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Principles of Broad-Based Mediation Practice

This book allows the reader to watch mediators at work. It is designed to ensure that mediator trainers, those who conduct mediation, or those new to the field of mediation can, with relative ease, envision two well-known mediators. It allows the readers to have insight into what was going on the minds of John Haynes and Larry Fong during their mediation sessions. We have chosen six cases from a range of mediation fields to demonstrate what we believe to be the core mediation-specific strategies. In addition, we have identified a number of generic principles that are not necessarily specific to one particular field of mediation. We seek to learn from the broad base of mediation. Thus we are trying to extract some theory from our practice because we believe that as theory informs practice, practice can also inform theory.

As mediation evolves from a practical exercise to a professional practice, we need to agree on a set of theoretical principles. Michael Lang, a leading mediation trainer, comments that without such an understanding, mediators are “skilled mechanics trying out one tool after another.” Thus, he maintains, without a theoretical underpinning, they do not consider the reasons behind their actions, or the consequences, nor can they adequately evaluate their success or failure. They have no way of learning from their experience, or passing on their understanding to others. Theory, Lang concludes, “provides both a foundation for our work and a way to understand the nature of the process we are managing. It gives the practitioner a foundation upon which to base an assessment of a conflict situation and to design an appropriate intervention” (Michael Lang, “Becoming Reflective Practitioners,” *Consensus*, MIT-Harvard Public Disputes Program, 1996; reprinted, Mediation Information Resources Center, Eugene, OR, 1999).

As knowledge in the field of mediation matures, professional mediators seek ways of understanding, explaining, and reflecting on what they do. This can be stated as an *If-Then* hypotheses to predict participants' behavior in a given situation. Hypotheses are tested and if found to be false, they can be revised or discarded. If found to be "not false" enough times, they become the benchmark by which to evaluate the success in the given situation, and to pass on the successful models to aspiring practitioners.

Hypotheses serve as the cornerstone of mediation planning to ensure that there is order in the mediation. Hypotheses are tested constantly by measuring expectations against feedback from the clients. From the feedback come even more questions. However, hypotheses are never true, only useful or not useful. The mediator must be sure that the hypotheses they derive are useful in providing insight into the clients' problems. John Haynes has coined the phrase "Mediation is the management of other peoples' negotiations." Thus the mediator needs the best guess (another definition of hypothesis) about what to expect as the negotiations take place.

While it may be too soon to lay claim to a unified mediation field theory, we hope to stimulate analytical thinking in this direction. Thus this book is meant to focus the readers' thinking about their thinking. It is important that this book become a living document that endures throughout time rather than one that crystallizes thought of one mediator over another. Let us examine how theories are formed.

Theory can develop in two ways. (1) Deductively, we create an interpretative framework to explain a particular process or interaction. For example, we can predict that pure water will react differently to salt water with regard to freezing temperatures. We test this hypothesis repeatedly to confirm or falsify it. If pure water continually freezes before salt water, we cannot be sure it will *never* freeze after salt water. But we can predict, with some certainty that the next time, it will continue to freeze first. (2) Inductively, theory is developed through close scrutiny of individual interactions to discover the organizing principles that are empirically grounded in practice. In our example above, we would observe that ponds freeze before the ocean bays and form a hypothesis about the temperature at which water freezes: salt water freezes at a lower temperature because of the salt.

The authors have developed their practice of mediation with reference to theories derived from many sources. Now in writing this book, we rely primarily on the second, inductive, process to identify a conceptual model applicable to all contexts of mediation: family, business, education, environmental, medical, and others not yet established.

Michael Benjamin and Howard H. Irving further distinguish between different levels of theories.

Level one refers to formal theory, which in the exact sciences [such as physics] involves the systematic relationship between axioms, assumptions, propositions and hypotheses. The requirements at this level are so

strict that no theory in the social sciences can meet them. Level two refers to semiformal models. Here, the technical requirements are less stringent, involving models that display the relationship between specific factors from which hypotheses may be deduced [that is, can be tested and found to be false]. . . . Level three refers to exploratory models, which discuss the relationship between an incomplete set of factors and propose no testable hypotheses. Finally, level four refers to *atheoretical* practice models—the so-called *how-to-do-it* models [purely descriptions]—that are based on a wealth of experience but make no theoretical claims as such. (*Mediation Quarterly*, vol. 16, no. 1, Fall 1998)

We trace the evolution of our thought about mediation from level four toward level two over the last twenty-four years as John Haynes sought to explain his practice in numerous articles and the previous three books. His thought evolved since 1976 when he began to conceptualize the model. “Divorce Mediator: A New Social Work Role,” (*Social Work*, vol. 23 (1), Jan. 1978) was published, and the result has since been termed the Haynes Model of Mediation, most clearly elaborated in *The Fundamentals of Family Mediation* (State University of New York Press, 1994). The model suggests that mediation is a *process* of identifiable steps or stages and the role of the mediator is the *manager* of other people’s negotiations, so that the mediator controls the process and the clients must control the content. The goal is an agreement negotiated by the participants that *satisfies the needs of all involved*. Mediation is an exercise in problem solving; these definitions are central to the Haynes conceptual model.

In addition, Larry Fong has explained how his practice revolves around the importance of asking small questions that become larger within the context of mediation. Questions, neutrality, hypothesizing, and strategizing all form the hallmark of his mediation, ensuring that the clients have full, participative, and comprehensive understanding of what their problem is and how to resolve it. Through temporal questions and the use of reflective questions, the interview of the clients becomes the intervention. The questions are meant to be provocative through personal reflection. Thus through such a method of questioning, clients can better change their attitudes and behaviors to meet their problems mutually and respectfully.

