

GREGORIO BILLIKOPF
University of California
Party-Directed Mediation: Helping Others Resolve Differences
(c) 2008 Regents of the University of California
All Rights Reserved (**2nd Edition Beta 2 Version**)
gebillikopf@ucdavis.edu, (209) 525-6800

PART III - JOINT SESSION

5

Mediating the Joint Session

The time has come to bring both parties together into a joint session. In this chapter we will focus on some basic principles that are essential in terms of carrying out a *joint session* under the Party-Directed Mediation approach. We will examine matters related to:

- Helping the parties feel at ease
- Sitting arrangement
- Getting the dialogue started
- Agreements

HELPING PARTIES FEEL AT EASE

No matter how well parties have been prepared through the pre-caucus, they are likely to be quite anxious at the idea of confronting their adversary. Each party has had to walk through a thorny path—and deal with feelings of discouragement, fear, anger, and lowered self esteem—just to be here.

The joint session should take place in a location that is neutral and private: without phones, or any other sort of interruptions. Furthermore, it is vital to allow enough time for the parties to continue talking if they are involved in a productive dialogue. Anything the mediator can do to make the setting a comfortable one will help reduce tension during the joint session.

Most likely, one of the contenders will arrive slightly

before the other to the joint session. The mediator may invite individuals to sit down and make themselves comfortable when they arrive, but stays standing until both parties have arrived. This detail sends a clear message to the party who is last to arrive that the joint session has not started without him or her.¹

Although the seats have been carefully placed by the mediator (see next sub-section), parties are permitted to adjust the distance between them before moving on.

We are almost ready to get into the substance of the joint session. Provided that permission has been obtained to do so, the mediator may wish to share the positive aspects about each contender mentioned by the other party during the pre-caucus. Taking time to do so helps further break the ice and reminds the parties that there is hope.

This is *not* the time, however, to ask individuals to share positive comments about each other. Parties are seldom psychologically ready to begin with positive comments. Furthermore, the mediator generally does not ask contenders to share positive comments about each other during the joint session. Doing so weakens the validating value of what parties have to say about each other. It may appear as if the mediator is 1) manipulating contenders to say something nice about each other; or 2) discounting the many issues that have brought the parties into the conflict.

Instead, parties will make their own positive validating comments when they are ready and without any prompting.

The mediator may remind the individuals that they may take a break, ask to caucus with the mediator, or take time to call a stakeholder at any time. My experience is that the use of pre-caucusing greatly reduces the need for such interruptions. Letting the individuals know of these options ahead of time, however, is part of the process of transferring ownership to the parties.

Finally, the mediator may quickly wish to review some of the ground rules, if it is necessary, and ask the parties if

they wish to abide with these, or make any additions or modifications. Some mediators ask the parties to help arrive at these ground rules. This whole preliminary period should seldom last more than a few minutes.

SEATING ARRANGEMENT

A mechanical aspect to mediation that is extremely powerful in Party-Directed Mediation is the seating arrangement: the two parties sit facing each other such that they are in a position to have good eye contact.

One option is to separate the parties with a table. A table sets up a minimum distance and a physical barrier between the contenders; one which can be comforting to them under some situations. When a rectangular table is used, the mediator sits at the long end, far away from both individuals (Figure 5-1).

When no table is used the mediator may place the seats further away than what is probably required. It is better to err by giving individuals more personal space than they need. Parties often choose to move closer on their own. The neutral party may, at times, be surprised by the proximity chosen by the disputants.

The mediator sits far enough away, in Party-Directed Mediation, that the contenders would have to turn their heads if they wished to make eye contact with her. Such a move gives the neutral party time to remind the individuals that they are in mediation to dialogue with each other. This way, it is not easy for the parties to check if they have “scored a point,” or to enlist the mediator to their side.

Because people who are in conflict often discount the other person, having to exchange eye contact once the positive pre-caucus has taken place tends to be powerful medicine toward reconciliation. At this time, eye contact serves to remind parties of the positive affect they may have had for the other at one time, and which they have relegated to the subconscious. To once again begin to see each other

as real people. Without the pre-caucus groundwork, however, eye contact may increase hostilities.

This seating arrangement—where parties face each other rather than the mediator—underscores the message that parties are there to *talk to each other*. Such a seating arrangement is the second pillar of the Party-Directed Mediation approach (the pre-caucus being the first).

In more traditional mediation settings, parties sit facing the third party rather than each other. The not so subtle message in the traditional seating arrangement is that the mediator will solve their disagreements.

