

TRANSFORMATIVE MEDIATION

Transforming the Adversarial Ethic

By Louise Phipps Senft

Before sharing with you important information about transformative mediation, first let me share with you that I left the practice of litigation 21 years ago to found a firm built on mediation and the promotion of peaceful, cost-effective, and sustainable resolutions through quality dialogue. It isn't only my business, it's my mission and the mission of our team at my firm, Baltimore Mediation. *We believe in the transformative power of quality dialogue.* We believe in the restorative power of a conversation driven by participants courageous enough to have a face-to-face candid discussion with the assistance of a skilled mediator. Mediation creates a safe space, supported by confidentiality—via state and federal court rules throughout the country and in one state, Maryland, by statute—which ensures that nothing in the conversation can be used for or

against any party in an adversarial context. Mediation can be a powerful process for those who have the courage to request or demand it. The trouble is, when faced with legal problems or conundrums or challenges, many if not most businesses do not know that mediation exists as a viable option because the information is not shared with them by their litigation or corporate counsel. If it is raised as an option by counsel, it is often then dismissed by counsel as “not viable” or “not for this case.” Or, if the mediation option is posed by the client, legal counsel often advises against it as “too risky.” Too risky for whom? And why not for this case?

The irony is that each year more and more senior litigators, on the precipice of retirement from the practice of law and no longer buoyed at the prospect of more court battles, flood into our mediation training courses, tired and beat up from

the years of the adversarial ethic, eager to be more peaceful. We say, welcome, welcome, welcome! The world eagerly awaits you.

The Power to Transform through Dialogue

I hope to inspire you about transformative mediation. It is the kind of mediation we have championed for over two decades and practiced in all kinds of venues across the country and overseas. It has worked for large land disputes, riparian rights disputes, zoning disputes, and construction and building disputes, and it has worked for every variety of breach of contract in the business and every employment arena you can think of, including securities disagreements, partnership conflict and dissolutions, discrimination complaints, and the “we don’t get along or like each other anymore” workplace conflicts. It has also been the process of choice for family situations, from amicable marital separations to fiery complex divorces with child support and custody battles and real and personal property division with complicated tax and estate issues, to international kidnapping treaties, to post-divorce college education conflicts, and to prickly alimony modifications. And it has been pioneered in thorny or tragic marital difficulties involving affairs, lack of sexual intimacy, addictions, Internet pornography, bankruptcy, children with special needs, and sensitive issues around caring for elder parents. Transformative mediation is used to work through all the complexities of family dynamics that regularly manifest themselves in closely held and family-operated businesses. And transformative mediation is also an option of choice for those working hard to stay together as a family, as business partners, as executive leadership teams.

Yes, it’s been a glorious 21 years, and our work has taken us across the United States and to four continents. We have mediated on small family farms on the Eastern Shore and in Tidewater, in state and federal agencies in the midwestern plains, the high mesas of the Hopi Indian Reservation, and all the way to the West Coast and back again for Fortune 100 and 500 companies.

You might ask how a mediation practice can be so broad, and I want to share with you our secret ingredient: dialogue. We purposefully and intentionally choose to be transformative mediators to assist people with quality dialogue and to help them engage in a constructive way. Face-to-face dialogue. And it turns out, this is what people and organizations seem to want most.

