The Innocence of Words: A Taxonomy of Speech Acts used by Practitioners of Alternative Dispute Resolution as Described in Selected Alternative Dispute Resolution Literature.

by

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ABSTRACT

This work explores the description of language and communication in a selected ADR literature. It compiles a list of utterance types described by practitioners and theorists and analyzes them according to Austin and Searle's Speech Act Theory. The study seeks to answer the following questions using case study and content analysis: What speech acts, commonly used in Alternative Dispute Resolution (ADR), appear in the discussion of language in ADR literature? What are appropriate definitions of such speech acts? Which speech acts are specific to different models of dispute resolution?

A scheme is created that classifies the utterance types in a taxonomy. The speech acts created are expository, interrogative and creative. Expository speech acts provide the information needed to understand the context of discussions and the situation having led to it. Participants, to communicate or share information about the situation, use interrogative utterances. Creative utterances are used to create discussion and generate ideas.

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CHAPTER ONE - INTRODUCTION

"Ever since the Biblical myth of the Tower of Babel, analysts have identified language difference as a potent cause of division and conflict..." (Shell 2001, 2) but it can also be the means of resolving tension and creating peace. The original perfection of language and communication allowed men to aspire to reach the heavens. At Babel, God himself had to intervene, and confounding the language of men, created a world of misunderstanding and potential conflict[1]. Whether language is used to cause strife and divide men, or to create the conditions for harmony, it remains as important today as it was to the inhabitants of Babel. The need to study and analyze it, however, has increased significantly. The study of communication in conflict and dispute, for example, is more important than ever before because of our heightened awareness of the power of language[2]. An increasingly relevant part of that discussion is the form and function of language in conflict. Here of course, language is the words and symbols used in the process of communication. Language in conflict situations has the power to be explanatory and cohesive or divisive and threatening (Lakoff 2001). Yet it is increasingly perceived as a means of resolving conflict rather than as a cause of it. In the field of Alternative Dispute Resolution (ADR), language, whether destructive or constructive, is central to the processes of conflict management and resolution. Words are an increasingly

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[1] "In its original form, when it was given to men by God himself, language was an absolutely certain and transparent sign for things, because it resembled them. The names of things were lodged in the things they designated, just as strength is written in the body of the lion, regality in the eye of the eagle, just as the influence of the planets is marked upon the brows of men: by the form of similitude. This transparency was destroyed at Babel as a punishment for men. Languages became separated and incompatible with one another only in so far as they had previously lost this original resemblance to the things that had been the prime reason for the existence of language. All the languages known to us are now spoken only against the background of this lost similitude, and the space that it left vacant."
(Foucault 1966, 176)

[2] Language is a system of arbitrary symbols, signs and gestures ordered by rules for combining its components, such as words. It is generally shared by a specific group of people and is used for communication. Language itself does not express meaning or assure communication and understanding. Communication is the exchange of thoughts and messages, the effective sharing of information or ideas, and the creation of an interpersonal rapport. Communication can take place without language since it is an expression of meaning; expressions of meaning can be achieved through body language or other means. In order to *effectively* communicate, however, it is important that participants in communication share a

significant element in the analysis and resolution of conflicts. The roles and functions of language in ADR are the topic of this thesis.

The attributes and role of language used by ADR practitioners are important. How they are characterized is significant to the development of ADR as an academic and professional discipline. Allusion to the innocence of words, for example, can be considered a provocative inclusion in the title of a thesis on the use of language and communication in conflict. It implies that words are cunning and deceitful; that speakers use words deliberately. Foucault, Habermas, Wittgenstein and other philosophers have explored how words are used to build reality and create opportunities for change. They claim that possession of language is possession of the means through which people experience the world. Words construct the event. Words, their meaning, forms and the settings in which they can be used, are constituted by more than semantics and define and create a large part of reality (Lakoff 2001). Philosophers discuss speakers' potential to direct the course of events; that potential is often reached in the practice of ADR.

In ADR, theorists and practitioners continually debate the role that practitioners play through their use of words. They ask whether practitioners are neutral, objective facilitators of communication between conflicting parties or manipulative, subjective participants to the dispute. Are the words of ADR practitioners innocent facilitators of communication between parties, or do they have a real impact on how conflicts are managed and resolved? Either way, practitioners play an important part in the ADR process of resolving disputes and creating peace. While this study will not address the question of practitioners' role in conflict and dispute, it will explore their use of language and practices in communication. The research explores speech acts and discursive practices used by ADR practitioners as reported in selected ADR literature. The present discussion considers a selection of ADR literature and assesses the common communicative processes that are identified therein in an attempt to contribute to a general theory of language and communication in ADR.

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framework for the interpretation of the expressions or language they use. This shared framework creates a context in which the listener can understand the meaning intended by the speaker.

Objective and Goals

The objective of the study is to compile an initial taxonomy of the most common discursive practices[3] of alternative dispute resolution practitioners as they are reported in a selected ADR literature. The study will enumerate and describe the speech acts and discursive practices used by ADR practitioners.

The goal of studying speech acts and discursive practices within ADR literature and placing them in a broader context (of Speech Act Theory and intentionality) is to place them in a taxonomy that will provide some understanding of how practitioners use language in ADR. Such a critical reflection on current practice might help practitioners interact more effectively with parties to a dispute.

The study proposes to answer the following questions:

- What speech acts, commonly used in ADR, appear in the discussion of language in ADR literature?
- What are appropriate definitions of such speech acts?
- Which speech acts are specific to different models of dispute resolution?[4]

The study will also provide a critique of the existing approaches to language in ADR and highlight the areas of ADR that need to be further developed to achieve a better understanding of how ADR practitioners use language as a communicative tool.

Scope

This exploratory study's scope is limited to ADR literature that makes direct reference to language as a communicative tool. The study will not include transcripts from mediation or other ADR processes and will not exhaust all the literature available in the field of ADR. Only speech acts and language described by ADR practitioners and authors in ADR literature will be explored. There will be no analysis or compilation of the speech acts, communication or language used by disputants or by legal practitioners.

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[3] Common practices are selected according to the frequency or emphasis with which they appear in the literature.

[4] The use of language made in the different models of ADR may suggest a lot about the model itself. In many cases, models develop a rationale for the use of specific discursive practices and speech acts. As such, use of language across models of ADR will not be further discussed in this thesis.

The study will not address the issues of language that arise around, or are created by, culture, intercultural conflicts, or parties who are non-native speakers. Languages' function as a provider of substance and content will not be reviewed. The scope of the study is limited to the use of language and communication by practitioners of ADR as part of the resolution process.

The "ability to generate and understand utterances in ordered speech act sequences such as arguments, discussions, exhortations and consultations which constitute conversations" (Vanderveken 1994, 4) is essential to the practice of ADR. It is beyond the scope of this project, however, to explore practitioners' ability to effectively use language to communicate and so I will discuss only the self-identified speech acts and communicative tools that practitioners make use of in their work. I will not be studying the conditions necessary for the "successful performance of entire conversations" (Vanderveken 1994, 5) as they occur in ADR processes, or the ability of practitioners to effectively communicate. This study examines speech acts in isolation within the ADR setting; I will not explore the larger conversational structures.

General Research Approach

This qualitative collective case study presents an initial taxonomy of the language of ADR practitioners as it is described in ADR texts. The works that appear in the bibliography were chosen through a purposeful sampling. The sampling was designed to identify the major uses and functions of language that emerge. The texts sampled highlight the elements of language and communication in conflict and ADR. The use of ADR works as a case study called for both a within-case analysis and a cross-case analysis[5] of the literature discussing elements of language and communication. The data collected will be presented in a taxonomy of acts used by ADR practitioners.

[5] "When multiple cases are chosen, a typical format is to first provide a detailed description of each case and themes within the case, called a **within-case analysis**, followed by a thematic analysis across cases, called a **cross-case analysis**, as well as assertions or an interpretation of the meaning of the case. In the final interpretive phase, the researcher reports, as Lincoln and Guba (1985) mention, the "lessons learned" from the case." (Creswell 1998, 63)

Data on the communicative tools of ADR practitioners was gathered from selected books, journal articles, magazine and newspaper articles, field notes, and participant observation. The cases included were ones that presented content relevant to the discussion of language and communication in ADR. The data was verified by reference to multiple data sources and by checking the final account with select informants.

Austin (1962) and Searle's (1965) Speech Act Theory is used as a framework for analyzing language and communication in ADR. Its main premise is that communication is a form of action effected through language. Practitioners ***do*** something through language. Practitioners intend to do something through language. In applying Speech Act Theory to ADR, I assume that practitioners act by using a variety of communicative tools. These tools constitute different types of utterances such as framing, reframing, paraphrasing, questioning, listing. Each type of communication will be classified according to the speaker's intent according to speech act type in a comprehensive taxonomy.

A descriptive methodology (content analysis) has been chosen because of the flexibility it provides in exploring the available literature, defining categories and identifying gaps therein. The interdisciplinary nature of the research question also requires the versatility that content analysis provides.

Issues, preparation and thoughts related to interdisciplinarity

There are several important issues in the development of this interdisciplinary topic. The use of literature from different disciplines is a challenge. A related difficulty is the application of the specifics of Speech Act Theory to the broad and often vague context of ADR. Another difficulty is the inconsistency in meaning and definition of speech acts in ADR literature.

A number of different literatures are pertinent to this study and there is disagreement between them. The focus on discursive practices, communicative tools and speech acts calls for methods and theories most commonly found in linguistics: discourse analysis, content analysis, Speech Act Theory and communicative action theory. This

privileges a linguistic perspective that may be marginal to the study of discursive practices in ADR. The issue is highlighted by the limited relevant discourse on communications in ADR. A solution is to work from a selected literature, much in the spirit of an ethnography of communication in ADR, to adapt the analysis of linguistic elements, speech acts and discursive practices to the broader context of Alternative Dispute Resolution.

Speech acts and discursive practices are used differently in ADR and in linguistics. Each uses different criteria for the selection and classification of speech acts. Linguistics creates specific and detailed definitions of speech acts and classificatory groups. Such a precise framework is difficult to apply to ADR, whose definitions vary among works. Speech Act Theory must be adapted for specific application to ADR. The shared area between ADR and linguistics is hard to identify and will be better explored in order to make this study an applicable and useful piece of work.

Content analysis is generally difficult in ADR because of the presupposition of uniformity within the field of ADR. Such an assumption is misleading given the interdisciplinary nature of ADR and its related literature. Study of ADR discourse depends heavily on the availability of documents. Furthermore, once data from documents is collected, it can be difficult to determine its validity and relevance because of variations in definitions between texts. This creates problems in constructing a relevant and accurate taxonomy because it limits the possibility of establishing descriptive classes that both correspond to reality and are inclusive of different perspectives.

Potential problems

There are several limitations to this study. One challenge is the selection of an appropriate and adequate literature to achieve the research objectives. Another problem is the difficulty of selecting literature representative of communication in ADR. Moreover, as is common in the construction of taxonomies, defining the criteria of classification for the speech acts and discursive practices will be difficult.

Results

The results will be presented in an initial taxonomy describing the speech acts used by practitioners of ADR in various ADR processes. It is important, however, to emphasize the exploratory nature of the study and discuss the gaps in ADR literature and the limitations of Speech Act Theory in creating such a taxonomy.

Another important part of the results is the discussion of possibilities for future research in communication in ADR. This definition of speech acts and discussion of communication in ADR is a springboard for future study of ADR practitioners' use of language and communicative skills in managing and resolving disputes.

Definitions and common understandings

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean - neither more nor less."
> "The question is," said Alice, "whether you can make words mean so many different things."
> "The question is," said Humpty Dumpty, which is to be master - that's all" (Lakoff 2001, 227).

There are very few agreed upon definitions in ADR. Many practitioners and authors use words in ADR without any reference to conventional meaning or understanding of variations among practitioners and theorists. This creates obstacles to meaningful discussion in ADR. Therefore, for the purposes of this work it is essential to define some of the terms that will be used throughout. The designations presented here are not definitive and should be interpreted in the most general and inclusive sense possible.

The definitions that I chose to use in this work were selected because they best illustrate some of the themes and sub-texts being discussed; many others could have been presented but were victims of redundancy and space. This is the case throughout this work where definitions are presented; in such a short study, it is impossible to do justice to the vast literature available and choices had to be made.

Alternative Dispute Resolution

Conflict analysis and dispute resolution are generally associated because they constitute two different parts of a process whose goal is the resolution of conflict. Conflict analysis is defined by Winslade and Monk (2000, 132) as

> ...the synthesis and interpretation of data collected by the mediator from interviews, direct observation, or an examination of secondary sources. The mediator's central task during this stage is to integrate and understand the elements of the dispute: people, dynamics, issues and interests.

Dispute resolution

> ...refers to a series of reciprocal and complementary actions on the part of conflict actors. It is thus both interactional and joint action. Initiation of the resolution is an instance of social collaboration. Conflict can be resolved only when and as the contending parties manage their communication in such a way as to generate substantial areas of agreement and joint action. (Himes 1980, 289).

Alternative Dispute Resolution refers specifically to non-curial processes of conflict and dispute resolution. The 'alternative' does not refer to the disputes but to the methods used to resolve them. Goss defines ADR as follows:

> Alternative Dispute Resolution, or ADR, as it is more commonly known, refers to the wide variety of methods by which conflicts and disputes are resolved other than through litigation. There is nothing particularly new or innovative about the alternate processes, however, interest in and creative applications of the alternatives has exploded in the last quarter of a century (Goss 1995, 2).

Generally, the alternative approaches to curial methods of resolution include dispute prevention, informal problem-solving discussions, negotiation, confidential listening, mediation, consensus building, neutral expert fact finding, ombudsman, advisory opinions, mini trial, early neutral evaluation, pretrial conference, summary jury trial, mediated arbitration, administrative decision-making, arbitration, private judging, referee, litigation management, litigation, advocacy and others. Apology and Restorative

Justice can also be included in ADR but will not be part of this discussion of ADR processes[6]. The most often cited processes are:

- Negotiation "...is a bargaining relationship between parties who have a perceived or actual conflict of interest. The participants voluntarily join in a temporary relationship designed to educate each other about their needs and interests, to exchange specific resources, or to resolve less tangible issues such as the form their relationship will take in the future or the procedure through which problems are to be solved." (Moore 1996, 217)
- Mediation "...is an extension or elaboration of the negotiation process that involves the intervention of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of the issues in dispute." (Moore 1996, 217)

  It is a "process of dispute resolution focused on effective communication and negotiation skills. The mediator acts as a facilitator assisting the parties in communicating and negotiating more effectively, thereby enhancing their ability to reach a settlement" (Goss 1995, 5).
- Arbitration "...is a generic term for a voluntary process in which people in conflict request the assistance of an impartial and neutral third party to make a decision for them regarding contested issues. The outcome of the decision may be either advisory or binding." (Moore 1996, 218)

The processes used by practitioners of ADR will vary according to the strategies adopted. Strategies include: bargaining, competition, collaboration, and cooperation, each of which employs different tactics. Communicative tools and speech acts are tactics and tools that practitioners employ in their quest for the resolution of conflict. It is important to note that many different philosophies and approaches are used by practitioners of ADR and that while each one has an effect on how communication is used, this thesis addresses communication in alternative dispute resolution in terms that allow its conclusions to be applied generally.

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[6] Apology and Restorative Justice are excluded from this work because they do not appear in the general literature of ADR. A secondary literature review would have been necessary to adequately research the language and communication of apology and restorative justice; such a project is beyond the scope of this research.

There is more to the use of the word 'alternative', however, than a statement of choices other than litigation or court-based methods of resolution. 'Alternative' often implies marginalization or a departure from standard and tradition. Having no established norms or standards, ADR is often considered outside the accepted and expected means of resolving disputes. Alternative dispute resolution can also be perceived, and may be critiqued, as second-class justice. It does not have a traditional structure and does not fit with convention. 'Alternative' suggests that there is no established, accepted and uniform method within the field. While many of the assumptions associated with the term 'alternative' are unfair, the field is relatively young [(Goss 1995), (Sandole 1987)] and does not share the professionalization, legislation, recognition, and legitimacy of traditional means of dispute resolution. While adjudication and ADR each have specific discourse types and recurring patterns of linguistic practices[7] ADR does not yet operate from recognized language and communication frameworks, rules, order and processes.

Resolution itself must also be qualified. Laue describes resolution as the ultimate goal for conflict. He notes, however,

> ...that conflict is never solved; we talk of conflict resolution, not conflict solution. Individual conflict incidents or episodes may be solved – they may move on to a termination which may or may not represent the interests of all the parties involved" (Laue 1987, 26).

The idea that there is more to resolution than the suspension or end of active conflict is reflected in the different styles of alternative dispute resolution processes, especially transformative. Each style defines success differently and works towards similar goals but with slightly different objectives. The goal of ADR is to achieve a situation acceptable to all parties involved in the process. The objective of each style varies from the transformation of disputants in transformative mediation to integrating their interests in interest-based negotiation[8].

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[7] "...[P]atterns of linguistic form, meaning and structure used by speakers in social activities, such as the types of social, professional activity as [...] keeping order and resolving disputes" (Maley 1995, 96).

The definitions presented above will be used in the following work; they have been chosen because they are representative of the definition of ADR in the selected literature. Many different definitions could have been used in this work, each of which would have presented differences and nuances. It is in part from that variation that the importance of studying language and communication in ADR arises.

