of wanting her to abort their first child ("Sharon"), thus discrediting and undermining his claim to be a caring father. The mediator tries to intervene in the incipient dispute (line 6), but is interrupted by the complainant who produces another disputing move in lines 7, 9, 10 and 12). As the argument escalates, the Mediator again intervenes and stops the dispute (lines 13–16).

#### Excerpt 1

- 1 C: YEAH, I you know? I still don't feel good about it,  
 2 because like this is my flesh and blood! You know, and  
 3 you know, uh, I['m yeah-]  
 4 R: [But ] you shouted abortion, for nine  
 5 months! [with Sharon]  
 6 M: [Listen, we ] are not=  
 7 C: =Hey,=  
 8 M: =talking (a[bout] )  
 9 C: [WHO ]  
 10 had the abortion? Y[ou want to get] SMART?



- 11 M: [Wait a minute!]  
 12 C: DIDN'T SH[E JUST] HAVE ONE?  
 13 M: [Hey wait!]  
 14 M: HOLD IT! WE'RE NOT IN HERE TO TALK ABOUT THAT.  
 15 I DIDN'T TALK ABOUT MY PROBLEMS, OR WHATEVER  
 16 WE'VE ALL GOT A STORY. That's no one's business.

Even when the disputants speak for themselves, they are still under control of the mediators. Here, a mediator exercises her right and responsibility to sanction and stop arguments, which are a breach of the speech exchange system of mediation. Mediators also control disputant's self-representations by limiting the topic of talk. In the example above, the mediator specifically identifies some unacceptable topics of talk in lines 14–16. This example also shows that disputant self-representation may not facilitate conflict resolution, because it may lead to arguing or irrelevant utterances.

The more common scenario in these hearings is for disputants to speak for themselves, but within the constraints of the speech exchange system of mediation. Excerpt 2 from a hearing between a divorced father and his children's step father shows a complaint and the response to that complaint. The mediator's only participation in this exchange is to solicit the respondent's answer to the complaint (line 9). In the speech exchange system of mediation disputants are supposed to address their remarks to the mediators, rather than to each other, and to wait until selected to speak by the mediator instead of selecting themselves as next speaker (Garcia 1991). Thus the interactional organization of mediation constrains how disputants can represent themselves in mediation.

## Excerpt 2

- 1 RA: All I do want, from Mart, is civility, yes, and number one,  
 2 on the list, before civility is I want to be free, to raise my  
 3 children, in a manner that I want to. And I don't want any  
 4 interruptions. And that's all! It's very simple. The only  
 5 time we, you know, the only time that there are problems is  
 6 when he either comes out with some sort of antagonistic,  
 7 you know, sarcastic response, or, he tries to manipulate my  
 8 seeing my children. And that's it! ((claps hand))  
 9 MB: Mart?  
 10 C: Well, uh, I think the .. I don't know what he wants of me.  
 11 He says he wants me to leave him alone while he's raising  
 12 his children I have never been in the way.

By controlling the exchange of turns between the disputants, the mediator limits the types of exchanges that can occur between them. For example, when disputants' utterances are directed to the mediators, they refer to the opposing disputant via the third person. Their complaint is thus constructed as a story told to the mediator rather than an accusation directed at the opposing disputant (Garcia 1991).

In sum, disputants' self-representations in mediation vary in terms of level of compliance with the speech exchange system of mediation and mediator control, but are never completely unconstrained. Disputants representing themselves display an orientation to the speech exchange system of mediation. Mediator representation of disputant's positions will be considered in the next section.

### Mediator Representation: Paraphrasing, Extending, and Replacing

Disputants in these data are often represented by mediators who speak for them. The types of mediator representation that occur, paraphrasing, extending, and replacing, will be discussed in the order of the least to most intrusive. When paraphrasing, a mediator repeats or rephrases a position expressed by a disputant. When "extending," a mediator elaborates or revises a position stated by a disputant, going beyond what was actually said by that disputant. When "replacing," a mediator takes the place of a disputant in the negotiation, expressing positions or justifications that were not expressed by the disputant.

*1. Paraphrasing a Disputant's Position.* Paraphrasing (restating, reframing or rephrasing) is a technique often recommended for enhancing communication in mediation (Donohue, Allen and Burrell, 1988; Roberts, 1988, p. 65, 74; Cahn, 1992). Summarizing a disputant's position may make that person feel understood and may make the opposing disputant more willing to listen to the position.

