

# MEDIATION THEORIES: THEORETICAL UNDERPINNING OR ROAD MAPS?

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ABSTRACT . . . . .	77
The Elephant and the Blind Men. . . . .	79
WHAT IS A THEORY?. . . . .	80
The Clash of Newtonian and Quantum Mechanics . . . . .	81
Mediation. . . . .	84
Mediation and Theories . . . . .	87
The Importance of The Means of Observation . . . . .	89
Consequences of Means of Observation . . . . .	90
Goal Based Mediation Theories . . . . .	91
Road Maps vs. Theories. . . . .	91
Universal Understanding (or Seeing the Elephant) . . . . .	92
Blind Men and the Elephant . . . . .	93

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PARADOX . . . . .	93
BIBLIOGRAPHY . . . . .	95

## **Mediation Theories: Theoretical Underpinning or Road Maps?**

Dave Edwards\*

### **ABSTRACT**

A significant body of literature describes mediation models as theories. Thru these theories authors attempt to establish a theoretical underpinning for the mediation process. By reference to the physical sciences, and using quantum physics as the context, this article postulates that mediation theories are significantly different in nature to theories in the physical sciences. One example cited is that in contrast to scientific theory, it is an impossible task to test mediation theories against observable phenomena. Additionally, in several important ways a mediation theory shapes, directs and restricts the course of a mediation in a manner that no scientific theory would.

Finally, the author asserts that the fact that the pursuit of a universal theory of mediation is destined to fail, ironically is a positive factor for the future of mediation. In reality mediation theories function as road maps which aid the parties in reaching predetermined goals. By shaping the course of the mediation, the mediation model assists all parties in that quest.



## **The Elephant and the Blind Men**

There is an ancient parable regarding certain disciples who approached Buddha and asked him whether the world is infinite and eternal, or finite and not eternal. The Buddha answered, saying that a raja once instructed his servant to collect men who had been born blind, and then to show them an elephant. Each of the blind men was presented to a different part of the elephant.

After the blind men felt the elephant, the raja went to each of them and asked each to describe an elephant. The men who were presented with the head answered, "Sire, an elephant is like a pot." And the men who had observed the ear replied, "An elephant is like a winnowing basket." Those who had been presented with a tusk said it was a ploughshare. Those who knew only the trunk said it was a plough; others said the body was a grainery; the foot, a pillar; the back, a mortar; the tail, a pestle, the tuft of the tail, a brush.

The Buddha observed the blind men quarreling with each other about the nature of the elephant and stated:

Just so are these preachers and scholars holding various views blind and unseeing.... In their ignorance they are by nature quarrelsome, wrangling, and disputatious, each maintaining reality is thus and thus.<sup>1</sup>

One can argue that the proponents of various theories are akin to the blind men in this parable, focusing on an aspect and missing the whole. This paper will discuss the purposes of theories and the impact of theories; firstly in general, and secondly, in the specific area of mediation. It will attempt to satisfy the reader that a mediation theory differs significantly from the understanding of a theory in the physical sciences. First, not unlike scientific theories, mediation theories provide a framework which aids in the understanding of the mediation process. However, unlike a scientific theory, this understanding impacts directly upon

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1. Udana 68-69: This is a version of the well-known Indian tale from the Buddhist canon, but some assert it is of Jain origin. Cf. *Tattvarthaslokavartika* 116 at p. 806. Mihir Yast 10.2: Cf. *Analects* 15.5 at p. 1020.

the conduct of the parties and thereby alters the course of the mediation. Second, mediation theories are more than theories. Unlike scientific theories, mediation theories begin with a definition of the ideal outcome and then define a process which facilitates the outcome. Third, I will argue that slavishly adhering to a mediation theory turns a mediator into a blind man and obscures the whole, while focusing upon the part. Finally, paradoxically I will demonstrate that seeing the part and not aiming for the whole is positive and a necessary approach for mediation. Recourse will be made to the physical sciences as to support this thesis.

