

TRANSFORMATIVE MEDIATION – CAN YOU FIND HEART AND SOUL (AND ADVENTURE) IN AN INCREASINGLY NUMERICAL WORLD?

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Cet article est la version éditée de la communication présentée par les auteurs en mars 2016, à Queenstown (NZ) lors de conférence Annuelle de Arbitrators' and Mediators' Institute of New Zealand, Inc (AMINZ) de l'International Academy of Mediators (IAM). Les auteurs retracent l'historique et l'évolution du concept de 'Transformative Mediation' et l'importance qu'il revêt aujourd'hui au sein des médiateurs.

This essay is a reflection on the presentation given by the authors at the 2016 Annual conference of Arbitrators' and Mediators' Institute of New Zealand, Inc (AMINZ) and International Academy of Mediators (IAM) in Queenstown, New Zealand under the same title. The original format of the panel was an attempt to track Transformative Mediation from its origins to its meaning and use today: its evolution and changing differences in meaning, use, application and general and specific relevance to the profession of mediation. Discussions included the practical application of these different approaches, and potential for future considerations.

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I INTRODUCTION

This paper is therefore a compilation and synthesis, in more organised fashion, of the presentation and exchange at the Queenstown conference.

From a structural perspective, the live presentation adopted a format of the reasons for and difficulties with transformative mediation approaches. In doing so, the use of a transformative style was advocated by Kimberlee Kovach with difficulties and downsides articulated by Tony Willis. Eric Galton acted as the general moderator (while also providing his perspectives) and Jerry Weiss served as a reconciler/ mediator of the divergent positions. During what was a lively free-ranging, hop-scotch course of this one hour exchange, what emerged was that not only had the definition and application of Transformative Mediation changed since it first appeared in the literature and practice, but also that the panel participants perhaps agreed more than their initial opposing roles suggested. In the end, all were able to acknowledge that not only is there a place for transformative mediation in the current practice, but also a need for more awareness and potential use, particularly given the current market and environment.

II MEDIATION AS TRANSFORMATIVE

Even before its introduction into the literature in 1994 by Robert A Baruch Bush and Joseph P Folger,¹ elements of a transformative mediation model no doubt existed in thought and use. For example, some early mediators as well as mediation programs emphasized the empowerment of the parties as important and dominant goals of the process.² Yet at that time, little detail in terms of any literature on the topic existed, other than perhaps in some training materials. The early detailed articulation of the model in terms that were socially and psychologically based, caused some stir for those advocates and other professionals who had traditionally viewed conflict and its solution within the usual binary boundaries of the legal dispute. While mutual interest-based negotiation³ was on the rise, along with a mediation model that focused on the parties interests, Bush and Folger went a good step beyond these basic views, and framed mediation as a process that provided the

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- 1 See Robert A Baruch Bush and Joseph P Folger *The Promise of Mediation* (Jossey-Bass, 1994). The revised edition, *The Promise of Mediation: The Transformative Approach to Conflict, Revised Edition*, was published in 2004.
 - 2 This was one of the co-author's (Kovach) personal experience when she served as a mediator with the Columbus Ohio Night Prosecutor Program 1978-1980, as well as when she conducted early mediation trainings in Texas commencing in 1980.
 - 3 The first book to explore this in detail was the best-selling and seminal work in the field published in 1981. See Roger Fisher and William L Ury *Getting to Yes: Negotiating Agreement without Giving In* (Penguin, 1981).

individuals involved both empowerment and recognition. Bush and Folger set forth transformative mediation as a distinct and separate model of mediation, which was compared to other models and professed to offer much more than settlement or satisfaction, or social justice.⁴ In other words, the transformative model as discussed and proposed was to be adopted in whole, rather than a view of mediation as a process with transformative potential. Additionally, several practitioners took on an "all-or-nothing" view of mediation as being conducted completely and solely in the transformative model. Likewise, some institutions and mediation programs required that all mediators conducting the process do so only within the bounds of a transformative approach.⁵

Simply stated, for many if not most legal disputants and their advocates, there was little place for what they considered to be the antithetically based "Aha" moments of such psychologically oriented notions as "empowerment" or "recognition" in the context of legal dispute settlement. It was difficult – if not impossible for those in the process to consider those "humanizing" factors that were conducive to placing the transformation of the human conflict interaction itself as the superior process goal, as opposed to closure, settlement or resolution. For some mediators, particularly those tasked with the settlement of pending litigation, "transformative" was not part of understanding the mediation process – and in other cases was almost viewed as a dirty word. Some of those thought that this approach to mediation was – or should be - confined to a very small arena of disputes that by definition required human interaction. These matters consisted of cases in the area of domestic relations being the most obvious, where issues of children and well-being resided at the core of the relationships.