Dispute Resolution Styles

Alternative dispute resolution practices are voluntary, non-binding participatory processes in which third-parties act to contribute to resolution by helping with process, communication or content. Depending on the style of the practitioner, the third-party can be neutral or partial, and the process distributive, integrative, evaluative, facilitative, or transformative. The goal of all dispute resolution processes is the substantial convergence of the goals of disputants. The means through which goals can be made to converge (Darling 1998, 21) vary according to resolution style:

- The objective of distributive dispute resolution is to allocate desired resources equally between the parties of a dispute. Third party practitioners make judgments and decisions about the outcome of the resolution process.
- Integrative dispute resolution is informed by the definition of participant interests, needs, desires, concerns, fears and hopes. Its objective is to create solutions that accommodate rather than compromise participants' desired outcomes. Practitioners help disputants to identify interests, needs, desires, concerns, fears and hopes and encourage discussion about outcomes likely to meet parties' interests.
- Facilitative dispute resolution aims to structure a process that allows parties to reach a mutually agreeable solution. The practitioner is a neutral, process-oriented, impartial participant.
- Evaluative dispute resolution is modeled on court-based resolution. Practitioners are likely to make recommendations to disputants. They are more concerned with an

[8] A goal is the general purpose to which effort is directed. An objective is an observable, material phenomenon that is worked toward or striven for.

abstract justice, however, than with serving the needs and expectations of parties. The practitioner provides evaluative information and suggests possible outcomes or solutions. The evaluative process is a hybrid of mediation and arbitration.

- Transformative dispute resolution aims to achieve the empowerment and recognition of parties. Its goal is to provide opportunities for the disputants or the dispute to be transformed through the process. Resolution is a secondary goal. The practitioner is more concerned with the process than with outcome and is an integral part of the transformation that occurs. The practitioner is not neutral or impartial but is very much engaged in the process.

Carrie Menkel-Meadow (1995) in her work on ADR, specifically mediation, describes styles of resolution that include facilitative, evaluative and transformative, and adds to these bureaucratic, open/closed, activist, community and pragmatic resolution. In describing different ways that practitioners can perform resolution, she highlights the need to develop a more focused analysis of how tactics and tools are adapted to context, situation and goals. She describes how practitioners develop techniques that agree with their philosophies of resolution and apply them to specific conflict situations.

ADR Practitioners

Practitioners of dispute resolution, often referred to as the third party in a dispute, are members of the legal profession, mediators, negotiators, arbitrators, referees, therapists, social workers, other professionals and non-professionals practicing in the field of alternative dispute resolution. James Laue explains that:

> *Third party* is a term of social science analysis, not mathematical literalism. It does not mean literally the third party in a situation in which there are two other parties. First and second parties have a direct interest or direct stake in the conflict and its outcomes. The third party is one with less directly at stake. The third party certainly has something at stake (reputation or professionalism, for example) but will not be affected by the allocation of resources, the exercise of power, the determination of new rules or the other types of outcomes which may take place as conflict is processed. The third party stands on a different base (Laue 1987, 24).

The strategy, style and approach of ADR used by each practitioner differ. Generally, however, ADR practitioners attempt to make communication in conflict effective through

their speech acts and discursive practices. Burton says, "the process of resolution of conflict is essentially the process of testing whether information is received as was transmitted, and whether what was transmitted was sent deliberately and contained accurate information" (Burton 1969, 48).

ADR practitioners, through different means, test communication. They use language and communication as a means of acting on the conflict and its disputants. What we want to know about language in ADR is how practitioners involved in disputes can use language and describe events in ways that allow conflict and disputes to be resolved (Lakoff 2001). Practitioners attempt to control communication to ensure that language remains a benevolent and constructive force in the resolution process.

Disputants

The disputants are every person that engages in the management and resolution of conflict and disputes through alternative means. They are voluntary participants in the process and call upon the services of ADR practitioners.

Context

Context can be defined as, among other things, "where, by whom, in what tone words are uttered" (Lakoff 2001, 39). In alternative dispute resolution, the general context is situations in which conflict and disputes occur. ADR can occur at a number of different locales but is generally organized in a place that is neutral and comfortable for all disputants. ADR defines specific roles for disputants and third party practitioners. The participants in ADR are generally willing to involve themselves in the management and resolution of disputes and conflicts. Tone depends on the dispute resolution strategy used by practitioners.

ADR is a form of social activity that has a specific rhetoric. The language of ADR practitioners gains specific force through the context in which they practice. Bourdieu has worked on the legitimate use of language in specific social situations. His discussion of language in an institutional context can be applied to ADR:

> There is a rhetoric which characterizes all discourses of institution, that is to say, the official speech of the authorized spokesperson expressing himself in a solemn situation, with an authority whose limits are identical to the extent

> of delegation by the institution. The stylistic features which characterize the language and priests, teachers and, more generally, all institutions, like routinization, stereotyping and neutralization, all stem from the position occupied in a competitive field by these persons entrusted with delegated authority.
> It is not enough to say, as people sometimes do, in order to avoid the difficulties inherent in a purely internalist approach to language, that the use made of language in a determinate situation by a determinate speaker, with his style, rhetoric and socially marked identity, provides words with 'connotations' that are tied to a particular context, introducing into discourse that surplus of meaning which gives it 'illocutionary force'. In fact, the use of language, the manner as much as the substance of the discourse, depends on the social position of the speaker, which governs the access he can have to the language of the institution, that is, to the official, orthodox and legitimate speech (Bourdieu 1994, 109).

The context of ADR makes up a social ritual in which speech takes on specific force and the acceptance of it by participants is implicit. The social mechanisms that constitute the context of ADR produce complicity between participants and, as Bourdieu notes, they construct the authority and legitimacy of practitioners' language.

In discussing language and context, a key consideration is how the meaning of words is affected by the context in which they are uttered. "If we attempt to define a word (or any other meaningful unit of human communication) it must be in terms of the constraints those situations exercise on it in which its use has an interpretation" (Evans 1981, 189). Evans uses the example of the word 'car', which can be defined in terms of its possible uses: to call attention to an object, to serve as a warning of danger, or as a description. Context provides a frame for the interpretation of words and utterances.

Conflict and Dispute

The everyday use of the word 'conflict' denotes "overt, coercive interactions in which two, or more, contending parties seek to impose their will on one another" (Bercovitch 1984, 64). It implies violence and hostility. The range of conflict phenomena, however, from disagreement, to dispute, is much wider than is generally understood: "The conventional usage of the term is inconsistent with the full range of the phenomenon" (Bercovitch 1984, 63). In ADR, conflict is understood as a social activity in which several parties with seemingly incompatible standpoints confront each other.

Specific definitions of conflict and dispute will be given here and are important to bear in mind throughout this study. It is interesting to note, as Bercovitch remarks, "that etymologically the word conflict is derived from the word *confligere* where it means to strike together" (Bercovitch 1984, 14). ADR reflects that sentiment in its belief that all parties working on conflict together can manage and resolve it.

While there is a negative connotation to conflict, the prevailing attitude in ADR is that conflict and dispute are a part of life that is not to be avoided or dismissed as destructive. "Conflict can lead to growth and be productive for all parties." (Moore 1996, 57), it can have a revitalizing effect (Bercovitch 1984). Bush and Folger (1994) describe the transformative potential of conflict and the benefits of engaging it. Conflict is generally perceived as a destructive occurrence, but it is portrayed in ADR as a positive force that holds the potential for change and the opportunity to recreate realities.

Conflict generally refers to disharmony between incompatible or antithetical persons, ideas, or interests, whereas a dispute is an argument against something maintained, upheld or claimed by another; "Conflict and disputes exist when people are engaged in competition to meet goals that are perceived to be or actually are, incompatible" (Moore 1996, 417). Dispute is conflict particularized over an issue (Darling 1998, 21). The words 'conflict' and 'dispute' will be used interchangeably throughout this work.

Before continuing in the discussion of language and communication in ADR, it is important to highlight the difficulty of synthesizing any aspect of such a complex and broad field. The selected literature presents some similarities, such as a tendency to associate all ADR processes with mediation; it does not allow a comprehensive view of ADR to be built. The inconsistencies and complexities that characterize the literature may come across in this text as a lack of cohesion. The views and observations presented in this work are not exhaustive or representative of all the ADR literature available, or even of the selected literature.

This study presents a discussion of speech act use by practitioners in ADR and compiles the results of that discussion in a taxonomy. The next Chapter will address the fundamental elements of Speech Act Theory and explore their application to ADR. An overview of discussions of language use in ADR (to be conducted in chapter three) will

lead to the proposal (in chapter four) of a classification of speech acts used by practitioners of ADR. Speech Act Theory is not being proposed as the only way to conceptualize the use of language in ADR (attention will be paid to its limitations throughout) but it will be suggested that Speech Act Theory can helpfully suggest some of the limits of ADR in the sense of clarifying crucial assumptions of ADR that become apparent when its language is studied carefully. The fifth and concluding chapter will discuss the use of speech acts by ADR practitioners in a broader context, will review the major elements of importance to language and communication in ADR, and propose questions and topics for future research.

CHAPTER TWO – SPEECH ACT THEORY AND ALTERNATIVE DISPUTE RESOLUTION

> "At the heart of both conflict and resolution is communication." (Mayer 2000, 119)

Effective communication is described as essential to the resolution of conflict (Burton 1969, 49; Moore 1996, 209) and it is understood to be an inherent part of Alternative Dispute Resolution (ADR) (Phillips 1997, 23). Practitioners of ADR use communication as a tool to understand, analyze and resolve conflicts and disputes. Communication is so important to conflicts and their resolution that as theories of ADR have developed, it has been a pivotal element in all of them. The Communication Theory of Conflict (Moore, 1996), for example, is based on the premise that conflict is the result of poor communication in quantity, quality, or form. The theory postulates that if the right quantity of communication is attained, if the quality of the information exchanged is improved, and if this information is put into a mutually acceptable form, the cause of the dispute will be addressed and the participants will move toward resolution (Moore 1996, 62).

While the importance of communication in conflict is widely admitted, there is not as much discussion of communication tactics and skills in the ADR literature as one might imagine. Some years ago, Johnson pointed to the lack of a general and sound conceptualization of language use in ADR as a fundamental problem standing in the way of progress in the field:

> Because of the lack of conceptualization of communication, much of the research on communication in conflict situations takes on the character of a blind man stumbling in the dark searching for something to give him a frame of reference concerning the ground he is trying to explore (Johnson 1974, 65).

He even considered that "the operational definition of communication used in the conflict studies manifest[ed] wide differences, with some researchers operationally defining communication as the passing of notes, others as the use of a telephone linkage, and

others as face-to-face discussion" (*idem*). The situation has improved a great deal since Johnson made these comments.

Why study communication in ADR

It is important to study the forms and functions of language in ADR because, as Tidwell says:

> Language and communication are equally important in conflict and its resolution. In either case, they serve a central role of coordinating action, of serving as a conduit through which individuals are linked to ideas, and as a method for wielding power. In cases of conflict there can be little doubt that people fight over words... It is true that communication plays a central role in conflict and its resolution, and it is also true that texts on conflict resolution are generally correct to emphasize the positive value of good communications. Furthermore, it is worth acknowledging the much larger role communication plays. Analysts of conflict and practitioners of conflict resolution must be equally aware of how communication and language influence the process of conflict and its resolution (Tidwell 1998, 105).

Reasons for exploring language and communication in ADR are clearly spelled out in much of the literature as practitioners and theorists describe the current situation of ADR theory and its uses of language. Like Tidwell, Burton presents the idea that communication is central to conflict and its resolution (Burton 1969, 49). He, however, analyzes the degree of effectiveness of communication, its role in conflict and its potential for resolution. Burton notes that communicative systems allow for antipathetic responses: "communication is a tool of conflict as much as it is a tool of peaceful relationships... Whether communication makes for harmonious or for conflicting relationships depends upon its content and perception of its content" (*ibid*, p. 69). He does not identify any of the specific means and tools that practitioners use to effectively communicate. Fisher and Ury define processes and goals for dispute resolution and describe some communicative practices used to achieve them (Fisher and Ury 1981). They evidently understand the importance of effective communication but do not explore it in any depth. In their treatise on transformative mediation, Bush and Folger (1994, 266-268) discuss a number of different communicative tools used in the practice, but the concepts and definitions used are specific to their approach and do not apply to ADR as a whole. Candlin (1994, 79-91) conducts an in-depth discussion of framing as a

communicative tool in mediation, offering interesting insight into how one broadly characterized type of speech act is used in ADR, but does not discuss how Speech Act Theory (or any other theory of language) might be applicable to the analysis of communication more generally in ADR, nor do other studies of framing (Drake 1996; Hale 1998; Maley 1995; Moore 1996; Mayer 2000). Some studies explore framing as an essential communicative tool used by practitioners of ADR but do not offer a comprehensive understanding of the language and communication of ADR practitioners.

Most of the literature alludes to various communicative practices in ADR, such as framing, questioning, active listening, restatement, paraphrasing, summarizing, generalizing, fractioning and reframing, but never with reference to a comprehensive scheme of language use in ADR. Sloan describes the discursive practices essential to his particular style of dispute resolution (Sloan 1998, 90), but like others offers no comprehensive theory of how language and communication affect the analysis, management and resolution of conflict and dispute as a whole. The present suggests that Speech Act Theory can help us to explore language and communication in ADR. The most recent attempts at a comprehensive theory of language and communication in ADR are those of Moore (1996) and Mayer (2000). Like Sloan, however, they limit their discussion to the perspectives within which they practice: Moore practices a form of interest-based dispute resolution and Mayer a variation on narrative dispute resolution. The present discussion considers different styles of ADR and assesses the common communicative processes that are identified in a selection of ADR literature in an attempt to contribute to a general theory of language and communication in ADR.

This chapter will present the fundamental elements of Speech Act Theory and explore their application to ADR. An overview of discussions of language use in ADR (to be conducted in chapter three) will lead to the proposal (in chapter four) of a classification of speech acts used by practitioners of ADR. Speech Act Theory is not being proposed as the only way to conceptualize the use of language in ADR (attention will be paid to its limitations throughout) but it will be suggested that Speech Act Theory can helpfully suggest some of the limits of ADR in the sense of clarifying crucial assumptions of ADR that become apparent when the language of ADR is studied carefully.

In order to understand the concepts essential to Speech Act Theory, a distinction first needs to be made between language and communication. A language is a system of arbitrary symbols, signs and gestures ordered by rules for combining its components, such as words. It is generally shared by a specific group of people and is used for communication. Language itself does not express meaning or assure communication and understanding. Communication is the shared making of meaning, the exchange of thoughts and messages, the effective sharing of information or ideas, and the creation of an interpersonal rapport. Communication can take place without language since it is an expression of meaning; expressions of meaning can be achieved through body language or other means. For *effective* communication, however, it is important that participants in communication share a framework for the interpretation of language or other expressions. In ideal exchanges, this shared framework of interpretive assumptions creates a context in which a listener can understand meanings intended by a speaker.

Speech Act Theory: Overview

Speech Act Theory bridges the gap between language and communication in its explanation of, as Austin's book title puts it, "how to do things with words" (Flowerdew 1990, 80). It introduces the idea that "the function of human speech is not merely to represent a world, truly or falsely, but equally to serve as a medium of action to bring a world into being by the talking of it" (Cooren 1997, 223). It begins with the assumption that communication does not occur through the simple utterance of sentences or other expressions, but takes place through the performance of acts such as making statements, asking questions, giving orders, describing, explaining, apologizing and thanking. It explores how language is used to communicate and it classifies instances of communication according to the actions that they perform. These acts can be distinguished from simple sentences or expressions by the pragmatic force that they carry. Utterances acquire pragmatic force when a hearer construes the speaker's intent. The analytic perspective developed and the classificatory scheme put forth in Speech Act Theory (Austin 1962; Searle 1965) will briefly be described in the following section. The fundamental premises will be presented and a brief explanation of speech act types will be given.

A basic premise of Speech Act Theory is that language forms propositions. These propositions, however, do not have any communicative force (they do not express anything or convey any significant meaning) until a speaker gives them force. Apart from anything a speaker *does* through speech (e.g. asks a question or gives an order), what is performed is a locutionary act. A locutionary act is the act *of* saying something and not the performance of an act *in* saying something. What a group of words (proposition or utterance) expresses or means as a speech act (as a move in communication) is its illocutionary force. The illocutionary act is the performance of an act *in* saying something. Austin's (1962) purpose with Speech Act Theory is to classify utterances according to their illocutionary force. Wunderlich describes the illocutionary force of utterances in the following terms:

> The illocutionary force of a Speech Act should be characterized both (a) in terms of (pragmatically) presupposed mental states of the participants, and (b) in terms of the state of interactions brought about by performing a speech act. This follows from the assumption that:
> a) in performing a speech act, every speaker has something in mind, consequently, the hearer is entitled to infer that the speaker has a certain belief or expectation;
> b) each speech act brings about a certain effect in that it changes the obtaining state of interaction; consequently speaker and hearer are entitled to assume a certain new sate of obligations and commitments, of information and of mutual social relationship (Wunderlich 1980, 292).

It is important to note that speech acts can be classified according to any number of criteria and that the difficulty of creating a comprehensive classificatory scheme is significant. As a result, any attempt to create a universal classificatory scheme for speech acts has failed (Wunderlich 1980; Flowerdew 1990; Vanderveken 1994; Taylor 1987). Nevertheless, in attempting to create a classification of speech acts, or the framework for such a classification, one must recognize the demands of specificity. Specificity is the requirement that the kinds of speech acts recognized be concerned particularly with the subject under study. The problem of specific application to a field versus universality is one of the weaknesses of Speech Act Theory that will be explored in a later section. Speech Act Theory nonetheless remains important because it insists that we understand speech as action, and because it takes account of the intent of the speaker. It is a common sense view of ADR practitioners that some uses of language are more likely to occur at

certain points in mediation than at others, that some uses of language are more effective than others. Speech Act Theory can help us to understand why this is so.

Perlocution is the final type of speech act Austin identifies. Through perlocutionary acts, a speaker produces an effect on a hearer. The perlocutionary act is the effect of the action being carried out by the speech act; as Habermas puts it, perlocution attempts "to bring about something *through* acting in saying something" (Habermas 1983, 286). Conversely, the locution and illocution in a speech act are, respectively, "to *say* something, and to act *in* saying something" (*idem*). It can be challenging to relate perlocution to illocution, since the speaker may have a clearly defined intent while the hearer's interpretation can be influenced by several factors. It is generally more difficult to determine an effect produced by a speech act than it is to identify the force of that speech act according to the intention of the speaker.

