

## THE PROBLEM WITH “PROBLEM SOLVING”:

### LEARNING FROM OTHER APPROACHES TO MEDIATION

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Court-annexed, private, and broader community mediation programs are now widely popularized in the United States. “Alternative” or “appropriate” dispute resolution (“ADR”) is fast becoming the norm in many kinds of disputes, and a plethora of programs offer basic training to meet the demand. A large part of the growth of ADR is the growth of the use of mediation to manage disputes. Peacebuilder groups such as the International Institute for Mediation & Historical Conciliation (“IIMHC”) that are based in the USA work in the context of a larger mediation world than perhaps most other mediation programs. Yet we exist and interact with these other programs. We seek to learn from them and also to share our unique insights gained from mediating historical identity disputes in less structured and more complex, international settings.

As most training programs follow a facilitative, problem-solving approach<sup>1</sup> (which for brevity I will call the “standard approach”), the field of “dispute resolution” (which overlaps with the field of “peacebuilding”) is producing a cadre of mediators who share similar values and perspectives. Under the standard approach, disputes are essentially seen as problems. The mediator is seen as a negotiation consultant who helps the parties to go beyond their positions to identify mutually acceptable solutions that satisfy their interests.<sup>2</sup> Insofar as the normalization of mediation has led to a standardization of “best practices,” it is crucial for mediator-practitioners and trainers to take a hard look at how they practice and what they teach. That is what I aim to begin here, at least on a theoretical level.

Of those training programs that follow the standard approach as I have thus-far defined it, three of the core principles that tend to recur in the curriculum are: (1) neutrality of the mediator, (2) self-determination of the parties, and (3) informed consent of the parties. These core principles serve many useful purposes in mediation and have made their way into the relevant legal rules and norms governing mediators. Yet each of these principles leaves gaps, conflicts, and ambiguities when translated into mediation practice. For ideas on how to resolve these shortcomings, we can turn to other approaches. Narrative mediation and transformative mediation offer some answers. These alternative approaches are quite capable of being integrated with the facilitative, problem-solving approach. They offer powerful new viewpoints on the definitions of conflict and mediation and on the different “moves” that a mediator can make in typical situations. Further, the insights they offer should lead us to rethink what we might assume to be “basic” or “required” about a standard mediation training curriculum, and what actually might not be “basic” about the standard approach. What choices does the standard approach entail, bolstered by what assumptions and what ideological positions?

**(1) Mediator neutrality**, a core principle of the standard approach, has been questioned in recent years. For example, Kenneth Cloke has said that there are no genuine neutrals without biases or points of view, and that neutrality can become “a straightjacket,” paralyzing a mediator’s ability to empathize with the parties or to understand their stories. Why do we assume that neutrality is crucial for a mediation to be fair? Some may argue that a mediator must at least

behave externally neutral and equidistant from each side, even if he has biases. They argue that neutrality is necessary for the parties to feel safe in trusting the mediator. But is it possible that parties do not need a mediator to be objectively neutral or equidistant, but rather, to embrace subjectivity and involvement? Does it contradict neutrality for a mediator to not only acknowledge parties' emotions, but to also be emotionally honest about her personal reactions to what the parties have said? Should a mediator not show vulnerability, or even go so far as to criticize his or her own reactions to the parties or to the conflict? These behaviors may be key to a mediator's bringing his humanity and genuine passion for dispute resolution into the process, yet they are hindered by a striving for neutrality, whether internal or external.<sup>3</sup>

Furthermore, the standard approach's emphasis on neutrality seems to require that mediators treat each participant as if they had the same amount of power over decision-making in the relationship, even when the mediator can sense or knows that the parties have an extreme power imbalance. In the standard approach, a mediator may raise questions about the relationship as it relates to the immediate "problem" at hand, using reality-testing, reframing, "what if" questions, etc., but she must remain detached from most any outcome to which the parties agree. Alternatively, the mediator can withdraw, depriving the parties of the mediation process in a way that seems ultimately evaluative, not facilitative. Between these choices lies a gap where the mediator may be an instrument to perpetuate domineering or exploitive relationships. Within this gap, true self-determination for all parties seems unlikely.

