

Resolving Conflict Together: The Understanding-Based Model of Mediation

Presented by

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We are delighted to contribute to this volume of the Journal of Dispute Resolution honoring Professor Leonard Riskin, whom we have known, worked with, and learned from for more than a quarter-century. Professor Riskin has been a pioneer and guiding light in the field of alternative conflict resolution as it has evolved and come of age over the course of this same period. He brings insight and spirit to all his work, and his contributions have been, and continue to be, ground breaking. Students and practitioners, as well as those served by the profession, have benefited richly from the depth, breadth, and care of his thinking, teaching, and writing-as have we. It is a privilege and delight for us to be connected with him as a friend and colleague with whom we share so much. His work is a service of love to the many he touches and for whom his ideas and spirit provide such rich support. We look forward to more.

The following excerpt is from a book in progress-tentatively titled, Resolving Conflict Together: The Understanding-Based Model of Mediation-that is planned to be published in 2007 by the American Bar Association. In this book, we seek to set out the approach to mediation that we have been developing through our work with the Center for Mediation in Law (the Center). We have termed this approach the "Understanding-Based Model" of mediation. The book develops twelve mediation cases, in which Gary served as mediator and which, with commentary, serve to transmit our approach to mediation. Each case focuses on a different aspect of the mediation process. The excerpt here, which we call The Publishing Case, focuses on the role of law in mediation. A note of explication is in order to put this case in context. This chapter is from roughly the middle of the book, and the reader does not have the benefit of the concepts and principles developed earlier. While it is not possible to provide that entire context

in summary, we start with a brief summary of some of the salient aspects of the Understanding-Based Model. We also note that the chapter refers to several concepts developed at length earlier in the book. We hope they will be at least clear in concept.

JOURNAL OF DISPUTE RESOLUTION

The Publishing Case

I. INTRODUCTION

A. The Understanding-Based Model of Mediation Four interacting principles guide this work:

1. **Developing Understanding:** The overarching goal of this approach to mediation is to resolve conflict through understanding. Deeper understanding by the parties of their own and each other's perspectives, priorities, and concerns enables them to work through their conflict together. With an enhanced understanding of the whole situation, the parties are able to shape creative and mutually rewarding solutions that reflect their personal, business, and economic interests. We therefore rely heavily on the power of understanding rather than the power of coercion or persuasion to drive the mediation process. We want everything to be understood, from how we will work together, to the true nature of the conflict in which the parties are enmeshed, where it came from, how it grew, and how they might free themselves from it. We believe the parties should understand the legal implications of their case, but that the law should not usurp or direct our mediation. We put as much weight on the personal, practical, or business related aspects of any conflict as on the legal aspect. In finding a resolution, we want the parties to recognize what is important to them in the dispute, and to understand what is important to the other side. We strive for a resolution to satisfy both.

2. **Going Underneath the Problem:** Experience has shown us that conflicts are best resolved by uncovering what lies underneath them. Conflict is rarely just about money, or who did what to whom. It also has subjective dimensions: the beliefs and assumptions of the individuals caught in its grasp, their feelings, such as anger and fear, the need to assign blame, and the desire for self-justification.

There are also assumptions about the nature of conflict itself, which support the conflict and keep it going-like the theory of the exclusivity of right and wrong. And there are ideas about how conflicts must be resolved, such as the belief that the other person must change his position or that an authoritative third party must decide the outcome. We need breadth and depth of understanding to hope to break out of such a complex and multilayered situation, what we call a "Conflict Trap." Repeatedly, we find that the basis for resolution comes from discovering together with the parties what lies at the very heart of their dispute, which is often a surprise to the parties, and which often has a profound affect on their work together.

3. **Party Responsibility:** This approach is also grounded in the simple premise that the person in the best position to determine the wisest solution to a dispute is not a third party, whether a court or judge or mediator, but the individuals who created and are living the problem. Therefore, we ask the disputants to assume the primary responsibility for working things through, and we ask that they work things through together. As we like to think about it: Let the parties own their conflict.

4. **Working Together:** When we promote working together, we mean that all meetings with the mediator occur with all parties present (including lawyers if they have a role). There is no caucusing, no shuttling back and forth; no secrets to keep from one party or the other; and no private meetings, except for those between the parties and their counsel. Instead of being responsible for fashioning an acceptable solution, the mediator's job is to enable the parties to reach a mutually agreeable solution together.

We believe the impulse to work through conflict together is a natural part of the human condition, though it may be nascent, buried, or blocked. It is hardly recognized in the legal community, but we have seen it, waiting to be tapped and given room for expression. We have seen it succeed for many thousands of individuals and organizations, some of whose stories, like *The Neighbors*, make up this book.

The Center's model shares much in common with a number of other approaches to mediation. For example, we stress the importance of articulating interests that underlie the parties conflicting positions and developing solutions that will serve those interests. There is also much that distinguishes this approach.

