

Transformative Mediation: Preserving the Unique Potential of Mediation Across Dispute Settings

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1. The Origins of Transformative Mediation: Responding to Concerns about the Evolution of Mediation Practice

The transformative approach to mediation was developed over a decade ago to align mediation practice with unique and important goals for conflict intervention practice. Specifically, transformative mediation helped to address three important concerns that have emerged about the direction and evolution of mediation practice in the United States and elsewhere. These three concerns are summarized below as critical questions that have arisen in the field of mediation over the past fifteen years.

Does the Practice of Mediation Actually Offer An Alternative Conflict Intervention Process? As the use of mediation expanded across sectors of dispute resolution during the 1980's and 90's, an important body of research documented that, in practice, mediation was becoming more and more like the conflict intervention forums it was intended to replace.² Mediators were becoming highly directive and judgmental as they intervened in parties' disputes. They often decided which issues the parties could discuss and they shaped the terms of settlement the parties reached.³ In many instances, mediators ignored concerns that parties themselves identified and wanted to address. Sometimes the control a mediator asserted was aimed at protecting parties from making what the mediator believed to be potentially "bad" decisions that could be detrimental to themselves or each other. In other instances mediator control was exerted to dictate how parties participated in the mediation process. This type of

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² See, for example, Joseph P. Folger & Sydney, Bernard, *Divorce Mediation: When Mediators Challenge the Divorcing Parties*, 10, *Mediation Quarterly*, 5-23, (1985); David Greatbatch & Robert Dingwall, *Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators*, 23, *Law and Society Review* 613 (1989); William A Donohue, COMMUNICATION, MARITAL DISPUTE AND DIVORCE MEDIATION, , Jossey-Bass, (1991); Joseph P. Folger, *Mediation Research: Studying Transformative Effects*, 18, *Hofstra Labor and Employment Law Journal*, 385-397, (2001);

³ Some see the lack of focus on party self-determination stemming from the institutionalization of mediation programs in court settings. For examples, see, Nancy Welsh, *The Thinning Vision of Self-determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?* 6, *Harvard Negotiation Law Review* 1-96 (2001); Joseph P. Folger *Mediation Goes Mainstream: Taking the Conference Theme Challenge*, 3 *Pepperdine Dispute Resolution Law Journal*, 1-10, 2002.

process control was used mostly to contain conflict interaction and limit the parties' expression of emotion. In other mediation practice, control was exerted to ensure that the parties definitely reached a settlement, even if it meant that the mediator pushed for terms of agreement that the parties were reluctant to accept.⁴

The concern about mediators' directive practice prompted the need for an approach to mediation that emphasized self-determination of the parties, not just in the rhetoric of mediation but also in the way mediation is actually conducted. Transformative mediation responded to this concern about mediators' directive practice in a clear and convincing way that has attracted many mediators across diverse sectors of practice to its principles and methods.⁵ The transformative framework made clear that mediation can stand, in practice, as a clear alternative to adjudicative forums of conflict intervention.

Do Mediators Practice with Clear Purpose? A second concern about the evolution of mediation stemmed from the mediation field's reluctance to examine the underlying purpose behind mediation practice. As the mediation field expanded, it became increasingly apparent that not all mediators practiced in the same way -- different underlying purposes gave rise to very different approaches to practice.⁶ In large part, the mediation field was willing to ignore critical questions related to mediation's multiple goals, despite the fact that different forms of practice led to a) different expectations for what mediation provides, b) different conceptions of what "success" is and how it should be assessed, and c) different views of what appropriate, advisable, or even ethical mediator behavior is.⁷

Rather than examine the diverse (and sometimes inconsistent) goals and objectives of mediation and the controversies about these goals, many leaders in the mediation field evaded these issues by instead supporting a myopic and unreflective view of practice. They

⁴ Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation and What it Means for the ADR Field*, 3 Pepperdine Dispute Resolution Law Journal, 111-131 (2002).

⁵ See Robert A. Baruch Bush & Joseph P. Folger, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* Jossey-Bass, (1994); Robert A. Baruch Bush & Joseph Folger, *LA PROMESA DE MEDIACIÓN*, Granica (1996); Robert A. Baruch Bush & Joseph P. Folger, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT*, Jossey-Bass (2005); Joseph P. Folger & Robert A. Baruch Bush, *DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK*, Institute for the Study of Conflict Transformation, (2001).

⁶ Robert A. Baruch Bush, "One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance", 19, Ohio State Journal on Dispute Resolution, 965-1004, (2004).