Transformative vs. Directive Mediation

What is transformative mediation and why does it matter that you know about it? Well, it matters because your clients come to you as a trusted advisor. Trusted advisors need to be on the cutting edge of what is available for their clients. It matters because clients have choices in the marketplace for the type of mediator they are seeking. And you have choices for the type of mediator you might consider becoming. Yes, there are different types of mediators trained and guided by their particular world views or particular conflict theories. There are other mediators who have no mediation conflict theory training at all but who focus instead on subject matter expertise (which, by the way, is not required by statute or court rule of any mediator in the United States except for child custody and divorce mediation, and in one state, bankruptcy and medical malpractice mediation). But all mediators are required to have mediation skills training. So you may have thought anyone with negotiation or settlement experience can mediate. Ah, you now know otherwise. Even if you knew this already, you may not have been aware that there are different conflict theories that inform every mediation training and every mediator practitioner, whether the mediator is explicit about it or not. For those mediators trained in getting agreements, unfortunately, in practice, many are doing whatever they want or believe they can do to “get an agreement,” which can include all sorts of tactics, some of which are ethically questionable (such as “arm twisting”) under the Model Standards of Conduct for Mediators, promulgated by the ABA and other groups in 2005.

Essentially, there are two main approaches for a mediator: to be directive



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or to be transformative. Stated another way, a mediator has an *orientation* to his or her practice, whether spoken or silent, whether conscious or unconscious. Taking a directive approach, the mediator's goal is always to get the parties to settle. This approach, whether the mediator's formal training was explicit or not about the theory on which it is based, is rooted in power theory, rights theory, or needs and interests theory, or some combination of these. On the other hand, taking a transformative approach, the mediator's goal is always to facilitate quality dialogue, with agreements as a natural by-product. Transformative mediation training is rooted in relational conflict theory. Perhaps the approaches sound similar: after all they are both used to help people resolve their differences. They are not similar. They are radically different. Transformative mediators do not have agreement as their goal. Do they value agreements? You bet—but they value face-to-face quality dialogue more.

In transformative mediation, research says, participants are more likely to create sustainable agreements.

Indeed, the research in the field of conflict resolution supports the statement that participants in a transformative mediation are more likely to agree when a mediator takes a transformative approach. More importantly, the research says participants are more likely to create sustainable agreements, on their own terms, due largely to a mediator committed to fostering their quality interaction and committed to resisting the urge to direct them, whether by force or by reason, into agreement terms acceptable to the mediator. The most recent research, perhaps the most extensive and gold standard to date in its scientific rigor, reports that mediators who are directive also produce clients who are less confident

about their choices and their own abilities. Directive mediators actually *disempower* clients.

I could stop here because that is the sum and total, the essence of the difference between the mediation approaches—directive or transformative. But the real *pièce de résistance* of the differences lies in the how-to of the transformative practice itself. So let's take a glimpse of what a transformative mediation process looks like and how you might consider it as a valuable process for your clients.

The Transformative Mediation Process: A Closer Look

The Goal Is Not Settlement, but Settlement Is a Likely By-Product

Let's imagine an attorney, you, advising your clients who have a dispute to enter into a transformative mediation process where the goal is not settlement. Huh?, you might say. Why would I do that? While it's true that the transformative mediator's goal is not settlement or agreement, settlement *may* be the clients' goal. If so, there is probably no *better* process for fostering a qualitative settlement than a transformative mediation because terms of agreement are the result of quality dialogue—candid exchange of information and hard questions posed with the ability to be thoughtful and discerning. Parties shift to thinking *on their own* because they are *more informed*.

However, not all parties have settlement as their goal, and not all parties have *only* settlement as their goal. Consider a family business where the father, president and CEO, and the lead sales manager son do not see eye to eye on the same strategic trajectory for increasing profits. It's a serious conflict, but it is not a legal dispute. A legally binding settlement is not their goal. For the father and son, you might dismiss mediation out of hand as not appropriate, soft. After all, it's a tough situation, but it's not a legal dispute. You take the view of, just wait until it ripens, if at all, into a legal matter. Or say you decide to send them to a mediator. If it's a directive-settlement-oriented mediator, that mediator is likely to bypass important aspects of the conflict or dismiss certain topics as irrelevant or *getting in the way of* reaching an agreement.

