

By Louise Phipps Senft

The negotiating table

# Turning problems into opportunities

## MODELS AND PHILOSOPHIES OF MEDIATION

I'd like to begin with a bow to the new year and to resolutions and a renewed commitment to positive change. Mediation for one of the lawsuits you are handling or for a situation in which you are involved personally might be one of those new year's 2005 resolutions. The question might thus be, which type of mediation might you consider, for not all mediation processes are the same.

While there is of course some overlap and adaptation to situations and circumstances, mediation is often classified into three main models: evaluative, facilitative and transformative. Which model a mediator follows is influenced by the mediator's background and training and by what the mediator hopes and expects will result from the mediation. In addition to what the mediator expects or hopes, I will later ask in this article what should a mediator hope and expect.

The evaluative mediator hopes and expects that, through the mediator's involvement, the parties will reach a monetary settlement of their conflict. This is the mediator's objective. It is certainly not an evil objective. The mediator believes that he or she has knowledge, experience and skill (that the parties may lack or be unable to presently implement), to convince one or both of the parties to settle for a particular amount of money. The mediator believes the objective of the parties is also to get a settlement, and so the mediator is directive in steering the negotiations, or often separating the parties, and will offer at some point settlement recommendations. These are not of course binding, but are influential. They are also often stated by the evaluative mediator privately to each party and outside the presence of the other party while the mediator tries to broker a deal. A monetary settlement may or may not result, but if so, the resulting settlement might be somewhat resented when the parties did not have a chance to talk with each other and/or if the settlement is not what the parties wanted or only dealt with one aspect of the dispute. Evaluative outcomes are often a compromise for both parties. To some extent this model is similar to settlement conferencing. Some believe that "unless mediation is going to be substantially different from settlement conferencing, why have it?" (I'd like to thank Frank Pugh for coining that phrase and many other ideas discussed in this column.)

A facilitative mediator has more confidence in the ability of the parties to resolve their conflict than does an evaluative mediator but believes proactive mediator intervention with a goal to solve the problem is necessary for the parties who have previously been unable to reach settlement on their own. Facilitative mediators often guide topics for discussion by the parties and decide what is helpful to settlement and what is not. While not evaluative in the sense of judging the respective merits of the case and making outcome recommendations, the facilitative

mediator will influence what the parties will consider relevant or important for settlement or problem solving. Both the evaluative mediator and the facilitative mediator have settlement as the goal of the mediation. The parties may feel reluctant to bring up what has not been suggested to them or what is not related to a formal or traditional settlement. It is Ok for many facilitative mediators that parties bring up matters that appear unrelated to the problem, as long as they do so within the mediator's ground rules and tie the topic back to aiding in settlement. Otherwise, the mediator may declare an "impasse" and end the mediation. The facilitative mediator therefore often decides for the parties either what they can and cannot discuss or how they can or cannot discuss something. This narrowing however is not as strict as the evaluative mediator's narrowing of what is relevant. By way of example, the facilitative mediator's outcomes are often more creative than an evaluative mediator's outcomes. The facilitative mediator often believes that the mediator controls the process while the parties control the outcome.

What the transformative mediator does is not always fully understood, even by other mediators, as it is working within a relational view rather than a problem solving view, which can sound ironic. The transformative mediator views conflict not a problem to be solved but as a crisis in interaction (communication, negotiation, etc.) and thus assists the parties in changing a quality of their interaction from negative and destructive to positive and constructive as they discuss and explore various topics and possibilities for resolution, this includes attorneys as well. The transformative mediator believes parties want to resolve their conflict—whether by monetary settlement or in some other way--and that given a safe and encouraged setting, will themselves be able to do so, and will themselves know how best to do so and on what terms. Having a meaningful dialogue, the parties will be able to respond to each other and the situation with what is fully their own. The transformative mediator also believes that where parties do not have to "try their case" to the mediator, parties will feel freer to share important thoughts, comments and concerns with each other. Uninhibited conversation between the parties, invited by the mediator, can lead to greater understanding and to a clearing up of misconceptions, in turn leading to a much wider understanding of the situation and to conflict resolution that meets the more authentic desires and needs of all parties.

In transformative mediation, parties instinctively tend to resolve conflicts based on what seems fair and workable whether on legal grounds or not. This is obviously the case where there is some relationship between the parties, however, it is also the case where the parties are strangers, as in insurance companies and municipalities. The transformative mediator invites the parties to decide how they wish to interact with each other, assists them in this exchange, helps them clarify and decide what is important, what is difficult and how to overcome it, and any resolution of their conflict comes about as a result of those decisions, rather than by "take charge" intervention by the mediator. The outcomes thus have the potential to be more real and encompassing, whether simple or complex. So you have both a "better" settlement, the parties own terms of settlement *and* an improved way of dealing with each other, a double achievement.

Yes, I am a transformative mediator. I believe all mediators should take time to reflect on what all might be accomplished through mediation .... a settlement, or more than a settlement. In a settlement oriented mediation, the conclusions reached by the mediator may be what are most important to the mediator, but not necessarily to the parties. In a non-settlement oriented mediation, the conclusions reached by the parties are what are most important. All this is not

just getting the parties to feel good, rather it is to get the best, most lasting and authentic resolution of a conflict, both on paper and interpersonally, the greatest service a mediator can provide.

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### **The Negotiating Table - There's more than one way to resolve your disputes**

By LOUISE PHIPPS SENFT  
*Special to the Daily Record*

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The mediator believes the objective of the parties is also to get a settlement, and so the mediator is directive in steering the negotiations, or often separating the parties, and will offer at some point settlement recommendations. These are not binding, but are influential. They also are often stated by the evaluative mediator privately to each party and outside the presence of the other party while the mediator tries to broker a deal.

A monetary settlement may or may not result, but if so, the resulting settlement might be somewhat resented when the parties did not have a chance to talk with each other and/or if the settlement is not what the parties wanted or only dealt with one aspect of the dispute. Evaluative outcomes are often a compromise for both parties. To some extent this model is similar to settlement conferencing. Some believe "unless mediation is going to be substantially different from settlement conferencing, why have it?" (I'd like to thank Frank Pugh for coining that phrase and many other ideas discussed in this column.)

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the problem, as long as they do so within the mediator's ground rules and tie the topic back to aiding in settlement. Otherwise, the mediator may declare an impasse and end the mediation.

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