



Mediation is Risky Business

Session 1.2
Mediation is Risky Business:
Who "Owns" it and How does it Operate?




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Sam Before He Started Mediating! **Introduction**




"I SEE OUR TRAINING BUDGET IS TIGHT AGAIN THIS YEAR!"

- Sam Imperati, JD
- Former Trial Attorney and Pro Tem Judge
- Taught: Willamette MBA and L&C Law
- Currently: a Mediator, Facilitator, and Trainer
- Father of Two Mini-Mes!
- Uncle "Big Al" Capone

Presentation vs. Handout
No Legal Advice

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Ice Breaker

Your New Name For This Retreat


FIRST: Name of the first pet you can remember

LAST: Name of the first word (not numbered) street you can remember

I'm "Butch Oxford"



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Mediation is Risky Business

Agenda Overview



- Mediation is Risky Business
- What are the differences between the approaches and do they matter?
- Explore the ethical issues and practical questions surrounding the competing mediation models.
- Who "owns" it?
- EXTRA CREDIT: practical tools to provide the best combination of approaches.

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Ground Rules

- *Keep an Open Mind*
- *Participate Fully*
- *Share Differing Views*
- *Explore, Don't Debate*
- *Blackberry-Free Zone*
- *Have Some Fun!*

The Practical Details

Boot Camp!

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Mediation



Theories, Paradoxes & Tactics

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Mediation Compared to Other Forms of Dispute Resolution: Why are the Differences So Important?

Mediation is defined in Oregon:

"Mediation" means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated. (Emphasis added.)

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Why Does Anyone Mediate if Mediation Risks Psychological Dissatisfaction, Extra Costs, and Manipulation?

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[www.mediate.com/ICM/docs/Why%20Does%20Anyone%20Mediate%20If%20Mediation%20Risks%20Psychological%20Dissatisfaction,%20Extra%20Costs%20and%20Manipulation\(1\).pdf](http://www.mediate.com/ICM/docs/Why%20Does%20Anyone%20Mediate%20If%20Mediation%20Risks%20Psychological%20Dissatisfaction,%20Extra%20Costs%20and%20Manipulation(1).pdf)

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Spoiler Alert: Mediators are Master Manipulators Old Saws

- 1) Mediators own the process
- 2) Parties own the outcome
- 3) Mediators don't have preferences as to the outcome



Provocative Proddings

- 1) Mediators should not own the process
- 2) Parties may not actually own the outcome
- 3) Mediators do have preferences over outcomes

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1st of 3: Self-Determination Theory (SDT) (Psychology)

SDT: everyone has a need to feel:

Competent: to have an effect and attain valued outcomes

Related: to feel connected to others.

Autonomous: to self-organize and be concordant with one's integrated self.

Self-determining parties choose their

- dispute resolution processes and
- substantive agreements.



PARADOX: The more the mediator maximizes the parties' self-determination, the less the mediator satisfies her own

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2nd of 3: Transaction Resource Theory (TRT) (Economics)

TRT: people confront problems of imperfect information with respect to substance and process. Negotiating parties face contradictory pressures that consume resources:

Costs of making concessions and complying with the agreement militate against making an agreement.



Versus

Benefits of reducing conflict and inducing others to cooperate militate in favor of making it.

PARADOX: Parties exhaust their transaction resources in resolving the dispute, yet they invite a mediator in with her own interests and costs.

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3rd of 3: Collective Choice Theory (CCT) (Political Science)

CCT: assumes individuals can exercise choice consistent with their preferences – be it on process or substance.

PARADOX: it is impossible to design a process for a group to make a choice that guarantees an outcome as rational as choices made by its individual members. The parties risk cycling interminably among possible outcomes.

Or, if they agree upon one, it may well result from a party or the mediator manipulating the process.



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Mediators Manipulate by Using Rhetorical Tactics



Just Say-in!

