

Maurice A. Deane School of Law at Hofstra University

Scholarship @ Hofstra Law

Hofstra Law Faculty Scholarship

2002

Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation

Robert A. Baruch Bush

Maurice A. Deane School of Law at Hofstra University

Sally Ganong Pope

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Robert A. Baruch Bush and Sally Ganong Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, 3 Pepp. Disp. Resol. L.J. 67 (2002)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/162

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation

Robert A. Baruch Bush^o and Sally Ganong Pope*

Many practitioners now identify themselves as transformative mediators, who practice from the transformative perspective in some or all of their work. This article explains the unique character of transformative mediation by offering answers to three basic questions: Why is transformative mediation being sought and used by parties in conflict? What is the basic nature of the mediation process, especially the mediator's role, according to this model? How does a mediator work with the parties in transformative mediation? Answering these three questions—why, what and how—will provide the reader a good overview of the transformative model in theory and practice.¹ We begin in

This article is based largely on a chapter originally written by the authors for a forthcoming book on family and divorce mediation, which also includes chapters by many other prominent mediation authorities. See Robert A. Baruch Bush & Sally Ganong Pope, *Transformative Mediation: Changing the Quality of Family Conflict Interaction*, in *MEDIATING FAMILY AND DIVORCE DISPUTES* (J. Folger, A. Milne, & P. Salem eds., forthcoming 2003 from Guilford Press.)

^o Rains Distinguished Professor of ADR Law, Hofstra Law School; Fellow, Institute for the Study of Conflict Transformation.

* Fellow, Institute for the Study of Conflict Transformation; Mediator in private practice; former President, Academy of Family Mediators; former Adjunct Professor of Law, Cardozo School of Law.

1. This article expands upon earlier, foundational treatments of the transformative model. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (1994); Joseph P. Folger & Robert A. Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 *MEDIATION Q.* 263 (1996). The treatment here adds new insights about the model and its basic concepts, and about the concrete practices that flow from those concepts. Much of the content here is based on materials developed and presented by the Institute for the Study of Conflict Transformation and its Fellows, since the publication of those earlier works, in connection with training and educational courses on the transformative model. See *DESIGNING MEDIATION: APPROACHES TO TRAINING AND PRACTICE WITHIN A TRANSFORMATIVE FRAMEWORK* (Joseph P. Folger & Robert A. Baruch Bush, eds. 2001) (collection of essays discussing some of the ideas on which the Article is based) [hereinafter, *DESIGNING MEDIATION*]. The authors acknowledge the collaboration of the Institute's Fellows and Associates in the generation of the ideas summarized here. For further information about the Institute for the Study of Conflict Transformation, see www.transformativemediation.org. "The au-

the first section with the “why” of transformative mediation, because we believe the answer to this question provides the only solid foundation for answering the other two. Based on that answer, we offer a brief description of the process and the mediator’s role in the second section. Then, in the final section, we discuss at greater length the “how” of transformative mediation practice.

THE WHY OF TRANSFORMATIVE MEDIATION: THE DESTRUCTIVE CONFLICT SPIRAL

Why do parties come to mediators, and what is it that mediators can do to best serve their clients? Most mediators would probably say that when parties first contact a mediator, the reasons for their interest in mediation will generally fall into the following categories. Saving money, saving time, and avoiding the legal system are at the top of most lists. Reducing hostility and bitterness, as well as preserving or restoring a working relationship for the future, are also important. One party may be more interested in saving time and the other in restoring the relationship. Most all, however, agree that staying out (or getting out) of the legal system is essential. Also, with few exceptions, all hope to achieve a fair resolution of some kind, whether or not it is formalized in writing. At minimum, parties are looking for “closure,” for an outcome that allows them to move beyond the conflict and get on with their lives.²

However, in our view, all the above examples of party expectations reflect a common, and deeper, set of concerns that motivate parties to try mediation. That is, these goals reflect the parties’ desire to find a different mode of dealing with their conflict — different than the one they have experienced in their private negotiations, and the one they believe they would find in the legal system. Parties are looking for a better alternative to “doing it them-

thors want to acknowledge Bonny Adams, a graphic designer & volunteer at the Dayton (Ohio) Mediation Center, for the computer design of Figures 1 and 2.”

2. The goals expressed by mediators for their work, not surprisingly, mirror the expectations expressed by their clients. *See, e.g.*, Dorothy J. Della Noce, *Ideologically Based Patterns in the Discourse of Mediators: A Comparison of Problem-Solving and Transformative Practice* 150-172 (2000) (unpublished dissertation) (on file with author) (discussing how mediators frame their goals in relation to perceptions of what clients expect of them). Some mediators emphasize preservation of relationships, others the avoidance of the court process, and other the cost and time savings. A perusal of the Yellow Pages in any given community will confirm that all of these are seen by mediators as important “selling points” for mediation. The literature on mediation also reflects the view that the main benefits of mediation (to disputing parties) lie in its ability to achieve these goals. *See, e.g.*, Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982).

selves” or having lawyers (and perhaps a judge) do it for them. They want to feel more in control of themselves and the process. They do not want to be victimized, or to victimize the other party, in the process of dealing with their dispute; rather, they want to come out of the process feeling better about themselves, and about the other party, than they do at the point of frustration and impasse that led them to seek help from a lawyer or third party in the first place.

In part, this interpretation of party expectations is the product of our experience and observation in many hundreds of cases of people in conflict, whether in families, businesses, communities, or other contexts. In those cases, we found a strong pattern in the way people characterize what is most salient to them about their conflicts, i.e., what bothers them most and, therefore, what they most want help in addressing. One good, concrete way to describe this pattern is to give “voices” to the parties in a specific case, who represent a composite of the parties we’ve seen. While fictional, we think these voices reflect very closely the real experience of many parties to conflict³.

Therefore, imagine Jim and Susan Ellis, adult children of Walter Ellis, who founded the family business Jim and Susan are due to inherit and in whose profits they share equally. Though the example is a family business case, in our experience very similar views are expressed by parties to cases in almost every other conflict arena. Jim, 48, has worked at his father’s side in the business since graduating college, taking on more and more of the management as Walter aged. Susan, 40, a homemaker and mother whose children are now in college, has had a minor role in the business helping to deal with employee grievances, but is now shouldering most of the responsibility for dealing with Walter’s decline from a terminal illness. Still joined in both family and business, they are now deeply divided about the roles each should play in the two areas. Here is what Jim and Susan say bothers them most about their conflict, in response to questions such as: “What affects you most

3. The authors understand the risks of using a “composite” case to represent any kind of empirical phenomenon. The late Trina Grillo used this approach to comment brilliantly on questionable mediation practices and was severely attacked for doing so. See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1990). See, e.g., Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L.REV. 467 (1991) In the present article, the composite example is accompanied by a discussion of the research and theoretical literature supporting the authenticity of the “voices” presented.

about this conflict you're involved in? What's the hardest part of this? What's the impact that seems to strike you hardest?"

Susan: Well, what's really hard is that right from the very beginning, it was very hard to just suddenly feel so frustrated and helpless. You know, Dad is at the heart of this. Of course, it's really everything, but it always comes to a head over him. And to have Jim tell me that Dad never wanted me to play a major role in the business, he didn't think I was capable of it, when I knew that simply wasn't true at all. To have him tell me I don't know how my own father sees me! And tell me that, anyway, I just wasn't up to the work, that I should just satisfy myself with taking care of Dad. That made me so angry . . . but it also made me doubt myself. I was outraged, but I was also shaken. I mean, should I insist on pushing myself into the business more? Did I really know my abilities? And anyway, what could I do against this kind of solid resistance that Jim was putting forth. That feeling of helplessness and uncertainty was really, really hard for me.

Plus, I have to tell you, it was hard to find myself so full of anger and venom for Jim, the older brother I had admired for so long. How hard he had worked to make things work in that business, to build it up and make it a support for both our families, even when things had been very tough. But you know what? I found I couldn't see that anymore. All I could see is him closing his mind and his heart to both Dad and me. Locking himself up in his precious office and shutting the family out, scarcely even showing up at the hospital or the hospice to see Dad or take some of the load off me. And for what? Power? Ego? Just to keep himself "in charge?" I didn't like myself—I don't like myself—for seeing him this way. But I just couldn't help it. The helplessness and the hostility. That's what was so hard. And the more this has gone on, the worse that has gotten.