The concept of the perlocutionary act, the idea that effects are constructed by the performance of acts by a speaker, is how Speech Act Theory addresses the notion that language constructs reality. Winslade (2000, 39), for example, describes narrative in ADR as a process of constructing stories that lead to further conflict, resolution or transformation.[9] The perlocutionary act can also be related to Wittgenstein's notion that words construct the event, or to the Sapir-Whorf hypothesis that claims language constructs reality. As Edward Sapir put it, in a classic statement:

> Human beings do not live in the objective world alone, nor alone in a world of social activity as ordinarily understood, but are very much at the mercy of the particular language which has become the medium of expression of their society. It is quite an illusion to imagine that one adjusts to reality essentially without the use of language and that language is merely an incidental means of solving specific problems of communication or reflection. The fact of the matter is that the "real world" is to a large extent unconsciously built up on the language habits of the group.... We see and hear and otherwise experience very largely as we do because the language habits of our community predispose certain choices of interpretation (Sapir 1939, in Whorf 1956, 134).

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[9] Bush and Folger define transformative mediation as follows: "Riding the twin steeds of *empowerment* and *recognition*... mediation has the potential to do far more than create agreements and improve relationships. It has the potential to transform people's lives, to give them both an increased sense of their own personal efficacy (empowerment) and a greater openness to and acceptance of the person seated on the other side of the table (recognition). Even if no agreement is reached, even if no conciliation results, mediation should still be regarded as a success if it brings about empowerment and recognition." (Bush 1994, 63)

In ADR, transformative mediation has laid the most emphasis on the reality-generating potential of language used in mediation, but all styles of mediation use language to construct reality for the participants in them, and Speech Act Theory can offer important perspectives on this process.

Austin (1962) describes two general categories of illocutionary acts, performative and constative. Performatives can be further sub-classified according to their illocutionary force, into verdictive, exercitive, commissive, behabitive and expositive. Performatives are utterances whose illocutionary force is that of the performance of an action, rather than just an expression. They do not describe or report anything, but are prepared for and enabled by the circumstances in which they are uttered and the actions that accompany them. Performatives are utterances that involve doing: examples are the expression of wedding vows, the naming of a boat, the swearing in of a civil officer. Much discussion of Speech Act Theory has focused on performatives, acts in which the perlocutionary effects are clear. A constative, on the other hand, is a statement that simply expresses a fact and its perlocutionary force is much less clear. A single utterance can be analyzed as both constative and performative, but in many cases these two acts are not easily distinguished from each other.

Sub-categories of performatives have been proposed in Austin's work as follows. The verdictive is an exercise of judgement; it announces a verdict or gives a finding. An exercitive is an exercise of power or influence. An assumption of obligation or a declaration of intention is a commissive, which generally commits the speaker to doing something. Behavitives adopt an attitude and involve a performative utterance connected with reactions to behaviour designed to exhibit attitudes or feelings. Expositives are performatives that clarify reasons, arguments and communications; they are fit into conversations and dialogue by means of a clearly performative verb. Expositives are often used in ADR because of the communicative function this kind of speech act allows practitioners to perform.

The most important development of Speech Act Theory since Austin (1961, 1962) has been made by Searle (1965), who in his development of further criteria for the classification of speech acts recognizes representatives, directives, commissives,

expressives and declarations. His criteria do not, however, provide a means to handle utterances such as warnings, advice, proposals, offers, or addresses (Wunderlich 1980, 297). Regardless of the criteria used to create models, groups for classification or classificatory schemes for language and speech acts, communication is the instrument of interaction (Motsch 1980, 156). Speech acts are meaningful only within the conventions that signal the intentions of that interaction (Taylor 1987, 62). Situation and context, in particular the stages of the ADR process, are therefore important factors in the creation of any classificatory scheme or taxonomy of speech acts in ADR. Furthermore, speech act categories influenced by circumstances and the specific definitions that have been proposed by Speech Act Theory (as introduced here) can be modified or disregarded in favor of different ones, ones more suitable to the field, should the need arise. What will be most important in this discussion are the basic principles of Speech Act Theory: the specific taxonomy of speech acts proposed will be more tentative, a suggestion of how to talk about the language used and the communication achieved in ADR.

Speech Act Theory and Alternative Dispute Resolution: Creating a Taxonomy of Speech Acts

The discussion of language and communication in ADR literature tends to be either very specific or extraordinarily vague. Different styles of ADR, from the therapeutic to the bargaining, have developed various communicative styles and specify the verbal tools that are to be used by their practitioners. Transformative mediation, for example, emphasizes strategies that can be used during the resolution process to shape arguments, frame proposals and influence outcomes. Its communicative tools include reframing issues, reformulating concerns, pursuing discussion of some issues and not others, using directive questioning to shape arguments or justify overt opposition to parties' desired solutions, translating statements so that they are understood, offering summaries without reshaping the propositional content of what has been said, asking questions to reveal how parties want to be seen by each other and reinterpreting statements (Bush and Folger 1994, 268). In interest-based mediation, a variety of communicative techniques are used to help parties communicate about substantive issues in dispute. These include the use of restatement, paraphrase, active listening,

summarization, expansion, ordering, grouping, structuring, separating and fractioning, generalization, probing questions and questions of clarification.[10] In transformative mediation, practitioners use communicative tools to make parties more intelligible to each other (Bush and Folger 1994, 101).

Each style of dispute resolution, every practitioner and all the literature in ADR present variations on the language and communicative tools that are used in the discipline. Each type of locutionary act is differently defined according to the style or perspective in which it is used and can carry a variety of illocutionary and perlocutionary forces. Since the field of ADR is relatively young, the theory that informs it is still developing. Naturally, no comprehensive theory of language and communication in dispute resolution has yet been created and as a result, the understanding of communicative processes, tools and skills is still imprecise. Speech Act Theory can be usefully applied to language and communication in ADR because it can help us to talk about language use as action and so bridge the gap between language and communication. It will allow the communicative tools described informally in the

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[10] *Restatement.* The mediator listens to what has been said and feeds back the content to the party in the party's own words.
Paraphrase. The mediator listens to what has been said and restates the content back to the party using different words that have the same meaning as the original statement. This is often called reframing.
Active Listening. The mediator decodes a spoken message and then feeds back to the speaker the emotions of the message. This is commonly used in conciliation.
Summarization. The mediator condenses the message of a speaker.
Expansion. The mediator receives a message, feeds it back to the listener in an expanded and elaborated form, and then checks to verify accurate perception.
Ordering. The mediator helps a speaker order ideas into some form of sequence (historical, size, importance, amount, and so on).
Grouping. The mediator helps a speaker identify common ideas or issues and combine them into logical units.
Structuring. The mediator assists a speaker in organizing and arranging his or her thoughts and speech into a coherent message.
Separating and fractioning. The mediator divides an idea or an issue into smaller component parts.
Generalization. The mediator identifies general points or principles in a speaker's presentation.
Probing questions. The mediator asks either open-ended or focused questions to encourage a speaker to elaborate on an idea.
Questions of clarification. The mediator asks questions to obtain clarification of particular points.
Mediators use these communication tools to help parties communicate more accurately with each other. Ideally, the parties use them too. Mediators may encourage them to do so by explaining how the tools are used and by commending parties whenever they apply them (Moore 1996).

literature to be defined and classified, providing insight into the role language plays in the management and resolution of conflict.

Speech Act Theory is compatible with the current analysis of language and communication in ADR because both understand communication as a form of action effected through language. Communication in ADR can be explored from the perspective of the speaker or of the hearer (the practitioner or the participant) in the resolution process. Context is also an important aspect of communication in ADR. In suggesting a taxonomy of speech acts used in ADR, this study assumes the splendid isolation of practitioners' utterances. It focuses on the intent of the practitioner as described in ADR literature and deliberately avoids the complexities of establishing a speaker's achievement in using specific communicative tools. In a full account, it would be important to analyze each utterance twice: once to construe the intention (perlocutionary force), a second time to assess its actual effect (illocutionary force). Vanderveken, who distinguishes intended from unintended consequences of acts, has helpfully discussed the question of intent:

> Since our acts are acts, we must always remember the distinction between producing effects or consequences which are intended or unintended; and (i) when the speaker intends to produce an effect it may nevertheless not occur, and (ii) when he does not intend to produce it or intends not to produce it, it may nonetheless occur (Vanderveken 1994, 105).

This study addresses only the intended consequences of practitioners' speech acts. Consequently, it does not explore whether or not perlocutionary acts are performed successfully in the context of ADR.

The categories of speech acts that are discussed in this study are ones already described in the ADR literature. The task of this study, therefore, is to survey informal accounts of speech acts in the literature and to interpret the intent with which practitioners use them. It might seem that a taxonomy of speech acts can be proposed, and one will be, but the difficulty of distinguishing the different illocutionary and perlocutionary forces that can be attributed to each type of act means that no taxonomy can be definitive or exhaustive.

Understanding how practitioners use language, their intentions in using specific communicative tools, is significant in many ways. The speech acts that are mentioned in

the ADR literature by authors and practitioners of ADR will be compared one to another in a taxonomy of speech acts. The categories that will be used to classify the speech acts are also based in ADR literature and will be defined according to practitioners' intent. To analyze all of these strictly according to the specific categories proposed by Austin (1962) and Searle (1965) might be possible in a much longer study, but their usefulness for describing language and communication in ADR is (as will be suggested below) limited and will not provide the theory's potentially most insightful account of what practitioners use language for. Speech Act Theory will be most successful in offering insight into the communicative processes of ADR if it is applied only in its broadest notion: that communication is a form of action partly determined by the intent of the speaker.

Limitations of Speech Act Theory

Despite the important achievements made in Austin's (1962) introduction and Searle's (1965) consolidation of Speech Act Theory, the theory remains imperfect in several ways. One important flaw is the scope of its application, its degree of universality or specificity. While Speech Act Theory is often considered to be too vague and universal, it is this universality that makes it applicable to a variety of fields. There remain, however, serious problems in Speech Act Theory's inadequacy to deal with the variety of speech act phenomena in the wide variety of actual discourse situations.

In discussions of Speech Act Theory, there is often disagreement as to whether it is even possible to define a specific set of illocutionary acts and rules for performing them (Kreckel 1981) since any kind of classificatory system is limited by the difficulty of formulating a set of categories which is "exhaustive, insightful and empirically satisfactory, or [of proposing] criteria for identifying tokens of such categories reliably" (Taylor 1987, 62). Any classificatory system finds itself in a catch-22: if specific, concise categories are proposed, they lack universality; and if broad categories are proposed, their very breadth prevents them from being useful for analysis in specific cases. Flowerdew states that:

> Any approach is likely to suffer from the basic theoretical problem of the conflict between an all-purpose system – which is likely to have defects in relation to the specific situations in which it is applied – and a system derived

> from narrowly defined situation – which is liable to lack applicability to other, more general situations (Flowerdew 1990, 83).

Another problem that results from creating classes for speech acts is that in much of the literature, speech acts can only describe single sentences; discussion has been largely confined to the analysis of isolated illocutionary acts effected by single utterances (Vanderveken 1994, 4). There has been little consideration of context as a whole, or development of a framework to analyze entire situations and sustained communicative interaction between participants. This becomes a particular problem when the issue of implied meaning is addressed and context is necessary to determine it. Another, and more serious problem involves the important distinction of literal and implied force. Searle defines this distinction in terms of direct and indirect speech acts: "an utterance is to be taken as carrying its literal force of statement, question, or command, unless the context dictates that some other interpretation is to be put upon it" (Searle 1965, 298). In ADR, where context allows for various interpretations of utterances and allows for individual acts to be interpreted in many different ways, the assessment of context is imperative (Flowerdew 1990, 84). Thus, although the distinction between direct and indirect speech acts is important for understanding the function of utterances in ADR, they can be handled only in general terms, consistently with the uses being made of other aspects of Speech Act Theory here.

This discussion of the limitations of Speech Act Theory can be concluded with reference to Evans' description of ten elements that should be addressed in the creation of classes of speech acts.[11] Speech Act Theory, in any of its classificatory schemes, does not provide for them all - each one is a potential limitation. Wunderlich (1980) also raises problems in Speech Act Theory and identifies the following. The demarcation problem: one has to delimit individual speech acts from the continuous flow of speech. The

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11 "Any complete speech act should be (i.) formal; giving explanations and making predictions; (ii.) capable of assigning multiple speech act interpretations to an utterance; (iii.) capable of capturing sub-utterances as well as supra-utterance phenomena; (iv.) explicit about the kinds of inferencing it requires and the rules that govern such inferencing; (v.) computationally feasible (utilizing, as much as possible, simple mechanisms); (vi.) specific about the role of extra-theoretic information or processes in accounting for speech act interpretation; (vii.) capable of representing and utilizing contextual information in giving derivations from speech acts; (viii.) sensitive to the role of non-verbal and prosodic information in discourse; (ix.) flexible enough to account for indirect as well as direct speech acts; and (x.) generalizable to situations involving multiple speakers and multiple addressees" (Evans, 1981, p. 19).

identification problem: what criteria can be used to distinguish speech acts from one another? The classification problem: how can a classificatory scheme be established for the different types of speech acts, what are their distinctive criteria? The specification problem: what are the criteria for subtypes and the social bias of speech acts? The (de)composition problem: how can simple and complex speech acts be constructed, how can complex units be distinguished and what are the characteristic composition structures? Finally, the projection problem: one has to relate the verbal means, words and constructions, with the sentence meaning, described in terms of possible speech acts performed by an utterance of that sentence.

While Speech Act Theory has some important limitations, they will not diminish its usefulness in the analysis of ADR's communicative tools. The limitations are only relevant when addressing the details of Speech Act Theory and aren't applicable to the general premises that are used in this exploratory study, as will be shown in the following.

The Limitations of Speech Act Theory and its Use in ADR

The limitations of Speech Act Theory, although they are important, will not interfere with the present study. It is important, however, to understand why the flaws can so easily be dismissed. Speech Act Theory's limitations can be grouped under three major headings: the problem of universality vs. specificity, the consideration of context, and the creation of classificatory groups.

The issue of whether or not Speech Act Theory is universally applicable does not interfere with the discussion of speech acts in ADR because the study is case specific and does not seek universality. The exploratory study of speech acts will be applied only to ADR and can enjoy the luxury of specificity. The question of whether the taxonomy will be applicable to the broad range of ADR practices presents a valid concern, but the variation in ADR speech acts across styles will be accounted for as the taxonomy is created.

Although the issue of context and allowance for it in the description of speech acts is contentious in Speech Act Theory, there is a certain awareness of context in the description of ADR speech acts. Austin and Searle did not suppose that context would or

could be completely eliminated in determining speech acts. While they generally consider utterances in isolation and do not apply their theory to conversation structures, they do account for context – otherwise, it would be impossible to allocate intent. Evidently, the study must be relatively sensitive to the context of ADR in which practitioners operate if it is to make a relevant taxonomy of its communicative practices. The present study does not propose to use Speech Act Theory to analyze discourse as a fluid whole, however, but will be assessing utterances as isolated units.

The proposed use of literature avoids the problem of isolating speech acts and relevant utterances by proposing speech act categories and names for those categories. The identification and specification of speech acts has always been problematic in Speech Act Theory because of the difficulty of establishing a clear correspondence between conversational structures and the names people use to describe them. Since the names and categories of ADR speech acts are described in the literature, the identification and specification problem will not be a concern in the creation of a taxonomy for speech acts in ADR.

Thus, the major limitations of Speech Act Theory are not relevant to the creation of a taxonomy of speech acts in ADR because of the broad way in which the theory will be used. Those basic premises of Speech Act Theory that are generally accepted are the ones that are used in this study.

Conclusion

> Language, unlike, mathematics, is not clear-cut or precise. It is a natural human creation, and, like many other natural human creations, it is inherently messy (Halliday 1978, 83).

The following principles of Speech Act Theory will be used in the exploration of speech acts in ADR and in the creation of a taxonomy:

- Communication is a form of action that has language at its base.
- The type of action performed can be classified according to the intent of the speaker.
- Context is an important consideration in the determination of intent and the classification of utterances into speech act groups.

The classificatory schemes proposed by Austin and Searle, while useful in the creation of a general theory, are not effective in the analysis of speech acts in the specific context of ADR. The speech act classification that will be used in this study will therefore be drawn from existing ADR literature.

Speech Act Theory "aims to formulate the necessary and universal laws governing the successful performance of an illocutionary act" (Vanderveken 1994, 5). At a more fundamental level, it questions when and how statements are used and what their perlocutionary effect is.

Because language is seen as having the function of permitting or constraining the options that are available in a dispute resolution situation, language and communication needs to be explored in the field of ADR. Winslade (2000) describes this as the constitutive function of language. This study will explore the communicative tools used by practitioners to constitute the possibility of satisfactory outcomes in conflict and dispute situations.

CHAPTER THREE: LITERATURE REVIEW: DISCUSSIONS OF LANGUAGE IN ADR

As individuals and as a society, we are at the mercy of language. Language goes far beyond the task of communication and helps us to express our world and share it with others. As such, the use of language is an important element in Alternative Dispute Resolution (ADR). Discursive practices specific to the contexts and requirements of ADR are emerging. ADR practitioners are forming, as Whorf would put it, "language habits that predispose certain choices of interpretation" (Whorf 1956, 134). Practitioners are engaged in defining discourses that create worlds where understanding and peaceful solutions to conflict are achievable. The objective of analyzing the content of ADR literature is to explore practitioners' and theorists' use of language and comment on the functions it serves.

Language has a tangible effect on the development of ADR as a professional and academic field. The importance of language in ADR practices is highlighted in its literature. Discussion of language appears in most of the ADR texts reviewed and ranges from consideration of practitioners' general use of language to their application of specific speech acts. Practitioners and theorists present and define the linguistic practices that are characteristic of ADR. Much of the literature presents the idea that "the moves the mediator makes influence the disputing parties' actions and reactions, ultimately shaping how the conflict is addressed" (Winslade and Monk 2000, 39). These moves are communicative utterances: framing, narrative, and questioning. These and the other linguistic tools discussed in ADR literature will be described here.

