Mediator Behaviour: Demystifying What Actually Happens in the Room

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Abstract

A review of the Alternative Dispute Resolution (ADR) literature highlights considerable ambiguity surrounding what workplace mediators do in terms of behaviours adopted during dispute resolution processes. Core tenets of mediation – informality and confidentiality – further compound this ambiguity leading to diverse opinions in relation to the efficacy of workplace mediation as a dispute resolution alternative and even to the profession itself. In any profession, behavioural ambiguity of practitioners will have implications for theory, standards, training and governance. This article represents a set of reflections on the behavioural dynamics that are at play during the mediation process. It draws on data gathered from practicing mediators, based in either public or private provision. The findings demonstrate nuanced differences in mediator behaviour across context and the discussion offers insights as to how and why these disparities occur. The contributions of this paper lie in raising mediator awareness regarding their behavioural choices, and in informing mediator training, accreditation and regulation processes.

Keywords: workplace, mediation, mediator, ADR, behaviour, Ireland

Introduction

Workplace mediation is defined in terms of a process of structured dialogue towards pre-defined goals:

> "Workplace mediation is a confidential and voluntary process whereby an independent mediator assists two or more individuals, work groups, or employers and trade unions experiencing conflict or a dispute to identify their issues and objectives and explore how those objectives can be addressed with a view to reaching agreement." (Kenny, 2014)

Curran et al. highlight the potential benefits of mediation as: high settlement and participant satisfaction rates, improved relationships, morale and organisational performance, enhanced conflict management capacity and ability to deal with organisational change and improved 'organisational health' (2016b:9). In addition, they argue that in an increasingly individualised employment relationship mediation offers 'a degree of equality' to the employee that is not available through other dispute resolution processes (Bennett, 2016:171).

A greater understanding of mediator behaviour is important as it can facilitate client self-determination, a purported core principle of mediation (Hedeen, 2005). There are indications that mediator behaviour affects outcomes and therefore desired outcomes may be influenced by choice of mediator (Charkoudian et al., 2009; Wall and Kressel, 2012). A common understanding of mediator behaviour choices has implications for training, standards and governance.

Public and private workplace mediation provision

This study explores mediator behaviour across public and private contexts. Ireland has a short history of workplace mediation provision relative to other countries. Bennett (2013) found that in the UK there is greater use of mediation in the public sector compared to the private or cooperative sectors. In particular, there is an identifiable impact of ethos on how conflict is viewed and managed.

When the empirical work for this paper was conducted there were four contexts through which workplace mediation could be accessed in Ireland:
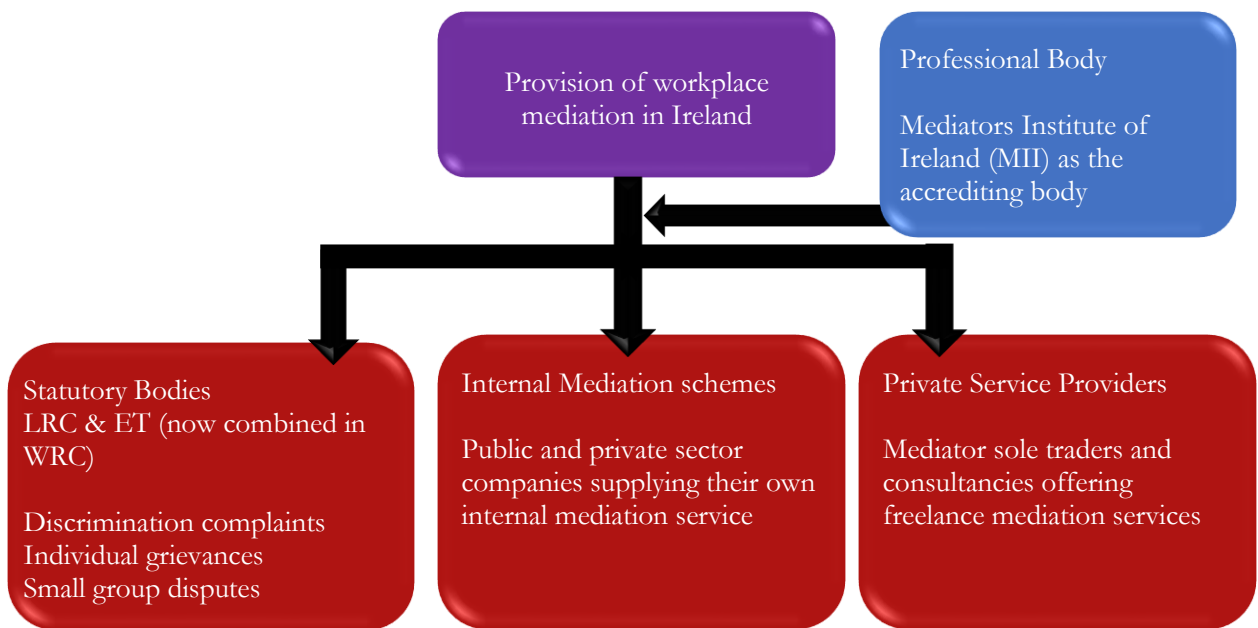
(Adapted from Curran et al., 'Shaping the Agenda 1', 2016a:9)