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Rhetorical Tactics (Persuasive Discourse)

Aristotle divides rhetorical arguments into three, not mutually exclusive, categories:

- Logos:** Logic stimulates need to feel competent
- Ethos:** Ethics, virtue, and goodness stimulate a party's need to feel related by communal norms
- Pathos:** Sympathy and emotion can satisfy a person's need to feel autonomous




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Rhetoric presents existing information in a way that can manipulate a person's thinking.

- Forensic:** "Attempts to change what we see as the truth about the past" (E.g. "Is it possible their intent was [positive] ...")
- Epideictic:** "Attempts to reshape views of the present" (E.g. "You have a choice - fix blame or fix the problem.")
- Deliberative:** "Attempts to make the future" (E.g. "Wouldn't it be better to build a relationship vs. build a case?")



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The “Presentation to Influence the Outcome” Tactic

Economic Theory: rationality presumes people make identical choices over identical options, regardless of how the options are described.

Reality: People perceive outcomes in terms of gains and losses relative to some intuitive reference point they usually can only vaguely articulate.



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Choices Cannot be Presented Neutrally



The “Summarize or Reorder” Tactic

Example: Suppose a disputant were to make a series of proposals with multiple costs and benefits. People often employ a mental accounting assigning value into two categories – good (gains) or bad (losses).

Economic Theory: Money is Fungible

Reality: Money in one mental category is not a perfect substitute for money in another.



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Mediators Manipulate by Using Heresthetic Tactics



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Just Say-in!



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Heresthetics (Political Strategy)

Heresthetics: Structuring the world so you can win. Related to rhetoric, but involves more than verbal persuasion. It involves setting up a situation so that other people will want or feel compelled by circumstances to cooperate, even without persuasion.

According to SDT and TRT, a mediator in support of Self-Determination should engage the parties in a collaborative discussion and ultimately a decision to select mediation and the mediator's approach be it Transformative, Facilitative or Evaluative.

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Process Tactic

The challenge in choosing a process looks like this:

Rank:	First	Second	Third
Participant:			
Party 1	Evaluation	Facilitation	Transformation
Party 2	Facilitation	Transformation	Evaluation
Mediator	Transformation	Evaluation	Facilitation

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Lesson:

By setting the order of the questions, each participant controls the outcome even if it's done unintentionally or benevolently.

When mediators set the agenda, we are exercising the art of heresthetics and that is potentially dangerous.

Robert's Rules are amenable to manipulation.

Arrow shows the impossibility of designing ANY process that's immune to manipulation.

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Arrow's Theorem

Arrow's impossibility theorem states that whenever the set A of possible alternatives has more than 2 elements, then the following three conditions become incompatible:

- **Unanimity, or Pareto efficiency:** If alternative a is ranked above b for all orderings R_1, \dots, R_N , then a is ranked higher than b by $F(R_1, R_2, \dots, R_N)$ (Note that unanimity implies non-imposition).
- **Non-dictatorship:** There is no individual i whose preferences always prevail. That is, there is no $i \in \{1, \dots, N\}$ such that $\forall (R_1, \dots, R_N) \in L(A)^N, F(R_1, R_2, \dots, R_N) = R_i$.
- **Independence of irrelevant alternatives:** For two preference profiles (R_1, \dots, R_N) and (S_1, \dots, S_N) such that for all individuals j , alternatives a and b have the same order in R_j as in S_j , alternatives a and b have the same order in $F(R_1, R_2, \dots, R_N)$ as in $F(S_1, S_2, \dots, S_N)$.

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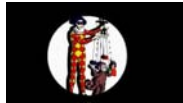
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Arrow's Theorem does not say, if a group reaches a decision, it has been dictated.

It says: **we cannot guarantee someone didn't manipulate it to get their preferred outcome.**

The parties, including the mediator, each have the potential to act in a disingenuous manner, especially in caucus.

They can inadvertently influence the outcome.



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Substance Tactic

What might mediators do when parties are choosing among **substantive alternatives**, especially when parties often defer to the mediator's subject matter expertise?

Mediator Options:

Option A: Mandy Mediator has legal expertise that the parties/attorneys do not. They are considering an agreement far less advantageous to one party than going to trial. Mandy prefers no agreement and sets the agenda to secure impasse.