⁷ As an illustration of how different models of practice enact different conceptions of the same concepts, see, for example, Dorothy Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 Negotiation Journal 271-301 (1999).

encouraged mediators to master sets of isolated intervention skills, without acknowledging that these skills are *always* linked to the underlying purpose to which they were put. Mediators and trainers often used the metaphor of a “*toolbox*” to guide mediator’s professional skill development. This metaphor supported the belief that practitioners should continuously add new “tools” to their professional toolbox by learning individual and de-contextuated strategies (e.g., communication skills, tricks, tips and methods). This toolbox approach to learning and practicing mediation was seen as beneficial because it could enable practitioners to draw from an array of intervention moves and use them as different situations or events unfolded during their mediation sessions.

The concern about the toolbox metaphor – and the type of mediation practice it ultimately gives rise to -- is that it ignores the fact that no tool is ever free from the purpose to which it is put. *Any mediator skill can be used for a wide range of purposes, depending upon the explicit or implicit goals of the practitioner who is using it.* For example, a caucus (a meeting with one party alone) can be used by a mediator to motivate an intransigent party to move away from an extreme position that he or she has taken in a joint session with the other party. In a caucus, a mediator can be more comfortable pushing a reluctant party away from an extreme position or viewpoint because the pushing can be done without the other party being aware of it. Alternatively, a caucus can be used by a mediator to help a party to think about what he or she wants to say or not say to the other person in the negotiations during the joint session. In the latter case, the mediator uses the caucus to help the party decide what he or she wants to say or do, thereby serving an empowerment function. In the former case, the caucus is used to influence or convince a party to change their stance about an issue under discussion. These are very different views of how a mediator can or should use a caucus. And these different practices related to mediators’ behavior during caucusing are based on very different conceptions of what a mediator’s core purpose is as he or she conducts their practice.

Similarly, most mediators believe that they need to be able to master the skill of “good listening.” But the skill of good listening is never disconnected from the purpose to which listening is put. Mediators are always listening with some purpose in mind and they use what they have heard from the parties to reach some goal they have as mediators when they intervene in the parties’ conflict. A mediator can listen for a wide variety of different purposes, including: to diagnose parties’ issues, to identify underlying needs, to move parties away from

stances that seem illogical or self-defeating, to deconstruct a parties' personal narrative, or to summarize what the parties have said so that they can reflect on their own views and the views of the other. These different goals reflect very different underlying objectives that mediators might be attempting to achieve as they listen to parties during a mediation session. And these purposes for listening are tied to broader purposes or goals for mediation itself.

Transformative mediation addressed the critical need to clarify the underlying goal of mediation practice. The transformative framework is built upon an explicit and clearly stated ideological purpose for mediator's practice and it demonstrated how a set of specific intervention skills can be consistently used to support the accomplishment of this explicit, transformative purpose.⁸ In this sense, transformative mediation challenged the common assumption in the mediation field that collecting and mastering communication skills or tools, independent of examining the use to which they are put, is an effective approach to becoming a competent practitioner. Instead, the transformative framework emphasized that clarity of purpose is the foundation for the use of any skill-set that mediators master and that becoming a competent practitioner means being fully aware of and dedicated to a clear purpose for practice.

Can Mediation Preserve its Unique Capacity as a Non-adjudicative Conflict Intervention Forum? The third concern that transformative mediation addressed was the need to define and preserve the *unique* capacity of the mediation process itself. The available range of adjudicative processes (including trials, settlement conferences, mini-trials, hearing panels, arbitration) accomplish important and necessary functions in addressing disputes. These processes render fair and equitable judgments, create settlements for difficult disputes, deter abusive or criminal behavior, and/or efficiently dispose of cases that may be backlogged in the courts and other institutional systems. When mediation parallels these processes or attempts to achieve similar purposes that these conflict intervention processes serve, the unique potential of mediation is lost or muted. When mediation simply tries to be an efficient way of disposing conflicts, it can always be outdone by other adjudicative processes that can consistently serve the goals of efficiency and case disposal more effectively. When mediation tries to ensure settlements, it simply duplicates the judgmental practice of these available conflict intervention processes.

⁸ Joseph. P. Folger & Robert A. Baruch Bush, *Developing Transformative Training: A View from the Inside*, in DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK, 168-182 (Joseph P. Folger & Robert A. Baruch Bush, eds. 2001).