A powerful alternative vision is provided by John Winslade and Gerald Monk in their seminal work, *Narrative Mediation*.<sup>4</sup> In contrast to the standard approach, narrative mediation rejects the idea of neutrality and the notion that "it is their dispute, not ours." Narrative mediators do not try to winnow down the "problem" through the limited rhetorical moves of summarizing, reframing, etc. – rather, they encourage the parties to bring out the complexity of numerous competing, background stories of conflict. Narrative mediators take an active role in focusing the parties and the conversation on "unique outcomes" - points in the conflict when the typical relationship between the parties was not adhered to – where one or both parties made gestures toward finding common ground or moving past their usual patterns of dissonance. Rather than trying to stay "neutral," the mediators engage in co-authoring, with the parties, a new narrative about their relationship, starting from the unique outcomes. Narrative mediation helps to address the challenge of mediating oppressive relationships without becoming a tool to further the oppression, by allowing a mediator to insistently confront the parties with the narratives they put forward and to push them toward constructing a new one.

(2) In addition to neutrality, **informed consent** is a core principle typically included in the standard approach to mediation training. Informed consent, however, is ambiguous at best. It is not clear how much we as mediators have a duty to discuss with parties about process before we begin to essentially direct that process. Leonard Riskin's "Grid for the Perplexed," which is still often taught in basic trainings, provides a simplistic chart to categorize mediation approaches along two dimensions: "problem-definition" (broad / narrow) and "facilitative / evaluative." While the "facilitative / evaluative" spectrum is often discussed at length, in many standard trainings the mediator's choice of "problem-definition" is essentially left open. As a result, co-mediators, (even different mediators from the same group or program) often have widely divergent approaches to the same case, which may cause confusion or disillusionment for parties

and mediators alike. Shouldn't we give training on *when* to define broadly and *when* to define narrowly, for new mediators? More importantly, shouldn't we tell the parties what our orientation is in this regard, before they assent to the mediation? Isn't that part of making an informed choice?

The transformative approach to mediation, as put forward by Professors Baruch Bush and Folger in *The Promise of Mediation*, offers a powerful alternative conception of informed consent. The transformative approach suggests that the mediators' style should be made explicit and should vary according to what the parties choose with no undue suggestion or influence by the mediator. The transformative paradigm, with its focus on the parties being empowered to make the best decisions for themselves about the process in mediation, provides a theoretical basis on which to expand the standard model's usual "introduction" stage to a mediation. Almost always in small claims mediations but also in larger-scale mediations, this can easily be done if a frank discussion is had about mediator approach and style before engaging in the business of mediating the case. The notion of informing all participants at the outset of the mediation of the continuum of existing stylistic models and which model(s) the mediator practices, is hardly new,<sup>5</sup> but unfortunately, is rarely taught. Such information would include a brief explanation of the broad/narrow problem-definition spectrum and other key variables as they are relevant to the particular context, and would go a long way toward true informed consent of parties.

**(3) Self-determination** of the parties is a third core principle perhaps most often touted under the standard approach because it is so different from what occurs at adjudicative proceedings, such as courts or tribunals. A central tenet of the standard approach is that the mediator guides the process, but not the substance of the settlement agreement. But under this rubric, the notion of self-determination quickly breaks down in practice. The process/substance distinction is a false dichotomy because guiding one often equates to guiding the other. A mediator's "process moves" (such as suggesting an agenda, reframing the issues as the mediator sees them, allowing or not allowing non-parties to the case to be present or to speak, using the one-text procedure for drafting a settlement agreement led by the mediator, or urging the parties to get an outside expert to decide technical questions) almost always have substantive effects. These actions affect how comfortable parties feel in settling and how in-control of the situation they perceive themselves to be. In turn, such actions may impact their substantive choices in their agreement.

