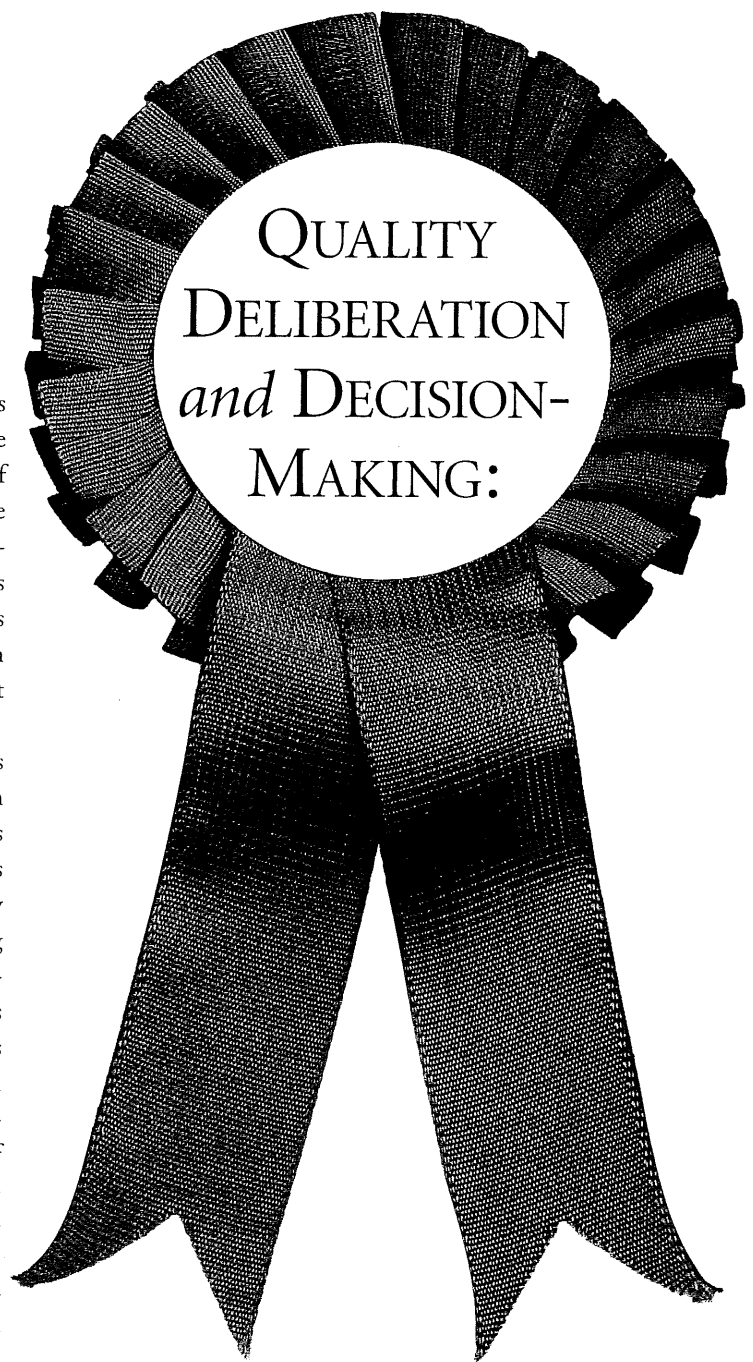


The best way that I know to define a mediation process which is guided by a transformative approach is to share with ACR readers what we have developed at the Institute of Conflict Transformation and what certified Transformative Mediator™ trainers teach in a Transformative Mediation training. We begin with the basic proposition that mediation is one form of intervention in conflict, meant to help the parties who are engaged in conflict. Help them with what? Help them how? To be of real help, the intervenor must understand what conflict *is*.

