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Resistance to Mediation: Understanding and Handling It *

Maria R. Volpe
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ABSTRACT

One of the major challenges confronting mediators is the resistance to their intervention efforts by disputants. This article examines some of the explanations for resistance to the mediation process as well as suggested ways of coping with resistant disputants.

As mediation grows in acceptance, popularity, and diversity, a variety of new challenges are confronting mediators. An increasingly important area of concern for mediators is resistance to their intervention efforts by disputants. And, the fact that mediation is now being used as a compulsory court intervention process (as a result of legislation, policies or regulations) makes understanding of resistance for mediators even more critical. (e.g., Freedman 1984).

Practitioners involved in a wide range of problem-solving and intervention processes, particularly those in mental health work, have long been aware of the phenomenon of resistance by patients or clients. (e.g., Anderson and Stewart 1983; Streat 1985). In fact, understanding the causes

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of resistance is an integral part of their professional education and training, and a body of literature on resistance theory has been built up. With few exceptions (e.g., Folberg and Taylor 1984), there is little in the mediation literature focused on resistant behavior that has been written specifically for mediators. This void is especially significant since many mediators do not have a mental health background and may not have received any education or training in detecting or handling resistance.

The Mediation Process

Generally speaking, mediation can be defined as a short-term, task-oriented, participatory intervention process in which disputants voluntarily agree to work with a third party to reach a mutually satisfactory and balanced agreement. Depending on the nature of the case, mediation processes and outcomes may be quasi-therapeutic as well as quasi-legal.

Mediation, not unlike other intervention processes (such as counseling, therapy and social work), frequently engenders resistance from clients or patients who are *required* to face problems and deal directly with them. Individuals confronted with problems often do things which have the effect of impeding the very efforts that can help them. This occurs whether or not they have overtly made the commitment to participate in the process and despite the costs, emotional and/or practical.

Disputants are often still mired in the win-lose mode as they begin the mediation process. And, unlike many other intervention processes, mediation usually engages the disputants directly in the resolution process to thrash it out face-to-face.

While it is not expected—nor appropriate—for mediators to deal directly with the intricacies of resistance emanating from the intrapsychic world of a disputant, it is nonetheless imperative that mediators understand the dimensions of resistances so that they can more effectively deal with the mediatable issues.

Resistance

We define resistance as actions by parties, both conscious and unconscious, that forestall, disrupt and/or impede change designed to alter customary behaviors. While resistance is typically seen as undesirable and dysfunctional, it may in fact serve some useful purpose. For example, dealing with resistance satisfactorily can facilitate resolution. Alternatively, it

can slow down or halt the decision-making process. Resistance is universal and manifests itself in many ways, some of which are obvious while others are subtly disguised as something else.

Resistance is known to practitioners in all fields that attempt to introduce new or different ways of doing things. Depending on the field of practice, the practitioners' response to resistance will vary. In fact, because of the many ways that resistance may appear and the different types of practitioners who confront this problem, the literature in the more established intervention fields offers countless theoretical perspectives and intervention modalities addressing resistance. (e.g., Anderson and Stewart 1983; Streat 1985). However, unlike long-term intervention processes where the intervener attempts to overcome client resistance by talking about feelings and actions over time, mediation requires that the mediator come to grips with the resistance more directly and quickly.

Furthermore, because their process is agreement-oriented, mediators may not always be aware of the need to be concerned about resistance or have the time to handle it. Mediators, nonetheless, should understand the resistance factor and why it sometimes occurs. In doing so, the mediator may avoid actions that may in fact contribute to disputants' resistance to the mediation process and hamper the work with the mediator. Simply stated, you cannot ignore resistance. If you try to ignore it, you may exacerbate its effects.

Resistance to Mediation: Some Explanations

Situational: Perceptions of Contemporary Mediation

One commonly held belief is that resistance to the mediation process is a direct result of the widespread lack of information about the process. It is widely believed that, because the use of mediation is a relatively new method in virtually all areas except labor, the process would be used more frequently, willingly and effectively by disputants if it were better known and understood. Some people even confuse the word "mediation" with "meditation." And, even among more sophisticated people, is not readily distinguished from other intervention processes, particularly arbitration. Hence, there is a considerable need to inform the public about mediation.

