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The Involved Uninvolved.

How Mediating Third Parties Transform Conflicts

Justus Heck

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Working Paper

The Involved Uninvolved. How Mediating Third Parties Transform Conflicts¹

Justus Heck

By applying the concept “involved uninvolved” I address Simmel’s question about how a mediator affects the conflict dyad. In the sociology of the third party, conflict research within sociological systems theory, and mediation research there is a lack of investigations into mediation as a process having its own intrinsic logic. Until now, research has either given only scant attention to the role of the mediator and the mediation process, or given too much credit to the techniques of the third party. Moreover, third parties do not mediate by means of formalized procedures only. Instead, everyone does so on occasion. In addition, many organizational roles require repeated but latent mediation. My aim is to respecify Simmel’s approach to mediating third parties, drawing upon conflict and interaction sociology. Against the background of the problem of reference found in all mediation and dispute settlement – that of specifying the conflict in opposition to its generalization, escalation, or differentiation – I show in the second section how the mere presence of mediators leads to greater self-discipline in how the parties interact. In the third section I focus on how the involvement of a mediator contains the intensification of the conflict that usually occurs in face-to-face interactions. More importantly, it will be argued that such involvement initiates communication about the underlying conflict, which transforms highly escalated communication. In this respect, it is not a threat but a warning to remind the parties of the consequences of intransigence. Although this creates favorable conditions for identity management for the disputing parties, the involvement of third parties poses new risks.

Mithilfe des Begriffs des „beteiligten Unbeteiligten“ gehe ich der von Simmel aufgeworfenen Frage nach, welchen Unterschied der Vermittler für die Streitdyade macht. In der Soziologie des Dritten, der systemtheoretischen Konfliktforschung und der Mediationsforschung fehlen bisher Studien, die die Vermittlung durch anwesende, neutrale Dritte als eigenlogischen Prozess beschreiben: Entweder vernachlässigt man ihn bei der Analyse oder aber man führt zu viel auf seine Techniken zurück. Vermittelt wird aber nicht bloß in formalisierten Verfahren wie der Mediation, sondern jedermann tut dies situativ-okkasionell. Viele Organisationsrollen fordern zudem eine wiederholte, aber latente Vermittlung. Ziel ist, für diese Vermittlerrollen Simmels Versachlichungsthese konflikt- und interaktionssoziologisch zu respezifizieren. Dafür markiere ich das Bezugsproblem jeder Konfliktbearbeitung – die Ausdifferenzierung des Konflikts – und zeige im zweiten Teil, wie der nahezu unbeteiligte Vermittler allein durch seine Anwesenheit die Parteien zur Selbstdisziplinierung anhält. Im dritten Teil adressiere ich, wie seine Beteiligung interaktionstypische Konfliktintensivierungen einhegt und Kommunikation über den Konflikt anlaufen lässt, die Beziehungs- und Machtkonfliktkommunikation in charakteristischer Weise transformiert: Malt der Dritte etwa die Folgekosten von Unnachgiebigkeit aus, ist das eine Warnung und keine Drohung. So entstehen günstige Bedingungen für ein Identitätsmanagement der Parteien, wiewohl eine Beteiligung Dritter neue Risiken schafft.

Keywords:

Mediation, third party intervention, compromise, interaction, dispute resolution

¹ The article first appeared in The German Journal for Law and Society in 2016.

Mediating conflicts as a subject of sociological theory²

It has been undisputed since Georg Simmel's *Sociology* (1964[1908]) that the presence of a third party brings about greater structural changes in a dyad than the presence of any additional persons. In addition to third parties, Simmel was interested in how a mediator changes a conflict dyad (Simmel 1964[1908]: 146ff.). His finding, in brief, was that they made the conflict more objective. Since then, conflict research has followed up this finding in rather different ways, and still identifies it as current – which is not altogether unjustified (Neidhardt 2013: 424). In the following, I would like to re-examine Simmel's objectification hypothesis in terms of conflict sociology and interaction sociology. Even after many years of research into conversation analysis, Angela Garcia also concludes that mediation should be more closely examined in terms of interaction sociology (Garcia 2010: 221). Moreover, studies addressing how conflict resolution is affected by the presence of neutral third parties are still lacking in conflict research within systems theory and the sociology of the third party (Gessner 1976; Kieserling 1999: 257ff.; Lindemann 2010; Luhmann 1999[1981]: 92ff.; Luhmann 2008a: 55ff.; Messmer 2003; Nollmann 1997; Werron 2010). Thus, the goal of this article is to link up with these gaps in research and reanalyze the relevant works on the topic. In addition, I draw upon my own informal expert interviews with mediators.

As a criticism of existing research, the first section of the article introduces the concept of the involved uninvolved and employs it in particular to illustrate the importance in conflict resolution of a third party who is present but almost uninvolved. Since not only professional mediators mediate, I then propose a typology of three generalized levels of mediation to which my argument refers. In order to re-examine Simmel's hypothesis that third parties make conflicts more objective, it is necessary to trace the problem to which every instance of conflict mediation refers – the differentiation (meaning the escalation) of the conflict. In the second and third sections, I show that mediating third parties broadly transform communication in conflicts, and how they do it. The second section is about the difference that even the almost uninvolved presence of a third party makes in this regard. The third section focuses on the mediator's communicative involvement in transforming the conflict. Finally, I provide a brief summary and call attention to open questions.

² I thank André Kieserling, Wolfgang Ludwig Schneider, Kai-Olaf Maiwald, Cornelia Bohn, Alfons Bora, Fritz Jost, Christoph Gesigora, Fran Osrecki, Johannes Schmidt, Claudia Scheid, Peter Münte, Veronique Zanetti, Heinz Messmer, Adrian Itschert, Stefan Wilbers, Hendrik Stary, the editors of *Zeitschrift für Rechtssoziologie*, and the two reviewers for their comments on the manuscript and their support. Not least, I owe thanks to the mediators who gave me insights into their work.

Neutral third parties as special involved uninvolved participants

In the sociology of the third party, mediators in conflicts have no particular significance. If the socio-theoretical interest in third parties is not already dominant (Bedorf 2010; Eßlinger 2010), a mediator is one third party among many. Black and Baumgartner (1983) also have a broad and questionable concept of the third party in terms of conflict sociology because they use the term “third party” for both impartial people and those with a vested interest. Black and Baumgartner are right to assume that parties to a conflict are not homogeneous, but are differentiated. For example, a group on one side of a conflict may include hardliners (hawks), people prepared to compromise (doves), people requiring protection, informants, allies, lawyers, and additional supporters. Because of this internal differentiation, new third-party positions can emerge *within* one group.³ Yet it is customary in conflict and legal sociology to analyze these roles as partisan, in contrast to the neutral third party.

Conversely, neutral third parties appear to be particularly relevant because their position and their behavior are subject to numerous conditions. The course of the conflict depends to a significant degree on their presence and their intervention (Galtung 1965; Eckhoff 1966). The publicness of the conflict alone has a calming effect on the adversaries (Habermas 2009[1962]; Stok 1930). In addition, some roles of third parties provide them with opportunities for intervention that open up unexpected opportunities for settling the conflict. In order to capture what is special about neutral third parties, I use the heuristic of the “involved uninvolved”⁴ borrowed from Luhmann: third parties are uninvolved in a conflict because, and as long as, they are independent, impartial, neutral, or simply indifferent. They are involved because and to the extent that they have opportunities of exercising influence in a conflict between two parties – and thus run the risk of themselves becoming a party to the conflict.⁵ In contrast to Black and Baumgartner (1983), my heuristic technique not only helps understand “settlement roles” (judges and mediators) better; it serves equally well for analyzing the role of therapists, sports referees, historians, sociologists, journalists, interpreters, or facilitators. Although these lines of generalization are laid out in the theory, I focus here on mediating third parties.

³ The crucial question then arises, what conditions must be met to categorize a partisan role as third party.

⁴ For a fundamental analysis see Luhmann 1999[1981]: 92ff.; Luhmann 2008a[1969]: 55ff. and 121ff.; Luhmann 2010: 353ff.

⁵ In individual cases, this matches expectations of, for example, judges.