As a 'middle ground approach', some of us took a selection of the various ideals and principles of Transformative Mediation and approached matters on a 'case-by-case' basis. The thinking was that the value of such an approach can best be acknowledged, without the necessity of a wholehearted adoption.⁶ The view was that

4 Above n 1.

5 Likely the most well-known is the United States Postal Service and its employment programme, entitled REDRESS or Resolve Employment Disputes Reach Equitable Solutions Swiftly. For additional discussion in greater detail, see Bingham, Lisa B and Nabatchi, Tina "Transformative Mediation in the USPS REDRESS Program: Observations of ADR Specialists" (2001) 18(2) Hofstra Labor and Employment Law Journal available at: <<http://scholarlycommons.law.hofstra.edu/hlelj/vol18/iss2/4>>.

6 See for example Irvine, Charlie, Transformative Mediation: A Critique (September 1, 2007). Available at SSRN: <ssrn.com/abstract=1691847> or <dx.doi.org/10.2139/ssrn.1691847> which

such movement could be achieved in some cases, but surely not all. Such an approach would allow the goals of empowerment and recognition to emerge when and if so desired by the parties and as part of the mediation process. Alternatively, however, in those instances where the parties themselves, as well as their representatives, had other goals in mind, mediators would not pursue the elements of the transformative model.

III EVOLUTION OF THE CONCEPT AND APPLICATION OVER RECENT DECADES

Around the same time as Bush and Folger wrote about Transformative Mediation, mediation professionals began defining roles, styles and approaches. Some of these were descriptive of the practice observed, while others may have been more prescriptive, and perhaps had the effect of limiting how the disputes as well as ourselves as mediation professionals were viewed. Perhaps foremost among these models was the "Riskin Grid", which confined styles of mediation and mediators to a matrix based on two sets of values; one being a range of style/role from Evaluative to Facilitative and the other pertaining to how problems were defined, from Narrow to Broad.⁷ There is little doubt that these models reflected a result and resolution orientation as opposed to the human value criteria of the transformative model. Some of these descriptors continue in use today.

Just as Transformative Mediation was often misunderstood and the subject of some skepticism as well as criticism, more "practical" models such as Riskin's Grid were subject to a large amount of stereotyping, over-simplification, and criticism as well.⁸ Yet mediators continued to evolve and search for descriptors. Given some people's inclinations, whether because of inherent characteristics such as model preference or bias, process goals, or market force and demand, mediation had certain features, and such were considered nearly indispensable to the process.

examines the beneficial features of the process, as well as some of the critiques, and concluding that there is, in fact, room for middle ground.

7 The initial paper was Leonard L Riskin "Mediator Orientations, Strategies, and Techniques" *Alternatives to the High Cost of Litigation* 111 (1994). In response, some challenged these descriptors. See Kimberlee Kovach & Lela Love "'Evaluative Mediation' is an Oxymoron" 14 *Alternatives to the High Cost of Litigation* 31 (March 1996). Thereafter, Riskin continued with additional expansion of the ideas, see Leonard L "Riskin Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" July 1, 1996 (1997) 1(7) *Harvard Negotiation Law Review* available at SSRN <<http://ssrn.com/abstract=1506684>>. At this point, another response was put forth: Lela Love & Kimberlee K Kovach "Mapping Mediation: The Risks of Riskin's Grid" (1998) 3 *Harv Negotiation L Rev* 71. These dialogues have continued to the present.

8 Above n 7.

Simultaneously, a strong necessity arose among mediators to find a place in the lexicon for the style, approaches to and /or goals of mediation.

Many of us, as practicing mediators, have more than a few dramatic stories with respect to a transformative process moment, such as an important emotional breakthrough or moment in mediation that was key to the successful closure of a dispute. Upon a more reflective analysis, it may be observed that these shifts that occur and emerge serve as foundational to durable resolutions - those that serve process, product and people. These usually consist of smaller, harder to discern events and interactions which are nevertheless quite important for the process. Certainly, we all agree that effective mediators should be vigilant and mindful of these opportunities. "Shifts happen" and they need not be events of high drama that some people think of when they think of Transformative Mediation with its perceived primary goals of moral growth, better relations, and empowerment of individuals.