### WHAT IS A THEORY?

Dictionaries provide various definitions of the word “theory”. One definition provided by Yahoo’s American Heritage Dictionary is “a belief or principle that guides action or assists comprehension or judgment.”<sup>2</sup> Merriam-Webster Online Dictionary offers a similar but more scientific definition: “a plausible or scientifically acceptable general principle or body of principles offered to explain phenomena”.<sup>3</sup> Its etymology can be traced from the Latin “theoria” which in turn derives its origin from the Greek “theoria”. This is likely a derivative of the Greek word “theoros”, meaning spectator, which in turn, comes from the Greek word for “a viewing” or “to see”.<sup>4</sup>

It is clear from all definitions that a theory provides a framework which aids one in “seeing” or comprehending a phenomenon.

In the scientific field a significant aspect of theory development is the testing of the theory against empirical facts. There is a continual dance from development, to verification, followed by acceptance or rejection.

What the scientists do to discover the truths of nature is to first take account of the empirical facts regarding some phenomenon. With the further use of human intuition, they then formulate a set of principles that in turn acts as the universals that lead, by logical deduction, to particulars that are to be compared with the empirical facts. If there is a correspondence between these particulars and the empirical facts, one can then say that, thus far, there is an achievement of some new understanding of the phenomenon. The theory is then said to be true to nature. Yet this sort of truth is, in principle, refutable. The discovery of any new empirical facts that do not conform with the alleged “true theory” or the discovery of any logical inconsistency

2. <<http://education.yahoo.com/reference/dictionary/entry/theory>>.

3. <<http://www.merriam-webster.com/dictionary/theory?show=0&t=1317426106>>.

4. *Supra* note 2.

in the formulation of the theory must then lead to a partial or total rejection of the scientific truth of the theory.<sup>5</sup>

Let us turn to some specific examples of the development of theories in science to further consider elements of a theory and the importance of a theory to the subject matter.

### **The Clash of Newtonian and Quantum Mechanics**

Nowhere are the importance and the impact of a theory better demonstrated than in the sciences. Over the centuries scientists have strived to create frameworks or principles which help explain phenomena. The creation of theories which help one comprehend nature is a fundamental aspect of science. Western science, in particular, prides itself in the ability to verify and to prove the validity of a theory. In fact a fundamental aspect of a scientific theory is that it can be tested against observable phenomena and proven to be correct in all situations.<sup>6</sup>

In the late 1600's Newton burst onto the scientific scene and profoundly impacted the way man viewed the world, primarily through the development of a theory, namely the laws of motion. These laws postulated that the movement of objects in the universe could be determined in a mechanical fashion. For example, the concept that "for each action there is an equal and opposite reaction" was one such law developed by Newton. As well, provided certain information was known about an object, then one could predict with extreme accuracy what that object would do in the future.<sup>7</sup> Newton proposed the theory and then mathematically demonstrated that the theory was correct when tested against observable events. Indeed Newton's laws of motion are still used today to calculate the trajectory of satellite launches relative to the solar system.<sup>8</sup> As the theory was verified by empirical data, scientists eventually accepted the theory as a valid one. The theory provided a framework which aided scientists in "seeing" or comprehending the universe. The significance of this theory cannot be overstated.

First, man now had a tool with which to calculate future events in a manner never before available to him. Provided one had sufficient information about an object, its future location could be mathematically calculated. These laws created a framework for "seeing" and for under-

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5. Mendel Sachs, *Physics of the Universe* (London, GBR: Imperial College Press, 2010) at 64: <<http://site.ebrary.com/lib/oculyork/Doc?id=10421981&ppg=83>>.

6. *Ibid.*

7. Gary Zukav, *The Dancing Wu Li Masters* (New York, Morrow Quill, 1979) at 50.

8. *Ibid.* at 51.

standing how the universe appeared to operate. Using the principles of the laws of motion one could predict how an object moved the way it did. Indeed, one could calculate with great precision the motion of an object.

Second, viewed in the broader context, the fundamental nature of the universe seemed to be unveiled by these laws. It appeared to be a machine.

In short, if we are to accept the mechanistic determination of Newtonian physics—if the universe really is a great machine—then from the moment that the universe was created and set into motion, everything that was to happen in it already was determined.<sup>9</sup>

Finally, since one could observe and calculate future events, the theory implied that one could observe an event without impacting that event. Scientific objectivity was born.

[It]...rests upon the assumption of an external world which is “out there” as opposed to an “I” which is “in here”... The task of the scientist is to observe the “out there” as objectively as possible. To observe something objectively means to see it as it would appear to an observer who has no prejudices about what he observes.<sup>10</sup>

The significance of the theory clearly extended beyond the actual application of the theory. Before Newton’s discoveries the predominant world view was one which was propagated by the Church. Man was the center of the universe. Newton’s discovery led to the world view of the Great Machine which was unaffected by man’s efforts.