The Mediation Service of the Labour Relations Commission (LRC) emerged in 2005 to meet a growing number of cases which did not fit the typical profile of collective disputes referred for conciliation. These disputes are often based on a breakdown of working relations between individuals or small groups that has significant negative consequences both for the parties and for the conduct of work. Such conflicts may centre round a clash of values, personalities and/or interests and may involve issues of bullying and harassment. Mediation in this context typically involves a mediator working with individuals or small groups (with or without their representatives) to address an issue of conflict. The mediators are civil servants who invariably hold a second role as advisor or conciliator.

From 2001 the Equality Tribunal (now, like the LRC, under the Workplace Relations Commission (WRC)) used mediation to address complaints of discrimination under Irish Employment Equality law. Mediation is the default process offered once a complaint of discrimination is made and will proceed, unless either/both parties are unwilling to engage with the mediation process. In such cases the complaint will proceed to adjudication by a single adjudicator. Mediation in this context typically involves a mediator working with a complainant and a respondent (with or without their representatives) addressing a specific complaint of discrimination under Irish equality legislation. The mediators are legally qualified equality experts who also adjudicate complaints of discrimination, although they never mediate and adjudicate the same case.

In some organisations (either public or private) a workplace mediation service is provided internally. In addition to their regular work role, staff are trained as mediators and deployed to address disputes within their own organisation. In Ireland, the establishment of such internal mediation services has been restricted to large national organisations, including the health service, public transport providers, utility providers and the postal service (Teague et al., 2015:98). These organisations have built mediation into their dispute resolution policies and practices. Agreements reached have no legal standing and if mediation does not resolve the dispute, or if either party is unwilling to engage, it is referred to the next stage of the relevant policy.

In the private arena, workplace mediation services are offered by a growing number of professionals operating either as sole traders or under the auspices of a consulting firm. Most workplace mediators are accredited by the Mediators Institute of Ireland (MII) as the professional body for mediation practitioners. Disputes may be individual, small group or collective and may constitute disputes of rights or disputes of interests. Agreements brokered by private mediators incur a fee to the contracting agent (usually the employer/HR Manager) and have no legal standing.

Literature Review

In this section we present literature that may throw light on the ambiguity surrounding mediator behaviour. This will then be followed by empirical findings from interviews with mediators regarding their behaviour in process.