Excerpts 3, 4, and 5 show how a mediator may represent a disputant by paraphrasing a disputant's expressed position. These examples are from the dispute described above in which a divorced couple negotiates visitation arrangements. In Excerpt 3 the complainant offers to give up two of his visitation days a month (two Thursdays).

## Excerpt 3

"The twins said well what happened to Thursdays they, you know they specifically brought that up to me and I said well, it looks like Mom wants to spend more time with you two. So if you know you want to do Thursday, Friday one week, and then just a Friday the next week, that's compromising a little bit . . ."

A few minutes later the mediator "repeats" the complainant's offer (Excerpt 4).<sup>6</sup>

## Excerpt 4

- 1 M: And then what I hear, is the last month or so, it's been
- 2 every other Thursday, and then that next week is uh for the
- 3 Friday, and you're not willing
- 4 R: Uh=
- 5 M: =to he's willing to relinquish! He used the word. Uh one
- 6 of those Fridays.
- 7 C: No=
- 8 M: =Instead of making it cons[iste]nt I MEAN THURSDAYS!
- 9 C: [No]
- 10 C: Thursdays ri:ght.
- 11 M: Instead of [mak]ing it I just
- 12 C: [I ]
- 13 C: I'm willing to go along with the schedule that she said just
- 14 to keep the status quo and keep her happy that she's you
- 15 know,
- 16 M: Um hmh. He's offering the two Thursday night.

The mediator's reformulation of the complainant's offer differs from it in several ways. First, the complainant's offer was directed at the mediator and referred to the respondent in the third person. The mediator's reformulation is directed at the respondent and refers to the complainant in the third person (in line 5). Second, the mediator describes the complainant as "relinquishing" two days of visitation, while the complainant originally characterized his offer as a "compromise." The mediator's paraphrase thus presents the complainant's offer as giving something up to the respondent.

After the mediator's reformulation, the complainant repeats his position and gives a reason for this position (lines 13 and 14). The complainant does not explicitly disagree with the mediator's

representation of his position, but by rephrasing it and elaborating the reason for his position, he revises the version she presented. In this version he deletes his initial use of "compromise," and says he's willing to do what she (the respondent) proposed. The mediator's second rephrasing (line 16) again emphasizes that the complainant is offering something or giving something to the respondent. However, the mediator's restatement does not repeat the reasons for the position the complainant gave (line 14, "to keep her happy").

A few minutes later in the hearing, the proposal to eliminate two Thursdays of visitation a month is again under discussion. In Excerpt 5 the mediator again "repeats" the complainant's offer, emphasizing that the complainant is giving up something to the respondent (line 1). The respondent acknowledges this restatement in line 2, but does not accept the proposal. The mediator then adds to her characterization of the offer by repeating the complainant's reason for his offer (lines 3 and 4). It is not until this final representation of the offer that we see the first tentative move towards acceptance on the part of the respondent (line 5).

#### Excerpt 5

- 1 M: And he is willing to give up two of those Thursdays.
- 2 R: I know.
- 3 M: Number one I heard it to make it consistent for the children,
- 4 and that that would please you!
- 5 R: I'll just I'll do it, just to meet him half way, ..

In sum, mediator paraphrases are never exact repetitions of disputant's statements. Each time the mediator repeated the complainant's offer, she changed it slightly and emphasized different aspects of it than the complainant had emphasized. How an offer is presented or represented may have an impact on how it will be responded to by the opposing disputant. Paraphrasing is therefore part of the work towards dispute resolution.

2. *Extending or Elaborating a Disputant's Stated Position.* The second type of mediator representation in these data is extending or elaborating a disputant's stated position. A mediator makes an argument consistent with a disputant's expressed position, but goes beyond what was actually said.

For example, in Excerpt 6 from the dispute between the divorced couple, the respondent argues that their children should spend more time at her house and less at the complainant's because they are spending too much time away from the "home base" (lines 1–5). The complainant interrupts to challenge this argument (lines 6 and 7). The mediator sanctions this breach of mediation format (line 8), but then goes on to represent the complainant's (Stan) expressed position in a dyadic exchange with the respondent.