Now imagine your business clients who have a difficult partnership they need to unwind. They have clients, accounts, and positive standing in the community. They also have families, and the breakup is causing tension between children who essentially grew up together. Settlement and a lot of other goals such as family preservation are paramount for them. You decide to advise the client to go to mediation. Let's say the other side agrees and they go to a directive-settlement-oriented mediator. Let's further say that the mediation was "successful"; they "got the deal done," but they never resolved the handshake loan from one of their family members because the mediator declared it was not a partnership liability and so it was dropped, or they never discussed what each would say to their friends about the other because the mediator viewed this as irrelevant to the deal. Or, maybe they were lucky enough to have a mediator who helped them with a joint statement to the outside world about their parting of ways, but what they were really or equally concerned about was what each would say to their families and friends and close business confidants; when this was raised in the mediation, the mediator changed the subject because that kind of discussion was probably emotional or prickly and likely to run the risk of undoing a settlement, and so it was therefore purposefully avoided because it could be the fly in the ointment.

Directive-settlement-oriented mediators steer clients away from discussing what the mediator believes will derail a deal, especially topics that are emotional and relationally complicated. Transformative mediators, on the other hand, *follow* the parties' talk whatever it is and intervene in ways to foster engagement on emotionally charged or sensitive issues *knowing* that such emotions are the very energy for potential conflict transformation.

So you have an idea of the differences in approaches. Both kinds of mediators have a desire to help people resolve issues, but one, the mediator with the transformative approach, follows the parties and their needs and what they want to talk about, which ultimately produces

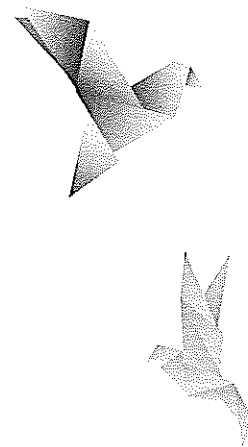
more resolutions that are satisfactory to both parties, as well as more sustainable. No wonder there are reports from clients who were first referred to settlement-oriented mediators but who later participated in transformative mediation that they felt that their arms were twisted, that they never got to speak about what was important to them, and that both parties left unhappy, albeit with an agreement. It must be why directive mediators often say, "I know I did a good job in the mediation when both parties are unhappy. (Tee he ha ha.)" Not funny. If you think about it, why would anyone who cares about the well-being of their clients advise them to participate in an approach that dehumanizes them? The primary reason is that the advisor didn't know better or never gave thought to an *orientation* to conflict.

What, Exactly, Does the Transformative Mediator Do Differently?

Let's now look more closely at what a transformative mediator actually does that is different.

A transformative mediator is trained to create a safe forum for open and honest dialogue, no matter how difficult. So, for starters, a transformative mediator spends time with the participants in face-to-face discussions to allow them to set the agenda and decide how they wish to engage. The transformative mediator *follows* the participants' discussion, punctuating it from time to time with reflections of what each speaker has said, using *their words*, not the mediator's, to aid in greater clarity about each person's perspective. A transformative mediator doesn't lead but allows for and makes space for each speaker to speak, to be engaged, to ask questions of the others, to amend, to edit, to explore, to change their minds as they become more certain and confident.

A transformative mediator listens very carefully and gets out of the way when the participants are engaged. When the parties pause in their interaction, a transformative mediator provides summaries and recaps of large chunks of conversations to aid in better understanding the big picture, identifying barriers, and highlighting possible ideas and options—both



tangible and intangible—that emerged *from the parties* through *their* dialogue. A transformative mediator assists the parties in removing the barriers to understanding and quality interaction and helps them to consider more fully options and consequences raised by the other participants. Transformative mediators take an optimistic view of people and their ability. They are unrelenting in this view. They help participants consider the “maybe, maybe not.” And they leave room, space, and time for shifts and for informed thinking. For those participants interested in settling disputes, their settlement terms become more robust and thought-through, with more traction and buy-in of the end result. And for those participants for whom agreement was never the goal, misunderstandings are cleared up, ease in interactions is restored, productivity is energized, and emotional cohesion is often created.