Mediation has, instead, a different and unique contribution to make to the important work of conflict intervention, one that is distinct from the goals of adjudicative processes and that rests on a more optimistic view of parties' capacities to address their own issues and to move toward an understanding of each other's perspectives. Adjudicative processes, by definition, are built on the assumption that parties cannot make appropriate, lawful, or equitable decisions *for themselves or each other*. For this reason, adjudicators are needed to settle conflicts *for the parties*. Moreover, adjudicative processes also assume that parties are enveloped in their own points of view and cannot consider or acknowledge the perspectives and situations of the other. For this reason, adjudicators need to take diverse perspectives into account when deciding the outcome or settlement terms of a dispute. Taken together, these assumptions establish the need for adjudicators to contain parties' conflict by making decisions for them and limiting their interaction with each other. In contrast, mediation's unique potential stems from a more optimistic view of *people's capability to work through their own conflicts*. This is the view that the transformative approach to practice adopts in both its statement of purpose and its enactment of mediators' practice.⁹ And it is the unswerving commitment to this view that preserves mediation's uniqueness and alternative value.

2. The Purpose of Transformative Mediation Practice: Transforming the Quality of Parties' Conflict Interaction

Transformative mediation offers an approach to mediation practice that is based on an alternative ideological view of how productive conflict might be fostered through third party intervention. Specifically, it suggests that mediation practice can rely on a transformative, rather than a settlement, view of conflict. In the transformative framework, conflict is understood as a crisis in human interaction. The experience of conflict makes it difficult for people to engage in interaction with each other in a productive or constructive way. The personal, emotional, and substantive challenges that conflict raises for people tends to throw them into states of weakness and self-absorption. As people try to address conflict issues while they are in these debilitating states, destructive interaction tends to emerge and persist -- interaction that prevents people from understanding themselves and each other and that also undermines the parties' sound

⁹ Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13, *Mediation Quarterly*, 263-278 (1996).

deliberation and decision-making. In contrast, productive conflict occurs when the *quality* of the parties' conflict interaction shifts. This shift in conflict interaction happens as each person moves from states of weakness and self-absorption to states of greater strength and openness. Thus, *the term "transformation" in this approach to practice refers to the transformation of the parties' destructive conflict interaction.* This transformation occurs when parties are able to move, to small or great extents, out of the weakness and self-absorption that conflict has created.

The role of the mediator in this transformative view of practice is to pro-actively support productive shifts in the parties' interaction. Mediators follow and support the issues the parties want to discuss and they help parties increase their understanding of their own views and the views of the other, as the parties make decisions they want to make. As a result, the mediator helps the parties create their own outcomes based on clearer and more confident understandings of themselves, each other, and the nature of the issues that divide them. The outcomes the parties reach are the parties' own, whether these outcomes are negotiated terms of agreement, choices to continue or end a relationship, financial commitments and promises to each other, or decisions to take the conflict to another forum. The mediator's purpose is not to shape particular outcomes or choices the parties make, but, by supporting constructive changes in the parties' interaction, allow the parties to make the clearest and most confident choices for themselves based on enhanced understanding of each other and the issues that have arisen between them.

This approach to practice assumes that if parties' conflict interaction is supported and facilitated by a trained mediator, parties are able to find the balance of individual strength and clarity (empowerment) and social connection (recognition) that may have been lost in the downward spiral of their destructive conflict interaction. The transformation of destructive conflict interaction allows people who are enmeshed in divisive and emotional issues to draw upon their inherent capacities for both agency and human connection to address the difficult challenges that conflict creates. This means that although mediators have a definite role to play in supporting the transformation of conflict interaction, mediators' control over substantive issues and parties' expressiveness is counterproductive because it undermines the parties' opportunity to realize their own human capacities for greater self-empowerment and

interpersonal recognition. In other words, mediator directiveness and control make the goals of transformative practice unattainable.¹⁰

3. Key Features of Transformative Practice: Proactively Supporting Shifts in Parties' Conflict Interaction

All of the skills and practices that mediators enact in a transformative approach to intervention are aimed at fulfilling the purpose described above. At the level of practice, mediators sustain a focus on the parties' moment-to-moment interaction as it unfolds during mediation sessions, in order to support their purpose of conflict transformation. This "micro-focus" prevents mediators from getting ahead of the parties and from adopting a diagnostic mindset that leads to the kind highly directive practice that research had documented.¹¹ Instead, this focus allows mediators to work with, rather than contain, the parties' conflict interaction and to attend to opportunities for empowerment and recognition as they arise in the parties' unfolding interaction. Although the full range of skills that mediators employ in this model of practice cannot be comprehensively covered here, the following set of features offers a representative sense of the practice orientation that transformative mediators enact.