### Excerpt 6

- 1 R: That I got the base, the home, family, and I feel that
- 2 Thursday, Friday, and Saturday without them being,
- 3 consistently at home, is too much. I feel that it's too much.
- 4 Even though you don't get to see them, they're not at home, and
- 5 they're at school, and they're on the road,=  
6 C: =They're home  
7 seventy five percent of the time.
- 8 M: Stan wait.
- 9 C: Okay.
- 10 M: That's your feeling,
- 11 R: Right.
- 12 M: And you have every right to that. That is not his feeling,
- 13 a[nd that's] not how he sees his home base.
- 14 R: [I know ]
- 15 R: I know.
- 16 M: You know he sees it very loving, very whole, very consistent,
- 17 very disciplined.
- 18 R: I know!
- 19 M: Okay. For him that's what he sees and what we have to discuss.
- 20 R: I know.
- 21 M: And he's a fifty percent a parent, and you're fifty percent a
- 22 parent.

The mediator's explanation that the complainant also sees his "home base" as loving, whole, consistent and disciplined is not a restatement of what the complainant said, but it is consistent with his position that the children should spend more time at his house. Her statement "he's a fifty percent a parent, and you're fifty percent a parent," is consistent with his complaint that "they're home seventy five percent of the time," because that utterance shows he's concerned about the inequality of the visitation arrangements.

In sum, “extension” includes instances where mediators represent a disputant by elaborating or extending a position taken by that disputant in a previous utterance. This category differs from paraphrasing, because the mediator goes beyond what was actually said by the disputant. Thus the mediator is representing a disputant’s expressed position rather than re-presenting his or her utterances.

3. *Replacing the Disputant*. When “replacing” the disputant, the mediator does not restrict him or herself to representing the disputant’s expressed positions, she or he goes beyond what the disputant said and argues in place of him or her. The mediator acts as if he or she were a principal in the dispute, directly engaging in negotiations with the opposing disputant.

For example, in Excerpt 7 from a hearing about the location of the boundary line between two neighbors’ properties, Mediators A and B take the place of the complainant in a negotiation with Respondent A. The respondent had paid the county several thousand dollars to build a culvert between the two properties to solve a serious erosion problem. The respondent wanted the complainant to reimburse him for part of this expense.

The respondent makes a proposal in lines 1 to 4. Mediator B counters this proposal by explaining why the respondent should not be compensated for his expenses (lines 5 - 8). The respondent replies to this challenge (line 9) by referring to the history of the agreement to put in the culvert which he had outlined earlier in the hearing (“I went with a compromise with the county”). Mediator A challenges this argument by pointing out it was the *respondent* who made the agreement, not the *complainant* (lines 13 and 14). The respondent explains why he made the agreement without the complainant’s participation (line 15). Mediator A responds that he did it for his benefit (lines 16–17). The respondent (lines 18 and 19) replies that it wasn’t only himself that benefitted, the complainant benefitted also. Mediator A challenges this argument as well, claiming that the respondent did not have the right to make an agreement for the complainant (lines 20 to 23). Having attacked the proposal on logical grounds, Mediator A introduces procedural grounds for not considering the respondent’s proposal (lines 23 to 28).

## Excerpt 7

- 1 RA: Damned for my troubles that I went through, and the money  
 2 that I paid the county to improve his property and getting  
 3 the base rock fill, and everything else, that he should  
 4 compensate me for part of my expenses.
- 5 MB: Let's try to understand one thing, Mister Cartel, the work  
 6 and the money that you expended in putting in this culvert,  
 7 and actually rescuing your property from destruction, you  
 8 did it, for your sake.
- 9 RA: I went with a compromise with the county,
- 10 MA: Yes.
- 11 MB: Yes.
- 12 RA: That I would take my fences and they would accept the
- 13 MA: You went with the compromise with the county, not these  
 14 folks. You went there. You did it.
- 15 RA: They wouldn't have done it,
- 16 MA: You decided it was worth it to you to do it, otherwise you  
 17 wouldn't [have ]
- 18 RA: [It's not] only to my advantage, though I'm  
 19 protecting my neighbor's advantage also.
- 20 MA: THAT is something you were giving your neighbors  
 21 unwittingly. You were between a rock and a hard place. I  
 22 will agree! But you can not, you could not have committed  
 23 them to something they didn't agree to. Now, if you feel that  
 24 equity is on your side. Then you can after the fact sue them  
 25 for their share. If you feel that you want to do arbitration on  
 26 that you can do that. But we're talking about something else  
 27 here. Remember we defined the area. You put five thousand  
 28 dollars in there but that wasn't his statement of the problem.