B. Parties' Responsibility and Non-Caucus Approach

In the Understanding-Based Model, the emphasis is on the parties' responsibility for the decisions they will make. In this approach, the assumption is that it is the parties, not the professionals, who have the best understanding of what underlies the dispute and are in the best position to find the solution. It is their conflict and they hold the key to reaching a solution that best serves them both. Meeting together with the parties (and counsel) follows from these assumptions about parties' responsibility.

Many other approaches to mediation recommend that the mediator shuttle back and forth between the parties (caucusing), gaining information that he or she holds confidential. Our central problem with caucusing is that the mediator ends up with the fullest picture of the problem and is therefore in the best position to solve it. The mediator, armed with that fuller view, can readily urge or manipulate the parties to the end he or she shapes. The emphasis here, in contrast, is on understanding and voluntariness as the basis for resolving the conflict rather than persuasion or coercion.

We view the mediator's role in the Understanding-Based Model as assisting the parties to gain sufficient understanding of their own and each other's perspective so as to be able to decide together how to resolve their dispute. The parties not only know first hand everything that transpires, but they have control over fashioning an outcome that will work for both. They also participate with the mediator (and counsel) in designing a process by which they can honor what they each value and help them reach a result that reflects what is important to both of them. As mediators, our goal is to support the parties in working through their conflict together, in ways that respect their differing perspectives, needs, and interests, as well as their common goals.

To work in this way is challenging for both the mediator and the parties. The parties' motivation and willingness to work together is critical to the success of this approach. Mediators often assume that the parties (and their counsel) simply do not want to work together, and therefore keep the parties apart. In our experience, many parties (and counsel) simply accept that they will not work together and that the mediator will be responsible for crafting the solution. But once educated about how staying in the same room might be valuable, many are motivated to do so. If the parties (and the mediator) are willing, working together throughout can be as rewarding as it is demanding.

C. Role of Law and Lawyers

Mediators tend to be divided in how they approach the role of law in mediation. Some rely heavily on what a court would decide if the case were to go to trial, authoritatively suggesting or implying that law should be the controlling standard used to end the conflict. Other mediators, concerned that the parties might simply defer too readily to the law and miss the opportunity to find more creative decisions, try to keep the law out of mediation altogether. As developed in the excerpt that follows, in this model, we welcome lawyers' participation, and we include the law. But we do not assume that the parties will or should rely solely or primarily on the law. Rather, the importance the parties give to the law is up to them. Our goals are: 1) to educate the parties about the law and possible legal outcomes, and 2) to support their freedom to fashion their own creative solutions that may differ from what a court might decide. In this way, the parties learn that they can together reach agreements that respond to both their individual interests and their common goals while also being well informed about their legal rights and the judicial alternatives to a mediated settlement. In these and other respects, the Understanding-Based Model seeks to utilize mediation's potential to resolve conflict in ways that honor the parties, their differences, and their relationship.

ABOUT THE ROLE OF LAW AND "THE LEGAL CONVERSATION"

This mediation began with a call from Rob, the lawyer for Rick, owner, president, and CEO of a small publishing house, BookPro. Rob told me that his

client was in a dispute with a writer, Charlene, whom they had under contract, and who was represented by counsel, Carl. I told Rob that I'd prefer to talk with both lawyers at the same time with permission of their respective clients. Rob had anticipated my request and with Carl's agreement and with their clients' permission, we scheduled a conference call for later that day. Carl, who seemed guarded and skeptical, introduced himself as representing Charlene, "who had published with BookPro and who had been under contract but was no longer." Rob quickly countered that the contract was fully in force. It was apparent that the status of the contractual arrangement between BookPro and Charlene was central to their dispute.

The lawyers explained that they and their clients had participated in several previous efforts to resolve this long-simmering dispute, which had taken a sharp turn toward litigation in the prior month. They believed it might be worth making one more try to see if they could avoid trial. I said that I was willing and briefly explained my approach to mediation, that we would work together, all the parties to the conflict in one room. I further asked the two attorneys to prepare a short memorandum that described how they saw the dispute from their perspectives, to send one to me, to exchange them with each other, and to share them with their clients. They agreed. I received the two memoranda by the beginning of the following week. Our first mediation session was scheduled for two days later. The memoranda gave some of the background of the dispute, as well as the lawyers' legal positions. BookPro had published three of Charlene's books as part of a series conceived by her. Their relationship was initially satisfactory, but sales fell off on the third book. Charlene was then approached by a larger publisher who was interested in her continuing the series with them, and she believed that she had the freedom to do so. Rick disagreed and said that according to the contract with Charlene, BookPro had a right of first refusal on all future books in the series.

The lawyers took diametrically opposite legal positions on this key issue. I imagined each had informed his client of the strength of their legal position and the relative weakness of the other, and that this legal context was central to the

ways the parties were experiencing their dispute. Two days later, my hypothesis would be tested.

