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BY WHAT STANDARDS DO WE DEFINE MEDIATOR QUALITY? by Louise Phipps Senft

For years mediators across the country have bandied about attributes describing a quality mediator, and for years it seemed there was general consensus of what those qualities were. Most of these discussions, however, were often punctuated with a sigh sounding something like: "Well, quality could be a lot of different things depending on the *mediator's style, and ...what the parties were looking for, it's all those things.*" This discussion garnered the spotlight in Maryland when, under the leadership of Chief Judge Robert Bell and the Maryland Mediation and Conflict Resolution Office, a Committee on Mediator Quality Assurance ("QA") was appointed to come up with a plan for assuring quality mediation in Maryland. The Committee was representational of the bar and organized practitioner groups, and it sought wide input from other practitioners, mediation users and representatives, and program managers from across the state. The QA Committee also studied the efforts of other states in this arena and soon learned what a daunting task it is to not only create a process that could assure mediator quality, but to more fundamentally define what mediator quality actually *is*.

What are the qualities of a good mediator?

Someone who is a good listener
Someone who is nonjudgmental
Someone who can engage
Someone who likes people
Someone who has integrity
Someone who has a positive attitude
Someone who is willing to take risks
Someone who is flexible
Someone who is committed to high standards
Someone who is compassionate
Someone who has a lot of life experience
Someone who has good verbal skills
Someone who has good communication skills
Someone who has good writing skills
Someone who has a sense of humor
And the list goes on, or is this it?

Are these the qualities of a good mediator? These are often the qualities of a good mediator as expressed by *experienced mediators* themselves.
Any so far that you question or disagree with? Let's continue.

What about qualities like the following:

Someone who is impartial
Someone who is fair
Someone who gets settlements
Someone who can get parties to do something
Someone who is persuasive
Someone who stops bad behavior
Someone who balances power
Someone who keeps the parties on track

Are these qualities of a good mediator? These are often the desired qualities that are expressed by many *attorneys* who represent parties in mediation. They are also qualities expressed by those who define a successful mediation as a settlement of that particular dispute. Agree? Not sure?

Or what about qualities like the following:

Someone who smoothes over broken relationships
Someone who doesn't allow negative comments
Someone who doesn't allow out of control language
Someone who gets consensus
Someone who creates harmony

Are these qualities of a good mediator? These are often the desired qualities that are expressed by referral sources such as *counselors, social workers, clergy, board presidents, company owners, and human resource managers*. They are also qualities important to those who define a successful mediation as a restoration of relationship. Disagree? Not sure?

Or, What about these qualities:

Someone who does not pressure agreement
Someone who allows the parties or participants to speak about issues important to them
Someone who allows the parties or participants to speak fully
Someone who allows the parties or participants to hear the other parties' or participants' perspectives fully
Someone who allows the parties or participants to speak to each other
Someone who respects the parties or participants
Someone who treats the parties or participants with respect
Someone who is confident about the process

Are these qualities of a good mediator? Research points to these being the qualities that are expressed and matter most to the *parties* or the *participants*, regardless if there was a

settlement or not. Surprised? Agree? Disagree? Not sure? Are they different from the previous lists of quality? Let's continue.

Or, What about these qualities:

Someone who focuses on the quality of the interaction of the participants

Someone who creates a safe place for meaningful dialogue to occur

Someone who invites the participants to speak to each other

Someone who views positive as well as negative comments as opportunities

Someone who opens conflict up, believing that suppression usually creates more conflict

Someone who does not pressure agreement

Someone who is OK with non-agreement

Someone who fosters conflict shifts making agreement more likely on genuine terms

Are these qualities of a good mediator? These are qualities expressed by transformative mediators who define a successful mediation through a systems lense as one where the negative experience of conflict has shifted to a more positive experience which may result in an agreement, or may not, depending on the parties' choice, but which also has a more likely probability of resulting in a more constructive experience with the way the parties handled the conflict. Agree? Disagree? Not sure?

We have made an assumption that those in the mediation field believe that mediator quality is of real importance, and we have set out to ensure it. One glance, however, at the above varying, and certainly not exhaustive, lists of attributes of mediator quality as well as the varying groups that may embrace them leads to the question: Mediator Quality--By whose standard? It is a thoughtful and essential preliminary question. Can there be different standards? If yes, why then does the mediation field attempt either to define mediator quality by one standard, or to include all qualities by not defining any under the term used for many different processes: "mediation"?