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"A Passive Evaluator?"



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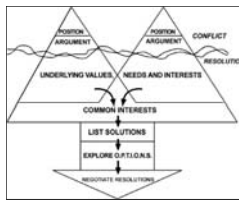
Option B: Based upon Mory Mediator's expertise, he discerns a basis on which the parties can settle, but he says nothing, which satisfies the tenants of Impartial Regard, but ends with an impasse. A Transformative Mediator?

Option C: Mory uses his subject matter expertise to explain why one argument/position is more likely to prevail in front of the ultimate arbiter, which leads to a settlement. Reality Testing or an Evaluative Mediator?

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Option D: Mandy learns that Party 1 prefers alternative "A" because of its ECONOMIC value, while Party 2 prefers "B" because of its REPUTATIONAL value, which Party 1 is less concerned about. Mory suggests: "A" in exchange for confidentiality. The pairing of Interests to overcome an Impasse over Positions. OK?



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Which Options Are OK?

The above common techniques create mediator opportunities to help parties explore solutions based upon the different intensities of their preference.

Without standards, the parties are left to the mediator's preference, which is often left unspoken – so much for "full disclosure," "informed consent" and "self-determination!"



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Lawyers in Mediation Are Especially Challenged



Examples from a bar CLE:

- A) "Don't Bury the Lead," meaning lead with your point, and then, backfill with the train of logic and facts that got you there, not the other way around; and
- B) "Don't take the bait," meaning never directly respond to your opponents framing of the story; always reframe it by telling your story.

These tactics were enthusiastically received by the audience. Lawyers zealously representing parties in mediation, or acting as a mediator, **might be**

27 **desensitized to the inappropriate use of rhetoric**



And So are Others!

CE for psychologists and social workers: some objected to mandatory ethical and competency standards because the lawyers would write them to exclude non-lawyers.

Irony: These particular attendees were eschewing setting standards that might benefit their clients and their profession out of fear, and not turning to mediation to help find an answer.



Psychology



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Moral of The Stories

We have observed / participated in robust debates, about which profession "owns" mediation.

Playful Provocation: If **attorneys**, acting as advocates or mediators, are desensitized to dangers of heresthetic and rhetorical tactics, they have a **blind spot**.

Parties should be cautious, unless mediators who are attorneys are re-sensitized to the implications of using these tactics.



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Conversely, mediators from different professions of origin should be sensitized to their blind spot - laws are nothing more than society's codification of fairness norms surrounding appropriate behavior.



Laws are based upon commonly accepted values and needs – “interest” in our vernacular.



One's profession of origin determines the “reprogramming” necessary to be an excellent mediator!

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Mediators have a duty to display impartial regard and may be less desensitized, but what about all those popular “breaking impasse” courses?

Regardless of our profession of origin, we struggle with ethical issues associated with our tactics.

The Intersection of Logic and Emotion.

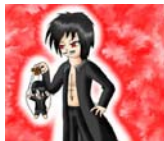


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Mediator Ethical Challenges

- Heresthetics and Rhetorical tactics impart power to mediators.
- Every mediator action exercises some form of power while mediating; so, let's own it for crying in the night!
- If we don't, how is it safe for parties to engage in mediation?



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Ethics: The Solutions Are Here



Oregon Mediation Association (OMA) Core Standards of Mediation Practice for Guidance & Improvements

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Solution: Ethical Standards



"Let's just go with the commandments and work out ethics later."

1. Self-Determination
2. Informed Consent
3. Impartial Regard
4. Confidentiality
5. Process & Substantive Competency
6. Good Faith Participation
7. Fees
8. Advertising & Solicitation
9. Dual Roles & Hybrid Processes
10. Mediation Practice

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Conclusions

1. Mediation works because a mediator's **ethical use** of heresthetics and rhetoric serves the participants' psychological needs for self-determination and efficient use of resources.
2. Parties and a mediator who **agree on** ethical standards satisfy their intrinsic needs, reinforcing self-determination, solve a complex contracting problem at lower cost, and mitigate manipulation.
3. We should **rethink our "old Saws."** Perhaps,
 - A) Parties do not own the outcome,
 - B) Mediators should not own the process, and
 - C) Mediators have preferences over outcomes.

