European Proceedings of
Social and Behavioural Sciences
EpSBS

www.europeanproceedings.com
e-ISSN: 2357-1330

DOI: 10.15405/epsbs.2021.06.03.52

AMURCON 2020
International Scientific Conference

PROBLEM OF THE SCOPE OF MEDIATION TODAY

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Abstract

This paper discusses the mediation scope that has recently turned into a pressing issue; it limits the mediation effectiveness and popularization. The authors discuss mediation trends: mediation styles' differentiation, emergence of several different schools varying in their approach, growing interest in the mediation theory. We investigate mediation barriers and focus on the internal limitations resulting from mediation technology and ethics. The paper demonstrates the complexity and fundamental blurriness of the borderline between mediation and similar approaches to problems and conflicts, i.e., legal and psychotherapeutic approaches. It analyzes the inadequacy of the conventional separation criteria: casework duration and depth, focus on the future, etc. The authors suggest using relative rather than absolute criteria. The authors developed novel criteria that set mediation and other methods apart. They are the mediator's neutrality and impartiality, the disputed matter which is the subject matter of negotiations rather than a symptom. We underline the crucial importance of moving from the position level (e.g., the lawsuit matter in court) to the level of interest and focusing on a win-win result; this transition is a distinctive medication feature. We discuss the procedural and substantive mediation evaluativeness and demonstrate their link to its neutrality, and the role they play in setting the mediation scope. Statistically significant data is retrieved from mediation practitioners' datasets. Thus, the mediation scope is a problem calling for further consideration, as the scope of cases suitable for mediation, the development of mediation practices, prevention of occupational burnout in mediators, and some other issues are pressing.

Keywords: Mediation, problem, scope, practice, mediation eligibility

https://doi.org/10.15405/epsbs.2021.06.03.52
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eISSN: 2357-1330

1. Introduction

What sets apart mediation and other alternative dispute resolution (ADR) methods is perhaps one of the most common questions professionals face attempting to expand the scope of mediation. In the 21st century, this discussion has transcended the matters of practice, and the question arose whether the theory of mediation and the need for it shall be recognized (Advancing..., 2016). Thus, the scope of mediation remains an important yet unresolved issue.

2. Problem Statement

Mediation has been an interdisciplinary technology since its inception. Over the recent decades, the single mediation model has evolved into multiple styles that can be classified into five or six drastically different schools (Foster, 2009). Some of them are more legal by nature while others are not dissimilar to psychotherapy for the clients (Ivanova, 2015a). Sometimes, the scope of mediation gets unreasonably narrow or broad. As a result, not only professional mediation practices, but also certain organizational issues and legislative provisions highlight the need to define the scope of mediation (Strebkov & Musayev, 2020). This lack of definition results in a disunity and counterproductive competition among professionals, which jeopardizes the development and promotion of mediation while also fending off potential clients.

3. Research Questions

In order to solve the problem in question, we must accomplish several objectives, and most importantly:

- Define different mediation scopes;
- Identify the indicators to distinguish mediation and similar ADR methods;
- Find how the scope of mediation is linked to the suitability of cases for mediation.

4. Purpose of the Study

This paper is an attempt to show the problematic nature of mediation scope, to analyze how such scope could be set, and to emphasize the importance of setting such scope.

5. Research Methods

For this research, the authors analyzed Russian and international papers on the topic as well as the mathematically processed data of their original research that involved mediation practitioners.

6. Findings

Speaking of the scope of mediation, we can highlight its limitations, whether related or not related to the profession itself. The following limitations exist:

1. Technological and methodological limitations associated with the procedure, toolkit, and functioning of professional mediation.

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2. Ethical limitations pertaining to the adherence to the principles of mediation that demand confidentiality, impartiality, voluntariness, and other inherent features of mediation.

3. Tangible, technical, and physical limitations arising from the requirements to the room and equipment for a productive negotiation.

4. Cultural and linguistic limitations that jeopardize understanding and may worsen the conflict unless duly accounted for. For instance, in case of international mediation, even if the mediator speaks both languages, it is always necessary to determine whether the parties want an interpreter to make sure the mediator will not tamper with the negotiations.