Jim: What's been hardest? Well, first of all, when Susan started showing up at the office and sounding off, handing out orders to the staff, that really threw me. Do you know how many 24-hour days and 7-day weeks I've poured into this business, especially since Dad's been out of the picture? Sure, there are problems with the staff from time to time, and sometimes Sue's been a help. But only when Dad or I asked her to help. I thought we both understood that there's got to be only one authority in the place, or else everything gets screwed up. She can't just march in and start taking over. Now all of a sudden, she's telling me I've got major problems with two of my key people, and I'd better let her handle it unless I want to lose them. I was stunned. And I just didn't know how to respond. Don't I know my own managers? Wouldn't I know if something was so out of whack? I thought so, but then I wasn't absolutely sure. And then, before I could figure that out, Susan went

and shuffled both employees' responsibilities without even checking with me! She'd never done anything like that on her own . . . and now this. I was so surprised and confused, I didn't know what to do!

The other hard part, I've got to tell you, is the unbelievable bad feeling that welled up. The fury, the hostility that I feel toward Susan and her family. Her husband was always needling her about how she should 'take more of a hand' in the business, and 'be more assertive' with me. You know, I've always believed in keeping the peace at home, not letting anything split up the family. I thought I was pretty good at overlooking things and refusing to be negative. But don't kid yourself. I started to see Sue, and her husband, as selfish, greedy, ingrates and worse. At one point, I thought to myself, the real reason she's down here at the office making trouble is that she just doesn't want to be bothered with Dad any more. For her, he's as good as gone, and she wants to make sure that when he's really gone, she and her husband are positioned to muscle their way in and push me out of what I've worked my whole life for. I felt ashamed for attributing these kinds of motives to Sue. But I couldn't help it. The worst thing about this conflict is that it's brought out the worst in me. All my insecurities. All my mean-spiritedness. All my . . . smallness. At some point, I thought, I'd be willing to give in just to end this nastiness. But by that time, it seemed that giving in wouldn't help. The air was just poisoned.

Jim's and Susan's "voices" echo what we regularly hear when parties talk about their personal experience of conflict (though they may be more articulate than many). What most people find hardest about conflict is not that it frustrates their satisfaction of some right, interest, or project, no matter how important, but that it leads and even forces them to behave toward themselves and others in ways that they find uncomfortable and even repellent.⁴ It alien-

4. The fact that conflict induces – almost compels – behavior that alienates people from both self and other is documented by studies cited below. See *infra* note 10. The point of the text here is that this aspect of conflict is what people find most difficult and oppressive about it. There is both direct and indirect evidence for this claim. For example, one study documents that when parties are asked to describe their experience of conflict in metaphors, almost all their negative metaphors reflect two primary states: powerlessness, and alienation from the other party. See S. McCorkle & J. Mills, *Rowboat in a Hurricane: Metaphors of Interpersonal Conflict*, 5 COMM. REP. 57 (1992). In training exercises that ask participants to draw pictures that express their negative experiences of conflict, similar results are reported. See Paul Charbonneau, *How Practical Is Theory?*, in *DESIGNING MEDIATION*, *supra* note 1, at 37, 45-46. Beyond this direct evidence of what people find *worst* about conflict, other evidence suggests the same conclusion by

ates them from their sense of their own strength and their sense of connection to others, and thus it disrupts and undermines the interaction between them as human beings.⁵ In short, conflict precipitates a crisis in human interaction that parties find profoundly disturbing, and help in overcoming that crisis is a major part of what parties want from a mediator.

This view of why parties seek mediation is supported not only by our own experience, but also by what theory tells us about conflict and its escalation. Insights from the fields of communication, developmental psychology and social psychology, among others, all support this view of what conflict “means” to people, and what kinds of processes they find most helpful in responding to it.⁶ According to what we and our colleagues call the “transformative” theory, conflict as a social phenomenon is not only, or primarily, about rights, interests, or power.⁷ Although it implicates all of those things, conflict

documenting what parties value *most* in processes for handling conflict. A large body of research, generally associated with “procedural justice” theory, documents disputants’ preferences for processes that maximize opportunities for party decisionmaking and for interparty communication. See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); Robert A. Baruch Bush, “What Do We Need a Mediator For?: Mediation’s “Value-Added” for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1, 18-21 & accompanying notes (1996). The clear implication is that these process features are preferred because, by supporting parties’ capacities for self-determination and interconnection, they counteract and remedy the negative experiences of weakness and alienation that parties find so distressing in conflict. See LIND & TYLER, *supra*; Bush, *supra*.

5. See *supra* note 4; *infra* note 10 and accompanying text.

6. References to studies and theoretical formulations from these fields are found above and below, in relation to the specific points made in the text. See *supra* note 4; *infra* notes 10, 11, 17, & 22.

7. It should be clear that the transformative view of conflict is offered here, and throughout our work, as one theory of conflict and intervention. We acknowledge the existence of other theories, which carry very different implications for conflict intervention processes and practice. Thus, rights theorists see conflicts as representing competing claims of right, and thus demanding processes that resolve those claims according to formal rules. See, e.g., Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). Power theorists see conflicts as struggles to achieve domination and avoid subordination, thus calling for processes that avoid, eliminate, or reverse power imbalances. See generally, I THE POLITICS OF INFORMAL JUSTICE (Richard Abel ed., 1982). Finally, “needs and interests” theorists see conflicts as problems in satisfying apparently incompatible needs with scarce resources, and thus favor processes in which expert problem-solvers find hidden complementarities in needs that can then be satisfied with “win-win” solutions. See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984). As explained below, the transformative theory sees conflicts as crises in human interaction that call for processes that help parties to regenerate positive interaction by making shifts from destructive to constructive experience of self and other. See *infra* Figures 1 and 2 and accompanying text. None of these theories can claim to be a definitive account of the human social reality of conflict. However, neither can any of them be dismissed as presumptively invalid, including the transformative theory. Ultimately, one’s choice to subscribe to one or another of these theories must rest on weighing the evidence that

is also, and most importantly, about peoples' interaction with one another as human beings.⁸ The theory confirms what the parties' "voices" describe: What affects and concerns people most about conflict is precisely the crisis in human interaction that it engenders. The corollary, explored below, is that in order to be useful to parties, conflict intervention cannot only be about problem-solving, about satisfaction of needs and interests; it must directly address the interactional crisis itself.⁹

FIGURE 1 represents this phenomenon, as transformative theory understands it. Conflict, along with whatever else it does, affects people's experience of both self and other. First, conflict generates, for almost anyone it touches, a sense of their own WEAKNESS and incapacity. That is what Jim and Susan both mention first. For each of them, conflict brings a sense of relative weakness, compared to their pre-conflict state, in their experience of self-efficacy: a sense of lost control over their situation, accompanied by confusion, doubt, uncertainty, and indecisiveness. This overall sense of "weakening" is something that occurs as a very natural human response to conflict; almost no one is immune to it, regardless of their initial "power position." At the very same time, conflict generates a sense of SELF-ABSORPTION: compared to before, each party becomes more focused on self alone — more protective of self, and more suspicious, hostile, closed and impervious to the perspective of the other person.¹⁰

supports each and on one's interpretation of that evidence, a process that involves not only "scientific" comparison but ideological belief and choice.

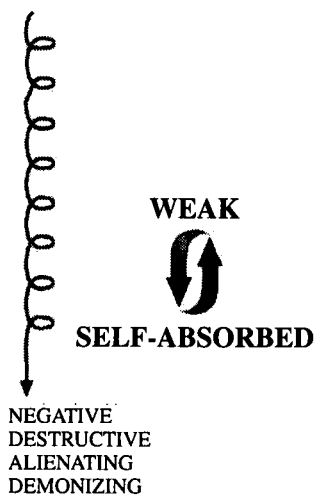
8. See, e.g., Sally Ganong Pope & Robert A. Baruch Bush, *Understanding Conflict and Human Capacity: the Role of Premises in Mediation Training*, in *DESIGNING MEDIATION*, *supra* note 1, at 61, 63-64; Susan Beal & Judith A. Saul, *Examining Assumptions: Training Mediators for Transformative Practice*, in *DESIGNING MEDIATION*, *supra* note 1, at 9, 11-12.