Just as Newtonian science turned the Church world view on its head, the impact of the theory of quantum mechanics had a similar effect on the Newtonian Great Machine world view. Quantum mechanics demonstrated that for certain purposes Newtonian science was not applicable, and in the process demolished the unpinning of the Great Machine concept of the universe.

Later we will discuss another aspect of the development of the theory of quantum mechanics in more detail. However, what is important at this point is to understand that according to quantum mechanics it is not possible to know enough about the present to make a complete prediction about the future, only its probability.<sup>11</sup>

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9. *Ibid.*

10. *Ibid.* at 55. We will return to this implication later in the paper.

11. *Ibid.* at 52.

This principle was developed by Werner Heisenberg and was called the uncertainty principle. This principle or theory states that one can never measure accurately both the motion and location of a particle. The more information one has about the location, then the less information one could have of the motion, and vice versa. Since one could not know both the location and the motion of the particle, one could only calculate the probability of the future location of the particle. Hence, contrary to Newtonian science which allowed for calculations of the future with a certainty, the future of the particle could not be calculated with a certainty.

Further, this principle demonstrated that the very act of measuring the particle changes it. As Zukav states “[a]t the subatomic level, we cannot observe something without changing it. There is no such thing as the independent observer who can stand on the sidelines watching nature run its course without influencing it.”<sup>12</sup>

Applying these concepts to theories one can see that theories have implications beyond the reason for which they were first developed. Newton’s laws of motion were developed to help explain the motion of inanimate objects. However, the philosophical implications were much broader. As one could observe nature without impacting or changing it, it appeared that man’s efforts were irrelevant to the world. These laws, applied to the broader universe, “reduced the status of men to that of helpless cogs in a machine whose functioning had been preordained from the day of its creation.”<sup>13</sup> The implication of Newton’s laws of motion, taken beyond the specific purpose for which they were developed, framed mankind’s view of the world.

Quantum mechanics had a similar, but dramatically opposite effect upon man’s view of the world. Unlike Newtonian science which was focused upon certainty, quantum mechanics tells us at the subatomic level only the probability of an event can be calculated. Further, we are not the objective observer viewing the event from behind a glass wall. Quantum mechanics tells us that we are part of the event. We cannot observe the event without changing it.<sup>14</sup> Quantum mechanics reinserted man as a significant player in the events of the universe.

Clearly theories not only help one comprehend the phenomenon, but also the philosophy of the theory can have much broader ramifica-

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12. *Ibid.* at 134.

13. *Ibid.* at 53.

14. *Ibid.* at 56.

tions. Indeed, not unlike the situation where a yellow filter is placed over the camera's lens tinting everything yellow, a theory can provide a filter which dramatically impacts upon how one views the process or event.

### **Mediation**

Many theories attempting to explain the process of mediation have been developed. The original theory of mediation is described by Deborah Kolb and Kenneth Kressel as the "mythic world of mediation".

It is

...one in which one practitioner of the art is pretty much like another in regard to motives and orientation to the role. In the mythic world, mediators are impartial neutrals who have no authority and no wish to impose their views on the disputing parties. Also, the process is entirely voluntary and noncoercive...<sup>15</sup>

This theory, rooted in Newtonian science, is "... reflective of a universe in which it is possible to stand outside (narrative) time and (social), space, separate and autonomous from interpretative frames, relational patterns, and communicative processes."<sup>16</sup> Science through quantum mechanics and many social studies<sup>17</sup> have both shown the falsehood of this concept.

Another theory of mediation is that the process should be interest-based. Under this theory the mediator and the parties examine the conflict from the point of view of searching for the real interests of the parties, arguing that there may be solutions which are mutually beneficial and which satisfy the real interests of all of the parties. The interaction of the parties is not significant; it is their interests which is the focus of the mediation. How the parties will interact in the future is not significant to the process; resolving the dispute is. In this theory conflict is fundamentally a clash of interests.

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15. Deborah M. Kolb and Kenneth Kressel, "The realities of making talk work" in Deborah M. Kolb & Associates, eds., *When Talk Works: Profiles of Mediators* (San Francisco: Jossey-Bass, 1994) at 459-460.