While recognition and empowerment of human relations may not be apparent on the radar of many mediators or mediation participants, particularly those involved in 'commercial disputes', they are, in fact, elements that most conflicts and mediations contain. Additionally, such perspectives often hold the very answers to some of the more stubborn challenges of conflict and its resolution.

IV CONFLICTS AS WE KNOW THEM CONSIST OF HUMAN BEINGS, FIRST AND FOREMOST

In his novella *Being There*, the author Jerzy Kosinski's protagonist Chance the Gardener is mistakenly presumed to be a sophisticated and highly educated businessman, instead of the simpleton he really is; incapable of uttering more than confused or simple expressions or stating the obvious. In his transition from the foolish Chance the gardener to Chauncy Gardiner, advisor to a US President, he becomes a national hero whose confusion and simple statements resonate with the public as allegorical brilliance. It would not be unlike Chauncy to observe that "human conflict is about humans" or that "it is difficult to have difficult conversations".

Similarly, we in the neutral community too often engage in the obvious while participating in the process in less than a mindful manner. When we do so, we miss what might be opportunities with respect to building better relations. Approaching mediation in a thoughtful manner and mediating in a way that is mindful of its human participants may be obviously important to the reader; however there is much more modeling and use of methodologies based upon the competition and style of the

courtroom than one might think about at first. As a result, these approaches and perspectives have found their way into mediation as it is actually employed, by the participants, their representatives and even the neutral. There sometimes even exists a digression to the "hand to hand combat" of the trial, instead of other more human and, dare we write, "transformative" opportunities that might exist in the mix of the people and the issues that constitute the dispute.

We think that it may be quite beneficial to consider how we, as mediators, may in simple, small ways, stick our toes into the water of humanity without the grand gestures or process changes so often related to transformative mediation. Can mediators take simple steps to mediate with more reflection as to the human elements and condition? How can these small, albeit important, steps help avoid fear, build trust and save wear and tear of important human good will? And how might these simple elements be vital, if not *transformative* in terms of the overall benefit to the process and participants? As initial considerations, let us consider the following:

- Conflict and its resolution are intimate processes. For mediators and advocates to engage in earnest in a respectful manner with people who are at odds on issues that might well be all-consuming to them requires all of us in the process to be up close and personal. This emotional dynamic, when combined with additional factors such as differing concerns, beliefs, values, needs, and fears that are not just personal but in turn, are intimate requires much focus on inter- and intra- personal matters. Perhaps the simplest, but yet the most difficult and necessary is that of listening. It is essential that mediators proceed with awareness and respect for those conditions and their accompanying factors, arguably even in the most seemingly detached and commercial of disputes.
- Clarity and communication are too often lost in a mix where the neutral is either used as - or incapable of becoming more than - a simple "water carrier" or sheep dog. In such cases, the mediator's role consists of ever harrying parties in from the margins of the dispute toward that area where there might more likely be agreement. As mediators, we must always strive to help disputants in using a process that assists them to be more clear and communicative from beginning to end and in a step-by-step manner. Although this may not be considered transformative, such goals advance a more positive human interaction between and among the participants. Little things like complimenting and even rewarding noble and polite behaviors can go a long way in providing an opportunity for a shift in dynamic, and opening up the process to real, authentic communication.

Conversely, while a certain "directiveness" may be desired or constructive, it needs to be done in a respectful manner that is mindful of the human beings who are involved in the process, along with all of their attendant perspectives. Assertiveness may have its place, both for advocates and neutrals, but empathy is a cornerstone of trust-building and one should always err in the direction of empathy. It is desirable not only in the neutral. Empathy should be promoted by neutrals, so that perhaps in some instances the participants can view the mediators as a model, and even begin to make some attempts at demonstrating some empathy themselves.