9. Certainly there are problems to be solved in any conflict, and certainly parties want to solve those problems. The reality is, however, that they want to do so in a way that enhances their sense of their own competence and autonomy without taking advantage of another. They want to feel positive about themselves for how they handled this crisis, and this means making changes in the difficult conflict interaction that is going on between them, rather than simply coming up with the "right" answers to specific problems.

10. Strong support for this account of the human experience of conflict comes from work in the fields of psychology, including cognitive and social psychology, and neurophysiology. See AARON T. BECK, *PRISONERS OF HATE* 3-39 (1999)(summarizing extensive work documenting how people confronted with challenge or threat, as is common in conflict, experience a sense of their own powerlessness, diminishment, disregard and victimization, leading to a sense of hostility, suspicion, and anger towards the other party); DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 13-33, 56-77 (1995)(describing research showing how the neurophysiological response of the brain itself

In sum, no matter how strong a person is, conflict propels them into relative weakness. No matter how considerate of others a person is, conflict propels them into self-absorption, self-centeredness. None of this occurs because human beings are “defective” in any way. It is rather because conflict has this power to affect our experience of ourselves and others, in virtually every context in which conflict occurs.

FIGURE 1
Negative Conflict Interaction



However, there is more to the picture, as Susan’s and Jim’s comments imply. As the cycling arrows in FIGURE 1 suggest, the experiences of weakness and self-absorption do not occur independently. Rather, they reinforce each other in a feedback loop: the weaker I feel myself becoming, the more hostile and closed I am toward you; and the more hostile I am toward you, the more you react to me in kind, the weaker I feel, the more hostile and closed I become, and so on. This vicious circle of **DISEMPOWERMENT AND DEMONIZATION** is exactly what scholars mean when they talk about “conflict escalation.”¹¹ The transformative theory looks at it more as “interactional de-

to conflict leads to the phenomena described by Beck). *See also supra* note 4.

11. *See* BECK, *supra* note 10, at 15-29 and *passim* (describing precisely this kind of vicious cycle, leading ultimately to mutual hatred and violence, at both the interpersonal and intergroup levels). Jeffrey Rubin (one of the leaders in the study of the social psychology of conflict) and his colleagues describe the central role of fear, blame and anger in producing conflict escalation. *See* JEFFREY Z. RUBIN, ET AL. *SOCIAL CONFLICT: Escalation, Stalemate and Settlement* 74-81

generation.” Before their conflicts begin, whatever the context, parties are engaged in some form of decent, perhaps even loving, human interaction. Then the conflict arises and, propelled by the vicious circle of disempowerment and demonization, what started as a decent interaction spirals down into an interaction that is negative, destructive, alienating and demonizing, on all sides.

That is what the spiraling line descending at the left of FIGURE 1 is meant to represent. The interaction in question does not end when conflict begins, but it degenerates to a point of mutual alienation and destruction. That is the conflict escalation or degeneration spiral. When nations get caught up in that spiral, the outcome is what we’ve seen all too often in the last decades—war, or even worse than war, if that’s possible. For families who get caught up in that negative conflict spiral, the result is family disintegration, with the home becoming an adversarial battleground.

Given this view of what conflict entails and “means” to parties, where does conflict intervention come into the picture? In particular, what are parties looking for when they seek the services of a mediator? The answer follows from the above discussion. What bothers parties most about conflict is the interactional degeneration itself; therefore, what they most want from an intervener, even more than help in resolving specific issues, is help in reversing the downward spiral and restoring a more humane quality to their interaction.¹²

As stated at the beginning of this section, parties often explain that they want not simply agreement but “closure,” to let go of their bitter conflict experience and move on with their lives.¹³ But if the negative conflict cycle is not reversed, if parties don’t regenerate some sense of their own strength and some degree of understanding of the other, it is unlikely they can move on and be at peace with themselves, much less each other. What we are suggesting is that, without a change in the conflict interaction between them, parties are left disabled, even if an agreement on concrete issues has been reached. The parties’ confidence in their own competence to handle life’s

(1994). International conflict theorists also recognize how escalation is the flip side of interactional degeneration into weakness and self-absorption. See, e.g., Terrell A. Northrup, *The Dynamic of Identity in Personal and Social Conflict*, in *INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION* 55-82 (Louis Kriesberg et al. eds., 1989).

12. See *supra* note 4; *infra* note 17, and accompanying text.

13. See, e.g., Della Noce, *supra* note 2, at 160-63.

challenges remains weakened, and their ability to trust others in relationships remains compromised. The result can be permanent damage to the parties' ability to function, whether in the family, the workplace, the boardroom, or the community.¹⁴ "Moving on," therefore, necessarily means moving out of their negative conflict interaction itself, and parties intuitively know this and want help in doing it. Perhaps no one can avoid the negative conflict spiral, but what can be done to reverse it?¹⁵

From the perspective of transformative theory, reversing the downward spiral is the primary value mediation offers to parties in conflict. That value goes beyond the dimension of helping parties reach agreement on disputed issues. With or without the achievement of agreement, the help parties most want, in all types of conflict, involves helping them end the vicious circle of disempowerment, disrespect and demonization, alienation from both self and

14. Avoiding this kind of damage and its negative effects on the workplace was one of the reasons for the United States Postal Service's decision to employ the transformative model exclusively in their REDRESS Program for mediating workplace conflicts. See Robert A. Baruch Bush, *Handling Workplace Conflict: Why Transformative Mediation?*, 18 HOFSTRA LAB. & EMP. L.J. 367, 370-71 (2001); Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375, 378-81 (2001). We recognize that, in some cases, the experience of reaching an agreement may itself help parties to "move on". However, our experience suggests that, unless the mediation process directly addresses the conflict interaction, reaching an agreement by itself does little to bolster confidence and trust and bring the kind of "closure" discussed in the text.

15. Of course what is done to "resolve conflict" can sometimes make that downward spiral even worse, as is often the case with adversary processes, in the court system or beyond it. Most people don't want to remain in a destructive, alienating and demonizing interaction, because everyone in that kind of interaction is both victim and victimizer simultaneously, which is what it means to be in a state of both weakness and self-absorption. If conflict tends to position the parties as both victims and victimizers, why respond with a process that only reinforces that state of affairs? Even though adversary processes do help disputing parties claim and vindicate important rights, those processes themselves often leave the participants wounded, leave them in some sense permanent casualties. That is, adversary processes can leave parties feeling more disempowered, more demonized and demonizing, than they felt before they arrived. See PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000); LAW IN A THERAPEUTIC KEY (David B. Wexler & Bruce J. Winick eds., 1996) (discussing the insights of "therapeutic jurisprudence" about the frequently negative impacts of legal rules and institutions on the emotional life and psychological well-being of both litigants and lawyers). See also Susan Daicoff, *The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement*, in Dennis P. Stolle et al., *supra* (suggesting conceptual links between the therapeutic jurisprudence movement and transformative mediation). This does not mean that the adversary process is not a necessary institution. We firmly believe in the importance of lawyers and legal rights and vindication of those rights in court and similar venues, because all of these are sometimes necessary. Therefore we affirm the value of formal legal processes; but, like many, we suggest that they serve as a last and not a first resort in most cases, because the costs of using the legal process are very high, not just in the material terms we normally think of, but in the human terms, the negative impacts of the process on human interaction.

other. Because without ending or changing that cycle, the parties cannot move beyond the negative interaction that has entrapped them and cannot escape its crippling effects.¹⁶

Here is the completion of our answer to the first question posed above: why is the mediation process sought and used? As transformative theory predicts, and research documents, parties who come to mediators are looking for, and valuing, more than savings in time and money, and more than simply reaching agreements on specific issues. They are looking for a way to change and transform their destructive conflict interaction into a more positive one, to the greatest degree possible, so that they can “move on” with their lives constructively, whether together or apart.¹⁷ As discussed in the next section, the transformative model of mediation is intended to help parties do this.

