

Beyond the Dispute at Hand: Using Transformative Mediation Techniques to Better Understand and Resolve Conflict

Brandon J. Lester

Associate General Counsel, The Ohio State University

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Does Mediation Do What We Want It To Do?

- Mediation (and ADR generally) are promoted as offering quicker access to justice and increasing party satisfaction in the process and result.
- Focus on cutting through overly complex litigation procedures can help speed, but what is in the parties' best interests relative to their dispute?
- Is focusing on settlement, and using the various techniques designed to assist parties in getting there quickly and efficiently, the best approach to addressing underlying conflict?

Example – A Scene from an Italian Restaurant

- Can this dispute be settled easily? How might you do it?
 - Separate parties to hear concerns? Discuss them publicly?
 - Suggest a compromise on location?
 - Suggest somewhere the parties hadn't considered?
 - Propose mutually agreeable schedule?
- If the dispute is resolved, how likely is it to recur?



Transformative Mediation

- Based on theory that conflict is not inherently negative, and mediation can be used to help parties better understand conflict, underlying issues, and how they want to proceed in the future.
- Primary focus is on party self-determination in process and resolution.
- Mediator's role is to support the parties in: (1) making shifts toward recognizing the reasons for their conflict, and (2) becoming empowered to take steps toward change on their own.
- Mediator is not an advocate, evaluator, or decision maker.

Transformative vs. Facilitative and Evaluative Mediation

- Facilitative/Evaluative
 - Mediator structures session/lays down ground rules to help focus and guide toward resolution.
 - Mediator may take an active role in either identifying or suggesting issues and solutions throughout.
 - Goal is to work toward settlement of the dispute presented.
- Transformative
 - Mediator cedes control to the parties, and allows them to express what they want (even high emotions).
 - Mediator more passive, but uses targeted assistance to enable shifts.
 - Goal is to advance parties' understanding of conflict – settlement positive but not only or primary goal.
 - Conflict is not necessarily negative, but how you respond is vital.

When and Why to Use Transformative Mediation Techniques

- When:
 - Can be used in any context, but most effective when parties' relationship affects the dispute (e.g., employer/employee, domestic matters, landlord/tenant, etc.).
 - Key is that the parties can benefit from better understanding of other/themselves.
- Why:
 - Settlement may be a temporary fix if the underlying conflict is not addressed.
 - Parties generally don't want to be victims or victimizers, and greater recognition and empowerment of the other side and themselves can get them out of the cycle of being either (or both).

Recognition and Empowerment

- The overarching focus in transformative mediation is on facilitating shifts in recognition and empowerment to improve their conflict interaction.
 - Recognition – parties understand their own views and those of the other party
 - Empowerment – parties believe that they have the strength to discuss or resolve a particular issue (or to hold their own ground in that situation)
- The mediator's objective is to support the parties throughout the mediation session so that they can advance in these areas (if they want to do so).

Transformative Mediation Skills and Approaches

- Allow parties to decide what to discuss and how to discuss it
 - Mediator takes a passive approach from the outset, asking parties what they want to cover and how they want to do it rather than dictating structure.
 - Facilitate free-flowing conversation between parties/assist them moving forward.
 - Don't judge what is relevant and what is not – not always clear what is really going at the heart of the conflict.
- Keep parties together
 - Minimize or eliminate shuttle mediation – parties must hear themselves/each other to shift and make positive change.

Transformative Mediation Skills/Approaches, cont.

- Allow parties to express themselves fully and without filters, even if they do it with emotion/charged language.
 - Make sure that the environment is supported, but otherwise listen intently and avoid interruptions, even if they interrupt each other – parties' views come first, not the mediator's.
 - Anger is common in disputes, and if not addressed, could undermine resolution.
 - Hearing how the other side feels in their own words and seeing their emotions is essential to recognition, and expressing it can be empowering and cathartic.
 - Goal is to allow parties to express themselves as they want, even if it may seem inflammatory or counterproductive.

Transformative Mediation Skills/Approaches, cont.

- Reflection (similar to looping)
 - Let each party speak freely, then reflect what they shared (content and emotions).
 - Give parties the opportunity to correct or augment as may be appropriate.
- Summarizing
 - Include both parties' views, condensed into themes/topics.
 - Don't omit any issues that the parties raised, or soften/dilute their views.
- Translation
 - Describe what parties are trying to say, but allow corrections.

Transformative Mediation Skills/Approaches, cont.

- Let silence sit.
 - Give parties the opportunity to reflect when important points are shared – do not rush conversation.
- Be an calming, supportive presence.
 - Create an environment where parties feel safe in sharing, but do not demand that parties remain calm.
- Resist urge to dominate conversation, advocate for one party's position, or dissuade party from thinking or feeling a particular way.
 - Help parties advance, but don't make it about you.

Transformative Mediation Skills/Approaches, cont.

- Focus on range of possible positive outcomes, not just settlement.
 - Parties decide what is most important for them, and better understanding of conflict, other party, and self can be a positive ends, even if no settlement occurs.
 - Recognition/empowerment shifts can make settlement more powerful and lasting.
 - Focusing on settlement as sole measure of success can lead to counterproductive instincts, e.g.:
 - Not broaching certain issues or avoiding steps backward for fear that it could threaten settlement.
 - Using control (even implicitly) to influence settlement when parties don't want to (or aren't ready to) do so.

Considerations in Using Transformative Mediation Skills

- Some commentators express concern about blending transformative and facilitative/evaluative mediation given different focuses.
- Be conscious of style, approach, and aim to avoid confusing the parties.
- Use approaches where appropriate to facilitate progress, but do not shift focus dramatically.
- Allow catharsis to occur, but don't mistake session for therapy.
- Remember that settlement is only one of a multitude of positive outcomes, and artificial settlement holds little value.

Contact Information

QUESTIONS?

Brandon Lester

Associate General Counsel, The Ohio State University

1590 N. High Street, Suite 500
Columbus, OH 43201

Phone: 614-688-2314

Email: lester.173@osu.edu