In this excerpt both mediators, while representing the complainant's interests, go beyond what the complainant actually said in the hearing.

In sum, when "replacing" a disputant in a negotiation with the opposing disputant, the mediator is representing their interests in a far more radical way than when paraphrasing or extending. The mediators negotiate instead of the disputant, rather than merely representing what that disputant has expressed.

When mediators represent a disputant by "replacing" him or her in an exchange, they also intervene in the opposing disputant's *self* representation, by challenging that disputant's positions. The opposing disputant is thus led to change their position, or their justification for that position. For example, in excerpt 7

above mediators A and B refused to accept Respondent A's position, and refuted every justification for that position he attempted.

### Summary

In sum, there are no instances of "pure" self-representation in these hearings, because disputants' actions are shaped in orientation to the speech exchange system of mediation. By such actions as addressing their remarks to the mediator rather than the opposing disputant, speaking only when offered the floor by a mediator, referring to the opposing disputant in the third person, and limiting their remarks to the topics specified by the mediators, the disputants exhibit a controlled degree of freedom of expression. Thus, the greatest disputant autonomy in these mediation hearings occurs when disputants represent themselves within the confines of the speech exchange system of mediation.

The three types of mediator representation of disputants' positions involve varying degrees of intervention into disputants' statements. Mediators' paraphrasing of disputants' positions reproduce most closely what the disputants actually said. However, as shown above, even restating or rephrasing may change the message produced by the disputant. The mediator may choose to convey only parts of the disputant's position in their restatement or may reformulate it. Mediators' restatements of disputant's positions and offers thus change them in ways that may have implications for the resolution of the dispute. When extending or elaborating a disputant's position, mediators go beyond what the disputant actually said, although their utterances remain consistent with the disputant's stated position.

Finally, mediators may go beyond representation to replacement of the disputant in the negotiation process. In these cases mediators take the place of a disputant in an exchange with the opposing disputant. In the next section I explore the implications of mediators' "replacement" for the dispute resolution process.

### Implications of "Replacement" for the Dispute Resolution Process

When "Replacement" is used to challenge a disputant's position, they may be put under great pressure to change their



position. Excerpts 8, 9, and 10 are from a dispute between an auto repair shop and a vehicle owner over repairs done to that vehicle. As excerpt 8 begins, the complainant reminds the mediators that in addition to the items that were not repaired correctly, a new problem emerged when the car was at the repair shop—a cracked water pump housing. Mediator A then replaces the respondents in order to disagree with the complainant.

#### Excerpt 8

- C: We're also forgetting the water pump was not leaking when I brought it in there. Somebody could have whacked it with a hammer for all I know.
- MA: Who cares? And, and you could have broken two minutes after you drove out of the garage. Nobody's ever going to be able to decide when it cracked.

Such aggressive mediator representation, and intrusion into disputants' *self* representation, may lead to resolution, but at a cost. For example, the complainant in this hearing eventually agrees with the solution proposed by the mediators, but only reluctantly. Excerpt 9 shows the complainant's response to being told he would have to pay about \$400 more for the vehicle repair than expected.

#### Excerpt 9

"I'm not happy with it at all. Well I mean there's got to be some, some recourse for people who don't know any better, that take vehicles to people, and this, they let them go out like that. They had it a week and a half, they had the vehicle."

After another two minutes of discussion in which Mediators A and B work to persuade the complainant that his desire for a lower bill is not warranted, the complainant reluctantly agrees to the amount the Mediators suggested:

#### Excerpt 10

"Well I guess I have no other recourse. Basically, so, pay it up and uh . . ."

Although the mediators were able to get the complainant to agree to the solution they suggested, he did so only reluctantly, and with explicitly stated reservations.

### Implications of "Replacement" for Disputant Autonomy, Mediator Neutrality, and Disputant Compliance

This sociological analysis of the interactional process of mediation hearings has shown how disputants' positions are represented by disputants and mediators, and explored the implications of those representations for the unfolding negotiation. Both constructive and potentially problematic results of representation were identified. With regard to disputant self representation, I showed how the interactional organization of mediation and the actions of the mediators created a safe and constructive environment for disputants to represent themselves, such that the inflammatory effects of conflictual utterances are lessened (see also Garcia 1991).