The present task is to examine our practice, to develop testable hypotheses about what we do, throw out what proves unproductive, and further refine the hypotheses. It is a slow and often unrewarding process, and perhaps a better theory will come eventually from the academics, who approach the task by the deductive method. But until that day, we will do the best we can.

Michael Williams, in a private communication, adds this note to the search:

I wonder not so much about theory as about theorising. I think at this stage in the evolution of mediation, we can say some things seem to work most of the time, some seem to work some of the time, and others don’t

seem to work at all. I think we can also say that if you call yourself a mediator, there are things you should not do, because they're unethical. I'm not convinced that we can develop a universal theory of mediation. Every year for the last four or five, I've been saying, "The essence of mediation is . . ." And ended the sentence differently each year.

I think examining what happened in a given mediation enables us to see patterns and from those to devise models. Any model that emerges from that examination may be useful because it can be applied to other mediation, or give us ideas that we can use in other mediations. But there isn't a universal model, applicable in all cases. Mediation is an art, not a science. (January 2000)

Dorothy Della Noce, writing in *Mediation Quarterly* (vol. 15, no. 2, Winter 1997), outlines her suggestions for constructing a successful conceptual model. We find these ideas helpful in formulating our current thinking about moving from the working model to a level-two theory (Benjamin & Irving). In developing this model to date, the present authors have drawn on established theories in other fields, notably communications theory and the power of metaphors in shaping meaning; on negotiation theory and various theories of conflict and conflict resolution; and elements of systemic family therapy. How these theories have influenced the model is spelled out in *Mediating Divorce* (Haynes & Haynes, Jossey-Bass, 1989). It has been our concern to take what is useful from these fields to construct an integrated model that is clearly distinguished from them, and particularly from the fields of both law and therapy. We believe that mediation is distinct in its practice and goals, and should entertain a discreet theory.

With this in mind in the present work, we have made explicit the "purposes and contours of the proposed model . . . [so that] the practitioner can choose to accept or reject the model on the basis of how it accords with his or her view of mediation, conflict, people, and the world" (Della Noce, p. 139). Certain themes run through all the cases, and we have identified the terminology that seems to fit. While each situation is different, yet the patterns emerge and eventually can be identified as organizing principles.

If this results in a discreet theory, then these principles can be applied to different cases to predict outcomes, to define, and therefore evaluate the "success" of the process. The cases presented here involve a single session, the first, and as such few result in agreements per se. Rather, we can see how the parties shift from their opening, antagonistic positions into more thoughtful, cooperative behavior. "Success" as measured here is the ability of all the parties to continue in the dialogue. In one case, Sexual Harassment, success comes in the form of an agreement. In another, Open Adoption, the three parties agree to draw up their ideas to become part of a final written agreement. But these are not the only measure of success. The second Fong mediation ends with the two sets of parents able to see the others' point of view for the first time. The other three Haynes's cases illustrate different outcomes: after intense struggle, the clients are able to listen to each other

and agree that cooperation, growing from pursuit of their mutual self-interest, is their best course of action. The actual agreements will emerge out of the cooperation. Mediation, we believe, is a long-term process and each session reflects small steps toward eventual "success." We might say that the success of a session is unknown until the clients show up for the following session!

The purpose of this chapter is to introduce those organizing principles of mediation that we believe occur in all of our work. Central to the process is the notion that the clients must own the content of the discussion and the ultimate agreement. Some of these principles and strategies have been described elsewhere, and we will briefly discuss them here. Then we discuss more thoroughly the new ideas we have developed from our work for this book. In the following chapters we have carefully annotated the transcripts of our work. Where useful, we have added those nonverbal behaviors that help the reader to understand what is happening in the session.

Let us define two of the terms used here. *Organizing principles*, as stated above, are the bases from which theory is constructed. *Strategies* are the actions the mediator takes, based on the organizing principles.

THE PROCESS OF MEDIATION

Clients come to mediation with a presenting story that almost always has the same three components. The details of the stories are unique but the structure of the story is almost always governed by these three components.

The first is their personal and exclusive *version of the events* that led them to mediation. Each participant gives a version in a way that demonstrates how good that person is. It is a statement of innocence. The second part of the story is the complaint against the other[s], which demonstrates how bad the other person is. Each story usually maximizes gain and minimized loss to themselves. It is a statement of responsibility. The third part of the presenting story is the teller's *definition of the problem*. The problem definition has the same characteristic as the complaint. Each person's problem can only be solved by a change in the behavior of the other party. Each person feels that the change must come from the other. The person who defines the problem usually has the ready-made solution.

We can see from this that, no matter how much information the mediator gives to the clients before they come to mediation and repeats in the opening few minutes, the clients do not see a mediator sitting in front them, but a judge. They each want the mediator to judge them well and to judge the other badly.

This creates an interesting problem for the mediator who must now convince the clients that he is a *mediator* not a *judge*, and that he is not available for judgment. While shifting the clients from the role of judicial consumers to mediation clients, the mediator must also attempt to help the clients develop a new mutual and neutral definition of the problem to be solved in the mediation. The mediator cannot be helpful to the clients by helping them find solutions to disparate

problem definitions. If the mediator focuses on one of the presented problem definitions, it will cause consternation in the other client[s]. If the mediator persists in focusing the clients on the search for a solution to one client's problem definition, then the other client[s] will leave the mediation. It is our opinion from providing consultation to many practicing mediators that this is the most common reason for clients to drop out of mediation.

Thus the early task of the mediator is to help the clients discard their individual definitions of the problem and pursue a new, *mutual problem definition* (MPD) that, when solved, benefits everyone. In multiparty mediation the difficulty is compounded, since each participant must agree to the new problem definition. You will see a good example of this issue in the case mediated by Larry Fong between disputing neighbors trying to protect their children.

