

PARTY-DIRECTED MEDIATION: FACILITATING DIALOGUE BETWEEN INDIVIDUALS

GREGORIO BILLIKOPF, University of California (gebillikopf@ucdavis.edu, 209.525-6800)

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**PART III – JOINT SESSION**

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## 5

### Mediating the Joint Session



Mike Poe

The mediator has now listened to and coached the parties and has determined they are ready for the joint session. No matter how well disputants have been prepared through the pre-caucuses, they are likely to be anxious at the idea of confronting their adversaries. Along the way, each party has had to traverse a thorny path—and deal with feelings of discouragement, fear, and frustration.

The joint session should take place in a location that is neutral and private, without phones or other interruptions. A comfortable setting will also help reduce tensions. Furthermore, it is vital to allow sufficient time for the parties to fully engage in dialogue.

Next, we will examine matters related to:

- Seating arrangement
- Opening the mediation
- Getting the dialogue started
- Agreements

## SEATING ARRANGEMENT

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A practical aspect that is extremely influential in PDM is the seating arrangement: the two parties sit facing each other in a position that promotes good *eye contact*. This is powerful medicine for mutual understanding. In more traditional mediation the disputants sit facing the neutral rather than each other (photo, page ix). The not-so-subtle message is that the third party is there to solve the case, or worse, to act as a judge.

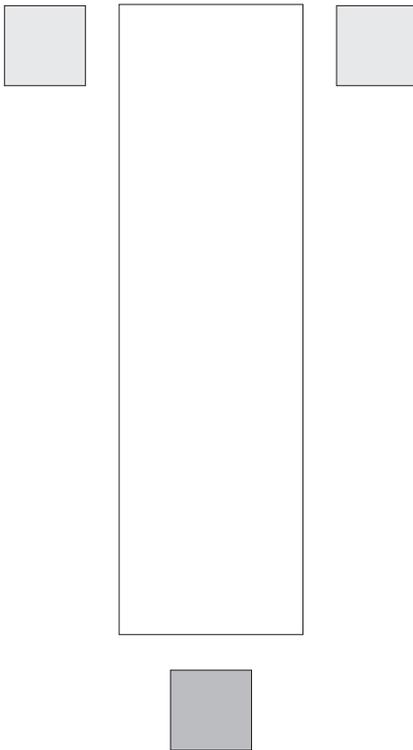
It is well known that eye contact tends to increase aggression among disputants. Yet, once parties have begun the trajectory towards reconciliation through the process of pre-caucusing, eye contact in the joint session can help soften feelings of aversion. It serves to remind people of the positive affect they might have felt for each other at one time, though they have now relegated such feelings to their subconscious. The parties are ready to begin to see each other as real people.

One option is to seat the parties at a table. This allows for a personal safety zone providing the comfort of a physical barrier between contenders. The ideal is a long rectangular table. The parties sit across from each other at one end of the table while the mediator sits at the other end, far away from them (Chapter 5 opening photo and Figure 5–1).

Another alternative is to use a set of comfortable armchairs and do without the table. The chairs should be placed at a distance that permits sufficient personal space between the parties. I usually place the chairs somewhat farther apart than is probably required. Parties often choose to move closer on their own. The mediator may, at times, be surprised by the close proximity chosen by the disputants.

In PDM the neutral sits far enough away that the parties must turn their heads if they wish to make eye contact with the

mediator. This way, it is not easy for the disputants to check whether they have “scored points” or to enlist the mediator’s support. If parties do turn toward the mediator, the neutral can encourage them to address each other instead. This seating arrangement—in which adversaries face each other rather than the mediator—underscores the message that parties are there to *talk to each other*. It constitutes the second pillar of the PDM approach (the pre-caucus being the first).



**FIGURE 5-1**

*Seating arrangement during the joint session. The mediator sits at the far end of the table.*

It will not hurt to mention the seating mechanics before participants arrive at the joint session, as it is different enough from traditional mediation to possibly confuse parties who are accustomed to facing the mediator.