It is a curious thing to observe about practitioners in the conflict resolution world that there is a strong resistance to having differences and this resistance rears its head in practitioners' own discussions on mediator quality. For instance, the discussion either stays very broad based, to include everyone, "big-tent" as some have called it, or the discussion is diverted to exploring the myriad *ways* in which quality may be developed and ensured, for example, mentoring, reading, actual experience, co-mediation, observation, feedback, continuing training, to name a few. These are certainly important ways to develop and ensure quality; however, they are not responsive to the more fundamental question of what mediator quality *is*. The topic may appear to have the potential to divide the mediation community, which may be a reason for not taking it on with robust dialogue. Afterall, the concern that different often means exclusion is well established in our society. Additionally, it has been echoed in decades of some mediation training received by many, which teaches mediators to focus on commonalties and downplay differences to achieve resolution. Indeed, conflict does not feel good to most people and this is one way of dealing with it, one world view. As the mediation field evolves, however, the very fact that there may be differences, for very valid reasons, and there may be some controversy as we sort out what quality is may be exactly what serves

to propel the quest for excellence and what ensures the vibrancy, relevance and longevity of usage of the mediation process. By exploring the differences in quality of each orientation, we get closer to the possibility of *ensuring* quality in each orientation.

Mediator Orientation. *The indicators of mediator quality are different, and this is OK.* Differences can co-exist. What are the differences and what accounts for them? Differences in mediators and in mediator quality do not depend primarily on the mediator's style, but rather on something much larger, much more profound and pervasive in each mediator's life: that is, the mediator's *orientation* to conflict, to people, and to the potential that the mediation process holds. This orientation may not be something many mediators have yet considered. Whether the mediator is aware of it or not, it is this orientation however that guides the mediator's interventions, otherwise known as *what the mediator does*. It is this orientation that also shapes the ongoing development of a mediator, and the development of quality indicators within that orientation.

While there are many names for the various approaches that mediators may take to their practice: e.g., evaluative, directive, therapeutic, consensus-facilitative, problem-solving, rights-based, facilitative, transformative, narrative to name a few, it appears to me that all the approaches, and others that may be forming but not yet given a name, fall under two distinct orientations: a Directive Orientation and a Transformative Orientation, neither one of which is better than the other. They are merely different. This matters significantly when efforts are undertaken to define and then ensure mediator quality. It matters because a mediator's interventions are guided by his or her Orientation, and, depending under which Orientation a mediator practices, his or her benchmarks of *quality* practice differ significantly. Quality in one orientation will not be quality in the other.

In its most simplistic of forms, under the Directive Orientation, the mediator is operating with *either* an Individualistic World View, that holds individual rights at a premium, or a Harmony World View that holds living in community at a premium. When pressed, the Directive Orientation will forgo relationship in favor of upholding individual rights, and the Harmony World View will abandon or suppress individual rights for the good of the whole. The mediator operating from either of these views has a Directive Orientation and has interventions that are "directive", e.g., working to settle. Stated in another way, the Directive Orientation looks to settle often overlooking potential for strengthened relationship or looks to settle by smoothing over, often overlooking individual wrongs for the sake of harmony.

On the other hand, under a Transformative Orientation, a mediator operates with a Relational World View, where the need for self autonomy *co-exists* with the similarly held need for connectedness to other people. The mediator operating from this view would have a Transformative Orientation and would have interventions that were "transformative", e.g., working to foster but not supplant opportunities for parties/participants own decision making (autonomy/empowerment) and working to support but never force opportunities for parties'/participants' better understanding of each other's perspectives and the more complete situation (connectedness/recognition).

Again, neither orientation may necessarily be better than the other, although each may be better suited for particular settings, given the world view and goals of the program or the client, personally or institutionally. Their differences will produce different measures of quality, and the differences in orientation will produce different types of outcome.

Liberated from the one dimensional one-size fits all approach, the mediation field now has the potential to move beyond protracted and sometimes stalled discussions of the past into more robust and vibrant discussions of quality under each orientation. This includes the rich and various ways to develop and ensure this quality as well as a framework for mediation programs and an explanation for why one set of mediation training standards fails to ensure quality. Clarity about quality also aids efforts in instilling consumer confidence as well as efforts ensuring the present and future integrity of the field, and for many, the profession. Thus, one of the first responses to defining mediator quality is to first ask: From *what orientation* are you speaking and/or defining mediator quality?