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Recommendations

- 1) Make standards of ethical practice more robust
- 2) Have parties agree on the mediator's ethical standards.
- 3) Make standards of ethical practice mandatory.
- 4) Eliminate immunity from malpractice if a mediator charges a fee
- 5) Mandate More Training



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The Mainstream Approaches

Transformative Facilitative Evaluative



"So much is written, so little advanced."

If Freud, Jung, Rogers & Beck were Mediators
 – Who would the Parties Pick?
 43 Idaho Law Review 643 (2007)

[www.mediate.com/ICM/docs/43%20Idaho%20Law%20Review%20643%20\(2007\).pdf](http://www.mediate.com/ICM/docs/43%20Idaho%20Law%20Review%20643%20(2007).pdf)

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Intersection of Ethics and Approaches



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What are We Talking About Here?

- A broad review of literature and conference presentations in the field reveals a range of differences among mediation approaches.
- The following chart may be used for discussion purposes with the parties and their representatives.
- It is a “Discussion Draft”
- Edit it – please!

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Mediator Approaches

Approach	“Transformative”	“Facilitative”	“Evaluative”
Negotiation Theory	Interest-Based Relational	Interest-Based Preference	Rights-Based Distributive
Mediator's Value	Process	Process	Results
Central Actor	Party	Party	Attorney-Focused
Reference Points	Relationship	Relationship Preference	Legal Rights & Responsibilities
Communication Style	Listen	Explore	Argue
Goal	Fairness & “Resolution”	Prefer “Resolution”	Power & “Settlement”

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Mediator Approaches

Approach	“Transformative”	“Facilitative”	“Evaluative”
Decision-Making Reference Points	Perceptions & Subjective Standards	Combination	Evidence & Objective Standards
Length of Sessions	Longer	In-Between	Shorter
Underlying Values	Self-Determination	Both	Protection of Rights
Disclosure Expectation	Full Disclosure	Full Disclosure Preference	“Secret” Information OK

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Mediator Approaches

Approach	“Transformative”	“Facilitative”	“Evaluative”
Length Assumption	One or More Sessions	One or More Sessions	One Session
Mediator's Skills	Process Expertise	Process Expertise & Subject Matter Familiarity	Process Familiarity & Subject Matter Expertise
Party's Interests	Non-Economic	Economic & Non-Economic	Primarily Economic
Negotiation Style	Collaborative	Combination	Aggressive

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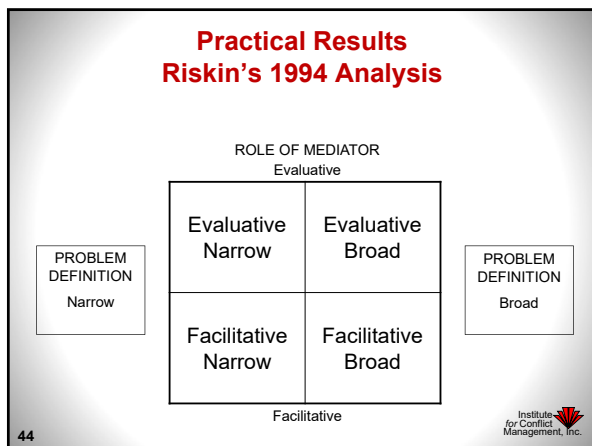
Mediation Approaches in Theory & in Action

A. The “Evaluative” Approach
 B. The “Transformative” Approach
 C. The “Facilitative” Approach
 D. The “Hybrid” Approach

Don Saposnek has suggested that a “one size fits all mediation model is no longer tenable.”

Research found that most of the mediators spent some time in each of the approaches while using an overall predominant approach.

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Riskin now recognizes that many – perhaps most – mediators fit in both categories *facilitating* some issues and *evaluating* others.