Language in ADR: Some General Considerations

ADR literature often refers to the importance of communication and communicative skills required for the effective resolution of conflict and dispute [(Mayer (2000), Sloan (1998), Taylor (1987), Fisher and Ury (1981), Burton (1969)]. The following pages will present what communication is to ADR, what it does in the ADR

process, how communication fits into the greater context of ADR, and the intent with which practitioners use it.

Communication in Alternative Dispute Resolution

Tidwell presents communication as a "process through which parties may wield power" (Tidwell 1998, 87). He states that:

> Most power, it seems, wielded in this world is linguistic and communicative. All communication events, including the speeches, the quiet chats, the books written and the hand gestures, all are moments where the potential to wield power exists. [...] In cases of conflict, there can be little doubt that people fight over words (Tidwell 1998, 105).

While power is an essential element of language, the main theme of Tidwell's description of communication is that it can be either benevolent or harmful as part of both conflict and its resolution. Tidwell defines communication as the exchange of meaning. As a central element to every conflict, communication makes important contributions to creating the necessary and sufficient conditions for the resolution of disputes.

In its most general sense, communication involves the exchange of information/messages. Burton, however, explains that communication can occur even in the absence of messages: "There is communication whether it be flows of messages or merely relationships that exist in the absence of actual messages and transactions" (Burton 1969, 48). As a part of ADR, however, communication must be described more specifically.

Communication acts in ADR have been characterized as a social relationship. Bisasso described the social relationship in dispute resolution as having the following features:

1) The will on both sides to engage in the communication act.
2) And consequently to make a conscious effort applicable to the medium of communication to keep the communication channel (link) open, for instance, in the case of interpersonal communication taking place in the form of a conversation or a discussion, paying attention to what the other is saying and asking questions where one has not understood or heard what the other is trying to say as well as making various other symbols and gestures to indicate that one is still committed to carrying out the communication act, may be required.

3) If one has reasons to doubt that the communication link is temporarily broken or interfered with one must try to re-establish it as soon as possible (Bisasso 1984, 144).

These considerations are important to the study of practitioner language because they explain why some patterns of communication are established in ADR. Many theorists and practitioners emphasize the social nature of communication.

Taylor and Cameron's (Taylor and Cameron 1987, 45) work on conversational analysis describes utterances and illocutionary acts as part of purposeful and rational exchanges of everyday life. Tidwell (1998) also picks up on the concept of communication as human interaction. He explains that conflict is wrought by judgment and motivation, both of which are hidden from view. Communication is used to give and gain insight into the judgment and motivation of parties. Conflict and its resolution rely on communication for its capacity to externalize issues (Tidwell 1998, 89). Tidwell's explanation is that communication allows conflict to be socialized.

Burton (1969, 49) in 'Conflict & Communication: The Use of Controlled Communication in International Relations' wrote that effective communication is essential to resolution of conflict. In every relationship, he explains, there is the potential for communication. It is the practitioners' role to turn that potential into a reality and direct the resolution of conflict and dispute. Burton (1969) sets the conditions for effective communication[12] and states that in conflict situations, control of communication is the best way of establishing effective communication between parties. Effective communication is: "the deliberate conveying and accurate receipt and interpretation of what was intended should be conveyed, and the full employment of information as received and stored in the allocation and re-allocation of values, interests and goals" (Burton 1969, 49). He explains that controlling communication in dispute situations raises the level of shared understanding, transforming competition and conflict

[12] The conditions for effective communication are intent, sincerity, perception, interpretation, and context. Procedural means of achieving effective communication include third party initiatives, and informal and secret communication between parties (Burton 1969).

into an opportunity to share perspectives[13] and build commonalities. While Burton's book studies how language is used in conflict situations to achieve resolution, his overall analysis of conflict is overly simplistic in its claim that the only element fundamental to resolution of conflict is effective communication. Can the key to resolving conflict be as simple as "testing whether information is received as was transmitted, and whether what was transmitted was sent deliberately and contained accurate information" (Burton 1968, 48)? He places the onus for conflict or peace on the quality of communication established and does not explore other issues that can create conflict. He claims that the single most important step in the resolution of conflict is the establishment of effective communication. While this may be true, there are also a number of other factors that must be included in any discussion of how conflict is resolved: history, relationship, and willingness to participate, for instance. Burton's arguments are still pertinent to current discussions, however, especially his claim that "the process of resolution of conflict is essentially the process of testing whether information is received as was transmitted, and whether what was transmitted was sent deliberately and contained accurate information" (Burton 1969, 49). This is often the intent of practitioners in using speech acts.

Burton's work on the control of communication describes how third parties use questions, leading comments, clarifications, promotion of insight into the position of each party, correction of perceptions, explanation of interactions, establishment of a discourse, provision of reference frameworks. "The specific strategies of control that achieve their purpose are those calculated to promote abstract discussion of the concrete situation. Abstract models help parties to observe the basis of conflict and in particular to discern the processes and effects of escalation" (Burton 1969, 54). While Burton argues that effective communication and its control are over-riding factors in conflict resolution, he might agree that there are other contributing factors. His work does not pursue the discussion of those particular elements and that limits its usefulness in this discussion of communication in ADR. The emphases that must be retained from Burton's work,

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[13] Communicative competence (Bisasso 1984) could also be included in the discussion of effective communications. Communicative competence means possessing the ability to generate the right ideas, translate ideas in the required communication-code, be knowledgeable of the cultural aspects and conventions relevant to the communication situation, "self-control to produce and maintain the necessary general behavior required to reach the desired goal" (Bisasso 1984).

however, are the importance of communication in conflict, how practitioners have an essential role in establishing effective means of communicating and the importance of verifying communications, and that in verifying communication, it is possible to manipulate content and the perception of content.

Burton, however, was working in the more general field of international conflict, and probably did not expect his work to be applied to ADR in particular. Goss, who does work on ADR specifically, says that in ADR, effectiveness of communication is dependent on the deliberate utilization of techniques (Goss 1995, 2). She explains that it is the mediator's role to "interject to ensure that the most effective negotiation approaches are being taken and that, if there is room for agreement, that agreement is achieved" (Goss 1995, 5). Fisher and Ury (1981) also, in their work in interest-based negotiations, highlight the importance of communication as a cornerstone of alternative dispute resolution. They describe, as does Burton, how breakdown in communication can be the cause of conflict, and they suggest where to find solutions. Their discussion makes obvious that the ADR practitioner's role is to control the communication between participants and, when necessary, reconstruct it using (and encouraging the use of) different discursive practices. Control and reconstruction enable practitioners to manage and resolve conflict. Many practitioners would agree with Burton that: "If the substance can be phrased or conceptualized differently so that it seems a fair outcome, they [the disputants] will then accept it" (Burton 1969, 29).

What Communication Does

Communication allows activities to be coordinated among participants in ADR, it informs and persuades disputants of the possibility of resolution, and generates the volition to resolve conflict.

The goal of practitioner's use of language in conflict situations goes beyond simply refereeing communication between parties. In engaging parties to a conflict, practitioners do more than just apply language. Goss (1995) identified what communication does in ADR: ensures clarity, clarifies parties understandings, identifies assumptions, identifies common ground, isolates what is agreed upon or not agreed upon by parties, narrows the dispute to its basic elements, encourages parties to brainstorm

ideas, assists in developing solution ideas, ensures that discussion moves forward and towards resolution of the issues, and encourages mutual recognition.

> Misunderstandings can be cleared up by a third party, the disputing parties are more inclined to listen to each other, emotional levels can be reduced, the power relations of the parties can be balanced so that solutions reflect basic issues and not these relations, and alternative viewpoints can be put forward in ways that allow the parties to move away from stances that have been adopted. [...] ...Functions [of language] that are particularly relevant to international mediation include data collection and processing and verification of statements (Burton 1969, 61).

Communication, Intention, and Context

Austin's Speech Act Theory uses intention and context to analyze communication. He explains how utterances are classified into speech acts according to speakers' intent and to "the context in which they are designed to be or have actually been spoken" (Austin 1962, 102). While it is possible to criticize Speech Act Theory on several levels, it does provide a framework with which to explore language and communication in ADR. It can be extremely useful in the discussion of language in ADR, especially for its principled application of context and for helping us to examine carefully the language in a particular sub-field. ADR is interested in the strategic use of language to control process and, to a certain extent, shape outcome; Speech Act Theory can help us to examine these.

Taylor (1987) especially was aware of the limitations of Speech Act Theory and analyzes them in his description of conversation and its structures. He described the difficulty of establishing clear correspondence between conversational structures and the names people use for them. He highlights the difficulty of creating the classes and definitions that constitute a taxonomy. This challenge is especially relevant to this study of the specific speech acts used in ADR. Many aspects of speech act categories make them difficult to identify. In ADR, a major complicating factor is mediation style. The use of both framing and the kinds of utterances that can function as frames, for instance, vary according to the style of mediation being practiced.

Taylor defines context, as does Speech Act Theory, as an essential element of language use. He explains that speech acts are more than simple utterances; they reflect the situation in which they are used. In ADR, this means that speech acts themselves do

more than just frame issues or ask questions. Because they are used to satisfy participants' expectations and resolve conflict, the specific goals pursued affect which speech acts are used, when and how. Goals and objectives determine the intent with which practitioners act.

Intent is implied in any communication. Bisasso states that:

> Communication acts are supposed to be intended and subservient to certain goals aimed at by the originator of the act. As a matter of fact, there are even exchanges of communication without real exchange of information, like in the case of small talk at parties and various forms of greetings. Since acts of communication presuppose consciousness and intention, they are limited only to people and animals, for these are the only beings (creatures) endowed with the capacity to behave consciously and goal-orientatedly (Bisasso 1984, 136).

Taylor and Cameron (1987) also acknowledge that verbal interaction is purposeful and goal-directed toward furthering the interests of actors; in the case of ADR, reaching a satisfactory end to the conflict.

Bisasso (1984) describes several goals that can be achieved through communication: to inform, remind, draw attention to a particular point, argue for or against a particular point, attempt to convince or persuade, express a wish or protest, insult, express feelings, accuse, condemn, excuse ourselves or others, encourage, discourage, deceive, mislead, confuse, cross, disappoint, frustrate. Communication in the pursuit of these goals signals to disputants that certain behavior is expected of them and will often require that they take action or formulate a response.

Bush and Folger (1994) describe the range of strategies, "specific moves made during the process", used to "shape arguments, frame proposals, and influence outcomes" (Bush and Folger 1994, 65). These strategies allow practitioners to "direct moves primarily toward the creation and acceptance of settlement terms that solve problems [...] these strategies are often used to challenge the parties' own preferences for settlement or their own willingness to reach agreements" (Idem). Johnson explains that communicative strategies are generally used in conflict situations to induce cooperative behavior (Johnson 1974, 67).

Various theorists relate general objectives of the ADR process and specific goals of practitioners. From this relation follows the idea that utterance type (the means used to convey intent) is secondary to intent. Mayer (2000) especially sees speech acts as

secondary to intentions or contexts and highlights intention in ADR, rather than emphasizing the speech acts used to communicate it. Nevertheless, he elaborates the different ways of conveying intention: framing, reframing, body language, tone and narrative. His approach places a lot of faith in the correct interpretation of intention, which is also a critical element of Burton's (1969) and Fisher and Ury's (1981) work. The assumption that intention will correctly be recovered is a major impediment to effective communication. Burton, and Fisher and Ury explain that the communication of intentions is itself a cause of conflict and should not be taken for granted. Mayer departs from other theorists in ignoring the difficulty for listeners to identify speakers' intention. His thoughts realign with other theorists in drawing practitioners' attention to the significance of practitioner's use of language in their interventions. The principal limitation of intent as a unit of analysis in any communicative situation and the pursuit of goals is the significant difference between intention and perception. As Tidwell (1998) explains, much of the conflict resolution process is often spent in the clarification of perceptions[14].

Language and Context

The comparison of how judges and mediators use framing in mediation sessions shows how speech acts can be used differently according to the intent of the practitioner and the context in which he is operating. Candlin (1997) clarifies some of the ambiguity of Speech Act Theory's application in ADR in his discussion of framing across mediative styles. In another article, Candlin and Maley (1994) present an argument about how specific language use varies according to the background, the style, the context, and the practitioners' perspective. They explain that discursive practices can achieve different effects and that speech act use by ADR practitioners is determined by their background (in either adjudication or mediation); the context in which they operate.

Candlin and Maley's article is especially relevant to the discussion of discursive practices in ADR because it discusses practices as identified and defined by practitioners: "The response strategies that mediators themselves identify are: repetition, paraphrase, summary, formulation/reformulation, reframing" (Candlin and Maley 1994, 79).

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[14] The correct transmission of intention, as noted, can be disrupted by perception. Another element that can contribute to misunderstanding in communication is expectations.

Practitioners have specific intentions and are aware of the context when they work with disputants towards resolution. Burton (1969) said that in the context of communication, there is the potential for positive transactions as well as for antipathetic responses. It is the practitioners' responsibility, and should be his intention, to guide disputants towards constructive interaction. They are to apply what Burton called 'controlled communication'[15].

Wunderlich addresses ADR communication, discourse, intention and context in his discussion of the institutionalization of the language of ADR. He considers intention and context in the following:

> The illocutionary force of a Speech Act should be characterized both (a) in terms of (pragmatically) presupposed mental states of the participants, and (b) in terms of the state of interactions brought about by performing a speech act. This follows from the assumption that:
> (a) In performing a speech act, every speaker has something in mind, consequently, the hearer is entitled to infer that the speaker has a certain belief or expectation;
> (b) Each speech act brings about a certain effect in that it changes the obtaining state of interaction; consequently speaker and hearer are entitled to assume a certain new state of obligations and commitments, of information and of mutual social relationship (Wunderlich 1980, 292).

It is interesting to apply his statements to ADR where context often dictates novel use and interpretation of speech acts by practitioners and disputants. These comments further show the difference between speakers' intentions and hearers' expectations.

Beyond any general discussion of language and ADR there is a gap in the literature between theory about the contexts of speech act use and the intentions with which they are uttered. The previous paragraphs have identified some of the themes that emerge from ADR literature. The difficulty in assessing speech acts most relevant in ADR, however, is that every type or category of speech act can be used with different

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15 "The technique of controlled communication derives from the hypothesis that conflict occurs as a result of ineffective communication, and that its resolution, therefore, must involve processes by which communication can be made to be effective. [...] Controlled communication between parties in dispute is an attempt to raise the level of communication to transform competitive and conflicting relationships into ones in which common values are being sought. For this to happen hitherto unexplored alternatives suggested by untraditional modes and concepts, need to be introduced into discussions" (Burton 1969, 49, 56).

intentions. In the following section, speech acts will be discussed as they are described and understood by the practitioners and theorists who have written about them. This discussion overviews only how they appear in ADR literature. It does not include any analysis of intentions as it is beyond the scope of this review to engage and analyze each speech act.

Speech Acts in Alternative Dispute Resolution

The specific discursive practices presented in ADR literature can be considered speech acts because they are uttered to achieve certain goals and have certain effects within the context. They have perlocutionary force[16]. Asking questions for information, requesting details and providing elucidation are examples of illocutionary acts that often occur in conflict resolution processes. Practitioners can use them to achieve different perlocutionary effects. The extent to which those acts contribute to resolving disputes remains an important question (Burton 1980). As discussed in the previous section, ADR literature often ignores the dynamic relations between context, intention, and perlocutionary force. This study explores what is available in the literature, but is limited to a selection of texts and is not exhaustive. After reviewing some general issues in practitioners' direction of parties' attention to language, the following sections will discuss the speech acts most often treated in the ADR literature: framing, narrative, questioning, hypotheticals and listing/brainstorming.

Reflection on Discourse in ADR

"Discourse is both the process of talk and interaction between people, and the products of that interaction. Talk tends to happen in recursive patterns within particular locales, and we can therefore speak about these patterns as particular discourses" (Winslade and Monk 2000, 38). The discussion of speech acts in ADR helps to

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16 "Saying something will often, or even normally, produce certain consequential effects upon the feelings, thought, or actions of the audience, or of the speaker, or of other persons: and it may be done with the design, intention, or purpose of producing them; and we may say, thinking of this, that the speaker had performed an act." The perlocution is an action. It is "what we bring about or achieve *by* saying something, such as convincing, persuading, deterring, and even, say, surprising or misleading." It achieves a certain effect by saying something. It affects the development and resolution of conflict." (Austin 1962, p. 101, 108, 120)

consolidate the discourse of ADR. Discourse exploration is also used in mediation as a means of depersonalizing conflict. Discussing their language allows parties to separate themselves from the conflict itself. Use of specific discourse practices for doing this allows practitioners to define and control the communicative situations they encounter. Speech acts are an important resource for practitioners to encourage parties to reflect on their discourse.

Practitioners' Use of the Functions of language in ADR

Communication in conflict resolution can be described as exchanges between disputants. Gruber (1982, 182) offers a general explanation of how language functions in conflict situations:

> A: 'statement'
> B: 'counterstatement' (i.e. disagreement with A)
> A: 'counterstatement to B' (i.e. disagreement with B and possibly insisting on the original statement made by A)

It is in such sequences that ADR practitioners intervene to direct communication in constructive ways. Gruber also studies a phase in conflict where opposing parties "clarify their points of view towards the conflict issue" (idem). It is this phase that offers possibilities for practitioners of ADR to direct the language used to discuss conflict and in so doing, build solutions. This is where the variety of functions of language in ADR becomes especially significant.

Colosi describes how skilled ADR practitioners raise doubt to achieve this goal of encouraging parties to clarify their view of the conflict issue:

> Effective mediators rely on the same tools that effective negotiators use: the creation and maintenance of doubt. Effective mediators create and maintain doubts by raising questions about alternatives and implications that the negotiators may not have considered or fully appreciated (Colosi 1987, 94).

