

# **A Theory of Mediation**

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There is no lack of debate in the field of mediation. Topics that tend to attract the most attention and vigorous discussion include mediator qualification and process outcome. What's lacking, according to Douglas Noll, is a practical theory that would bring together different views, and help both practitioners and clients. In the following article, Noll reviews existing literature to form a simple mediation theory founded on basic conflict dynamics. Noll theory provides a framework for explaining various mediation styles and outcomes -when a certain approach is appropriate and why.

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To date, the debates in the mediation field have centered on which process is better, who is qualified to be a mediator, and on outcome measurement. In reading the vast literature generated by these debates, no clear theory of practice has apparently developed. I believe that a general theory has not developed because the debates on process and outcome have not considered conflict dynamics.

I propose that when conflict dynamics are considered, a simple theory of mediation arises. This theory appears to reconcile and justify all of the diverging views of practice and outcome into a unified view of mediation.

This theory of mediation contains four strands: conflict goals, level of conflict escalation, mediation style or process, and outcome. I will explain each strand then state a theory of mediation encompassing them all.

## Conflict Goals: CRIP

Wilmot and Hocker have developed the acronym CRIP as an analytical tool in conflict.<sup>1</sup> CRIP stands for content, relationship, identity, and process.

CRIP is a way of looking at the conflict goals people bring to a dispute. Content goals are most familiar to lawyers because they involve substantive rights and obligations. A dispute over money is a typical content goal; one party claims damages and wants payment while the other denies and resists payment. Each party is focused on the goal of compensation.

Without diminishing their importance, content goals rarely are the sole cause of human conflicts. Often, content goals are granted substantially more importance by parties and counsel than they deserve. For example, a demand for money might be higher than is realistic or fair, not because the plaintiff is seeking a superior negotiating position, but because the demand for money is symbolic of other conflicts occurring between the parties.

Relationship goals ask the question, "Who are we in this conflict?" Relationship goals usually involve issues over hierarchy, power, and social roles. Many times, parties feel a deep sense of injustice and offense. In civil cases, both sides often feel victimized.

Parties to conflict are said to have relationship goals when they seek relief from the injustices they feel. The injustices are often not subject to legal analysis. Consequently, the goals are left unstated or stated vaguely. How many times have clients said, "It's not fair," or "I've been taken advantage of"?

Relationship goals, being emotionally based, are sometimes difficult for clients to articulate. Therefore, clients tend to project their relationship goals into content goals. This is how content goals become symbols for other conflict goals.

Identity goals concern self-esteem, face, impression management, and social identity. These goals ask the question "Who am I in this conflict?" Conflicts that have escalated into litigation commonly involve clients whose self-esteem or face has been threatened or injured.

This goal is extremely powerful because it involves a threat to a person's psychological existence. The deeper the challenge to self-esteem, the more likely a fight-or-flight reaction will occur. Like relationship goals, identity goals are often not well articulated. Hence, identity goals too can be projected onto content goals.

If both relationship and identity goals are projected onto a content goal, one can see why a party may seem unreasonable in a demand for compensation or refusal to pay.

Process goals concern how parties prefer to deal with conflict. Lawyers see resolution of conflict from an adversary ideology. Sometimes, this orientation can exacerbate a conflict. If party A wishes to fight and party B wishes to avoid, B's reluctance to fight may turn to intransigence. How many times have clients said that they don't want to sue, but if they do, it will be all out war? Other clients may relish the idea of a good fight and have little interest in other processes. Thus, a conflict can arise simply through different process goals.

Obviously, parties in conflict have different goals at some level of the CRIP model. Conflict becomes particularly interesting when the parties specialize in different conflict goals.

For example, one party may be focusing on relationship goals while another is focusing on process goals. If neither party is listening to the other, they each assume they are being ignored. This is very common in partnership disputes, domestic relations conflicts, and employment litigation. The phenomenon of fundamental attribution error is triggered, by which each side assumes the best intentions for self and worst intentions for the other. This suggests that effective conflict analysis consider whether parties are specializing in different conflict goals.

Finally, conflict goals may change during the conflict cycle. Conflict has to be viewed as a dynamic process involving the rational and emotional aspects of personality. Thus, as the conflict progresses, conflict goals may strengthen or weaken, change in importance, or become

symbolic for unstated goals. Oftentimes, conflict goals will change retroactively as a rationalization for present conduct.