Whether you are contemplating retirement yourself or simply doing something different in your current practice, consider attending a series of transformative mediation trainings so that you too can consider mediating—or negotiating—from this approach. Consider becoming a “little m” mediator using transformative skills in your daily interactions with clients, family, and strangers.

When Might You Recommend Transformative Mediation to Clients?

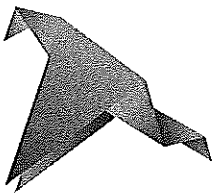
Recommending transformative mediation to your clients would be natural in many circumstances you are likely to encounter in your practice. For instance, you might recommend it if you are in active practice and have a trust and estate matter where one or more of the family members are disagreeable and decisions are not being made when they need to be, or where two or more family members have ongoing tension about a past decision, or two or more family members just don’t get along. Or you might recommend transformative mediation for adult sibling clients, including spouses, who got along reasonably well until a piece of property was left to one family member causing strife or division between that person and another family member, as for example, in the case of a beach or mountain

home bequeathed in equal parts to multiple adult children such that some want it and some do not and they are in conflict about a buyout or how to share the maintenance costs or split the prime time between their families and renters.

Remember, a transformative mediator is trained in fostering quality dialogue. A really good transformative mediator knows how to work with multiple parties in fostering quality dialogue as well. A likely result of facilitated quality engagement are terms for agreement that are tailored and personalized, and that work for all parties. Another equally important or perhaps more important outcome is a reduction in inter-family gossip, which enables family members to address each other directly and with greater ease and confidence, with family holiday meals and traditions restored—all by-products, like agreement, of dialogue that allows for shifts.

Or perhaps you represent the owners of a closely held business, whether they be the first or second or third generation, and the head of the business is aging or failing in health and the younger owners are facing a buyout of the senior owner that may cripple the business financially. Or perhaps the oldest son in line to take over the business is not well-suited for managing or inspiring those in the company, or the oldest daughter’s husband, the son-in-law, is now in the business and doing a good job but the younger son is resentful, and your job is to advise the owner. Consider recommending transformative mediation for the family or for whoever in the family is willing to participate. There is no reason to hold up dialogue because of a power play by one person who declares they will not come to the table. Dialogue is powerful between two or more individuals, and a change in the dynamic of two can bring a positive impact on the whole. Possible outcomes are employee/management relationships that feel genuine and uncomplicated, a more productive business, and perhaps a parting of the younger son, but in an amicable way, with integrity.

Perhaps you represent a client whose grown daughter is in the throes of a sad, now-getting-nasty separation or divorce, and you learned this in passing when



your client casually shared how broken up he was about it. Consider recommending that he share the possibility of transformative mediation with the separating or divorcing couple. Possible outcomes are a parting of ways with dignity and much less cost or (as we've seen) even reconciliation, if so chosen by the parties.

Perhaps you yourself have complex decisions you need to make with your spouse as you age, or with your children, your business partner, or your law firm. You too might consider transformative mediation for yourself. Possible outcomes are more fully informed decisions made with intention that will have longevity and staying power, a meaningful send-off, a different work schedule or fewer clients, or a new function as a relationship-sustainer for current clients. The possibilities are endless. It's a dialogue that provides safety where the courageous conversation can happen and where integrity can be strengthened for all. It is commonplace for transformative shifts to occur. Shifts occur because a transformative mediator recognizes the opportunities the directive mediator misses or chooses not to see. When shifts occur, conflict interaction is transformed. When conflict is transformed, agreements happen on authentic terms. Our clients have called this "settlement plus."

The Two Most Important Things to Know about Transformative Mediation

There are two main and most essential pieces of information for you to know as both a consumer representing your clients and as a mediation participant yourself. The first is that transformative mediators trained in and guided by relational conflict theory essentially believe that people have what it takes to be both strong for self and responsive to others, even in conflict and even as conflict unfolds as a result of dialogue. Thus, there is really no downside—only an upside for choosing transformative mediation.