Informality and confidentiality are integral features of the mediation process, critical to its success through the encouragement of candid, open discussion (Brown, 1991). However, these features can serve to exacerbate the ambiguity surrounding what happens in mediation. Opinions on the exact nature of confidentiality can vary widely however, challenging mediation providers and policy makers to strengthen confidence in terms of supply and delivery (Freedman and Prigoff, 1986; Kirtley, 1995; Morek, 2013). Curran et al. explored the dilemma of balancing confidentiality and transparency in a state-funded mediation service and concluded that a 'dialectic tension' exists between the two but that pragmatic solutions can be found to address this confidentiality-transparency tension while still delivering a quality service (2018:33).

Context awareness as a mediator competence

Curran et al. (2016b) reported contextual factors as significant indicators in both the use and effectiveness of mediation in the workplace. Organisational size, culture and ethos together with hierarchical arrangements all influenced the likelihood of mediation as a response of choice to workplace conflict. The research also found that the mediator must understand how their role fits within the organisation's relevant policies and procedures. Significantly, the research highlighted the singular effect of the mediation process itself as an intervention into existing organisational change and transformation processes:

> "Culture, ethos and inherent attitudes to the nature of the employment relationship can significantly influence organisational approaches to resolving workplace disputes. Hierarchical context and the structure of organisations affect perceptions of conflict and conflict behaviour. Also sectoral factors influence the use of mediation, with greater use in the public sector than the private sector.
> To be effective, the mediator must understand how their role fits within the organisation's relevant policies and procedures. Mediators should also have an understanding of the process of change, and an awareness of the context for participants during and after their engagement in mediation." *(*Curran et al, 2016b:10)

The research identified the need for mediators to have a better understanding of the impact of contextual factors and called for further exploration into how this competency can be addressed in training and evaluation.

Mediator preferred style

Curran et al. (2016a) describe a range of preferred styles, strategies, models and tactics which the mediator may call upon during the mediation process and/or across mediations. These can be arranged under four main categories: facilitative, evaluative, settlement and transformative.

Table 1   Mediation models (adapted from Curran et al, 2016a)

Preferred Style	Description
Facilitative	Parties allowed a high degree of autonomy to express their interests and needs
Evaluative	Parties provided with a realistic evaluation of their negotiating positions
Settlement	Parties brought to a point of compromise through incremental bargaining
Transformative	Parties empowered to find a resolution between them

These styles become evident through the combination of skills and competencies based around empathic listening, emotional intelligences and tacit knowledge use. The culmination of these factors, along with mediator career experiences and personal values, cemented by theory and training, can result in a kaleidoscope of behaviours which can be adopted by the mediator to address the presenting dispute in the presenting context. In this respect the mediator mind-set can be viewed as utilitarian and instrumentalist, carefully self-regulating behaviours in response to actions and developments within the mediation process.

The mediator mind-set

The variability implied by these antecedents creates challenges for empirical research. Strategic decisions made by the mediator are nuanced, in-the-moment, and often informed by intuition. This makes mediator behaviour difficult to quantify and harder to predict. There is potential for errors, mismatches between what Argyris calls 'theories of action' and 'theories in use'(Argyris, 2010, 2004, 2000). Theories in action are those that people espouse principles of, concepts which may point to training or experience, and which they believe they act upon. Theories in use indicate actual behaviour, which may or may not align with the former. He proposes the concept of Double-Loop Learning, where the detection and correction of errors (Single-Loop) generates developments and refinements that lead to a skilful awareness and an increased confidence in predicted outcomes (Argyris, 1977).

Argyris describes individuals with productive reasoning mind-set as those that produce valid and verifiable knowledge, create informed choices and make personal reasoning transparent in order for their claims to be tested robustly. These conflict-aware individuals are vigilant about striving to avoid unknowingly deceiving themselves and others.

Theory can help to shed light on the ambiguity surrounding mediator behaviour. Whilst informality and confidentiality are core features of mediation, the tension this creates with requirements for more transparency can be effectively addressed.

