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DIFFERENT MEDIATION STYLES AND THEIR USAGE IN FAMILY MEDIATION

Every mediator has his own mediation style but this does not necessarily mean that there are no mainstream mediation styles. Nowadays every mediator gets special education which is usually based on one of the mediation styles described below. In actual praxis however it is up to the mediator's personality how he conducts mediation and whether he mixes different approaches or rather sticks to the toolkit of one certain style.

Legal literature distinguishes between four main mediation styles, the facilitative, the evaluative, the transformative and the narrative mediation. In the followings I will present the specific features and characteristics of the facilitative, evaluative and transformative mediation styles based mainly on the legal literature of the United States and afterwards assess their possible usage in family mediation. As a first step I would like to shortly discuss what mediation is and clarify the meaning of family mediation since it seems that there are many misunderstandings in connection with family mediation.

First of all I would like to give a short explanation on the reasons for preparing this essay in English. Mediation as it is known today and the mediation styles to be described were originally developed in the United States. Therefore, by preparing this essay, I used English language materials and resources. On the other hand I also considered the fact that there are specific legal terms (for example: "empowerment") which cannot be translated into Hungarian and can be better defined and explained in English.

Mediation is one type of alternative dispute resolution. Mediation – in short – is when disputing parties voluntarily seek help of an impartial third party who lacks decision authority to resolve their dispute and the parties work together with the

third party towards a settlement of the dispute.¹ This definition may be seen as generally accepted but we will see that it is not fully consistent with all mediation styles.

Family mediation's core essence does not differ from the one of general mediation. However, it needs to be emphasized that family mediation is not a relationship therapy, marriage counseling or an attempt on reconciliation. Family mediation helps couples (married or not) with the resolution of conflicts (such as child custody, visitation rights, distribution of property etc.) emerging from the dissolution of marriage or separation.

Facilitative mediation is the first evolved mediation style (1960's) and is regarded as the classic approach of mediation. This approach was developed by volunteer mediators and dispute resolution centers. The goal of these volunteers was to provide an opportunity and a framework for useful and reasonable communication to disputing parties which was ought to enable them to settle the dispute without a formal court procedure.

Evaluative mediation emerged in court-mandated or court-referred mediation.² The underlying concept of the evaluative approach is that by outlining the strengths and weaknesses of the parties' cases and giving an assessment on the possible outcome of the dispute in a court procedure, parties will show more willingness to settle the dispute out of court to avoid a lengthy and costly court procedure.

Transformative mediation has another significantly different approach as to the goals of mediation. The concept of transformative mediation is that unlike problem-solving mediation (facilitative mediation) which concentrates on improving the parties' situation (settlement of the immediate dispute) mediation should rather concentrate on improving the parties themselves. Transformative mediation is regarded as successful if the parties as persons are changed for the better.³

As mentioned before I will not discuss the fourth main mediation style known as narrative mediation at length. The roots of this mediation style can be found in narrative therapy⁴ developed in Australia. This approach was developed by John Winslade and Gerald Monk.⁵ In short "*[t]his style of mediation presupposes that people become caught in the conflict cycle because they see themselves as being*

¹ Riskin's definition: "a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction." 1996. 8. p.

² ZUMETA 2000.

³ RISKIN 1994, 84. p.

⁴ WHITE – EPSTON

⁵ WINSLADE, John and MONK, Gerald: Narrative Mediation: A New Approach to Conflict Resolution. 2000

bound to it. A mediator using this style gets the parties to view the conflict from a distance, through story telling. After they finish with the story, the parties work with the mediator to create a new story where the conflict is replaced by an agreement leading to resolution. The goal is to get the parties to detach themselves from the conflict.”⁶

Facilitative mediation

The so called facilitative mediation was the first type of mediation being taught and practiced. It is presently the most widely accepted and practiced mediation style.

Riskin describes the underlying assumption of the facilitating mediator as follows: the mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can create better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.⁷

Facilitative mediation is an ‘interest-based’ mediation style. An interest-based approach focuses on the underlying needs and interests of the parties and encourages parties to develop several alternative solutions to the dispute which address not only the legal rights but also the underlying interests of the parties.⁸ By focusing on interests, parties who are at an impasse may discover several possible solutions to their problem and may also discover shared compatible interests.⁹

Mediator’s role and mediation process

Zena Zumeta gave a short but expressive summary on the role and general approach of facilitative mediators: in facilitative mediation, the mediator structures a process to assist the parties in reaching a mutually agreeable resolution. The mediator asks questions; validates and normalizes parties' points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution. The facilitative mediator does not make

⁶ FOSTER 2003.