As the manager of the negotiations, the mediator uses some *generic strategies* to help the clients arrive at a common definition of the problem. They are *mutualizing*, *normalizing*, *maintaining a future focus* with an additional focus on what the clients want rather than what they do not want, and *summarizing* the useful information the clients provide while ignoring the unuseful. Let us look at each of these generic strategies.

Mutualizing

The mediator continually points out the mutuality of the clients' positions. Whether it is as business partners or as parents, mediation clients share many concerns and interests. However, in the argument, each usually tries to show that only their story is the useful one, and only their problem is the one worth solving. Each time one client makes an exclusive claim, the mediator reminds the client that both points of view are valid. In the Bagels chapter the mediator uses the metaphor of the goose that lays the golden eggs to remind the clients of their mutual interest in protecting the joint business. We have identified other uses of the mutualizing strategy throughout the book.

Normalizing

Most clients have difficulty explaining to themselves why they are in mediation. Their life has experienced many conflicts and most of them have been settled without the help of a third party. Therefore, the clients must justify to themselves why they are in mediation now. It seems that most satisfy themselves with the idea that their dispute is abnormal, or more common, that the behavior of the other parties to the dispute is abnormal. Assuring the clients that their situation is normal helps them accept that it is also solvable. As they give up the idea that the behavior of the others is abnormal, they also move toward creating a problem-solving environment. They can relax, knowing that things are normal and therefore, in this experience, solvable.

Maintaining a Future Focus

Most clients want to talk about the past, yet the past contains the problem. The solution lies in the future. (See Table.) Therefore, the mediator can only mediate in the future tense. Talking about the past is not mediation since it is either judgment—trying to decide who is right and wrong from the past—or therapy—helping the clients understand their past. We believe that mediation can help people find new, hopeful, and mutually respectful futures without settling all of the past issues. In mediation, the concern about the past changes as a result of creating a different future, rather than reaching an understanding of the past. In fact, much of the research today on positive psychology is future focused.

The Past and Future in Mediation

<i>Past</i>	<i>Future</i>
Problem	Solution
Complaints	Goals
Sameness	Difference
Unchangeable	Change
Hopeless	Hopeful
Do Not Want	Do Want
Cannot Work	Can Work
Stuck	Fluid
Resistance	Openness

The second part of maintaining a future focus is finding out what the clients want. Most clients are highly articulate about what they *do not* want and equally reticent about what they *do* want. However, the mediator is only useful to the clients in helping them to determine what they do want in the future and then helping decide how they can get what they want. It is difficult for the mediator to help clients not get what they do not want, which is what clients expect if the mediator dwells with them in the past.

In reading these cases you will note how we always try to open the session in the present tense and then move into the future tense as quickly as possible. Much of our mediation training focuses on how to help clients find a future that is different from the past. Most clients will tell mediators they want a future that is hopeful and quite different from what they have been through (the past). But they do not know how to get there from here. Contrast that to the present legal system that makes decisions about the future based on the past. Mediation is more about focusing on the future to decide what is best for the future. If one asks clients what they thought of the past, especially disputants, their descriptions of the past are of sorrow, regret, and anxiety. When one asks them about the future their themes are of hope, a future without the same problem, or a whole

host of words and feelings associated with “moving on.” The future is always perceived differently, especially if there has to be an ongoing relationship.

A notable exception reported here is the case of Open Adoption, in which the mediator recognizes that the natural mother and the adoptive parents have had constructive discussions in the past. Therefore, he decides to refer to the *successful* past as a way to bridge the gap they now face. The strategy illustrates the power of the past to influence attitudes and behavior in the present, and lead to a solution for the future.

Summarizing

When the clients enter mediation, they will experience a conversation about their problem that is different from the conversation they will have with another professional about the same problem. For example, clients taking the problem to a lawyer will have a conversation about their rights and how they can exercise those rights while blocking the other’s rights. The same problem taken to a therapist will, depending on the theory of the therapist, focus on helping the clients see how a better understanding of the past prepares them for a different future. The focus will be on the behavior of the individual and the dynamics of the participants. In mediation, the focus is on reaching a negotiated settlement.

What, then, determines the direction that the conversation takes about the same problem in these different professional settings? It is the parts of the story that the professional focuses on. For example, the typical attorney, on hearing the clients’ stories, determines the right and wrong of the case and the legal rights of each of the parties. The therapist determines the dynamic problem and begins working on that. The mediator determines what needs to be negotiated. He does this by asking questions and making comments about those aspects of the story that will lead to negotiations. He avoids the unuseful parts of the story, which we define as including those parts relating to the clients’ legal rights or their emotions. The areas of useful conversation in mediation are about the *data*, the *goals* of the clients, and their *strategies*.

The mediator maintains a focus on these and summarizes back to the clients any information they provide that falls within these three areas. As the mediator summarizes back to the clients the useful aspects of their stories, they tend to focus on what they perceive is the important information to the mediator. They tend to focus on goals and the future as the sessions proceeds, if their goals and the future are central to the mediator’s summary and subsequent questions. In another way of thinking about this, the mediator *dis-attends* to the unuseful and *attends* to the useful parts of the conversation. The clients respond to his or her attention to their goals, which makes for a useful conversation. You will see clearly how this works in the transcripts.

If clients indicate that they need to focus on the legal aspects of their experience, then the mediator should refer them to a legal specialist. In the same way,

if one or more clients indicate that emotions are interfering with the mediation, they should have the help of a therapist, outside the mediation framework. This is not to say mediators should be unsympathetic to emotional states. It simply says that clients come to mediation to find solutions to specific problems and that is the primary task of the mediator.

