

## **From the Editorial Board: The Expanded Reach of Mediation**

**Tony Belak**

*The International Center for Compassionate Organizations*

**Ari Cowan**

*The International Center for Compassionate Organizations*

### **Introduction**

Mediation has been around since the days of the Phoenicians, where it was a practice used to settle disputes in commerce. It was also a practice in Ancient Greece and, later, in the Roman Empire. In some cultures, the mediator was a chief or wise man and was sometimes viewed as sacred. This calm approach to dealing with conflict appeared in Buddhist cultures and was considered a thoughtful and civilized way of settling differences in Confucian society.

Mediation has been used in a range of settings, including commercial, workplace, family, legal, international, and workplace environments. In recent years, mediators have applied various styles and philosophies in an attempt to assist parties in conflict to manage their differences. The following is a brief summary of traditional mediation styles.

### **Evaluative Mediation**

Evaluative mediators assist negotiations, usually, by focusing on the value of the case in light of litigation prospects. Legal merits take precedent over personal issues, and the neutral's opinion over-shadows the realistic assessment of the parties themselves. This approach often separates the parties early, with the neutral shuttling between the camps, bringing terms and options constructed in the private sessions. This messenger method orients the parties to the mediator, not each other, and misses opportunities for subtle and creative resolutions by focusing on narrow bands of legal issues rather than the full spectrum of needs and interests the parties may express with interactive communication.

### **Facilitative Mediation**

On the other hand, facilitative mediators assist negotiations by inducing the parties to employ principled bargaining techniques to identify issues and interests. Separating wants from needs is vital to success but can be time consuming, since it requires trust building between the parties to be effective. These mediators encourage the parties to listen to understand rather than listen to respond, de-emphasize legal issues, and confine themselves to assisting the parties to assess the value of their case rather than offer their appraisal of the likely outcome in court. Facilitative mediators see their role as limited to helping parties analyze litigation options for themselves. This self-determination can be unsettling for some but up-lifting for others. If there is a personal advisor or attorney practicing a paternalistic approach to representation, facilitative mediation may not be as effective as a more directive style. A facilitated approach may not be able to meet

the parties' needs or expectations with substance, since these mediators attempt a process requiring willingness to explore interests and feelings.

### **Transformative Mediation**

Transformative mediation emerged with Bush and Folger's 1994 breakthrough book, *The Promise of Mediation: The Transformative Approach to Conflict*. Their approach is focused on strengthening the parties' personal capacity for decision making and increasing their willingness and ability to appreciate perspectives different from their own. The mediator's role is to help the parties enhance the quality of their decision making and communication, subject only to their own choices and limits. With the mediator's focus on empowerment and recognition, the process can result in not only resolution of the parties' immediate problem but also can cause significant changes in their personal capacities for self-determination and responsiveness to others, both in the immediate matter and beyond. The mediator fosters empowerment by supporting each party's deliberation and decision-making at every possible opportunity and encourages voluntary efforts to reach new understanding of the other's perspective. Without discernable steps, the mediator follows the parties through the process looking for opportunities to intervene and rarely separates them.

### **Other ADR Processes**

While there are other ADR (Alternative Dispute Resolution, Appropriate Dispute Resolution, or — in Australia — External Dispute Resolution) processes such as neutral case evaluation, moderated settlement conferences, summary jury trials, and non-binding arbitration which provide predictions of what litigation will bring, some mediators select a particular style because it streamlines the sharing of essential information through the questioning by the neutral. These directive neutrals believe that the highest value to be attained through conflict intervention is mutual satisfaction of competing individual needs with reduction of suffering and dissatisfaction from unmet needs. They tend to believe that social institutions, such as courts, should referee adversarial competition between individuals and encourage conflict resolution for all on equal terms. This style views people primarily as separate and autonomous, without an inherent nexus to others, who pursue self-interest and have irrational fears and emotions. The mediator defines her/his role as persuasive, directive, or evaluative with the goal of generating interest-based bargaining and finding agreements that solve tangible issues in the parties' conflict.

### **The Challenge of Mediation**

No matter how diligent to task or knowledge, indicators for satisfaction among parties to mediation may focus on different variables. The most frequently given party response for satisfaction with the mediation process depends upon how important the participants were made to feel during the mediation. Parties complimented mediation when allowed to present their views fully and when given a sense of being heard, while helping them to understand each other. Parties' favorable attitudes toward mediation came from their perception of how the process worked, with two features in particular being most responsible:

1. The greater degree of participation in decision-making that parties experience in mediation;
2. The fuller opportunity to express themselves and communicate their views, both with the mediator and each other in a respectful exchange.