~ Mediators support parties in shaping their own ground-rules for their interaction during the mediation.

In many forms of practice, mediators establish pre-set ground-rules that the parties are asked to follow during a session. In contrast, mediators working within a transformative orientation hold discussions with the parties about what ground-rules they feel they need to guide or limit the conversation they are about to have.¹² In some instances, the parties disagree about issues related to such ground-rules and they need to talk through their differences about what guidelines are needed and why. The mediator facilitates this discussion in order to help the parties understand the different views about how they want to talk to each other during the session. This conversation often allows the parties to delve into important communication style

¹⁰ Bush and Folger, supra note 1 at 251.

¹¹ Folger and Bush, supra note 5, at 30-31; *Folger & Bush, Ideology, Orientations to Conflict, and Mediation Discourse*, in *NEW DIRECTIONS IN MEDIATION* (Joseph P. Folger and Tricia Jones, eds. 1994)

¹² For a description of the opening of a transformative mediation session, see Sally Pope, *Beginning the Mediation: Party Participation Promotes Empowerment and Recognition* in *DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK*, 85-95 (Joseph P. Folger and Robert A Baruch Bush, eds. 2001)

differences that arise from different cultural, gender, or professional backgrounds that the parties bring into the mediation room with them. Parties are encouraged to raise issues regarding how they are communicating with each other, not just at the beginning of a session, but at any point during the mediation. In this way, the discussion of the mediation process is integrated into the discussion of parties' substantive issues and decisions about both process and content are left to the parties themselves, not the mediator, throughout the mediation session.¹³

~ Mediators facilitate the parties' decisions about whether and when they want to focus on topics related to the past, present or future.

In many models of mediation practice, mediation is often conducted as a "future oriented" process. In practice, this usually means that the mediator actively discourages parties from discussing past events or the history of their conflict because this retrospective focus is assumed to be counter-productive. This focus is considered unhelpful in constructing agreements that move parties beyond their current issues and toward the future. In transformative practice, on the other hand, the parties are encouraged to decide for themselves whether talking about the past, present or future is important or useful to them.¹⁴ When there are differences among the parties about where the focus of the discussion should be, the mediator facilitates the discussion of these differences, with no preference for where the parties need to take their focus. If the parties cannot agree about whether they should or should not talk about the past during the mediation, the parties may decide to end the mediation. More often, however, this type of conversation leads to deeper understandings about differences the parties have regarding *how they talk to each other* about their conflict issues. It allows for clarification of why, for example, talking about the past may be seen as irrelevant to one party, but critically important to the other party. These conversations are often helpful to disputants in discovering why they have not been able to make progress on the tangible issues that divide them and in deciding how or whether they want to proceed with their current discussions.

~ Mediators proactively support parties' interaction and are attuned to conflict spirals that occur throughout the process.

¹³ For a discussion of the inter-relationship of mediation process and the content of parties' disputes, see Joseph P. Folger *Who Owns What in Mediation? Seeing the Link Between Process and Content* in DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK, 55-61 (Joseph P. Folger & Robert A. Baruch Bush, eds. 2001)

¹⁴ Folger & Bush, *supra* note 5, at 31-32.

In the transformative model of practice, there are no pre-set phases that are used by mediators as a map of the process they conduct. In many models of practice, phases are often used to guide the mediator's sense of how a mediation session should develop.¹⁵ Mediators rely on these phases to shape the parties' interaction as a session unfolds. In contrast, pre-set phases are not used in the transformative approach to practice. The reason for this is that pre-set phases of the process do not encourage or help a mediator to stay focused on the parties' unfolding moment-to-moment interaction.¹⁶ Instead, these pre-set phases tend to lead mediators to take their focus away from the parties' interaction and to adopt a "macro-view" of what the issues and topics are. This view encourages mediators to quickly set topic agendas before parties have fully expressed their views or heard each other, to diagnose issues from the mediator's point of view, and to emphasize points of agreement more than points of disagreement. All of these directive interventions are likely when mediators rely upon a phase-map of the process to guide their practice during a mediation session. A phase model places the mediator in a position of "leading" the parties through a process because it takes the parties' interaction where the mediator's "map" assumes it should go during a typical mediation session.¹⁷ In important ways, these phases serve as the foundation for directive mediation practice, a practice that steers mediators' focus away from the parties' interaction and undermines parties' control over the direction of their own dispute.

