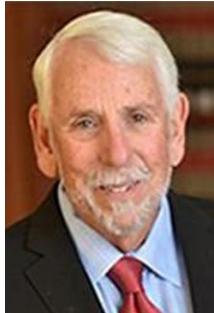


Toward Integration and Peacemaking in the Mediation Field

Theory-of-Change Symposium

indisputably.org/2020/01/theory-of-change-symposium-part-5-and-coming-attractions/

January 19, 2020



[Forrest S. \(Woody\) Mosten](#) urges mediators to be open to a range of approaches and philosophies and to incorporate a philosophy of peacemaking in their practices. He advocates expanding training curricula to address intake and practice management strategies, work in interdisciplinary teams, intractable conflicts, social science research, a broad range of mediation strategies, and dispute prevention. He is a mediator and collaborative attorney with offices in Beverly Hills and La Jolla and is an Adjunct Professor at UCLA School of Law.

The growth and acceptance of mediation may be one of the most important developments in access to justice and resolution of disputes in recent decades.

However, it has been a bumpy ride! Mediation leaders and organizations have had our own intractable conflicts, mediation thought leaders have argued over the purity of our respective mediation theories, and the mediation field has suffered strife with the organized bar, collaborative law community, and legislatures and courts in many jurisdictions.

The goal of this piece is to identify some of these conflicts, propose strategies to help resolve them, and encourage increased integration and harmony in the mediation world. I hope that practitioners and academics will shed our myopia and search for more integrative visions of our training and practice.¹

The following are descriptions of some standard practices in our field, each followed by a proposed strategy to promote increased harmony in the field.²

¹ In 1999, I convened a group of trainers at the Western Justice Center in Pasadena, California, to explore pedagogical innovations. The format was to have each invitee lead a training module with the rest of the participants serving as students in training. This symposium morphed into a special issue of the Family and Conciliation Court Review showcasing papers from some of the participants. See Forest S. Mosten, *Mediation 2000: Training Mediators for the 21st Century*, 38 FAMILY AND CONCILIATION COURT REVIEW 17 (2000).

² This piece reflects my imperfect observations of the field without empirical foundation. I hope that others will conduct research to support or modify these views.

Modulate Many Mediators’ Litigation Orientation with Increased Use of Facilitative and Interest-Based Approaches

Mediators with backgrounds as judicial officers and litigators³ often work primarily in caucuses utilizing evaluative interventions in a single-session format.⁴ This approach to mediation usually is activated in later stages of litigation, close to trial dates, and after most discovery has been completed. The main “consumers” of these mediations are litigators who engage mediators who they know and are comfortable with: mediators who are schooled in the trenches of litigation.⁵

Courts, training organizations, and mediator organizations should study how late-stage, caucus-based, evaluative mediations compare with early, joint-session-based, facilitative mediations. Training programs should offer both models as different approaches to mediation. We should avoid artificial distinctions between civil and family mediation approaches and, instead, focus on what parties need in their cases. Trainings should use “tool box” approaches of strategic interventions⁶ rather than one-size-fits-all models.

³ These mediators cover all fields of law. Even though mediators handling non-family matters (such as business, real estate, probate, and personal injury cases) often rely heavily on use of caucuses and evaluative techniques, so do many family mediators who are lawyers or retired judges.

⁴ Single-session format is contrasted with sequential-session format. In single sessions, mediation participants commit to a limited period of time, generally within one day. Everyone expects that by the end of the session, the dispute will be settled or the parties will proceed to court or litigation-focused negotiation. In sequential-session format, the parties meet for a limited time period (generally two to four hours) with a plan for one or more sessions in the future. In some sequential sessions, the parties focus on specific issues. In other sequential sessions, they work on all outstanding issues. Mediators should be trained to use both formats and combine them as appropriate.

⁵ Parties who are represented by lawyers generally are not involved in the selection of mediators and do not communicate directly with mediators before mediations begin, unlike self-represented parties. We should study the process for selection of mediators, including parties’ participation and consent.

⁶ See, e.g., DOUGLAS FRENKEL & JAMES STARK, THE PRACTICE OF MEDIATION: A VIDEO-INTEGRATED TEXT (3rd ed. 2018); DWIGHT GOLANN, MEDIATING LEGAL DISPUTES : EFFECTIVE STRATEGIES FOR NEUTRALS AND ADVOCATES (2008); CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (4th ed. 2014).

Broaden Range of Mediation Interventions for Mediators Who Prefer Facilitative and Transformative Approaches

Many mediators – including but not limited to family mediators – encourage mediation early in cases, prefer facilitative and transformative approaches, rely heavily on joint sessions, and work with lawyers outside of mediation sessions.