Approaches like transformative mediation, mentioned above, offer a more consistent viewpoint with regard to self-determination, in that the mediator empowers the parties to make process as well as substance decisions. Here the mediator follows the parties, and does not guide at all unless absolutely necessary. *Pro se* parties, a common occurrence in court-annexed community level mediation as well as many other venues, are not typically "empowered" in the sense that they let the mediators run the process. For instance, parties often do not realize that they can call a private caucus. Facilitative problem-solving mediators should learn to incorporate the transformative approach's tendency to empower parties regarding process choices.

Another example to illustrate the difference between the standard and transformative approaches is in how we summarize the parties' comments, especially opening narratives. Where a facilitative, problem-solving mediator will often reframe a lengthy or explosive comment in such a way as to concisely capture the party's interests in the mediator's own words, a transformative

mediator will more often take longer: they will repeat back the exact words or phrases used by the party, to highlight the party's own choice of rhetorical content as having a special meaning that other words cannot equally convey. The underlying difference lies in why we summarize: under the standard approach, it has more to do with the mediator defining the problem and less to do with party self-determination; the transformative approach seems to have it the other way around.

(4) The examples I give above are just the tip of the iceberg. Many other approaches to mediation are being put forward, such as John Paul Lederach's elicitive approach, and the IIMHC's own unique, memory-based approach. If we are to address the problems of the standard approach in which most of us were initially trained, then the question arises: can mediators mix approaches, "transplanting" tools or perspectives from one approach to another?

While the alternative approaches I have mentioned thus far have much to offer, there may be obstacles to integrating them into any basic mediation curriculum, whether starting from a "blank slate" or revising some version of the standard model. The question invites us to re-examine what is a truly necessary, basic mediation curriculum and what should be relegated to "advanced trainings" (which, in effect, means marginalizing as an "alternative"). Today's trainers need to re-examine what are the "ABCs" that every beginning mediator must learn as opposed to certain choices or "spins" on mediation that are added on afterward.

One obstacle to changes in the standard mediation training curriculum is that many of us as practitioners are heavily invested in a facilitative, problem-solving model. After all, many mediators make much of their livelihood from teaching people how to reframe disputes into lists of "interests," "options," "objective criteria," etc. Others may be intellectually committed to the school of thought in which they were initiated as mediators, or committed to the standard approach on purely intellectual grounds regardless of the problems they see in practice. Finally, measures of efficacy that at least partially support the ideas of "success" in facilitative or evaluative mediation (settlement rate, volume of cases) are less readily available in transformative, narrative, or other approaches to mediation. Since our culture asks us to define and quantify success in any professional endeavor, mediators and trainers are bound to be influenced by this disparity in ease of measurement. We must find ways to address this problem.

Additionally, on the intellectual front, the obstacle faced is a strict detachment between approaches. Such a detachment, while I think unnecessarily artificial and separatist, hangs upon a central argument. The argument is that the approaches cannot be combined because they have fundamentally different goals.<sup>6</sup> Such an argument is bolstered by the trend in the literature for each approach to distinguish itself as explicitly as possible from other approaches, to form separate camps, and even to stake out intellectual territory in an effort to prove itself independent. But the truth that I have, in practicing mediation, is that different approaches' goals are usually not at all contradictory, but rather, complementary.

Transformative mediation is probably the most well known approach to be pitched by its proponents as "exclusive" in this regard. Yet while the language of other theories (like transformative mediation or narrative mediation) may be quite distinct, making them appear incompatible with the standard approach, the reality is that they often emphasize separate but

related aspects of the process of conflict resolution. Some research has been done to show that practitioner-trainers of mediation draw on a range of theories about mediation.<sup>7</sup> Boston-based mediator David Hoffman, in *Confessions of a Problem-Solving Mediator*,<sup>8</sup> agrees with the notion that sometimes a problem-solving approach works best but sometimes aspects of transformative mediation work better, depending on the circumstances and the moment in the mediation. There is no strong empirical evidence favoring one approach over any of the others as of yet. The argument for higher efficacy of the facilitative, problem-solving paradigm is mostly anecdotal: there is little empirical research to show that any particular approach to mediation makes a statistically significant difference to outcome (except to show that being overtly directive tends to influence settlement rate – an outcome that may or may not be relevant in the contexts in which many mediators now work).