The assumed impartiality of third parties and their lack of personal involvement results from their equal distance from both parties. Third parties intervene either quasi as strangers who have no other roles in relation to the parties or as individuals equally close to both sides (Simmel 1964[1908]: 149). From the perspective of the parties to the conflict, professional mediators are above suspicion because they deal with the conflict as strangers carrying out the job and are paid in exchange. Since equal social proximity to the adversaries also establishes a neutral position, Simmel is certain that every “triad” requires some amount of mediation and that the three people involved each fulfill the role of mediator some of the time (Simmel 1964[1908]: 18). Despite equal distance from the adversaries, the third party’s presumption of neutrality can be cast into doubt in the course of his or her involvement, whether rightly or not; after all, neutrality is a problem of representation in face-to-face interactions (Clayman 2001; Jacobs 2002).⁶ This means that intervention by third parties requires greater attention and fine-tuned routines if they do not want to lose their impartial status because of their involvement.

In other words, neutral third parties with opportunities for involvement in the conflict are special inasmuch as they can lose the status of not having a personal interest because of their involvement, contrary to role expectations. With this finding, I would like on the one hand to suggest that the present deliberations can in part be transferred to sports referees or therapists and on the other to make plausible why I do not discuss supporting third parties at the same level as mediators.

Underestimated presence and overestimated intervention

Employing the established concept of the involved uninvolved, and with the goal of delimiting a gap in research in interaction sociology, I criticize sociological research into mediation in this section, because it displays two contradictory tendencies. For one thing, many studies explain consensual agreements without analyzing the presence of a neutral third party. They underestimate his or her presence and potential for transforming the conflict. For another, some studies focus mostly on the involvement of the mediator and give the impression that seeking consensus depends decisively on this person's techniques.

⁶ I cannot go into greater depth here regarding the conditions under which third parties are expected to be neutral and how the involved uninvolved represent neutrality.

Underestimating the presence of a mediator

When predicting the conditions under which mediation will be successful, many studies neglect the presence of a mediator. Instead, they explain the willingness of parties to cooperate and make compromises in cases of mediation in terms of the social environment of the conflict, attributing this either to the parties' social relationship or the "nature" of the conflict. Horwitz (1990), for example, sees agreements as depending on the kind of social relationship between the parties: if they are socially close and if their relationship is long-term, they reach agreement. Jansen (1988) argues similarly by identifying a correlation between long-term relationships and cooperative continuation of contact. It is plausible that systems with little differentiation put pressure on willingness to give ground (Luhmann 2008b: 282ff.). However, a criticism is that this approach disregards settling conflicts as a process with its own intrinsic logic (*Eigenlogik*).

In mediation research the question which conflicts are particularly suited to mediation is widespread. Eckhoff (1966) classically points out that conflicts concerning interests are easier to resolve than conflicts regarding values. Gessner (1976), for example, is similarly of the opinion that conflicts referring to roles are suited to mediation, as distinguished from those referring to individuals or norms. In his study on the efficiency of mediation, Felstiner (1991) concludes, among other things, that the parties' cognitive orientation should not be too legalistic, that larger numbers of concrete topics in dispute increase the probability of reaching agreement, and that zero-sum games lower the probability of settlements being achieved. Instead of considering conflicting interests, the parties' cognitive orientation, or the number and concreteness of the contentious issues as givens, I propose regarding them as the goal and the outcome of mediation (Galtung 1965). In any case, mediating third parties change the way in which people talk about the conflict.

The overestimated involvement of mediating third parties

Besides ascribing the efficiency of mediation to the conflicting parties' social relationship or to the nature of the conflict, other studies emphasize the mediators' sociostructural characteristics, competencies, or techniques. According to these studies, mediating third

parties dominate the situation. Thus, less attention is paid to all effects brought about by their mere presence and by the interaction.

Industrial sociologists have attempted to explain the success of agreements as a function of the characteristics and attitudes of practicing mediators, e.g., of their political preferences or their income levels (Weschler 1950), without, however, arriving at a clear result. Landsberger (1955), in contrast, analyzes mediators as taking a leading role in the mediation situation. Most of the mediators he studied made proposals and eased the situation, for example through humor. But this was not true of one restrained mediator in Landsberger's sample. The finding that mediators cultivate either an active, negotiation-oriented style or a passive, therapeutic one is stable (Kolb 1983; Rosellen 1980; Silbey/Sally 1986). But how can it be explained that passive mediators are just as successful as active ones? This contradictory finding may be a reason why people continue to believe that mediation is an art.

The insight that it is difficult to standardize involvement in situations in a role that entails performing services forms the basis for Oevermann's sociology of professions (Oevermann 2009). Even though it emphasizes the difficulty of standardizing action, Maiwald continues to be mainly interested in more conceptual descriptions of action with respect to family mediation (Maiwald 2004a: 110ff.). Apart from discussing the working relationship (*Arbeitsbündnis*), the descriptions focus on the involvement of the third party, which is also true of analyses of mediation as a social technology (Bröckling 2015; Münte 2016). According to Maiwald, mediators become involved by vicariously interpreting specific consensual solutions and explicating the parties' orientation toward cooperation, which varies from case to case. While bearing in mind that it is necessary to differentiate between cooperation in the situation itself and cooperation after mediation, it should also interactionally be explored what functions the explication of future cooperation will have.

In this context, the result of Maiwald's hermeneutic analysis of mediators' professional self-understanding is remarkable: their self-understanding reveals that they experience mediation techniques as vague and consider this a shortcoming. At the same time, mediation appears to be a kind of "automatic technology" (ibid.: 153), and the mediator seems to be invisible (Maiwald 2003). I believe that this involves an argument based on interaction sociology. Not (only) the action taken is decisive, but also the presence of the mediator. Yet Maiwald avoids acknowledging the fundamental difficulty that "people processing" lacks a technological foundation and must be taken seriously as interaction (Luhmann/Schorr 1999[1979]: 118ff.).

Qualitative studies (Garcia 1991; Greatbatch/Dingwall 1997; Heritage/Clayman 2010: 200ff.; Nothdurft 1995; Silbey/Sally 1986; and others) provide better insights into mediation interaction. Nonetheless, Silbey and Sally (1986), for example, place a strong focus on the mediator's techniques and thus on his or her involvement. It is the studies in conversation analysis that show that the mere presence of a mediating third party changes the situation. This "passive facilitation," as the effect is called, can be studied using Garcia (1991) as an example. She argues that impartial third parties introduce a specific "speech-exchange system" into settling the conflict. According to Garcia, the almost impartial presence of third parties stabilizes the parties' turn-taking, which is jeopardized during the conflict. Although I find this convincing, Greatbatch and Dingwall (1997) justifiably object that Garcia gives too much significance to the "speech-exchange system" because the parties settle contentious issues themselves or at least do not go into them more deeply. How can this be explained?

Up to this point, I have used the analytical approach of the involved uninvolved to explain the special features of neutral third parties and have criticized mediation research. Since the mere presence of the mediator (like that of other neutral third parties) makes a difference to the interaction, it is important to separate this analytically from his or her involvement in communication in connection with settling the conflict. Before I include this insight in the analysis of mediation, I will go into the various positions of mediating third parties in greater depth.

The decentering of the concept of mediation

Sociology's interest in the topic has ebbed and flowed. Corresponding to the efforts of practicing mediators to establish professionalization, the current sociological literature limits itself to mediation as a very specific, formalized procedure for settling conflicts. In so doing, it loses sight of the consequences relevant to the conflict and the interaction which arise from the transition of the conflict dyad to a mediation triad, which apply in the same way to judges in conciliation hearings or to arbitrators. Simmel did not limit the discussion to professional and formalized mediations, and Luhmann did not define the neutral third party in conflicts more closely, either. Both authors propose a broad concept of conflict mediation (Luhmann 1999[1981]: 107ff.) which can be used to describe the presence and the intervention of a neutral, impartial third party who will not decide the conflict between the parties against their will. In the course of the intervention, a decision is made whether or not agreement is possible

(Gulliver 1977).⁷ If we regard the heterogeneity of the positions of mediating third parties, then both the difference between mediation and arbitration (Maiwald 2004: 110ff.) and the question whether the mediation is called “out-of-court,” “alternative,” or “informal” is initially less important. In order to decenter the conventional concept of mediation and to recognize in which cases an analysis involves conflict mediation, I distinguish among three levels of generalization in this section: situational-occasional, repeated latent, and formalized mediation.