THE “WHAT” OF TRANSFORMATIVE MEDIATION: CHANGING THE QUALITY OF CONFLICT INTERACTION

The answer to the second question initially posed — what is the nature of transformative mediation, and especially the mediator’s role — requires further discussion of the model of conflict interaction introduced above. However, to anticipate the endpoint of that discussion and as the previous section implies, transformative mediation can best be understood as a process of “changing the quality of conflict interaction.”¹⁸ In the transformative mediation process, parties can recapture their sense of competence and connection, reverse the negative conflict cycle, re-establish a constructive (or at least neutral) interaction and move forward on a positive footing, with the mediator’s help.

Before presenting the theoretical explanation of “mediation as conflict transformation,” the concept can be illustrated concretely by returning to the

16. See BECK, *supra* note 10, at 15-29.

17. See LIND & TYLER, *supra* note 4; Bush, *supra* note 4; Lisa B. Bingham, *Mediation Employment Disputes: Perceptions of REDRESS™ at the United States Postal Service*, 17 REV. PUB. PERSONNEL ADMIN. 20 (1997); James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS™ Program*, 18 HOFSTRA LAB. & EMP. L.J. 429 (2001) (pointing to, or presenting, a variety of quantitative and qualitative research studies that show how parties view interactional transformation as one of the most valued products of and one of the most important reasons for using mediation). See also *supra* text accompanying notes 10-12.

18. See *infra* Figure 2 and accompanying text.

“voices” of Jim and Susan, the composite parties to our fictional family business dispute. After participating in mediation (with a transformative mediator), they describe some important aspects of how the process worked and how it affected them in their conflict.¹⁹

Susan: You know, it's strange, but I have to say that, in a way, the mediation helped me start to take myself back. I mean, come back to the way I know I am. Even though I was still fighting with Jim about Dad and the business. For one thing, the mediator's invitations to me to talk, and her attentiveness, created a space for me to do just that — talk it out. Even if I wasn't always making sense or wasn't very clear, she'd listen, and she would repeat and go over what I said. It was almost like she was holding up a mirror, an audiovisual mirror, to let myself see and hear what I was saying. It was almost like talking with myself. And doing that helped me actually listen to my own thoughts, and as I did that I started to realize what I was trying to say, and understand it better for myself. Then I could say it more clearly. So I began to get clearer, calmer, less desperate, and less frustrated. I mean, overall I'd say I began to get stronger right there in that room during the conversation. That was terrific!

When that happened, it began to be a different situation, because then I was experiencing the whole thing differently. More calmly. More confidently. So, I could see the situation differently in some ways. And I could even listen differently to Jim. I could see him again without that cloud of anger and ill will. That in itself — that I could see him that way again—was really a tremendous relief and it made an enormous difference in our ability to keep talking to each other. To go back to talking to each other about our disagreements in a constructive way.

Jim: As I said before, the really bitter part of the conflict was that it brought out the worst in me. My doubts in my judgment and understanding. Even worse, my need and my willingness to blame and demonize Susan, the very person I have to go on working and living with, to keep Dad's legacy to us intact. You know, you can't divorce your own sister. In the mediation, I don't know how, but I began to reconnect with, how should I say it, the angels of my better nature. It's not just that I became more confident and clear about what I was thinking and saying. I did, but I also managed to take off those dark glasses that the dark place was coming from. I began to see Susan

19. More of the specifics of how mediators work with parties in the transformative model are described in the following section of the article. The point of the “parties’ quotes” given here is not to detail those specifics, but to give a more concrete sense of how the process affects the parties’ conflict interaction.

again for who she really is (even if I totally disagree with her), a great sis and a loving, thoughtful daughter who is totally devoted to Dad, and who cares about the business he built for us.

I also realized, like I said, that Susan and I are connected in this life, whatever happens. But you can't stay connected to someone you don't trust, and you don't respect and you hate. It was so easy to lose that trust. It was happening so fast, and I couldn't seem to do anything about it. The mediation allowed me to realize that's what was happening and to choose not to let it happen, not to let it continue. Whether or not we agreed about what was the best course for the business, or for Dad. Once we turned that corner back to being ourselves, me and Susan, and being in control of ourselves, I knew that we'd eventually figure out how do the right thing, whatever it was.

In sum, as Jim and Susan describe it, the nature of the mediation process in their case was one of interactional change (or transformation). That is, each of them changed the way s/he experienced and interacted with both self and other, in the midst of their continuing conflict. To put it differently, mediation supported them in a process of changing the quality of their conflict interaction, and most importantly, reversing its negative and destructive spiral.

To explain this view of mediation at the theoretical level, we can build on the earlier discussion of interactional degeneration in conflict. How does mediation help parties in conflict reverse the destructive conflict spiral? Out of what resource is that kind of transformation generated, and what is the mediator's role in doing so? The first part of the theoretical answer to this question points not to the mediator at all, but to the parties. The critical resource in conflict transformation is the parties' own basic humanity — their essential strength, decency and compassion, as human beings. As discussed earlier, the transformative theory of conflict recognizes that conflict tends to escalate as interaction degenerates, because of the susceptibility we have as human beings to experience weakness and self-absorption in the face of sudden challenge.²⁰ However, the theory also posits, based on what many call a "relational" theory of human nature, that human beings also have inherent capacities for strength (agency/autonomy) and responsiveness (connection/compassion), and an inherent moral resiliency that allows these capacities to overcome the tendencies to weakness and self-absorption.²¹ When these ca-

20. See *supra* notes 9-11 and accompanying text.

21. See Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Me-*

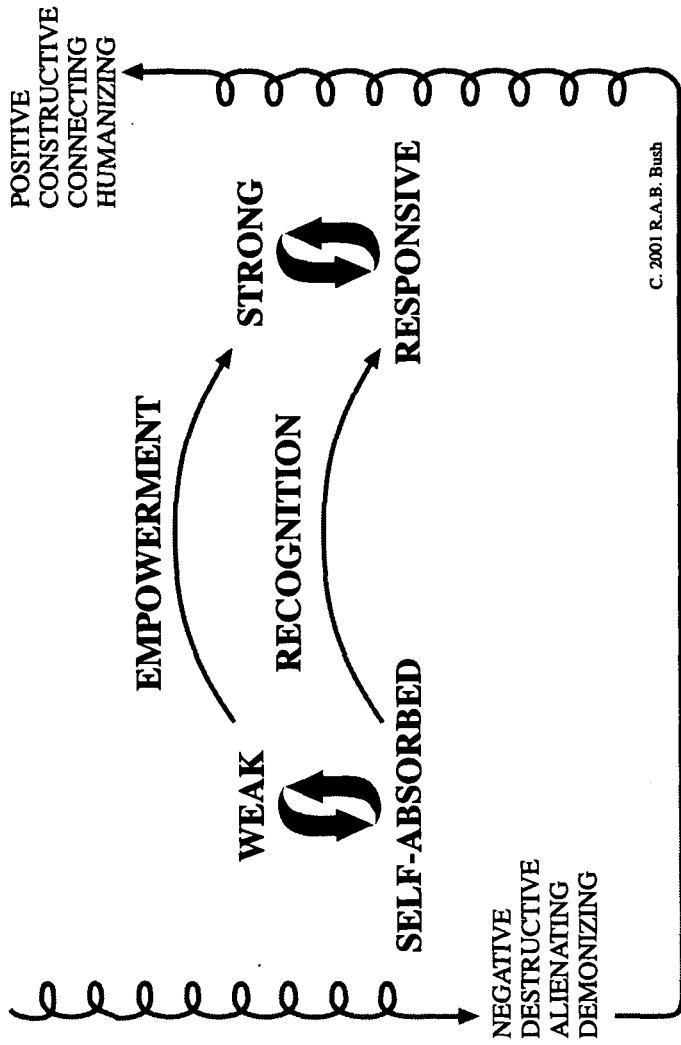
capacities are activated, the transformative theory asserts, the conflict spiral can reverse and interaction can regenerate, even without the presence of a mediator as intervener.