Effective mediators need to be context-aware and adapt their behaviour choices to the exigencies of the unique circumstances facing them with each mediation. While personal values, training and experience may combine to form a preferred style, an effective mediator must self-regulate their behaviour as 'utilitarian instrumentalists'.

The distinction between 'theories of action' and 'theories in use' (Argyris) may help to explain the gap between what mediators say they do and what they actually do. Developing a productive reasoning mind-set will lead to more effective mediator performance.

Methodology

The purpose of this paper is to explore what mediators actually do during the mediation process and across public/private contexts.

Detailed semi-structured interviews were conducted with a sample of public mediators operating under one of two precursors to the Workplace Relations Commission (namely the Labour Relations Commission (LRC) x 6, and the Equality Tribunal (ET) x 6), a sample of 6 mediators operating internally in a public service institution, and 6 mediators operating privately. The rationale for the mediators chosen was as follows. The LRC facilitated access to all of the mediators operating within the LRC and ET at the time. The researchers wanted to include a matched size sample of internal mediators and a matched size sample of private mediators so that the different contexts within which workplace mediation is offered in Ireland would be represented.

The research approach was qualitative and areas covered by the questionnaire included: organisation and dispute context, mediator characteristics and goals, the mediation process, and mediation outcomes. This paper draws on the section that covered mediator behaviour which was informed by thirty-two behaviours commonly identified in the international mediation literature. For this section the interviewees had to review the 32 behavioural items and indicate which ones they 'typically

adopt' and which they 'typically avoid'. The questionnaire was sent to the mediators in advance and the researcher then met with them to go through the entire questionnaire.

The LRC facilitated access to LRC and ET mediators. The authors then negotiated access to an organisation with their own internal mediators. In addition to their regular work role, these staff are trained as mediators and deployed to address disputes within their own organization. A list was provided of all of the mediators and the sample was comprised of those first to respond to an invitation to participate in the research, up to a maximum of 6 mediators.

In the private arena, workplace mediation services are offered by a growing number of professionals operating either as sole traders, or under the auspices of a consulting firm. Most workplace mediators are accredited by the Mediators Institute of Ireland (MII). The private mediators were sourced through a snowball sampling method where mediators recommended other possible participants. Interviews were conducted at the mediators' workplaces except for the independents who were interviewed at hotel locations.

Interviews lasted between 40-96 minutes and were recorded and transcribed for thematic analysis. As the behaviour section was largely quantitative the researchers were able to simply count the number of times a behaviour was 'typically adopted' or 'typically avoided' across the context samples. Table 2 below profiles the respondents across contexts.

Table 2   Profile of Respondents and Contexts

Context	LRC	ET	Internal	Independent
Number of mediators interviewed	6	6	6	6
Professional Background	Public Service Industrial relations specialism	Public Service Legally qualified. Employment law specialism	Human Resources (2) Nursing (2) Union Rep (2)	IR/HR Qualification (5) Solicitor (1)
Mediator Training	MII Accredited Additional credentials CPD	MII Accredited Additional credentials CPD	MII Accredited Additional credentials CPD	MII Accredited Additional credentials CPD
Mediation Experience	5-15yrs	5-15yrs (except 1 with < 5yrs)	5-10yrs (except 1 with < 5yrs)	10-15yrs

Type of Disputes	Interests	Rights	Interests	Rights or interests
	Individual or small group interpersonal disputes	Complaints of discrimination under Equality Acts	Mainly bullying and harassment under 'Dignity at Work' policy	Broad range of disputes including interpersonal conflicts, bullying, harassment and breach of employment rights
Typical initial disputant hostility (10=Max)	6-7	7	7.5	8
Relationship between Disputant & Employer	On-going	On-going or terminated	On-going	On-going
Mediation Service Funding	State funded	State funded	Costs covered by the organisation	Costs covered by the contracting employer

Mediator interviews were designed to interrogate the perspective and experience of individual mediators and to explore the behaviours they typically adopt and typically avoid, in mediation sessions. The mediator perspective provides an important contribution to research. However, while this type of data has value, the limitations of self-report methodologies must be acknowledged. Wall and Kressel (2012) emphasise that what mediators say they do in interviews or surveys may not correlate perfectly with what they actually do in practice.