### Conflict Escalation: Five Stages

Spillman and Spillman<sup>2</sup> have observed that conflict escalation is a gradual regression from a mature to immature level of emotional development.<sup>2</sup> The psychological process develops step by step in a strikingly reciprocal manner to the way we grow up. In other words, as conflicts escalate through various stages, the parties show behaviors indicating movement backward through their stages of emotional development.

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In this analysis, escalation is charted in five stages, each having its own characteristics and triggers. Stage One is part of normal, everyday life. Even good relationships have moments of conflict. These can only be resolved with great care and mutual empathy.

In this stage, people look for objective solutions in a cooperative manner. If a solution is not found, especially because one of the parties sticks obstinately to his or her point of view, the conflict escalates.

In Stage Two, the parties fluctuate between cooperation and competition. They know they have common interests, but their own wishes become more important. Dealing with information becomes limited to that favoring one's own arguments. Logic and understanding are used to convince or win over the opposing side.

At this stage, each party does everything possible to not show weakness. The temptation to leave the field of argument increases until the conflict escalates because of some action taken by one of the parties.

By entering Stage Three-the field of concrete actions-each party fears that the ground for a common solution is lost. In other words, the parties lose hope for a reasonable outcome. Interaction becomes hostile. All logic is focused on action, replacing fruitless and nerve-racking discussions.

This is often when parties hire lawyers. Hiring a lawyer is satisfying because it temporarily reduces inner tensions and anxieties. Finally, "something is being done" about the problem. Paradoxically, the parties each believe that through pressure they will change the other party. At the same time neither is prepared to yield.

At this level, stereotyping is applied as negative identification of the opponent. Hence, parties are implicitly characterized as dishonest, unscrupulous, or fraudulent. Power becomes important as empathy disappears.

At Stage Four, the parties' cognitive functioning regresses to those of 6-year-olds. One is aware of the other's perspectives, but is no longer capable of considering the other's thoughts, feelings and situation. How often have we remarked that parties in conflict are acting like children? In

fact, they are because of the escalation. Both sides are forced into roles from which they see no escape.

If the conflict cannot be halted at this stage, the escalation undergoes a dramatic increase in intensity. Escalation results when one side commits some action that is felt by the opposite side as a loss of face.

At Stage Five, progressive regression appears in the form of a comprehensive ideology and totalizing of antagonistic perspectives. Sacred values, convictions, and superior moral obligations are at stake. The conflict assumes mythical dimensions. Sometimes the parties have fantasies of omnipotence, seeing no way that they can lose in court.

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In psychological terms, the escalation has reached a hallucinatory-narcissistic sphere. The entire self-conception is drawn into the conflict such that individual perceptions and evaluations disappear. By threatening and creating fear, both parties strive towards total control of the situation and thereby escalate the conflict further. To remain credible and to restrain the enemy from an act of force, the threatened party feels compelled to commit acts of force itself. This, in turn, proves to the threatening party the aggressive nature of the other and provokes counterforce and further escalation. This process continues until the parties reach financial or physical exhaustion, or a court or arbitrator decides the matter.

Mediation Style and Process

Riskin's Model

In 1994, Professor Leonard Riskin proposed a system for classifying mediator orientations.<sup>3</sup> His classification system asked two principal questions. First, does the mediator tend to define problems narrowly or broadly? Second, does the mediator think he or she should evaluate-make assessments or predictions or proposals for agreements-or facilitate the parties' negotiation without evaluating? According to Riskin, answers to these questions reflect mediator beliefs about the nature and scope of mediation and assumptions about the parties' expectations.

In Riskin's system, mediators with a narrow focus assume that the parties have come to them for help in solving a technical problem. This problem has been defined by the positions the parties have asserted in negotiations or pleadings.

Typically, the parties have a distributive orientation. They ask questions such as, "Who pays how much to whom?" Or, "Who can use the property?"

Typically, the parties see the problem as a division of a resource in which one gains and the other loses. Outcomes at trial, uncertainty, delay, and expense drive the mediation process. Parties, through their lawyers, will bargain competitively, emphasizing positions over interests.

Mediators with a broad focus assume that the parties can benefit if the problem is defined beyond the narrow legal issues. Interests often lie beneath positions, and the mediator should help the parties satisfy those interests when possible.

The evaluative mediator assumes the parties need some direction for settlement. The direction might be based on law, industry standards, or technology. The evaluative mediator also assumes that he or she is qualified to give such direction based on experience, education, training, and objectivity.