The new system makes central the idea of participant (parties, representatives and mediator) “influence” with respect to particular issues. He does this by dividing mediation decision-making into three categories:

1. Substantive,
2. Procedural, and
3. Meta-procedural (decision-making about the *process* of making decisions)

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Mediation Ethics 101: Mediator’s Role in Determining the Appropriate Approach

Commentators such as Kim Kovach have described the profession of mediation as having “growing pains.”

There is a built-in inconsistency in the development of “standards” for mediators. The entire premise of mediation is its lack of rigidity. Mediation is a flexible process, and that flexibility is one of mediation’s key benefits.

To achieve the flexibility of process, mediators should be given a certain amount of freedom to use the mediator’s preferred approach or model, the one with which the mediator is most comfortable, and perhaps, as a result, the most competent.

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Mediation Ethics 201: Preserving the Mediator’s Neutrality & Impartiality Through Self-Determination of the Parties

How can mediators preserve the integrity of the mediation process as a forum where an impartial third party assists the participants in resolving their own disputes?

The central question is whether the disputants arrive at a resolution by their own self-determination or under the control of the mediator.

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Self-Determination

OMA Standard I:

Mediators respect, value and encourage the ability of each participant to make individual decisions regarding what process to use and whether and on what terms to resolve the dispute. (Emphasis added)

Comment 3:

Mediators should educate participants about the continuum of mediation approaches and identify the approaches the mediator practices. Engaging the participants in a discussion to establish expectations about these approaches will help the participants give their Informed Consent to the approach best suited to their particular situation. (Emphasis added)

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Informed Consent

OMA Core Standard II:

To fully support self-determination, mediators respect, value, and encourage participants to exercise Informed Consent throughout the mediation process. This involves making decisions about process, as well as substance, including possible options for resolution. Initially and throughout the mediation process, mediators further support Self-Determination by making appropriate disclosures about themselves and the specific mediation approaches they use. OMA Core Standards. (Emphasis added.)

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Informed Consent

This is consistent with the Oregon (OSB) Rules of Professional Responsibility, Rule 2.4, which states:

(a) A lawyer serving as a mediator: (1) shall not act as a lawyer for any party against another party in the matter in mediation or in any related proceeding; and (2) must clearly inform the parties of and obtain the parties' consent to the lawyer's role as a mediator. (Emphasis added)

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Mediation Ethics 301: Approaching the Ideal of "High-Quality Consent"

John Lande has defined "high-quality consent." A condition in which mediation participants have the opportunity to make decisions by considering the situation sufficiently and without excessive pressure. The elements are:

- A. Explicit consideration of principals' goals & interests
- B. Explicit identification of plausible options
- C. Principals' explicit choice of options for consideration
- D. Careful consideration of options
- E. Mediators' restraint in pressuring principals to select particular options
- F. Limitation on the use of time pressure
- G. Confirmation of consent

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Mediation Ethics 401: The Impact of Perceived Procedural Due Process

Nancy Welsh argues that the added benefit provided by mediation is the experience of justice, or "procedural due process." She describes research showing that citizens "want the courts to resolve their disputes in a manner that feels like justice is being done." (Emphasis added) Welsh considers four changes in the filed negatively impact procedural due process:

- A. The reduced role for disputants
- B. The preference for evaluation by the mediator
- C. The abandonment or marginalization of the joint session
- D. The lack of creativity in the settlements produced

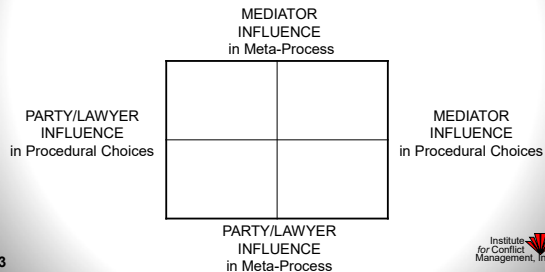
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How are the Mediator's Obligations Implemented in the Real World?