THE ORGANIZING PRINCIPLES OF BROAD-BASED MEDIATION

In addition to the ideas discussed above we believe that we can identify a core of *organizing principles* that are demonstrated in our work. These are present in all types of mediation and regardless of the profession of origin of the mediator. We can describe our vision of mediation in three categories. There is first the *structure* (data collection and display, hypothesis development and testing, et cetera). There are the generic *strategies* that we use as we move through the stages of the structure. Finally there are the *organizing principles* that provide the “Aha!” in our analysis of what happened in a session. Once we are aware of their power in advancing or obstructing a session, we become more focused and efficient in our practice.

- Working with the presenting and the metastories
- Choosing the client to ask first
- Choosing the central issue (also called identifying the underlying problem)
- Making process versus content suggestions
- Teaching clients negotiating skills
- Maintaining and shifting roles in mediation
- Using language to create shifts safely
- Developing a future with a difference

These principles are present to some degree in every mediation. Once they are understood, the mediator can use them to generate hypotheses to be tested in each session to understand what is going on, to predict what will happen next, and to gauge the success of the activities. In the following discussion, various principles are highlighted in the various cases. One case may illustrate two or more principles and the commentary at the end of each chapter analyzes the principles fully. Here, we simply draw the reader’s attention to the various examples.

Working with the Presenting and the Metastories

We believe that mediation is all about storytelling. It opens with each client’s presenting story. It continues as the mediator helps the clients develop a mutual story about their problem. While doing this, the story moves from a blaming, past-focus to a cooperating, future-focus that leads to an agreement embodying a future with a difference for all involved.

In addition to the presenting stories clients also have metastories, an often unrecognized mental superstructure, which controls the way they think about the world and life's problems. The metastory is the basic motivating force or filter through which the clients view every situation.

For example, a client may believe that "the world is a minefield." In this case he will filter all experiences through this metaphor and it will shape an essentially suspicious nature that will view new ideas as potential mines. Another family might operate under a "circle the wagons" metaphor and defend itself against the outside world. In this family, loyalty under pressure is essential and family members are judged, in large measure, by how loyal they are to the family in a crisis. Independent thinking becomes dangerous since it might lead the independent thinker to desert the family. In chapters 4 and 5, we meet the McDougal family who live according to a clear metaphor about how to parent that is shared by the adults but is being challenged by their only child. The family metaphor circumscribes the mediator's behavior since he can only act while not violating or directly challenging it. Rather, the mediator works with the parents' metastory and assists in creating an environment of change in the family within the confines of the metaphor. The task is the same for all mediation clients.

This does not mean that the mediator takes a therapeutic stance by dealing with the metaphor, even though the particular metaphor might be dysfunctional to the family. The metaphor establishes the parameters that bound the presenting story and define the direction and amount of movement that can take place.

In the Parent-Teacher case we see two clashing metaphors. The teacher's is that professional teachers know what is best for the pupils. The mother's is that good mothers protect their children. In that chapter you will see that movement is defined by these two metastories and limits the way in which the mediator can help shape a problem definition for the clients. The two families in *Neighbors*, chapter 4, have similar metastories about how to be good parents and these lead to conflict between the adults as well as the teenagers. The mediator honors the stories in working with the families. Thus the metastory dictates the process as well as the content.

In chapter 2 we meet Ross and Dan, two businessmen who are in dispute about whether and how to modernize their factory. Each of them is governed by a different life meta story that constrains the mediation and governs the direction of any movement in the presenting stories toward solutions. These cases will be helpful in understanding how the mediator deals with life metaphors.

Choosing the Client to Ask First

When the mediator meets with the clients for the first time he must decide on the level of formality—Will he use first names? In addition, he must make a choice as to who speaks first. To whom does the mediator direct the first question in the mediation? This decision is very important and influences the rest of the session.

We can divide the problem into two factors. The first is to think about the clients as the *complainer* and the *defender*. That is, one person is filing a complaint about the other, or whose story is essentially a complaint about the activity of the other client. Our sense is that it is useful to start with the person who is filing the complaint. If the mediator starts with the defending person, they have no story from which to work and, therefore, are in the position of only being able to deny the existence of a problem. This puts them in a confusing position and adds to the ire of the complainer.

The pitfalls of the latter approach are illustrated in the Sexual Harassment chapter. The mediator directs his first question to the professor (the defender) who can only deny any problem and, in order to make a case, attacks the motives of the complaining student. The mediator quickly turns to the student for data and develops the essential story of the mediation. When the professor's turn comes a second time he has a story to work from and his behavior is less an offense, but still more so than if he had not been asked to go first. Thus do we learn from our mistakes.

In the Adoption chapter, the mediator focuses some of the initial questions on the birth mother. In this mediation there is the apparent "two against one" problem where there are two adoptive parents and the natural mother. The mediator wants to make sure that the original storyteller (the natural mother) has the ability to start off. Her story is the first "natural" story as it is she who gave birth and allowed for her son to be adopted. Later, the mediator sees her story as a theme of a "gift or giving."

In all mediation, the tenor of the talks is determined in the first minutes of the session. While the mediator cannot expect, and should not try, to eliminate conflict from the session except through a negotiated agreement, he can make the session more productive by structuring the order of the storytelling so that the one who replies has something to reply to at the beginning. When doing this, the mediator must also be aware that the replier is forced to pay attention to the complainer's story, thus giving greater credence to the other's position. If the mediator fails to pay attention to this paradox, the person going second in the storytelling order is put at a disadvantage.