### OPENING THE MEDIATION

The day of the joint session, one of the parties will likely arrive before the other. The mediator may invite individuals to sit down and make themselves comfortable, but remains standing until both parties have arrived. This detail sends a clear message to the last person to arrive—that the joint session has not started without her.<sup>1</sup>

If permission to do so has been previously secured, the mediator may



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*Effective PDM requires a belief in the inherent goodness of people as well as confidence in the process itself.*

wish to share the positive attributes raised about each contender by the other party during the pre-caucuses. Taking time to do so helps break the ice and reminds the disputants that there is hope.

This is *not* the time, however, to ask the parties to share these positive comments about each other. Disputants are seldom psychologically ready to begin with affirmations. Likewise, during the joint session the mediator may underscore transformative comments that come up naturally but generally does *not* ask contenders to share such validating comments about each other. Doing so weakens the value of transformative discourse. It may appear as if the mediator is: (1) manipulating contenders to say something nice about each other or (2) discounting the many unresolved issues that have brought the parties into the dispute. Instead, participants will make their own validating comments when they are ready, without any prompting.

The mediator may wish to remind individuals that they can take breaks, ask to caucus with the neutral, or phone a stakeholder at any time. My experience is that effective pre-caucusing greatly reduces the need for such interruptions. In fact, as of this writing, I have not yet had, or needed, a caucus once a joint session began. Even so, it is important for parties to know this small lifesaver is available if needed. It is yet one more way to emphasize that participants have much control over the process.

## GETTING THE DIALOGUE STARTED

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After any additional introductory comments from the mediator, the time has come to turn over the reins to the parties. Mediators can explain that they will bring up topics—from the lists developed during the pre-caucuses—and ask one party or the other to expand on the subjects and thus begin a dialogue.

Although the mediator may pick the first topic, one option is to permit the parties to continue the conversation from there. Either way, the mediator ensures all issues are exhausted before the joint session is over. The neutral will easily note when parties

move evasively from one subject to another as a defensive or offensive tactic.

A thought-provoking piece on the challenges of choosing topics for discussion in mediation is offered by Douglas Frenkel and James Stark in *The Practice of Mediation*.<sup>2</sup> At times, an individual will have expressed a great desire to apologize to the other party about some matter, and this also may be a good starting place. What is essential is to balance the players' opportunities to speak and address issues of importance to them.

Successfully dealing with any issue under contention (e.g., the offering and accepting of an apology or reaching an agreement on how to deal with a future difficulty) can be very energizing and give the participants the confidence they need to face other challenges.

The mediator does not present or summarize the difficulty itself, but only triggers a memory: "Mei, could you please explain to Hua the matter of the letter you found on your desk?"

Mei shares with Hua—hopefully briefly—her concerns about the letter and gives Hua the opportunity to react. That is, Mei uses the *seven word* approach introduced in Chapter 4. When both have finished the conversation on this matter, the mediator may invite Hua to tell Mei about a specific worry brought up in her pre-caucus.

When the parties are doing a good job of managing their own topics and coming up with sustainable resolutions, mediators have little to contribute other than the comfort of their presence. Neutrals also note any agreements or concerns that might need to be revisited, such as patterns of troubling interaction between the parties. These may include such things as negative gestures, confrontational body language, manipulative comments, or some of the other dysfunctional communication patterns we saw in Chapter 4.

While the ideal in PDM is for the disputants to speak to each other with as little interruption as possible, there are times when the mediator must intervene and help parties overcome dysfunctional communication styles or deal with power imbalances.



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*Parties will share positive, validating comments about the other contender when they are ready and without any prompting.*

The seriousness of communication infractions, as well as differences in neutrals' styles, will dictate the frequency and degree of mediator intervention. Time spent role-playing and developing negotiating skills in the pre-caucus will result in a smoother joint session.

At times, it may be tempting to ignore an area of concern brought up during a pre-caucus. What happens when one of the parties wants to share something with the mediator, but does not want this subject to come up during the joint session? This type of situation is quite common in NPAs, and may also arise during PDMs.

Mediators need to respect the rights of the parties not to bring up certain topics. However, one of the neutral's most important roles is to help individuals learn how to share sensitive issues in a

way that does not come across as offensive. Also, it is worthwhile for both disputants to prepare themselves—even if they are not sure if they want to address an issue—as topics may well be raised by either party during the joint session.