The impact of mediator representation varies with the type of representation. Paraphrasing can contribute to the dispute resolution process by allowing the mediator to reframe or repackage a disputant's position in a form more acceptable to the opposing disputant. When extending a disputant's position, mediators can effectively communicate that perspective without allowing direct confrontation between the parties.

Forms of mediator representation such as paraphrasing and extending a disputant's position may thus have positive consequences for the dispute resolution process. By representing disputants with limited ability to speak for themselves, mediators may create equality between the disputants, thus "leveling the playing field" (Cooks and Hale, 1994, p. 63-4; Irving and Benjamin, 1987; Regehr, 1994, p. 366). Mediator representation of disputants' positions is therefore not in itself a problem.

However, several potential problems became apparent in these data with the third type of mediator representation, replacing the disputant. Disputant autonomy is decreased for both the disputant who is being replaced (whose interests are represented by the mediator) and the disputant who is being challenged by the mediator. The replaced disputant loses the opportunity to present his or her own reasons and justifications for his or her positions. The opposing disputant who is challenged is further pressured to revise his or her positions. Replacement may lead to the opposing disputant being pressured to accept a solution. The

moral force of the mediator, and their authority in the hearing may give them the persuasive or coercive power to get a disputant to give in. Thus, the extent of mediator intervention in the dispute resolution process which "replacement" entails may not be appropriate for community mediation.

In addition, an examination of research on mediation suggests several other possible outcomes of mediator replacement of disputants.

1. *"Replacement" may decrease success and user satisfaction.*

In general, research shows high rates of success (generally defined as reaching agreement) and user satisfaction for mediation programs.<sup>7</sup> Active mediator intervention has been shown by some researchers to be positively related to success and satisfaction (e.g., Bercovitch, Anagnoson, and Wille, 1991, p. 16, and Kimsey, Fuller, Bell, and McKinney, 1994). However, the types of intervention described by these researchers is much less coercive than the "replacement" type of representation found in these data (for example, see Tidwell, 1994, and Donohue, et al., 1988).

Some research connects dis-empowerment of disputants with failure to reach an agreement (Kelly and Gigy, 1989, p. 274). Merry's (1989) study suggests that settlement may be related to mediators avoiding appearing to coerce or pressure disputants (p. 244). Kelly and Gigy's (1989, p. 279) results also suggest that there may be a relationship between successful mediation and mediator restraint: 75% of the divorcing couples reaching an agreement felt the mediators "did not impose their viewpoint, and were impartial." Thus the more extreme type of mediator intervention, replacement, may reduce mediation's success rate and user satisfaction.

2. *"Replacement" may decrease compliance with agreements.*

Another potential risk of mediator replacement of disputants in negotiations is that disputants may feel pressured to accept a solution they are unenthusiastic about. In general, mediation practitioners agree that compliance will be greater when disputants create their own agreement than when a third party imposes a solution on them (Silbey 1987, p. 415; Cahn, 1992, p.43). Blades (1985), Burrell, Donohue, and Allen, 1990, and Pearson

and Thoennes (1984; 1988) found that compliance with mediated agreements was greater than with adjudicated agreements. Reluctant agreement with solutions may reduce compliance rates, and hence mediation's effectiveness (Regehr, 1994, p. 361; Irving and Benjamin, 1987).

3. *"Replacement" may decrease mediator impartiality or neutrality.*

When a mediator directly supports a disputant's position, and disagrees with the opposing disputant's position, a posture of neutrality may be difficult to support (see Cook and Hale, 1994, p. 63 and Cobb and Rifkin, 1991, p. 70 for similar arguments). Research has identified a relationship between mediator trust, impartiality, or neutrality and mediation outcomes (Karim and Dilts, 1990; Fuller, Kimsey and McKinney, 1992, Kimsey, et al., 1994, p. 89). Cooks and Hale (1994) include disputant self-determination, informed consent, mediator impartiality, and mediator neutrality as essential components of ethical mediation.

