

Beyond Settlement

Let the wise listen and add to their learning,
and let the discerning get guidance.

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Alternative Dispute Resolution Commission
Advanced Mediation Techniques Workshop
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What's the Problem?

Focusing intently on achieving settlement, can undermine the outcome in these ways:

- Imperfect results
- Mediators may dismiss or overlook information
- Settlement may be premature and seem forced [convergence v. divergence]
- Parties subtly induced to settle when in doubt
- Failing to identify and address the need for procedural and psychological satisfaction

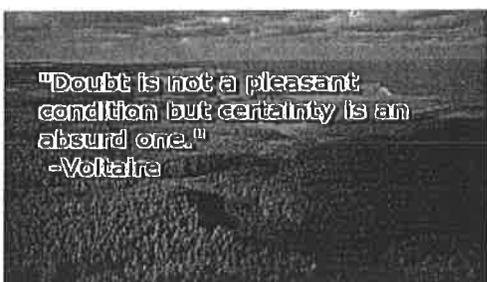
Convergence v. Divergence



5 Steps to Move Beyond Settlement

- Resist Certainty
- Pay Attention to Detail
- Value Ambiguity
- Practice Humility
- Learn Ceaselessly

Resist Certainty



"Doubt is not a pleasant condition but certainty is an absurd one."
-Voltaire

Pay Attention to Detail

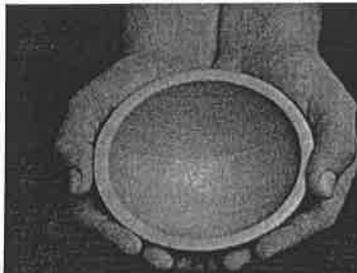


OH PLEASE, WHO WOULD BE THAT STUPI

Value Ambiguity

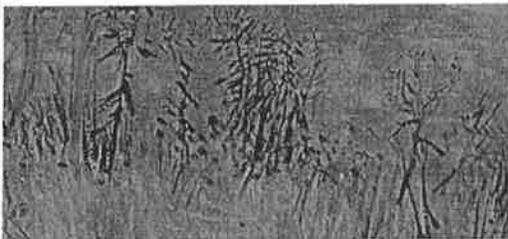


Practice Humility



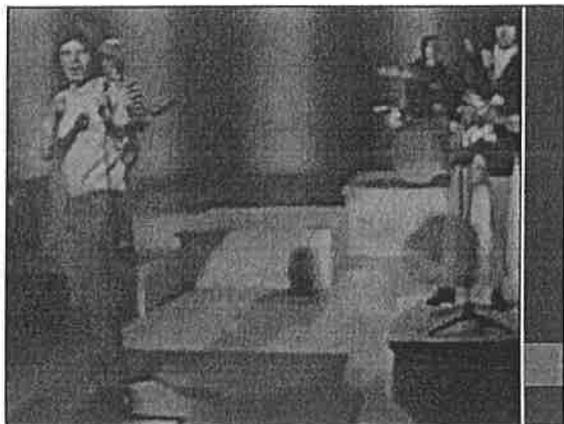
Humility
is not
thinking
less of
yourself,
but
thinking
of
yourself
less
- C. S. Lewis

Learn Ceaselessly



*"I've just kept on ceaselessly painting
in order to learn painting."*

—Vincent van Gogh, Nuisien, on or about November 17, 1885, to Theo van Gogh



Hypothesis

- Tentative explanation for observations and other phenomena that can be tested
- Assumption taken to be true for the limited purpose of investigation
- An attempt to "make sense" of what has occurred
- Not a statement of truth
- Not a guess, hunch or gut feeling



Family Business Dispute

- After reading the scenario, what is your working hypothesis?
- What theory influences your understanding?
- How do you describe this conflict?
- Who is involved? Who is affected?
- What is the real problem?

WHAT IS THEORY?

A theory explains phenomena and gives meaning to events, structures, patterns and behaviors.

Explains: allows us to classify, sort, frame and otherwise explain events

Predicts: provides inferences about future events may be made

Influences: describes conditions under which events may be made to occur.



He who loves practice without theory is like the sailor who boards ship without a rudder and compass and never knows where he may cast.