There is no established mediator role in the situational-occasional variant, only someone who intervenes in individual cases because a disagreement requires it – for example, when a family is having a meal (Keppler 1994: 134f.; Simmel 1964[1908]: 149; Vuchinich et al. 1988). The situational need initiates the search for one or more mediating third parties. It goes without saying that this need is first directed toward accredited participants (Goffman 1981: 124ff.). If a non-accredited participant in the interaction should find him- or herself in the role of the situational mediator, this approximates what Maiwald calls a “peacemaker” (Maiwald 2004: 114ff.). However, the disturbance of the peaceful situation is an invitation to bystanders, who initially try to tactfully ignore the argument (or enjoy observing it), to intervene.⁸ The need for mediation exists situationally-occasionally, but there is no need for it to be confined to a particular person or role. Accordingly, the briefest mediation sequence would consist of a proposal for solving the problem, followed by two affirmative responses ratifying the proposal. This case must be differentiated from moderation, which does not involve an agreement about the matter in question and keeps the parties capable of interaction and the conflict alive, but within limits. If a person resolves conflicts in multiple situations concerning varying topics, then an expectation develops that he or she is suitable as a mediator in addition to his or her role in the family. If this person does not intervene spontaneously, people turn to him or her, asking him or her to intervene. Some situations even begin with the identification of a chairperson, which takes situational-occasional mediation to the second level of generalization.

Especially in organizational contexts, the opportunity to resolve conflicts repeatedly, but latently, is structurally linked to membership roles. However, neither the designation of the

⁷ It is an open question whether searching for agreement should be described in interaction-sociological terms primarily as finding a compromise (and thus as a negotiation), as a discussion, as reconciliation, or as therapy.

⁸ I see a lesser problem of legitimation here than Maiwald does. Under what conditions bystanders intervene is, however, another research question entirely. Whether or not the parties approach a mediator themselves must certainly be kept in mind. But I consider this question less crucial than Maiwald, who bases his typology of mediation on it (Maiwald 2004: 110ff.).

role nor the official role expectations specify this function. Such people are not called on as mediators, but in fact they repeatedly mediate or at least are forced to take a position in other members' disputes. As a rule, nobody openly requires them to mediate, but they are rarely able to evade the pressure to mediate entirely. It is an empirical question whether such "positional third parties" actually resolve disputes.

One example of this is the middle manager who intervenes between senior management and the lower levels of the hierarchy (Luhmann 1972[1964]: 210f.). According to a training supervisor, mediation training is in high demand among middle managers in particular, but specifically not to prepare them for mediating as a full-time profession. Further examples in education and academia include school principals, university management or deans, and in the business sector supervisors as well as employee or union representatives (Bailey 2009: 184ff.; Gross et al. 1966; Schimank 2008; Müller-Jentsch 2009). In the same fashion, mediating within a department is the department head's job (Luhmann 1972[1964]: 48f., 204f., 210f.). Furthermore, people working in boundary roles must reconcile the expectations of the organization with those of its environment (ibid.: 220ff.). Examples include diplomats, negotiators, social workers, police officers (Black 1980: 132f.), and lawyers involved in plea bargaining (Hallevy 2009). The list could go on. If the people in these roles prove themselves in practice, and do not take action spontaneously, people will seek to activate them as mediators.

At the third level, the roles and procedures involved in mediation are formalized. People can officially call on the mediators; consequently, everyone is aware that a third party will become involved. The mediators are experienced in settling such conflicts or have completed relevant training. Procedural rules stipulated by law or by the organization apply. This level of generalization includes extrajudicial mediation, non-binding arbitration, mediation within and outside companies, and, in part, conciliatory dispute resolution in organizations, judges negotiating settlements, official attempts by judges to settle conflicts, obligatory mediation, and, as a borderline case, victim-offender mediation. Beyond the many commonalities shared by the three levels of generalization, this typology opens up additional opportunities for comparison which will be referred to in the following where appropriate.

In the three previous sections, I criticized the literature on the sociology of the third party and of mediation on the basis of the analytical paradox of the involved uninvolved in order to give reasons why it appears reasonable to divide the line of argument into "mediating third parties as people merely present" and "the involvement of mediating third parties." By decentering it,

I also aimed at introducing a broad concept of mediation to which the following line of argument refers.

Escalation of the conflict as a problem of reference for mediation

If we wish to understand the intervention of mediators as outlined, we must take account of the reference problem involved in differentiation, generalization, or escalation of the original conflict.⁹ My hypothesis is that mediation blocks or reduces the differentiation of the conflict at various levels. In this context, Simmel's argument about making the conflict more objective emerges as one aspect in a broader transformation of conflict communication, which I would like to demonstrate with recourse to the systems-theory sociology of conflict. But before I discuss scaling back and transforming conflict communication, I will explain the differentiation of conflicts in terms of the three dimensions of meaning.

In the factual dimension: if two parties argue, this means that a difference of opinion has become a conflict. From that point on, the two parties contradict each other openly and directly, which disrupts the usual situational peace. If objective and personal matters are separated sufficiently, Messmer categorizes this as an objective conflict (Messmer 2003: 147ff.). The dispute intensifies if the parties keep adding new topics to the conflict (ibid.: 169). From then on, in addition to becoming more extensive in terms of the topics involved, the dispute is no longer centered around a concrete accusation, but organizes abstract and differing objectives to form a front. The issues involved in the conflict become a Gordian knot. If the positions become more entrenched, the parties come to view the conflict as a zero-sum game: any gain for my opponent is my loss – and my opponent's loss is my gain. It is common for the adversaries to deny each other the right to disagree.

In the social dimension: Instead of discussing "the matter at hand," people denigrate their opponents in moral terms. In this way, the conflict intensifies in the personal dimension (ibid.: 176ff.). Instead of discussing the matter, people blame their opponents and accuse each other of starting the conflict. Communication that conveys respect as well as understanding diminishes. Messmer localizes this on the level of interpersonal conflict, which follows that of objective conflict (Messmer 2003: 185ff.). People also say, "the first victim of war is the truth," meaning that nobody believes their opponent anymore. In this case, an opponent's

⁹ On the concept of conflict and the following deliberations, see: Kieserling 1999: 257ff.; Luhmann 2008a[1969]: 100ff.; Luhmann 1995[1984]: 388ff.; Messmer 2003.

friendliness is perceived as extremely spiteful. Moreover, strong identification with a position makes the way the parties present the conflict inflexible. Backing down would amount to “denying what you were just a moment before,” as Simmel said about reconciliation (Simmel 2006[1908]: 377). The conflict draws in previously uninvolved third parties, some of whom become supporters and, as hardliners, demand intransigence.

In the temporal dimension: communication is highly integrated, since the adversary’s utterances and actions must not be allowed to pass without comment. One word leads to another. However, what is said is not really considered binding; after all, it is true in conflicts that “what is said [...] is not considered final; it is often modified later, its emphasis is shifted, it is taken back (and often even denied – but only in one-to-one communication)” (Stok 1930: 539). People in a rage talk incessantly and may even raise their voices, so that turn-taking, which is normally based on the cooperation of those present, is thrown into disarray. Messmer calls this an intensification of the conflict related to the way the adversaries speak (Messmer 2003: 172). As a result of the assumption of malicious intent, it seems as though the other side has always been hostile and will continue to be so in the future.

Often a combative attitude is not the reason why earlier statements in an argument are not taken back: instead, this results from the significance of who takes the first step toward compromise. Every “unaccompanied” concession can be interpreted as weakness and admission of guilt. Since continuing the conflict could become even more costly, the adversaries are confronted with both a dilemma over losing face and a negotiation dilemma. In highly escalated cases, the adversaries may threaten lawsuits, trying to prevail in this way; Messmer calls this a power struggle and thus a final step before resorting to other means such as litigation or using force (Messmer 2003: 225ff.).

Which remedies do mediating third parties provide in such cases?

Mediating third parties as people present

In addition to the possibility of becoming part of a conflict, mediating third parties are also involved in the events as bystanders. Their presence or their “passive” style of mediation alone raise the possibility of concluding a dispute without further action. Black observed this effect with police officers on the beat (Black 1980: 132f.), and Gulliver with mediators in collective bargaining disputes and with a mediator from the Ndendeuli tribe (Gulliver 1977:

27).¹⁰ If a third party is present, the dispute is under observation and thereby becomes semi-public. This provides good conditions for the parties to distance themselves and to censor themselves. The same insight regarding the disciplining effect of observers is to be found in Michel Foucault (1978[1975]), although more for dyadic observational relationships. The conversation-analytical concept of the “overhearer” similarly draws attention to the fact that communication is adapted to the particular audience (Heritage/Clayman 2010: 175ff. *inter alia*).

