



PARTY-DIRECTED MEDIATION: PUSHING THE ENVELOPE

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ABSTRACT

Mediator styles vary on a number of dimensions. One such factor relates to degree of mediator directiveness. This paper introduces and defends a model—Party-Directed Mediation—that empowers parties to increasingly take more responsibility for the resolution of their conflict. Not all conflicts lend themselves to Party-Directed Mediation. The model is especially designed for conflicts affecting co-workers, neighbors, members of family owned businesses and other instances where parties will continue to live or work together after the mediator goes home. In recent decades a number of mediation styles have moved away from mediator-directed approaches, with the idea of empowering parties. The Party-Directed Mediation approach pushes the envelope in terms of empowering parties and reducing mediator directiveness. This is mainly accomplished through two somewhat controversial techniques: (1) the pre-caucus (where the mediator meets alone with each party before ever bringing both parties together); and (2) the party-directed joint session (where the parties sit facing across from each other and direct their comments to each other rather than to the mediator).

PARTY-DIRECTED MEDIATION

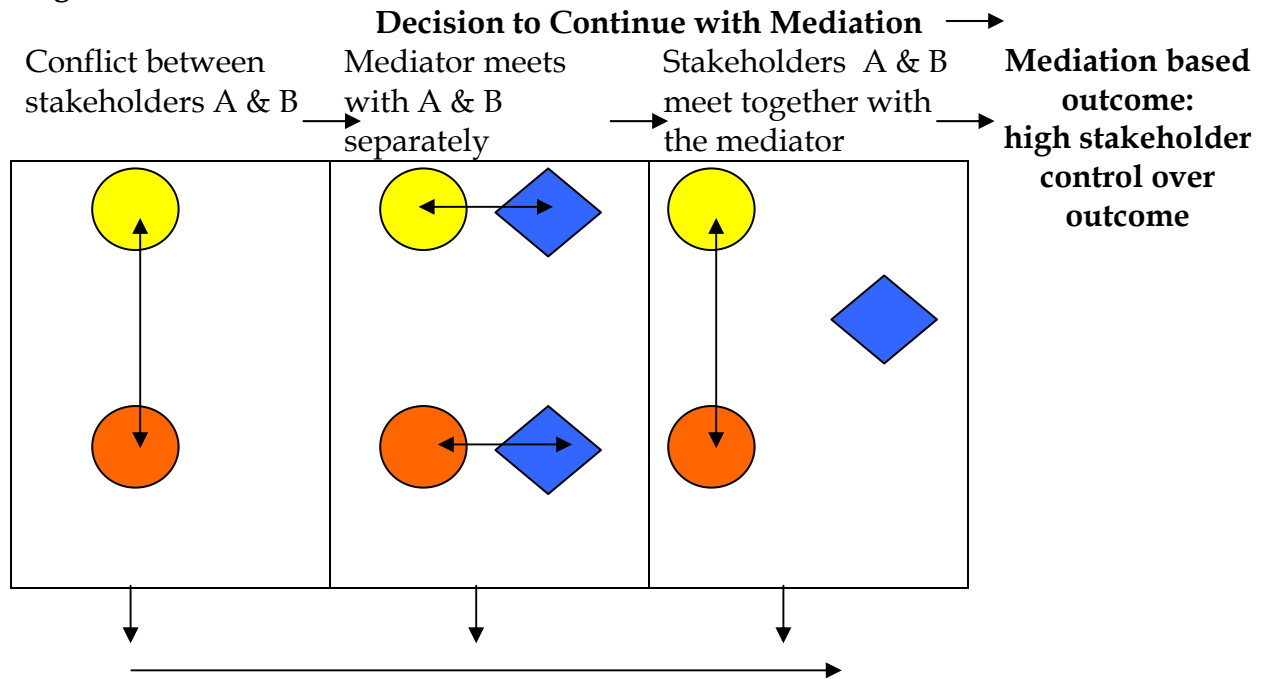
Mediator styles vary on a number of dimensions. One such factor relates to degree of mediator directiveness. Some mediators such as Frances Butler (Kressel, 1994) are quite directive in their approaches, while others such as Robert A. Baruch Bush and Joseph P. Folger (Bush & Folger, 1994) attempt to empower their clients to arrive at their own solutions. There are arguments made by both camps in terms of promoting one perspective or the other.