- Trust...true and real trust...is essentially at the basis of all successful, lasting resolutions. Mediators should continually remain aware of how all words and gestures have an effect on the parties and the process. Just as those that we coach throughout a process, we must remain mindful that trust is between humans and cannot be imposed or adjudged. "Transformation" from mere language to human conduct is part of any durable resolution. This is so even in the commercial dispute where the final pivot to agreement depends so much on people trusting or at least, beginning to trust, that they might have a prospect and partner for resolution. And in particular, a durable and lasting resolution. We should be mindful of Mencken's admonition, which may be eye-opening for many mediators: "It is mutual trust, even more than mutual interest, that holds human associations together".⁹

This quote, although supporting trust, almost appears to make trust and interest mutually exclusive. But trust and interests coexist; they are related, it seems to us. Much of what is promoted by some of the best mediators is interest -based negotiation; and to go a step further, mutual interest -based negotiation. And such interest-based negotiation is quite often predicated upon trust. In either event, the notion of the necessary compromises for resolution without continuing conflict entails its own whole set of emotional and "human" dynamics that needs to be attended to for positive outcomes that are durable and lasting. Nonetheless, the strictly positional, sometimes combative style that we see so often - what some call "trial by mediation" - depending on culture and various other factors, is indicative of a totally self-

9 The entire quote is as follows: "For it is mutual trust, even more than mutual interest that holds human associations together. Our friends seldom profit us but they make us feel safe. Marriage is a scheme to accomplish exactly that same end." HL Mencken Read more at: <www.brainyquote.com/quotes/quotes/h/hlmencke157545.html>.

interested format and approach. In these situations, the participants, whether lawyer representatives or the parties seek very little, if any, investment of trust in opposing parties, thereby taking the humanistic, and potentially transformative elements out of the equations, with result of potential partnership and other collaborative opportunities founded on trust completely absent from the table.

This essay posits that collaborative engagement, with its implicit elevated tone and content of respect, even if not totally similar to definitions of transformative mediation of two plus decades ago, may provide a healthier and more durable model of negotiation and mediation with the resultant lasting outcome. Acknowledging disagreement may exist, and even if one doesn't agree – in whole or in part - with this premise, we need to carefully examine what we are espousing throughout the course of our contact with the parties in mediation. Specifically, if we are talking the talk of collaboration, mutual interest and their inherent human qualities, then it is important to walk the walk, if even in only minor ways. For example, by undertaking to conduct the mediation in a way that expresses an expectation of best practices of respectful and courteous behaviour, a tone is set. Such action can clearly have an impact, and affect the minor shifts in a trajectory that may sweep into a broader and more impactful arc later in the process. Furthermore, we need to be ever mindful of underlying emotions and their drivers; we also need to be aware and deliberate about the manner in which we address them, that being with a sensitivity and intellect that may make a difference. Should such factors be ignored as irrelevant to the way problems are solved, when they are clearly a force behind those problems, the problem isn't really resolved. Enduring and durable outcomes require human, if not transformative considerations and indications throughout the process, which brings us to our next point.

- The manner through which we as neutrals teach aspiring mediators and advocates, and coach disputants can often have a considerable impact on outcome. In the former case, it may affect a lifetime of work. In the latter, it may well affect the outcome of the dispute; not merely whether it is resolved, but how durably it is resolved and in what kind of condition the disputants will be left in the aftermath. While most law school texts and courses in negotiation, mediation, and mediation representation are inclined toward a collaborative bias, ironically there is more often than not little hint that many of the 'legalized' disputes resolved in mediation, perhaps most, are resolved through a process that reflects a digression to the litigative, adversarial process. When this occurs, little attention is paid to the parties and the human

and emotional dynamics or circumstances that they find themselves surrounded by. Focus on "legal mediation" often forgets or even purposely ignores the opportunities for the parties to step beyond the competition in a more collaborative manner, and move to resolution in a more constructive fashion.

Likewise, similarities arise with how mediators coach disputants and their representatives. Perhaps too often do we as mediators focus on the lawyers and their idea of bargaining, including the pressures we see in various regions to not convene a joint session.¹⁰ But when everyone is 'in the room' with its opportunities to get the collective "humanity" of the dispute at the same table, additional possibilities may emerge. These include the chance to speak, in terms of elevated tone, content and conduct, and in so doing we may even be able to explore both directly and indirectly some of the keys to the conflict. Such an exchange - one that is perhaps more attuned and sensitive to the human, maybe even transformative potential - may provide additional room for moves or shifts. We believe that movement and shifts do not need to be monumental or profound; rather it is those small shifts that might lead to prouder moments than someone sitting at the end of the day with no more than a settlement based upon an evaluation or mediator's proposal and a stale tuna salad sandwich. Mindfulness of the dignity of the human beings and the privilege we enjoy in serving them should not be an unattainable aspiration or goal.