Initially imagining the mediating third party as “inactive” re-opens the issue of the third party’s invisibility: although he or she does nothing but look on, the parties can feel his or her eye. In this way, the third party’s influence remains almost invisible.¹¹ Consequently, I describe the mediator who is present in terms of the sociology of the bystander (Goffman 1966; Stok 1930; Vierkandt 1923), which I divide into the objective, social, and temporal dimensions. The purpose of this arrangement is as follows: as they begin to look at themselves more objectively, the adversaries commit themselves on their own initiative to a more peaceable description than they would have been able to in the absence of a third party. People doing so make their positions partially compatible with giving ground or accepting a non-preferred decision (Luhmann 2008a[1969]: 91-120).

In the factual dimension, the presence of third parties imparts more objectivity and introduces more discourse to the situation (Messmer 2003: 147ff.; Simmel 1964[1908]: 148; Stok 1930: 528ff.). This process is facilitated by metacommunication entering into the conflict system. Addressing an uninvolved person means that the parties to the conflict are not arguing *in actu*, but instead talking *about* the conflict, for example, by justifying their positions to the third party. In his or her presence, they must describe what happened and why, as the third party was not present at the time. They must explain their position and, perhaps even worse, take criticism of it seriously. Merely intensifying the expression of opinion is not an advisable strategy; instead, a more moderate tone and generalizing to make opinions comprehensible to the third party is a better approach. Since neither party knows how the adversary will adapt to the new situation and whether his or her own arguments will have a bearing on the third party, the adversaries must carefully determine which arguments are robust, whether their own assessment corresponds with that of the third party, and how the adversary will defend him- or herself. Revenge or personal attacks will scarcely be understood; instead, they may

¹⁰ I will not attempt here to systematically address the question of the circumstances under which this effect starts and stops.

¹¹ The invisibility of third parties should also be discussed in connection with their neutrality.

demonstrate from the mediator's point of view that a position is inferior for certain reasons, and therefore not worthy of support. In other words: the situation forces the parties to be disciplined and separate the objective issues from the person.

Arguing with a third party present implies that the parties' positions are not worthy of support per se. Not only the result of the formalized mediation of the conflict is open. Both sides are in the same situation of soliciting support for their point of view. In this sense, this entails a concession to the adversary and a relativizing of the personal standpoint: the adversary is allowed to justify his or her position, and the person's own standpoint is not the only one imaginable. This precludes argument about the right to argue and grants "license to be adversaries" (Luhmann 2008a[1969]: 103).

In contrast to largely contentious court cases, in mediated cases the adversary remains the focus of effort; after all, the adversary's willingness to give ground is decisive, not a decision made by a third party (Werron 2010: 308). For this reason, in mediation competition for the third party's good will must be seen in a different light from court proceedings. If the third party does not make the decision, does that make him or her irrelevant, as Horwitz (1990) believes? If the parties generalize their standpoints, don't they automatically end up in court? – No, for in social terms the direction in which self-distancing and generalizing of the positions ideally goes becomes apparent: the mediator who merely observes represents norms of a more comprehensive system or of a "social matrix" (*Muttergebilde*; Stok 1930: 530f.). The adversaries are then guided by these norms to avoid appearing to be disregarding them. In the presence of the third party, the norms can no longer be ignored without ignoring the third party. The norms thus represented, and therefore the expectations that support from the third party in attendance as well as from members of the same system who are not in attendance arouse, can be divided into two categories: first, the norms of the context of the dispute, and second, the norms of the interaction. Concerning the context of the dispute: the family mediator represents family norms, arbitrators neighborhood norms, and the business mediator the norms of the "reputable businessperson." The mediator's opposition to alternatives that would avoid such mediation, such as court proceedings can be anticipated. According to Luhmann (1999[1981]: 71), such avoidance alternatives are to be *dethematized*.

Secondly, the norms include those concerning reasonable engagement in the interaction (Goffman 1966; Goffman 1989: 113ff.). In the end, consideration for the third party implies consideration for the adversary. The mere presence of an unfamiliar person means that people will not take too many liberties. Accredited participants in the interaction are entitled to more

than indifferent politeness. Reasonable engagement means avoiding direct dissent in the presence of third parties or at least repressing it, because the adversaries would otherwise be too self-referential and over-involved. Garcia's findings confirm that certain duties to keep the peace are adhered to in the dispute resolution situation, for the adversaries weaken their accusations by using uncertainty markers such as "I think ..." or "perhaps," or by not mentioning the person causing their anger at all or only hesitantly or in a collective sense (Garcia 1991: 830ff.). Conflict avoidance is also documented by not seizing upon opportunities to dissent, by allowing sequences of dissent to go unchallenged, or in "conciliatory accounts" in which one of the adversaries blames or excuses both sides in equal measure (Greatbatch/Dingwall 1997).

If appropriate engagement means not directly and constantly contradicting the other side, "the third party is embarrassed [...]" (Luhmann 1999[1981]: 103) if the parties are nonetheless over-involved and combative. The fact that the neutral person is embarrassed indicates to the parties that their engagement was inappropriate. That participating third parties are also affected is like an alarm system indicating that the adversaries are overheated. Getting carried away in the presence of the mediator would degrade him or her first to an onlooker and then to an unperson. It would be tactful not to deal solely with the adversary. According to one mediator, the parties apologize to him for precisely such incidents, which demonstrates the norm of appropriate engagement vis-à-vis the third party.

The constellation of the triad has two further consequences. First, the mediating third party is optimistic regarding an agreement because, as an onlooker, he or she is not involved in the everyday wrangling and the oppressive past history of the dispute. Such onlookers develop – sometimes at universities – an "optimistic distortion of reality" (Vierkandt 1923: 398), as is to be found in descriptions mediators make of themselves: It is better to give ground than be unyielding, a consensual solution is possible, and a win-win situation is attainable (Heck 2015). The past history of a dispute does not cloud the judgment of third parties, which is why they are suitable to be patriots (Vierkandt 1923: 397) as well as peace activists. As a result, the mediator optimistically and unrealistically anticipates a more peaceful future, whereas the parties involved are on the verge of giving up or initiating legal action.

Secondly, the party silent at a particular moment perceives him- or herself more as an audience for the adversary who is speaking and monitors his or her engagement in the dispute just as the third party does. If the adversary argues in a civilized manner, then the party not yet speaking is to a certain degree forced to do so as well. The kind of engagement previously

demanded, as an onlooker, is now required of this party too (Vierkandt 1923). Listening, which becomes necessary when it is the adversary's turn to speak, is not easy in conflict situations. This form of social control is lacking in the conflict dyad because there is pressure to participate.

In the temporal dimension, uninvolved third parties maintain a record of the interaction and reduce the directness and speed of dissent. The presence of the third party as a witness makes the parties' utterances more binding and more difficult to retract, so it can be assumed that all parties present are aware of them. The onlooker reactivates the memory which is taken for granted in normal interactions; among other things, this ensures that new information is designated as such only once, or that people stay on topic (Luhmann 2005[1975]: 31ff.). This hinders the parties by means of an interaction system from endlessly repeating accusations and counteraccusations.

After all, one word leads to another when people argue. Here, the uninvolved person buys time, for his or her mere presence disrupts the immediacy of contact and slows down the "ever faster workings of action and reaction" (Stok 1930: 527). The parties address the third party instead of their opponent, with a view to his or her reaction. Garcia (1991) analyzes this matter further: as a result of this, a party will contradict the other side – if at all – only at a later point in time, and then only selectively. Since the presence of the third party slows down turn-taking in the dispute, there is less need to contradict directly and without prior thought.

The presence of an almost uninvolved third party sets in motion the separation of the issue and the person, the representation of norms, the bindingness of what is said, and the deceleration and selectivity of contradiction, which stimulates the parties' self-distancing and self-censorship. Under these circumstances, many parties may come to feel that the other side may be quite reasonable after all.

The involvement of the mediating third party

Involved uninvolved third parties are not only present; as they participate in communication and have opportunities to directly influence the conflict, they change it, increasing the likelihood that the parties will give ground. Their participation prevents the conflict from becoming more differentiated on more levels than Simmel assumed at the time. Metacommunication partly reverses the interpersonal conflict communication (in the form of moral degradation and ascribing guilt) and transforms threats into warnings. In policing the

interaction, third parties filter out trivial matters and shut down sources of conflict intensification that are typical of interactions. Because of their involvement, it is easier for the adversaries to distance themselves from things they said before. At the same time, I show in many places how involving third parties creates pressure to give ground.