While the purpose of this paper is to push the envelope in terms of party-directed mediation, it should be clear at the outset that some situations may call for more mediator intervention than others. Where differences in opinion between the parties are mostly substantive in nature (about ideas, concepts) rather than relational (face work, personality) there may be a greater need for mediator intervention. For instance, two managers may be involved in a heated dispute over the design of a pay for performance program. A mediator who is a compensation specialist would be amiss in

keeping quiet when the managers come to an agreement that is fraught with potentially disastrous consequences.

Where parties will continue to live or work together after the mediator goes home, the process may call for less directiveness than cases where the parties are not expected to see each other again. The purpose of this paper, then, is not to argue in favor of mediator directiveness vs. empowering stakeholders, but rather, to explain how party-directed mediation gives control to parties for those cases where empowering the parties makes the most sense. In Party-Directed Mediation, parties are helped throughout the process to increasingly take more responsibility for the management of their conflict.

Figure 1.



Other third party intervention: lower stakeholder control over outcome

Participants: Contender A, ; Contender B, ; Mediator, .

Figure 1. Giving parties the opportunity to meet individually with the mediator in a pre-caucus, increases the chances that parties will retain much control throughout the mediation process. The parties are the main actors, even during the joint session. Where this approach fails, third party intervention strategies are more likely to be more controlling and directive on the part of the facilitator, often taking on a more quasi-arbitration appearance.

Reducing mediator directiveness or increasing party empowerment is mostly accomplished through two somewhat controversial techniques (Billikopf, 2004; Billikopf, 2002; Billikopf & Linden, 2004): (1) the pre-caucus (where the mediator meets alone with each party before ever bringing both parties together); and (2) the party-directed joint session (where the parties sit facing across from each other and direct their comments to each other rather than to the mediator).

PRE-CAUCUS

An extensive review of the mediation literature (Appendix) on caucusing and pre-caucusing shows that mediators have traditionally been somewhat weary of caucusing and even more weary of pre-caucusing (Billikopf, 2002). Billikopf argued that the complaints about caucusing were more reflective of a condemnation of directive mediation than of caucusing. This last observation seems accurate where a non-directive approach is taken: when mediators are not guiding the parties towards a solution, mediator bias is less crucial.

It is widely accepted that mediators bring their own biases to the process (Bush & Folger, 1994) and some would even argue that mediator bias may be unavoidable (Susskind & Ozawa, 2000). My own mediation practice has led me to conclude that even after explaining to the parties the mediator's role, that parties expect the mediator to come and decide who is right or wrong and take more of an arbitrator's role. To some degree, the parties wish to show the mediator that they are willing to cooperate and accept mediator direction. In the resolution of deep-seated interpersonal conflicts, a mediator who accepts what seems a party's invitation to be more directive, will end up losing the respect of one or all of the parties.

In light of the comments on mediator bias, as mediators take increasingly more directive approaches, concerns about caucusing seem particularly valid. Conversely, because in Party-Directed Mediation the parties speak to each other and by-pass the mediator – unless the mediator needs to interrupt to remind the parties about the ground rules – the issue of mediator bias is greatly reduced.

PURPOSE OF THE PRE-CAUCUS

With the exception of Winslade and Monk (2000) and Billikopf (2002, 2004), there are few proponents of the pre-caucus in the literature. In the pre-caucus, the mediator meets separately with each party before ever bringing them together. Through empathic listening skills, the mediator permits each party to hear himself or herself and become more receptive to hear an opponent (Billikopf, 2004).

Winslade and Monk (2000), in spite of their use of the pre-caucus and a moderately party-directed approach, fail to take advantage of a fuller delegation of power and responsibility to the parties. In their book, the parties involved in the conflict talk to each other through the mediator rather than directly to each other. As long as the mediator retains such a position of power, issues of mediator bias are a concern. In the Party-Directed Mediation approach, the mediator prepares each party during the pre-caucus to face the other by being a good listener, and also by role-playing ahead of time some potentially difficult conversations that may take place. The mediator can give each participant negotiation tools to use in the joint session. People often contend with each other because of their lack of negotiation skills (International Labour Organization, 2001).

The idea is that each party can explain his or her needs while showing an interest and respect for the needs of another. The chances of a positive outcome will increase and parties will be better prepared to confront each other as well as other conflicts in the future. Not all parties can successfully proceed to the next step in a Party-Directed Mediation.

