

By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

Why Not be Directive?

Mediators are to facilitate dialogue and assist with quality decision making. Transformative Mediators have, as one of their rules, a strong belief against being directive towards the parties during mediation. But directive advice given in mediation or elsewhere can often be good and fitting advice. So why discard it? For a mediator, there are three reasons why.

The first is that, while directive advice is often good and fitting, the danger is that it is not always good and fitting. And this is not a mediator's role. A mediator giving directive advice may end up telling people to take action or make decisions that are not good for them or helpful for them, or tell them how to process their disagreement in a way that does not suit them. No advice is better than bad advice. What will work for a mediator in his or her viewpoint may not work at all for the other people, or for one of the persons in the mediation. A mediator's thinking of something that a person should do or should refrain from doing does not make it so. Mediators can never completely stand in the other person's shoes. Even when standing in our own shoes, we sometimes make bad decisions for ourselves. Why inflict this on others? There are persons who are required to give advice and hence be directive. Lawyers give advice, doctors give advice, consultants give advice, spiritual advisors give advice, and so forth. Such advice is necessary and proper and that is why people talk to them, to get their advice. Even there, however, the advice may not always be the best, but giving advice is what such people are supposed to do, and most try to do their best, and they are highly trained in their respective areas.

The second reason against a mediator being directive is that, even if our proposed advice is in fact good advice, there are times when people don't want advice. There are times when people are not receptive to even hearing what a mediator has to say, let alone considering or following what is said. There are moments during which people resent being told what to do, even when told gently. In mediation, people need to do other things than hear advice. This is why they come to mediation. --to decide for themselves. They often need to vent, and be listened to. Listening is often the best thing we can do for a person caught up in a difficult conflict to help them get clear about what is the best thing to do. Listening helps people sort things out and encourages them to talk more about what is troubling them. Giving advice interrupts listening. Why would a mediator interrupt what she knows is helpful for the party with something that might not be helpful at all? When mediators find themselves beginning to advise, they need to step back and ask themselves "Why am I giving advice? What is my purpose? Is it to try to bring about a settlement on the terms I paternally think are best? Who made me king? Is this ethical under the Mediator's Standard of Practice?" Additionally, parties in mediation need to listen to each other and to try to understand each other, whether agreeing or not.

Listening to each other is much more important for the parties than listening to the mediator even though some mediators may not want to realize this.

Finally, people do not typically come into mediation to be directed as to how to resolve their conflict. If they wanted this, there are other processes other than mediation where parties are told how to resolve their dispute, such as court where a judge decides the case, or arbitration where the arbiter decides the case, or settlement conferences where the facilitator advises on a reasonable settlement applying the law to the facts. Even when people enter mediation asking the mediator to tell them how to resolve their conflict, such as the case often with lawyers, there are enormous benefits to the parties themselves, and to the relationship between the parties, for the mediator not to advise and instead to provide the opportunity for the parties to be the co-architects of the resolution of their conflict. Even if they end up resolving their conflict along the identical lines that the mediator would have suggested, it is more meaningful for the resolution to have been their solution. They buy into it more and live up to it more. They experience the satisfaction of working together, maybe for the first time in a long while. That in itself has lasting benefits in how they view and understand each other and relate to each other, and how the terms of the agreement are lived up to, and how they address future conflicts.

Yes, when mediators have the “perfect” solution in mind, it can be hard to stifle it. This does not mean to suggest that the mediator never offers information along the lines of what parties may consider in order to help them proceed effectively or to choose what they might discuss from the various options that have surfaced. In the real world we live in, if parties in conflict needed no help, they would not have ended up sitting in a room with a mediator. Transformative mediators try neither to be doctrinaire nor to abandon common sense. But how they proceed stems from the philosophy that given the chance to engage in a meaningful way and to obtain salient information, parties know best when and on what terms to resolve their conflict in a truly voluntary manner both as to how they get to a resolution and what they end up with as their agreement. When a mediator remains constant in this philosophy, not being directive comes naturally. While other mediator philosophies may result in the parties reaching settlement, transformative mediation philosophy results in the parties reaching settlement and a good bit more for the parties. A non-directive approach is often a better process with a better outcome.

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