All mediation models are premised on one or more theories of conflict. These theories or premises guide the mediator in his or her approach. Different theories of conflict offer answers to the questions “What is conflict?” and “What intervention is needed to overcome the conflict?” For instance, Power Theory defines conflict as a struggle for domination, and according to Power Theory, the parties need help organizing and mobilizing to get power back, take it away or balance it. Rights Theory defines conflict as a contest between competing claims or “rights”, and according to Rights Theory, parties need help in argumentation and advocacy to champion one right over others. Needs and Interests Theory defines conflict as a problem of meeting incompatible needs with limited resources, and according to this theory, parties need help in problem-solving, resource re-distribution and “getting to yes”. Transformative mediation is based on a Relational Theory of conflict. Relational Theory defines conflict as a crisis in human interaction, and according to Relational Theory, what parties need help with is overcoming this crisis and being restored to a constructive interaction.

To understand a transformative approach to conflict, we remind ourselves of the answers to the basic question: “What is conflict, as the parties experience it?” As transformative mediators, we understand that the most upsetting and difficult part of every conflict has little to do with the conflict or the dispute itself. The most disturbing aspects of conflict come from the *way* people *do* the conflict—the conflict *experience*. Stated another way, it’s the disputing rather than the dispute that shapes and marks the negative experience of conflict. So, whether it’s mobilizing like-minded activists, advocating certain rights, or



Mediation from a Transformative Approach

BY LOUISE PHIPPS SENFT

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negotiating certain needs and interests, it's the *way* people in conflict go about it that shapes the positive or negative experience with conflict.

Thus, the chief role of a transformative mediator, guided by a relational view of conflict, is to assist parties in changing the quality of their conflict interaction from something negative and destructive to something more positive and constructive. This change will allow them to more fully deliberate and make decisions that work best for them. The beauty of mediation is that it is a person-to-person, face-to-face process, and therefore there are many opportunities for the parties to change a quality of their interaction, especially when the third-party neutral intervener, the mediator, is focused and purposeful in highlighting the opportunities for such changes. From this framework, it is not necessary for a mediator to smooth things over, reallocate assets, balance power or do the problem-solving. The parties will do this naturally on their own, when and if they so choose, when there is a change in the quality of their interaction. And, indeed, they are more likely to do so.

Defining Success

Many parties view a successful mediation as one that resolves or settles their dispute. As we all know, while many conflicts and disputes are settled in mediation, not all of them are necessarily resolved. The negative conflict experience remains. In many situations, even though a dispute is settled or an agreement is reached, parties still often feel dissatisfied, and in countless situations, even angrier as a result of their mediation experience. Why is this? Many parties may initially define a successful mediation as one in which an agreement is reached. However, transformative mediators believe that if settlement is to occur, it will happen on genuine terms more often when and if the mediator's focus is *not* on settlement and *not* on getting the parties to agree but on something else: the quality of their interaction and deliberation. While it may seem counterintuitive, it is the mediator's mindset of letting go of the goal of getting the parties to yes, or getting the parties to agree, or forcing the parties to do anything, that provides the opportunity for clearer thinking and informed deci-

sion-making. This approach produces not only more informed and more satisfying decisions, but most importantly a more satisfying experience with the *mediation experience*.

To further understand transformative mediation, it is important to note that it neither requires nor depends upon any prior relationship between the parties. The approach is premised on the interaction itself, in the moment, between people. Whether the parties have years of knowing each other (such as business, employment or family relationships), or a short time of knowing each other (surgeons and patients), or have never met before (insurance adjusters and claimants), all people when they meet face-to-face in mediation are relating to each other in one way or another. The transformative approach is focused on the quality of that person-to-person interaction. When the interaction is meaningful, the mediator steps back; when it appears ragged or unsettled, the mediator listens carefully and then intervenes in ways to open the conflict, making room for it to unfold, whether between adversarial attorneys, deeply hurt spouses, long-time business partners or strangers.

A transformative mediator recognizes that settlement is one of the many choices that might open to disputing parties as an incidental benefit of an improved interaction. Indeed, it may become even more likely with improved interaction. If transformative mediators do their job, parties are likely to make positive changes in their interactions with each other and, as a result, find acceptable terms of resolution when and where such terms genuinely exist. Thus, settlement remains a distinct possibility—one choice available to the parties depending upon how their own goals and insights develop through the mediation conversation. Settlement is *not* however the single outcome controlled by the mediator, nor is it the mediator's single measure of a successful mediation. Parties may voluntarily choose to leave the mediation with new insights on their choices and their situation, and with new interpersonal understandings but with no agreement. Or they may take the conflict to a different forum such as litigation or counseling. The point is, the *parties*, not the mediator, come to such decisions based on informed choices throughout the mediation as to process and outcome.