After the pre-caucus, it may become clear to the mediator that the parties lack the skills to be brought together into a party-directed joint session. One option, at that point, is to use a more traditional approach to mediation (Billikopf, 2002). Another option is to invest more time into additional pre-caucuses (Billikopf, 2004). In some instances, parties may need a lot of help from the mediator, beyond simply empathic listening, if they are to gain enough confidence to face their contender in a Party-Directed Joint Session.

One question that is always asked of each party is to state something positive about the other. This is done because parties who cannot say something positive about the other have not given themselves permission to go beyond finding who is right and who is wrong, and move to resolution.

Is asking parties to find something positive to say about each other or having them role-play an apology somewhat directive? Perhaps. Linden (2004), based on the case study included in Chapters 5 through 10 of *Helping Others Resolve Differences* (Billikopf, 2004), found it to be so. The mediator may suggest, for instance, that one of the parties may want to repeat a positive comment made about the other during the pre-caucus, or acknowledge a fault, or offer an apology. The parties are not forced, however, to follow-through with such suggestions. The mediator has at his or her disposal a number of approaches developed by other theorists, including the concept of finding *transformative moments* (Bush & Folger, 1994).

In addition to transformative moments, the mediator using the Party-Directed Mediation approach, may challenge a party during the pre-caucus, to examine blind

spots and feelings. Asking a party to state something positive about another with whom they have been fighting for years, is a type of challenge. Because challenges are not introduced right away, but rather after the party has had a chance to be heard, often parties will naturally bring up transformative statements about the other.

Despite the comments about finding transformative moments and challenging blind spots, in the Party-Directed Mediation model, the mediator generally spends the lion's share of the pre-caucus involved in empathic listening. The comparatively brief time spent in the pre-caucus on more directive approaches, in contrast to the empathic listening, is an investment that is often necessary so that parties can take more control of the joint session, when lack of mediator directiveness is most crucial.

During the pre-caucus the mediator notes areas of disagreement or contention between the parties. This list is later used during the joint session to make sure the parties do not forget to discuss any important disagreements. Likewise, with the agreement of the parties, potentially transformative moments may be jotted down that may help clear misunderstandings or increase communication.

One of the challenges in adopting a Party-Directed Approach is that mediation probably takes substantially more time. Mediators must be effective empathic listeners. Rather than jumping in to point out a fault in logical thinking or a blind spot, an empathic listener permits the party to speak and often discover his or her own blind spots (Rogers R., 1951). So, while mediators have the opportunity to challenge parties, they should not rush to do so. On the other hand, one of the jobs of the mediator is to keep parties psychologically safe. If the mediator feels that the conflict might escalate rather than work itself to a resolution, or feels that one of the parties is too aggressive or unforgiving to use this approach, the mediator needs to provide sufficient challenges during the pre-caucus to determine if it is safe to bring the parties together. After all, having the parties face each other and direct their conversations to each other during the joint session will be quite taxing and puts an enormous burden on them. Whatever preventive measures are taken during the pre-caucus will result in a smoother joint session.

Furthermore, while Party-Directed Mediation can be very effective for the mediation of deep-seated, long term interpersonal conflicts, the approach requires a certain amount of "goodness" on the part of both parties. That is, each party must eventually be willing to see the other party as human. In deeply entrenched conflicts this usually takes some time. Parties who even after being listened to for one or more pre-caucuses continue to believe that all the blame lies with the other party, are not good candidates for Party-Directed Mediation (Billikopf, 2004). This and other limitations, then, make it so that at times other mediation approaches may be more effective.

PARTY-DIRECTED JOINT SESSIONS

In terms of pushing the Party-Directed Mediation envelope, I recall a case where a party I listened to in a pre-caucus gained so much confidence that he contacted the other party and held a successful joint session without a mediator present. While mediators should not expect this to be a typical result of pre-caucusing, it does illustrate the idea of empowering the parties.

As was alluded to earlier, through the pre-caucus parties are prepared to face and speak to each other directly. A review of the literature (Billikopf, 2002) shows that even mediators who have moved away from directive mediator approaches have parties talk to them rather than each other. Yet, when the parties can speak to each other directly – provided they are ready to do so – the opportunities for party empowerment increase.