A second explanation focuses on mediation's relationship to the legal system. It is often argued that mediation in most sectors operates in the shadow of the law and that legal practitioners serve as gatekeepers. Riskin (1982,41) has noted, for example, that "The future of mediation in this

country rests heavily upon the attitudes and involvement of the legal profession.” Further, Riskin (1982,43) points out:

Most lawyers neither understand nor perform mediation nor have a strong interest in doing either. At least three interrelated reasons account for this: the way most lawyers as lawyers look at the world; the economics and structure of contemporary law practice; and the lack of training in mediation for lawyers.

As a result of factors such as these, law schools, bar associations and countless other groups are mounting a multitude of eclectic efforts to inform members of the legal profession about mediation and its relevance for them. (e.g., see ABA Law School Directory 1983; Sander 1984; Burger 1984).

A third possible explanation for resistance to mediation goes to the central premise of the process itself. In the literature, mediation is often characterized as an empowering process through which the mediator empowers the parties, particularly the weaker party. This raises questions about whose side the mediator is on. Colosi (1983, 2) for example, points out that the “temptation to the mediator to use the mediation process to somehow bring equity to the dispute by attempting to modify the balance of power is incredibly strong.”

Drawing an analogy between the weaker party and a lamb and the stronger party and the lion, Colosi (1984, 17) further notes that

When mediators work to empower the lamb, the mediator may be helpful in that particular case...may help that lamb...they may help that underdog to prevail and do better than perhaps the lamb or underdog might have done otherwise, without the help of the mediator. But there’s a danger that the mediation may earn a negative reputation because of the activities of such mediators.

Both lion and lamb may simply ask, “What’s in it for me?” and refuse to use the mediation process.

There is one vital distinction between mediators and therapists that should be underlined pertaining to the “neutral” unbiased stance that each should have. The therapist’s “neutrality” is centered on ethical and moral issues. In Lewis Wolberg’s book, *Techniques of Psychotherapy* (1977, 137), the author presents a list of “rules” for building a therapeutic relationship, one of which is “avoid moralistic judgments.” If the patient says, “I get an

uncontrollable impulse to steal,"unsuitable responses from the therapist are 'That can get you into a lot of trouble,' 'You're going to have to put a stop to that' or 'That's bad.' The suitable responses listed include: 'Do you have an idea what's behind this impulse?'; 'How far back does this impulse go?'; or, 'How does that make you feel?' The point is that the therapist is neutral, on the patient's side, and nonjudgmental. When this approach is transferred into group therapy, the same style is employed even when dealing with conflict within the group. The therapist is on the side of the speaker, and does not make ethical or moral judgments. (e.g., see Levine 1979).

In mediation, "neutrality" is quite different. The mediator is not on anyone's side. Neutrality and impartiality imply not taking sides while stressing recognition of reality and working toward problem solving. (Moore 1986, 15).

This neutrality is not easy to achieve because the mediator's knowledge of the facts comes from the disputants, who have their own credibility and their own capacity for persuasiveness. For the mediator to be neutral, facts must always be credited to their source as that person's account of what is or what happened. The mediator's task is precisely the opposite of that of the therapist. The mediator must be seen *not* to be on one's side and, of course, not to side with one's opponent. To the comment quoted by Wolberg, "I get an uncontrollable impulse to steal," the mediator would likely say, "What would you want to achieve that way?" The mediator could also point out—to the benefit of all—that there is a difference between an impulse and an action. Or, the mediator could just ignore the remark. The mediator is there to advance the process, not to cure any individual, except insofar as the process may be quasi-therapeutic for the parties.