Doubt allows disputants to consider the plausibility of new assumptions and proposals and creates potential for resolution. Moore also describes the use of doubt as a means for practitioners to influence the resolution process. He says, "[m]ediators often use doubt to influence the parties towards settlement" (Moore 1996, 209).

Menkel-Meadow in a review of ADR texts reveals that a "recurring, if disturbing, theme in these profiles is the extent to which mediators do control, manipulate, or dictate either the discourse of mediation (Cobb and Rifkin 1991; Greatbach and Dingwall 1989) or specific outcomes" (Menkel-Meadow 1995, 222). She argues that the literature reveals commonly agreed-upon practice routines for ADR processes, "such as narrative claiming and story presentation, facilitated communication and empathy training, question framing strategies, reframing, information sharing, brainstorming, reality testing" (Menkel-Meadow 1995, 227).

Sloan describes the use of interrogative (questioning) and reflective (restating, paraphrasing, and summarizing) skills as a means of controlling the process of ADR. Those skills can be used to get the process started, move it ahead, get it on track, or mark progress (Sloan 1998). Using more general terms, Copi (1972) presents three functions of language, all of which are used in ADR: informative, expressive and directive. Informative language is used in the collection and sharing of information. Expressive utterances are made to vent and arouse feelings or emotions. Directive utterances are used to induce disputants to take or avert action[17].

Finkle (2003) describes in his Mediation Primer the general goals that mediators seek to achieve through speech: probing for information; building relationship; providing, gathering and clarifying information; identifying interests; and probing for possible solutions.

The speech acts that will be described in the following are the means that practitioners have to engage disputants and direct the ADR process from conflict to resolution. Each of the following sections will review a speech act described in ADR literature and briefly explain it. It is important to note that the descriptions cannot be exhaustive as the field is continually developing and the contradictions within the field are considerable. For each of the speech acts, a number of other definitions could have been presented, and should be developed in other research endeavors.

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[17] Copi does not provide a means of identifying these utterance functions because all functions can be present to a greater or lesser extent in any utterance.

Framing

A frame can be defined as: "a 'structure of expectation' (Tannen 1979) or, more precisely, as 'a body of knowledge that is evoked in order to provide an inferential base for the understanding of an utterance' (Levinson 1983)" (Lakoff 2001, 19). Darling described framing as an "inclusive way to set a mutual agenda for the negotiation and encourage the participants to trust that the issues that are important to them are on the table. It also sets common goals for the negotiators" (Darling 1998, 52). Hale presents frames as "habits of the mind – strategies for living that people develop for living in a social and thus conflictual environment (Burke 1959)" (Hale 1998, 148). In the broader context of Hale's work, the function of framing is to:

> Amplify the negotiation and open it up to achieve elegance rather than purchase closure at the price of neglect of personal or emotional needs, oversimplification of the issues, or unacceptable process. Finally, a rich negotiation frame must allow people to change and grow throughout the process. [...] [Practitioners] diffuse unproductive frames and translate them into more generative, dynamic frames (Hale 1998, 149).

Practitioners use frames to build resolution in several ways: suggesting new frames, manipulating, and consolidating the existing frames of disputants. Practitioners involve disputants in the creation of frames because disputants who have helped to construct it will more readily accept the frame. Burton (1969) explains that allowing disputants to view conflict through different frames will help them to understand their conflict differently from how they experience it. The gain in perspective provided by new frames increases potential for resolution.

Framing takes on different characteristics and implications, however, depending on the perspectives and backgrounds of practitioners. ADR generally uses frames in a more fluid and pliable way than that described above by Lakoff. Sloan (1998), following the trend set by Fisher and Ury (1981), explains that framing is a key element to successful resolution of conflict. He describes framing in ADR as both a process and a discursive practice. The proposition and modification of frames is the responsibility of the practitioner. Framing is an activity in which practitioners engage disputants. It is an essential tool for effective communication. In their work on transformative mediation,

Bush and Folger (1994) have explained framing as a means of recognizing parties to a dispute, stating that practitioners should reframe by offering summaries of parties' views and positions without substantively reshaping what parties have said, thus translating one party's statements so the other is more likely to hear them accurately or consider then sympathetically:

> Another way of describing this move of 'translation' is to look at it as 'reinterpretation': Whenever the opportunity arises, the transformative mediator offers parties the opportunity to reinterpret statements or past behaviors of the other party in a more positive light, in view of information and explanations offered by that party in the mediation. If accepted by the listening party, the reinterpretation is itself one form of giving recognition to the speaking party (Bush and Folger 1994, 125).

Furthermore, practitioners should offer possible reinterpretations of parties' actions or motives without trying to convince disputants that any one interpretation is necessarily correct or better. Part of the idea of transformative mediation is to reinterpret actions and motives of disputants so they empower parties, giving them a sense of control and allowing them to consider new options. Bush and Folgers' (1994) account of framing suggests how it can achieve this goal.

Sloan describes framing as a way of clearly identifying what disputants are in ADR to work out. It uncovers issues and "defines a common agenda of what they [disputants] have to resolve" (Sloan 1998, 87). Sloan explains that disputants will generally describe what is at issue in positional, polarized ways. If they are allowed to persist in holding these rigid frames, conflict becomes entrenched; for that reason, practitioners must reframe issues to make them resolvable.

> The mediator frames the issue by gathering into a brief statement the fundamental material both are saying. In so doing, an attempt is made to 'clean up' the words used to express the matters at issue while still being inclusive. [...] Note that the 'issue frame' is neutral in its language and inclusive in its content. It is purposely inclusive in nature, framing the issue in the most inclusive terms possible while still being true to the content of each negotiator's statements (Sloan 1998, 91).

Successful framing is generally said to include the following elements: an introductory phrase that brings parties together; conjunctive language so as to avoid win/lose or

distributive issue frames; and affirmation of the issue frames by the parties. Sloan (1998, 92) presents templates of these elements in the following table:

Table 1. Elements of Successful Framing (from Sloan 1998, 92).

Introduction	Phrase aimed at bringing the parties together in a neutral and inclusive way.	'What we are here to resolve is…' OR 'The issues we need to work on are…' OR 'So the questions we need to discuss are…'.
Conjunctive Description	Inclusive language defining the issue, acknowledging the differences. Avoids distributive whether or not. Uses integrating words like how or what.	'…the question of how…' OR '…what to do about…' OR '…how to deal with…'
Seek Affirmation	Frame it again until you get a yes.	'O.K. It seems then what we have to resolve is…'

Sloan's guidance to practitioners' language here is based on his view that framing determines how conflict is perceived and can either increase or diminish the likelihood of resolution. It is the practitioner's mandate to create frames that nurture resolution.

Maley's work (1995) highlights the contextual purpose of framing and describes the specific ways that it can be used. She explains that practitioners carry out their task through a range of functional and rhetorical modes and their interventions and use of framing are reflective of these modes. The notion that simple discursive practices can be used to different effect was explored in an article jointly written by Maley and Candlin (1994) that discussed the effect of practitioners' background (either legal or mediation) on their use of speech acts in ADR. In that article, framing is defined as formulating,

> …in a more or less explicit way a version of the disputant's previous contribution, or even a sequence of previous contributions and exchanges [...] they seek confirmation, that is, a further response from the disputant that the proposition contained in the mediators' response/utterance is correct. They are

> both retrospective and prospective in effect and serve to promote the cohesion and coherence of the interaction (Candlin 1994, 79-80).

This suggests both the importance of the "seek confirmation" move and also how its meaning at successive stages of mediation can differ, despite the formal similarity of whatever words the mediator might use. Most importantly, Maley and Candlin discuss the concept of framing and its specific use in ADR mediation while illustrating the multiple objectives that framing tries to achieve. The following rather lengthy quotation clearly describes the issues raised by a number of practitioners and authors in their discussions of framing in ADR:

> There is considerable overlapping in mediation literature and training manuals on the meaning and use of these terms [framing, repetition, reframing, paraphrasing, summary]. Sometimes 'formulation' is used to cover all of them with a common criterion said to be that they preserve meaning or the relevant features of the disputant's contribution. Some writers and trainers, however, distinguish reframing from repetition, paraphrase and summary; and they identify reframing as a response strategy that does what it says - reframes the terms of the dispute and, it is hoped, the disputant's perception of the issues or problems of the dispute. This mediator view of framing and reframing is very close to Goffman's sense of frame as 'basic frameworks of understanding' available in our society for making sense of events.
>
> Within mediation, frames, framing and reframing take on additional meaning. Here reframing is relevant not only to the mediation process in which the disputants are currently placed; but also, importantly, reframing involves altering the participants' perceptions and current frames of the behavior, attitudes or issues in the dispute.
>
> Wall and Dewhurst point out that even as they seek confirmation for a previous contribution, formulations have other uses or effects in controlling the process of mediation. Such effects might include clarifying meaning, softening or sanitizing a previous contribution, changing a topic, emphasizing points of agreement (Candlin, 1994, 80-81).

As framing has been given more attention in ADR literature, it has become a part of both its discourse and theory. Mayer's (2000) recent book is an indication of the increased play given to speech acts in ADR literature. He defines framing as "the way a conflict is described or a proposal is worded; reframing is the process of changing the way a thought is presented so that it maintains its fundamental meaning but is more likely to support resolution efforts" (Mayer 2000, 132). He sets out guidelines to be used by practitioners for effective use of framing:

- It should be used to highlight issues and ideas;
- It should be used in the presentation of important issues where there are both truths and challenges;
- Constructive framing is about clarity and honesty, not about smoothing over difficult issues;
- Framing must be reflective of the essential needs of the parties;
- Framing must be interactive and iterative.

Also described in his work are four types of reframing. Detoxification reframing is meant to express important issues while removing unproductive language - emotion, position taking and accusations are withdrawn. Definitional reframing redefines issues or conflicts to make resolution more integrative; it invites parties to see conflict as a mutual problem to be solved. Metaphoric reframing "...attempts to find a new or altered metaphor for describing a situation or concept, thus changing the way in which it is viewed. Sometimes this means finding a metaphor that all parties can use or translating one party's metaphor into a metaphor recognized by the other party" (Mayer 2000, 134). Narrative reframing considers and changes the story line used in a conflict, altering not only how the conflict is described, but also how people position themselves within that conflict. The number of sub-types of framing is likely to increase as speech acts in ADR are studied and as a better understanding of them is gained.

An important issue to consider in the discussion of framing is how practitioners make use of it in the management of conflict situations. In most cases, practitioners present themselves as neutral third parties whose interests and intentions are not constitutive elements of conflict or its resolution. Framing, however, provides an opportunity for practitioners to act with the intention of affecting outcomes. Through it, they can affect conflict in considered and measured ways but their acts may also have unintended consequences. The practitioner's active involvement in the construction and deconstruction of frames, it would be possible to argue, turns him or her into a participant in the disputes. Active involvement through framing implies that the practitioners are capable of significantly influencing the conflict and can no longer be considered neutral.

Bush and Folger (1994) address the issue of practitioner influence in their theory of transformative mediation. They explain how transformative mediators use reframing,

reinterpreting and translating to facilitate perspective taking and help make disputants more intelligible to one another. Their writing and theory on transformative mediation presents the issue of practitioner influence. A major way for practitioners to influence processes is 'selective facilitation'[18], specifically in integrative resolution, where mediators alter conflict by choosing when and how they intervene, or by pursuing discussion of some issues and not others. They describe the dangers of selective facilitation and explain that practitioners must be aware of and careful about the ways that they behave and speak in conflict situations[19]. To be effective facilitators, they should be respectful of all the parties involved and allow them to choose the direction that the process will take allowing them to create their own solutions.

Moore explains how active listening and reframing allow practitioners to influence communication behavior and structure "for the purpose of clarification and problem definition. [...] The mediator has extensive control over what will or will not be communicated and can frame information exchange so that it is more likely to be accepted" (Moore 1996, 218). Darling (1998) explains that the stating, restating, and refining of positions in dispute situations is done with the intention of achieving resolution.

It is possible for specific frames to recur in the general narratives of disputants. Hale (1998) explores the tragic, euphemistic, debunking and comic frames[20]. She speaks

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18 Selective facilitation appears in Bush and Folger's work on transformative mediation and is attributed to Greatbatch and Dingwall. They explain it in the following passage:
In pursuing discussion of some issues and not others, the mediator selectively facilitates the discussion of only certain options. If one or both of the parties sense that favored treatment is being given to one option, they may protest. However, selective facilitation is often quite subtle. It can easily go unseen or unacknowledged. The mediator can easily be viewed as simply guiding the process – keeping the session moving toward a useful or acceptable solution. Greatbach and Dingwall (1989) suggest that when selective facilitation occurs, it indicates that 'the mediator is working with notions of what kind of settlement would be desirable (a favored outcome) and what kind of settlement would be undesirable (a disfavored outcome) and seeks to guide the interaction accordingly (Bush and Folger 1994, 61).

19 There is no room in this discussion to explore neutrality in communication and ADR; it has been and should continue to be, however, studied by both practitioners and students of ADR.

20 The tragic frame is "a clear and defined frame that brings about tragic results, and this pattern of relating is often seen in parties in mediation."; the euphemistic frame is "an attempt to eliminate conflict by imposing the authority of a higher code order, a natural or supernatural set of assumptions and

to the need for practitioners to address the frames put forth in disputes and direct them towards a constructive end. Most importantly, however, she identifies how frames display that "communication is transactional (what each party does affects the other and creates change in himself), a pattern of relating exercised by one party can quickly become the broader frame for the entire communication context" (Hale 1998, 150).

Restating

One move often considered part of framing, restating, is also described as part of the processes of brainstorming as described in Sloan's (1998) work. Restating problems in different ways allows disputants and practitioners to expand options for resolution further. It will not be further elaborated here, although it should be noted that the appearance of restating in two different major kinds of speech acts as described in the literature illustrates the difficulty of building a single, inclusive theory of language use as it has been discussed.

Formulation/Reformulation

Formulation occurs when mediators "provide an interpretation of what they understand the speaker to be saying" (Phillips 1997, 33). Phillips elaborates this description of formulations:

> Formulations, however, are not neutral restatements or 'reflections' of what was said but represent ideological commitments on the part of the person constructing the formulation. In this sense, formulations can be seen as subtle reformulations (Davis, 1996) (Phillips 1997, 33).

The objective of formulation and reformulation is to allow the practitioner to "introduce their own perspective on the discourse without appearing to depart from a neutral observer position" (Phillips 1997, 35). Phillips explains that a reformulation occurs when, "in our attempts to reflect or paraphrase what someone has said, we alter the meaning associated with the original statement" (Phillips 1997, 14), the goal of which is to construct a mutual understanding. He further proposes that formulating allows the

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requirements."; the debunking frame is "used to reflect the attacking or ridiculing of traditional or valued ideas."; and the comic frame enables disputants to relate their stories in a way that offers hope.

mediator to: "(1) transform disputants' statements, (2) select or ignore disputants' issues, and (3) invite or discourage disputants' contributions to these issues. Formulation apparently plays an important function in the reformulation of dispute narratives" (Phillips 1997, 161).

Paraphrasing

Philips (1997) also describes the use of paraphrasing in ADR, specifically in mediation. The goal of paraphrasing is to ensure understanding between participants in the ADR process. Paraphrasing occurs when a person "reflects the thoughts and feelings contained in the messages of the speaker without judgment" (Phillips 1997, 8).

Rhetoric

In general discussions of language, what is called "rhetoric" is the art of influencing the thought and conduct of an audience through the effective use of language[21]. In ADR, however, it is a specific communicative device whose tactical use can be considered in relation to framing. It is considered in this part of the discussion because of its use in conflict and its resolution. The following description of types of rhetoric is drawn principally from Bailey's (1983) work on the tactical uses of passion. His writing sheds light on how emotion, conveyed through language, is frequently used as a tool by practitioners (and disputants) in dispute situations. As a speech act, rhetoric can build a frame from which to create resolution.

Assertive Rhetoric ensures that only one side of a story gets heard. Assertions include discussions of facts and values. They question the moral boundaries of using authority, fright, focusing on personalities and the usage of vivid examples, rhetorical tricks and figures of speech. Assertions are presented as:

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21 For many people, the word "rhetoric" conjures up images of doubletalk -- political or advertising language used to befuddle and confuse its audience. This common usage of the word causes problems for the serious modern student of rhetoric, because the term can legitimately be defined, as it is in my Random House dictionary, as "the undue use of exaggeration or display... concerned with mere style or effect." However, this is not the only, or even the primary, sense of the word.

> ...peremptory; they assert truths that they present as inescapable, defying argument, so essentially true that they are beyond the need for corroborating evidence (Bailey 1983, 124).

Assertive rhetoric is used differently in the conflict and resolution stages of ADR. It is important to note that this type of utterance allows no dialogue. Its intention is to eliminate all divergent opinions. Assertive rhetoric relies on facts and values to dissuade from argument; part of its task is to "confer on values the status of facts" (Bailey 1983, 133). Assertive Rhetoric can be considered a type of frame. It presents fact, value and opinion as undeniable in an attempt to persuade the hearer of a given point of view; it frames them as "self evident, undeniable [...] beyond doubt, and beyond questioning" (Bailey 1983, 134). Such utterances may begin with such statements as 'I think we can all agree' or 'there is no doubt that'. Unlike the speech act of seeking confirmation, discussed above, assertive rhetoric neither invites discussion nor entertains the possibility of differing opinions.

The rhetoric of compromise, by contrast, more resembles dialogue. It allows participants to try and undo the other's sealed position while simultaneously displaying willingness to compromise. The six ways practitioners can do this, according to Bailey, are: "...the psychological shock; the unspoken invocation of solidarity through play or similar actions; the parading of an authoritarian philosophy as the master value; direct appeal to the value of an open mind; a call to duty; and the suggestion that a deal may be made" (Bailey 1983, 158). The goal of this type of rhetoric is to establish "the general principles by means of which a reasoned discussion can be conducted" (Bailey 1983, 159)[22].