FIGURE 2 expands the picture presented earlier and illustrates this positive potential of conflict interaction. It is true, as we have seen with hundreds of parties in all the different contexts that we've worked in, that people in conflict tend to find themselves falling into the negative cycle of weakness and self-absorption. But it is equally true that people do not necessarily remain caught in that cycle. Conflict is not static. It is an emergent, dynamic phenomenon, in which parties can, and do, move and shift in remarkable ways, even when no third party is involved. They move from weakness to STRENGTH, becoming calmer, clearer, more confident, more articulate and more decisive. They shift from self-absorption to RESPONSIVENESS, becoming more attentive, open, trusting, and more responsive toward the other party.²²

diation, 15 NEGOTIATION J. 271 (1999) (offering a concise discussion of the relational theory and further references). See also BUSH & FOLGER, *supra* note 1, at 229-59 (offering a more complete treatment of the relational theory). While not referring to the relational theory per se, both Beck and Goleman acknowledge the human capacity for strength and compassion in the face of challenge and conflict, and describe work that documents these capacities in action. See BECK, *supra* note 10, at 34-36, 227-48; GOLEMAN, *supra* note 10, at 96-106, 142-47, 261-87. See also ALFIE KOHN, *THE BRIGHER SIDE OF HUMAN NATURE: ALTRUISM AND EMPATHY IN EVERYDAY LIFE* (1990).

22. Just as studies document conflict's negative impacts and the downward conflict spiral, see *supra* notes 10-11, research also documents the dynamics of empowerment and recognition "shifts" and the upward, regenerative spiral. See BECK, *supra* note 10, at 34-34, 227-48; GOLEMAN, *supra* note 10, at 96-106, 142-47, 261-87; Antes et al., *supra* note 17, at 434-61; Janet Kelly Moen et al., *Identifying Opportunities for Empowerment and Recognition in Mediation*, in *DESIGNING MEDIATION*, *supra* note 1, at 112-32 (2001). The authors' own experience in training mediators provides confirming evidence of the reality of these shifts. In exercises asking trainees to experience or recall actual conflict situations, the trainees regularly reported experiencing these shifts. Pope & Bush, *supra* note 8, at 61, 64-66.

FIGURE 2 CHANGING CONFLICT INTERACTION



The arrows moving from left to right in FIGURE 2 represent these shifts, the movements parties make from weakness to strength and from self-absorption to responsiveness to one another. In transformative conflict theory, these dynamic shifts are called “EMPOWERMENT” and “RECOGNITION.”²³ Moreover, as the figure suggests, there is also a reinforcing feedback effect on this side of the picture. The stronger I become, the more open I am to you. The more open I am to you, the stronger you feel, the more open you become to me, and the stronger I feel. Indeed, the more open I become to you, the stronger I feel in myself, simply because I’m more open; that is, openness not only requires but creates a sense of strength, of magnanimity. So, there is also a circling between strength and responsiveness once they begin to emerge. But this is not a vicious circle, it is a virtuous circle — A virtuous circle of conflict transformation.

Why “conflict transformation?” Because as the parties make empowerment and recognition shifts, and as those shifts gradually reinforce in a virtuous circle, the interaction as a whole begins to transform and regenerate. It changes back from a negative, destructive, alienating and demonizing interaction to one that becomes positive, constructive, connecting and humanizing, even while conflict and disagreement are still continuing. This reversal of the conflict cycle from negative and destructive to positive and constructive is what the upward-spiraling line at the right of FIGURE 2 represents. The Figure as a whole reflects Susan’s and Jim’s descriptions of their experience of both the original spiral into destructive conflict and the regeneration of positive interaction through the mediation process.

The keys to this transformation of conflict interaction are the empowerment and recognition shifts that the parties themselves make. No matter how small and seemingly insignificant, as these shifts continue and accumulate, they can transform the entire interaction.²⁴ Is it hard for those shifts to occur? It most certainly is, especially for parties who have been overcome by the sense of weakness and self-absorption that conflict first brings. It’s hard, but it’s eminently possible. And, in transformative mediation, this is the “value-added” that mediators bring to the table.²⁵

23. BUSH & FOLGER, *supra* note 1, at 84-95. See also Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator’s Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 266-72 (1989); Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. L. ISSUES 1, 10-15 (1989) (for the earliest articulations of the concepts of empowerment and recognition as elements of a transformative model of mediation).

24. See, e.g., Folger & Bush, *supra* note 1, at 275-76.

25. See Antes et al., *supra* note 17; Moen et al., *supra* note 22 (two studies documenting how mediators support empowerment and recognition shifts and thus help the parties to transform

Mediators provide important help and support for the small but critical shifts by each party, from weakness to strength and from self-absorption to responsiveness.²⁶ As discussed in the following section, they do this by using their skills to highlight the opportunities for shifts that surface in the parties' own conversation and to support the parties' efforts to utilize them. FIGURE 2 describes the potential effects of the mediation process on conflict interaction and the transformation and regeneration of the human interaction between the parties, even as the conflict continues to unfold. In this picture, the mediator stands, as it were, at the bottom of the figure, offering specific forms of support that help the parties make empowerment and recognition shifts and reconnect to their inherent capacities for strength and responsiveness, when and as they choose to do so.

This overall picture provides the answer to the second question, regarding the definition of mediation itself, and the mediator's role, in the transformative model. Both of these definitions differ markedly from the normal definitions found in training materials and literature on mediation.²⁷

In the transformative model:

MEDIATION IS DEFINED as a process in which a third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities for resolution.²⁸

THE MEDIATOR'S ROLE is to help the parties make positive interactional shifts (empowerment and recognition shifts) by supporting the exercise of their capacities for strength and responsiveness through their deliberation, de-

conflict interaction). See also Bush, *supra* note 4, at 26-36 (explaining how supporting empowerment and recognition shifts is the function mediators perform that is most valued by their clients).

26. See, e.g., BUSH & FOLGER, *supra* note 1, at 99-104; Antes et al., *supra* note 17, at 433-61.

27. In training materials and mediation literature, the mediation process is normally defined as a process in which a neutral third party helps the parties to reach a mutually acceptable resolution of some or all the issues in dispute; and the mediator's role is defined as establishing ground rules, defining issues, establishing an agenda, generating options, and ultimately persuading the parties to accept terms of agreement. See, e.g., Joseph Stulberg, *The Theory and Practice of Mediation*, 6 VT. L. REV. 85 (1980). See also, Riskin, *supra* note 2; JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984).

28. See, e.g. Pope & Bush, *supra* note 8, at 63-64.

cision-making, communication, perspective-taking, and other party activities.²⁹

THE MEDIATOR'S PRIMARY GOALS are: (1) to foster empowerment shifts, by supporting — but never supplanting — each party's deliberation and decision-making, at every point in the session where choices arise (regarding either process or outcome)³⁰ and (2) to foster recognition shifts, by encouraging and supporting — but never forcing — each party's freely chosen efforts to achieve new understandings of the other's perspective.³¹ Specific practices tied to these goals are discussed in the following section.

The transformative model does not ignore the significance of resolving specific issues; but it assumes that, if mediators do the job just described, the parties themselves will very likely make positive changes in their interaction and find acceptable terms of resolution for themselves where such terms genuinely exist.³² More importantly, they will have reversed the negative conflict spiral and begun to reestablish a positive mode of interaction that allows them to move forward on a different footing, both while and after specific issues are resolved and even if they cannot be resolved.³³

The transformative model posits that this is the greatest value mediation offers to parties in conflicts of all kinds. It can help people conduct conflict itself in a different way. It can help people find and take the small but meaningful opportunities for empowerment and recognition shifts as they arise. It can support the virtuous circle of personal empowerment and interpersonal recognition that de-escalates and “de-embitters” conflict (so that, with the bitterness drained out, even if there may still be conflict, it is no longer dehumanizing and demonizing). It can turn conflict interaction away from alienation, from both self and other, toward a renewed connection to both, restoring strength of self and appreciation of other, even while conflict continues. Me-

29. *Id.*

30. Joseph P. Folger, *Who Owns What in Mediation?: Seeing the Link Between Process and Content*, in *DESIGNING MEDIATION*, *supra* note 1, at 55 (using studies in the field of communication to refute conventional wisdom that process control by the mediator can be consistent with outcome control by the parties).

31. *See, e.g.*, Bush, *supra* note 4, at 30.