Unconscious Resistance

Another set of explanations derives from an area not generally part of mediator training, more specifically psychoanalytic theories of the unconscious. It is obvious that the literal meaning of the term "unconscious" is "not in consciousness" or outside of our awareness. In developing his ideas about unconscious thoughts and ideas, Freud went beyond this simple notion. His first or basic level of meaning of unconscious was, however, at this *descriptive* level. It refers to things which we are not aware of—facts, for example, that are not "at the tip of the tongue." A friend's phone number might be one such item of knowledge. At first, we may not be able to recall it; but, with a moment's thought or effort, we can bring it back to awareness. Items that can be easily brought to consciousness are conceived of by Freud (1912, 262) as residing in the preconscious system.

However, there are also memories, ideas and thoughts that are banished from consciousness, driven underground and not subject to recall under ordinary circumstances. Painful memories, for example, are *repressed* from consciousness and never admitted as long as the repression operates successfully. This suggests the forceful and energetic nature of ideas not in consciousness, and it constitutes Freud's *dynamic* level of meaning.

Finally, as Freud investigated dreams, it became clear to him that the unconscious was characterized by an ability to condense, displace and distort ideas. These forces were understood by Freud to be dominated by the wish fulfillment aspects of the pleasure principle and by other aspects of what he called primary process thinking. Thus, unconscious ideas had their own system of organization and of process—a notion indicating the *systematic* meaning of the term unconscious.

These three levels of meaning can be summed up in terms of simple, direct questions as follows: "What is unconscious?" for the *descriptive* level; "Why is it unconscious?" for the *dynamic*; and "Where is the unconscious idea? How does it operate?" for the *systematic* level.

How do we know that the unconscious really exists, since, by definition, no one can attest to their own unconscious. We know it from its manifestations ranging from "forgotten" material that is suddenly remembered, through slips of the tongue, dreams, ideas that come up during free association, to specific behaviors induced by post-hypnotic suggestion. In this way, everyone can attest to its reality.

In psychoanalysis, resistance was originally understood to relate to the tendency of many patients to reject frequently and vigorously offered interpretations. But as attention was drawn to this resistance, therapists also noticed another level:

Individuals ostensibly seeking psychotherapeutic help were reported, despite their obvious distress, to carry out various maneuvers which undermined and sabotaged the therapist's efforts on their behalf, despite their having consulted the therapist voluntarily, and despite the considerable amounts of money and time they expended in this search for emotional well-being. (Singer 1965, 223)

Freud's students and followers, Adler, Jung, Sullivan, Fromm-Reichman, focused on the notion that resistance is a mechanism in the service of avoidance, an attempt to keep hidden material that will heighten anxiety and thereby maintain a sense of personal dignity and continuity rather than it being a deliberate backward step.

It is important to remember that resistance reflects the individual's disbelief in alternative ways of living. Holding on to familiar ways, the person fears that any other way of dealing with things will be disastrous and shattering to self-esteem.

Psychotherapists deal directly and extensively with unconscious resistance, as well as with the nature and style of the relationship between therapist and patient, because contained within them are clues to the very deep intrapsychic conflicts that must be resolved. Therefore, in a therapeutic situation, resistances must be identified, analyzed and discussed.

The mediator may encounter similar resistances, but extensive analysis and discussion of them is not crucial to the process. In mediation, the effort is to help contending parties resolve their differences and come to an amicable agreement. Unconscious resistance is interference, and its nature, motives and feelings must be understood only in order to overcome its force as an impediment.

Experienced therapists know that interpretation, clarification and labeling of behavior is appropriate only when the individual comes with a problem, and the road to addressing it involves interpreting the behavior of the patient. In any other situation, interpretation is uncalled for, and it usually is experienced as an aggressive attack. For the mediator to interpret behaviors in terms of their unconscious roots—to label some behaviors as resistance, for example—is to risk being perceived as aggressive and hostile. The mediator should be able to recognize resistance, but be close-mouthed about interpretation of the resistance.

Recognizing resistance—even if it is not labeled as such—will help in refusing to tolerate resistant behavior. Thus, if a party in a dispute consistently arrives late for sessions, or leaves early, the mediator should quite clearly tell the offending party that, by limiting the time to work on a resolution, *he or she is slowing down the process rather than helping it along.* If the party offers excuses for the lateness—*ascribing it to factors beyond his or her control*—the response could be that the process works only when the participants make every effort, including planning to arrive early and giving themselves enough time, so that they do not cut into the time of the sessions. The discussion focuses on the behavior and its effects, not on its unconscious purposes.