In contrast, the facilitative mediator assumes that the parties are intelligent, capable of solving their own problems, and understand their situation better than the lawyers and the mediator. Thus, the facilitative mediator sees his or her mission as enhancing and clarifying communications between the parties. Unlike an evaluative mediator, the facilitative mediator will not give an opinion concerning possible outcomes or settlements. First, the facilitative mediator believes that an opinion might impair impartiality. Second, the facilitative mediator does not believe that he or she has enough information to render an informed opinion.

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According to Riskin, each type of mediator will use certain strategies to resolve conflict. The evaluative-narrow mediator defines the conflict in terms of strengths and weaknesses of positions and likely outcome at trial. This mediator will study carefully pertinent documents and pleadings before the mediation. During the mediation, this mediator employs evaluative techniques such as:

- \* urging parties to settle or accept a settlement proposal;
- \* propose position-based compromise agreements;
- \* predict court outcomes;
- \* persuade parties to accept mediator assessments; and
- \* assess the strengths and weaknesses of each side, usually in private caucuses.

The facilitative-narrow mediator, like the evaluative-narrow mediator, provides reality checks for the parties. However, this mediator uses different techniques. The facilitative-narrow mediator will not assess or predict outcomes, study relevant documents, or apply pressure to settle. Instead, usually in private caucuses, the facilitative-narrow mediator will help the parties understand each side's position and the consequences of not settling. In addition, in private caucuses, the facilitative-narrow mediator will help the parties assess proposals and formulate alternatives. The facilitative-narrow mediator might ask the following questions:

- \* What are the strengths and weaknesses of your case? Of the other side's case?
- \* What are the best, worst, and most likely outcomes of litigation? How did you make these assessments? Have you thought about other issues?

- \* How long will it take to get to trial? How long will the trial last?
- \* What will be the associated costs in money, emotions, or reputation?

The evaluative-broad mediator emphasizes interests over positions and proposes solutions to accommodate those interests. Because the evaluative-broad mediator constructs the agreement, this type of mediator emphasizes his or her own understanding of the conflict as much as the parties. The evaluative-broad mediator will study relevant documents, pleadings, and briefs, but will also uncover underlying interests.

Typical techniques include:

- \* explaining that the goal of mediation can include addressing underlying interests;
- \* encouraging the real parties or decision makers to attend and participate;
- \* asking about situations, plans, needs, and interests; and
- \* speculating about underlying interests and asking for confirmation.

The evaluative-broad mediator provides predictions, assessments, and recommendations, emphasizing options that satisfy broader interests rather than narrow positions.

The facilitative-broad mediator encourages parties to consider underlying interests rather than positions. He or she helps parties generate and assess proposals designed to accommodate those interests. Techniques might include:

- \* encouraging the parties to discuss underlying interests in joint sessions; or
- \* encouraging and helping the parties develop their own proposals.

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The facilitative-broad mediator does not provide predictions, assessments, or recommendations. In a facilitative-broad mediation, legal argument occupies a lesser position. The facilitativebroad mediator does not need to fully understand the legal posture of the case, but must be able to quickly grasp the legal and substantive issues to respond to the dynamics of the situation. In addition, this mediator must be able to assist the parties in realistically evaluating proposals.

Kovach & Love's Model

Riskin's model has made a substantial contribution by clarifying the state of mediation practice and by stimulating the debate about the direction that mediation practice should take. The model has been criticized as tending to legitimize evaluative mediation.

Many scholars and practitioners believe evaluative processes do not belong in the definition of mediation. Mediation, in their view, is a process that fosters party autonomy and party decision

making. Many others, especially evaluative practitioners, sharply dispute this contention. The academic literature on the debate is substantial.

Professors Kimberlee K. Kovach and Lela P. Love offer a model slightly different than Riskin's. Their model emphasizes what they see as profound differences between adjudicative/evaluative dispute processing and facilitative dispute processing. In this model, a "Great Divide" separates processes that require evaluation from those that require facilitation. In processes where the neutral renders a judgment, the neutral has an evaluative role. In consensus-building processes, the neutral has a facilitative role.<sup>4</sup>

Kovach and Love point out certain implications of their model. First, they recognize that some evaluations require quite substantial qualifications. They believe that evaluators in legal contexts must be lawyers. This is because lawyers are constrained by rules of professional conduct, are liable for malpractice, and are educated in norms of credible evidence, fact-finding procedures, burdens of proof, and appropriate legal research and analysis. In nonlegal disputes, Kovach and Love argue that similarly high standards for evaluators should apply.