32. *See, e.g.*, BUSH & FOLGER, *supra* note 1, at 106-07. *See also* Antes et al., *supra* note 17, at 429 and n. 1; Karen A. Intrater & Traci Gabhart Gann, *The Lawyer's Role in Institutionalizing ADR*, 18 *HOFSTRA LAB. & EMP. L.J.* 469, 469-70 (2002) (discussing statistics that document the impressive number of cases resolved through transformative mediation of workplace conflicts at the United States Postal Service).

33. *See, e.g.*, Lisa B. Bingham & Tina Nabatchi, *Transformative Mediation in the USPS REDRESS™ Program: Observations of ADR Specialists*, 18 *HOFSTRA LAB. & EMP. L.J.* 399, 401-02 (2001); Antes et al., *supra* note 17, at 433-61 (discussing results of research studies that document positive changes in parties' interactions as a result of transformative mediation of workplace conflicts at the United States Postal Service).

diation can thus help disputing parties to “move on with their lives,” with the capacity for living those lives restored — including both a sense of their own competence and confidence in their ability to connect to others.

The transformative view of what mediation can and should be, as demonstrated by the above discussion, is both practically and theoretically based. From the insights of psychology, communications, and other fields, we have understood why conflict transformation is important and how it can theoretically occur through mediation.³⁴ From the parties that we have worked with and studied over many years, we have learned that this theoretical promise of what mediation can offer is real. It is not a magical vision, nor naïve; or, if it is naïve, its naïve faith in human strength and decency carries the deepest truth within it. The promise mediation offers for transforming conflict interaction is real, not because mediators can bring expert knowledge and wisdom to bear, or give advice about how to solve the problems and difficulties the parties face.³⁵ The promise is real because skilled (and wise) mediators can support the parties’ own work, create a space for that work to go on, and, most important, stay out of the parties’ way. Transformative mediators will allow and trust the parties to find their own way through the conflict, and more importantly, find themselves and each other, discovering and revealing the strength and compassion within themselves. In the final section, we discuss some of the specific practices that transformative mediators use to do this.

THE HOW OF TRANSFORMATIVE MEDIATION: LISTEN, REFLECT, SUMMARIZE, CHECK IN — AND LET GO

How does a mediator translate transformative conflict theory into spe-

34. See *supra* notes 4-24 and accompanying text.

35. There are, of course, models of mediation other than the transformative model, the most important of which is what Bush and Folger called the “problem-solving” model. See BUSH & FOLGER, *supra* note 1, at 55-77. See also Bush, *supra* note 14, at 368 & n. 4 (noting that other commentators use different names to denote the problem solving model). In the problem solving model, the touchstone of the process is indeed the mediator’s expertise, as to both process and substance. See Deborah M. Kolb & Kenneth Kressel, *Conclusion: The Realities of Making Talk Work*, in MAKING TALK WORK: PROFILES OF MEDIATORS 459, 470-74 (D.M. Kolb & K. Kressel eds., 1994). As a result, the problem solving model and other similar models of mediation offer little hope of realizing the promise of mediation for interactional transformation, as has been noted elsewhere. See, e.g., BUSH & FOLGER, *supra* note 1.

cific mediation practices?³⁶ The first “skill” of the transformative mediator is to steadfastly keep in mind the “why” and “what” of mediation from this perspective; why the process is being used, and what is its basic nature. The transformative mediator has truly important work to do: supporting the parties as they discuss the issues between them, and supporting their empowerment and recognition shifts — from weakness to strength and from self-absorption to responsiveness.³⁷ Understanding this mission, embracing it, keeping it clearly in mind, and being confident in its value to the parties, is essential to everything the mediator does.³⁸ It allows her to be finely attuned to the kind of interaction the parties are having and to indications of individual weakness and self-absorption. When weakness and self-absorption are present, the mediator views those states as opportunities for empowerment and recognition. She responds, at appropriate points, with several simple but effective kinds of interventions, which are used throughout a session to help support the parties’ interactional shifts. Her steady focus on conflict transformation as the essence of the process keeps her attention on this dimension, no matter what difficult and complicated issues the parties are discussing.

Essential Skills: Learning the Language of Empowerment and Recognition

In order to notice opportunities for empowerment and recognition shifts, the mediator pays close attention to the parties’ own conversational cues in the immediate interactions between them, including what they do and say. The mediator stays “in the moment” of the conversation between the parties, in order to see and hear what they are saying.³⁹ He understands that, when

36. It is certainly obvious, but we nevertheless add this caution, that this discussion is not intended as a “how-to” manual for transformative practice. No responsible practitioner should attempt to work with clients using this model without skills training, and preferably mentoring, with a competent transformative mediator/trainer. The basic skills summarized here are simple in concept, but using them effectively and responsibly is quite challenging. Among other lessons, we have learned that it is almost impossible to become truly effective in transformative practice without engaging in self-taping and critique, of either live or simulated mediations. Watching oneself on tape, working in context, and then reviewing the tape with colleagues, is the best way to learn if one is using transformative responses effectively and appropriately. *See, e.g.*, THE PURPLE HOUSE: A TRANSFORMATIVE MEDIATION ON VIDEOTAPE, WITH COMMENTARY (forthcoming, 2003 [from the Institute for the Study of Conflict Transformation]).

37. *See supra* notes 25-35 and accompanying text.

38. *See* Beal & Saul, *supra* note 8, at 9; Charbonneau, *supra* note 4, at 37 (for a more developed discussion of the importance of clarity about purpose as the foundation for effective practice).

39. *See, e.g.*, Folger & Bush, *supra* note 1, at 273. *See also* BUSH & FOLGER, *supra* note 1, at 100, 192-93.

the mediation first begins, parties may not be able to talk about the issues or listen to each other effectively and productively, and they may be confused about what they want. As a result, the mediator will first focus on simply listening and observing for indications of weakness and self-absorption, because these are the starting points for interactional transformation.

The mediator must know how to recognize these opportunities; in other words, the mediator must know what he is listening and looking for. In effect, the mediator is learning to listen to the exchanges between the parties in a whole new way, on a new level, and in a new language — the language of conflict transformation. Therefore, the mediator must master the vocabulary of empowerment and recognition, starting with signifiers of either weakness or self-absorption.⁴⁰ For example: “What should I do?” shows that the party sees the mediator as the decision-maker and feels dependent. “I’m really confused,” expresses lack of clarity, and probably uncertainty. “I’ve had enough of this!!” expresses strong emotions and feelings and shows a sense of helplessness or frustration.⁴¹ “What do you expect from someone like that?” indicates a negative view of the other party, and hence self-absorption. “It’s not like me,” or “You don’t understand what it’s been like for me,” are requests for understanding that suggest the experience of nonrecognition.

A mediator listening with a transformative ear will not ignore or dismiss statements of this nature as the parties “resisting” or merely “venting.” The statements will be seen and heard as important markers of opportunities for shifts in the conflict interaction. In this new language, every expression that conveys the message “I feel weak,” in whatever fashion, is an opportunity for an empowerment shift towards greater strength. Every expression that conveys the message “I am trapped in my own perspective and cut off from the other,” in whatever variation, is an opportunity for a recognition shift towards increased responsiveness.

Once able to work in the language of conflict transformation the mediator also needs to be able to enact supportive responses that assist the parties

40. See Moen et al., *supra* note 22 (for an extended treatment of the vocabulary of empowerment and recognition).

41. However, depending on when and how it is expressed, the quoted statement could be an indication of an empowerment shift, from weakness to greater strength and decisiveness. This illustrates the more general point that accurately understanding the language of empowerment and recognition requires attention not only to the actual language used, but also to its tone, as well as to nonverbal signals, emotional intensity, etc. Considerable skill is required of the mediator in this process.

in making empowerment and recognition shifts, and to do this without pushing, directing or having any agenda for the parties.

Essential Skills: Supportive Responses

With the understanding that one of the “hallmarks” of transformative mediation is that “small steps count,”⁴² the mediator will notice changes in the parties indicating that empowerment and recognition shifts are occurring, and that strength and responsiveness are emerging. Since the mediator’s goal is to support shifts from weakness to strength and from self-absorption to responsiveness, the mediator must be able to observe and listen closely as the conversation unfolds.