A. The Approaches on the Ground

Riskin's 2003 New New Grid: Deciding Who Influences Procedural Decisions

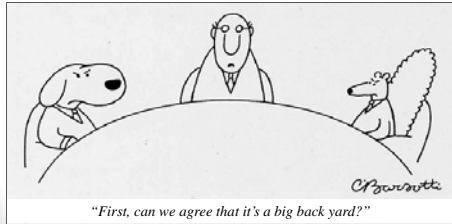


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It is all-too-common for the mediator to assume that we “own the process” and the participants own the “outcome.” We challenge that assumption regardless of the mediator’s preferred approach.



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Pre-Session Approach Assumptions

M E D I A T O R S A S S U M P T I O N (M)	Party A's Assumption (A)			
		Transformative	Facilitative	Evaluative
	Transformative	M, A, B		
	Facilitative		M, A, B	
Evaluative			M, A, B	
Party B's Assumption (B)				

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Assuming the best-case scenario where each party makes the same assumption, the mediator only has a 33% chance of matching their selection, which are not very good odds.

In fact, if each party makes a different assumption, by definition, there is no agreement on which approach to use.

Under that scenario, the mediator’s implementation of her or his assumption results in one of three negative outcomes: 1) Party A is unhappy, 2) Party B is unhappy, or C) Each is unhappy. Thus, the need to have the approach discussion seems evident.

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What Type of Conflict do the Parties Bring to the Table?

Before beginning the non-process portion of the mediation, mediators should engage the parties and agree upon the type of underlying goals, recognizing that will affect the preferred mediator approach. William Wilmot & Joyce Hocker have developed the acronym "TRIP" as an analytical tool:

1. Topic Goals
2. Relationship Goals
3. Identity Goals
4. Process Goals

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How Far has the Conflict Escalated?

Spillman & Spillman have observed that as conflict escalates, parties tend to regress in their maturity. Their suggested stages follow:

- Stage One:** More often, blows over & resolves itself.
Stage Two: Parties fluctuate between cooperation and competition. Logic & argument are used to beat the other party.
Stage Three: Concrete actions. Each party fears the possibility for a reasonable outcome has been lost. When the parties hire lawyers.
Stage Four: Almost any action by the other party is seen as a loss of face requiring further reaction. The parties find it very difficult to see things as the other party sees them without help.
Stage Five: The parties see each other as enemies and seek to hurt each other, often hurting themselves in the process.

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Bringing These Concepts Together

Goals	Topic	Relationship	Identity	Process
Stages	Substantive Rights & Obligations	Between the Parties	Feelings	Negotiation Over How
One	NM	NM	NM	NM
Two	A	T,F	T,F	A
Three	A	T,F	T,F	A
Four	E	T,F	T,F	A
Five	E	T,F	T,F	A

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Transformative, Facilitative, Evaluative, Any, No Mediation



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The Approaches at the Operational Level

The following chart puts forth a draft construct for Implementation Tools and Associated Approaches.

It is designed to help the parties better understand how the generalized differences in mediator approaches translate into specific mediator behaviors.

It should be edited and used by you to ask participants about their preferences and get agreement on what you will do and not do.

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TOOL/APPROACH	TRANSFORMATIVE	FACILITATIVE	EVALUATIVE
Explain Approaches		X	
Focus on Interests		X	
Focus on Rights			X
Focus on Relationship	X		
Joint Session	X		
Caucus			X
Joint Session And Caucus		X	
Pre-Mediation Submissions			X
Full Party Disclosure	X		
Process Expertise		X	
Relationship Expertise	X		

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TOOL/APPROACH	TRANSFORMATIVE	FACILITATIVE	EVALUATIVE
Subject-Matter Expertise			X
Mediator Options		X	
Mediator Opinions			X
Mediator Raises Matters Not Discussed by Parties			X
Legal Information			X
Mediator Declares an Impasse			X
Rectify Power Imbalances		X	
Mediators Raise Interests of Those Not at the Table		X	
Advise Parties on When to Make a Proposal			X