Just as the transformative approach⁷ has its limitations, facilitative models may benefit from judicious use of evaluative approaches and alternative mediation formats. For example, mediators should consider how and when to offer mediator settlement proposals or engage experts for confidential abbreviated evaluations.⁸

Review Court and Community Mediation Programs Protocols Serving Self-Represented Parties

Mediators in community and court mediation programs serving self-represented parties generally use a single-session format have limited time periods, often just one to four hours. These parties often need significant time for orientation about mediation and help in developing good mediation strategies.

Policymakers for court and community programs should review their mediation protocols to provide more information and assistance to self-represented parties. For example, orientation videos and meetings might be unbundled from the mediation sessions. They could be provided prior to the mediation day and/or posted online so that parties can watch them at their convenience. Programs can provide coaches for self-represented parties to help them prepare for and participate effectively in mediations.

Deepen Mediation Training by Addressing Intractable Conflicts, Social Science Research, and Broad Range of Mediation Strategies

The mediation field is a Tale of Two Realities: (1) resolution of personal and business disputes, and (2) handling of long-term social challenges such as ethnic and geopolitical problems, climate change, world hunger, and diversity and equality issues. Most mediators focus only on resolving the conflicts of parties in the room rather than broader

⁷ See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (rev. ed. 2004).

⁸ See, e.g., **Error! Main Document Only.**Forest S. Mosten, *Confidential Mini Child-Custody Evaluations: Another ADR Option*, 45 FAMILY LAW QUARTERLY 119 (2011); **Error! Main Document Only.**Margaret Shaw, *Mediator Proposals: Let Me Count the Ways*, DISPUTE RESOLUTION MAGAZINE 27 (Winter, 2012).

societal justice issues such as those addressed by Mediators Beyond Borders International and the Beyond Intractability Project.⁹

Mediation trainees would benefit from an understanding of the commonalities of these approaches and how strategies from each approach can be transferred into new contexts. Mediation trainings should address intractable conflicts,¹⁰ social science theories presented in major works such as *The Handbook of Conflict Resolution*,¹¹ and foundational theories presented in *The Making of a Mediator*.¹²

Increase Use of Interdisciplinary Teams in Mediation

Mediation training programs generally don't teach how to work with collaborative attorneys or mental health and financial professionals in mediation.¹³ Similarly, mediators rarely are taught how to serve in collaborative law cases. Parties and professionals alike often see mediation as just the "next stop" along the litigation highway rather than the "last stop" so that focus and resources can be marshalled into a resolution at the mediation table.

Mediators need training in team building and skill sharing with collaborative professionals. Mediators should be trained in working with collaborative attorneys¹⁴ from the beginning of a negotiation, when trouble strikes during negotiations as well as upon termination of a collaborative process. Given that many mediators work alone as sole practitioners, training is needed in learning about interdisciplinary teamwork that includes co-mediation and integration of mental health and financial professionals as neutrals, coaches, and evaluators within the mediation process.¹⁵

Incorporate Intake and Practice Management Strategies in Mediation Training

⁹ [Mediators Beyond Borders International](#); [Beyond Intractability](#). David Hoffman and I co-facilitated a [Peacemaker Retreat](#) in January 2020 in San Diego.

¹⁰ See PETER T. COLEMAN, THE FIVE PERCENT: FINDING SOLUTIONS TO SEEMINGLY IMPOSSIBLE CONFLICTS (2011).

¹¹ PETER T. COLEMAN, MORTON DEUTSCH & ERIC C. MARCUS, THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (3d ed. 2014).

¹² MICHAEL D. LANG & ALISON TAYLOR, THE MAKING OF A MEDIATOR: DEVELOPING ARTISTRY IN PRACTICE (2000).

¹³ See Forrest S. Mosten & Lara Traum, *Interdisciplinary Teamwork in Family Law Practice*, 56 FAMILY COURT REVIEW 437 (2018).

¹⁴ See FORREST S. MOSTEN, COLLABORATIVE DIVORCE HANDBOOK (2001); BUILDING A SUCCESSFUL COLLABORATIVE PRACTICE (Forrest S. Mosten & Adam Cordover eds., 2018).

¹⁵ *Id.*

Mediators are trained to help parties sitting at the table but generally aren't trained to do telephone intake or proactively convene mediation parties. When mediation case managers handle intake, mediators are shielded from the intake process and meet only parties who have already committed to mediation. This experience differs greatly from private practice where parties or counsel select mediators from an "audition list" and mediators mediate only cases when they are selected.