CLOSE LISTENING, combined with observation of what the parties are saying through body language, is thus a foundational skill and is used continuously throughout the mediation. Nuances in the language used by the parties as they move through the discussion are crucial indicators of shifts, and body language is as important as the actual words spoken. Close listening is done with no other goal in mind except to hear what is being said or trying to be said. It is being fully present to the person speaking.⁴³ Good, deep listening makes possible the effective use of other key skills such as reflection, summary, and “checking in.” Without close listening, effective transformative mediation will be impossible.⁴⁴

REFLECTION is another primary supportive response.⁴⁵ In reflecting a party statement, the mediator simply says what she hears the party saying, using words close to the party’s own language, even (or especially) when the language is strong, loud, negative or strongly expressive. The mediator does not soften the party’s language or remove its “sting.” For example, the mediator does not turn anger into a request for change, but simply acknowledges

42. See Folger & Bush, *supra* note 1, at 275-76.

43. See MARY ROSE O’REILLEY, *RADICAL PRESENCE: TEACHING AS CONTEMPLATIVE PRACTICE* 22-32 (1998) (for a good discussion of the concrete meaning of “close listening”).

44. See GOLEMAN, *supra* note 10, at 142-47 (recognizing the importance of listening in reversing negative conflict spirals).

45. From the parties’ comments about the composite case presented earlier in this article, it is clear that their mediation was conducted by a practitioner of the transformative model, using responses including reflection and summary. See *supra* text following note 19. See Erling O. Jorgensen et al., *Microfocus in Mediation: The What and How of Transformative Opportunities*, in *DESIGNING MEDIATION*, *supra* note 1, at 133 (providing a further discussion of the basic mediator responses discussed in the text). Much of the discussion here is drawn from mediation training materials developed and presented in courses conducted by the Institute for the Study of Conflict Transformation, of which the authors are both Fellows. See also *THE PURPLE HOUSE*, *supra* note 36.

the anger by saying what she has heard. By using the exact or similar language, without distortion or softening, the mediator leaves room for the participant to choose to expand on the angry or negative statement, to explain it further, or to rethink it and amend it to reduce hostility or exaggeration. All of these can and do happen. Reflection is particularly helpful to assist a party to think through something that seems unclear or complex, or to help a party who seems uncertain or ambiguous about what he is saying. In these ways, reflection allows a party to "listen and talk to himself," and by doing so to gain clarity and confidence about what he is saying. It also may give the other party an opportunity to hear something she may not have heard or understood when it was first being said. The overall effect of reflection is to "amplify" the conversation for both parties, to make what is being said more audible so the parties can understand themselves, and each other, better.

In transformative mediation the parties often talk directly to each other for extended lengths of time. Mediator participation in the discussion is quite minimal for those periods, but the intense focus on listening by the mediator continues. In this situation, reflection will be used less, and summarizing will be the more likely response when the mediator enters the conversation. The difference between reflection and summary is important. In a reflection, the mediator is speaking to and with one of the parties, engaging that party directly and completely, while allowing the other party to "listen in" from a safe distance. In a summary, the mediator speaks to and with both parties and includes much larger blocks, or "chunks," of the party conversation and interactions.

SUMMARIZING is often used when there have been long periods of party conversation, and the parties come to a natural break. Summarizing is also helpful when the parties do not know "where to go next" or say "we're stuck; we need some guidance here." Since a lot of ground will have been covered during the conversation, the summary provides the parties with a review of what they have been talking about and what each has been saying. It helps the parties remember what they were discussing and make more informed choices about where they want to go. Like a reflection, a summary is inclusive. The mediator does not select from what has been said and does not drop any issues, particularly intangible ones. The summary is not an educational monologue by the mediator and has no agenda or direction built into it. It is a powerful tool for supporting empowerment and recognition when it highlights the differences between the parties, and the choices they face.

Without any other skills, the mediator could effectively mediate in a supportive way using only listening, reflection and summary. CHECKING IN, however, is an important and effective addition to the other essential skills and is frequently coupled with reflection and summary. Checking in may end a summary when the mediator asks the parties "Where do you want to go from here?" It is often used as a process intervention when it seems the parties have come to a choice point in the mediation, and it provides them with the opportunity to make a clear decision. When there is a fork in the road, it is helpful for the mediator to point it out and ask the parties which direction they want to take. For example, if the parties began talking about one subject and moved on to two or three others, the mediator may summarize the discussion and ask the parties whether they want to talk further about any of the subjects already mentioned, or move on to other matters.

QUESTIONS are obviously used for checking in. Questions are also used in many other supportive ways, provided that they do not lead or direct a party in any way. The risk is that questions can put the mediator ahead of the parties, leading the discussion and having the parties respond to her, rather than allowing the parties to have their own conversation about the matters important to them. In transformative mediation, questions are used to open doors or invite further discussion. "Is there more you want to say about that?" is one such question, and there are many others. However, the mediator does not use questions for her own purposes, such as to gather information or to understand what the parties are talking about. The parties have the information they need, and if they need more information, they will discover that for themselves in due course.

There are other responses that can support empowerment and recognition shifts. Silence is a natural response by parties to intense conversation. Allowing time for silence is an important mediator response. When something powerful has been said or has happened during the parties' interaction, it is helpful to simply let the parties decide how they want to respond even if there is a long period of silence. The mediator does not need to do something just because there is silence. Moreover, eye contact, facial expression and gestures are also part of the mediator's communication. Just by looking at the other party when one party seems to be finished speaking, the mediator may unwittingly send the message that she is asking the second party to speak, and this may put pressure on a party who is not really ready to respond. In other words, since silence and nonverbal messages can be used in directive as well as supportive ways, the mediator needs to consider them as carefully as

any verbal communication.⁴⁶

All the above mediator responses — reflection, summary, checking-in, questions, and the others mentioned above—are used over and over again throughout the mediation. They are also used steadfastly, resisting the temptation to substitute other responses that are inconsistent with transformative theory. The mediator cannot “try out” transformative moves and then abandon the approach when the “going gets tough.”⁴⁷ This approach to mediation requires courage — courage that comes from convictions. Courage to allow and help the parties to deal with differences, even differences expressed in chaos, confusion and high conflict, is essential for the transformative mediator. She must be able to summarize the confusion and the differences, as well as any negative views of each other that parties might express. The courage to do so comes from trust in the parties and their ability to make empowerment and recognition shifts and make the best decisions for themselves.

This approach also requires a certain degree of tentativeness in the use of responses. An “in charge” mediator will interfere with the parties’ empowerment and undermine the potential for shifts. Instead, the transformative mediator realizes that her reflections or summaries may not be entirely accurate, and that they should therefore be presented in ways that allow and encourage correction by the parties. Similarly, questions should be asked in ways that allow parties to refrain from answering them if they so choose. The message in both words and mediator “style” should be that this is the parties’ process, not the mediator’s.⁴⁸

The preceding paragraphs describe the essential “hows” of transformative mediation. These are the primary skills needed to practice effective transformative mediation. Mediator personality and conversational style have an impact on how responses are used, but consistency in the use of the responses discussed here will identify the transformative mediator and make her an effective practitioner. The mediator does not act differently depending on the substantive area of practice. No new skills or special techniques are used

46. See James R. Antes & Judith A. Saul, *Evaluating Mediation Practice from a Transformative Perspective*, 18 *MEDIATION Q.* 313 (2001).

47. See BUSH & FOLGER, *supra* note 1, at 108-112, 278-79; See also Dorothy J. Della Noce et al., *Myths and Misconceptions about the Transformative Orientation*, in *DESIGNING MEDIATION*, *supra* note 1, at 50, 53-54.

48. See Folger, *supra* note 30.

in a divorce mediation, in comparison to a workplace or business mediation.⁴⁹ Whether the parties are in high conflict or not, the mediator continues to work as a transformative mediator, using the basic responses summarized here. All the mediator's decisions — whether to speak or be silent, whether to summarize what has been happening or to ask a question — are guided by and based on the transformative theory discussed earlier.

Essential Skills: Avoiding Directive Responses

Using the essential skills of reflection, summary and checking in, the mediator “follows” or “accompanies” the parties; he does not have a set agenda of steps to accomplish in a particular mediation.⁵⁰ The parties begin where they choose to begin, and in the course of the discussion talk about anything of importance to them. The mediator will not rule out any subject as inappropriate or unhelpful. The mediator will not tell the parties how to have their conversation, nor when to continue or end it.