Shortly after the first edition of this book was published, a seminar participant raised his hand and mentioned that there happened to be two individuals attending the workshop who were involved in a long-term contentious relationship at work. Class participants requested that we incorporate the case into the seminar. The contenders, Keith and James, agreed to have the workshop participants play the mediator role with my help.

James was sent out of the conference room while the seminar participants and I listened to Keith. Once this pre-caucus was concluded, we reversed the process.

Incidentally, empathic listening seems to have a stronger effect when there is a larger audience. For instance, affected parties may feel more intensely understood when they are heard by co-mediators. In a workshop like this, when many participants are listening empathically, these positive feelings are multiplied. Put yet another way, it may take shorter periods of time to feel heard when there are multiple attentive listeners.

During his pre-caucus, Keith explained that James had cheated his employer by adding two hours of overtime to his timecard. Keith, as a way of showing what an honorable person he was, told us he had never mentioned any of this overtime mischief to his boss.

The joint session proceeded very well, with both disputants speaking to each other and solving the difficulties that had been raised. The parties were about ready to finish, so I had to decide whether to have them discuss the honesty issue. Inspired by Robert Baruch Bush and Joseph Folger's *transformative* approach to helping contenders apologize or share feelings of regard for each other, and these authors' belief that it is more important to have disputants come to a better understanding of each other than merely find short-lived agreement,<sup>3</sup> I ventured to bring up the subject. I was taking a risk.

James explained to Keith that indeed he had worked the two extra hours at a different location *before* Keith arrived. Had they



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*The mediator needs to be especially sensitive to signs that one or both parties are capitulating just to move on.*

not cleared up this issue of integrity, it is doubtful their newfound harmony would have endured.

It is good to talk about the past. It can help unravel patterns of conflict and provide transformative opportunities. Without understanding the past, it is hard to prepare for the future. At some point, however, the focus must turn to dealing with future behaviors rather than nursing past injuries. PDM normally permits disputants to naturally transition from speaking about the past to discussing mutual understanding and required changes for the future.

## AGREEMENTS

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The mediator needs to be especially sensitive to signs that one or both parties are capitulating just to move on—or out of the



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*The interpersonal negotiation skills gained are exactly those that will help individuals deal with future conflicts without the aid of a mediator.*

mistaken idea that they are pleasing the neutral. Such conduct can often be noted in the tone of voice and body language of the contenders, but not always. Mediators may ask parties some pointed questions about their agreements, encourage specificity, and challenge agreements that seem weak and unlikely to endure.

When dealing with more difficult situations, part of the role of the mediator is to keep the parties from becoming overly discouraged. This can be done periodically by talking about the progress that has already been achieved.

In Chapter 4, we referred to the Harvard Negotiation Project approach introduced by Roger Fisher and William Ury in their

seminal work, *Getting to Yes*.<sup>4</sup> These scholars suggest that by concentrating on *positions* (i.e., proposed solutions) parties accentuate their disagreements. When, instead, people focus on the *needs* and *fears* behind their stated positions, they are more likely to find mutually acceptable solutions that address the needs of all involved. Resolutions based on this approach are not only more acceptable to the parties, but they are also more likely to be long-lasting. When the light goes on, disputants realize that it is not a zero-sum game in which one person must lose for the other to win.

I prefer to begin by having parties present their initial positions, which allows them to feel understood and retain a sense of control over the process. Mediators can move parties: (1) from stating their positions or stances, (2) to understanding each other's unmet needs and fears, and finally (3) to discussing possible solutions. It helps to have disputants tentatively summarize, to the best of their abilities, the unmet needs and fears of the other. A structured way to clarify positions versus needs is outlined in Sidebar 5-1.

Contenders often discount each other by refusing to acknowledge that the other party has a need worth considering. Years ago I conducted a communication seminar hosted by a large enterprise. Without realizing it, I selected two individuals to role-play a hypothetical conflict that turned out to be all too real. The mediation scenario used a more traditional approach without any pre-caucusing.

The head cook was asked to recognize, in his own words, that the field foreman needed meals to arrive in a timely fashion. Yet the cook could not focus away from the fact that meals were being wasted each day.

“You see, it’s his fault because . . .”

“We’re not talking about faults at this time. Instead, we just want you to state the perspective of the field foreman,” I interrupted.