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TOOL/APPROACH	TRANSFORMATIVE	FACILITATIVE	EVALUATIVE
Advise Parties on What to Propose			X
Advise Parties on What Arguments to Make			X
Advise Parties on When to Make the Arguments			X
Advise Parties on What Information to Give Other Side			X
Advise Parties on When to Provide Information to Other Side			X
Willingness to Make Conditional Offers			X

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TOOL/APPROACH	TRANSFORMATIVE	FACILITATIVE	EVALUATIVE
Willingness to Hear the "Bottom Line" and Still Negotiate #s			X
Prefers to Discuss Money 1 st			X
Prefers to Discuss Non-money Terms 1 st		X	
Urge Or Require Pre-Mediation Submissions			X
Evaluate Credibility			X
Discuss Jury Appeal			X
Discuss Only Strengths	X		
Discuss Only Weaknesses			X

TOOL/APPROACH	TRANSFORMATIVE	FACILITATIVE	EVALUATIVE
Discuss Both Strengths and Weaknesses		X	
Refer Parties to Outside Information		X	
Research Law Independently			X
Research Facts Independently			X
Prepare Unbinding Memorandums of Understanding			X
Prepare Binding Memorandum of Understanding			X
Prepare Formal Settlement Documents			X

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TOOL/APPROACH	TRANSFORMATIVE	FACILITATIVE	EVALUATIVE
File Formal Settlement Documents			X
Willing to Manage Profanity and Anger		X	
Discuss Firmness of Offers from Other Side			X
Rectify Procedural Power Imbalances		X	
Rectify Substantive Power Imbalances		X	
Willingness to Use "Mediator's Solution"			X
Willingness to Talk to Parties Without Attorneys	X		

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TOOL/APPROACH	TRANSFORMATIVE	FACILITATIVE	EVALUATIVE
Willingness to Talk to Attorneys Without Parties			X
Follows Up After Formal Session		X	
Willingness to Convert From Mediator to Arbitrator on Any Issue			X
Willingness to Convert to Arbitrator for Settlement Language Disputes			X
Willingness to Convert to Arbitrator on Fees Disputes			X

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All of this material should be edited specifically for the types of cases you do.

Suggestion: Prepare a clear and concise statement outlining the mediation approach(es) you use, giving examples of what you do, and, equally importantly, what you do not do.

This information can be transmitted in a pre-session explanatory letter, referenced on your website, be included in your Agreement to Mediate, or discussed at the beginning of the mediation session.


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Coma Breaker

Your Approach to Work = Microsoft Program



Why?

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My Approach is Better Than Your Approach!

It is time to answer the question first asked, "[i]f Freud, Jung, Rogers, and Beck were mediators, who would the parties pick?"

Each represent not just their unique approaches, which have evolved into unique practices of psychology, but the desirability of aligning oneself professionally with his or her personal approach to their trade.

A challenge to our field: identify the mediator's unique approach to mediation, articulate that approach to the mediation parties, and finally obtain their informed consent before moving forward.

70 We are still "growing up" and that's great!

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Background

The profession or field of mediation has evolved into several distinct groups of practitioners who sometimes seem to speak different languages in describing the techniques, styles, models, processes and desired outcomes of their work.

In fact, there is a fair amount of professional infighting over what camp is the true guardian of mediation.

Professionals in therapy have encountered the problems of communication with patients about the therapist's approach for many years.

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Mediation is Risky Business

The First Salvo

Bush and Folger ignite the debate with:
Reclaiming Mediation's Future: Getting Over the Intoxication of Expertise, Re-Focusing on Party Self-Determination

<http://www.mediate.com/articles/BushFolgerFuture.cfm>

Bush and Folger's Key Arguments:

- Mediation needs to return to their original vision
- Transformative Mediation is the best (and perhaps only) way to assure the Self-Determination of the parties
- There is no room for evaluative techniques in mediation
- Mediators should not have substantive expertise
- Mediation has been captured by a culture of experts

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The First Salvo, cont.