Second, they believe that tactics and strategies should be appropriate to the orientation of the neutral. Evaluators should not use caucuses because of due process concerns. Furthermore, mediators should not be evaluators because mediation training normally does not include instruction on assessing credibility, weighing evidence, assigning the proper burden of proof, or conducting appropriate research. When mediators offer opinions on likely judicial outcomes, questions are raised about the duty to research before evaluating, the liability for erroneous conclusions, and the possible unauthorized practice of law.

On the other hand, facilitators may elicit information about assumptions, feelings, and perspectives that would be inadmissible in a factfinding or evaluative process. In an evaluative process, hearsay evidence would normally not be considered or would be discounted substantially. In a facilitative process, rules of evidence simply would not apply.

### Carnevale's Strategic Choice Model

Social psychologist Peter Carnevale designed the strategic choice model of mediation to predict the types of strategy that a mediator is likely to use in different circumstances. The model considers four basic mediator strategies: compensation, pressure, integration, and inaction.

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The model assumes that mediator strategy is determined by the mediator's assessment of the costs and benefits associated with a strategy, the feasibility of a strategy, and mediator incentives. According to the model, two factors determine the mediator's choice of strategy.

The first factor is the value that a mediator places on the disputants achieving their aspirations. This value may be based on a genuine concern for the disputants' welfare or from a strategic concern when the mediator has interests in the outcome of the dispute.

The second factor is the mediator's assessment of the probability that a mutually acceptable solution will be found, or "perceived common ground." Perceived common ground implies that the parties have low aspirations, being cooperative with one another.

According to the model, mediators integrate when they want the parties to achieve their aspirations and there is common ground. In this case, an integrating strategy is worth the time and effort and is feasible because there is a good chance of finding a mutually acceptable solution.

Mediators press when they don't care whether the parties achieve their aspirations and when there is little common ground. In this case, pressure is feasible because the mediator is not afraid to alienate the parties. Mediators compensate when they want the parties to achieve their aspirations, but there is little common ground. In this case, compensation is worth the cost. For example, the United States, as mediator, may agree to compensate the Palestinians by financing an international airport in the Gaza Strip.

Mediators become inactive when they do not care if the parties achieve their aspirations and when there is much common ground. Inaction becomes feasible because there is a good chance that the parties will reach agreement on their own.

The model assumes that mediators not only consider reasons to use a strategy, but also reasons not to use a strategy. When there is little perceived common ground, for example, mediators decide not to integrate because there is little chance that an integrative agreement will be found.

When perceived common ground is high, mediators decide not to compensate or press because the strategies are not necessary. When mediators do not value the parties' aspirations, they decide not to compensate or integrate because the strategies are not worth the cost and effort. When the parties' aspirations are valued, mediators decide not to press or be inactive because the strategies are not likely to lead to the parties' aspirations being met.

Outcome Continuum: Decision to Reconciliation

The final strand of this theory of mediation involves outcome. Like process and style, the debate about appropriate mediation outcomes has been fierce.

On one side, court administrators and a large number of practitioners measure outcome by settlement rates. A good outcome occurs when an agreement is reached and the case is removed from the docket by a dismissal.

Another group, consisting of many academics and a large number of practitioners, follow some form of Bush and Folger's transformative model.<sup>6</sup> Outcome in that model rejects settlement and looks simply to whether the parties have gained some sense of empowerment to make decisions and have recognized the other's perspective.

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A third group, based primarily in the faith and peace community, measure outcome by the degree of personal reconciliation that occurs between the parties. The restorative justice movement is

illustrative of this concept of outcome, especially as exemplified by Professor Ron Claassen's models of Reconciliation of Injustices and Reconciliation of Interests.

These outcomes seem to fall into a continuum of possibilities. At one end, the conflict is resolved by decision, judicial or arbitral. At the other end, conflict is resolved when the parties reach a full and mutual reconciliation that includes genuine apology and forgiveness. In between, are mutually agreed settlements and transformative outcomes.

## A Theory of Mediation

A theory of mediation should provide a descriptive prediction of what orientations, processes and outcomes might be expected in a given conflict or dispute. Considering the four strands, my theory of mediation is stated as follows:

The nature of the conflict dictates the mediation process to be used and the conflict's likely outcome.

Theorem No. 1: As long as the conflict remains centered on content goals and has not escalated beyond Stage Three, facilitated distributive bargaining, interest-based negotiation, and evaluative mediation are effective and efficient processes for achieving appropriate conflict resolution.

Corollary to Theorem No. 1: Facilitated bargaining, interest-based negotiation, and evaluative mediation processes are not efficient or effective at high levels of conflict escalation or when identity or relationship goals are in play.