One relevant psychological insight in understanding resistance to mediation concerns the relationship between resistance and transference. Transference refers to the transfer of feelings, attitudes and expectations deriving from other relationships to the situation at hand. Falling in love with the therapist is one form of transference. Hating the therapist for bigotry, intolerance, and coldness is another, even when the therapist has done nothing to merit this judgment other than keeping quiet.

Mediators encounter resistances of a similar sort when resistance to the process is expressed as a hostile rejection of the mediator. Folberg and Taylor (1984, 331) point out during negotiation it sometimes occurs that one of the participants announces that he or she "wishes to withdraw from mediation because (1) mediation is not working or (2) the mediator is biased or incompetent." Folberg and Taylor suggest that this resistance can be dealt with by "legitimizing this announcement before it happens." In the earliest stages, the participants are told that they have these feelings, that "such a response is natural," and that the appropriate thing to do is to discuss these issues in a private caucus or telephone conversation before taking any action.

The essential point is that, in moving forward toward resolution of their problems, human beings also take backward steps, fearful that movement will mean unwelcome change. These backward steps are not always deliberate and overt, but may be disguised from detection by the actor. The mediator must be aware of these forces and their negative effects so that the tasks of negotiation and mediation can be pursued.

Conscious Resistance

A third set of explanations focuses on conscious resistance, that is resistant activity that the individual is aware of, although not always aware of its motivations and causes. It usually is found in the interior dialog of individuals. The person says inwardly, for example, "All right, they can make me appear to cooperate, but there is no way in which they can get me to do what I don't want to do."

All of us know that we have the capacity to carry on that kind of inner speech. In fact, when people are engaged in interior dialog in a laboratory setting, it is possible to monitor electrical changes and subtle muscular movement in the larynx. (Zemlin 1968, 341). The messages will vary with the person and the circumstances but the essential point is that the individuals know that their intention is to thwart a particular direction or command rather than comply. This can occur even while the person is ostensibly committed to a stated agreement.

With the increasingly compulsory nature of mediation, such as mediation in child custody cases, there are several bases for conscious resistance to the process which are fueled by specific motivations that the individual is aware of and consciously expressing.

Most common is simply the novel, unknown nature of mediation. The disputant, not knowing how mediation works, or perhaps never having even heard of mediation, fears the unknown and balks at taking part in it. Mediation is a private process not generally open to public scrutiny, and may have an image that's even more mystifying than the court process.

During the initial stage when the disputants are revealing personal positions and interests, some disputants are only able to repeat their general positions over and over, and, hence have difficulty in saying why they are insistent on that position.

Another concerns interference with the process as it goes along. Distracting comments, excessive questioning, or claimed difficulty in comprehending are all behaviors that tend to slow down or completely stop the process. In multi-session mediations, cancelled appointments and recurrent lateness may also be indications of possible resistant behaviors.

Furthermore, because mediation encourages parties to work through their own differences without the assistance of advocates, some disputants are uncomfortable being in the same room with their adversary without a buffer. Moreover, the anger and feelings of vindictiveness against the other party as well as possible stubbornness may make it virtually unable for some to concede a point. Since the emphasis is on individuals working through their own differences, the selective interpretation of information and feelings that might otherwise occur if advocates were present is minimized.

Another source of conscious resistance stems from a disputant's reluctance to change the status quo, whether or not a temporary advantage is being enjoyed. For some people, the mere thought of dealing with unfamiliar conditions often activates anxiety as well as efforts to protect themselves from changes. Hence, it is not uncommon for mediators to experience a wide range of conscious resistive behaviors, such as: pointed avoidance of relevant material; dwelling on trivia; reduction of time for work by being late; making conflicting appointments or completely forgetting appointments; development of symptoms or other emergency problems; or refusal to comply with agreements.