⁷ RISKIN 1996, 24. p.

⁸ BROWN 2002.

⁹ FISHER – URY – PATTON 1991, 42. p.

recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case. The mediator is in charge of the process, while the parties are in charge of the outcome.¹⁰

The goal of a facilitative mediator is to ensure that the parties' agreement is based on sufficient information and understanding. To achieve this goal, facilitative mediators predominantly hold joint sessions with all concerned parties present so that the parties can hear each other's points of view, but they also hold caucuses¹¹ regularly.¹² *“Mediators push disputing parties to question their assumptions, reconsider their positions, and listen to each other's perspectives, stories, and arguments. They urge the parties to consider relevant law, weight their own values, principles, and priorities, and develop an optimal outcome. In so doing, mediators facilitate evaluation by the parties.”*¹³

The facilitative mediator discourages discussion about past events, because it tends to lead to blaming behavior which may hinder or block the mediation process. Instead, the mediator tries to focus the parties' attention on the resolution of the present dispute. For the same reason the facilitative mediator tries to contain or control emotions since emotional outbreaks may also block the mediation process and even endanger the overall success of the mediation. Furthermore, a facilitative mediator also tries to direct the discussions and to concentrate on issues which are more likely to be settled and drops issues where a settlement is less likely to be reached or which are highly debated by the parties.¹⁴

Pros and Cons

Facilitative mediation seems to be largely acceptable to almost everyone. Some critics say that this approach is time consuming and very often ends without an agreement. Bush and Folger expressed strong concerns that facilitative mediation may be too directive and the mediators' influence on the process compromises the mediator's neutrality.¹⁵

¹⁰ ZUMETA 2000.

¹¹ Separate hearing

¹² ZUMETA 2000.

¹³ LOVE 1997, 937. p.

¹⁴ BURGESS

¹⁵ BUSH AND FOLGER 1994, 104-105. p.

Evaluative mediation

Evaluative mediation takes a very different approach to mediation. It is a process modeled on settlement conferences held by judges.

Evaluative mediation is a 'right-based' approach which "focuses on the legal rights of the parties and attempts to achieve a resolution which meets the relevant legal criteria of the dispute in a manner that is consistent with resolutions achieved in a traditional court setting."¹⁶

The underlying assumption of evaluative mediation is that the parties need some guidance from the mediator – since they are not able to settle the dispute themselves – regarding the appropriate grounds for settlement and they also assume that the mediator is qualified to give such guidance based on his training, experience, and impartiality.¹⁷

Mediator's role and mediation process

An evaluative mediator assists the parties in reaching resolution by pointing out the strengths and weaknesses of their cases and predicting the outcome of a possible court procedure. An evaluative mediator might also make formal or informal recommendations as to a fair settlement of the dispute. An evaluative mediator evaluates the given dispute based on the legal concepts of fairness. An evaluative mediator prefers to meet in separate meetings with the parties (and their attorneys), practicing a so called "*shuttle diplomacy*". They help the parties to evaluate their legal position, the costs and benefits of pursuing a legal resolution rather than settling in mediation. The evaluative mediator does not only structure the process but also directly influences the outcome of mediation.¹⁸

Pros and Cons

Supporters of the evaluative style argue that clients want a solution if they are not able to reach an agreement on their own and they also want to know that the chosen solution is a fair one. Evaluative mediation is mostly effective in disputes

¹⁶ BROWN 2002.

¹⁷ RISKIN 1996, 24. p.

¹⁸ ZUMETA 2000.

where money is at stake and it is no wonder that this style is highly appreciated by business men who want a quick and cost-efficient solution.