Let us see how this works. Imagine a session: A opens with his story. Assume the mediator interrupts with a summary after one minute and then invites B to speak. B will begin by refuting A's story for one half of the time and then proceed to tell his story. Again the mediator interrupts after one minute, summarizes and turns the dialogue back to A. A begins by refuting B's story for one quarter of the time and adds to his own story for the balance of the minute, thus making it stronger. When B's turn comes again, he has a stronger A story to refute and so spends another one half of his time refuting and half adding to his own story. You can see now that in the first four minutes of the session, we have spent three minutes hearing A's story and only one minute hearing B's story.

The mediator can help alleviate this problem by (1) keeping the imbalance in mind, and (2) noting to the clients that he has not bought A's story over B's.

This lessens B's need to convince the mediator that A is wrong. Finally, (3) the mediator can maintain a focus on the mutuality of their situation by the way he summarizes the two stories.

The second factor relates the issue of *gatekeeping*. We make the case in the Parent-Teen chapter that each family has a gatekeeper who must be deferred to in order to gain entry into the family. Gatekeeping is also present in most multiparty disputes.

A gatekeeper is the person in the group informally designated to handle initial contact with the outside world, and to protect the group from harmful intrusion. If the mediator begins with an undirected question (a question asked to the group as whole rather than an individual), the gatekeeper will usually respond first. The mediator notes this role and honors it because the gatekeeper can determine whether the mediator is admitted to the secrets of the group. In these cases, Mrs. McDougal [Parent-Teen] is clearly in this role.

In business settings the gatekeeper is the usually the most senior person present. If the mediator opens with a directed question to a junior person, it places the junior in a difficult position since that person cannot answer the question adequately until the gatekeeper acknowledges the mediator. At the same time the gatekeeper is annoyed at being ignored.

In multiparty mediations where an overt hierarchy does not exist, such as in neighborhood disputes, the mediator should attempt to open with a non-directed question aimed at one of the contending parties so as to allow the leader (gatekeeper) of each group to emerge organically. When the group has identified the one responsible, this helps the mediator in identifying the spokespeople in the room and suggests who the mediator should focus on as the negotiations get underway.

You will see the mediators using different techniques in deciding who goes first. Some of these will be helpful to you in deciding how you open a session.

Choosing the Central Issue

Most people come to mediation in response to a perceived crisis in a relationship. The problem may be long standing, but a specific event transforms the nagging, uncomfortable situation into a crisis demanding action. For example, in the Parent-Teen case, the family has experienced a developing problem as the rift between the parents and son grows wider. However, a call from the school counselor turns the simmering situation into a crisis demanding attention, so the family seeks mediation. The crisis essentially defines the problem for the family and shapes the presenting story. In this case, "the son's behavior." However, as mediators, we know that laying the problem on one person (what in therapy is called the identified patient) will only result in a deadlock. However, we can not totally ignore the presenting story since we would have to jump to a conclusion as to what the central issue really is.

The mediation literature refers to the “underlying story,” which is different from the metastory described above. Some mediators recommend that they should try to reveal the underlying story. However, when do mediators know when they have reached the underlying story. If we think of the stories as being like onions, then how many layers do we peel away before we reach the right layer, and how do we know that if we peel a little (or a lot) deeper we would find the “true” underlying story?

When therapists look beneath the presenting story, they will stop peeling the onion at the point they find an underlying story that matches their theory of human behavior and therapy. This explains why a therapist with an object relations theory can be as helpful as a family systems therapist to a client with the same presenting story.

The central issue is a subset under the problem definition, which can be seen as a general statement with branches. Often the problem definition contains three or more subissues, any one of which could be negotiated.

In a mediation, we begin with general questions to elicit responses about the presenting problem. By summarizing back the useful information, and ignoring the unuseful data, we begin to see the outlines of the various issues. We must sift the data in our minds to determine where to turn first to seek a mutual problem definition about these issues. Often more aspects of the problem emerge as the session progresses, or wholly new issues may surface. At some point, the mediator achieves a mutual problem definition and must then decide which of the subset of issues to pursue toward the eventual agreement. A classic example of getting to the central issue lies in the case of Tom and Pat reported in *Mediating Divorce*. The mediator helped the clients formulate the presenting issues into a problem statement. But agreement eluded the session until the issue of the mother’s fears could emerge and be dealt with. The mediator must remain flexible in testing the hypothesis about what the central issue is, and not become wedded to a particular issue if an agreement is to emerge.

In the present cases, we see the problem clearly in another aspect of the Parent-Teacher chapter. Each woman puts forward her own definition of the problem and lays claim to a central issue—in stark contrast to the other’s claim. The mediator cannot begin with either issue without losing the participation of the other party. He must try to focus their attention on the problems of the child as primary, regardless of how the problems arose in the first place. Only then can he select one of the subissues, in this case the homework, as the one to work on.

In the Bagels case, we see how a proliferation of issues can be baffling to the mediator. Dan enlarges the issue, adds new dimensions, and shifts focus so frequently, that Ross simply denies any issue at all, other than Dan’s attitude. The mediator would have to shift his hypothesis to meet each new expansion or diversion. It is hard to focus the partners on their mutual self-interest or come up with a mutual problem definition in such circumstances. But this must be done before any issue can be addressed successfully.

The organizing principle demonstrated here is the pitfall awaiting mediators as they decide which is the central issue. In any session, the mediator is constantly constructing hypotheses about the range of issues and testing them in the early interactions. The strategy of summarizing allows the mediator to focus on the goal of the mutual problem definition and lets the central issue emerge out of the hypothesis testing. If the mediator selects a central issue but the parties do not agree that it is central, they will balk in one way or another and stymie the session. Hypothesis formation and testing are discussed in greater detail in the authors' book *Mediating Divorce* (1989).