Conversely, when mediators denied parties real process control, party satisfaction levels were lower, to the conclusion that despite what we might have thought, parties to mediation do not place the most value on a process that provides expediency, efficiency, or finality of resolution. Actually, the likelihood of a favorable substantive outcome is not most important to parties; rather, an equally or more highly valued feature of mediation is procedural justice or fairness, which in practice means the greatest possible opportunity for party participation in determining outcome, compared with the assurance of a favorable outcome, and for party self-expression and communication.

Some would encourage those in dispute to listen carefully in recognition of the individual and, perhaps, be transformed by the experience to establish a long-lasting and meaningful resolution. Sometimes, this style of mediation does not seek immediate resolution, as much as it hopes enlightenment will guide the parties, now empowered, to fruitful co-existence. Then again, the directive mediator will intervene to assist the parties in their dispute believing evaluation by the neutral should be the basis for rational people to resolve the matter with a focus on the agreement; without settlement, the mediation has no purpose. Between these approaches are other styles and schools of thought in the delivery of mediation services. Most mediators tend to utilize a hybrid or combination approach as required.

From this abundance of styles and practices, the initial selection of the appropriate mediator to the particular conflict and parties is critical. The ultimate result will follow the path of the mediation process and end where the parties determine, but the emotional component of resolution is at risk. The “feeling” aspect of settlement can be an important part of the entire experience, not to be over-shadowed by the relief of resolution as much as the way it was accomplished. The mediator should be alert and responsive to emotional needs of the parties, if indicated, but often masked by the presence of counsel or positional bargaining.

The mediator brings to the settlement table his/her own personality, life experiences, education, and training. If the mediator is to be a vital component to resolution, these factors must also be considered in the totality of the process. The mediator’s agenda and assertiveness may undermine the parties’ self-determination and the resilience of any agreement. The mediator’s lack of attention to communication dynamics or emotional factors may result in unfair outcomes detrimental to the less powerful party or leave unexplored potential for change, growth, or healing. Moreover, the mediator’s quest for open communication might permit one party to dominate or exploit another. Also, parties may not desire to explore development of needs and feelings, instead insisting on more substance over subliminal satisfaction.

The parties’ willingness to adopt the mediator’s suggestions about their negotiation behavior, situational characteristics, and information gathering and sharing can be significant to the outcome. Until the parties trust the mediator and have confidence in the mediator’s ability, knowledge, and style, the parties restrict opportunities for successful resolution. If the neutral is to affect resolution through the parties, then the mediator must influence the parties’ perceptions and attitudes toward themselves, each other, the negotiations, and mediation itself. Parties’ attitudes can be a critical determination of mediation success. During the course of the mediation

process the parties will engage in the same learning patterns concerning the neutral as that of their negotiations. The parties will attempt to obtain information concerning the characteristics of the mediator to determine whether the mediator is impartial, trustworthy, and capable of helping them in resolving their conflict. Trustworthiness and sincerity may be deduced from the mediator's personal individuality, but whether he/she is capable of assisting the parties to negotiate a settlement can be determined by the strategies and style the mediator employs. Style and interaction serves to provide evidence upon which to confirm or reject the initial perceptions the parties formulate concerning the mediator and the process. The mediator's style and strategy determine the parties' attitudes toward mediation, and the parties' attitudes shape the outcome.

While each style has advantages, for many mediators the evaluative approach seems comfortable, since it allows the neutral to direct the parties to an apparent resolution. However, early movement to this style deprives the parties of the opportunity to fashion their own lasting solution. Nevertheless, there are parties who seek the advice of an authority figure and encourage the mediator to assume that role and guide them. Some disputants may view themselves as a victim in need of a power figure to recognize their plight and vindicate the wrong perpetrated on them. While their legal claim may be viable, the martyr mentality-oriented individual can be unrealistic concerning settlement and demand more than the courts will allow. One result not available through the courts is an apology, which is also often not available through directive or evaluative mediation with the neutral acting more like an expert than a liaison. A strong and guided approach could assist in a reality-based resolution for some, but the evaluation should be measured against the full exploration of options, real or imaginary.

### **Enter Compassionate Mediation**

An answer to the challenges of the role of emotions, sensitivity to fairness, and the connection between the mediator and the parties is the newly developed Compassionate Mediation (also referred to as "Whole Person Mediation") — an advance form of mediation. This approach to conflict resolution embodies core elements of evaluative, facilitative, and transformative mediation and adds elements that give the mediator greater insight into the dynamics of the interaction of the parties as well as new tools to increase the efficacy of their mediation sessions. For the parties, Compassionate Mediation creates a safer, more balanced experience that takes into account the suffering that is the result of the conflict itself and the fear of adverse outcomes resulting from mediation.

Developed at the International Center for Compassionate Organizations by Ari Cowan and Tony Belak, JD, this new approach incorporates Belak's substantial background and rich experience in mediation with Cowan's Integrative Conflict Management Model (ICM<sup>2</sup>) to deepen and increase the effectiveness of the mediation process.