What continues to confound the mediation field and the discussion on quality is twofold: many mediators are not *aware* of the world view that they hold despite the fact that it is what guides their mediator interventions, and many mediators claim to have the same skill set used differently based on *style*. As for the first barrier, it is understandable that many mediators have not yet clarified their orientation since the concept of a mediator “orientation” emerged in only the last few years, beginning with Robert B. Bush and Joseph Folger’s The Promise of Mediation (1995), and much mediation training has not yet incorporated the theory which matches the orientation that forms the basis for the interventions. For instance, a mediator may say she is facilitative, and that she can demonstrate competence as a facilitative mediator. It depends, however, from which orientation she practices in order to see her demonstrate competence or mastery.

An illustration of why this is so is as follows. Under the Directive Orientation, indicators of mediator quality may be related to mediator fluency in a certain set of skills. For example, a mediator under the Directive Orientation should be able to demonstrate these skills, to name a few:

- Listening Skills
- Summarizing Skills
- Questioning Skills
- Reframing Skills
- Power Balancing Skills

On the other hand, under a Transformative Orientation, indicators of mediator quality may be related to mediator fluency in a particular set of skills, some which appear the same as those in the Directive Orientation skill set, and some of which are different, while others are purposefully eliminated from the skill set. For instance, a mediator with a Transformative Orientation should be able to demonstrate these skills, to name a few:

- Listening Skills
- Summarizing or Reflecting Skills
- Open-ning questions
- Reframing Skills

Following Skills

At first blush, the fact that both orientations use some of the same skills may lead to the conclusion that the orientations are really not that different, or the differences just depend on *style*. It is true, even on this short list, that the orientations have some skills in common that may define mediator quality, for instance: Listening, Summarizing, Asking Questions and Reframing. If a mediator were asked *why* he employed these skills, however, he would respond very differently guided by a different set of values, depending upon which orientation guided his practice. Furthermore, an interview with the parties or participants at the end of the mediation session with a Directive mediator, whether evaluative on content or facilitative, would most likely reveal a very different experience than would the results of an interview with the parties or participants at the end of a session with a Transformative mediator, whether facilitative or narrative, or other label.

For instance, in the Directive Orientation, the mediator listens for areas of agreement and commonality, and for some mediators guided by a Directive Orientation, may also listen for areas of uncertainty on which to capitalize regarding the unknown to convince the parties of the benefits of settling. And for those who may employ summarizing skills, to use such skills is most always to build rapport between the mediator and the parties, since it is the mediator to whom and through whom the negotiation will most likely be channeled. Questions are asked to narrow issues and ferret out what is relevant and to discard what is not relevant. Reframing skills are employed to remove the emotional content so the parties can have a more reasonable negotiation. Power balancing skills are used because power needs to be balanced if there is to be a fair agreement.

On the other hand, in the Transformative Orientation, the mediator listens for party cues, some which are expressions of commonalties or willingness to consider an idea, while others are statements of singular position or indications of uncertainty or defensiveness, in order that the process may be momentarily slowed down to invite an exploration. The opportunity is for clarity to have a chance to emerge by allowing the parties to ask questions or further explain. Such opportunities produce new information and opportunities for the parties to be responsive to each other and to the situation which in turn leads to greater open-ness and possibilities for solution. Summarizing and other reflective skills are used primarily to benefit the quality of the dialogue so that the parties may get across what they intended to have understood by each other, and if what they intended is not what they said, they have the opportunity to amend, change or reject. And this goes both ways, so information is clearer. The mediator follows the parties and asks questions that open and invite exploration of what the parties just said. This is one of the great benefits of having a mediator, as this skill of asking open questions without knowing the answer is often counterintuitive for many attorneys or for human beings experiencing conflict. It is one of the skills that opens up quality dialogue with the potential byproduct of greater understanding and resolution. Reframing is not to remove the essence of what is said, but rather to invite clarification of what matters most to the speaker. Close attention is paid to power and powerlessness, not for the mediator to balance, but rather as opportunities for the parties to make decisions about the process,

including separate sessions, bringing in others for support or assistance, suspending a session, or highlighting new information and other process options.