5. Legal limitations that arise from the legislation of the parties' jurisdictions. For instance, labor law-related class actions are eligible for mediation in many countries, but not in Russia.

6. Administrative barriers and limitations arising from corporate culture and existing practices, where there is reluctance to let third-party mediators help resolve internal conflicts even if doing so would be legal. For instance, one executive once claimed his company would never resort to mediation as long as he was in charge.

7. Limitations of awareness: mediation is a relatively novel approach that people are not commonly aware of.

8. Other limitations that are situation-, dispute-, or party-specific, including limitations arising from the goals of such parties.

The limitations listed above can be classified into external and internal barriers, the latter being linked to mediation as a method, process, or procedure. This paper discusses specifically the internal limitations of mediation that in the opinion of most professionals set the scope of mediation, that is, answer the question, "Is it mediation or is it no longer mediation?"

Defining the scope becomes an even more pressing issue when one has to compare legal aid and psychological/psychotherapeutic intervention. Professionals on both sides tend to believe they provide mediation as part of their professional services, that they need neither additional training nor additional services from mediators (Foster, 2009). Some lawyers even claim that only lawyers can be mediators.

The "watershed" between mediation and legal aid is often based on the criterion of evaluativeness. Structured control of the process (procedural evaluativeness) is something that many schools of mediation consider to be a norm, whereas only the evaluative mediation style enables the mediator to directly influence the substance of the dispute (i.e., to apply substantive evaluativeness) by means of counseling (Ivanova, 2015b). During separate preliminary meetings with the parties, the mediators attempt to identify the weaknesses of each party's legal position, which makes the parties less confident and more complacent for a quicker and easier settlement. Advisory mediation takes this even further, as the mediator advises both parties on how to resolve their conflict in the best way.

This approach is criticized by many mediators, who believe that this turns mediation into a pretrial conference, and that a mediator loses neutrality once their expert opinion has been voiced. On the other hand, many lawyers believe that classical mediation does not work; they often say, for instance, that they are paid for analysis. Clients seek expert opinion, too, and prefer to delegate their responsibility to the professional, although that often leads to a disappointment in the outcome (Garby, 2016).

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The opponents of evaluative mediation believe that the mediator's interference with the substance of the dispute renders mediation void of its core advantages. On a global scale, we can see zealots that consider their mediation style the only right way. Evaluation mediation is opposed by transformative mediation (Bush & Folger, 2005).

Many mediation styles overlap with corresponding fields of psychological and psychotherapeutic theory and practice. At the same time, the borderline between therapy, counseling, and mediation remains a disputable, multifaceted subject. Unfortunately, many papers only present an oversimplified interpretation thereon. For instance, some give the following example: if the professional helps settle a divorce-related dispute, then it is mediation; and if the professional works with the 'living' family, then it is therapy. We and many international researchers agree that this classification is absurd.

In Russia, family mediation refers to the mediation of any conflicts between or involving family members: conflicts of spouses, parent-child conflicts (including those where the children are adult), divorces, and splitting the inheritance. On the other hand, some distinguish between divorce mediation and family mediation (Parkinson, 2018).

Mediation is not always clearly different from psychotherapy and counseling. Unfortunately, criteria that seem to be clear and well-defined on paper are often inapplicable in the real world, a situation that confuses many professionals and forces them to completely reject the idea of separating these methods. For instance, it is even more difficult to draw the borderline in case of narrative mediation, as this style appeals to the deeper level of relationships and beliefs (Winslade & Monk, 2008). Narrative mediation seeks to improve the parties' relationships rather than to settle their dispute; this is where the borderline between mediation and psychotherapy becomes very vague.

Opinions vary on the proportions of psychotherapy, psychological counseling, conflict counseling, and mediation. Such opinions are often indicative of the methodological approaches of professionals holding them. The variation in opinions mainly concerns the extent of evaluative mediations and that of the client's activity, freedom, and responsibility (Ivanova, 2015a). Many still believe that clients only go to the professional for a "dummy guide to solution" when they can't solve the problem themselves. At best, mediators are seen as counseling psychologists.