Summarization

Practitioners often use summarization as a means of marking transitions between phases of the resolution process[23] or to establish understanding between parties before

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[22] Bailey's work treats the tactical uses of passion, in particular, rhetoric, as a means of convincing disputants that the course of action suggested is based on shared values and interests. It is a means of introducing passion as an aspect of reasoning in the context of disputes. He describes this as manipulation in the intention of reaching decisions.

new agreements and discussions can be built. Phillips describes how summarizing behaviors "stimulate patterns of supportive communication between disputants, thus facilitating an agreement" (Phillips 1997, 27).

Narrative

Narrative in ADR is both a discursive practice and a mediative style. While most practitioners make a distinction between narrative as a process in conflict resolution and its use as a discursive practice, there is still ambiguity as to what these are and how they work. Narrative is often used as a general term in ADR, but there a few definitions that spell out what it is and how it is used.

Steel (2002) draws on a distinction widespread in narratology to provide a two-level model of narrative as composed of story and discourse. "Story refers to content, discourse to the means by which that content is communicated" (Steel 2002, 59). Acknowledgement of ADR as a specific context in which narratives are constructed is important because narratives in ADR involve both the stories that are recounted and the context in which they are told:

> A first general point about conflict narrative is that it is difficult to sustain the premise that there can be narratives independent of the situations in which they are told. The content and conduct of conflict narratives are linked through the circumstances of a particular telling, and through that they are further intertwined with a particular web of a narrator, audience, purposes and expectations. Motives are usually patent rather than covert and audiences clearly partisan (Brenneis, 280).

Brenneis explains that the functions of narrative in conflict are manifold: "...stories are not always intended to provide clarity; they may also be instruments for 'obscuring, hedging [...] of narrated events open to question' (Bauman 1986: 5-6)" (Brenneis, 281). Stories are constructed to shape the "future course of the conflict and the broader contours of social life" (*Ibid*, 285). More specifically, narrative helps "define, clarify, and comprehend troubled relationships and troubling events" (*Ibid*, 287). Further, he

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[23] Moore, for example, described 12 phases of the mediation process: establishing relationship with the disputing parties, selecting a strategy to guide mediation, collecting and analyzing background information, designing a detailed plan for mediation, building trust and cooperation, beginning the mediation session, defining issues and setting an agenda, uncovering hidden interests of the disputing parties, generating options for settlement, assessing options for settlement, final bargaining and achieving formal settlement.

describes the four ways in which the narration of conflict changes social realities: it constitutes knowledge; it creates a legitimate narrative that is owned by its author; it clearly frames interaction, engenders manifestation of conflict, and constitutes social relationships; and it "catalyze[s] personal experience" (Brenneis, 287).

Winslade and Monk (2000) describe characteristics of narrative in ADR that relate its function to framing. Stories and narratives are excellent opportunities, claim a number of practitioners, to set a frame for conflict and create the perspective on reality from which it will be discussed:

> In my view, we began with a narrative that already contains a beginning and an ending, which frame and hence enable us to interpret the present. It is not that we initially have a body of data, the facts, and we then must construct a story or theory to account for them. Instead... the narrative structures we construct are not secondary narratives about data but primary narratives that establish what is to count as data. ...[T] hey define what constitute data of those accounts (White and Epston 1990, 28).

Narrative provides as much of an opportunity for disputants, as it does for practitioners, to influence the outcome by affecting the language of the dispute. Disputants can manipulate their own narratives to create a position to which practitioners and other disputants may be sympathetic. Narrative enables individuals to edit their experiences to fit circumstances and contexts. Winslade and Monk depict narrative as indeterminate and ambiguous. Because of that, practitioners dealing in narrative can easily construct and shape language to direct disputes towards resolution. Practitioners can also recreate parties' own stories through questioning or invite them to recreate their stories to meet the objectives of the resolution process.

> Winslade and Monk (2000) characterize the narratives of conflict situations: In mediation, we might expect to hear two conflicting narratives being played out, each with its own characterizations and thematic elements, in each of the narratives, we might expect slightly different arrangements of plot elements that have been selected for inclusion. Each selection would be made on the basis of narrative plausibility or coherence. Moreover, each arrangement of plot elements would draw forth different characterizations and construct a different account of the events of the dispute. [...] It follows, then, that the success of a mediation might depend not so much on the extent to which a mediator can separate the story of the dispute from the realities or facts, but on the extent to which the mediator can work with the parties to create an alternative story (Winslade and Monk 2000, 44).

They lay such emphasis on narrative because for them, it is a central function of language in the fundamental reality that it is a means through which meaning is constructed through ongoing, interactive processes. They question whether a mediator can ever separate stories of a dispute from its "realities" or "facts" because they share the perspective on language taken in this study. It does not so much report a prior set of meanings as actively engage speakers in their construction:

> Words are not simply vehicles (or neutral tools) we use to represent an event or reality. As Wittgenstein argued, words construct the event. From this viewpoint, language has meaning in its use rather than in its correspondence with events in the world. [...] If language can be understood as a meaning-making activity rather than a passive reporting function, meaning cannot be chosen arbitrarily. Language is then seen as having the function of permitting or constraining the options that might be available to us (Winslade and Monk 2000, 39).

While this general perspective is extremely valuable, Winslade and Monk can be criticized for not considering the practical applications of narrative and the ways in which ADR disputants and practitioners make use of it.

Mayer (2000) discusses narrative as a means of reframing. He claims that the 'story line' held by parties approaching conflict proposes a setting, describes an action and characterizes participants. By using those elements of disputants' narrative frame, it is possible to change how they experience conflict, and in so doing, whether they are willing to resolve it. Narrative becomes part of a process that allows disputants to tell their stories to each other in a powerful manner while working to create a new, shared story that incorporates the main elements from each party's narrative. Its use in ADR exemplifies Whorf's (1956) notion that the conceptualization of a given conflict will vary according to individual language because language is an intellectual tool that reflects subjective experience. Mutual intelligibility or unintelligibility is created by disputants' individual stories – subjective dialects may divide them, thus restraining resolution.

For Fisher and Ury (1981), narrative is only one step of the resolution process. It is not used, as it is in transformative mediation, as the primary means of creating solutions. Narrative in integrative resolution is a way of helping disputants to work through emotions and issues that, while not necessarily a part of the problem to be

resolved, can impede the resolution process. "People obtain psychological release through the simple process of recounting their grievances. [...] Letting off steam may make it easier to talk rationally later" (Fisher and Ury 1981, 34). The participants' narrative is ultimately a source of information and emotional and psychological release. From this perspective, narrative cannot directly change the course of conflict.

White and Epston (1990) discuss some of the other limitations of narrative. They explain that the recounting of experience through language comes at a cost because certain parts of it are discarded in order to create emphasis and meaning from the perspective of the person telling the story. Narrative is not a source of truth or accurate facts that can be used by any practitioner because it is biased in nature. The subjectivity of narrative should never be forgotten: "As this storying of experience is dependent upon language, in accepting this premise, we are also proposing that we ascribe meaning to our experience and constitute our lives and relationships through language. When engaging in language, we are not engaging in a neutral activity" (White and Epston 1990, 27).

According to White and Epston (1990), the therapeutic practitioner's role in relation to narrative is clear because of the explicit relationship between power and language. Through the storying process, therapeutic practitioners have the power to create narrative. Epston and White explain that through their own language use, therapeutic practitioners may encourage disputants to create stories that lend themselves to resolution. In the case of ADR, acceptable narratives are generally those that present the most opportunities for resolution. Through discourse, the dimension of narrative as a story communicated in specific language in a specific context, new languages may be constructed to bridge the discord between individuals or between professional fields. Shared discourse is what ultimately creates a shared universe for disputants to engage each other in, enabling them to engage in effective communication.

Exploring Wittgenstein's description of the way that words construct events, Winslade and Monk say "we might hear people's stories of conflict as rhetoric, or as constructions in language that shape their experience" (Winslade and Monk 2000, 39). The way that people speak about conflict will transform it. Fruggeri describes mediators who use narrative as concerned with "co-constructing a context in which a change in the set of alternatives from which choice is made becomes possible" (Fruggeri 1992, 14).

The importance of constructing narratives is that it draws attention to specific elements of conflict and gives direction to discussions. While it is a communicative tool used in ADR, narrative has also come to characterize a whole style of mediation based on the storying process of disputants.

As a style of resolution, narrative mediation has become of great interest within ADR[24]. Much of its success hinges on the discursive practice that is at its foundation: narration. The basic premise of most narrative practices in ADR is that conflict can be effectively resolved by transforming the stories that people use to describe their conflicts and how they situate themselves within those stories. Practitioners and disputants both use narratives. The stories that are created in narrative mediation can be equated to the frames used in interest-based ADR and transformative mediation.

Many of the features of ADR language discussed in this chapter, restating, framing, questioning, listing, and other speech acts and communicative devices are used both to influence narratives of conflict told in ADR and to build the narratives upon which resolution of conflict can be founded. For example, Cobb and Rifkin explain how "mediators facilitate story construction by asking questions that invite stories, sequence events in an intelligible order, and establish various character roles" (Cobb 1991, 86).

Questioning

While narrative allows disputants to present realities and truths, there is need in ADR to explore those stories further and create a shared understanding of what is at the core of conflict and dispute. Winslade and Monk (2000) describe stories and narratives as central to the process of mediation, in particular, but propose "deconstructive questioning" as a means of exploring the narratives put forth by disputants.

> If mediation is about creating new meaning in a dispute where existing meanings have become stale or stuck, then deconstructive listening and

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[24] The underlying assumption of narrative mediation (as a process, not a discursive practice) is that conflict results from the frustration of human need or interest. Because people's needs are constructed in conversation (at least from a social constructionist perspective), and conversation can potentially lead to the revision of needs, practitioners of ADR can resolve conflict through the use of language and communication. This is part of discussion about language as a form of social action. In such a context, it is essential to consider context because "what might be experienced keenly as a need in one context or in one formulation of an issue might change dramatically when considered in the light of a different conversation." (*Idem*)

> deconstructive questioning are useful tools in this creative task. A useful image is to think of a conflict story being told by the parties in a mediation as a suitcase into which have been thrown a collection of meanings. These are the meanings that the parties have made of the events that have transpired between them. These meanings are constructed out of the discourses to which the parties are subjected in the world around them. The mediator's task is to unpack the suitcase and take out the pieces and hold them up for view by the parties. This unpacking involves adopting a naïve posture and asking questions, not so much about the obvious and ordinary aspects of the baggage that comes with the dispute (Winslade and Monk 2000, 39).

They claim that, as they define it, deconstructive questioning is less confrontational or adversarial than other means of questioning truth. Opening discourse in a dispute situation creates opportunities to act upon and build new ones that are more conducive to peaceful resolution.

Questions are a part of the ADR process as it is understood by all who have studied it. Questioning is most often treated in the ADR literature where interventions are discussed. In a first instance, they can be used to dictate or manage the content of dispute situations. Questions seek confirmation or acceptance of the suggestions that practitioners proffer; they reframe and manage communication between participants (Candlin 1994). Sloan (1998) also presents interrogation as a means of managing the process of dispute resolution. He explains that questioning is a general communicative skill used in ADR to advance the resolution process. While it is generally acknowledged that practitioners have an impact on conflict and resolution in the questions they pose, a general claim to neutrality is still made. As has been mentioned in the discussion of framing, most practitioners and theorists ignore the issue of neutrality in exploring speech acts used by practitioners. Bush (1994), however, is quite candid about practitioners' use of questioning and how it can alter the course of conflict. He describes questioning as a means of selective facilitation. Directive questioning, he claims, is used to shape arguments, mold narratives and justify opposition. Practitioners, to achieve desired outcomes, use questioning of both the content and the process of mediation.

Fisher and Ury (1981) include questioning in their account of discursive practices used for integrative alternative dispute resolution and describe different objectives with which ADR practitioners use it. They characterize questioning as an expansive means of exploring the elements of conflict; it is an open way of talking to disputants. Questions

can help identify interests. They serve as an acknowledgement of opposing parties' perspectives. Questioning can create understanding and build solutions because it allows practitioners to make suggestions that are non-binding[25]. Most importantly, questioning does not generate as much resistance as other communicative practices. Open questions can be used to find out what motivations underlie disputants actions.

Winslade and Monk further illustrate the use of questioning in their description of interviews between participants to an ADR process. They explain that practitioners use questions either to collect relevant information from them, or to persuade them of the benefits of resolution. Questions can also be used to build rapport, to help identify information that needs to be exchanged; to "clarify misperceptions, [to] fill in data gaps, and [to] help parties reach agreement" (Winslade and Monk 2000, 124) and to allow exchanges of information about the process. Winslade and Monk go on to describe other strategies that mediators use to elicit information:

- Explaining the importance and worth of the data to the mediation process so that the disputant feels that he or she can make a genuine contribution toward a positive change.
- Stressing the need to hear all views, especially those of the interviewee.
- Explaining the benefits of participation.
- Answering questions that may decrease resistance to participation.
- Demonstrating a positive personal interest in the disputants' concerns, problems, or viewpoints (Winslade and Monk 2000, 123).

They present interviews as ideal opportunities for data collection[26]. They explore the processes and critical issues that arise in the development of interview processes and the dynamics of interviewing in dispute contexts. Most importantly, Winslade and Monk (2000) provide insight into the types of questions and responses used in mediation. The

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[25] This can often be an issue in negotiation: participants are unwilling to explore new ideas because they are concerned with commitment and implicit agreement.

[26] Winslade and Monk add that while there are many advantages to interviews in ADR, such as focus on issues deemed important by the mediator, ability to filter information and to gain the most information in the shortest amount of time, there are some major drawbacks. Interviews can bias the information because interviewees may provide information that he or she thinks the interviewer wants, the mediator may miss valuable information if the right questions are not asked, and "the mediator's conception of the conflict, rather than the participants, may become the dominant framework for defining the dispute" (Winslade and Monk 2000, 132).

following table is reproduced from their *Narrative Mediation: A New Approach to Conflict Resolution.*

Table 2. From Winslade & Monk 2000, 128-9, Table: 5.1. Types of Questions or Responses.

Type of Response	Definition	Example
Elaboration Question	A request for more information related to something respondent has already said.	A. We are interested in co-parenting but don't know what it entails Q. Can you say more about what concerns you?
Active Listening	An exact statement or paraphrase of what the respondent has said. The restatement often focuses on the emotional content of a message and is more of a response than a question.	A. I'm very upset about the condition of the road and what they did to it. A. You are very angry that they damaged your property.
Direct Clarification Question	A direct request for information to clarify vague or ambiguous information.	A. We do not want multiple-family homes in our neighborhood. It spoils our single-family-home lifestyle. Q. It is the idea of multiple-family homes that bothers you or the number of people or units in each one that is important?
Inferred Clarification Question	Clarification of information that was implicit in previous response.	A. The meeting was held over at the Federal Building. Q. At Frank Williams's office?
Summary Question	A question that summarizes previously stated information and requests that the respondent verify the data.	A. We purchased the property as a cooperative venture, wrote an agreement that required an equal input of money, and they subsequently violated it by not making agreed payments. Q. You purchased property, made a financial agreement, and then the partners failed to follow through?

Confrontation	A question that points out a discrepancy in data presented by the respondent. (This should be used with care because it can create resistance from the interviewee.)	A. I want to have Smith pay for the cost of replacing my windshield and all the trouble he has cause me. That amounts to $250. Q. You say you want to have him pay $250 in damages, yet you stated earlier that your brother handled the installation and that the glass cost only $100. What exactly were your time and energy expenditures on this problem?
Repetition Question	An exact restatement of a previous question.	Q. How much will impact mitigation cost to restore the land to its previous state? A. Oh, I'm not sure with the price of water, seed Q. How much will impact mitigation cost to restore the land to its previous state?

They further describe the use of closed questions as a means of narrowing the focus of discussions and gaining specific information. Open questions, on the other hand are used to overcome distrust and guardedness (Winslade and Monk 2000, 130)[27].

Colosi also explains the use of questions in ADR:

> The use of questions rather than statements gives mediators more room to respond and [gives parties] more freedom to consider what the mediator is saying. It also allows the mediator to play a more neutral, laissez-faire role as declarations tend to be more leading and value-loaded than questions. [...] This sort of probing, thorough questioning almost always leads to the creation of doubts (Colosi 1987, 94).

The creation of doubt is important because it can motivate disputants to consider all possibilities. Moore also includes the creation of doubt as a means of influencing

[27] Open questions allow respondents to answer in any way they chose. Closed questions generally require a specific format and limit the possibility of adding any other information than what was requested.

communication in disputes: "By raising questions about potential outcomes that the party may not like the mediator can often moderate a party's position and incline him or her toward mutually acceptable settlement possibilities" (Moore 1996, 179). Moore further states:

> Through careful questioning that may vary in degree of directiveness, the mediator may begin to create doubt in a party's mind about the feasibility of his or her adherence to an option. If misused, this technique obviously approaches manipulation and raises questions about the ethics of mediator influence (Moore 1996, 57).

Darling (1998) describes the importance of questioning as a means of exerting influence. Philips (1997) takes the view that the kind of questions asked (open, closed, leading, neutral...) will influence the answers they elicit. According to him, questions evoke stories and influence the way discussions unfold. Practitioners affect conflict by asking thought-provoking questions and providing needed information. Bush and Folger (1994) express a different view. They explain that practitioners' may question to gather information or help disputants consider issues more fully, but they contend that questions should not direct the discussion toward a specific outcome. They should instead reinforce the need for disputants to create their own solutions. Speech Act Theory helps us to compare these accounts of questioning. For Philips (1997), questions strive directly for perlocutionary effects, ones the practitioner has in mind in the illocutionary act of questioning. Bush and Folger, by contrast, consider that questions function as indirect speech acts, encouraging participants to courses of action that the practitioner may have in mind, but which he or she wishes the participants to arrive at through their own creative thinking about the situation. As indirect speech acts, questions allow participants to save face, to alter their stance or to adopt a new course of action without seeming to do so at the practitioner's behest.

