

THE CANADIAN INTERNATIONAL INSTITUTE OF APPLIED NEGOTIATION

Win that Agreement: Confessions of a Real World Mediator

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When I teach mediation I try to illustrate mediator styles by talking about West Coast "laid back" mediators and East Coast "Henry Kissinger" mediators - two extreme stereotypes. The "West Coast" type mediator is Rogerian, non-directive, using a therapeutic type of mediation based on "trusting the process". The "Henry Kissinger" type uses carrots and sticks, "intervenes" in disputes; he is directive and sees much of the problematic of conflict through the power lens. Generally, I'm type-cast by colleagues as the Kissinger type.

Actually, the Canadian International Institute of Applied Negotiation (CIAN) tries to expose its Certificate Program candidates to a variety of approaches and styles of mediation. As its President, I'm proud of the extremely high quality Faculty we have and of our willingness to be open to new and different ideas and approaches. Thus, we should know about evaluative and transformative mediation, among others, and each of us in the end will develop our own personal style as mediators. In my view, there is no universally correct approach or style: conflicts, the people embroiled in them, and mediator personalities are all too complex to assume that there is one best way to mediate.

In this spirit, and to stimulate more discussion among CIAN Faculty and readers, I take issue in this article with the working assumptions of mediation which are generally associated with its popular form. The "declared" approach and what really happens (or needs to happen, in my view), to mediate effectively in tough conflict situations are explored in a frank and candid way.

Am I saying that mediators shouldn't learn the mediation process as we teach it? No, not at all. Am I saying that I don't use techniques such as reflecting, reframing and summarizing? No. Am I saying mediation is simply motherhood and anyone can do it? Definitely not!

Rather, the reader is invited to enter the world of conflict as I inhabit it, a world where power is a central element, where the mediator is active in driving for an agreement because the goal of resolution is itself the prime motivator of the mediator, and where what separates the artist from the technician, the master from the student, is a complex configuration of clinical skills, personal attributes, intellectual strengths and life experience.

Not everyone can be a mediator, although everyone provides mediating functions from time to time. We help others communicate more effectively; we help them identify the real issues in dispute and so on. Being a Mediator, however, is something in its own right; it is not an "add on" to another established competency or professional designation. This "something in its own right" is what inspires the Institute's Certificate Program and it is our reason for creating the designation, Registered Practitioner in Dispute Resolution (RPDR).

Because much of what is stated here may be treated as heresy by all those in the West coast camp, my view is presented as a confession. For what it's worth, I confess that when I am at my best as a mediator, I practice a heretical form of mediation. I appear to be motivated by drives antithetical to the field of conflict resolution (like the desire to win); and I act when doing my work in ways that go against the grain of generally espoused theory and practice in mediation.

Yet, I am much more often than not an effective mediator, and I take seriously my failure to bring my clients to resolution. I want to "win that agreement"!

So, how does my experience reconcile with theory? Why do I feel like a sinner?

Consider the sacred liturgy that we teach:

- Mediators are neutral
- Mediators are without decision-making authority
- Mediators are non-directive
- Mediators facilitate
- Mediators should not offer solutions to the parties
- Mediators do not negotiate with the parties
- Mediators are impartial with respect to the outcome of mediation.

And so my confession begins . . .

MY FIRST CONFESSION: It is when the power imbalance between parties is obvious, or when the values held by one party greatly diverge from the ones held by me, or when the obstinateness of a party is clear and vexes me - it is during one of these extreme occasions that I realize I am not neutral. But I "act" neutral. I try to hold myself in check; I have developed a "clinical face" that is like the proverbial "poker face" but customized to fit the role of the "neutral". I confess I am not neutral in these situations and even when I'm in less extreme situations, in cases when the oppressor is not across the table from the oppressed - I see too that in these situations that I am not neutral. I design the process, create the setting in many ways, and shape the social-psychological moment. I confess I am not neutral.

MY SECOND CONFESSION: I have decision-making authority and I use it. I determine who will give their opening statement first, what factual, emotional or process-related comment or inflection should be picked up and attended to in the discussion (if one or both of the parties have missed it and I decide it is significant to progress) – where progress itself has a whole set of values and descriptors that I (in addition to the parties) have assigned to it. I confess I am given decision-making authority by the parties as they enter the process, as they go through it, and at the end

- for example when there are issues such a wording an agreement, perhaps where language is key and the precise choice of a phrase or the decision to de-emphasize a delicate point is made by me.

MY THIRD CONFESSION: I have already given examples of how directive I am; all with the implicit consent of the parties, whose consent is sometime evident in only the fact that they choose to remain at the table. They may not like the “what” that is implied in how I direct them; but they have given me a chunk of their franchise over self-determination and I believe they actually expect me to provide direction. And they don’t want or need to be consulted at each point along the way! They are in trouble, they are in pain, they most likely think the other side is malicious or mad, or both - and I represent sanity, through structure, direction and by doing and being these things that I confess.

MY FOURTH CONFESSION: I facilitate, yes, but I confess that I do this by confronting, challenging, providing reality checks, and digging right in to the heart and soul of the people and their conflict. Nobody gets off the hook with some comforting phrase like: "I'd like to do a process check: how does everybody feel about where we are?" I know darn well in some circumstances they feel terrible, would like to avoid, pack it in, and run for the hills!

MY FIFTH CONFESSION: Sometimes I think this is my greatest sin, based on what I hear spoken by mediators. They say: mediators should not offer solutions to the parties. I do! I confess that when all else has failed - when the parties are stuck and I believe that they really want to move forward, I will (in caucus or at the table if the mood is right) suggest some potential solutions that will address the interests of the parties as I have understood them. Of course, whether and how the parties move on my proposals is up to them.

MY SIXTH CONFESSION: Now I see I’m really bad! Because we are told that mediators do not negotiate with the parties. I’m sure I do. First, I think of negotiation as the art of persuasion. We try to influence others to do things that we want them to do - sometimes for their own good. So, I indulge in negotiation during the stage of getting the parties to the table. I inform them of the process and do the good things that good and proper mediators do. But I also remind them of their BATNAs¹, and I try to persuade a reluctant party to enter into mediation. It’s better, I say, than litigating, or warring - "at least, give it a try" I say. And I think I negotiate with them about some process design issues. I don’t just say, "Hey, so here’s this empty shell we call the mediation process - do whatever you wish." For goodness sakes, I’ll have a lot to say about the shape of the table, some basic ground rules, what might make sense about this and that. And in the heat of the negotiations between the parties - I’ve tried on countless occasions to be persuasive. I’m guilty of encouraging, enjoining, engaging,

¹ Best Alternative to a Negotiated Agreement (see: [Getting to Yes](#) by Fisher & Ury)

persuading parties to consider the other side's point of view; to offer a proposal that is meaningful (goes to interests) rather than merely meeting a position; of considering the consequences of behaviour.

MY SEVENTH CONFESSION: This is the mother of my discontent. The reason I transgress against theory and declared practice. For it is said: Mediators are impartial with respect to the outcome of mediation. Well, I'm not! At a profound level I'm partial - partial to peace, to resolution, to healing, to an outcome that, ideally, has specific qualities. Mediation, for me, is peacemaking. It is not value-neutral. The Peacebuilder, the Peacemaker, the Peacekeeper are partial to peace. We are not just traffic cops, or technicians of process technology. I know this for a fact: when lives are at stake and my purpose is to help people come to a non-violent resolution of their conflict, I am partial to peace. Maybe that is why I sin. Do you?