Because of the frequent occurrence of "replacement" in these data, I conclude that the style of mediation practiced in the program studied is more similar to the "deal-making" style than the "orchestrating" style Kolb (1983) identified. The informal structure of mediation, and the less rigidly defined roles and procedures give the mediators several avenues of more or less subtle influence over the outcome of the process. If the goal of alternative conflict resolution procedures, such as mediation, is empowering disputants to make their own decisions, perhaps the role of the mediator needs to be re-thought. If mediators are taking an active role in negotiation, shaping and revising disputants' positions, and speaking in their place, a less than optimal degree of disputant autonomy may exist.

Mediation programs in the U.S. vary greatly in their structure and in how the role of mediator is enacted.<sup>8</sup> Thus these results should not be considered generalizable to other mediation programs until empirically tested. Cahn (1992, p. 70) points out that "the role of the interventionist in divorce mediation" has been understudied. Further research is also necessary on the relationship between interventionist mediator strategies, such as replacement, and disputant's compliance with agreements.

## Notes

1. Cobb and Rifkin (1991) point out that in some mediation ideologies this type of representation is considered legitimate mediator practice, as long as it is applied to both sides in a dispute.
2. One hearing, a dispute between a divorced couple over care of their children, is chaired by only one mediator.
3. The turn-taking system (Sacks et al., 1974, pp. 703–4), consists of the rules and procedures participants use to exchange turns talking. In ordinary conversation, turn transition properly occurs at the end of a “unit type” (e.g., sentence, clause, or phrase). Speakers can select another to speak (e.g., by asking a question). If current speaker does not select a next, any participant may speak. If a next speaker does not self select, the current speaker may continue. Turns at talking and types of turns (e.g., questions and answers) are not predetermined or controlled by conventions, structures, or individuals outside the interaction, but are negotiated in the context of the talk itself. Turn-taking in mediation is partly pre-allocated, as in trials (Atkinson and Drew, 1979), and news interviews (Clayman, 1987; Greatbatch, 1988; Heritage and Greatbatch, 1991).
4. For any given interaction, the participation framework describes what patterns of participation and address occur (Goffman, 1981). Participants in ordinary conversation negotiate their participation status (e.g., ratified participant vs. bystander, addressed vs. non-addressed recipient) in the context of the talk.
5. Speakers in the transcript excerpts are identified with the initials of their institutional roles: C is a complainant; R is a respondent; M is a mediator. If more than one person holds a specific role, the parties are labelled A and B (e.g., MA is Mediator A). The transcripts have been simplified for ease of reading. Pseudonyms have been used for all proper nouns. The following symbols are adopted from Gail Jefferson’s system for transcription (see Atkinson and Heritage, 1984): A dash indicates a word was cut off abruptly. Underlining indicates stress or emphasis. Capital letters indicate increased volume. Words in parentheses are tentative transcriptions. Brackets indicate when two or more people are speaking simultaneously. Equal signs indicate one word is attached to another.
6. Post-modernists argue that representation as conceived by modernists is not possible. There is no such thing as simple representation. The message is always changed when it is repeated.

The underlying assumption of modern representation that it is possible to present something over again, to replace one object (concept, person, place, or time) with another, without loss of content or violation of intention. The post-modernists say this is impossible. (Rosenau, 1992, p. xiv).

While agreeing that “pure” representation may not be possible, I would argue that people still “do” representation, and act as if a position has been

represented. Representation as a practical accomplishment is the focus of this paper.

7. For example, Kressell (1985) found divorce mediation settlement rates ranging from 22–97%, with most programs settling 40–70% of cases. Kelly and Gigy (1989) found that 57% of divorce mediation cases in the program studied reach agreement. Silbey (1987, p. 419) found that 84% of families using a parent-adolescent mediation program reached agreement. 83% of these families were satisfied with the mediation process. Kelly and Gigy's study (1989, p. 278) also found that 78% of the men, and 72% of the women, were satisfied with mediation. Bautz and Hill (1989) found that 70–90% of divorced couples were satisfied with mediation. Kressell (1987, p. 69) found that 70–90% of the couples surveyed were pleased with mediation, a significantly higher rate than those whose divorces were handled by the courts.
8. For example, hearings may be chaired by one to three or more mediators (Cerino and Rainone, 1984). Mediation may be accomplished through caucuses (a series of private meetings between the mediator and individual disputants), through joint sessions, or through some combination of the two (Wahrhaftig, 1983; Felstiner and Williams, 1978; Kolb, 1981).

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