In a transformative view of practice, mediators focus on the unfolding patterns of interaction among the parties – not pre-set mediation phases. These patterns are constructed by the parties as soon as they begin to interact with each other and these patterns shift and evolve as the mediation session develops. The mediator works with these patterns and helps to facilitate them as the parties: raise issues, discuss how they are talking with each other, offer

¹⁵ See for example, Jay Folberg and Allison Taylor, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION*, Jossey-Bass (1984); Kathy Domenici, *MEDIATION: EMPOWERMENT IN CONFLICT*, Waveland Press (1996). A typical phase view of the process might include: mediator opening; storytelling; identification of underlying needs; finding common ground, agreement writing.

¹⁶ Dorothy Della Noce, *Mediation as a Transformative Process: Insights on Structure and Movement in DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE PERSPECTIVE*, 71-84 (Joseph P. Folger & Robert Baruch Bush, eds. 2001).

¹⁷ Because most phase models of the mediation process end with a phase of agreement writing or settlement, there is an assumption built into these phase models that the mediator needs to reach an agreement in order to "complete" the phases. This creates a natural momentum towards a heavily settlement orientation on the part of the mediator.

and modify points of view, clarify their own attitudes and feelings about topics, and make decisions about issues that are important to them.

Often the parties' conflict interaction evolves in spirals of interaction that are built on the parties' own prior interaction with each other during the session. Parties discuss issues in one way at an early point in the mediation and then come back to the same issues (sometimes several times) and have qualitatively different conversations about these issues at later points in the session.¹⁸ The nature of the conversation changes because of what transpires in the session, including new information that is exchanged between the parties, greater personal clarity about the issues, and enhanced understanding of each other's perspectives. Developments such as these can change the nature of the parties' conversation about the same topics or issues as it "recurs" at a later point in the mediation session. Transformative mediators are attuned to these spirals of conflict interaction. They expect these spirals of interaction to occur across a mediation session and they often highlight to the parties how the same topics are being discussed differently as the parties' interaction unfolds over time during the process. In this way, parties see the evolution of their own conflict interaction and how it is affecting their personal views and decision-making.

~ Mediators allow for and support uninterrupted segments of interaction between parties.

In transformative practice, the emphasis is on supporting shifts in the parties' conflict interaction. Therefore, mediators are careful not to prevent or stand in the way of parties interacting with each other. The mediator is not present to make sure he/she understands the issues or views of the parties, but rather the mediator is there to *help the parties clarify what they are trying to say for themselves and to each other*, as they make decisions about the issues that divide them. Mediators cannot work *with* the parties' interaction if they prevent the parties from talking with each other or if they emphasize the importance of continuously talking *to the mediator* throughout the process. This means that transformative mediators need to be comfortable with difficult conflict interaction – interaction that is usually based in parties' lack of empowerment and their inability to take the perspective of the other.

~ Mediators facilitate parties' emotional expressiveness as it occurs in the parties' interaction.

¹⁸ See Bush and Folger supra note 9 at 202.

In some models of practice, parties' expression of emotion is often seen as a threat to successful or productive mediation outcomes. Emotional expressiveness is viewed as inconsistent with a rationale, problem-solving process that is often argued to be the foundation of effective mediation intervention. In transformative practice, on the other hand, emotional expressiveness is seen as an inherent outgrowth of the parties' conflict interaction.¹⁹ All significant conflicts are assumed to be emotional for parties in some way or to some extent. Emotionality is part of the experience of conflict and the medium through which parties express themselves. To deny this characteristic of conflict is to ignore the very nature of what parties' experience in their conflicts over difficult issues. Transformative mediators learn to work with the emotionality of conflict, relying on the same core approach to the transformation of parties interaction that they use when they help parties address substantive issues or when they discuss differences in how they want to communicate with each other.

~ Mediators focus on and support the opportunities that arise in parties' interaction for greater self-empowerment and inter-party recognition.

Throughout the process, transformative mediators sustain a focus on parties' expression of weakness (e.g., expressions of unclarity, confusion, uncertainty, etc.) and self-absorption (e.g., expressions of self-protectiveness, closedness, defensiveness, suspicion, etc.) as they interact with each other about the issues or topics that divide them. The mediator works with the expressions of these states of weakness and self-absorption to help the parties move towards greater empowerment and recognition. When this movement does occur it usually happens in small, incremental steps. Mediators rely upon a core set of communication skills that are always aimed at the purpose behind transformative practice – to support shifts in the quality of conflict interaction by fostering empowerment and recognition.