16. Sarah Cobb, "Einsteinian Practice and Newtonian Discourse: An Ethical Crisis in Mediation" (January 1991) *Negotiation Journal* 89.

17. See for example: Lee Ross and Andrew Ward, "Naive Realism: Implications for Social Conflict and Misunderstanding", Stanford Center on Conflict and Negotiation: Stanford, CA, Working Paper No. 48, May 1995 at 118.

Transformative mediation is a theory which argues that

... a conflict represents first and foremost a crisis in some human interaction—an interactional crisis with somewhat common and predictable character. Specifically, the occurrence of conflict tends to destabilize the parties' experience of both self and other, so that the parties interact in ways that are both more vulnerable and more self-absorbed than they did before the conflict.<sup>18</sup>

The focus in transformative mediation is on the parties and their relationship, not the matter in dispute. Conflict is fundamentally a conflict of interpersonal relationships. This theory postulates that if the parties gain new insight into their situation and their relationship with each other, then the mediation would be considered worthwhile, even if the matter in dispute is not resolved. It is the moral growth of the parties to the mediation which is relevant.<sup>19</sup> The transformative theory is founded upon the concepts that people are inherently good; capable of making decisions; and seek connections with others. There is a moral imperative to improve the parties and thereby improve society. Settlement is secondary to these goals.

The narrative mediation theory also focuses upon "... mending of relationships between parties..."<sup>20</sup> The mediator helps the parties to discover and reveal "positive, relationship building content in their conflict-saturated narratives."<sup>21</sup> There is a focus upon meanings and identities rather than differences in interests. It is felt that by changing their respective narratives there will be a resolution of the dispute.

Ironically, the weakness of the transformative, narrative and interest based theories lies in their respective foci. If a theory is selected which is not consistent with the wants and needs of the parties, it will have the wrong focus and will ill serve the parties.

As a slight variation to the transformation and narrative theories, Christopher Harper argues that a mediator is a peacemaker who should

18. Dorothy J. Della, Robert A. Baruch Bush and Joseph P. Folger, "Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy" (2002) 3 *Pepperdine Dispute Resolution Law Journal* 29 at 50.

19. Robert A. Baruch Bush and Joseph Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (San Francisco: Jossey-Bass, 2005) at Chapter 2, 142.

20. Christopher Harper, "Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation" (2006) *Journal of Dispute Resolution* 610.

21. *Ibid.*

carry on an activist transformative-narrative mediation.<sup>22</sup> He believes that the process of mediation should follow the moral imperative of transformative mediation, but with a focus upon constructing a new positive discourse—a new conflict-free narrative.

Mediators should facilitate empowerment and mutual recognition as emphasized in the transformative model of mediation, but with an activist bent....To introduce fairness and justice into the mediation discourse, mediators need to find a way to incorporate those values without injecting the mediator's own view of what fairness and justice mean into the conversation...<sup>23</sup>

Relationships are important, but even more significant is fairness and justice. He advocates an interesting, but a fault filled concept. The mediator must keep her own sense of fairness out of the mediation, and yet, for example, he argues that the mediator should intervene if there is a power imbalance, seemingly positing that there are certain universal aspects of justice and fairness which the mediator can divine. When tested by the philosophical consequences of quantum mechanics, the inability of mediator neutrality and objectivity, the uncertainty principle and social studies,<sup>24</sup> the mediator as a peacemaker concept is exposed as the imposition of the mediator's concept of justice, and not the parties'.

Another theory of mediation is the Insight Approach. It adopts "an interactionist perspective that views human behavior as fundamentally relational".<sup>25</sup> In this aspect it bears a similarity to both the Narrative and Transformative theories. Conflict arises when one's Cares are threatened.

Cares, according to this approach, are defined to include more than the pursuit of our individual or collective interests, needs, or values. They also include our value based expectations of other's behaviour, our assumptions of how people ought to act, the presumed patterns of cooperation we consider necessary, and our value-based judgments of progress and decline that we perceive in the behaviours and intentions of ourselves and others.<sup>26</sup>

The mediator's role is to help the parties explore the defend-attack patterns of interaction; to find insights which help the parties develop new

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22. *Ibid.* at 595.