Before I discuss this in detail, following the dimensions of meaning, and oriented toward Messmer's levels of conflict, some qualifications are in order. Involving a third party does not guarantee peace. I will only briefly go into the problems arising from a third party's involvement which make it more difficult to give ground. Whether mediating third parties launch all their interventions intentionally is doubtful. It can safely be assumed that conflict resolution professionals often act intentionally when intervening, but this does not have to be the case. Of course, there can be no intervention in which all possible forms of participation occur. Because the studies cited and my empirical sources are primarily from family mediation and some from collective bargaining disputes and neighborhood dispute resolution, there are limits to generalizing individual insights to include other dispute contexts.

Factual: Enriching communication

Not only do the conflicting parties speak with the involved uninvolved *about* the dispute; the involved uninvolved also speaks *about* it. The mediating third party introduces metacommunication into the conflict system, which – in contrast to metacommunication in the dyad – is not immediately interpreted as conflict communication. Metacommunication is an aid and a remediation tool in everyday communication, which becomes more powerful, especially in the field of law, by arranging things schematically (Luhmann 2013: 52ff.; 117f.; 230ff.). From this perspective, third parties develop a language of their own to speak about disputes. In situational-occasional mediation, everyday language can be used which develops further as mediation is professionalized. As already indicated, according to descriptions made of themselves by mediators, giving ground is better than refusing to yield, a dispute can be solved by the conflicting parties themselves, and a win-win solution is possible, to mention only some very fundamental maxims (more on this in: Bröckling 2015; Münte 2016).

In formalized dispute resolution, the purpose of involving a third party is to reach agreement. This expectation tacitly reverses the burden of proof: if the parties refuse to give ground, they must explain why. The more a particular party continues discussing things and justifying his or her position, the more likely it is that the question whether giving ground in the dispute is

appropriate at all will fade into the background. Here, mediational metacommunication and its ethical principles regarding conditions of its application provide for neither reflection nor negation.¹² If the parties consent to the process, the expectation arises that they are not opposed to giving ground in the dispute. After all, key contributions by the mediator can be described as forms of metacommunication that are improbable in the conflict dyad. The tasks of policing the interaction, paraphrasing, apologizing on behalf of a party, communicating of mutual respect, and warning about the consequences of not giving ground will be discussed with this in mind.

What is always mentioned when it comes to the factual dimension should be stated first: third parties emphasize the objective aspects in the sense of separating the facts and the person, for example, by using the technique of paraphrasing individual or multiple contributions to filter out one party's accusations and directing attention to "interests" or objective matters. If that party accepts the description of the situation in its paraphrased form, and of course that poses a problem, then that amounts to accepting help to distance oneself. On the contrary, distracting from the dispute by carrying out secondary activities is rarely mentioned. Apart from greeting, making farewells, bridging periods of silence, and overcoming crises in the interaction, providing beverages and cookies—even if in small quantities—is an integral part of professional mediation programs. Setting the stage as a host is completely obvious if mediators invite the parties to their home. Such secondary activities reinforce the usual duties in interactions and provide evidence of cooperation beyond the dispute to be settled.

As explained above, people mistrust their opponents. In the event that there is still any communication at all, then it is assumed they will always lie to benefit themselves. Aside from the risk of not letting sleeping dogs lie, communication begins again through the involvement of a third party. Moreover, because the mediating third party is trustworthy, it is again possible to make a differentiated evaluation of what the parties say, to gather information, and to conduct indirect communication and effective disinformation. A more differentiated evaluation arises from the fact that the third party either consolidates what the parties say by not calling such statements into question and treating them as credible, or discredits them. The mediator discredits them by posing follow-up questions, "constructively" paraphrasing statements, and pointing out the risks of not giving ground and any inconsistencies in statements made (Jacobs 2002; Lovell 1952). In addition to bringing

¹² Deciding to use mediating metacommunication sets the course for not using legal means, which is difficult especially for lawyers in their first meeting with a client.

information to light, such investigations, which at times seem like interrogations, have the effect of giving the third party the opportunity to contradict one side indirectly or vicariously (Jacobs 2002) in order to avoid the appearance of partiality. The purpose of discrediting and contradicting is less to convince the other party through discourse than to exert pressure to give ground, for any position appears open to question.

As a person who mainly observes the dispute, the third party sees more: punctuation, structural grounds for the dispute, costs of not giving ground, or the consensus which the parties lost sight of long ago. Accordingly, mediators feed in their observations from the outside when they clarify supposed grounds for the conflict or propose solutions. Sometimes a proposal eliminates the “luxury problem” that a rational solution cannot be found because so many of them are possible (Stevens 1963: 136f.). One proposal is enough to “creat[e] direct contact between the parties” (Simmel 1964[1908]: 146).¹³ If the mediating third party initiates and proposes compensation, the compensation also loses the connotation of a bribe (Neidhardt 2013: 426). Whereas the same proposal coming from one party would be considered a sign of weakness, as immediately binding, or as an objectionable attempt to make a payoff, even a rejection of the proposal is unproblematic for the mediator (Garcia 1997: 223; Pruitt/Johnson 1970).¹⁴

In shuttle mediation, where the mediator shuttles back and forth between the adversaries, and in one-to-one meetings, the mediator functions as the functional equivalent of indirect communication (Kieserling 1999: 147ff.). Indirect communication means dropping hints or implying things. If such a remark is met with indignation, it can easily be disclaimed: “I didn’t mean it that way!” In disputes, this communicative register is lost, because it would either be overheard or could be interpreted as a weakness. In cases of mediation it is sometimes observed that party A asks the third party to suggest something to party B in *his or her* name, or that the third party uses the supposed willingness of party A to give ground to experiment with party B: “what if party A were to make a concession on topic X?” Regardless of party B’s reaction, party A does not have to assume any responsibility for this approach.

Mediators have supposedly been known to pass on confidential information without being authorized to do so, or to have presented hypothetical willingness to give ground in too obvious a way. Although experienced parties, for example parties to collective bargaining

¹³ Precisely this phenomenon weighs heavily on professional mediators when it comes to “short-term mediation”: how can it involve a procedure that maintains certain standards?

¹⁴ Mediators disagree whether they should make suggestions because that undermines the parties’ self-determination. According to mediators, however, actual practice varies widely.

agreements, adapt to this situation by no longer divulging any “real” secrets to mediators, and what is more, by attempting to instrumentalize them to serve their own ends, the monopoly on contact between the parties permits the third party to engage in “double talk” (Bailey 2009; Schimank 2008) to exaggerate the solidity of *both* positions or the regrets of *both* parties. When “speaking with a forked tongue,” the mediator plays devil’s advocate to both parties at different times, criticizing and discrediting them by referring in an exaggerated way to the purportedly solid position of whichever party is not present. Thus, third parties have resources for effective disinformation at their disposal, provided the parties are not communicating or that they distrust each other. In this sense, the obligation to maintain confidentiality protects mediators from having to disclose their maneuvers, but confronts them with the ethical question of whether and how much deception is legitimate (Cooley 1997). The use of disinformation certainly increases the chance that one or more parties will acutely regret having come to an agreement.

Social: Maintaining order during negotiations and managing identities

Normally, everyone present must contribute to maintaining order. A party that is silenced and then immediately claims the right to speak again simultaneously takes on the roles of victim, judge, and corrections officer.¹⁵ As chairperson of the session, the mediator fulfills the tasks for maintaining order, which are formalized for judges in the German Courts Constitution Act (Sections 176-183). In this way, the third party defuses sources of conflict and trivial matters typical of interactions. By controlling the agenda, the third party also controls which issues are discussed and when, and whether contributions to the discussion are “successful.” The fact that an agenda is agreed on and is observed not only limits digressions, but has a transformative effect because the agenda leads to a factorization of the conflict (Luhmann 1999[1981]: 111), that is, it breaks down the *mélange* of conflictual issues into subtopics, none of which implies “all or nothing.” If a dispute begins in *actu*, the mediator exercises authority to stop the parties (Paris 2005: 65-74), saying, as one mediator reported, something along the lines of: “so that’s what it’s like when you argue without me being there.”