Second, it's *counter-egoic*, as we say, for parties to choose to engage with someone who has harmed them or crossed them or breached their trust. When harmed, we want to move away from and

protect ourselves either through stonewalling or through striking back. That's the egoic response. Transformative mediators understand that. Stated another way, *it is intuitive to dialogue*.

A Call to Action

So, this is a call to action for you to consider your special role as trusted advisor. Will you have the courage to tell your clients about the option of choosing and preparing for an open and honest conversation? Will you support them? Will you have the same belief in your clients' capacity that a transformative mediator has? Or will you use the adversarial ethic, often cloaked as "advocacy," as a sword to sabotage your clients' chance at quality interaction with the very person or

Transformative mediators believe people have what it takes to be strong for self and responsive to others.

people whom they are against? Will you view mediation as weak and litigation as strong? Will you view mediation as too risky because your clients might give up a right that you wouldn't give up, or a right you want to champion? Do you view mediation as being too powerful, even dangerous to your practice, because it is so highly effective in resolving disputes efficiently by negating the need for costly and protracted discovery and delay?

Your clients need your *intuitive* support. Shutting down dialogue and foreclosing open sharing of information usually causes *greater* harm to people than the underlying conflict or dispute itself in terms of cost, lost business, exacerbated circumstances, magnified suspicion, escalated fear and dislike, and hurt feelings hardened into rage and vengeance. *Your clients need your support to prevent these outcomes. And the folks on the other side of the conflict need your support too.* People rarely need to be separated from each other in mediation unless they ask to be given some time to think something through privately, and

no one needs to be forced or manipulated or arm-twisted into a compromise or agreement. Compromises or mutual terms of agreement will naturally emerge from the parties from a qualitative conversation. So, the adage “You know it’s a good mediation when both sides are unhappy” is the antithesis of transformative work. There is no reason for anyone to have to participate in a process set up with a goal of both parties being unhappy.

In a transformative mediation process, disputes, especially those ensconced in litigation and adversarial tactics, usually shift and difficult situations are made better. The transformative mediator assists with clarifying barriers, sharpening the commonalities as well as the differences, and helping the participants exchange useful information and explore possibilities, both pros and cons, proactively but without pressure to agree or to compromise. A good transformative mediator knows that forcing agreement is not necessary. Participants often already have plenty of external and internal pressure to resolve conflicts—they don’t need more from the mediator. Practice bears out and research supports that authentic compromise and personalized terms of agreement are natural by-products of honest and open discussions and thoughtful evaluation. A transformative mediator knows how to foster quality interactions and outcomes. A transformative mediator is not a deal broker but rather a communication broker. In a transformative mediation, participants are not separated from each other by a mediator or by their lawyers, not, at least, for very long, because a transformative mediator knows the power of face-to-face honest discussions in a safe space that enable lawyers and their clients to feel confident and comfortable. Parties are rarely eclipsed by their lawyers in what they want to talk about in a transformative mediation.

While the participants may choose to meet separately to think more clearly or to talk between themselves or with outside persons, a transformative mediator raises the process option of the participants coming back together in face-to-face dialogue where the real breakthroughs happen. The more difficult the issue or the personalities, whether in litigation

or not, the more the situation calls for the transformative approach. The ability to speak and have a good chance at being understood by the other in the face-to-face interaction is the transformative aspect of mediation. This is what most businessmen and businesswomen, managers and employees alike, and most family members young and old yearn for when faced with a lawsuit or difficult business situation. But the legal approach often stifles the process by not supporting it. A lawyer espousing the adversarial ethic often advises parties not to speak candidly, which contributes to muzzling the voices of those who are, have been, and will be most impacted by the conflict and its “resolution.” This advice, given as an “advocate,” makes conflict worse. When this advice is also given in a mediation, such attorneys clearly do not understand the confidentiality standards or the power of transformative mediation.