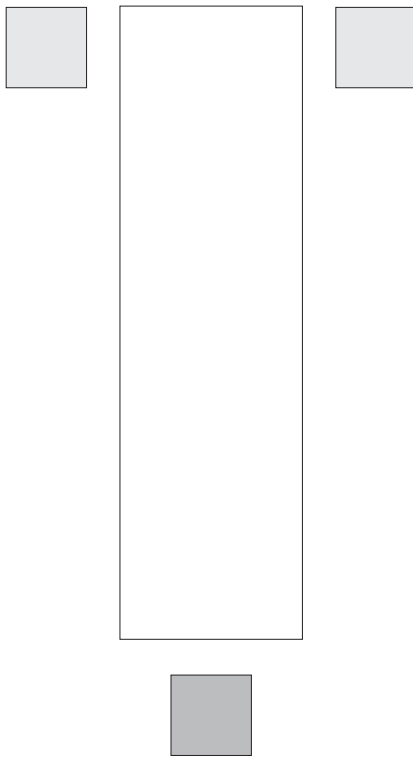


FIGURE 5-1

Seating arrangement during the joint session. In this example, the mediator sits at the end of the table.

On occasion, participants have been so accustomed to facing the mediator, however, that they have trouble with this concept. It will not hurt to mention the seating mechanics before participants arrive at the joint session.

GETTING THE DIALOGUE STARTED

After any additional introductory comments from the mediator, the time has come to turn over the reins to the contenders. Mediators explain that they will bring up topics—from the list developed together during the pre-caucus—and ask one or

the other to expand on these 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. When parties are allowed to bring up their own topics, one key role for the mediator is to make sure all topics are brought up before the joint session is over.

The mediator will have a good feel for this, and will easily note when parties move from one subject to another as a defensive or offensive tactic.

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. The mediator also notes any agreements or concerns that need to be revisited and discussed in more detail later; such as any troubling interaction patterns that may need to be pointed out.

Generally, I prefer to begin with topics that appear simpler and of a substantive nature, rather than more complicated emotive or affective issues.

At times an individual will have expressed a great desire to apologize to the other about some specific matter, and this also may be a good starting place. It is hard to make a fast and hard rule, however. What is essential is to give the parties a balanced opportunity 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 having participants agree on how they will deal with a future challenge) can be very energizing and give the participants the confidence they need to face the next difficulty that comes up.

“Mei, please, could you explain to Hua the matter of the letter you found?” The mediator does not present or summarize the matter itself, but only triggers a memory.

Mei shares with Hua her concerns about the letter and permits Hua the opportunity to react. When both have finished the conversation on this matter, the mediator may

now invite Hua to tell Mei about a specific worry brought up in her pre-caucus.

While the ideal in Party-Directed Mediation is for the contenders to speak to each other with as little interruption as possible, there are times when the mediator simply has to intervene and help parties overcome dysfunctional communication styles. Or, deal with large power imbalances.

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

It is critical, as we briefly mentioned, that parties discuss all of the issues they have brought up in the pre-caucus. Shortly after the first edition of the book was published, I was giving a seminar on the Party-Directed Mediation approach in Southern California. One of the participants raised his hand and mentioned that there happened to be two individuals who were attending the seminar who were involved in a long-term contentious relationship at work.

The participants requested that we incorporate this case into the seminar. The contenders, Keith and James, agreed to have the workshop participants play the role of the mediator 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.

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

The joint session proceeded very well, with both contenders speaking to each other and solving the difficulties that had been raised. The parties were about ready to finish when I had to decide whether or not to have

them discuss the honesty issue. Thinking of Bush and Folger's transformative approach, where it is more important to have parties come to a better understanding of each other than merely coming to an agreement that might not last,² I ventured to bring up the subject.

I realized that I was taking a huge risk. As it turned out, after both co-workers talked to each other in the joint session, James explained to Keith that he had worked the two extra hours. This had taken place at a different location before Keith had arrived. Had they not cleared up this honesty issue it is doubtful whether their new found harmony would have endured long.

It is good to talk about the past. It can help us unravel patterns of conflict and exchange 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. Party-Directed Mediation normally permits parties to naturally transition between speaking about past behaviors, mutual understanding, and required changes for the future.

AGREEMENTS

An essential aspect of becoming a good negotiator is to truly understand the challenge being faced. The mediator needs to be especially sensitive to signs that one or both parties are capitulating just so they can move on. Or, out of the mistaken idea that they are pleasing the mediator. Such behaviors 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 question agreements that seem weak and are unlikely to endure. When dealing with more difficult challenges, part of the role of the mediator is to keep the parties from becoming overly discouraged. This may be done, at times, by talking about the progress that

has already been achieved.

In Chapter 4 we referred to the Harvard negotiation approach, introduced by Roger Fisher, William Ury and Bruce Patton in their seminal work, *Getting to Yes*.³ They suggested that by concentrating on their *positions* (i.e., proposed solutions) parties accentuate their disagreements. When instead, people focus on what is behind their stated solutions, that is, their *needs* and *fears*, parties are more likely to find mutually acceptable solutions that integrate the needs of all involved. Resolutions based on this approach are not only more acceptable to the parties, but are more likely to be long lasting. When the light goes on, parties realize that it is not a zero sum game (where one person has to lose for the other to win).