Moreover, maintaining order includes regulating access to the situation. Only a very few may participate in resolving the conflict. Thus, having access to the situation specifies the dispute in social terms: both hawks and doves must stay at home. In the situation itself, the person

¹⁵ “Those who break the rules of interaction commit their crimes in jail.” (Goffman 1989: 115)

addressed is primarily the third party. When deviating from this principle, the third party nonetheless signals that he or she has received the message, interrupts direct exchanges between the adversaries, or encourages them to return to the forms of address agreed upon (Garcia 1991: 826f.). In addition, the mediator has the function of a “traffic light” for the parties taking turns speaking (Hahn 1991: 96f.). In case of doubt, and if turn-taking no longer works, the mediator grants the right to speak.

The involvement of an uninvolved person permits those at loggerheads to distance themselves from the previous history of presenting the conflict, because it enables them to *manage their identities* more broadly than would be possible without the third party. In short: the fact that the uninvolved joins the situation and becomes involved produces legitimate excuses for giving ground. Identity management does not mean that the parties contrive new identities in a targeted fashion, as if it were about impression management. Instead, the involvement of the uninvolved provides the situation with new depictions of the conflict, and the parties would have to resist them in order to remain in their previously held positions. From this perspective, giving ground does not arise from a desire for peace or from successful negotiations, but from the fact that it can be presented well, that giving ground is reasonable, and that the expectations of the others can be managed. The mere fact that a third party is involved provides a good alibi. After all, a party has not made concessions to the adversary, but to the third party’s tenacity. In other words, the uninvolved is a new target for attribution, especially in the case of failures.¹⁶

Moreover, third parties give rise to justifying or excusing narratives. In this way, they vicariously excuse the parties and make the question of assigning responsibility ambiguous. For it is striking in the empirical data that mediating third parties reinterpret past actions in the dispute by reducing ascribed intentionality, presenting actions as excusable, or giving other reasons for clearing a party of blame (Nothdurft 1995: 104ff.; Cobb 1994). In place of the adversaries who would take on responsibility by saying “I didn’t mean it that way!”, the third party apologizes indirectly and vicariously for the parties to the dispute and simultaneously takes back the temporal generalization that today’s opponent had always had evil intentions. When parties accept the reinterpreted course of events in a conflict, the implication is that they have in effect apologized, by the unspoken admission that they had not meant it that

¹⁶ For this reason, sports referees, and not the opposing team, are the target of the outrage they themselves purportedly cause.

way.¹⁷ If they let this version stand, then the third party has implanted the fiction that it was not intentional. This fiction is put to the test if the parties discuss the course of events as well as motives anew (Cobb 1994: 175f.).

For mediation, it is not decisive to suggest that one side or the other is completely blameless. Instead, it is about “minimal clarification of the offense” (Nothdurft 1995: 95), which purportedly cannot be cleared up any further. Then, the interpretation is, “Something or other must have happened!” There is general agreement that both sides were at fault, which makes the issue of who started the dispute ambiguous. This is an important step in deciding not to resort to the law, for which the question of blame is key.

Once the dispute is broken down into its components, the parties have characterized each other as morally inferior in their roles as partners, parents, neighbors, or business partners. Yet if they cooperate, both parties could still gain the respect (Luhmann 2008b) of the third party. As a representative of norms, he or she offers the prospect of his or her personal respect as well as that of absent members of the same system by presenting giving ground as good role behavior.¹⁸ Good role behavior depends on the context of the dispute. For example, people are considered good parents if they have the child’s well-being in mind and give ground for this reason. Parties also gain respect through fairness, willingness to compromise without being forced to do so (Garcia 1995: 206ff.), admissions of guilt (Nothdurft 1997: 99ff.), and reciprocating concessions. Sticking to ideological principles, for example by rigidly insisting on the law is not considered worthy of respect (Eckhoff 1967: 160) – just as little as questioning the purpose of the situation. According to one mediator, however, referring to the child’s well-being reveals the limits of such communication of respect, namely when one party asserts that his or her solution is in the child’s best interests.

The standard repertoire of mediating parties includes describing the risks of court proceedings. For going to court involves (allegedly) a long and expensive process with an uncertain outcome, which also threatens to ruin the cooperative relationship with the other side.¹⁹ The consequences of an unyielding stance that are described develop into excuses that legitimize giving ground. Whether the parties have assessed the risks appropriately or even perceive them in this way at all is not decisive. They must merely give the collateral damage

¹⁷ The credibility of this depiction depends on how (un)clearly the intentions can be recognized, which is presumably easier without more detailed clarification (in court).

¹⁸ This argument is very close to the legal concept of the “reasonable person” as well as considerations of equity and appropriateness.

¹⁹ Jansen (1988) interprets this involvement as a reminder of the benefits of giving ground. This raises the question why rational actors need to be reminded of the benefits of an agreement.

resulting from withdrawal the impression of being reasonable and logical. They do so because it is easier to abide by values opportunistically (Luhmann 2007[1971]) in view of the complexity of the matter (objective risk), the desirability of cooperation (social risk), and the duration of litigation (temporal risk).²⁰ This means that, under the apparent pressure of complexity, cooperation, and lack of time, it is not necessary to abide by things one identified with elsewhere. Under these circumstances, betraying your own principles becomes less objectionable.

Finally, strong pressure to yield arises in the social dimension if the third party supports one side's position and isolates the other one (with limitations as to time and scope). In mediation, asymmetries of the type "two against one" have been empirically proven to exist and are commented upon critically because they run counter to neutrality (inter alia, Garcia 1995; Greatbatch/Dingwall 1989). A similar problem arises from one-sided support which, from the perspective of professional mediators, becomes necessary if parties have no experience with strategic interactions. They are easily duped, but are not so unintelligent that they would not realize this later on. If the mediator does intervene noticeably, the other side will mistrust his or her neutrality. In this way, the third party tries to establish a level playing field, which is not really possible because equal terms among parties in this respect are achieved perfectly only by legal representatives in court. Hence, the parties are on (more) equal terms, if they are not involved in their own conflict anymore.

Temporal: Coordinating giving ground, buying time, and losing time

In the temporal dimension, the mediating third party solves the problem of making the first step and thus *coordinates* both sides giving ground. Once entrusted with the dispute, the third party creates time by taking the initiative, whether by scheduling conflict resolution, interrupting the process, or making suggestions. Inaction and restraint no longer signal weakness; one word does not necessarily lead to another. If the conflict resolution process comes to a standstill, the mediator intervenes, for example by taking the initiative and requesting a "positional report." For the parties, responding to this request is less binding than volunteering such a report would be (Garcia 2000). Under the aegis of the mediating third party, the conflict is broken down by topic again. The parties are reassured that they will not lose everything if they make concessions on a particular topic. In this way, work progresses step by step toward

²⁰ "Life is very short and there's no time for fussing and fighting" ("We can work it out," The Beatles 1965).

agreement which both parties ratify at the same time. This makes it possible for the points where the individual parties can give ground to be coordinated and conditioned in a controlled manner.

Conflicts generate new arguments, abstractions, or opportunities for solving problems. New arguments and solutions also enable the parties to distance themselves from their previously held positions. However, controlled use of this ability to innovate is problematic. If a new argument is emphasized too early, its liberating impact to depart from a position will be lost. If it is stressed too late, then it may have been assigned to one party and have become ineffective (Luhmann 1972[1964]: 204f.; Stevens 1963: 130). One mediator confirmed this, stating that if one party makes a suggestion right at the beginning, he, the mediator, sets it aside, referring to the phases of the procedure and explaining that it is too early for suggestions because preparations are still ongoing. This is also risky for another reason: if one side makes its best offer even before negotiations have really begun, the other side will get the impression that it could get even more (Blum 1961).

A shared memory of the interaction suffers from the dyad's dispute. As a participant, the third party organizes this memory via an agenda of topics, summaries of contributions, and by putting concessions or admissions of guilt in writing. The paraphrases formulate not only for the party whose words have been summarized what they "actually" wanted to say, but also determine what the other side should remember from the previous contributions. Moreover, third parties remind the adversaries of what was said during the process and use those utterances to apply pressure if a new statement is inconsistent with previous ones or if a change of position clearly seems to be logical. Conversely, and this should be underlined with respect to how mediation describes itself, it is not necessary to go into all topics that have been mentioned. According to one mediator, he does not work through the topics systematically, even if they were put on the agenda. Supported by being allocated to particular phases, some topics are left to be forgotten.