Restoring Good Relations: You Can Be the Catalyst

Fortunately, however, for some clients, there are many enlightened attorneys who understand the power of the mediation process, know the difference between directive mediators and transformative mediators, and know that their clients will likely return for legal advice on other matters for the very reason that they felt supported by the attorney in a mediation process that empowers them, rather than strips them of power. Transformative mediation is about the breakthroughs necessary for effective and satisfying negotiation and outcomes for all who participate. And attorneys who recommend and are supportive of a particular type of mediation—that which elicits and reflects rather than that which directs—are also beneficiaries, as reported in the most recent mediation research that found clients who experience such an approach hold their advisors and counsel in higher regard. That’s a sweet pay-back for a commitment to be counter-egoic. And yes, transformative mediation definitely saves time and money and is far less expensive than protracted litigation.

Clients need the support of their counsel to engage directly with each other

safely. I believe that individuals, no matter how unreasonable or obstreperous or crazy one or the other side thinks they are, can arrive at solutions that work for them, for both of them, for all of them, when given a chance to talk face-to-face openly, protected by the safety of the confidentiality of the mediation process and by the transformative approach, which is not focused on forcing people to agree but is focused on quality interaction. I know this. I have felt it, witnessed it, and been an instrument for it thousands of times in my own mediation practice. I know that transformative mediation is a powerful force, one that brings authenticity to human relationships.

And as for agreements, just to say it again—they are natural by-products.

Reflecting back on some of the examples noted, in our often highly transactional American society, it is understandable, albeit misguided, that many attorneys, especially litigation counsel, do not support mediation. If you, too, espouse an adversarial ethic, often framed as “advocating for” or “protecting” one’s client, it is easy to dismiss or to be fearful of the powerful process of mediation, especially transformative mediation. However, for those who are venerable and wise with many years of law experience who recognize and appreciate the gravitas of the role of trusted advisor, it is a wonderful wake-up message to know about the alternative of mediation. And, with the way the legal profession is shifting, albeit slowly, mediation is outgrowing its box of “alternative” and growing into its true place on the human spectrum of quality living and quality engagement as the *first* way complicated or emotional conflicts or disputes are worked out.

As for “just money” conflicts, have you ever had taken from you or given away money without an emotional experience? Transformative mediation is perfect for the “it’s only about the money” kind of case as well. We all have choices to either maximize self-interest (which fuels an adversarial ethic), or to place value on the interplay of self and other. The adversarial legal bar still has a powerful choke on the dispute resolution industry and on the empowerment of people who

want to live in a civil society. The institutional legal lens is still narrow, even after all these years of working towards ADR. That said, there are brave souls practicing law and in legal departments who call upon the transformative mediation process regularly and others who have gone so far as to institute mediation as a precursor to filing a suit or responding to a complaint. You might be one of these brave souls. They, like the clients who request or insist on mediation, are the heroes to bringing about a little more peace in a chaotic world.

It is you and all of us in the legal profession who have the greatest chance to influence clients and society. The pendulum is swinging in a new direction; you have an opportunity to join the others who have jumped off the cliff into the refreshing waters of the transformative mediation profession as a user or provider. Maybe you will reconsider some of the situations you have now in your practice and recommend transformative mediation. Maybe you will choose to attend your first transformative mediation training, or maybe you will ask your firm to sponsor such a training and be a leader in your community. You can be a trusted source for positive change.

When businesses choose transformative mediation as their process to work out complex disputes or to break through sticky personal conflicts between executives or difficult or uncomfortable employment or client matters, business is enhanced because the matters are worked through quickly and resource-efficiently in one or a few face-to-face meetings. You might be the catalyst for outcomes that are acceptable and more sustainable because they are neither arbitrary nor forced but are created by the participants themselves with process assistance from the mediator. Most importantly, for the long run, transformative mediation is a way for the relational aspect of doing business, including the practice of law, to be restored. ■