Process Versus Content Suggestions

Reading the transcripts or viewing the videotapes, it may seem that a mediation session is a free-for-all with no structure. *Fundamentals* (1994) describes at length the structure underlying the mediation process. Mediators set limits from the very beginning as they gather and display the data. Sometimes these are in the form of process interruptions to limit the thrust of the client. The purpose is first to establish a safe environment for the parties to explore their goals, test alternatives and take risks. As the mediation develops, they make further suggestions about the nature of bargaining and how to set up the final agreement. All of these must be about the process, not the content of the negotiations.

The second purpose of process suggestions or interruptions, in the Haynes Model, is to let the parties know they have not entered a therapeutic or a legal conversation. While mediators may deal with emotional or legal issues, it is not the goal of the session and they will refer clients with strong needs in either of these areas. As the present cases demonstrate, there is ample opportunity for a mediator to shift into the profession of origin for therapists or lawyers. When clients are unable to focus on their own self-interest because they have therapeutic or legal issues, mediators should make an appropriate referral and wait until the client is ready to continue mediation. Or they may learn that the referral was the best course of action.

The third purpose is to focus the parties on their presenting stories, to bring back wandering comments, and discard the unuseful data. The goal is to hone each presenting story into an eventual story that is mutual, for that is where the mutual problem definition lies. As we saw in the discussion of finding the Central Issue, this process may influence the content. By signaling that some data is useful and other data is not, the mediator indicates the direction of the MPD. But the mediator cannot force a direction that the parties reject. They will balk, find ways to undermine the session, or not return the next time. The Parent-Teacher case demonstrates just how powerful parties can be in frustrating the mediator in trying to reach the MPD.

Similarly, the mediator may make suggestions as to what data the clients need in order to make a decision. This might also require advice on how to obtain

the information. A clear example is in the Adoption chapter, when the mediator helps the clients understand what information is missing and how to locate it. In a sense, this is also part of helping them negotiate. While the mediator does not tell the client what or how to negotiate, since that is content control, he does intervene actively to make them knowledgeable about what they are negotiating, as part of the process control.

Another example of process suggestion is in the Bagels chapter when the mediator suggests how the partners might gather more information and think about the problem differently. These suggestions are, again, about how to go about the task, not what to agree to.

Teaching Clients Negotiating Skills

Mediation is the management of other people's negotiations. We believe that simple statement describes mediation better than any other we know. Mediation is all about helping people to negotiate a settlement of their dispute. The outcome of every successful mediation is some kind of a negotiated settlement. However, few people come to mediation with good negotiating skills.

Thus, the mediator must work with clients to help them improve their skills. First the mediator must determine whether the participants' negotiating strategies are consonant with their goals. Too often people engage in negotiating strategies without realizing that these tend to undermine their goals. For example, if a parent complains about a teen's room and the teen does not clean it up, the parent is likely to complain again. The complaint is ignored and soon the parent is nagging even though nagging has been shown to be an unuseful strategy in getting the teen to clean his room.

This behavior is then repeated in the mediation with the parent nagging at the teen. The mediator must help the parent find and develop alternative and more useful strategies for dealing with the conflict. On the other hand, the teen is also unlikely to know how to negotiate. In the absence of negotiating skills most people resort to threats and counterthreats. Obviously, if the teen is threatening the parents, it is unlikely that he will be able to influence them positively toward agreement on his goals. We see good examples of this problem and the mediator's strategy to teach the family members some useful negotiating skills in the Parent-Teen chapter.

In a business situation, the mediator often encounters partners with very different negotiating skills. These differences can be productive when dealing with the world outside of the business, when the parties can choose which is the best person to negotiate with the outside. However, the different styles and skills can be destructive to the partners' relationship when these interfere with their ability to problem solve within the organization.

We are of the opinion that many disputes in mediation are more about *how* people argue than *what* they argue about. Our experience leads us to pay close

attention to the *how* of the argument since, if we can improve the way people deal with the conflict and the strategies they use to reach their goals, the easier it is for them to resolve the *what* of the argument.

In the Bagels chapter the two businessmen have very different negotiating styles. The mediator observes the differences and determines whether one partner has an advantage over the other as a result of the individual negotiating behavior. There is a standoff in the sense that one partner has a strategy of enlarging the conflict, overdemanding and constantly complaining. The other partner takes the position that there is no conflict; therefore, there is nothing to resolve. As long as both hold on to these key strategies, agreement is very difficult to reach. We will be able to observe how the mediator deals with the clients' differing negotiating styles.

In the Parent-Teacher chapter, a similar problem presents itself. The conflict is as much about *how* the clients discuss the problem as the problem itself. Each has different strategies that tend to block the other's possible movement. The case is further complicated by the roles each of them adopts. We discuss the role problem below. The mediator's task in this case is to help the clients find more useful negotiating strategies within a general mutualizing framework that will lead them to see each other as partners rather than adversaries.

In both the Adoption and Neighbors cases, all the parties are novices with no negotiating experience and need the help of the mediator to understand how and when to bargain. Sometimes their "bargaining" takes the form of informal exchanges, more like a conversation, and all the mediator needs to do is provide a safe environment for them to explore and close the gap between their initial positions. At other times, he needs to restrain the participants from premature bargaining before they have all the information they need to negotiate in their best interests. These cases show the mediator as the manager of other people's negotiations.

In five of the six cases reported here, teaching negotiating skills played a role in the deliberations. Only Sexual Harassment did not entail it since the parties were not actually negotiating their dispute, but exploring alternatives to the present predicament.

Maintaining and Shifting Roles in Mediation

When clients enter mediation, they adopt roles. In most situations these roles are appropriate to the task. However, there are times when a client adopts the wrong role for the task. For example, a major problem in custody disputes in divorce is when the clients are in their *spouse roles* while talking about their children. When discussing children they should be in their *parental roles*. The spouse roles contain most of the hurt and disappointment of the marriage. As a hurt spouse, it is hard for a parent to respond in the best interests of the child when talking about the future parenting of the children. Productive discussions will be between the clients as mother and father, not as husband and wife.