23. *Ibid.* at 608.

24. *Supra* note 17.

25. Neil Sargent, Cheryl Picard and Marnie Jull, "Rethinking Conflict: Perspectives from the Insight Approach" (July 2011) *Negotiation Journal* 345.

26. *Ibid.*

patterns of interaction. This theory posits that when a threat is perceived to one's Cares, the response is defensive. However that is perceived as an attack upon the other party. If there is no threat to one's Cares, then there will be no defend-attack response. Fundamental to the Insight theory is that conflict is relational, dynamic and adaptive. One's values are of fundamental importance in this process.

### **Mediation and Theories**

Science has shown us that at least two significant implications arise from scientific theories. A theory helps one understand an event or a process; it helps us to "see". Applied to mediation, the theory helps one to understand what actually is transpiring during the mediation. It helps one understand how and why parties in mediation react during the mediation.

If one understands the process, it clarifies each party's role in the mediation. If a mediator's role is to help the parties navigate through the mediation, then clearly understanding what is transpiring during the mediation is critical. For example, in a mythic mediation, the mediator, as defined by that theory, must studiously maintain a role of neutrality; whereas an insight mediator, by definition, must explore patterns of interaction.

Secondly, not unlike the camera's yellow filter, the framework or theory of mediation impacts upon how each party will view each element of the mediation process. An interest-based mediator will be focused upon attaining a solution which is attuned to the parties' interests. On the other hand a mediator in a relational based mediation will strive to improve the interactions of the parties at this level. Each will view the discourse through the paradigm defined by its theory.

In this sense mediation theories go beyond the role played by theories in the physical sciences. Rather than simply allowing one to "see" the mediation process, the theory drives the conduct of the mediator, which in turn alters the conduct of the parties and the course of the mediation. By defining the process, the mediation theory creates the process. This is a distinctly different concept compared to the extrapolation of a scientific theory from the field it was developed into broader philosophical space.

The development of theories of mediation also diverges significantly from their scientific brothers and sisters in the area of verification.

As mentioned above scientific theories are constantly developed and then tested against nature. If the empirical facts do not conform to the theory, then the theory is either rejected in whole or part.

One difficulty with mediation theories lies in this verification process. In the realm of the physical sciences the verification process must be one which can be repeated by others in a manner which does not involve subjectivity. In other words the experiment performed in a Canadian laboratory must be capable of being repeated in a Spanish laboratory and must yield the same result. For example, one could suggest that, in order to test three mediation theories, the parties could mediate the same matter three times utilizing a different theory each time. The reality is that this is simply not possible. Mediation is a fluid, multi-dimensional process. Further, the uncertainty principle, as well as social studies, shows that the observation of the process changes it. One is left with applying, by extrapolation, various studies of human interaction to the mediation process.

There is a further problem associated with verification of mediation theories called the observer bias. Social scientists have demonstrated through many experiments that individuals perceive events differently. This was demonstrated in a study of the reaction of fans to a football game. Dartmouth and Princeton fans were asked to comment about the game. Princeton fans saw "a continuing saga of Dartmouth atrocities and occasional Princeton retaliations, whereas the Dartmouth fans saw a hard-hitting contest in which both sides contributed equally to the violence".<sup>27</sup> Fans who saw exactly the same game applied their bias to the interpretation of the event. In their minds they saw a different event. It is not unlike spectators of the televised debate of the leaders in the recent Ontario provincial election. One's bias filtered the words and actions of the leaders. A Liberal supporter would have seen a debate in which the Liberal leader excelled against the others; whereas a Tory supporter would have seen an entirely different debate.

Applying this concept to the mediation process and recognizing the variance in one's concept of the ideal result and the subjective analysis of these factors, it is clear that it is impossible to apply criteria for verification of a mediation theory which can be repeated in another setting in a non-biased way.

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27. *Supra* note 17 at 118.

### **The Importance of The Means of Observation**

The wave/particle duality of light is a fascinating example of the impact which different means of observing an event can have on the results. Prior to this discovery it was a fundamental concept of science that something either had the properties of a wave or those of a particle. It was clearly an either or situation.