While I cannot say that I yet see a framework for exactly how or when to use elements of different approaches, I do see clear reasons for why such integration is necessary. I have tried to present those reasons here. Adaptation is the hallmark of a good mediator, and we need to look to other models to help address the ambiguities of the standard, problem-solving, facilitative approach to mediation. This is an exciting time, one of reassessment of first principles, of confusion, and of integration of approaches to make future mediators better than ever. It is my hope that the IIMHC and other forward-thinking organizations will work together to achieve this aim.

<sup>1</sup> See Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEG. L. REV. (forthcoming April 2005). While Abramson found no thorough study of approaches taught in training programs, he gathered ample anecdotal evidence that many, if not most, basic trainings teach mediators problem-solving facilitation. In New England, the approach is taught in many court-connected programs, by private consultants such as Insight Partners, and by such Boston-area programs as the Harvard Mediation Program, Metropolitan Mediation Services, and Mediation Works, Inc. While many mediators have also trained in other approaches such as transformative mediation, most of them received their initial training in the standard approach. Phone interviews with Charles Doran, Melissa Brodrick, Dec. 16, 2004.

<sup>2</sup> Though not a mediation text, the definition of interests underlying problem-solving is based largely on ideas put forward by Roger Fisher and William Ury in *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2nd ed. with Bruce Patton, 1991). See, e.g., D. GOLANN, *MEDIATING LEGAL DISPUTES* 14-26 (1996); C. MOORE, *THE MEDIATION PROCESS* 18-19, 55-56, 98-101 (2nd Ed. 1996); FOLBERG & TAYLOR, *MEDIATION* 7-9, 38-72 (1994). Recent scholarship reinforcing problem-solving includes HAROLD ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* (2004) (approach, assumptions about how parties and mediators behave largely follows *Getting to Yes paradigm*); see also JAMES J. ALFINI, *MEDIATION: THEORY AND PRACTICE* Ch. 1-3 (2001); P. LOVENHEIM, *BECOMING A MEDIATOR: AN INSIDER'S GUIDE TO EXPLORING CAREERS IN MEDIATION* 86-87 (2002); LOUIS KRIESBERG, *CONSTRUCTIVE CONFLICTS: FROM ESCALATION TO RESOLUTION* 267-8 (1998) (citing “vastly influential book” *Getting to Yes* and problem-solving as “increasingly recognized beginning in the early 1980s”). “Negotiation consultant” term from interview with Charles Doran, Dec. 16, 2004.

<sup>3</sup> KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 12-14 (2001). *See also* Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 *LAW AND SOCIAL INQUIRY* 34 (1991).

<sup>4</sup> John Winslade & Gerald Monk, *NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION* (2000). *See also* [www.crinfo.org/narrative\\_mediation/](http://www.crinfo.org/narrative_mediation/).

<sup>5</sup> *See* JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* (2001).

<sup>6</sup> Some advocates of transformative mediation in particular argue that it cannot be integrated with facilitative mediation because its goals are fundamentally different, involving the moral development of the parties and not just the deal-making or transactional aspect of their interaction. Melissa Brodrick, *In people we trust: The essence of mediation*. 23 *SPIDR NEWS* 4 (Fall 1999). But this argument is unnecessarily separatist in most cases, where the different approaches' goals are not contradictory.

<sup>7</sup> Cheryl A. Picard, *Exploring an Integrative Framework for Understanding Mediation*, 21 *CONFL. RESOL. QUARTERLY* 3 (Spring 2004), 295-311.

<sup>8</sup> David A. Hoffman, *Confessions of a Problem-Solving Mediator*, *SPIDR NEWS* Vol. 23 no. 3 Summer 1999.

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