When people adopt a role in an interaction, they can only maintain that role as long as the other actors in the field support that role. If one client wants to play the role of hurt wife rather than caring mother, she can only do so as long as both the father and the mediator accept her spouse rather than mother role. If the mediator only relates and replies to her as the mother rather than the wife, it is very difficult for her to sustain the wife role even though the husband responds and joins her in the spouse role. This is because the mediator, at the same time that he responds to the wife as mother, responds to the man only as the father and not as the husband. The man, too, will find it difficult to sustain the spouse role.

This is a powerful idea that gives the mediator an important tool for helping clients to be in the most productive problem-solving environment. Because the clients cannot sustain a role unless they have the cooperation of the mediator, the mediator has considerable influence as to the roles of the clients.

Let us look at Bagels again for examples. Dan, one of the partners, continually falls into a victim, “poor me, I’m hard done by” role rather than the role of adult business partner. The mediator recognizes that no agreement will be reached if Dan is in this role, and so frequently denies support for the “poor me” role and relates to him as an adult business partner. At times this strategy works, as Dan is moved from victim to partner by the mediator’s behavior. He quickly slips back into the more comfortable “poor me” role, but is pulled back into the adult role by the mediator. There is a continual shift from productive to unproductive roles in this session. Ultimately, a deal will be struck only when both partners are in their adult partner roles and are using equally productive negotiating strategies.

We can see how clients slip from one role to another in the Neighbors case, and the ways the mediator helps them focus on the most useful role for the task. There are two couples who constitute four adults, parents, friends, and neighbors. As parents they are protective. As neighbors they are in conflict. As adults they can be role responsible models. As former friends, they can rebuild the relationship between them. The mediator develops a hypothesis on how to resolve the multilevel conflict and what roles are best suited to the solution.

In another case, the teacher and parent demonstrate a fascinating aspect of roles—the *invasion of roles* by one participant of the other. The mother gives educational advice to the teacher who retaliates with how to be a good mother. Whether conscious or not, defensive or offensive, these interactions increase the complexity of the mediation. No movement toward a mutual problem definition can occur until the mediator focuses on the invasions and gets the two women to acknowledge the power of their attitudes toward one another. The chapter commentary analyzes these dynamics fully.

Using Language to Create Shifts Safely

Most people will only make shifts in their negotiating position if they feel safe, and if they can save face while making the move. Mediators may think of saving

face as an oriental requirement. However, our experience shows that it is universal. People need to save face all of the time. Thus the mediator assists in creating an environment in which people can adopt shifts in their thinking, and then articulate them safely.

This process involves protecting clients while they are making concessions and preventing the other from gloating over the concession. It also requires the mediator to think about how a shift can be phrased in a way that enhances the ability of the client to make movement safely. In the Sexual Harassment case, the mediator develops two key constructs that make it possible for the clients to move. The first is the idea that each person has “boundaries” that should not be violated. This concept is accepted by the woman student. The mediator then develops a corollary concept that the male professor “inadvertently” crossed those boundaries.

With this new language, the parties are able to move toward defining the problem differently and mutually. The student’s integrity is maintained and the professor has some space in which to acknowledge his behavior without accepting blame, and to provide assurances of nonrecurrence. Note in this case that the mediator is not suggesting how to resolve the dispute, but helping to create an environment in which the parties can be free to discover an acceptable, mutual solution.

Similarly in the chapters on Adoption and the Parents as Neighbors, the common theme is keeping the clients talking with each other. Although initial positions are set, the mediator, through reflective questions, draws the clients out to make decisions that meet their *interests* and not their respective *positions*. Not all clients know how to do this. The mediator becomes an educator, not by telling them what to do, but through questions that are respectful, dignified, and without blame so clients gain insight into their interests that allows them to modify their positions. Those questions are one of intense curiosity. They are exploratory and not for the purposes of crystallization. The language the mediator chooses is active rather than passive, specific, and easy to understand.

Developing a Future with a Difference

As we stated in the discussion of generic strategies, people come to mediation with a future that is shaped by their pasts. Most clients only want to talk about the past. As noted earlier, negotiations can only be conducted in the future tense. The key form of question in mediation is a question about a future that is different from the future brought into the mediation. Thus using questions that are reflective, hypothetical, and future focused helps the clients understand that their problems in the past do not need to continue with the same intensity in their future. The mediator attempts to convey to the clients that they need to let go in the present to gain more control of their destiny in the future. The only useful dialogue about the past is when that past contains success. Then the mediator can help the parties to build on their successful experiences to overcome present difficulties.

You will see in each of these cases how we continually ask the clients to envision a new future. We do this by using questions that disconnect clients from past thinking and have them consider a future that is not encumbered by the past. For example, in a divorce case the wife complains that the husband has never cared for the daughter in the marriage. The mediator asks her, "Would you like him to be able to care for the daughter?" She replies, "He's never done it in the past." The mediator then asks, "Would you like him to be able to do it in the future?" This is a strategic question in that the wife cannot really say "No." She would prefer to, but cannot. Then she must move to a point in the future when he could care for the daughter. When she finally answers that she would like him to be able to care, the mediator explores with her what the father would have to know and how he could attain that knowledge about caring for the daughter. The line of questions about the future promotes different thinking.

We can see examples of this type of question in every case in this book. It is a central tenet of mediation. The Parent-Teen dialogue ends with a strong plea to look at the changes coming for all of the family: What do the members want to happen in the future? What does each one need to do to achieve the desired changes? The Sexual Harassment case is predicated on maintaining a future working relationship between the professor and the student—once they examine and reject the implications of going their separate ways. The three Adoption parents build on their successful discussions in the past to bridge over their differences in the present. The Neighbors also have a history of cooperation and friendship. The mediator constantly asks questions that reinforce how they can build as successfully in the future.

