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*Society of Professionals in Dispute Resolution News*]

## **Confessions of a Problem-Solving Mediator**

**by David A. Hoffman**

A few weeks ago, as I was preparing for a workshop about the emotional issues in family and business cases, I returned to *The Promise of Mediation*, by Robert Baruch Bush and Joseph Folger, the much-praised and much-criticized text that is arguably the most important book about mediation of the last 10 years. Revisiting their powerful yet provocative argument that mediators should reject a problem-solving orientation and instead embrace a transformative model of mediation, I found my resistance to that argument weakening.

It's not that I ever disagreed with the importance of transformative moments in mediation, or the value of empowerment and recognition, which Bush and Folger contend should always be the primary goals of mediation, as opposed to settlement. My resistance stemmed from what I (and many other mediators) saw as a fundamental tension between their model and the principle of party self-determination of the process. How could we justify imposing our own view of what mediation should accomplish (personal growth and development) on parties who came to us for something else (namely, settlement)?

A second major concern for me (and perhaps others) was that not all cases lend themselves to transformative techniques. In certain business cases, for example, the primary participants are lawyers, with clients represented by in-house counsel. For them, mediation is an exercise in bargaining, and the people who were originally involved in the dispute are often not at the table (in some cases they are no longer with the company). The parties' primary focus is their Best Alternative to a Negotiated Agreement (BATNA) — i.e., the likely verdict if the case goes to trial. The transformative potential in such a mediation is, in most cases, rather limited at best.

### **Basically a Problem Solver at Heart**

Revisiting *The Promise of Mediation*, I found myself ready to accept the possibility that I had resisted Bush and Folger's ideas because — dare I say it? — I am basically a problem-solver at heart. Tell me about a problem, and my first instinct is to suggest a solution. This, as sociologist Deborah Tannen and others have amply documented, is characteristic male behavior. My background as a lawyer could also be at fault. As a mediator once said to me, law school causes your left brain to circle around your right brain and eat it — and it takes many years of work as a mediator to recover the right-brain function.

Whatever the reason, contending with my problem-solving instincts is part of my work as a mediator. Learning to trust the parties' competence to solve their own problems is a fundamental principle of mediation. (See Albie Davis's "The Logic Behind the Magic of Mediation" for an unsurpassed articulation of that principle.) Yet it's a lesson that I — and I suspect other mediators too — must continually re-learn.

My growing appreciation of the Bush-Folger thesis was furthered by a training I recently attended on transformative mediation offered by the Cambridge Dispute Settlement Center. Trainer and mediator Melissa Broderick, who has taught transformative techniques all over the United States for the Postal Service's REDRESS program, demonstrated a style of mediation that is not so far removed from what I, and many mediators, instinctively do. That process essentially involves responding, in the moment, to the emotional content of what the parties are saying — or sometimes not saying — and following the direction of their concerns, whether related to the mediation process, the dispute that brought them to mediation, relationship issues, or other concerns.

## **Integrating Transformative and Problem-Solving Techniques**

Recognizing the similarity of Melissa's style and what I try to do in a mediation led me to recall a remarkable story told by a local mediator, Jim Barron, who was hired in the mid-1980's, right out of law school, by the Superior Court to help the Court clear its backlog of 24,000 cases. Unschooling in mediation — indeed, he'd never even heard of it — Jim was asked to review the pleadings and meet with the parties and/or their lawyers. He found that he was able to facilitate a settlement in a large percentage of the cases. When he later began to learn about mediation, he discovered — much to his surprise — that the techniques offered in mediation training were exactly those he'd developed for himself through trial and error. These techniques, according to Jim, involve a combination of transformative and problem-solving approaches.

I mention the story about Jim's experience because it stands in sharp contrast to the position argued strenuously in *The Promise of Mediation* that integrating transformative and problem-solving techniques is impossible since the goals and techniques of these two approaches are incompatible.

I believe that an integration of transformative and problem-solving techniques is not only possible, but in many cases essential. In virtually every mediation opportunities arise for people to experience empowerment and recognition, and we should be keen to respond to such opportunities. At the same time, the mediator, as an experienced dispute resolver, should help the parties steer a course toward settlement. This may involve joining in the parties' brainstorming, coaching them about negotiation, and, in some cases, providing them with feedback on the strengths and weaknesses of their cases.

## **Refusing a Problem-Solving Role Can Derail the Process**

In a recent article, Bush admits that at the outset of a case, most parties would opt for a problem-solving, settlement-oriented approach, rather than transformation. But he contends that, by the end of the case, what they often appreciate most about the mediation (regardless of whether a settlement has occurred) is the opportunity for empowerment and recognition. My own view is that even after a mediation is over, most people would prefer a mediation that encompasses both approaches.