Rationale: Evaluative mediation implicitly assumes that the disputants are rationally self-interested in maximizing their utility. Thus, evaluative mediators assume that disputants will attempt to avoid losses and seek economic gains. At low levels of conflict escalation and when content goals are solely in play, these assumptions are generally valid. When the conflict has escalated to Stage Four or Five, the disputants are no longer acting in their rational self-interest. Similarly, when relationship or identity goals are in play, rational self-interest is not operative. Thus, in these cases evaluative mediation will probably not be effective.

Theorem No. 2: As long as the conflict remains centered on identity or relationship goals or has escalated to Stage Four or Five, transformative or narrative mediation processes are effective and efficient processes for achieving appropriate conflict resolution.

Corollary to Theorem No. 2: Transformative and narrative processes are not efficient or effective at low levels of escalation or in purely distributive bargaining conflict situations.

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Rationale: Transformative and narrative mediation processes do not assume that disputants are rationally self-interested. Consequently, these processes are effective in irrational conditions. In particular, narrative mediation assumes only that conflict is one reality constructed by the disputants, that it can be de-constructed, and that a new reality can replace the old, conflict-laden reality. Transformative mediation likewise does not rely on rational self-interest. Instead, it seeks a re-ordering of internal perception (empowerment) and external perceptions (acknowledgement

and recognition of the other). If the disputants' internal and external perceptions are sufficiently changed to permit empowerment and recognition, transformative mediation declares itself successful. Transformative and narrative processes tend to be ineffective in purely distributive bargaining conflicts at low levels of escalation because the disputants are acting from positions of rational self-interest. They do not need the interpersonal processes designed to change perceptions or create new realities.

Theorem No. 3: Parties will be satisfied with their outcomes based on the nature of their conflict.

Corollary 1 to Theorem No. 3: Outcomes based on settlements or mutual agreements will be satisfactory to parties when their conflict is Stage Three or below and is not driven by relationship or identity goals.

Corollary 2 to Theorem No. 3: Outcomes based on the transformative principles of empowerment and recognition or narrative principles of re-constructing reality will be satisfactory to parties when their conflict escalates above Stage Three or is driven by relationship or identity goals.

Corollary 3 to Theorem No. 3: Outcomes based on reconciliation will be satisfactory to the parties when the conflict is predominately driven by relationship and identity goals.

Rationale: The obviousness of Theorem No. 3 and its corollaries is based on the observation that conflicts have different sources and accelerators. A plaintiff injured in an automobile accident is not as likely to be interested in reconciliation as in compensation. Of course, an apology by the negligent driver would be appropriate, but the real issue concerns the economic losses and general damages the insurance company will pay the plaintiff on behalf of the defendant. Most plaintiffs will be satisfied with a mediation that results in fair compensation for their losses.

On the other hand, if dignitary interests are involved, such that identity and relationship goals are in play, no amount of money will truly satisfy the victim. In these conflicts, parties will usually be satisfied only when the offender acknowledges and accepts responsibility for the offense. Transformative or narrative processes are more likely to achieve this outcome because they rely on interpersonal relationship building.

## Conclusion

This theory approaches mediation from a conflict dynamics perspective, rather than from a process perspective. The debate over process and outcome seems to have ignored the fact that conflicts are as diverse as human society. Thus, this theory anchors the process and outcome debate to the nature of the conflict. When this occurs, the differences between evaluative and facilitative processes can be reconciled and justified.

This theory has a further significant implication for practitioners. A competent mediator must be able to assess the conflict goals in play (including the fact that goals are dynamic during a conflict) and the conflict escalation level (which may not be the same for each disputant).

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Based on this assessment, the mediator must choose the process most appropriate to the situation, with the goal of moving the parties from high to low levels of escalation. As the parties move backward through the escalatory stages and reintegrate their personalities to adult levels of development, the mediator must change processes. Thus, a mediator capable of handling all types of conflicts must be well-educated in conflict theory, conflict dynamics, and process theory. Otherwise, the mediator will face too many conflicts without the skills necessary to produce effective outcomes.

Finally, this model provides a way of explaining the different processes and outcomes to parties and their representatives. Many lawyers and businesspeople are resistant to the transformative and narrative approaches to mediation. Likewise, many people from the therapeutic and counseling professions are antagonistic to evaluative mediation. This theory explains when a process is appropriate and why it is appropriate. The logic of the theory should appeal to a broad array of potential clients.

## ENDNOTES

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