Leonardo Da Vinci

Theories About Mediation

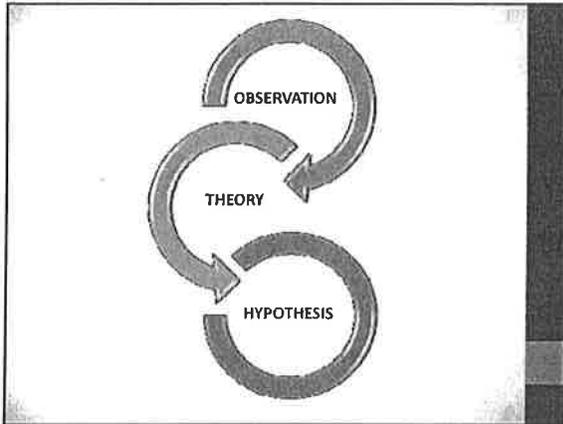
- **Self-determination**—parties to a conflict are best positioned to find solutions.
- **Confidentiality** nurtures parties' ability to communicate candidly.
- **Impartiality** helps parties feel confident in the process
- **Conflict** exists because of real or perceived incompatibility of needs, interests and goals.
- **Inter-personal relationships** are characterized by conflict.

Theory Based Mediation Models

- Narrative Mediation**
Winslade & Monk
- Transformative Mediation**
Bush and Folger
- Interest-based Negotiation**
Fisher & Ury
- Dispute System Design**
Costantino & Merchant
- Conflict Transformation**
Lederach

Theories From Other Disciplines

- Human Needs**
John Burton
- Organizational Management**
Mary Parker Follett
- Culture and Conflict**
Laura Nader
- Communications**
Deborah Tannen
- Psychosocial Development**
Erik Erikson
- Sociology**
Kurt Lewin, Lewis Coser, Morton Deutsch



What's So Important About Theory?

Beliefs:

- affect what you focus on and what you ignore
- your interactions with the parties and others
- determine the mediation model you use
- influence how you define the problems or issues to be addressed/solved
- shape how you see your role as mediator
- guide the choices you make as a mediator

Client Satisfaction

- How do we know what our clients truly need?
- What data supports this assessment?
- How are decisions made about:
 - timing, schedule and pace
 - joint session or caucus
 - issues/problems to be addressed
 - information needed for decision-making
 - negotiation/problem-solving process
- What role does the client play in any of these?



Process Satisfaction

Parties experience process satisfaction when they:

- sense the process is fair
- are provided all essential information
- fully participate, have a voice, are not ignored
- feel they can be honest in expressing ideas, concerns, emotions
- are not rushed and the process is well-managed
- understand the nature and goals of the process

Psychological Satisfaction

Parties experience psychological satisfaction when they are:

- treated with dignity as mature individuals—not as wounded or incapacitated
- able to feel calm, confident and hopeful
- actively engaged throughout the process
- able to participate without reservation or restriction
- making choices for themselves
- listened to, paid attention to—that they count

Outcome Satisfaction

Parties experience outcome satisfaction when:

- any agreements are complete and accurate
- their goals, needs and interests are fully addressed
- the outcome is logical, comprehensive and inclusive
- the terms are workable, practical and realistic
- the interests of all involved, including those not at the table, are addressed
- the document is well-framed, clearly stated and comprehensible

Satisfaction for Sylvia and Samuel

What are they seeking?

- **Process**—how will you organize and conduct the mediation?
- **Psychological**—what will you do to address the parties' needs?
- **Outcome**—what terms, conditions and agreements will be needed?



Implementing the 5 Steps

- Listen for what's said, not what you expect to hear
- Ask questions that reflect genuine curiosity
- Consider the parties' needs for satisfaction
- Be aware of your model/theory—stay true
- Avoid utilitarian "what ever it takes" approach
- Support (encourage) constructive divergence
- Avoid hasty convergence

SELECTED BIBLIOGRAPHY

Argyris, C. and Schön, D. A. Theory in Practice: Increasing Professional Effectiveness. San Francisco, CA: Jossey-Bass Publishers, 1974.