Research Findings

Mediators were presented with a list of 32 behaviours drawn from the literature and were asked to identify behaviours they would 'typically adopt' or 'typically avoid' in mediation. Table 3 lists a core of seventeen behaviours reported as typically adopted by over 75% of the mediators across contexts.

Table 3   **Mediator Behaviours Typically Adopted**

Behaviour	Frequency of use				
	ET	LRC	Internal	Independent Consultants	Total
1. Explain the process at the outset	100	100	100	100	100
2. Paraphrasing/summarising/ reframing	100	100	100	100	100
3. Agree ground rules at the outset	100	100	100	83	96
4. Clarifying	100	100	83	100	96
5. Highlighting areas of commonality	83	100	100	100	96
6. Refocusing the parties onto the issues	83	100	100	100	96
7. Allowing emotional outbursts	67	100	100	100	92
8. Information gathering	100	100	83	83	92
9. Handing back the issues to the parties (empowering)	100	67	83	100	86
10. Taking the heat out of communications (cooling)	100	83	67	100	86
11. Pointing out the alternatives to a failed mediation	100	83	100	67	88
12. Using silence	83	83	83	100	87
13. Naming the feeling expressed by a party	67	83	83	100	83
14. Using positive reinforcement	67	83	100	83	83
15. Using humour	83	67	67	100	79
16. Raise the issue of the parties goal(s) at the outset	67	67	100	83	79
17. Using best/worst case scenarios	67	67	67	100	75

Table 4 illustrates that five behaviours were reported as never or rarely adopted by the mediators. None of the mediators acknowledged 'taking the side of either party' or 'criticising the behaviour of either party in joint session', behaviours inconsistent with the ideology of the mediator as impartial. Only one mediator admitted to engaging in 'selling one party's case to the other party' although this behaviour was restricted to caucus sessions.

Table 4   **Mediator Behaviours Rarely Adopted**

Behaviour	Frequency of Behaviour				
	ET Mediators	LRC Mediators	Internal Mediators	Independent Consultants	Total Number of Mediators Adopting behaviour (sample = 24)
1. Taking the side of either party	None	None	None	None	None
2. Criticising the behaviour of either party in joint session	None	None	None	None	None
3. Siding (selling one party's case to the other party)	1 of 6	None	None	None	1
4. Raising the issue of an unbalanced agreement	1 of 6	None	None	2 of 6	3
5. Advising	1 of 6	2 of 6	2 of 6	None	5

Three mediators claimed that they would typically 'raise the issue of an unbalanced agreement'. Other mediators claimed that they didn't need to do this as they would engage in 'reality testing' of proposals along the way if they felt that solutions were unbalanced or unworkable. There were mediators however who felt it was not within their role to challenge the balance of an agreement if the parties were willing to sign up to it.

Five of the mediators admitted to typically 'advising'. Two were LRC mediators and one was an ET mediator. The two independent mediators who typically advised, qualified this by saying they would either do so 'cautiously' or only in 'certain cases'.

Table 5 lists ten reported behaviours that varied significantly across context. While the previous tables indicate similarity in behaviour across context, this data provides more compelling evidence to suggest that contextual factors influence mediator behaviour.