Few mediation training programs give more than passing reference to how to build and manage a mediation practice. Mediators in private practice must be financially stable to succeed over the long term. This omission in trainings is particularly significant because the qualities of successful mediators at the table (such as patience, rapport, building trust, accurate reporting, and good listening skills) often are far different than entrepreneurial qualities needed to run a profitable small business.¹⁶

Basic and advanced mediation training should cover client intake and practice management.

Mediators Should Help People Form Strong Personal and Business Relationships and Plan to Prevent and Manage Disputes

Most mediations and trainings focus on conflicts that have ripened into disputes. Very few trainings focus on prevention of legal problems and conflict wellness. For example, there is a great unmet need for mediation to help people build business partnerships and handle estate planning and other needs of the elderly.¹⁷

When mediators help resolve disputes, they should also help people form or rehabilitate relationships, and prevent and manage possible future conflicts. Such efforts can be symptomatic (such as dispute resolution process clauses included in settlement agreements) and asymptomatic (such as mediations in the formation of premarital relationships, businesses, and construction projects through the use of partnering processes).¹⁸

Move Beyond Mediation to Include Peacemaking¹⁹

¹⁶ Stephen B. Goldberg & Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three*, 24 NEGOTIATION JOURNAL 393 (2007); Robert J. Rhudy & Maryland Mediation and Conflict Resolution Office, [Engaging Conflict for Fun and Profit: Current and Emerging Career Trends in Conflict Resolution](#) (March 2014).

¹⁷ See Forrest S. Mosten & Lara Traum, *The Family Lawyer's Role in Preventive Legal and Conflict Wellness*, 55 FAMILY COURT REVIEW 26 (2017).

¹⁸ Frank Carr with the CPR Partnering Subcommittee of the CPR Construction Advisory Committee, [Partnering: Aligning Interests, Collaboration, and Achieving Common Goals](#) (2010).

¹⁹ Forrest S. Mosten, *Beyond Mediation Toward Peacemaking*, ACRESOLUTION MAGAZINE 30 (Summer 2013) (adapted from keynote address at 2011 Association for Conflict Resolution annual conference).

In recent years, there has been an important effort to integrate peacemaking into mediation practice and training. Peacemaking means helping improve others' lives, repair their relationships, and prevent future conflict. Peacemaking is actively restoring and creating harmony in interactions with clients, colleagues, opposing parties, family members, judges, court staff, witnesses, experts, and others in one's community. But it is not a process. Rather, it is a set of values, personal attributes, goals, and behaviors that guide our work. In other words, peacemaking reflects core values as expressed through one's work as a mediator, lawyer, or other professional dealing with conflict. Peacemakers come from all backgrounds, and there is no litmus test to earn your peacemaker card. While we hope that mediation is a kinder and gentler way of resolving disputes, some mediators use a peacemaking approach and others do not.²⁰

Mediation training and practice should integrate peacemaking concepts and strategies. For example, every mediator should be prepared to help parties make effective apologies, offer forgiveness, and be ready to handle rejection of an apology.

Conclusion

Mediators' quest for acceptance by professional and consumers may depend on an increased acceptance of various models and practice approaches. This requires continual reflection as a field.²¹

Mediation requires a myriad of practice approaches outside a mediator's field of specialization. These approaches need to be identified in basic training programs and explored throughout mediators' careers. For example, mediators specializing in real estate disputes may have no formal mediation training and use all-caucus, evaluative, mediator- and lawyer-dominated mediation techniques.²² Conversely, facilitative family mediators may resist using appropriate evaluation techniques. All these approaches may be effective some of the time. Hopefully, all mediators will improve their craft by considering styles, disciplines, and practice models outside of their normal comfort zones.

²⁰ BRINGING PEACE INTO THE ROOM: HOW THE PERSONAL QUALITIES OF THE MEDIATOR IMPACT THE PROCESS OF CONFLICT RESOLUTION (Daniel Bowling & David Hoffman eds., 2003); FORREST S. MOSTEN & ELIZABETH POTTER SCULLY, COMPLETE GUIDE TO MEDIATION 179 (2d ed. 2015); KIM WRIGHT, LAWYERS AS PEACEMAKERS: PRACTICING HOLISTIC, PROBLEM-SOLVING LAW (2010); Forrest S. Mosten, *Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAMILY LAW QUARTERLY 489 (2009); David Hoffman, [TEDx Talk: Lawyers as Peacemakers. Really?!? Yes, Really.](#)

²¹ Yes, I am suggesting the adaption of the concept of [kaizen](#) to continually improve our field.

²² Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: "The Problem" with Court-Oriented Mediation*, 15 GEORGE MASON LAW REVIEW 863 (2008).

As the torch passes from our founders to new generations of practitioners and thought leaders, we should incorporate peacemaking in our literature, practices, and organizational structures.