Beer, J. with Steif, E., The Mediator's Handbook, 3rd edition, Stony Creek, CT New Society Publishers, 1997.

Benjamin, R. D. "The Physics of Mediation: Reflections of Scientific Theory in Professional Practice." *Mediation Quarterly*, Volume 8, Number 2, 1990.

Birkhoff, J. E. and Warfield, W. "The Development of Pedagogy and Practicum." *Mediation Quarterly*, Volume 14, Number 2, 1997.

Bunker, B. B. and Rubin, J. Z. and Associates, eds. Conflict, Cooperation and Justice. San Francisco, CA: Jossey Bass Publishers, 1995.

Bush, R. A. B. and Folger, J. P. The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition. San Francisco, CA: Jossey Bass Publishers, 1994.

M. Deutsch, P. T. Coleman, E. C. Marcus (Eds). The Handbook of Conflict Resolution: Theory and Practice, 2nd Edition. San Francisco, CA: Jossey Bass Publishers, 2006.

J. Følberg, A. Milne, P. Salem (Eds). Divorce and Family Mediation: Models, Techniques and Applications. Thousand Oaks, CA: Sage Publications, Inc., 2004.

Freire, P. Pedagogy of the Oppressed. New York: The Continuum Publishing Company, 1993.

Gulliver, P.H. Disputes and Negotiation: A Cross-Cultural Perspective. Orlando, FL: Academic Press, 1979.

Jones, T. S. and Brinkert, R. Conflict Coaching: Conflict Management Strategies and Skills for the Individual. Thousand Oaks, CA: Sage Publications, Inc., 2008.

Kritek, P. B. Negotiating at an Uneven Table: Developing Moral Courage in Resolving Our Conflicts. San Francisco, CA: Jossey-Bass Publishers, 1994.

Lang, M. "Becoming a Reflective Practitioner", originally published in *Consensus*, Winter, 1997. Available online at: <http://www.mediate.com/articles/index.cfm>

Lang, M. and Taylor, A. The Making of a Mediator: Developing Excellence in Practice. San Francisco, CA: Jossey Bass Publishers, 2000.

Lang, M., "From Advocate to Advisor: The Role of the Lawyer in Mediation", <http://www.mediate.com/articles/index.cfm>, 2010.

Bibliography
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Langer, E. J. Mindfulness. Reading, MA: Addison Wesley Publishing Company, 1989.

Lederach, J. P. Preparing for Peace: Conflict Transformation Across Cultures. Syracuse, NY: Syracuse University Press, 1995.

Lipsky, D., Seeber, R., and Fincher, R., Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals, Jossey-Bass, 2003

Mayer, B. S. Beyond Neutrality: Confronting the Crisis in Conflict Resolution. San Francisco, CA: John Wiley & Sons, Inc., 2004.

McMahon, J., "Moving Mediation Back Toward Its Historic Roots — Suggested Changes", *The Colorado Lawyer*, June 2008, Vol. 37, No. 6

Moore, C., The Mediation Process: Practical Strategies for Resolving Conflict, 3rd Ed, Jossey-Bass, 2003

Pearce, W. B. and Littlejohn, S. W. Moral Conflict: When Social Worlds Collide. Thousand Oaks, CA: Sage Publications, Inc., 1997.

Riskin, L.L. and Westbrook, J.E., Dispute Resolution and Lawyers, West Publishing Company, 1987

Saposnek, D. T. Mediating Child Custody Disputes, Revised Edition. San Francisco, CA: Jossey Bass Publishers, 1998.

Schön, D. A. The Reflective Practitioner. San Francisco, CA: Jossey-Bass Publishers, 1987.

Senge, P. M. The Fifth Discipline: The Art & Practice of The Learning Organization. New York, NY: Currency Doubleday, 1990.

Tannen, D., You Just Don't Understand: Women and Men in Conversation, William Morrow, 1990

Wheatly, M. J. Leadership and the New Science: Learning about Organization from an Orderly Universe. San Francisco, CA: Barrett-Koehler Publishers, Inc., 1994

Winslade, J. and Monk, G. Narrative Mediation: A New Approach to Conflict Resolution. San Francisco, CA: Jossey Bass Publishers, 2000.