Thus we see that the eight principles underlie the dynamics of each mediation session. We have isolated them and, in a sense, internalized the function of each so that we do not have to think about them in the middle of a session. For example, we make process interruptions and suggestions to help hold the focus and move the session along. Or we might think, "Now is a good time to teach some negotiating skills." The more experience a mediator has, the more automatic will be the recourse to the principles in a session. Can they be taught to novice mediators? Of course. We were all novices once.

We invite the reader to study the six cases presented here in the light of these principles to discover, as we did, how they illuminate the outcomes of the sessions—and ultimately, of our practice.

Before we conclude, however, we would like to examine some questions mediators have raised about the particular mediation model that we have developed and follow in our practice and training.

We talk about mediator balance or neutrality and give examples of when we swing away from balance and how to get back into balance. This is a key element in every level of mediation, as addressed by Jimmy Carter, writing about the aftermath of Camp David II in the negotiations between Prime Minister Ehud Barak and Chairman Yasir Arafat. "An important principle in negotiations is for the mediator to maintain at least the semblance of neutrality. Accolades for one

side and condemnation of the other is always a political temptation after an unsuccessful effort, but this makes it very difficult to orchestrate future negotiation sessions where mutual confidence in the mediator is required" (*New York Times*, Aug. 6, 2000, Sect. 4, p. 15). While business and family mediators have less riding on their efforts than international mediators, the principle of neutrality is the same.

In recent years, debate has grown regarding how much direction a mediator should introduce into a session. We have stated repeatedly that we have no problem with the mediator directing the *process* of the negotiations, as long as the clients control the *content*. But, it is suggested, by focusing on one aspect of the conflict and ignoring others, the mediator *does* control the content. Let us test this hypothesis about the mediator's power to direct the outcome. In time after time, we have found that if we leave out an aspect that is important to one or more clients, the mediation will not move forward. We must locate the missing piece by listening and assessing the dynamics of the interaction. Only then will the participants fully join the mediation process and move toward a mutually agreed on solution. Thus the clients *do* have control over content, regardless of how the mediator initially chooses the issues to address in the unfolding process.

Further, we hypothesize that the future holds the answer to the problem and, therefore, we do not dwell in the past. Is this directive? Yes. Does it sometimes impede the mediation? Yes. In those cases it becomes evident that the past must be given its due before the parties can address the present conflict and resolve it for the future. In such a case, the situation dictates an exception to the principle, but does not invalidate the principle for all other cases. There is a difference, however, between acknowledging events in the past, and trying to solve past problems before solving the present ones. We firmly believe in the minimalist approach to mediation. Do only that which is essential to keep the dialogue moving forward.

In a similar vein, we do not dwell on the emotions of the participants, and certainly do not invite emotional explorations. This is equally "directive" since some clients are clearly emotional about the conflict and would like to express themselves. This book illustrates cases where the emotional content overrides the negotiations and must be acknowledged. We invite the emotional expression, respond to it, and move the focus back to the task at hand. If the person continues to seek expression, and clearly is unable to negotiate in his or her best interest, then we will make a referral to a therapist who can provide the support needed. But this is an adjunct to mediation, not its focus or purpose.

We believe that *anything* that interferes with a person's ability to negotiate in their best self-interest must be considered in mediation. This includes issues such as drug or alcohol dependence, spousal abuse, unbalanced power relationships, as well as those mentioned above. The mediator forms a hypothesis about the ability and willingness of the client to act in his or her best interest and tests it in the session. If the issue is blocking the client's effectiveness, then referral to either legal or therapeutic resources is called for. The clients may choose to reen-

ter mediation once the issue is addressed, or may find that the referral better meets their needs. The key factor for the mediator is the *degree to which the issue impedes the mediation process*. No one should be denied the opportunity to mediate simply because one of the issues is present.

Another issue has been raised: caucusing. John Haynes initially used the strategy and recommended it in his first book, *Divorce Mediation* (1981). He later wished it had been written in disappearing ink because subsequent experience convinced him it was not helpful. He found that clients gave him information in private that they did not want aired in the joint sessions. He found himself in an untenable situation—bound by confidentiality but knowing data that would materially influence the course and outcome of the mediation. Without caucusing, clients continue to hold secrets, but he is not party to them.

Finally, we wish to address the criticism of “cookbook” mediation. The first sentence of *The Fundamentals of Family Mediation* (State University of New York Press, 1994) states: “This is a cook book for family mediators.” It is based on theories of negotiations and conflict and sets forth a step-by-step model. However, it is not intended as a *lock-step* model. As in any recipe, ingredients can be mixed in various order and amount without affecting the outcome. But the novice cook (mediator) needs a clear recipe from which to deviate as experience and competence grow. We demonstrate in the present case studies that steps can be skipped or repeated, that clients can get stuck at any point and need to go back, or to find a different path through the thicket. That’s okay. When we say mediators control process, we clearly do not mean to cut the clients to fit the model.

CONCLUSION

As mediation matures, it will become a profession in its own right, rather than a cluster of professions-of-origin. Courses and degrees are now offered by a growing number of respected colleges and universities. The literature is expanding. The horizon is widening to include mediation of many types under one broad organizational umbrella.

The search for a unified mediation field theory continues like the search for the Holy Grail. No one has yet articulated such an encompassing theory, but the challenge is alluring. To be the first. To get it right. Whether from the academic or the practice field, a theory will emerge one day. This book does not claim the prize, but only a step in the right direction. We hope this stimulates new and creative thinking from both sources.