Although mediators' sustained focus on empowerment and recognition helps mediators to avoid a directive approach that prematurely focuses on agreement and settlement, this does not mean that parties who participate in transformative mediation do not reach agreements. Research on transformative practice indicates that that parties "settle" or reach closure with

¹⁹ Folger and Bush, supra note 5 at 28.

their issues approximately 60-65% of the time.²⁰ Transformative mediation provides a forum for parties to settle issues and for supporting parties' movement forward, but it is an approach in which the mediator does not impose or direct the development of any outcomes. Therefore, when issues are settled, the parties themselves have constructed their own solutions to their own problems and have reached their own agreements. It is mediator's persistent focus on the parties' interaction, rather than on possible settlements, that insures that when settlements do occur they have been created by the parties themselves.

4. Training Transformative Practitioners: Linking Transformative Purpose with Mediators' Practice Skills

Transformative mediation training is guided by the motto: *Purpose Drives Practice*.²¹ This means that the training is designed to provide mediation with multiple levels of understanding, starting with the ideological premises on which the transformative framework rests, and then moving to the mastery of specific skills and methods that can be used by mediators to work towards supporting shifts in the quality of parties' conflict interaction. Some of the key learning objectives of transformative mediation training can be summarized as follows:

- ~ Develop a clear understanding of relational premises and their implications for conducting conflict intervention.²² Mediators understand the underlying assumptions and premises that shape the purpose and practice of transformative mediation.

- ~ Understand the concepts of empowerment and recognition and be able to identify signs of each in emerging conflict interaction. Mediators develop experiential understandings of these concepts and closely examine the value of

²⁰ Cynthia J. Halberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 Hofstra Labor and Employment Law Journal, 375-383 (2001); For other outcome effects of the implementation of transformative mediation see: Lisa Bingham & M. Cristina Novac, *Mediation's Impact on Formal Discrimination Complaint Filing: Before and After the REDRESS Program at the United States Postal Service*, 221 Review of Public Personnel Administration (2001).

James R. Antes, Joseph P. Folger & Dorothy Della Noce, *Transforming Conflict in the Workplace: Documented Effects of the USPS REDRESS Program*, 18 Hofstra Labor and Employment Law Journal, 429-467 (2001).

²¹ Folger & Bush, *supra* note 5 at 169.

²² Dorothy Della Noce, Robert A. Baruch Bush and Joseph P. Folger, *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 Pepperdine Dispute Resolution Law Journal 39-66 (2002).

each and the inter-relationship between them in conflict.²³

- ~ Recognize shifts towards empowerment and recognition and the impact these shifts have on the transformation of the parties' conflict interaction. Mediators need to be able to support changes in conflict interaction with a clear understanding of how these shifts develop and build over time, independent of the specific outcomes of a mediation session.

- ~ Learn to expect and work with difficult conflict interaction that occurs when parties are in states of weakness and self-absorption. Mediators become comfortable facilitating difficult conflict interaction and controlling their urges to contain conflict, rather than support its transformation..

- ~ Practice specific communication skills that support shifts toward greater empowerment and recognition. Mediators master a range of skills (e.g., reflection, summary, check-ins etc.) and learn how each skill can be used to support empowerment and/or recognition.²⁴

- ~ Master *when to intervene* as the parties' interaction unfolds. Mediators learn the importance of the flow and spiral of parties' conflict interaction and the timing of their interventions in this flow. This requires mastering a delicate balance of intervention moves and restraint.

5. Adoption and Implementation of Transformative Mediation Across Dispute Sectors: The Quality of Parties' Interaction Matters in All Disputes

²³ For illustrations of how to identify empowerment and recognition in conflict interaction see Janet Kelly Moen, Donna Turner Hudson, James R. Antes, Erling O. Jorgensen, and Linda H. Hendrikson, *Identifying Opportunities for Empowerment and Recognition in Mediation* in DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK , 112-132, (Joseph P. Folger and Robert A. Baruch Bush, eds., 2001)

²⁴ In transformative mediation training, communication skills are never taught independent of the purpose to which the mediator puts those skills. In this way, the communication skills are always enacted with a specific purpose in mind, related to the twin goals of empowerment and recognition and the relationship between them.

Transformative mediation has been adopted across a wide range of dispute sectors and arenas of conflict intervention practice. It has been implemented in divorce and family mediation, employee and work place disputes, as well as in court referred cases in civil and small claim disputes, neighbor conflicts, and multiparty/public policy disputes. It has been adopted as the primary approach to practice by community and court-based mediation programs, private practitioners, as well as public and private organizations.²⁵ Transformative mediation has had this appeal across a broad range of sectors for several important reasons, described below.