Directive impulses arise when the mediator has his own view of what the parties should accomplish, such as reducing conflict or avoiding unfairness.⁵¹ Such impulses will almost certainly get in the way of the mediator's continuing ability to “follow” the parties. For example, interrupting an argument about past events by turning the focus to the future, or by asking a question about another subject, substitutes the mediator's judgment for the parties' as to the proper focus for discussion. Why a husband walked out of a marriage with no notice to the wife may be a crucial subject for discussion when the parties first appear for a divorce mediation. It may be the primary subject. The mediator who stops the discussion and refuses to “allow” discussion of what was wrong with the marriage, or discussion of an “old argument” about money, is disrespectful of the parties and is not following them or helping them have the discussion they choose. And if it transpires that

49. See, e.g., Sally Ganong Pope, *Inviting Fortuitous Events in Mediation: The Role of Empowerment and Recognition*, 13 *MEDIATION Q.* 287 (1996); Antes et al., *supra* note 17 (discussing the use of transformative mediation in two different contexts, family and workplace, and describing very similar mediator practices in both contexts).

50. See Dorothy J. Della Noce, *Mediation as a Transformative Process: Insights on Structure and Movement*, in *DESIGNING MEDIATION*, *supra* note 1, at 71 (discussing the concept of “following” and how “stage models” of mediation impede the transformative mediator's ability to “follow the parties” and are therefore inappropriate for the model).

51. See Grillo, *supra* note 3 (for numerous and powerful examples of the ways in which mediators act directly, and in doing so, disempower and even oppress the parties they are supposed to be serving). Grillo's examples include quotations from recognized mediation practice texts (none of them are based on the transformative model). See also BUSH & FOLGER, *supra* note 1, at 63-75 (for a discussion of mediator directiveness in the problem-solving model).

only one person wants to have a particular discussion, and the other refuses, then that itself becomes the subject for discussion and mediation.

The transformative mediator is not the director of the discussion. He will not tell the parties how to talk to each other or direct the course of their discussion or its content in any way. The transformative mediator positions himself as a reflective and helpful “conversational companion,” regardless of what the parties choose to talk about.⁵²

The mediator supports, but never supplants, party decision-making. He assists the parties with their decisions by helping to identify choice points throughout the conversation, and by restraining himself from making any decisions for the parties about the process itself or the substantive results. He respects the parties and their choices.⁵³ He trusts the parties. He has confidence in them: the confidence that they know best, that they know what is right for them. He will not attempt to substitute his judgment for theirs. He will not try to steer them in the direction of what he thinks is the best arrangement for them, whether for their family, business, agency, or community. Indeed, how could he know this, as an outsider to their lives? He will not decide what is fair for them, or what is unfair. He respects and trusts the parties to make those decisions for themselves. The mediator is not trying to “get” the parties to do anything — whether to talk to each other, to stop arguments for the sake of their relationship, or even to stay out of court.

So, while intensely engaged in listening and observing and enacting supportive responses, the mediator constantly maintains an awareness of and represses directive impulses. One of the parties may say, “I just don’t know what to do. I’m afraid to be on my own.” An almost automatic response would be to explain that most people feel that way when going through a difficult situation and then to move on with the “real business” of the mediation. That response actually minimizes the feeling of the confused party by making it normal, usual, and therefore capable of being ignored. It is directive because the mediator controls the content of the discussion by character-

52. See Sally Ganong Pope, *Beginning the Mediation: Party Participation Promotes Empowerment and Recognition*, in *DESIGNING MEDIATION*, *supra* note 4, at 85 (for a discussion of this practice, with examples). See also Pope, *supra* note 49.

53. See generally Trina Grillo, *Respecting the Struggle: Following the Parties’ Lead*, 13 *MEDIATION Q.* 279 (1996) (discussing how respect for the parties’ choices avoids many of the potential harms parties may suffer at the hands of directive mediators). See also Grillo, *supra* note 3.

izing the feeling and then moving the discussion on. A supportive response that truly responds to the opportunity for empowerment being presented would be to simply reflect the statement and then allow time for the party to respond as he chooses. A party might choose to move on to other business, might themselves say it's "just normal, I guess," might request more time to deal with the shock, or might elaborate further on how they feel, how the other party is behaving, and what they want to do about it. All of these possible responses will be empowering for the party who is feeling weak and confused at the moment.

Another example: even if many people going through a difficult employment conflict are afraid they will lose their job and end up "on the street," it does not help a particular party dealing with these circumstances to be told that "everyone feels that way." Rather than being empathetic and comforting, it is dismissive of a real concern and fear. Instead, the transformative mediator simply reflects the concern and the fear, using words close to those used by the party. The mediator might say: "So you are scared and worried about becoming destitute and, to use your words, 'winding up on the street.'" That statement will actually allow the party to know the subject is one that is on the table for discussion if he chooses to pursue it, and to know that the others in the room are now aware of both how the party feels and the depth of that feeling. The party can then choose where to take the discussion at that moment.

There are many other kinds of directive impulses. Trying to keep the parties "on track" or to "move the discussion along" interferes with the natural cycles of conversation of the parties. Pointing out "common ground," such as "you both really care about your child" or "you both have fears about the viability of the business," does little if anything to bring parties together and probably obscures the real and important differences between them. Differences should not be downplayed in the attempt to find, and stress, the common ground. Probing for what the mediator believes are the "real, underlying issues" is leading, directive and disrespectful of party autonomy. Following the parties in their discussion will highlight all of the issues the parties choose to put out on the table. Pushing them, probing and asking questions to get them to do more will be experienced as just that. The parties will feel they are being pushed, and opportunities for empowerment and recognition will almost certainly be lost. "Hypothesizing" by the mediator about what is important to one of the parties, or what will be an acceptable settlement, detracts from the intense focus needed to pay attention to what is actually going on right in front of the mediator. Hypothesizing requires the mediator to develop a line of questioning to follow up on and test the accuracy of the mediator's hypothesis; the result is the pursuit of the me-

diator's agenda, not that of the parties, and the loss of focus on changing conflict interaction.⁵⁴

The skills employed by the transformative divorce mediator are simple to describe: listening; reflection; summarizing; questioning to open doors, to invite further discussion on a subject raised by the parties, or to "check in" on what the parties want to do at a choice point in the discussion. They are not complex skills to describe. They are, however, difficult to employ. It is much easier to allow our directive impulses steer us into leading and guiding the discussion, and as a result, the outcome.⁵⁵ Although it is difficult to stay with the parties through their cycles of conversation as they develop strength and understanding, doing so is the work of the transformative mediator, and it is the help that parties in conflict value most.

CONCLUSION: PRACTICE BASED ON PRINCIPLES

As discussed above, the "how" of transformative mediation practice flows from the "why and what" of transformative conflict theory. In sum, it's all a matter of principles, the underlying theories of what mediation is and why it is being conducted. Significant and extraordinary differences in mediation practice occur as a result of the varying principles of mediators. Personality and conversational style do have an impact on mediator responses, but the most powerful impact on practice comes from the mediator's principles — what the mediator believes and values about conflict, mediation, and the human beings who are his or her clients.⁵⁶ Clear articulation and understanding of the principles of mediation — its theoretical "why" and "what" — are essential to a mediator's understanding of effective, responsible practice.

54. All of the examples of directiveness discussed in the text (keeping parties on track, moving them along, "normalizing" party fears, emphasizing common ground, probing for underlying issues, hypothesizing and "diagnosing" about issues and solutions) are offered as examples of effective mediation practice in many mediation texts. See Grillo, *supra* note 3 (for examples of directiveness advocated in mediation texts). See also Kolb & Kressel, *supra* note 35 (for a summary of practice within what they call the "settlement" model of mediation showing that many of these forms of directiveness are normative within that model).

55. See Folger, *supra* note 30.

56. See Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. (forthcoming 2003) (critiquing the tendency of practitioners and policymakers in the mediation field to ignore the significance of differences about theories of conflict and intervention, and to treat all differences of practice as questions of "mediator style").

Once a foundation of clarity about principles and purpose is established, an understanding of how to practice flows from that foundation and can be tested against those foundational principles.