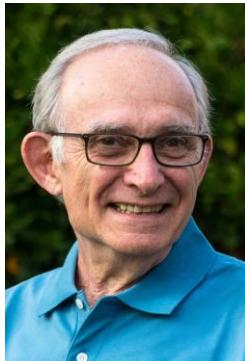


Good Mediators Act Out of Choice, Not Habit

Theory-of-Change Symposium

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[Michael Lang](#) argues that mediators should consider the particular nature of each dispute in deciding how to intervene instead of reflexively using the same strategy in all cases. He encourages mediators to be flexible and responsive and not dependent on comfortable and familiar routines. He has been a mediator for over 40 years and served as the founding director of graduate programs in dispute resolution. He is the author of *The Guide to Reflective Practice in Conflict Resolution* (2019) and *The Making of a Mediator: Developing Artistry in Practice* (2000).

Do you know why you do the things you do ... the choices you make?

(Rick to Merle, *The Walking Dead*)

In mediation practice there is a growing trend to make use of preset strategies, almost reflexively, without considering the particular nature of each conflict and the unique circumstances of the parties.

I reflected on the use of a predetermined interventions during a recent conversation with a respected and highly sought-after mediator. Defending the practice of conducting mediation primarily through private meetings, she insisted that caucus sessions are essential to bring out all relevant information. In her view, parties are hesitant to disclose information in joint session, while in caucus they are more forthcoming. Here's the essence of our conversation:

Michael: Do you believe parties always are more candid in private and that the information they share is crucial to reaching a settlement?

Mediator: Definitely.

Michael: How can you know whether the information offered in private would not have been shared in a joint meeting?

Mediator: It's just always true – it's human nature.

Michael: How do you decide when to convene private meetings?

Mediator: There's a point in every mediation where things are getting difficult. That's when I separate them.

Michael: How would you describe "things getting difficult?"

Mediator: When they argue and aren't making progress toward an agreement.

Michael: Do you ever explain your reason for shifting to private meetings?

Mediator: No. I tell them in my introduction that it's something I'll probably suggest.

As our conversation ended, there were still so many questions rattling about in my mind. I wanted to ask about the origin of this strategy – how did she come to the belief that parties are guarded in joint session and less restrained when speaking in caucus? Had she come to this through her own experience or did she discover it as a result of readings or educational programs? How does she determine whether information offered privately was critical to a successful outcome? I was curious whether she had ever conducted a mediation resulting in an agreement where there was limited or no reliance on private sessions. I wondered about the role, if any, of the parties (and counsel) in the decision either to remain in joint session or move to caucus, or whether the decision was the hers alone. In essence, how does she know what works and why?

This description amplifies my concern that private sessions may becoming – or perhaps already is – the default method for mediation. Here's a description of the "typical" mediation process:

A mediation session typically begins with a joint meeting of the parties, their attorneys and in some cases, insurance company representatives. ... Following the joint meeting, the mediator will usually separate the parties and begin meeting with them in a series of private, confidential meetings called "caucuses." ... Normally, the mediator will caucus numerous times with both sides until the case either settles or it becomes apparent that settlement will not be reached. (Michael Roberts, [Why Mediation Works](#), 2000.)

Roberts's depiction of the mediation process reinforces what I fear is becoming a trend among mediators: the unvarying reliance on a fixed technique or approach. The technique – in this instance, caucus – is used without consideration for or assessment of factors such as the context, history and nature of the dispute, the behavior of the parties, their capacity to communicate effectively, whether the parties are likely to move through moments when "things get difficult," and is their behavior cautious or candid, timid or self-assured.

I am not anti-caucus, nor arguing against shuttle mediation. I have the same concerns when mediators rely unquestioningly on joint meetings or brainstorming, or any other techniques.

So why am I grumbling? Am I just an "old school" mediator who can't appreciate this different approach? Not at all. I want to make the case that good practice relies on good thinking before acting, that knowing why we do what we do is as critical to our success as the skillful application of mediator techniques.

To act is hard. But the hardest thing...is to act
in accordance with your thinking. (Goethe)

Any intervention approach should be based on a thoughtful assessment of the situation and a clearly defined purpose. Doing the same thing, reflexively, may be effective sometimes or often. However, when we know why we do what we do and when we act in accordance with our thinking, we are operating with the highest level of competence.

At the outset of every mediation, we cannot know whether or when it may be useful to meet jointly or separately. There are exceptions such as when we are aware of circumstances that necessitate the use of private sessions. Deciding to meet privately or jointly requires the mediator to assess the advantages and drawbacks, including an evaluation of factors such as: the benefit to the parties of talking with one another in developing a workable settlement, the parties' capacity (or inability) to talk with and listen to each other, and (perhaps most importantly) the parties' preferences.

I think of Donald Schön's comment about professional practice:

The situations of practice are inherently unstable...[we] are confronted with an unprecedented requirement for adaptability. (The Reflective Practitioner, 1983).

Not all disputes and certainly not all parties respond to interventions in the same manner. Not all strategies work effectively all the time. Competent and resourceful practitioners carefully assess the pertinent factors then tailor an intervention approach suitable to the parties, their dispute, and their objectives.