Transformative Mediation Is Appropriate For Diverse Relationship Expectations.

Transformative mediation is used to address disputes that involve on-going relationships among disputants but *it is equally appropriate in cases where the parties will not have a relationship or any further interaction with each other after the mediation is over.* This is because parties' interaction is at the core of any conflict for however long the parties are interdependent. The quality of that conflict interaction matters to the parties' experience of conflict and to the outcomes they create.

A landlord and tenant need to interact to decide how they are going to settle issues about expenses and payments for back rent and repairs, even if the tenant is moving out of the building immediately after the mediation session. A patient's conflict with a medical administrator or doctor develops through their interaction with each other, even if the patient never sees the administrator or doctor again after the case is over. A client who has a claim against a store owner needs to interact with that store owner about how the claim will be addressed even if the client never intends to enter the shop owner's store again. A focus on empowerment and recognition is important in all of these disputes as the parties address their issues because the quality of conflict interaction is important to the way any of these conflicts evolve or develop. In short, transformative mediation's focus on supporting shifts in the quality of conflict interaction is relevant whenever parties' interact with each other in mediation, even if the dispute itself is not nested within an on-going relationship among the parties that will continue after the mediation is over.

²⁵ For a more in depth discussion of the range of disputes where transformative mediation has been used, see Bush and Folger *supra* note 4 at 85-130.

Transformative Mediation Supports Any Decisions Parties Make About Their Issues or Relationships. Transformative mediation has had wide appeal because it allows parties to better understand themselves and each other and make clear decisions about any issues that divide them. Transforming conflict interaction during mediation does not mean, however, that parties necessarily continue their relationship after the mediation session. Parties continue or sustain their relationship only if the parties decide they do not want to. In some instances, one or all parties do decide for their own reasons to end a relationship or to distance themselves from each other as a result of their participation in mediation. If a mediator insists that parties maintain or restore a relationship, this would be violation of the core principle of empowerment on which the transformative model of practice is built. The parties are always left to make their own choices about whether their relationship will continue and on what terms. Decisions about relationships are treated no differently than decisions about other issues the parties address. The value transformative mediation provides is that if parties do decide to end their relationship they are more likely to make this decision with greater clarity, understanding, and deliberateness rather than with unsettled, confused, thoughtless, or reactionary impulses. The quality of interaction with which the parties end their relationship is different and more constructive because they have been supported by the transformative process as they reached this decision.

Transformative Mediation Can Have Positive Effects Beyond Parties' Participation in Mediation Sessions. Transformative mediation has been adopted in some organizational and institutional settings because it can offer the possibility of “upstream effects.” The leader of the United States Postal Service program for employee discrimination disputes coined the phrase “upstream effects” to describe one set of possible outcomes that the transformative mediation process might yield.²⁶ In this nation-wide workplace program, 3,000 external mediators were trained in the transformative approach to practice to conduct mediations in a wide range of employee-employee and employee-manager disputes. The term “upstream effects” referred to the possibility that employee’s experience in transformative mediation could have a potential positive impact on their future workplace interactions after they left the

²⁶ Cynthia J. Halberlin supra note 12 at 377.

mediation room. The hope was that the collective experience of those who participate in the mediation process could, over time, help to shift the culture of the workplace overall.²⁷

The nature of transformative practice made the possibility of upstream effects a reasonable expectation. Transformative mediation provides an experience that can allow people to find new ways to interact with each other in the face of personal differences, perceived incompatibility or inequity, and the day-to-day challenges of work life. The transformative framework makes possible upstream effects because it is designed to support people in their efforts to work through difficult issues without being directed or evaluated by a third party. It is the parties' engagement with their own conflict struggle in mediation, supported by a skilled intervener, that allows for the possibility of personal development for those who participate in a transformative mediation process. Research conducted on the effects of the United States Postal Service program suggests that such upstream effects have occurred within this organization through manager and employee participation in transformative mediation.²⁸

Transformative Mediation Supports Parties' Discussion of Cultural Differences That Parties See as Relevant to Their Disputes. Another strong appeal of transformative mediation is that the process supports parties when they decide to explore and address difficult conflict issues related to cultural, religious, ethnic, and racial differences. Because this model of practice does not require or limit parties to focus just on "tangible" issues, parties can choose to address ethnic and cultural differences that pose difficult challenges for them. Often cultural differences contribute to difficulties that arise from parties' perceptions of each other, their interaction with each other, and the substantive issues over which they are divided. Mediators working within the transformative framework are able to facilitate discussion of these difficult cultural, racial and ethnic issues, *if the parties themselves want to raise these issues with each other*. In this sense, transformative mediators' practice is persistently elicitive – it works with parties' existing perspectives and orientations as they arise in the unfolding conflict interaction and supports discussions of these differences.