Both negotiating and mediating initially reduce time pressure, but – easy come, easy go – simultaneously increase it by unleashing the "dictatorship of endurance" (Weinrich 1972). The longer the negotiations last, the more urgent physiological needs and other role relationships become (Douglas 1962: 165ff.). People become exhausted and are also needed elsewhere. "Life must go on" is both an excuse for giving ground and creates pressure to do so. If the parties leave the meeting with rings under their eyes and visibly worn out, the

situation has given them a personal facade that convinces their supporters that they have tried everything (Walton/MacKersie 1965: 329).

As mentioned above, third parties describe the consequences of not giving ground and present the use of force or judicial proceedings as alternatives to be avoided. Court proceedings are presented as an objective risk because it is unclear who will win, as a social risk because the cooperative relationship with the other side is lost, and as a temporal and financial risk. If the adversary were to verbalize such matters, they would constitute at least indirect threats. Referring to the objective risk would confirm that the cards were stacked against the adversary in court; referring to the cooperative relationship would confirm that the adversary would be unable to deal with the end of the relationship. If a third party speaks about a dispute in this way, these are not threats, but warnings, for the third party does not have the power to act on the threats. But the warnings reveal behavioral options for putting oneself in a more or less advantageous position. In other words, third parties establish metacommunication that permits the adversaries to communicate about the costs of the conflict instead of about power (Messmer 2003: 225-274).

Yet, beyond the power to maintain order during the process, third parties have their own power, and the adversaries adjust their behavior to it. The classic example is a judge making a ruling and taking one side. Similarly, situational-occasional and repeatedly latent mediators have the opportunity to become parties themselves. For it cannot always be ruled out that the third party who mediates at the outset might later threaten to take sides because primarily one side is endangering peace within the system. Ruling out that a third party can become a party is therefore a feature of formalized mediation. In non-formalized settings, third parties sometimes reward giving ground by exchanging goods or granting privileges, paying from their own funds. Finally, even the most unprepossessing third party has the power, which according to one mediator is in fact used, to threaten to abandon the conflict resolution process: either the parties must be willing to compromise, or the mediation must come to an unsuccessful end.

Conclusion

The goal of the argument was to trace the transformation of conflicts achieved by mediating third parties in a more complex way than Simmel. In the first section, I pointed out that it is not enough to explain giving ground in a dispute with the duration of the relationship or the



nature of the fundamental conflict, but that the intervention of a third party must be taken into account as an interaction. Since people other than professionals also settle disputes, I differentiated among the involved uninvolved according to their roles as situational-occasional, repeatedly latent, or professional mediators and demonstrated how they transform the fundamental conflict. In contrast to the widespread conviction that the mediator's techniques matter, I argued in the second section that the mere presence of a mediating third party encourages admonishes the parties to make their contributions more objective and to exercise self-discipline in how they interact. Whether it should be claimed, for this reason, that the adversaries are *not* engaged in a dispute and that their preference for agreement is rehabilitated would require further study (Garcia 1991; Schneider 2009: 340ff.). In the final section, I demonstrated how the involvement of third parties introduces metacommunication into the dyad, which decisively transforms conflict communication. Furthermore, such involvement limits sources of conflict typical of such interactions, creates new opportunities for identity management, and coordinates giving ground.

The topic of neutrality was touched upon repeatedly. In the process, I did not systematically discuss the conditions under which a person is recognized as neutral or the question of what might endanger assumed neutrality during the process of solving a conflict. What is more, a comparison of the three proposed levels of generalization of mediation promises further insights. For example, one characteristic of professional mediators has proven to be not to take sides. The level also determines how binding an agreement can be, to what extent the obligation to keep things confidential is enforceable, and whether involvement officially takes place under the definition of the situation as "mediation." At the same time, it is necessary to take better account of the context of the dispute. For in a business context, people tend to argue more in roles, in family mediation as individuals. Moreover, it is an open question whether conflict transformation is taken up in the business world in the same way as in family matters. In the case of disputes in segmental societies and in contexts in which "peacemakers" (Maiwald) intervene, deciding against violence would have to be examined more closely, not deciding against legal means (Cooney 1998). Finally, we should recall that the involvement of mediating third parties does not guarantee peace and that it creates new problems in settling conflicts.

References

- Bailey, Frederick George (2009) *Morality and Expediency. The Folklore of Academic Politics*. New Brunswick, NJ: Aldine Transaction.
- Black, Donald (1980) *The Manners and Customs of the Police*. New York: Academic Press.
- Black, Donald & Baumgartner, Mary P. (1983) Toward a Theory of the Third Party, S. 84-114 in K. O. Boyum & L. M. Mather (Hrsg.), *Empirical Theories About Courts*. New York: Longman.
- Blum, Albert A. (1961) Collective bargaining. Ritual or reality. *Harvard Business Review* 39: 63-69.
- Bröckling, Ulrich (2015) Gute Hirten führen sanft. Über Mediation. *Mittelweg* 36 24 (1-2): 171-186.
- Clayman, Steven (2001) Footing in the Achievement of Neutrality. The Case of News Interview Discourse, S. 163-198 in P. Drew (Hrsg.), *Talk at Work. Interaction in Institutional Settings. Transferred to Digital Printing*. Cambridge: Cambridge Univ. Press.
- Cobb, Sara (1994) "Theories of responsibility". The social construction of intentions in mediation. *Discourse Processes* 18 (2): 165-186.
- Cooley, John (1997) Mediation magic. Its use and abuse. *Loyola University Chicago Law Journal* 29 (1): 1-108.
- Cooney, Mark (1998): *Warriors and Peacemakers: How Third Parties Shape Violence*. New York: NYU Press.
- Douglas, Ann (1962) *Industrial Peacemaking*. New York: Columbia University Press.
- Eckhoff, Torstein (1966) The mediator, the judge and the administrator in conflict-resolution. *Acta Sociologica* 10: 148-172.
- Eßlinger, Eva (Hrsg.) (2010) *Die Figur des Dritten. Ein kulturwissenschaftliches Paradigma*. Berlin: Suhrkamp.
- Felstiner, William L. F. (1991) The Logic of Mediation, S. 251-269 in D. Black (Hrsg.), *Toward a General Theory of Social Control*. Orlando: Academic Press.
- Garcia, Angela (1991) Dispute resolution without disputing. How the interactional organization of mediation hearings minimizes argument. *American Sociological Review* 6: 818-835.
- Garcia, Angela (1996) Moral reasoning in interactional context. Strategic uses of care and justice arguments in mediation hearings. *Sociological Inquiry* 66 (2): 197-214.
- Garcia, Angela (1997) Interactional constraints on proposal generation in mediation hearings. A preliminary investigation. *Discourse and Society* 8 (2): 219-247.
- Garcia, Angela (2000) Negotiating negotiation. The collaborative production of resolution in small claims mediation hearings. *Discourse and Society* 11 (3): 315-343.
- Garcia, Angela (2010) The role of interactional competence in mediation. *Conflict Resolution Quarterly* 28 (2): 205-228.
- Gessner, Volkmar (1976) *Recht und Konflikt. Eine soziologische Untersuchung privatrechtlicher Konflikte in Mexiko*. Tübingen: Mohr.
- Goffman, Erving (1952) On cooling the mark out. Some aspects of adaption to failure. *Journal of Interpersonal Relations* 15: 451-463.
- Goffman, Erving (1966) *Behavior in Public Places. Notes on the Social Organization of Gatherings*. New York: The Free Press.
- Goffman, Erving (1989) *Interaction Ritual. Essays on Face-to-Face Behavior*. Chicago: Pantheon Books.
- Greatbatch, David & Dingwall, Robert (1997) Argumentative talk in divorce mediation sessions. *American Sociological Review* 1: 151-170.