While the end result from both skill sets under each orientation may be agreement, the purposes for *why* a mediator employs the skills of listening and summarizing, for example, are quite different, and hence, the experience itself that the *parties* or participants have with their dispute or their conflict feels very different for them. In the Directive Orientation, the mediator controls the process, and makes the decisions relating to the process; in the Transformative Orientation, the mediator shares control of the process with the parties, who are invited to make their own decisions about the process. In the former approach, the dispute may be settled; in the latter, the dispute may be settled *and* the parties' initial closed or negative experience of the conflict may have shifted to something more constructive. This shift has the potential to have other positive implications beyond the mediation session, and beyond the immediate relief that a dispute is "over". Potential upstream effects may include long lasting commitment to the settlement terms, greater self confidence of the participants, lessening of hostility towards the other party and/or towards the other attorney and greater capacity to deal more constructively with future conflict. When attorneys are involved, additional benefits are often the clients' appreciation for the attorney as an advisor and guide rather than a mouthpiece and hindrance.

Research by Professor Lisa Bingham at Indiana University indicates that participants working with a mediator who does not focus on agreement but rather on the quality of the interacting have a higher likelihood of agreeing on genuine terms than those parties working with a mediator focused on settlement. Parties have reported this is so because they are not pushed or massaged into settlement terms by the mediator, but rather are given the ability to fully deliberate on terms they choose as important. Thus, quality indicators for a settlement oriented approach (directive) versus quality indicators for a quality of the interaction approach (transformative) will thus be quite different, and the mediation will look and feel different as well to the participants. Getting clear about the differences in quality indicators has the potential to produce more consistent mediation experiences for clients, and has equally as much potential to enhance the public confidence of the process.

Style. What about differences in *style*? While all mediators operate under one or the other orientation, nonetheless, each mediator still has his or her own style. Style comes from personality and cultural and personal characteristics. There are thousands of different styles. One's style is not one's orientation, however. Regardless of the various interventions that a mediator may choose at any given moment in the mediation, the motivation for the intervention is still rooted in his or her orientation. While it is true that not every intervention will be the same in response to a similar set of circumstances presented by the parties, and such variations can be attributable to style, the underlying motivation for the intervention will come from the mediator's views about the parties, about conflict and about the mediation process. By acknowledging the differences in orientation, we can thus celebrate the vibrancy of the different styles as just that, styles, rather than confusing style with competency and quality.

Ethics and Standards of Practice. While this article is not addressing specifically mediator ethics and standards of practice, mediator ethics and mediator quality are close cousins. Another aspect of a quality mediator is that mediator who has a solid grounding in mediator ethics and the Standards of Practice(s). Both the “Model Standards of Conduct for Mediators” prepared in 1994 by a joint committee representing the American Arbitration Association’s Litigation Section, the American Bar Association’s Dispute Resolution Section and the Society of Professionals in Dispute Resolution, now known as the Association for Conflict Resolution, and the “Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners” which was adopted by the Maryland Court of Appeals in 2002 and is incorporated by reference into Maryland Rule 17-101, include language that supports *both* the Directive and the Transformative Orientations. While this may satisfy practitioners as being inclusive, that is, those court roster mediators who are mediating litigated matters referred to them by the court, the Standards are nonetheless not as helpful as they could be because they are very generalized which leads to widely inconsistent experiences that parties and attorneys have with the mediation process. For instance, “Standard I. Self-Determination: “A Neutral shall Recognize that Arbitration, Fact Finding, Mediation, Neutral Evaluation and Settlement Conferencing are Based on the Principle of Self-Determination by the Parties.” “Self-determination is the fundamental principle of mediation, and it plays a more circumscribed role in other consensus-based ADR processes. In mediation, this principle requires that the mediation process rely upon the ability to the participants to reach their own voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.” The Standards then explicitly set forth what a mediator should *not* do by stating what the other ADR practitioners should do. For example, “A neutral evaluator [not a mediator], after considering presentations by the parties, renders an opinion as to the issue(s) presented, which may often be the value of a lawsuit...” and “A settlement conference facilitator [not a mediator] may recommend the terms of a settlement and may encourage the participants to settle a lawsuit. The participants may accept or reject the recommended settlement.” By defining what a court mediator should *not* do, e.g., render opinions, value the lawsuit, recommend terms of settlement, or encourage participants to settle, the Rules appear in this context to have a transformative approach to indicators of quality. On the other hand, the Standards define the process as one which seeks settlement which may have directive overtones. Regardless, one measure of quality for court appointed mediators appears to be a mediator who does *not* provide any case evaluation.