“Well, you see, he thinks he can get away with . . .”

The cook had to be stopped repeatedly. It was difficult for him to state (and thus validate) the other party’s needs.

SIDEBAR 5-1

Positions vs. Needs in Conflict Management

1. Parties divide a paper, chalkboard, or whiteboard into four sections as shown below.

2. Parties share their *positions* (i.e., stances).

3. Parties are free to restate, modify, or further clarify their own positions at any time.

4. Parties then seek to understand and record each other’s *needs*. Taking the time to ask effective questions of each other is an important part of reaching such understanding.

5. Parties brainstorm ways of mutually fulfilling expressed needs and reducing fears. Solutions may not be obvious at once, and disputants may want to sleep on it. For brainstorming to be effective, possible solutions should not be evaluated at the time, and even outlandish and extreme solutions need to be entertained. Only later, during Steps 6 and 7, are these potential solutions examined for their positive and negative contributions.

6. Parties are asked to resist devising solutions in which they no longer are required to interact with each other. Avoiding each other takes little creativity and is seldom the best way. Instead, participants need to seek creative, synergetic solutions.

7. Tentative co-authored agreements are evaluated and refined in light of potential obstacles.

8. Agreements—including a possible co-authored position—are recorded.

9. Parties consent to evaluate results at predetermined intervals.

10. Agreements are fine-tuned as needed and other challenges are addressed together.

11. At times it may be necessary to return to step 5 and consider additional ideas.

Position A	Position B
<ul style="list-style-type: none"> <li>• Need A-1</li> <li>• Need A-2</li> </ul>	<ul style="list-style-type: none"> <li>• Need B-1</li> <li>• Need B-2</li> <li>• Need B-3</li> </ul>
<ul style="list-style-type: none"> <li>• Fear A-1</li> <li>• Fear A-2</li> </ul>	<ul style="list-style-type: none"> <li>• Fear B-1</li> </ul>

An intermediate step—one that might have helped smooth the transition between a solely internal focus and stating the other party's position—would have been to encourage participants to ask nonjudgmental, fact-finding questions of each other.<sup>5</sup>

Once the cook stopped evading the process and described the position of the foreman, and the foreman did the same for the cook, they quickly came to a clever solution that benefited everyone and saved the corporation money. They decided that the field foreman would call the cook with an exact meal count for the day. This way, the cook would have fewer meals to prepare and thus would be able to produce them faster.

Sometimes negotiation is attempted but people's needs are incompatible. This may be especially so when no distinction can be made between *needs* and *positions*. When negotiation has failed, for whatever reasons, mandate may require that the dispute be resolved through arbitration or the courts. Bush and Folger suggest that if a door is left open for continued conversation, and if individual empowerment and mutual recognition have taken place, then mediation was not a failure. Much more of a failure, they convincingly argue, is for a mediator to be so focused on having parties come to an agreement that the resolution is forced, reducing the chances that it will be long-lasting.<sup>6</sup>

John Forester suggests that even when there are deep value differences, and basic needs are incompatible, parties may come to an understanding on peripheral issues. Despite disagreements parties may recognize some common goals.<sup>7</sup> For instance, each spouse may have profound religious convictions that are incompatible with those of the other (e.g., values they wish to instill in their children) yet come to an accord on how to live with such variances in such a way as to minimize harm to their offspring.

## SUMMARY

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PDM requires a certain belief in the inherent goodness of people, as well as confidence in the process itself. We considered the importance of the seating layout for the joint session, one

wherein parties can focus on each other rather than on the mediator. The seating arrangement underscores the contenders' responsibility for finding a viable solution.

Disputants can put to use the negotiation skills they acquired during the pre-caucus. In the joint session, the mediator or the parties may introduce topics of conversation. The key is that all the topics are discussed, even sensitive ones. If the pre-caucuses have been effective, the mediator's interruptions may be minimal, with parties taking responsibility for dealing with the past as well as making decisions about future behaviors. The skills gained through the process will help individuals deal with future conflicts without the aid of a mediator.

Finally, we considered one way to implement Fisher and Ury's negotiation approach, in which individuals separate their positions from their needs and fears.

## CHAPTER 5—REFERENCES

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