Thus, a transformative orientation to mediation expands

the definition of a successful outcome to include non-agreement as well and recognizes that often benefits result from a mediation that does not end in an agreement. These benefits include greater insight and clarity regarding the use of resources, which issues are important, the next steps that could be taken and which issues can be more narrowly defined. For mediators, it is a focus on the parties, exactly what they say and mean, their interaction, and the deliberation itself, out of which responsiveness to oneself as well as to the other person and quality decision-making are natural byproducts.

Empowerment and Recognition

When the transformative mediator intervenes in the conversation between parties, it is for the purpose of supporting clarity (empowerment) and perspective taking (recognition). For example, the transformative mediator may choose to:

1. Identify points in the interaction when a party is uncertain, disorganized, fearful, closed, defensive, suspicious or stuck;
2. Encourage the parties in deciding whether and how to deal with their situation;
3. Invite the parties to speak and ask questions directly of each other to better understand each other's experience, perspectives, interests, positions, offers and demands;
4. Highlight the commonalities as well as the differences so that the parties can think more clearly about their situation;
5. Highlight and embrace emotions rather than ignoring, reframing or neutralizing them; and
6. Intervene in ways that allow the conflict, the dispute or the difficult dialogue to *unfold* rather than to be closed down, muzzled, or fixed quickly by the mediator.

Quality dialogue does not necessarily mean "nice" or "well behaved" interactions but rather an opportunity to speak, hear and think clearly. Mediator "moves" such as the above provide space for all parties to think through their decisions and to emerge stronger as a result.

Transformative mediators may typically begin a session by orienting the parties to the process and orienting the parties to each other. The mediator often uses the metaphor of mediation as conversation because many people do not consider themselves good negotiators but all people know how to have a conversation. The mediator explains that mediation may be helpful and useful even if it does not result in an agreement.

A transformative mediator views the explanation of the process as an integral part of the parties' conversation. Transformative mediators view party self-determination as including both the choice to mediate as well as the degree of participation in the process. Opportunities for changes in interaction begin the moment

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the parties are welcomed to the mediation. The mediator may begin by asking each party what brings them to mediation and what their goals are. Transformative mediators are careful not to place parties in the position of feeling forced to respond to the other. In this way, no one party sets the stage or the agenda. I call this offering a "clean slate" to each. Mediator "moves" like this foster empowerment and recognition by allowing the space for each person to engage to the degree they feel comfortable.

Transformative mediators are defined not as much by their particular skills but by the reasons behind the skills they choose to use. For instance, when transformative mediators listen, they listen without the impulse to advise, fix, reframe, launder, agree with, align with, dissuade or disagree with any one party or position. Transformative mediators value the emotional content of what is stated in the mediation session since this often marks what is important to that person, and thus they listen for where particular emphasis is placed by a speaker.

Transformative mediators listen carefully and reflect back both the tone and the content of what was said without distortion. Unlike other styles of mediation, the transformative mediator does not attempt to reframe what was said or change it in any way. By offering an undistorted mirroring of what was said, the mediator gives the speaker the chance to get clear by listening to what he/she said and to deliberate more fully and freely, choosing to edit, modify and clarify his or her comments. The speaker may hear when he or she has gone too far and reconsider or retract negative or exaggerated comments. Reflecting comments by the mediator also help other people in the room to listen more carefully to what was said and to perhaps hear it in a new way. These are all empowerment outcomes in alignment with a relational approach to conflict.