Mediator Presence. In addition to one’s chosen Orientation to mediation, regardless of which orientation that is, and regardless of what kind of style each mediator has within the orientation, I believe there is something deeper, more profound in what shapes mediator quality, something that moves beyond what one thinks and feels about conflict, people and the mediation process. Some competent mediators have it and some don’t. There is a quality that certain mediators bring to a room, to a conflict that makes the business of dealing with the conflict easier. It is what Daniel Bowling, the first Chief Executive Officer of the Association for Conflict Resolution, referred to as “presence.” It is a certain way of *being*. It is that mediator who is aware of his tendencies to judge, to control or to avoid dealing with emotions and is aware of how such tendencies hinder the

unfolding of the conflict. It is that mediator who is aware of her reactivity and desire to shift the topic, or change the focus to something “relevant”, and knows that to do so is only a barrier for the parties. Mediator presence is that mediator who is receptive to the parties and is empathic, curious, and observant of the participant’s patterns. Presence is the ability to intervene with what the *parties* need, rather than what the mediator needs. Mediator presence, or mediator self-awareness, is what brings meaning to how mediators adhere to Standards of Practice.

Mediator presence is not developed overnight. It is, nevertheless, a quality that *can* be taught, nurtured and developed over time, although some mediators may not ever or may choose never to develop it. It is a composite of a mediator’s life experiences combined with the always learning insights about self and others. It is a centeredness, a type of graciousness. It speaks volumes when not speaking. When speaking, the words come from a place of wisdom and *responsiveness* to the parties.

The mediator who is tuned in to his or her own way of viewing the world, and how limiting this can be, has a much better chance of really doing the work called upon to do as a mediator. The mediator with self-awareness skills is aware of his or her own biases, what repels and what attracts, and the impulses that get in the way of the *parties’ self-determination*, the first and foremost ethical standard for mediators within both Orientations. Mediator presence, coupled with good skills and clarity about orientation, creates the safe environment that most parties and participants in conflict yearn for to discuss their viewpoints, differences and possibilities.

Reflective Practice. Another important aspect of Quality is the ability to be a reflective practitioner. A mediator with a reflective practice is a mediator who regularly continues to learn and hone his or her craft, or art as some see it, by discussions with other mediators, by staying abreast of happenings in the field, by obtaining feedback from clients, participants, trainers and peers, and by taking the time to draw insights from the new learnings and to incorporate them into practice in an ongoing process of development and improvement. While some mediators may pursue more tools for the toolbox, other mediators seek greater understanding of conflict dynamics, the mediation process and of self.

The mediator who provides a quality experience to the parties will most likely be the mediator who develops a reflective practice, aware of himself and of the parties and keenly familiar with his orientation and the mediation process.

Ability to Demonstrate Competence and Quality. Trial lawyers demonstrate their skills publicly in courtrooms and in board rooms, and surgeons demonstrate their skills in the surgical room and therapists demonstrate their skills in internships and group clinics, and all take years of school, of study and of hands-on practice and oversight. Quality mediators should be able to demonstrate their skills and ability. Each mediator in Maryland *now* has the opportunity to be evaluated by a performance based measurement, with both a written philosophical statement to self-define what values underlie his or her practice and a chance to mediate a live simulated matter and obtain feedback. The

Maryland Council on Dispute Resolution has such a certification process for mediator competence. The Institute for the Study of Conflict Transformation also has a Summative Assessment process funded by the Hewlett Foundation for mediator development and competence based on a videotaped demonstration with feedback, which is being field tested by the Baltimore Mediation Center's Practitioner's Institute.

Issues of mediator quality beg larger issues such as mediator roster quality and mediation program quality as they too operate from a particular worldview. As mediation continues to develop and grow in its use in Maryland and across the country, we also are getting better at explaining our differences in approach. There are two orientations that will produce different indicators of mediator quality, the Directive Orientation and the Transformative Orientation. The two orientations go beyond stylistic differences. Understanding the orientations and how they lead to different indicators of mediator quality bridges the gap in the discussions and debate on mediator quality by making sense of the differences and making room for both. Genuine and meaningful definitions and markers of mediator quality can now be taught and measured in a way that makes sense, and the many *ways* of ensuring quality now have a context, two contexts. It is an exciting time in Maryland.

THE END