Mediators should not be in too big of a hurry to move participants from 1) their position statement and explanation of their fears and needs, to 2) problem resolution. It is vital to first truly understand the nature of the challenges that seem to divide individuals. Allowing parties to hold an initial position permits each to feel understood and to retain a sense of control and ownership over the process. It helps to have, at some point, the parties explain, to the best of their ability, the *position of the other*.

Contenders often discount each other by refusing to even acknowledge that the other has a position. Years ago I had been giving an in-house communication seminar within a large enterprise. Without realizing it, I had chosen two individuals to role play a conflict that turned out to be real. This mediation took place using 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 there were meals being wasted each day.

“You see, it is his fault because ...”

“We are 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 that he can get away with . . .”

The cook had to be stopped over a dozen times. It was difficult for him to even state (and thus validate) the other’s position. Once he stopped evading the process and gave the position of the field foreman, and the field foreman did the same for the cook, they quickly came to a clever solution that benefited everyone and saved the corporation much money.

An intermediate step, that may have helped smooth the transition between a solely internal focus and stating the other party’s position, would have been to first encourage the parties to ask non-judgmental, fact finding questions of each other.⁴ An agreement was made that the field foreman would call the cook with an exact meal count for the day. Because the cook had an exact count, he had fewer meals to cook and thus could produce them faster. A structured way to clarify positions vs. needs is outlined in Sidebar 5-1.

Sometimes negotiation is attempted but people’s basic needs are incompatible. This may be especially so when no distinction can be made between people’s needs and positions. When negotiation has failed—for whatever reasons—a clear need may develop for resolving the dispute through arbitration or the courts. Bush and Folger suggest, however, 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 argue, is for a mediator to be so focused on having parties come to an agreement that the agreement is forced, reducing the chances that it will be long lasting.⁵

John Forester suggests that even where there are deep value differences and basic needs are incompatible, parties may come to agree on peripheral issues. People may agree to disagree while recognizing some common goals.⁶ For

SIDEBAR 5-1

Positions vs. Needs in Conflict Management

1. Participants divide a paper, chalkboard, or wipe board into four sections (as shown below).

2. Participants seek to understand and record each other's *position* (i.e., stance).

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

4. Participants now 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. Participants brainstorm ways of fulfilling the needs of both parties (in some cases solutions may not be obvious at once and parties 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 possible solutions should be entertained. Only later are these solutions examined for the positive and negative factors that they contribute.

6. Participants should resist solutions where they no longer have to interact with each other. To avoid each other takes little creativity and is seldom the best solution. Instead, participants need to seek creative, synergetic solutions.

7. Tentative co-authored agreements are evaluated and refined in light of potentially difficult obstacles that such solutions may yet need to endure.

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

9. Participants consent to evaluate results at pre-determined time periods.

10. Fine tune agreements as needed and work on other challenges together.

Position A	Position B
* Need A-1	* Need B-1
* Need A-2	* Need B-2
	* Need B-3

instance, where each spouse may have profound religious convictions that are incompatible with those of the other (e.g., in terms of the values they wish to instill in their children), yet come to an agreement on how to argue over the issue in such a way as to minimize harm to the children.

SUMMARY

Effective Party-Directed Mediation requires a certain belief in the inherent goodness of people as well as confidence in the process itself. In this chapter we considered the importance of the seating arrangement, one wherein parties can focus on each other rather than on the mediator. The mediator coaches the parties during the pre-caucus on effective negotiation skills. The seating arrangement permits the parties to put their negotiation skills to work and underscores the contenders' responsibility for finding a viable solution.

In the joint session the mediator may introduce topics of conversation, or the parties may do so themselves. The key is that all the topics are discussed, even sensitive ones. If the pre-caucuses have been effective, mediator interruptions may be very minimal, with parties taking responsibility for dealing with the past as well as with making decisions about future behaviors. The skills gained are exactly those that will help individuals deal with future conflicts without the help of a mediator.

Finally, we considered one approach to implement Fisher and Ury's negotiation approach, where individuals can separate their positions from their needs.

CHAPTER 5—REFERENCES

1. Daniel, D. (2001) *Conflict Resolution*. McGraw-Hill: New York, p. 69.
2. Bush, R. A. Baruch & Folger, J. P. (1994). *The Promise of Mediation*. San Francisco: Jossey-Bass Publishers.
3. Fisher, R., Ury, W., & Patton, B. (1991). *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed.). Penguin Books.
4. Bodine, N. (2001, July). Founder and member of Board of Directors of The

Workplace Institute (now Center for Collaborative Solutions) personal communication.

5. Bush, R. A. Baruch & Folger, J. P. (1994). *The Promise of Mediation*. San Francisco: Jossey-Bass Publishers.
6. Forester, John. (1999). Dealing with Deep Value Differences: How Can Consensus Building Make a Difference? In Lawrence Susskind, et. al. eds. *The Consensus Building Handbook*. Thousand Oaks: California. Sage Publications.