In 1803 Thomas Young utilized a very simple experiment to prove that light had the properties of a wave. Using the sun as a source he allowed the light to shine against a wall. He placed two screens between the sun and the wall. One screen had one slit in it and the second screen had two slits. The results on the wall were unexpected. Rather than being the sum of the light from all slits,

...the wall was illuminated with alternating bands of light and darkness! The center band was the brightest. On both sides of the center band of light were bands of darkness; then bands of light, but less intense than the center band; then bands of darkness, etc.<sup>28</sup>

This result was consistent with a well known aspect of waves called interference. Only waves create this interference pattern. This meant that light had the properties of a wave.

Many years later Einstein utilized a different experiment to show that light had the properties of a particle! Einstein built upon a discovery by Planck, who is credited by many as the founder of quantum mechanics.

Planck discovered the quantum nature of the subatomic. He discovered that the electrons of atoms did not radiate their energy smoothly, but rather in spurts.

[I]n other words, Planck discovered that energy is absorbed and emitted in little chunks and that the size of the chunks of a low-frequency light, like red, is smaller than the size of the chunks of a high-frequency light, like violet.<sup>29</sup>

Philippe Lenard had previously discovered a phenomenon that was named the photoelectric effect. He had demonstrated that electrons flowed from atoms in metal immediately after the metal was struck by

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28. *Supra* note 7 at 86.

29. *Ibid.* at 76.

light. Wave theory required that there should be a delay between the time the light struck the metal and the flow of the atoms.<sup>30</sup> Einstein's particle theory solved this discrepancy. He theorized that each time a photon (a particle of light) hit an electron it would knock the electron away "just as one billiard ball [hits] another billiard ball knock[ing] it away."<sup>31</sup> This meant that light was composed of particles!

Young first had proved that light had the properties of a wave. Einstein later proved that light was composed of particles. Especially in the days of Newtonian science when certainty and objectivity was the rule, this was an impossibility. As the concept of quantum mechanics took hold, scientists gradually accepted the possibility that the properties of light were dependent upon the process employed to observe it. How we observed light changed its properties. Indeed, John Wheeler of Princeton wrote:

May the universe in some strange sense be "brought into being" by the participation of those who participate? The vital act is the act of participation.<sup>32</sup>

How we participate could be said to change the event, or in the case of quantum mechanics, it may create the event. Stated another way, the lens through which we observe an event alters our perception of that event.

### **Consequences of Means of Observation**

Science has shown that the tool or method by which one observes an event ("Means of Observation") can have substantial impact upon the result of that observation. This phenomenon is similar to, but more significant than the "yellow filter" effect referred to above. I would argue that a mediation theory can be compared to the different experiments employed to prove the properties of light. The theory employed by the mediator will change the characteristics of the mediation and will change the outcome. For example, the application of a power-based mediation will result in the parties viewing only the issues from that perspective. Similarly if the theory employed is a narrative one, then the parties truly want to understand each other's "story". All parties will listen to each other and the result will be narrative based.

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30. Waves required several oscillations so that momentum was built up before the electron could escape.

31. *Supra* note 7 at 78.

32. J.A. Wheeler, K.S. Thorne and C. Misner, *Gravitation* (San Francisco: Freeman) at 1273.

The combination of the “yellow filter” referred to above and Means of Observation have a very powerful impact upon the course of the mediation. In a very profound way it creates the event! Not only does it fashion how the event will be manifested, but it also restricts or prevents the event from unfolding in another way. I would argue that this phenomenon prevents a mediation held under one theory from ever manifesting the aspects of a different theory.

### **Goal Based Mediation Theories**

There is another significant variance between scientific theories and mediation theories. In science a theory describes the event; it does not define the ideal outcome of the event, or the underlying goal of the event. Newton’s laws of motion did not begin with postulating the purpose of the motion of the object. His analysis focused upon providing a framework for calculating the motion of the object. Similarly quantum mechanics does not begin with a conclusion regarding the goal of the quantum leaps of objects. Rather, it describes a set of rules for calculating the probability of such movement.

However, that is not the situation for mediation theories. Each theory is based upon a conclusion regarding the purpose of the mediation. Transformative Mediation, for example, defines the purpose of the mediation as the moral improvement of the parties. Interest based mediation has a purpose. It is focused upon resolving the dispute. It is true that this goal is based upon an understanding of the basis of conflict, but nevertheless the theory is founded upon a goal. Newton’s laws of motion describe a method of predicting events; they ascribe no purpose to the motion of the object.