SITTING ARRANGEMENT

Mediators generally feel very uncomfortable having parties face each other, with the mediator sitting away from the parties (Billikopf & Linden, 2004). Yet, it is this sitting arrangement which delivers the message more clearly than almost anything the mediator has said or done earlier. That is, that the mediator is not there to decide which of the parties is right or wrong, but that the parties are there to talk to each other and craft their own agreement.

When using the Party-Directed Mediation approach, it is common for the mediator to speak less than 5% of the time. Mediators may introduce a new topic, give parties the opportunity to make a transformative comment, or ask for clarification on an agreement the parties have made. At times, parties have not been sufficiently prepared to speak to each other effectively, and the mediator may need to interfere to remind parties of the ground rules, or to help the parties reframe a comment or make other third party interventions.

I was giving a seminar in 2004 on the Party-Directed Mediation approach when someone raised his hand and mentioned that there were two participants in the class who had a long-term contentious relationship at work. The participants requested, and I consented, that we use that case to better understand the process.

One of the parties was sent out of the classroom while the class and I listened to the other party. Once this pre-caucus was concluded, we listened to the second party and excused the first. One of the parties had brought up the fact that the other had cheated the business owner by adding two hours of overtime to his time card. The man making the complaint had further added that he did not want to turn his co-worker in. The

joint session proceeded very well, with both parties speaking to each other and solving their own problems as they were introduced.

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 (1994), 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, the accused employee explained to the other that he had worked the two extra hours. This had taken place at a different location before the other had arrived. Had they not cleared up this honesty issue it is doubtful whether their new found harmony would last.

In the joint session, then, the mediator may introduce a new topic of conversation as the previous topic is resolved, and may interrupt the parties when needed. However, 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 parties deal with future conflicts without the help of a mediator.

OTHER TOOLS

Mediators have numerous tools at their disposal that fit in very well with Party-Directed Mediation. Three such tools, for the sake of giving examples, include (1) Narrative Mediation skills (Winslade & Monk, 2000) where parties are taught to focus on the story of the conflict and ways to move away from that story; (2) the multiple tools introduced in Transformative Mediation (Bush & Folger, 1994) such as acknowledging and underscoring positive comments or increased understanding between the parties; and (3) empathic listening (Rogers, 1951). There are innumerable other tools that are compatible with Party-Directed Mediation. A comprehensive list of contributions that are compatible with the Party-Directed approach are simply too many to mention. I make these comments as a reaction to the writings of some recent theorists who instead of focusing on where their approach is new and different, tend to discard the huge number of contributions made by other scholars.

A scholarly conversation about Party-Directed Mediation and its components, such as alternative uses of caucusing and party-directed joint sessions is just beginning (Steele, 2004). Over the next decade there are likely to be other contributions that will help mediators transfer more responsibility to parties to manage their own conflict with minimal mediator interference.

One such tool involved sharing a summarized transcript of a Party-Directed Mediation with the affected parties half a year after a successful mediation. After the mediation,

the parties had become good friends despite a prolonged contentious work relationship. According to the parties, more than the mediation itself, reading a transcript of what had transpired created a desire to change dysfunctional behaviors. One of the parties said, "I was afraid to walk out of my office and have people see me so naked [exposed], and then I realized that people around me have known all this time that I was naked. It was only I who did not know it." Specific research on conditions that favor sharing a transcript summary, as well as what might be good timing, are required. This example is given to promote other creative ideas that will help push the envelope of Party-Directed Mediation and empowerment.

CONCLUSIONS

Party-Directed Mediation pushes the envelope in terms of the responsibility given to the parties to resolve their own conflict. As the mediation progresses, the parties are given increased responsibility for the resolution of the conflict. Party empowerment is accomplished mostly through two controversial techniques, pre-caucusing and a party-directed joint session. These techniques become less controversial when mediators do not feel compelled to help parties arrive at conflict resolutions, but instead, permit the parties to take more responsibility to talk about the past and develop plans for future interactions.

Despite the newness of Party-Directed Mediation, it does not require mediators to drop effective techniques and principles they have already mastered. Instead, mediators are free to utilize most of the excellent tools that have been introduced into mediation over the decades. Nor does Party-Directed Mediation purport to displace other approaches to mediation. The new model works well under very specific conditions. Namely, in those circumstances where (1) people are involved in deep-seated interpersonal contention, (2) the parties will continue to work or live together after the mediation, (3) the conflict deals more with personality clashes than substantive issues, and (4) each party is willing to consider the possibility that he or she may be wrong in some point.

APPENDIX
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