On the other hand the evaluative style is highly debated in legal literature. Several academics and practitioners say that evaluative mediation should not even be identified as mediation but a different type of alternative dispute resolution. Evaluative mediation is mostly labeled as coercive and not impartial. One of the biggest opponents of the evaluative style is Lela P. Love. Her opinion perfectly reflects the concerns of other critics as well. In one of her publications she writes: evaluating, assessing, and deciding for others is radically different than helping others to evaluate, assess and decide for themselves.¹⁹ In another article she even says that evaluative mediation is an oxymoron. *“It jeopardizes neutrality because a mediator’s assessment invariably favors one side over the other. Additionally, evaluative activities discourage understanding between and problem-solving by the parties. Instead, mediator evaluation tends to perpetuate or create an adversarial climate.”*²⁰

Transformative mediation

Transformative mediation is a somewhat newer method constructed by Robert A. Baruch Bush and Joseph P. Folger and was introduced in their book *The Promise of Mediation* in 1994. Transformative mediation is a decisively different approach to mediation. The transformative style was developed by the authors to be a contrast to the *“problem-solving”* mediation and promised to resolve the underlying problems and shortcomings of problem-solving mediation. But what is problem-solving mediation? In brief Bush and Folger refer to facilitative mediation as problem-solving mediation. In the followings I present the underlying concept and features of the transformative approach based on the publication *Changing People, Not Just Situations: A Transformative View of Conflict And Mediation* by Bush and Folger published in *Mediation* and a summary of transformative mediation made by Heidi Burgess.

First of all, the transformative approach defines conflict in a different way than the problem-solving approach. The premise of the problem-solving approach is that conflict is a problem, which needs to be resolved. The transformative orientation however sees conflict as a potential possibility for moral growth.

¹⁹ LOVE 1997, 938. pp

²⁰ LOVE – KOVACH 1996, 31. p.

The underlying concept of the transformative approach is that conflict is a challenge to the parties and provides them an opportunity to clarify their needs and values for themselves. On the other hand conflict is also an opportunity to develop and exercise respect and consideration for others.

The goals of mediation are also defined in a different way. The goal of problem-solving mediation is a mutually acceptable settlement of the immediate dispute, while in the transformative approach a settlement is only a welcomed side effect and the objective is the aforementioned moral growth of the disputing parties. According to the authors, moral growth can be achieved through empowerment and mutual recognition. In the followings I provide a short explanation of the meaning of empowerment and recognition.

Empowerment

*“[E]mpowerment is achieved when disputing parties experience a strengthened awareness of their own self-worth and their own ability to deal whatever difficulties they face, regardless of external constraints.”*²¹ A conflict always affects the disputing parties in a negative way. Parties are typically confused, disorganized and most often do not know how to deal with the dispute. The parties are overwhelmed by the conflict situation and as a result they feel vulnerable. Parties are empowered in mediation when they become calmer, more confident, regain composure and take control of the situation.

Empowerment is achieved when the parties become aware of their goals, resources, options and preferences.

Clarity about goals means that the parties gain better understanding of what matters to them and why and that their goals are legitimate and deserve consideration.

Clarity about options means that the parties realize that they have several options to reach their goals and even if there are some external restraints they still have choices and they are in control of them.

Clarity about resources means that the parties are aware of their own resources which are already on hand. Furthermore, parties may also realize that they have something valuable to the other party and they are able to communicate it in a way that helps them in effectively achieving their goals.

²¹ BUSH – FOLGER 1994, 84. p.

Clarity about preferences means that the parties learn how to better assess the strength and weaknesses of their arguments, different solutions and consequences and will be able to make a reasonable decision.

Furthermore, empowerment is also achieved when the parties enhance their own skills to effectively resolve conflicts. They may get a better understanding how to listen, communicate and present arguments, analyze and evaluate options or resolutions.

Recognition

Bush and Folger describe the meaning of recognition as follows: in the heat of the conflict, disputing parties typically feel threatened, attacked, and victimized by the conduct and claims of the other party. As a result, they are focused on self-protection; they are defensive, suspicious and hostile to the other party, and almost incapable of looking beyond their own needs. From this starting point of relative self-absorption, parties achieve recognition in mediation when they voluntarily choose to become more open, attentive, sympathetic, and responsive to the situation of the other party.²²

It is important to clarify that recognition is not something you receive but is the experience to give recognition to the other party and it is not only giving recognition but it also has to be done voluntarily.