However, like any issue or topic that parties can raise in mediation, cultural, ethnic, or racial issues are only facilitated by the mediator if *the parties decide that these issues are*

²⁷ This goal was particularly important for this organization because the culture of the US Postal service was known to be quite adversarial and negative. The possible positive effects on the workplace culture was important to the leaders within the Postal Service who funded this mediation program.

²⁸ Jonathan F. Anderson & Lisa Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from the United States Postal Service*, 48 Labor Law Journal, 607-608 (1997).

important to address and they raise them in their discussions. It is not the mediator's responsibility to identify or surface these issues if the parties' do not raise them. But the freedom the parties have to discuss whatever issues they want to discuss and the willingness of mediators to work with any of the parties' issues creates the possibility for addressing deeply held beliefs or views that the parties believe lay at the heart of their conflict.²⁹ Leaders of several community mediation programs, in particular, have adopted the transformative mediation framework because they saw in it the possibility of being able to work effectively with the kinds of cultural and ethnic conflicts that characterized many of the disputes in the neighborhoods and communities they serve.

6. Institutionalizing Mediation's Unique Value

The need for mediation to preserve and nurture its unique capacity as a conflict intervention forum is critical as more and more institutional stakeholders turn to mediation for help in addressing a wide range of disputes. But mediation programs are not likely to survive if they do not preserve and promote mediation's unique value. When those who advocate for and establish mediation programs are not clear about what this forum can uniquely offer, institutional stakeholders are less likely to continue to fund and support the development of these programs, especially when they become familiar with mediator practice that is directive or undifferentiated from available dispute resolution forums. In addition, critics who see that mediation programs do not offer an alternative process often charge that mediation can be dangerous for clients if they are "advised," "influenced," or "pushed towards agreements" without adequate formal and procedural protection from this type of third party pressure. Because mediation is a private and informal process, these criticisms often have merit and contribute to a negative perception of mediation overall.³⁰

Most importantly, clients themselves will be reluctant to continue to use mediation if they do not perceive that mediation offers something different from existing processes that are

²⁹ For an illustration of a transformative mediation that involves racially-charged issues, see the Purple House case in Bush and Folger, *supra* note 4, 131- 214.

³⁰ For critical discussions of mediation practice and implementation, see, for example, Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology 1 Journal of Dispute Resolution* 81- 99 (2002). Bernard Mayer, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION*, Jossey-Bass (2004); Bush *supra* note 3.

aimed primarily at providing case disposition and imposed agreements for disputes. People who participate in mediation need to experience the process as both different from other conflict intervention services and as more valuable and enriching than their other available options. When participants do not perceive that mediation is a unique and powerful alternative, they end up asking: “What is the point?” and client demand for the process eventually fades. For all these reasons, it is important to recognize that mediation programs are not likely to flourish over the long run if mediation practice is not guided by clear, alternative goals and the mediation process does not demonstrate its own unique value.

Transformative mediation provides an approach to practice that captures a uniquely powerful experience for those in conflict because it trusts in the power of human interaction to unleash people’s inherent potential for empowerment and recognition. Over ten years of experience with the development and implementation of transformative practice in diverse contexts suggest that many clients and institutional stakeholders resonate with the core purpose of this approach to practice. Many institutional stakeholders, including judges, program administrators, and organizational managers, often become ardent supporters of transformative mediation when they understand the conceptual and ideological foundations of this approach and see its impact on the conflicts and lives of disputants who participate in this process. But it is the responsibility of mediation practitioners and leaders in the mediation field to be able to articulate the transformative purpose of mediation and commit to it in their practice.³¹ Over the long run, the success of mediation -- as the heart of the alternative dispute resolution movement -- will rest with the mediation field’s own ability to envision, articulate, and enact a process for conflict resolution that is guided by clear, powerful and unique goals.

³¹ For a discussion of how the unique goals of mediation can be implemented in court and other institutional settings see, Dorothy Della Noce, Joseph P. Folger and James R. Antes, *Assimilative, Autonomous, or Synergistic Visions: How Mediation Programs in Florida Address the Dilemma of Court Connection* 3 *Pepperdine Dispute Resolution Law Journal*, 11-38 (2002).