More often than one would want, after the work of mediation is successfully completed and an agreement identified that both parties had a hand in shaping, one party balks at the very last moment. The latter case may reflect resistance due to social factors, for it often reflects the influence of others who reject the resolution that the disputant has agreed to. They may be family members, close friends, or influential, respected third parties. Not having been part of the mediation, they continue to identify with the disputants' original position, making it a point of pride, honor, courage or machismo that the position prevail.

Dealing with Resistance: Suggestions for Mediators

Since mediation tends to be a short-term intervention process, the mediator often does not have an opportunity to handle resistance in a protracted

manner. Given the many direct and indirect ways in which resistances surface, as well as the countless intervention modalities, it is not surprising that mediators may experience difficulty in coping with resistance. In fact, if they anticipate it and are prepared to accept it as a challenge rather than as a threat, they will be able to creatively work it into the mediation process. What follows are some suggestions to assist mediators:

- It is essential for mediators to feel secure, competent and comfortable with the mediation process. Mediators should have both procedural as well as sufficient substantive knowledge so that they can quickly recover when unexpected situations arise, to take charge of the mediation process, and to convince ambivalent or uninformed disputants. Qualities that are important include being able to provide information about mediation as well as other alternatives and referral sources; thinking “on one’s feet”; and knowing or learning how disputants got to mediation in the first place. It is equally important that any challenges to the mediator not be taken personally.
- Since many mediators will not be in a position to conduct their own intake of cases and screen them as they see fit, they may find some of the disputants would not have been chosen to participate in a mediation session. In some instances, the disputants are overtly reluctant to participate since they feel that the mediation process was imposed on them. Mediators need to be careful not to become defensive while demonstrating that they are about to offer the disputants procedural assistance. Some disputants could easily question the mediator’s competency or authority. Announcing of credentials and/or experience, establishing rules, providing structure, helping to find alternatives, and modeling might help alleviate this problem.
- Mediators should also be aware of the fact that they may not be ready or able to handle certain types of cases due to any number of factors including areas of personal conflict of interest, personal bias, subject matter and complexity of the issues to name a few.
- Furthermore, mediators should be alert to the possibility that they might contribute to resistant behavior through their own verbal or non-verbal communication. For example, mediators may not adequately encourage disputants to continue with the process, or may not provide sufficient structure and guidance for the parties to interact with each other. It is important for mediators to recognize and avoid creating situations that encourage resistant behavior to evolve.
- When resistance is indicated by one of the parties, the mediator needs to be alert to the possibility that the nonresistant party is trying to coopt the situation to gain advantage.

- There are times when the disputants are not ready or able to participate in the mediation process (Haynes 1985, 52) The mediator might examine why the parties sought out mediation as an intervention process and perhaps even slow down the mediation process so that they might think through why they are there.
- Some of the resistance demonstrated by the disputants may be the result of fear of the unknown, lack of knowledge, or even misguided expectations. For the mediator, then, introductory comments and/or a contract are often crucial in setting the stage for the mediation process. Useful information is imparted about expectations, roles and responsibilities for mediator and disputants that may help to reduce fears.
- At times, disputants may lack the ability or skills to negotiate adequately on their own behalf. A mediator might want to give information, caucus with the parties, or even make referrals.
- For mediators working in some organizations, resistance can be due to the problems associated with the system's processing of the cases. For example, disputants may have been delayed, subjected to excessive paperwork, rescheduled due to personnel shortages, the need for additional information, documentation, witnesses, attorneys, etc. The mediator should demonstrate empathy, and certainly apologize for the inconveniences experienced by disputants.

Mediators and Resistance: A Final Word

Because mediation is viewed as a process in which disputants become engaged voluntarily, mediators may not be prepared to face resistance. In fact, some would argue that mediation sessions should not be conducted with resistant parties. The reality is that any intervention process activates resistance and, when it is not handled effectively, it can be a disruptive source of discomfort for mediators. Feelings of frustration, sense of failure, hopelessness, anxiety, resentment, loss of energy, insecurity, fatigue can result.

For mediators, the key to handling resistance is feeling secure with the mediation process. The hope would be that mediators, recognizing the significance of resistance to their work, would continue to learn more about its manifold roots and conceptualization, and work to develop better ways of recognizing and dealing with it.

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