One of the reasons why the distinction between mediation, psychotherapy, and counseling is so simplified is that it mostly refers to classical psychoanalysis and the associated counseling style. It is not uncommon to ignore the fact that the client-centered approach has become more popular over the recent decades; this approach defines the client as the expert on their own problem, and tasks the counseling psychologist to help the client actualize and articulate their solution that the client already has, even if they are not aware of it yet (Ivanova, 2015b). Apparently, this is similar to mediation, and not by accident. The approach originated in psychotherapy and soon found applications in other fields that involve interacting with the client. In fact, this approach was one of the arguments for alternative dispute resolution.

Misunderstanding the specifics of mediation can result in blurring the role expectations, extending the process unreasonably, rendering it ineffective, loss of the client's trust in the mediator, loss of credibility, and loss of the mediator's self-confidence. Regardless of the mediator's education, they do not provide psychotherapy services on top of mediation to the same client. If therapy is needed, the mediator can refer the case to qualified professional.

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Mediation can still have a positive psychological or even psychotherapeutic effect on the client. A client (a woman) posted this a month after the mediation, “Once we were done, I felt like my state of mind, my view of this conflict changed. Even my self-attitude changed, and that helps me now in my relationships!”

Sometimes, psychological counseling and mediation are confused with each other because mediators themselves refrain from using the word “mediation” when speaking to their clients. For instance, “counseling” is the term used in New Zealand to refer to the mediation of family conflicts.

In Russia, many mediators are afraid that use of niche terminology will scare away the clientele or complicate interaction; for that reason, they prefer to call this work “negotiations”, “discussion”, etc. In some cases, mediators even use such terms as ‘counseling’ or ‘advisory services’ in official documents to simplify the paperwork and avoid collision with certain regulations. This expands the scope of mediation and effectively overcomes the shortcomings of the existing medication laws—the shortcomings that the legislators are aware of and yet let remain in force. “Nothing is more permanent than the temporary,” they say.

If we consider the traditional criteria for separating psychotherapy and mediation, such as the duration and focus of casework, the depth and scope of the subject matter, including that of the analysis of the past, then it becomes clear such criteria are insufficient to define the scope of mediation (Parkinson, 2018).

For instance, a difficult case, e.g., a multilateral or spousal conflict, can take up to half a year to resolve; on average, family mediation takes ten sessions per case according to the global statistics. Different approaches to conflict still use identical or similar methods (Garby, 2016). And yet it is possible to define the scope of mediation.

Unlike a purely legal approach, mediation often goes beyond the substance of the lawsuit and positions of the conflict; it often seeks to strategically restructure the interaction between the parties to address their more implicit interests (Karpenko et al., 2018). On the other hand, unlike psychotherapy, mediation does not address symptoms, or internal dysfunctions (obsessions, enuresis, etc.). Mediator’s clients are virtually health, and mediation can only address issues that can be resolved by negotiations. A serious mental pathology is in fact a contraindication for mediation. The most important distinctive feature of mediation, the one that defines its uniqueness and advantages, is that mediators are impartiality and neutral towards their clients.

Research of the scope of mediation is inextricably bound to the eligibility of mediation. The narrower the scope, the less methods apply, the less cases are suitable for mediation. Many studies supervised by the authors hereof show that the majority of mediators support the idea of expanding the scope. Once they were armed with techniques used in transaction analysis, systemic methods, and other approaches from related disciplines, the mediators involved in those studies noted they became able to address more complicated cases and prevent occupational burnout thanks to more efficient and successful as well as less monotonous work.

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7. Conclusion

Thus, the scope of mediation is a complex and important question of mediation theory and practice, one that cannot be simply solved once and for all. Mediation is a "live" procedure and a dynamic process; its scope is flexible and relative, which means it should be subject to continuous monitoring and adjustment, if necessary.

By its nature, mediation is similar to other dispute resolution methods; its own toolkit keeps growing. At the same time, it remains what it is—mediation, an approach that stays true to its fundamental principles and covers the problems that are specific to mediation.

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