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There is no good definition of ADR, as described in a recent post.

This post suggests that it's time for a paradigm shift in our field. Instead of identifying our field as ADR, we should use dispute system design (DSD) as our central theoretical framework.

Time for a Paradigm Shift

Thomas S. Kuhn's classic book, *The Structure of Scientific Revolutions*, describes the process of the famous "paradigm shift." Scientists develop theoretical paradigms that are generally accepted in their scientific community. Over time, some scientists find "anomalies" that cannot be solved within the existing paradigms. Eventually, anomalies accumulate, and innovative scientists develop new theories to explain the anomalies. If a critical mass of scientists agree on a new paradigm, there is a paradigm shift to the next generally-accepted paradigm.

It is time for a paradigm shift in our current general mediation theory because of numerous problems. Our current theory is incomplete at best and seriously misleading at worst. The traditional mediation models are oversimplified, poorly mapping onto reality of practice. They combine multiple elements that are not necessarily correlated. Many practitioners ignore them because they are confusing or not helpful.   People do not understand the theoretical meanings because the terms are not consistent with commonly-understood language. Arguments about what is or is not real or good mediation have spawned unhelpful ideological divisions in the field. Other than that, the theory is perfect.

It's not just mediation. There are similar problems with negotiation theory. And "ADR" doesn't make sense. But DSD does.

A Brief Summary of DSD

DSD is the "applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict" instead of handling individual disputes on an ad hoc basis, per the recent award-winning treatise by Lisa Blomgren Amsler, Jan Martinez, and Stephanie Smith. It is well established in dispute resolution theory and practice.

The treatise illustrates how it is used throughout societies all around the world including in court and community programs; mass claims facilities; labor and employment systems; commercial, consumer, environmental, and international disputes; transitional justice processes for dealing with the aftermath of wars; and systems for collaborative governance.

DSD goals may include providing fairness and justice, efficiency, engagement of stakeholders in system design and implementation, dispute prevention, flexibility and choice of multiple process options, matching of design with available resources, training of stakeholders, and accountability.

DSD procedures involve identifying stakeholders' dispute system goals; understanding the context and culture affecting the system; consideration of appropriate dispute prevention, management, and resolution processes; and development of appropriate incentives and disincentives for using the system. Traditional mediation and negotiation models reflecting practitioners' goals and procedures may be elements of DSD analyses as relevant.

In essence, DSD is about tailoring dispute systems to the needs of stakeholders, especially disputing parties. Good designs fit the stakeholders' context and culture so that the dispute processes produce as much satisfaction of the parties' procedural and substantive goals as reasonably possible.

Individual Mediators' Dispute System Designs

Although people often think of DSD as being used only in large organizations, individuals and small practice groups also handle streams of cases and can use DSD principles and techniques to improve their case management and dispute resolution procedures.

A DSD framework provides a much more comprehensive understanding of negotiation and mediation than the traditional theoretical models, which generally focus on handling the ultimate issues in dispute. Negotiators, mediators, and mediation programs regularly perform many other significant tasks that are completely independent of traditional theories. For simplicity, the rest of this post focuses only on mediation.

One can think of mediation systems as involving the combination of mediators' and relevant mediation programs' actions before, during, and after mediation sessions. These involve

routine procedures as well as strategies for dealing with challenging situations.

We should first consider mediators themselves. Mediators necessarily are the center of their systems. People who mediate regularly do so only as a result of a series of experiences, possibly including but not limited to reading, training, education, and mentoring. Mediators bring their own personal histories, values, goals, motivations, knowledge, and skills to their work. Thus mediators handling the same case inevitably would mediate it differently.

Mediators vary widely in all of the following activities. Mediators often engage in various pre-session activities to design and tailor the mediation process for each case. These may include educating parties about the process, soliciting submission of documents, and discussing specific aspects of the dispute. We should consider this as the initial stage of mediation. (Let's stop using the term "pre-mediation," which shows up more than 46,000 times on Google. Relevant activity before mediation sessions is very much a part of the mediation process as recognized by the Uniform Mediation Act and lots of statutes and rules.)

During mediation sessions, mediators vary greatly in their approaches including the extent that they use joint opening sessions or caucuses, the focus of their questions (such as about expected court results and/or parties' intangible interests), the role of parties (which may vary depending on whether they are represented by lawyers), use of technological tools, seating arrangements, and even lunch breaks, among many other things.

After mediation sessions, mediators may read relevant publications, take additional training, attend continuing education programs, reflect on their experiences, and plan how they might improve their techniques in future cases.

Mediators who operate in organizational mediation systems (such as court-connected mediation programs, panels of practitioners, and employers) obviously are affected by those systems. The designers and operators of organizational mediation systems set the parameters of mediations in their systems. These parameters may involve selection and training of mediators, assignment of cases, case management procedures, policies about desirable and unacceptable techniques, and compensation arrangements, among many others. Thus individual mediators' systems are nested within organizational mediation systems where they mediate.

The mediation market and practice culture also can have very significant effects on mediation. I coined the term "liti-mediation" reflecting the reality that mediation often is intricately integrated into litigation practice culture, transforming both lawyers' and mediators' approach to mediation. Moreover, cases may involve a sequence of processes such as ne-

gotiation, litigation, mediation, trial, and appellate mediation, possibly using the same process more than once in a virtually infinite number of possible process sequences.

Redefining Our Field as DSD

So, instead of defining our field as a disparate collection of dispute resolution processes, I suggest defining it as the processes of planning, managing, and/or resolving disputes – in other words, dispute system design. In a DSD framework, courts and legal profession are part of the field as well as lots of others who aren't necessarily defined as dispute resolvers.

This post is adapted from my article in the Cardozo Journal of Conflict Resolution, *Real Mediation Systems to Help Parties and Mediators Achieve Their Goals*.

The next post in this series will present real mediation systems of real mediators to illustrate how this framework can be applied to individual mediators. The series also will include practical tools for instructors and practitioners to use these ideas in their teaching and practice.

Stay tuned.

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