Table 5   **Mediator Behaviours Differing Across Context**

Behaviour	Frequency of Behaviour				
	ET Mediators	LRC Mediators	Internal Mediators	Independent Consultants	Total
1. Referring to own experience	5 of 6	4 of 6	4 of 6	2 of 6	15 of 24
2. Determining the order of issues to be addressed	5 of 6	3 of 6	3 of 6	4 of 6	15 of 24
3. Critically evaluating the suggestions of either party (reality testing)	4 of 6	3 of 6	3 of 6	4 of 6	14 of 24
4. Steering towards a preferred solution	2 of 6	4 of 6	4 of 6	1 of 6	11 of 24
5. Making suggestions	5 of 6	4 of 6	1 of 6	1 of 6	11 of 24
6. Asking one side to state the other's position	None	3 of 6	2 of 6	5 of 6	10 of 24
7. Offering advice when asked	4 of 6	2 of 6	2 of 6	1 of 6	9 of 24
8. Pressing (urging either party)	1 of 6	4 of 6	3 of 6	1 of 6	9 of 24
9. Expressing your opinion	3 of 6	4 of 6	1 of 6	None	8 of 24
10. Raising legal issues relating to an agreement	6 of 6	None	1 of 6	None	7 of 24

Discussion, conclusions and implications for practice

This paper set out to demystify the ambiguity surrounding mediator behaviour during the mediation process. The empirical data was gathered from public and private sector mediators operating in the four different contexts through which workplace mediation can be accessed in Ireland.

The findings reveal a high degree of commonality across the behaviours adopted or avoided by mediators regardless of context (Tables 3 and 4). This is consistent with mediator behaviours reported in

the literature and supports current thinking in standards of practice regarding our understanding of what happens in mediation.

Conversely, differences in provision environment also translate into contextual nuances (as seen in Table 5). For instance, items such as 'referring to own experience', and 'making suggestions', cited by the LRC and ET mediators as frequently adopted, suggest evaluative, directive styles similar to conciliation or adjudication. This may be explained by the results-driven contexts in which they operate where the mediators wear a 'second hat' as conciliators and adjudicators. The data also supports contextual differences in behavioural approach when dealing with rights-based as opposed to interest-based conflicts. The ET mediators in particular utilised their legal expertise by 'raising legal issues relating to an agreement' consistently in addressing discrimination-based complaints. Hence the context throws light on the behaviour. 'Steering towards a preferred solution', 'making suggestions', 'offering advice when asked' and 'pressing' were rarely adopted by the private mediators. As independent consultants, operating across multiple contexts where details of process are not revealed to the contractor, these mediators seem more likely to stick with the principle of allowing the parties to self-determine. Table 5 provides a sharper perspective on mediator behaviour that has up to now been a source of confusion and ambiguity. It suggests that mediators operate as context-aware utilitarian instrumentalists self-regulating their behaviour in a nuanced way to address the exigencies of the situation in which they find themselves.

This article begins to address a lack of evidence regarding what workplace mediators actually do in Ireland, and how their behaviour varies with context. The findings of this research support the view that whilst there are commonalities in mediator behaviours across contexts, mediators are utilitarian instrumentalists and will employ appropriate behaviours they believe are most likely to assist the parties in addressing the conflict at hand.

Further research on mediator behaviour will present a detailed picture of what happens in mediation which will inform our understanding of mediation practice as academics and practitioners. This study provides an opening of that research agenda in Ireland. As research develops it will inform practice by assisting potential participants in determining whether mediation fits their needs. Increasing understanding of mediator behaviours will also inform professional training and accreditation processes. Further research is needed to realise this potential research-practice synergy. Despite a dramatic increase in practice very little research has been conducted in Ireland. Confidentiality is oft cited as a reason for the mystery surrounding mediation but as Curran et al. (2018) demonstrate, it is possible to manage the tension between confidentiality and transparency without compromising the process.

Attention needs to be paid to methodologies employed. Wall and Kressel (2012) argue that much of the research into mediator style and behaviour is based on self-report methodologies and that mediators don't necessarily do what they say they do. This echoes Argyris's theories of action/in use

contention (2010). Broadening the methodology to encompass observations of mediations (either real or role-played) to explore the behaviours actually adopted by mediators in practice will provide an added dimension to the findings of this research.

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Acknowledgements

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