The result of having defined the purpose or the ideal outcome of the mediation at the outset is that this goal has an impact upon every step in the mediation. If the desired outcome is a settlement, the mediator and the parties will be focused upon that and not, for example, upon altering patterns of interaction of the parties which trigger the defend-attack response.

In this sense mediation theories significantly depart from the role of theories in science.

### **Road Maps vs. Theories**

We have demonstrated that mediation theories differ in four ways from theories in the physical sciences. First, unlike scientific theories

for all intents and purposes they cannot be subjected to verification. Second, by clarifying the parties' role through the definition of the process, mediation theories fundamentally affect the process, creating the Yellow Filter effect. Third, and somewhat complementary to the Yellow Filter effect, by defining the Means of Observation, the process is prescribed and restricted. Finally, by virtue of the fact that mediation theories have defined ideal outcomes, they drift far from their scientific brothers and sisters.

These factors are the death knell to mediation theories as scientific theories. In one sense they are tautologies. Having defined the purpose or ideal outcome of the mediation, and therefore the roles of the parties, these theories create the mediation in the image of the definition. The theory creates the reality.<sup>33</sup>

A more apt description of mediation theories is that they are a model or method by which one attains a predetermined goal. Mediation theories are road maps; guides for mediators to get from point A to point B. Having decided for example, that point B in an interest-based mediation is a settlement, other routes which involve narratives would not be part of the route. The mediation will never go there.

### **Universal Understanding (or Seeing the Elephant)**

The difficulty of gaining a complete understanding of mediation is not unique. Commenting upon Galileo's view that man would never have a complete understanding of any natural phenomenon Sachs stated

The reason that, in principle, scientific truth must be refutable is that we can never claim the achievement of a complete understanding of any natural phenomenon. ... Human beings are finite, thus we cannot achieve unbounded understanding; that is to say, human beings cannot be omniscient!<sup>34</sup>

More recently Einstein strove unsuccessfully throughout his life to develop a unified field theory.

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33. In one sense this is similar to Wheeler's comments about quantum physics; that our role in measuring at the quantum level, creates the reality. See *supra* note 21.

34. *Supra* note 7 at 65.

### **Blind Men and the Elephant**

This takes us back to the parable. If one strictly adheres to the road map one will be restricted to the prescribed route. In the case of the elephant one will only find the trunk, the leg, or the tail. Interests of the parties will be revealed; relationships transformed; narratives told. What emerges will depend upon the approach adopted by the parties. They will, however, miss the whole elephant. Focused only upon the road map one will be akin to the blind man in the parable; one will miss a complete understanding of the mediation process. The real question to ask, however, is whether a universal understanding of mediation is a necessary, or even a desirable quest.

### **PARADOX**

For all of the reasons that I have expressed above, we will never have a theoretical framework for a complete understanding of the mediation process. We do, however, have mediation models, which in practice act as roadmaps and assist the parties in reaching their desired outcomes. The paradox lies in the fact that the roadmap creates the reality and restricts the parties to that reality, but without a roadmap, wandering aimlessly, they may not even achieve that. Indeed, it may not be desirable for the parties to mediation to strive to “see” the entire elephant.

Having a complete understanding or theory of mediation in a scientific sense may be beneficial as the utility of mediation may be enhanced in ways now unknown to us. Avenues of resolution heretofore unknown may open. Also, a scientifically sound theory of mediation would make mediation more respectable in the theoretical world. These goals, although laudable, must rank behind the immediate needs of the parties and the utility of the roadmaps.

Ultimately, the best view of mediation is that of a dance and the mediation model, the specific dance selected by the parties. The selection by the parties of the correct dance or mediation model is critical to the successful outcome of the mediation; the wrong selection risks a mediation which, for the reasons enumerated above, is doomed to failure. The methodology for that selection exceeds the parameters of this paper. However, it is clear that the selection will depend upon many factors, including the nature of the dispute, what the parties wish to achieve thru mediation, the relative power balance or imbalance of the parties, and the skill set of the mediator, to name a few.

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35. *Supra* note 7 at 35.

Zakov's comments about physics are equally applicable to how a mediator should view mediation and mediation models.

Most people believe that physicists are explaining the world. Some physicists even believe that, but the Wu Li Masters know that they are only dancing with it.<sup>35</sup>

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