Transformative mediators also provide regular verbal summaries to parties, which, like reflections, can also be powerful tools for supporting empowerment and recognition shifts for both parties. Unlike reflections of each party, however, summaries amplify what *all* parties have said after a "chunk" of

conversation. The subjects of the summaries may be both tangible and intangible, e.g. the payment on the contract or the way the attorneys treated one of the parties in deposition. Each summary includes what the parties seem to agree about and, more importantly, what they seem to disagree about as evidenced by the different views expressed by each party. Summaries are useful because when differences surface and are clarified, parties will usually move the conversation in a particular direction, or will choose a next step that the mediator could not have predicted. This unpredictable movement is the sign that the summary was effective in supporting party choice, unaffected by any mediator judgment or content agenda.

In addition to silence, process observations, and the above interventions, the mediator can help the parties by noticing the decision points and asking the parties what they want to do at any given time. This is the essence of a "check-in", which is an open question about process. Check-ins provide the opportunity for parties to shape their process and their outcome; they may correct a mediator's reflection or summary, and thus gain clarity as well as regain a sense of control and confidence. Mediator check-ins can also highlight for the parties opportunities for them to make choices for themselves, as well as to become aware of the choices and priorities of the other parties.

The transformative mediator regularly invites the parties to talk to and with each other, rather than to or through the mediator. When parties feel clear and strong enough, they take the invitation. Until then, however, the invitation remains open, welcomed but never forced. Why invite parties to talk with each other, rather than to the mediator? Because the most important action is between the parties. This is where the negative experience of conflict has the potential to change. This is the place where fully informed thinking emerges, where meaningful terms of resolution and settlement, if they are to be created, are created. This is also the reason why transformative mediators do not regularly rely on caucuses. Caucuses may be used, when and if requested by the parties or the mediator, for the purpose of fostering clearer thinking in a safer environment. They are not a tool for the mediator to broker the deal. When the mediator does, it robs the parties of the opportunity to change their conflict interaction and robs them of the opportunity to resolve the situation for themselves.

In conclusion, for many mediators, getting agreements is the overriding goal that drives their activities. For the transformative mediator, fostering quality dialogue and informed decision-making is the overriding purpose that drives our practice and the primary basis we use to judge our success. Problem-solving, agreement and settlement are not the transformative mediator's goals, nor are relationship enhancement or therapy. Problem-solving and

agreement *may* be the parties' goals and if so, problem-solving, agreement and settlement are all some of the likely possibilities of the transformative approach. But, problem-solving, agreement and settlement may *not* be the parties' goals. Parties may define a successful resolution in their own terms, to include *more* than a settlement, or something *other than* settlement. When this is so, the transformative mediation process enhances the likelihood of achieving these goals as well. The transformative mediator's goals are simply to enhance the quality of the interaction by fostering clarity and enhancing the quality of the deliberation. This is perhaps the chief distinction in a transformative approach compared with other models of mediation.

Influencing the Field

The first major treatise on the transformative model of mediation was put forth in 1994 in the groundbreaking book *The Promise of Mediation* by Robert A. Baruch Bush and Joseph P. Folger. Since then, the number of transformative mediators has grown steadily and the transformative model is now recognized as one of the leading models of practice. The transformative mediator's approach, rooted in relational theory, has influenced the most recent changes to the Model Standards of Conduct for Mediators endorsed by the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution. The most central concept of party self-determination now includes the parties' involvement in mediator selection, process design, participation in or withdrawal from the process, and outcomes, rather than *just* outcome; and most importantly, the definition of mediation's goals have been rewritten from assisting the parties "to reach a voluntary, un-coerced agreement" to assisting the parties in "coming to a voluntary, un-coerced decision in which each party makes free and informed choices." (revised, August 2005). Such changes as these which remove agreement as the goal and replace it with informed choices as the goal are powerful indicators of how a relational approach is profoundly influencing mediation for all practitioners. This bodes well for the future of mediation for all parties, and for the quality of dialogue among mediators of all orientation as we continue to learn from each other and further develop best practices. ☺



Louise Phipps Senft is a mediator, trainer, and owner of Louise Phipps Senft & Associates/Baltimore Mediation. She is Adjunct Professor of Law at the University of Maryland School of Law and Harvard's Program on Negotiation and an Associate with the Institute for the Study of Conflict Transformation.