Hypotheticals

Colosi describes alternative proposals and hypotheticals as means of penetrating disputants' defenses and creating dialogue. He distinguishes their use at different stages of negotiation:

> In the early stages, the mediator may properly interpret a negotiator's reluctance to discuss hypotheticals as revealing some lack of trust or even a lack of interest in settlement. It may take time before the parties are ready to disclose their true priorities to the mediator. If this reticence persists as even the final deadline approaches, however, the mediator may well be justified in doubting the negotiators' willingness to accept any settlement (Colosi 1987, 93).

Moore (1996) describes how practitioners use hypotheticals in controlling information exchanges between parties. He works from Fisher's 'asking ladder' to depict "the ways in which information is given or received in terms of the initiator's degree of directiveness. The ladder ranges from requests for information to general suggestions, specific suggestions, concrete proposals, and demands" (Fisher and Ury 1981, 141).

In another use of the hypothetical, described by Menkel-Meadow: "parties negotiate a hypothetical (rather than a real) issue in their dispute to reveal negotiation patterns and to shake them out of polarized positions on more expected issues" (Menkel-Meadow 1995, 223).

Tidwell explores use of language at many different levels of conflict and its resolution, one of which is propaganda. Practitioners can present creative ideas for resolution through the use of the hypothetical in the form of propaganda. As a communicative tool, propaganda allows the "propagation or creation of an idea or opinion where none existed before" (Tidwell 1998, 100). Propaganda in conflict situations can be used to empower a group and help reach resolution, or to further marginalize parties that are in disagreement with the proposed ideas. Propaganda is a means of persuasion.

Listing/brainstorming

Listing and brainstorming are important because they encourage disputants to consider a wide range of possible solutions as potentially acceptable. There are several ways that practitioners can list elements of conflict, solutions and possibilities for resolution. These techniques have helpfully been discussed by Sloan (1998) and Darling (1998). Sloan describes listing and brainstorming as a means of generating solutions. They help the parties to be more creative in building outcomes. As he defines it, "'Brainstorming' involves creative thinking and broadening one's perspective to look at

situations from different points of view" (Sloan 1998, 92). Listing can be used in the same way to help conclude agreements; it can help cement agreements by making sure they are clear, comprehensible, and enforceable. For Darling, brainstorming is a means of creating innovative solutions and emphasizing the need for participants to distinguish innovation from decision. Furthermore, he suggests that listing is a means of exploring possible solutions and guaranteeing that they will stand the test of working in the real world (Darling 1998, 53). In these discussions of brainstorming and listing, Sloan (1998) and Darling (1998) are carrying through suggestions made by Fisher and Ury (1981), who include listing in their discussion of discursive practices used by practitioners. As they characterize it, listing can be a way of stimulating ideas and generating likely means of resolving issues.

Neutral Goal Statement

One of the important utterance types that carry out the activity of brainstorming or of listing is the neutral goal statement. Neutral goal statements are designed to transform the ADR process into an exploration of interests. They are specific to interest-based negotiation (Fisher and Ury 1981; Darling 1998; Sloan 1998): they organize parties' interests and propose that parties enter into the creation of solutions. Sloan explains how practitioners can construct neutral goal statements:

> 1 Describe the interests the parties have in common.
> 2 Describe the interests of party A that are not shared by party B.
> 3. Describe the interests of party B that party A does not share.
> 4 Ask the question 'how' as a transition into the solution stage (Sloan 1998, 91).

This process allows the creation of a list of goals that must be met for agreement to be reached.

Other elements of communication in ADR

In this section, I will review some aspects of communication in ADR that are less developed. As Johnson notes, communication in ADR is not always fully explored: "...nonverbal communication involved in a person's appearance, gestures, facial cues, tone of voice, and so on, have most often been ignored" (Johnson 1974, 65). He includes

in nonverbal communication messages that express "feelings, likings and preferences in ways which contradict or reinforce verbal messages" (*Ibid*, 74) Mostly, nonverbal means of communication have been disregarded in the literature because they do not fit the conventional understanding of communication.

Fisher and Ury also point out practices that can be difficult to include as discursive practices: tone and silence. "Silence often creates the impression of a stalemate which the other side will feel impelled to break by answering your question or coming up with a new suggestion" (Fisher and Ury 1981, 112). Practitioners may use silence to motivate disputants to continue discussion and motivate them to find a solution. Fisher and Ury also put tone forth as a tool used to emphasize a point, to create a new frame, or to raise questions. They cite the good-guy/bad-guy routine and differences between threats and warnings as plays on tone (Fisher and Ury 1981, 136). Mayer (2000) also presents tone as a means of conveying intention and meaning in the context of ADR. Further to this, Fisher and Ury explain how people who have different communicative styles may impact how practitioners use language in conflict (Fisher and Ury 1981, 166). Notable elements of style are: pacing, formality, physical proximity, and bluntness of communication, time frame, public or private, rigidity.

There are other theorists who discuss these elements of style as significant to the resolution of conflicts. Bisasso (1984), for example, includes tone, choice of words, sentence structure, gestures, and postures in his description of unintentional transfer of information in communicative behavior. He explains that non-verbal communication influences attempts to dissolve disagreements and cannot be ignored in the overall discussion of communication in conflict situations. Bisasso says that even though they do not transmit information, non-verbal elements of communication are important because communication used to dissolve disagreement is more about the maintenance of relationships than it is about the transmission of information.

Taylor and Cameron (1987) list conversational features such as turn taking and adjacency pairs as communicative structures in social situations. Turn-taking systems assign turns to participants engaging in conversations. Adjacency pairs are "utterances, the parts of which are regularly produced one after the other, although by different speakers" (Taylor and Cameron 1987, 108). Adjacency pair types include invitation-

acceptance/refusal, assessment-agreement/disagreement, accusation-denial/admission, summons-answer, and request-acceptance/refusal. Bush and Folger (1994) include adjacency pairs in practitioners' awareness of parties' contribution and maintenance of a responsive posture in transformative mediation (Bush and Folger 1994, 192). Wunderlich (1980, 309) describes adjacency pairs and turn taking as a means of initiating and sustaining conversation/communication between disputants. Steel says of turn taking in the creation of narrative: "The disputant who is given the second turn does not simply tell his/her own story, but rather tries to link the story to the previous one" (Steel 2002, 64).

Steel (2002, 61) illustrates through case studies various linguistic features that make significant contributions to resolution processes. She includes in her discussion the use of indirect speech, direct quotations, volume and pitch, verb tense, time adverbs, time adverbials, and person. These are all language cues, she says, that allow the listener to interpret events or experience them vicariously. She describes the effect that each can be used to achieve; for example, they can be used to emphasize critical actions or evoke sympathy.

Problems in the study of language in ADR

Different elements of language in ADR discussed in the literature have been reviewed here. It is essential, however, to acknowledge the limitations of the study of language and Speech Act Theory. Specifically, any classification of discursive practices is difficult at best.

Wunderlich's (1980, 301-304) work on Speech Act Theory and pragmatics identifies five problems that arise in the study of discourse: demarcation, identification, classification, specification, and (de)composition. They are especially relevant to finding themes or patterns in the language of ADR, as has been done throughout this literature review, or in creating a taxonomy of speech acts in it, as is proposed in this study.

- The demarcation problem is the difficulty of delimiting individual speech acts from the continuous flow of speech.
- The identification problem involves the determination of criteria used to distinguish speech acts from one another. Identification is already an issue in ADR as theorists

and practitioners create discursive practices and apply them without any concern for uniformity across the discipline.

- The classification problem addresses how classificatory schemes are established for different types of speech acts, and defining their distinctive criteria. As the discursive practices continue to develop in ADR and become the object of study, it will be important to establish a clear classificatory scheme so that theories being put forth are applicable across the field by all practitioners and theorists.
- The specification problem involves determining criteria for subtypes. The problem of specification is already arising in ADR as theorists create subtypes for speech acts such as framing.
- The (de)composition problem asks how simple and complex speech acts can be constructed, how can complex units be distinguished and what are the characteristic composition structures. This problem is especially relevant in ADR where conversational structures are the predominant source for speech act data and dialogue is broken apart to analyze what is used therein.

Wunderlich also states that

> ...Pragmatics deals with the interpretation of sentences (or utterances) in a richer context, which includes the understanding of the preceding discourse, the beliefs and expectations which speakers and hearers have, their social relationship, their state of obligations, their state of knowledge etc. [...] with the conclusions a hearer draws from an utterance and with the consequential reactions of the hearer, independently of whether the speaker intends to induce these conclusions and consequences or not (Wunderlich 1980, 304).

His work serves as a reminder that, regardless of the specific uses of speech acts and their classification, there is a need to understand the larger contexts in which they are being used and the variables that affect their classification. In ADR especially, the reactions of the hearer (disputant), regardless of the intentions of the speaker (practitioner), are essential for understanding how speech acts are used and applied.

A more general problem of communication in ADR, however, was raised by Burton in his work on argumentative discussions. He explains that part of the problem of attempting to analyze language in conflict situations is that:

> ...[W]e assume the discussants to be ordinary language users in ordinary circumstances, acting of their own volition and seriously, saying what they

> mean and regarding themselves as committed to what they say, understanding what is said and basing their judgment on it, permitted to adopt any point of view that they may wish to adopt, and to advance any information that they may consider relevant, saying nothing that they do not consider relevant, permitted to attack any statement they consider worth criticizing, and prepared to defend any statement of their own that may be criticized by other discussants (Burton 1980, 152).

In the context of conflict and dispute, these assumptions limit the development of constructive discourse; to fully develop the language of ADR, it will be necessary to acknowledge that in ADR language is used deliberately and intentionally. Practitioners and disputants use language in specific ways in order to achieve desired outcomes, language use cannot always be taken at face value. ADR practitioners and the disputants they engage in the process must overcome any barriers to constructive use of language.

One of the more interesting challenges in the study of language in ADR is possible ethical issues that could be raised with the potential to influence people in their attempts at communicating to dissolve conflict. Bisasso states:

> Some of the most important moral problems arising from the essence of dissolving disagreements are connected to the question of the legitimacy of employing certain techniques in attempts to influence the will of another person into accepting and/or adopting particular views of positions which we would like him to, or which we believe to be the right or better one, to hold. We may wonder, for example, whether all ways in which one could 'persuade' another person to accept a particular view are, humanly speaking, legitimate and why? Or in which circumstances are particular techniques not legitimate and why (Bisasso 1984, 219)?

There is considerable difficulty in ensuring ethical use of language in conflict. Bisasso's (1994) comments highlight the lack of universal principles according to which devices for influencing disputants can be chosen, the difficulty of controlling the impact of the devices that are used, and the challenges of assessing and using communicative devices in any conflict situation.

Bisasso argues that the limitations of communication in dissolving disagreement center on moral and practical communication problems. Practical communication problems include the "lack of sure guiding principles on which to base choice of suitable communication devices; appropriate convincive or persuasive utterances (arguments) that will move the will of the communicative partner in the desired direction" and the

"limited power of convincive and persuasive communication devices for moving the will of a person in the direction that we might wish to" (Bisasso 1984, 213). The moral implications of practitioner communication in ADR raise interesting questions that will not be further pursued here. What needs to be remembered is the simple and profound principle central to all of them already quoted: "When engaging in language, we are not engaging in a neutral activity" (Epston and White 1990, 27).

Conclusion

The discussion in this chapter has explored a number of major themes and specific speech acts employed in the literature of language and communication in ADR. Language fulfills several functions in the analysis and resolution of conflict. The major speech acts highlighted in the literature and reviewed here are framing, narrative, questioning, hypotheticals, listing/brainstorming (along with some of their subtypes) and other significant aspects of communication that are not always included in the conventional understanding of language. In the next chapter, a taxonomy that specifies names, definitions and functions will be proposed for the speech acts discussed in this review.

CHAPTER FOUR - ALTERNATIVE DISPUTE RESOLUTION AS ACTION THROUGH SPEECH

This chapter explores the extent to which practitioners' (and, to a lesser extent, involved parties') uses of language in ADR can be classified with the help of Speech Act Theory. The objective of this chapter is to construct an initial taxonomy of the most common discursive practices of ADR as reported in a selection of ADR literature. The goal of studying discursive practices in ADR and interpreting them through Speech Act Theory is to understand how practitioners use language to manage conflict and create peace. Critical reflection on current practices may help practitioners to interact more effectively with parties and to ponder the ethical questions on their own role that arise from such reflection. This chapter classifies the speech acts commonly used in ADR according to the stages in the process at which they are especially important, defining them appropriately and identifying some of their central functions. Speech acts will be associated with the stage of the process they advance instead of being simply classified in a straightforward taxonomy because, as the literature was studied, speech acts identified themselves as acting firstly to the advancement of ADR processes, and secondly to effect a specific action within it. Since this study is a basic analysis of speech acts in ADR, I considered it more important to highlight this first function.

The Limitations of Taxonomies

Taxonomies cannot give exhaustive or definitive accounts of data from given fields. They build general categories proposing types and limit detail, elaboration and exception by creating subtypes. The proposed taxonomy is meant to serve as a starting point for further discussion of language in conflict resolution. It provides general categories of discourse processes and of the speech acts that achieve them. It does not explore instances of ADR practitioners' language in any great detail, describe it elaborately or explain exceptions to the descriptions it offers. The taxonomy does aim to provide a general framework for describing language use in ADR and suggests a starting point for further exploration of communicative behavior in ADR. There is at present no

general/shared theoretical understanding of language use in ADR and this taxonomy should orient the reader to some of the most important ideas in the literature and suggest directions for further research. The intent of this taxonomy is to provide a frame of reference. It should also invite further reflection on the ideas in the literature and on the ethical questions that arise regarding practitioners' manipulation of disputants in their attempts to achieve resolution.

The Limitations of a Taxonomy of Speech Acts in ADR

This study takes seriously Bush and Folger's warning that "Mediation is pluralistic and, in essence, no one taxonomy can fully capture the varieties of visions and practices that inform it" (Quoted in Menkel-Meadow 1995, 227). This statement applies to ADR as a whole, and to the language used in it. This chapter presents a taxonomy of speech acts, compiled from descriptions of language use in selected ADR literature. Before presenting the taxonomy, however, it is important to reflect further on the limitations of any taxonomy of speech acts in any field. Taylor (1987, 62) has very helpfully pointed out the difficulties of classifying illocutionary acts, the variety of speech act most common in the language of ADR practitioners.

> An illocutionary act is at bottom a *convention* whereby certain intentions of the speaker can be signaled.... There is a surface sequence of utterances: but on a deeper level there is 'what is really going on', and this entails that conversationalists share a knowledge of the acts which it is possible to perform, as well as the conventions by which they are performed (Taylor 1987, 62).

In our analysis we have expressed serious doubts about this picture of communication. The work of Kreckel (1981) has been cited as:

> [E]vidence for skepticism on the issue of whether everyone agrees on the existence of a specific set of illocutionary acts, and specific conventions for performing/interpreting them; we have also noted the difficulties that exist in actually formulating either a set of categories which are exhaustive, insightful and empirically satisfactory, or criteria for identifying tokens of such categories reliably (Taylor 1987, 62).

As Taylor also says, classification generally depends on rules evolved and sustained in concrete interaction in social groups (*idem*). In this instance, the creation of a complete taxonomy of discourse processes in ADR may be premature, since principles for

classification have not been discussed in the ADR literature. It is for this reason that Speech Act Theory is used as the foundation for the classification. While Speech Act Theory categorizes speech acts according to their functions, it is not possible to classify all of the kinds of utterances recognized in the selected ADR literature because speech acts may fulfill different functions. Acts recognized by practitioners are categorized here according to the stage in which practitioners apply them and the general uses to which they are put, but accounting for all of the specific functions for which they are used is beyond the scope of this study.

Another challenge to creating a taxonomy of speech acts in ADR is that, to be accurately identified, speech acts would need to be analyzed twice: once to verify their intention, a second time to see their effect (Taylor 1987, 58). The content of the selected literature allows only the intentions of practitioners to be explored; literature examining the effect of practitioners' language on disputants was not considered. It is in any case more difficult, as has been said, to specify perlocutionary effects than to construe illocutionary acts, and so the limitations of this study of ADR literature have been adopted with respect to the limits of Speech Act Theory.

Practitioner and ADR style are significant determinants of language use in ADR that make classification of discourse processes according to speech act function difficult. It is beyond the scope of this study to account fully for style in the classificatory scheme. To effectively analyze communication in ADR, it would be necessary to consider how different styles of mediation differ in the use of language, to characterize the range and sequencing of speech acts typical of transformative, narrative and interest-based mediation. This taxonomy will account for some of the differences in the use of speech acts attributable to style of mediation, it does not attempt to classify speech act use according to style but instead, recognizing that many speech acts are used in more than one style. This work presents a general outline of speech acts in ADR. The taxonomy will categorize them according to the stage in the process of ADR at which they are most likely to occur and to what general end they are used.

Discursive practices in ADR: A taxonomy of speech acts as reported in selected ADR literature

The following table lists speech acts identified in ADR literature, defining them and identifying their use in ADR. Types of utterance identified as speech acts are grouped according to their relation to three broad steps of the ADR process: the exposition of background that establishes shared perspectives and points of departure in the meditative situation; productive reflection on the conflict; and the creation of ideas for resolution. It is worth remembering that all of the processes classified here are instances of discourse, language as it is created and deployed in a specific context for a specific purpose. Winslade and Monk's (2000) account of discourse in their work on narrative mediation is especially pertinent: As they put it, "[d]iscourse is both the process of talk and interaction between people. Talk tends to happen in recursive patterns within particular locales, and we can therefore speak about these patterns as discourses" (Winslade and Monk 2000, 39). The goal of all discourse in ADR is to establish a shared language and system of meanings created from experiences shared in mediation. All speech acts in ADR aim to create a common language for disputants and practitioners to use in the specific context of dispute resolution.