- Gross, Neal, Ward, S. Mason & McEachern, Alexander W. (1966) *Explorations in Role Analysis. Studies of the School Superintendency Role*. New York: Wiley.
- Gulliver, Philip H. (1977) On Mediators, S. 15-52 in I. Hamnett (Hrsg.), *Social Anthropology and Law*. London, New York: Academic Press.
- Habermas, Jürgen (2009) *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*. Frankfurt am Main: Suhrkamp.
- Hahn, Alois (1991): Rede- und Schweigegebote. *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 43 (1): 86-105.
- Hallevy, Gabriel (2009) The defense attorney as mediator in plea bargains. *Pepperdine Dispute Resolution Law Journal* 9 (3): 495-525.
- Heck, Justus (2015) Mediationsforschung als Selbstbeschreibung. Ein soziologischer Kommentar. *Perspektive Mediation* 12 (1): S. 26-31.
- Heisterkamp, Brain L. (2006) Conversational displays of mediator neutrality in a court-based program. *Journal of Pragmatics* 38: 2051-2064.
- Heritage, John & Clayman, Steven (2010) *Talk in Action. Interactions, Identities, and Institutions*. Chichester, U.K., Malden, MA: Wiley-Blackwell.
- Horwitz, Allan V. (1990) *The Logic of Social Control*. New York, NY: Plenum Press.
- Jacobs, Scott (2002) Maintaining neutrality in dispute mediation. Managing disagreement while managing not to disagree. *Journal of Pragmatics* 34: 1403-1426.
- Jansen, Dorothea (1988) Ein entscheidungstheoretisches Modell zur Analyse von Vermittlungsverfahren und das Konzept der Konfliktnähe. *Zeitschrift für Soziologie* 17 (1): 3-18.
- Kepler, Angela (1994) *Tischgespräche. Über Formen kommunikativer Vergemeinschaftung am Beispiel der Konversation in Familien*. Frankfurt am Main: Suhrkamp.
- Kieserling, André (1995) Herstellung und Darstellung politischer Entscheidungen, S. 125-143 in O. Jarren, B. Knaup & H. Schatz (Hrsg.), *Rundfunk im politischen Kommunikationsprozeß. Jahrbuch 1995 der Arbeitskreise „Politik und Kommunikation“ der DVPW und der DGPK*. Münster: Lit-Verl.
- Kieserling, André (1999) *Kommunikation unter Anwesenden. Studien über Interaktionssysteme*. Frankfurt am Main: Suhrkamp.
- Kolb, Deborah M. (1983) *The Mediators*. Cambridge, Mass: MIT Press.
- Landsberger, Henry A. (1955) Interaction process analysis of professional behavior. A study of labor mediators in twelve labor-management disputes. *American Sociological Review* 20 (5): 566-575.
- Lindemann, Gesa (2010) Die Emergenzfunktion des Dritten – Ihre Bedeutung für die Analyse der Ordnung einer funktional differenzierten Gesellschaft/The emergence of order – The function of the third actor and its relevance for the analysis of functional differentiation. *Zeitschrift für Soziologie* 39 (6): 493-511.
- Lovell, Hugh G. (1952) The pressure lever in mediation. *Industrial and Labor Relations Review* 6 (1): 20-30.
- Luhmann, Niklas (1972) *Funktionen und Folgen formaler Organisation*. Berlin: Duncker & Humblot.
- Luhmann, Niklas (1999) *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie*. Frankfurt am Main: Suhrkamp.
- Luhmann, Niklas (2005) Einfache Sozialsysteme, S. 25-47 in ders. (Hrsg.), *Soziologische Aufklärung 2. Aufsätze zur Theorie der Gesellschaft*. Opladen: VS Verlag für Sozialwissenschaften.
- Luhmann, Niklas (2007) Die Knappheit der Zeit und die Vordringlichkeit des Befristeten, S. 143-164 in ders. (Hrsg.), *Politische Planung. Aufsätze zur Soziologie von Politik und Verwaltung*. Wiesbaden: VS Verlag für Sozialwissenschaft.

- Luhmann, Niklas (2008a) *Legitimation durch Verfahren*. Frankfurt am Main: Suhrkamp.
- Luhmann, Niklas (2008b) *Die Moral der Gesellschaft*. Frankfurt am Main: Suhrkamp.
- Luhmann, Niklas (2008c) *Soziale Systeme. Grundriß einer allgemeinen Theorie*. Frankfurt am Main: Suhrkamp. (translated as Luhmann, Niklas (1999): *Social Systems*. Stanford: Stanford Univ. Press.)
- Luhmann, Niklas (2010) *Politische Soziologie*. Berlin: Suhrkamp.
- Luhmann, Niklas (2012) *Macht im System*. Berlin: Suhrkamp.
- Luhmann, Niklas (2013) *Kontingenz und Recht. Rechtslehre im interdisziplinären Zusammenhang*. Berlin: Suhrkamp.
- Luhmann, Niklas & Schorr, Karl Eberhard (1999) *Reflexionsprobleme im Erziehungssystem*. Frankfurt am Main: Suhrkamp.
- Maiwald, Kai-Olaf (2003) Der Unsichtbare Mediator. Probleme der Ausweisung beruflicher Leistung in der Familienmediation, S. 195-226 in H. Mieg, M. Pfadenhauer & H. A. Mieg (Hrsg.), *Professionelle Leistung - professional performance. Positionen der Professionssoziologie*. Konstanz: UVK Verl.-Ges.
- Maiwald, Kai-Olaf (2004) *Professionalisierung im modernen Berufssystem. Das Beispiel der Familienmediation*. Wiesbaden: VS Verlag für Sozialwissenschaften.
- Messmer, Heinz (2003) *Der soziale Konflikt. Kommunikative Emergenz und systemische Reproduktion*. Stuttgart: Lucius & Lucius.
- Müller-Jentsch, Walther (2009) Gewerkschaften als intermediäre Organisationen, S. 51-86 in W. Müller-Jentsch (Hrsg.), *Arbeit und Bürgerstatus*. Wiesbaden: VS Verlag für Sozialwissenschaften.
- Neidhardt, Friedhelm (2013) Bedingungen und Formen „gütlichen Einvernehmens“. Zur Theorie haltbarer Kompromisse. *Berliner Journal für Soziologie* 23: 417-439.
- Nollmann, Gerd (1997) *Konflikte in Interaktion, Gruppe und Organisation. Zur Konfliktsoziologie der modernen Gesellschaft*. Opladen: Westdt. Verl.
- Nothdurft, Werner (1997) *Konfliktstoff. Gesprächsanalyse der Konfliktbearbeitung in Schlichtungsgesprächen*. Berlin u.a.: de Gruyter.
- Oevermann, Ulrich (2009) Theoretische Skizze einer revidierten Theorie professionalisierten Handelns, S. 70-182 in A. Combe & W. Helsper (Hrsg.), *Pädagogische Professionalität. Untersuchungen zum Typus pädagogischen Handelns*. Frankfurt am Main: Suhrkamp.
- Paris, Rainer (2005) *Normale Macht. Soziologische Essays*. Konstanz: UVK Verlagsgesellschaft.
- Pruitt, Dean G. & Johnson, Douglas F. (1970) Mediation as an aid to face saving in negotiation. *Journal of Personality and Social Psychology* 14 (3): 239-246.
- Rosellen, Richard (1980) Verfahren zwischen Gesprächstherapie und hard selling, S. 215-218 in E. Blankenburg, E. Klaus & Hubert Rottleuthner (Hrsg.), *Alternative Rechtsformen und Alternativen zum Recht*. Opladen: Westdeutscher Verlag.
- Schimank, Uwe (2008) Double Talk von Hochschulleitung, S. 154-172 in W. Jaeger (Hrsg.), *Universität und Lebenswelt. Festschrift für Heinz Abels*. Wiesbaden: VS Verlag für Sozialwissenschaften.
- Silbey, Susan S. & Merry, Sally E. (1986) Mediator settlement strategies. *Law and Policy* 8 (1): 7-32.
- Simmel, Georg (2006) *Soziologie. Untersuchungen über die Formen der Vergesellschaftung*. Frankfurt am Main: Suhrkamp.
- Schneider, Wolfgang Ludwig (2009) *Grundlagen der soziologischen Theorie. Band 3: Sinnverstehen und Intersubjektivität – Hermeneutik, funktionale Analyse, Konversationsanalyse und Systemtheorie*. Wiesbaden: VS Verlag für Sozialwissenschaften



- Stevens, Carl M. (1963) *Strategy and Collective Bargaining Negotiation*. New York u.a.: McGraw-Hill Book Company.
- Stok, Wilhelm (1930) Zur Soziologie der dreigliedrigen Gruppe. *Zeitschrift für die gesamte Staatswissenschaft* 88: 422-544.
- Vierkandt, Alfred (1923) *Gesellschaftslehre. Hauptprobleme der philosophischen Soziologie*. Stuttgart: Enke.
- Vuchinich, Samuel, Emery, Robert E. & Cassidy, Jude (1988) Family members as third parties in dyadic family conflict: Strategies, alliances, and outcomes. *Child Development* 59 (5): 1293-1302.



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