Compassionate Mediation also incorporates lessons from the work of International Center Fellow Paul Gilbert, PhD (author of *The Compassionate Mind*) and the Compassionate Mind Foundation (United Kingdom) along with the International Center's Research Director Lidewij Niezink, PhD's work in the empathy field. Stephen Karpman, MD's (San Francisco) Drama Triangle is also an important concept in Compassionate Mediation.

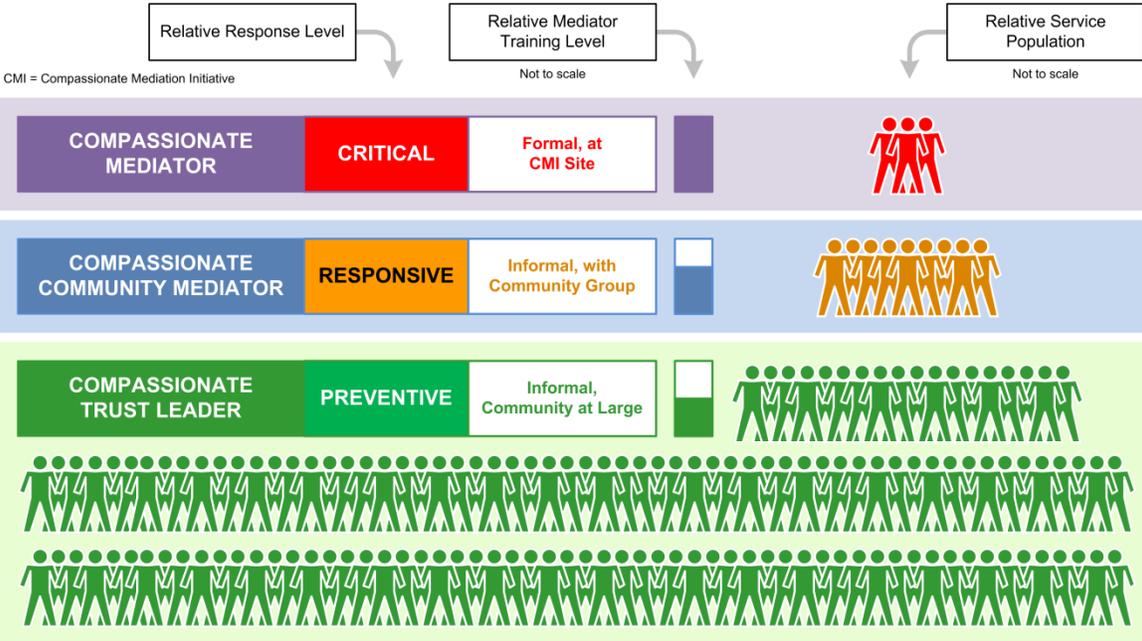
The work of the Yale Center for Emotional Intelligence provides a foundational component for Compassionate Mediation. The Emotional Intelligence impact on conflict issues such as bullying informs the development of Compassionate Mediation.

### Expanding the Reach of Mediation

One of the unique things about Compassionate Mediation is that it expands the scope of services by developing three practitioner levels:

1. Compassionate Mediator — Professionals providing formal mediation services in situations in which legal issues (that may be legally binding or may result in legal action) are concerned.
2. Compassionate Community Mediator — Practitioners offering a semi-formal conflict management process to community members who are looking to work through their differences in a flexible, safe, and structured process.
3. Compassionate Community Trust Leader — Trained community members who provide information, education, and coaching about compassionate conflict management; are an active voice for compassion, understanding, and the working out of differences, and are a trusted members of community social, faith-based, political, or other groups.

**Figure 1**  
**Compassionate Mediation Application Levels**



In addition to the fundamental elements of confidentiality, neutrality, listening skills, clarifying questions, open communication, suggestions (rather than ultimatums), and other essentials, Compassionate Mediation incorporates new concepts and research-based strategies — including those from neuroscience, psychology, emotional intelligence, and other recent findings in brain and social sciences — to assist the mediator and the parties to achieve positive results.

The implications for mediation are significant, expanding the body of understanding and skills as well as the application in daily living that provide basic skills to a broader audience that, in turn, can incorporate the concepts into families, workplaces, and communities. This approach may increase awareness of and engagement in more formal types of mediation.

Although new, Compassionate Mediation concepts have been applied at the University of Louisville through the Office of the Ombuds as well as course offerings at the university. The first cohort of Compassionate Trust Leaders graduated in August 2015 as part of the Challenged Communities Compassionate Mediation Initiative — a pilot program in Louisville, Kentucky. This program will be offered in the United States and internationally in 2016, expanding the reach of mediation worldwide.