The use of speech acts in ADR is difficult to classify because of the variety of functions that they can be used to achieve. Each utterance type, depending on the participants, the specific elements of the conflict, the context, the style of ADR, the practitioners characteristics, can be used differently and to a different end. Because of this, the speech acts are grouped in the taxonomy not according to function, but according to the general stage in the resolution process in which they are used. Within those stages, it is found that most of the speech acts used will be put to a definite end: expository, interrogative, or creative. The speech acts illustrate the means used to achieve those ends and provide a way of thinking about language use by practitioners in ADR.

Table 3. Use of utterances and speech acts by practitioners of ADR according to stage in the resolution process

Stage in the Process	Utterance Type/Speech Act	Definition	Function
Expository: Provides information needed to understand the context of discussions and the situation having led to it.	Discourse	A language that is created and used in a specific context for a specific use. A shared language and system of meaning created from shared experiences.	Creates a common language for disputants and practitioners to use in the specific context of dispute resolution.
	Narrative	Narrative is the story and language used to describe it, which is told within a specific context and from a specific perspective.	Define, clarify and help understand conflict, relationships, and troubling events. Obscure narrated events. Change social realities. Frame interaction, engender manifestation of conflict and constitute social relationships. Create a setting from which conflict can be discussed. Manipulate language and shape it towards resolution. Draw forth characterizations of conflict and construct different accounts of events. Create solutions. Inform. Create emphasis and meaning.

	Framing **Sub-types:** *restating, formulation, reformulation, paraphrasing, rhetoric, summarization, active listening, structuring, separating and fracturing, generalization*	A definition of framing that is reflective of the way framing is used in ADR is "the way a conflict is described or a proposal is worded; reframing is the process of changing the way a thought is presented so that it maintains its fundamental meaning but is more likely to support resolution efforts." (Mayer 2000) Framing is used both by disputants and by practitioners	Create a discussion that is conducive to dialogue and resolution. Give disputants' perspectives. Builds a shared framework for communication. Create a story in which all parties to a dispute have a role. Summarize. Translate. Reinterpret. Clarification. Define goals and agendas. Influence the perception of conflict and resolution. Seek confirmation of disputants' contributions. Highlight issues and ideas. Present principal elements of conflict. Selective facilitation. Set direction of conflict and resolution. Influence communicative behavior.

Reflective/Interrogative: Utterance used by participants to communicate or share information about the situation.	Questioning	An expression or communication that proposes, invites discussion, consideration, or reply.	Explore stories. Create understanding. Clarify misperceptions. Construct and deconstruct meaning. Open discourse. Dictate and manage the content of disputes. Seek confirmation or acceptance of practitioners' suggestions. Reframe communication between disputants. Selective facilitation. Shape arguments. Mold narratives. Identify interests. Make suggestions. Collect information. Persuade. Build rapports. Summarize. Confront. Narrow the focus of discussions. Overcome mistrust and guardedness. Create doubt. Exert influence. Build stories.

	Hypotheticals	Communication that proposes possible or supposed behavior, invites reply to proposed hypothesis.	Penetrating defenses. Creating dialogue. Control information exchanges. Request information. Make suggestions. Make proposals. Make demands. Change polarized positions. Propaganda. Create ideas and opinions. Empower. Marginalize. Persuade.
Creative: utterances used to create discussion and generate ideas	Listing/Brainstorming Sub-types: Neutral goal statements, Ordering, Grouping.	Process used to generate ideas and motivate thought on issues being discussed.	Encourage disputants to consider a range of possible options. Create perspective. Conclude agreements. Create innovative solutions. Explore possible solutions. Stimulate ideas. Generate means of resolving issues. Explore interests.

Speech Acts and Utterance Types used by ADR Practitioners as Presented in the Literature: Some Comments on the Taxonomy of Speech Acts

The speech acts that are frequently used in ADR – narrative, framing, questioning, and hypotheticals, brainstorming and listing – have been classified into three groups (exposition, reflection/interrogation and creation). Each stage in the ADR process favors certain communicative functions in ADR.

Expository utterances enable communication about disputes and conflicts. They allow disputants to build understanding and exchange meaning; from this understanding, resolution can be created. Expository utterances include framing, which constructs a shared perspective from which disputants address major issues; and narrative, which

allows participants in disputes to share their stories and experiences while building common stories with other disputants.

The utterances classed as enabling reflection are used to gather information from disputants. They can be direct questions, descriptions of hypothetical situations, and like utterances dominant at all other stages of the resolution process, strategic uses of silence (which occur in all styles of ADR), although not precisely speech acts, can be important communicative moves by practitioners hoping to encourage reflection. Questions and hypotheticals can convey or elicit information. They can be used directly or indirectly and could be divided into a number of subtypes and distinguished according to the style of resolution in which they are used. They allow communication and exchange of information about conflict situations, and about the process of resolution in which participants and practitioners are engaged. For this reason, the general speech act the stage or general element of resolution process they achieve is called "reflection".

Practitioners of ADR use creative utterances to stimulate discussion and motivate original thinking. Brainstorming and listing are the most commonly used of them, but other techniques such as neutral goal statements that require the hearer to reply can be effective.

Comments on the Speech Act Taxonomy

The taxonomy emphasizes the general functions of speech acts in ADR and the stages of ADR processes in which they are used. The first stage of the resolution process requires the collection and exchange of information and in it are used expository speech acts. The second stage generally occurs once disputants and practitioners need clarification and detail about the discussions taking place, and interrogative speech acts are generally used to that end. Finally, the collaborative building of an acceptable situation for all parties may demand creative discussion achieved through creative speech acts. The discussion of 'stages' in ADR processes must be put into context here because there are no accepted stages of ADR that are inclusive of all ADR styles and processes, as there are in the judicial system. While there are no generic stages, most ADR processes will follow the general frame set out in the taxonomy (of gathering and exchanging information, questioning the information and stories presented, and creating

mutually acceptable solutions) and to do so will apply the utterance types enumerated therein.

Many of the utterance types described in the taxonomy can be associated to specific styles of ADR. Expository utterances are especially prone to variation according to style. Winslade and Monk have specifically described discourse in their work on narrative mediation: "Discourse is both the process of talk and interaction between people, and the products of that interaction. Talk tends to happen in recursive patterns within particular locales, and we can therefore speak about these patterns as particular discourses" (Winslade and Monk 2000, 38). Their definition of discourse is useful, however, in stressing the importance of communicative interaction in ADR. They continue their discussion of narrative mediation with an association between the stories created in the narrative style of ADR and the frames built in interest based and transformative styles of ADR. Framing itself is given specific focus in works by Fisher and Ury (1981) and Sloan (1994) that describe integrative dispute resolution, but is treated in almost every text that treats language in ADR. The interrogative and creative stages and associated speech acts are used across ADR styles. While their specific application may vary according to practitioners, their functions remain the same.

The creative stage is an interesting one because the intent with which practitioners use speech acts changes. The function of the utterances in the creative stage is to encourage participants to take control of the process. In the expository and questioning stages, practitioners use speech acts to control the processes and the communicative behavior of disputants.

CHAPTER FIVE – SUMMARY AND CONCLUSIONS

> The communication process poses the largest challenge to our effectiveness as conflict resolvers but also the greatest opportunity to enhance that effectiveness (Mayer 2000, 119).

> Language and communication are equally important in conflict and its resolution. In either case, they serve a central role of coordinating action, of serving as a conduit through which individuals are linked to ideas, and as a method for wielding power. In cases of conflict there can be little doubt that people fight over words. [...] It is true that communication plays a central role in conflict and its resolution, and it is also true that texts on conflict resolution are generally correct to emphasize the positive value of good communication. It is also worth acknowledging the much larger role communication plays. Analysts of conflict and practitioners of conflict resolution must be equally aware of how communication and language influence the process of conflict and its resolution (Tidwell 1998, 105).

The importance of communication in Alternative Dispute Resolution is illustrated throughout ADR literature and is specifically treated in the works selected for this study of speech acts used by practitioners of ADR. This work was directed at answering the following questions:

- What speech acts, commonly used in ADR, appear in the discussion of language in ADR literature?
- What are appropriate definitions of such speech acts?
- Which speech acts are specific to different models of dispute resolution?

The study also aimed to provide a critique of the existing approaches to language in ADR and highlight the areas of ADR that need to be further developed to achieve a better understanding of how ADR practitioners use language as a communicative tool. The following pages will review these and propose further discussion of language and communication in ADR.

What speech acts, commonly used in ADR, appear in the discussion of language in ADR literature? What are appropriate definitions of such speech acts?

The results and discussion of chapters three and four present a list of speech acts and their definitions. While it would have been useful to create an exhaustive list of specific speech acts used in ADR, the literature used, the omission of original transcripts from ADR processes, the application of Speech Act Theory and the constraints of taxonomies limited the study to a more general discussion. That discussion listed speech acts drawn from a selected literature according to the function they serve in ADR processes. More specifically, speech acts were associated with the stage of the resolution process to which they contribute: the expository stage in which there is exposition of information and construction of mutual meaning and understanding, the interrogative stage that aids in the communication and clarification of information, and the creative stage where innovative and expansive new ideas are found for resolution. This classificatory scheme provides an overview of how language is used by practitioners in ADR processes to advance the process and direct disputants towards resolution. While this taxonomy provides a useful way of thinking about how language is used in ADR, it is important to consider that each speech act, regardless of its association with a specific stage of the process, can be used in any stage of the process to different effect. Questions, for example, can initiate exposition and framing can be part of interrogation.

The description of actions performed through language, as is proposed in chapter 4, builds on Moore's discussion of practitioner activities in mediation:

> A *move* for a mediator is a specific act of intervention or "influence technique" focused on the people in the dispute. It encourages the selection of positive actions relative to the issues in conflict (Gatung, 1975). The mediator, a specialized negotiator, generally does not directly effect changes in the disputants by initiating moves, as do the parties themselves he or she is more of a catalyst (Moore 1996, 57).

Moore describes how mediators move to modify communication by controlling or assisting the parties' determination of:

1. What is communicated (this includes active listening, restatement...).
2. How a message is communicated - in terms of both syntax and means of transmission.

3. By whom the message is communicated (messages are made more or less acceptable depending on who sends them).

4. To whom the message is delivered (mediators can direct the speaker's message to those who are most ready to hear them).

5. When a message is delivered (communication timing).

This is done by either "encouraging or inhibiting discussion by one party until the other party or parties are most receptive" (Moore 1996, 185).

6. Where the message is delivered.

Practitioners' of dispute resolution intend, through their communication with parties, to affect how the ADR process unfolds. They direct their efforts towards reaching the goals of each stage of the resolution process (collection of information, clarification of stories and information, and creation of innovative ideas for resolution) so they direct communication towards those goals.

The means through which practitioners modify, control, and influence communication and language in ADR processes have been described in much of the literature and are listed in the taxonomy presented in chapter 4. Speech acts and utterances used by practitioners provide insight into how conflict and dispute are resolved through ADR and how ADR processes develop. Practitioners use language in the intent of affecting disputants' perception, language, thought and behavior, and to direct the process in which they are all participating.

In assessing the language of ADR practitioners', questions remain about its effect on disputants (speech act analysis can capture only the intent of practitioners and not the results they achieve). Many aspects of language in ADR have not been treated in this work: disputants' use of language and their communicative behavior; the relation of speech acts to ADR styles, other factors than language that are likely to influence resolution. The field of language and communication in ADR is complex. It is important to deconstruct it and explore its constituent parts more comprehensively and in greater detail. This work is far from exhaustive and should be considered a springboard for future research. It remains an exploratory study of language and communication in ADR.

Which speech acts are specific to different models of dispute resolution?

The relation of speech acts to ADR styles was briefly developed in the discussion of selected ADR literature. Certain styles emphasize specific speech acts, narrative ADR, for example, emphasizes the use of narration and story telling in its practice, while interest-based negotiation emphasized framing. It is not possible, however, to associate all speech acts to specific ADR styles. Different practitioners, theorists and styles of ADR may highlight the use of specific speech acts but most speech act types are used across ADR styles.

Critique of language and communication in ADR and ideas for further research

It is very difficult, in an exploratory study of communication and language in ADR, to formulate a relevant evaluation. The ideas of language and communication in ADR are too diffuse and incoherent to critique them in a meaningful way. Since a comprehensive critique would not be accurate, it becomes important to identify possibilities for the discussion of language use and the deconstruction of current practices. It is also valuable to question the assumptions underlying communication in ADR theory and practice.

The much-debated idea of practitioner neutrality generally follows discussions about the control exerted through language by ADR practitioners in dispute resolution processes. While many theorists assume that practitioners are neutral participants with ADR processes, their description of practitioner language use belies it. The performance of speech acts like framing, questioning, and brainstorming are very active ways of participating in and directly affecting outcomes. Practitioners' participation in ADR influences the structures and content of ADR processes. As professionals, their involvement affects the language used by disputants and the ideas that govern the communicative behavior of participants, even if they do not address substantive issues. Practitioners are active participants in the processes through their speech and their communication with disputants. How this affects their status as professionals, how they are and should be perceived, and their function and status in dispute resolution processes need to be addressed in a critique of the practice of ADR. Their role in ADR is to assist

disputants with the expression of meaning. But how far from 'expression' is persuasion, manipulation or coercion?

> The idea that dissolving a disagreement through communication means, in the last analysis, influencing the will of the communication partner in a desired way, is to be located in the meanings of the terms 'convincing' and 'persuading'... (Perelman, Ch,; *Logik und Argumentation*; Athenaum 1979; in Bisasso 1984, 93).

The lines often blur and it is increasingly important to understand how language is used in order to better control it and the effect it has on disputants and processes. Practitioner neutrality, and the related ethical and moral considerations of intervention in conflict, will require further exploration as the field evolves. In discussing this topic it is important to consider that "[t]he ability to control is not inherently good or bad. Rather, the ethical, moral or evaluative question arises with respect to how we employ the ability to control" Tucker 1981, 15).

Specific research on language in ADR and the theories on its use will evolve as deeper foundations are laid out for ADR. ADR's development as a legitimate field will be rapid as theories develop. It will become possible to go beyond simply deconstructing existing notions of ADR and to formulate a cohesive critique of the field and its relationship to conventional dispute resolution. The consolidation of an exhaustive and cohesive theory of language and communication in ADR will create new opportunities for ADR practitioners' and theorists'. One must ask, however, whether it is possible to construct generic structures that are representative of ADR practices, as Darling had done to illustrate negotiation processes (Darling 1998), and whether it is useful to do so. Would practitioners turn to ready-made solutions and processes rather than rely on the creativity and flexibility that has thus far been the trademark of the discipline? Would definite structures and theories in ADR turn it into a field in which expertise is limited to the contents of a practitioner toolkit and in which all processes can be summed up in an 'ADR for dummies' guidebook?

The discussion of stages of the resolution process, and speech acts and their use by ADR practitioners engaging disputants in ADR processes leads the oft-debated issue of whether ADR practices are simply the application of a toolkit built up from previous experiences, finite academic knowledge and conventional wisdom on resolution? Is it a

legitimate academic and professional discipline? The future of ADR depends on practitioners' and theorists' ability to develop it as a professional field. The creation of a speech act taxonomy for ADR is a starting point for research into the complex structures that constitute relationships between participants, cultures, contexts, attitudes and behaviors; language and communication being a central constituent element. The taxonomy is not a list of communicative tools to be distributed to students and practitioners but rather a foundation for the development and future research in the field. Language and communication in ADR are more of a social ritual than they are an assemblage of tricks and tools. That ritual and the roles played within it by the different participants require further study.

In discussing the development of a cohesive and exhaustive theory of language and communication in ADR to advance it as a legitimate discipline, it is important to ask whether it would be necessary for practitioners to be familiar with the discourse and communicative practices of ADR to successfully practice in the field. After all, the rules of speech action and communication have not been set out in this or any other ADR work. They are not explicitly described in discourse, yet each style of ADR and the field as a whole have been thriving. In exploring the literature, it becomes apparent that it is not as much the specific theories of communication and language that are interesting to ADR practitioners as it is the general conceptions and practical applications of how language can be used to move conflict towards resolution. It is important to develop an understanding of language in ADR because it is a part of setting conditions for the effective resolution of conflict.

Further research should focus on whether or not there is a need to study and develop theories of language and communication in ADR; the role of practitioners and disputants in communication processes; and the function of language in ADR processes. It should address the disjointed understanding of language use in ADR and, if appropriate, create a unified perspective. It is possible to argue, however, that the flexibility of language and communicative processes in ADR is a strength rather than a weakness and that the creation of standards would diminish the effectiveness of ADR. Specifically to the literature explored in this work and the discussions presented, further

research should focus on the effect of practitioner language and communication on the outcome of ADR processes and disputant communication and behavior.

Final thoughts

It is important to remember that very few works explore conflict and dispute. There is an abundance of literature on the participants to conflict resolution processes, the context of disputes, the behavior, language, attitude, feeling, psychology, geography and all other factors contributing to conflict and disputes. Conflict and dispute themselves, however, appear to be too elusive to be concisely written about. In understanding and effectively working in conflict, therefore, it is important to develop its constituent parts and their dynamics.

As Alternative Dispute Resolution continues to develop, it is becoming imperative to study the science, skills, conventional knowledge, laws, and rituals[28] that make it up. It is essential to consider the conflicting ideas and meanings that are developing within ADR and question how the field is growing and where it is headed.

Finally, I thought it appropriate to reflect on one more passage from Austin because

> After all, we set some limits to the amount of nonsense that we talk, or at least the amount of nonsense that we are prepared to admit we talk; and so people began to ask whether after all some of those things which, treated as statements, were in danger of being dismissed as nonsense, did after all really set out to be statements at all. Mightn't they perhaps be intended not to report facts but to influence people in this way or that, or to let off steam in this way or that? Or perhaps at any rate some elements in these utterances performed such functions, or, for example, drew attention in some way (without actually reporting it) to some important feature of the circumstances in which the utterance was being made (Austin 1961, 221).

[28] The reference to ritual is drawn from lecture given by Michelle LeBaron in the context of the MADR program at the University of Victoria. She describes the resolution potential in creating rituals within a group to build a sense of community and an awareness of the shared process.

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