Mediator's role and mediation process²³

In transformative mediation the mediator takes only a secondary position and lets the parties decide on not only the matter itself but also on procedural rules (setting goals, ground rules etc.). He may make recommendations regarding procedural issues but in the end the parties decide whether they accept the recommended rules or create own ones. The mediator “microfocuses” on the parties’ statements and lets them define issues themselves to discuss. Transformative mediators do not interfere with the course of discussion they rather encourage parties to discuss all issues which are of importance to them, even if those topics are highly contested or hardly negotiable. The mediator concentrates on the parties’ behavior and statements and always looks for openings to enable empowerment and recognition.

²² BUSH – FOLGER 1994, 89. p.

²³ This section is based on the summary of Heidi Burgess on Transformative Mediation

Unlike a problem-solving mediator, a transformative mediator encourages parties to discuss the past, since he sees a possibility for recognition in revealing the causes and motives in past conflicts and disagreements. The transformative mediator also encourages parties to express emotions since these are integral parts of the mediation process. There are no time limits in transformative mediation, parties may spend as much time on discussing each issue as they want and need to. The mediator assists the disputing parties to assess and analyze the situation and the different options and encourages them to work out a settlement if they want to. Nevertheless, even if the parties do not come to a settlement, if there is any increase in parties' empowerment and/or recognition of the other, the mediation process is regarded as successful.

Pros and Cons

Transformative mediation is mostly criticized for being too idealistic, lasting too long and ending too often without an actual agreement. Although I have to say that the last critic could be hardly reasonable since the transformative approach expressively does not define reaching a settlement as the goal of the mediation process. As a critic of the transformative approach I would rather say that the results of transformative mediation (empowerment and recognition) are almost impossible to measure.

As to my personal opinion, I consider the basic objective of transformative mediation, namely to improve the disputing parties' personalities, as a worthy one what mediators should always keep in mind, but I also think it is not always enough. Long-lasting results with respect to the parties' dispute can only be achieved by a fair settlement.

Usage of the different mediation styles in family mediation

The statement in the introduction, namely that the essence of family mediation does not differ from general mediation, is true in general but there is a great difference. What makes family mediation different is the special relationship of the parties. Unlike business or indemnification disputes for instance, where parties not necessarily have to have a long term relationship after settling the dispute, in case of family disputes however in most cases a long term relationship after the dissolution of the marriage or the relationship still remains unavoidable, especially if the disputants have children together. Therefore, in family disputes a real 'win-win solution' is absolutely necessary in order to settle the parties' relationship in a

long-lasting and satisfactory way. A stable, long-lasting settlement by families with children is of outstanding significance.

In my opinion the evaluative approach is rather inadequate for family mediation. In family disputes an evaluation of the possible outcome of a court case is on one hand not necessary, since given the facts, any divorce lawyer is capable of that and on the other hand it does not resolve the underlying problems. Since evaluative mediation fits cases where money is concerned, it could eventually be successful in cases where only the distribution of property is disputed.

Facilitative mediation is, in my opinion, the only mediation style, which may be used successfully in its pure form in every kind of family dispute. If the parties are able to agree on the issues related to the dissolution of the marriage or relationship in a fair way, they will also be able to cooperate better with each other in the future.

On the other hand I think that transformative mediation alone, if not accompanied by an agreement, is not always appropriate to settle family disputes. For example if the parties are not able to agree on child custody and visitation rules, even if the parties became somewhat better persons, there has to be a court decision regulating these issues and most probably it will not be tailored to the needs of each party. If one of the parties feels that he or she has been defeated or lost something (since in case of a court decision there is always a winner and a loser, or at least the parties consider it this way), this will likely lead to future conflicts.

I strongly believe that the best way to settle family disputes is a mixture of the facilitative and the transformative approach. It is a question of course whether these two approaches are compatible with each other. According to Bush and Folger the answer is a definitive no: “transformative and problem-solving approaches are fundamentally distinct and inconsistent, especially at the level of concrete praxis [...] integrating the two approaches present enormous practical and conceptual difficulties.”²⁴ It is true that the two concepts are significantly different but in my opinion besides the primary goal of a fair settlement at least the general goal of transformative mediation (empowerment and especially recognition) should also be kept in mind during the whole mediation process.

²⁴ BUSH – FOLGER 1994, 108-109. p.

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