"Mediators were captured, intoxicated by – and ultimately addicted to – the drug of the problem-solving culture, the culture of expert fixers, protectors, and problem solvers, who offer to take away the pain and frustration of unmet needs and tangled problems, applying their well-trained skill sets to accomplish wonders for eager clients who would otherwise suffer."



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The Sleeping Dragon Awakens

My fiery response to Bush and Folger:

Ironically, Bush and Folger are Evaluative

<http://www.mediate.com/articles/FuturesImperati.cfm>

Rebutting their key arguments:

- Folger and Bush do not own the original vision of mediation. It has been around for thousands of years.
- Whether the mediator favors the transformative, facilitative, or evaluative approach is largely irrelevant to Self-Determination. What matters is that the parties give their informed consent to the mediators approach, whatever that approach may be.

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Mediation is Risky Business

The Sleeping Dragon Awakens, cont.

- Evaluative techniques can be a valuable tool in mediation, if that is what the parties want. Also mediation approaches lie on a spectrum it is not just two isolated points.
- Substantive knowledge can be in some circumstances be critical (child support obligations can't be waived in a mediation agreement) .
- Most parties probably expect at least some basic level of substantive expertise.



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Here Comes the Transformative Cavalry

Rhoades and Simon attempted to rebut my rebuttal:
Bush and Folger on Reclaiming Mediation's Future
<http://www.mediate.com/articles/SimonRhoadesResponse.cfm>

Rhoades and Simon's Key Arguments:

- Sam's Article advocated for mediator Self-Determination
- Mediators can't ensure Self-Determination if they use evaluative techniques
- Transformative mediators are more dedicated to Self-Determination than other mediators

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Here Comes the Transformative Cavalry, cont.

- There is no room in mediation for evaluative techniques
- Mediators should not set ground rules because it undermines party Self-Determination
- Mediators can't use reality testing or reframing techniques. Mediators should "reflect the participant's comments as close to their own language and intensity as possible."
- The focus of the mediator should not be on resolving the dispute.



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Mediation is Risky Business

The Imperati Strikes Back

Unleashing the Dogs of Bull Shit!
(Framed in the voice of Jon Stewart and Stephen Colbert)
What if Jon Stewart and Stephen Colbert Reacted to Simon & Rhoades on Imperati on Bush and Folger!
<http://www.mediate.com/articles/Imperati4.cfm>

Rebutting their key arguments:

- My first article does not advocate for mediator Self-Determination, but it points out that if a mediator restricts his own approach (for example using only transformative techniques) then the Self-Determination of the parties has been undermined.

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The Imperati Strikes Back, cont.

- Self-Determination is not rooted in either using evaluative or transformative techniques, the key is explaining the available approaches to the parties and getting their informed consent to the approach used (whatever that approach may be).
- The notion that transformative mediators are more dedicated to Self-Determination is not based in any objective measure.
- The way the term mediation is defined and commonly understood does not exclude evaluative techniques, in fact evaluative techniques are often expected to be a part of mediation.

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The Imperati Strikes Back, cont.

- Setting ground only undermines the Self-Determination of the parties if they don't want ground rules.
- Reflecting the participants' comments in "as close to their own language and intensity as possible," adds no value to the process.
- Rhoades and Simon seem to have an aversion to taking any action that could impact the outcome, but the fact that the parties hired the mediator indicates that they are **counting on** the mediator impacting the outcome.

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Mediation is Risky Business

The Imperati Strikes Back, cont.

- Reality testing and reframing are not used for the purpose of controlling and/or manipulating the parties, such techniques are used to help give the parties a fresh perspective on the dispute.
- If the parties want the focus of the mediator to be on resolving the dispute, then it should be, and if it isn't then the mediator isn't assuring the Self-Determination of the parties.



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Discussion Questions

- 1) Are there meaningful differences between the approaches?
- 2) Have we created self-limiting role definitions?
- 3) Should mediators explain the differences in approaches? How do we do that? Is this concept impossible to implement?
- 3) How will we know that the parties truly understand and have selected wisely? Do we have an obligation to ensure they have?
- 4) Where do we go from here?

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Go Forth and Mediate!

Thank You!

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