- Fairness and perceptions of it can also profoundly affect the durability of resolution. Once again, while notions of fairness are persuasive in life, they often also have a very unique role in, and relationship to, conflict. The promotion and understanding of fairness are clearly conducive to the small...and large shifts and "transformations" necessary for durable conflict resolution. The deeper satisfaction of human beings should be important to

10 This has been discussed a great deal in the last few years, as a trend in some jurisdictions within the United States, where the joint session is absent, and in many cases, the parties never even see one another. Matthew Rushton "The Long Goodbye: Is Mediation Evolving or Regressing?" (June 17, 2015). There is considerable data to support this view. See eg JAMS study showing data base group of JAMS mediators, who 4-20 years earlier had utilised a joint session at the rate of 80%, only using it in 2015 in 45% of mediations. Likewise, while showing a diminished usage throughout the US, its use in Southern California was a mere 23%. There is a strong suggestion in actual data and anecdotally that the trend is moving East...and beyond. See also Jay Folberg "The Shrinking Joint Session: Survey Results" (Winter 2016) 22(2) Dis Resol Mag.

us neutrals as should be the fact that force and might do not provide the returns that a fairer process will almost certainly yield.

V A WORD ON HINDRANCES TO SMALL AND LARGE SHIFTS

Being open to, and aware of, opportunities for small shifts throughout the mediation, let alone more profound transformational opportunities, clearly is complicated and challenging work. But it can be deeply gratifying. Beyond some cultural aversion to such a process as described above, there also remain environmental impediments. Legal disputes many times consist of formats and rudimentary process and an educational foundation that creates representatives who are very deeply steeped in the limited binary choices of the win and lose, right-wrong paradigm. This is the law, where there is a "rectangularity" and process that lends itself to decision making by others who are strangers to the dispute. Yet the responsibility for making those decisions for the disputants and their lawyers falls to strangers. Moreover, the nomenclature of causes of action alone can be cold and offensive to the humanity we may be seeking to instill. And the legal profession can often attract a certain emotionally avoidant type of person who finds shelter in the profession and away from those places where real life events and people rub up against each other.¹¹

It is no different for those who find their way to law and litigation. Although lawyers were, and maybe still are in some jurisdictions considered 'counselors at law', in the world of litigation much of that counseling role seems lost. The role of the lawyer advocate to persuade strangers to a dispute of one side or the other, requires excellent in advocacy and persuasion of a particular perspective. Conversely, helping disputants reach accord among themselves in a manner that allows them to get past the competitive narrative is a completely separate and distinct process, that requires a very different skill set. Yet rarely is such acknowledged in theory let alone observed in practice.

Moreover, the legal model too often provides a form of bargaining, usually positional or distributive, that has become predictable, and offers a very limited ability to provide clarity or advancement beyond the conflict. Instead, such approaches are based upon argumentation and an extension of that conflict, where there is little room for real communication. The argumentative model does not provide a framework for necessary civility, which point increasingly is by complaints from judges and advocates alike, who complain about the diminution of civility and collegiality.

11 See for example, David Maister Charles H Green and Robert M Galford "The Trusted Advisor" (2001).

Add to all of this the "velocity" demanded by present commerce, communication and markets and it becomes very clear that the intimacies required for the shifts we think might be important are hugely challenged by an environment where there is little time for the important narrative, craft, art and communication needed for the "stitching together" and "connection making" that remain so important to those relations. This includes discussion of all aspects of conflict, which are so uniquely human. Insert into that mix of bustle and increasing energy electronic devices as a preferred form of communication (and too often diversion and distraction) and the aversion, if not escape, from necessary intimacies becomes almost complete.¹²

These challenges are certainly daunting, and no doubt many more exist. Yet, the mindful neutral, through diligence and perseverance can still help design and manage a process that maintains a transparency in tone and content in a room where people are respectful and polite. Bad – or non-productive behaviour may be prevented before it starts; and people and their inherent dignities are given a chance. This does take some courage.

VI CONCLUSION

As mediators, we are bridges of sorts with a gift and privilege to help people in conflict. We should strive, even if in small ways, to help human beings conduct the processes for resolution of their disputes in a manner and with a quality befitting of their humanity. Although this may not consist of a widespread and total adoption and implementation of the transformative model of mediation as initially proposed and discussed by Bush & Folger and advocated by others, it may indeed provide increased awareness that the more human aspects of conflict should be identified, considered and honoured.

12 Sherry Turkle "Alone Together: Why We Expect More from Technology and Less from Each Other" (2012) Sherry Turkle "Reclaiming Conversation: The Power of Talk in a Digital Age".