Recently an experienced plaintiffs' employment lawyer asked me, during a late stage of a mediation involving a terminated whistle-blower, what I thought was the greatest weakness in her client's case. After I explained why most mediators resist providing this type of evaluation, she told me the parties had selected me because they wanted someone who could give them a reality check — someone experienced with employment cases who could, as part of the mediation process, provide feedback of this kind. We were at or near impasse, and a trial date

was at hand. So was the end of the day, and the parties (who were unable to schedule a second day of mediation) had to leave soon.

One answer to this dilemma — the one taught in many mediation trainings — is to respond that mediation does not involve case evaluation, and that, if the parties want an assessment of the strengths and weakness of the case, they should hire another individual — a case evaluator. However, as a practical matter, the parties do not want to hire yet another individual who needs to be educated about the case. They usually come to feel a degree of trust in their mediator. I suspect they resist the idea of a separate case evaluator because they feel that the mediator they know is better than the case evaluator they don't know.

In the end, I did tell the lawyer what I saw as the major problem with her case. She thanked me for that feedback, and the case settled. My feedback on that issue was not the sole reason for the settlement; there were transformative moments in the mediation that proved extremely helpful, such as when defense counsel acknowledged the plaintiff's integrity. However, refusing to answer the question posed to me (in caucus) by plaintiff's counsel about the weaknesses in her case would have, in my opinion, derailed a process that was moving toward a positive outcome.

### **Mediators' Questions Unavoidably "Steer" the Process**

In other cases, the parties want to talk about the tax consequences of various settlement options. While studiously avoiding giving tax advice, I am willing to brainstorm with them about various alternatives. When it comes to drafting a settlement agreement, I sometimes review with the parties a checklist of common provisions in such agreements. In short, I am willing to bring my experience to the table as a resource, while at the same time trying to avoid steering the process in a particular predetermined direction.

This is a delicate dance, and I recognize there are difficult ethical and practice issues involved here — issues which can, for the most part, be avoided by engaging in a purely facilitative practice. However, even in such a practice, our questions unavoidably "steer" the process to some extent. The issue, then, is how much steering we do, how we go about it, and to what end.

I have the utmost respect for mediation colleagues who believe that transformative mediation is the true path and decline, for reasons of principle, to give case assessments or to use other "problem-solving" techniques as part of a mediation. I do not believe that mediators should use such techniques simply because there is a market for mediators who will do so. I do believe, however, that mediators can employ the tools of transformative mediation without entirely rejecting problem-solving tools. Experience suggests that each has its place, and trying to lead the parties in a transformative direction while they are engaged in problem-solving can be as counterproductive as pushing in the direction of problem-solving when a potentially transformative moment is at hand.

### **Taking the Best from Both Approaches**

Accordingly, when I gave the workshop on family and business cases, I offered the accompanying chart as a summary of what I understand to be the fundamental characteristics of transformative and problem-solving mediation, as those categories are articulated in *The Promise of Mediation*, and suggested the possibility of integrating these approaches. (See chart below.)

Transformative	Problem-Solving
Process-oriented	Result-oriented
Scrupulously non-judgmental	Willing to provide evaluation in some circumstances
Focus on parties' responsibility for outcome	Mediator assists in reaching a settlement
Party-guided process	Mediator-guided process
Focus on parties' competence to resolve dispute	Emphasis on mediator's competence in helping the parties resolve dispute
Expression of emotion seen as integral	Emotion seen as interfering with resolution
Focus on the here and now	Focus on the future
Micro-focus	Macro-focus
Focus on relationship	Focus on solution
Conflict as an opportunity	Conflict as a problem
Goal: social change/personal transformation	Goal: conflict reduction/welfare maximization
Relational worldview	Individualistic worldview

When I look at the characteristics on the right side of this ledger, I see aspects of mediation that I do not want to discard. For example, a focus on the parties' relationship should not preclude focusing on solutions to their problem; attention to the "here and now" sometimes must give way to attention to the future; a process orientation must, at some point, make room for a result orientation. Of course, the dichotomous view of mediation expressed in this chart radically oversimplifies the complexity of the subject. The point is, there should be a third column, somewhere in the middle to describe a form of practice that takes what is best from each of the other two columns and integrates them.

### **Is Good Judgment Part of the Mediator's Repertoire?**

In days of yore, people came to village elders to discuss their disputes — not because the elders had the best process skills but because they had experience and, hopefully, good judgment. (The elders had probably acquired their good judgment as most of us do — from those experiences in which they had used extremely bad judgment.) The elders' judgment and discernment were what led the parties to trust them with a role in resolving their dispute.

I think there is wisdom in bringing all of our many skills and qualities — and experience — to bear on the process of helping people. I do not pretend to know how transformative and problem-solving techniques might best be integrated. But my instinct tells me that along the path toward such an integration is where we will find the greatest opportunity for mediation to resolve disputes and heal the wounds in our society.

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