The nervous banter among the four people in the room came to an abrupt halt when I said, "Let's start." After the lawyers reviewed their previous efforts at settling, I asked why they thought they had been unsuccessful. I was met with short-clipped answers. Each side blamed the other for its intransigence. I had very little idea where they had gotten stuck before, other than in the blame game. We talked generally about the mediation process. No one was particularly hopeful, but all would like to see if they could reach an agreement. We also agreed upon several ground rules, spending a significant amount of time talking about confidentiality, since there was a court hearing already scheduled. I then suggested how we might proceed through "two conversations."

A. The Two Conversations

Whereas the role of law in the traditional system is fairly clear-as the principal guide for judges in making and justifying decisions-its place in mediation is very much in question. As we see it, whether dealt with explicitly or not, the law influences or even directs the action from on stage or off.'

As the mediation progressed, the following history emerged: Charlene had spent a year trying to market an idea she had for a book on parenting, entitled *The Adventure of Parenting*. Thirty publishers had rejected her proposal before she approached BookPro, Rick's fairly new publishing company. Rick offered Charlene a small advance, which she jumped at. The book became very successful, resulting in a second book focused more specifically on the child's first years: *The Adventure of Parenting-From Years One to Three*. At the time the second book was published, Rick and Charlene conceived of a series on parenting, using a similar format to the first two books and covering the remainder of the growing up years in two- to three-year increments. As of the time of the mediation, three books had been published, all of them very successful, with more in the works. But there had been a fall off in sales in the last book. Charlene blamed this on the failure of Rick and BookPro to put sufficient resources into marketing. Rick claimed the cause was a slumping

economy and significant changes in the publishing industry. Meanwhile, a large publisher approached Charlene with an offer to publish the remaining books in the series for a big advance and a promise to heavily market and promote the books.

We were able to make a good amount of progress in the mediation, with each side exchanging proposals that at least narrowed many of their issues, but one issue remained intractable. Rick had entered into a contract with Charlene that he felt gave him the right of first refusal on all her future books on the growing up years. Charlene wanted to be sure that she had an out if she felt that Rick wasn't putting in a sufficient marketing effort to adequately publicize the books, particularly given the interest of the other publisher. We were beginning to explore the question of the business/personal reality in terms of what was important to each that had led them to the positions they had staked out when

Carl turned to Rick:

Carl: You have to understand that you can't lock Charlene into an exclusive with you for all books she publishes in the future, even if it's a continuation of the series that you've already published. Indentured servitude violates the Constitution.

Rob: That's not right Carl, and you know it. There is a clear commitment, spelled out in the contract for the first book and each subsequent one, that BookPro will publish the books in the series.

Mediator: This sounds to me like the beginning of a discussion about the law. Is that something you want to be doing?

Carl: I think it's necessary that they have a realistic view about this issue if we're going to make any kind of workable agreement, but I don't need to go any further with it right now.

Mediator: How about you Rob?

Rob: No, I just needed to be sure that everyone realizes that Carl is wrong.

Mediator: From my perspective you're both being very clear, but you are taking opposite views of the law. I want to say again that I think that it could be a

valuable discussion for us to talk about the law, especially if you'll talk about both the strengths and risks of your legal positions.

Charlene: I think if we don't do that, we're just going to beat around the bush.

Rick: But we need to find a better way than before.

Here we were again, but with one big difference. Now the parties were motivated to have the conversation about the law. They hadn't been ready out of fear that it would quickly degenerate the way it had in the past. But now the failure to have a separate discussion about the law was impeding their efforts to continue the other conversation about their business and personal interests. My concern that not separating the two conversations might cause the two subjects to get mixed up with one another had become the reality in the room.

We return here to an essential point: that the mediator maintain bifocal vision, a focus on both the content and the dynamic, on the "what" and the "how" of the conflict. In so doing, I was able to hear the content of the legal point that Carl was making, and to see how it impeded Rick's and Charlene's conversation about personal and business interests, without adding any legal clarity.

Both parties were quick to realize and acknowledge that unless the conversation about the law were to occur, and to occur differently than it had previously, their ability to work creatively together toward solutions was likely to remain locked within the borders of their Conflict Trap.

Mediator: I know that you're worried about the discussion polarizing you. But if we can do it in a way that brings a fuller understanding into the room than you've had before, it could be productive. To achieve that, both of your lawyers have to be willing to talk about the risks you face. Otherwise, as I see it, we'll just have one more round of diametrically opposed legal positions with neither of you wiser as to how the law might inform your situation.

Carl: I'm willing to talk about risks, but I think you should know that there is very little risk to us in litigating.

Rob: There you go again. Our downside risk is also pretty low.

Rick (to me): You've got your work cut out for you.

Mediator (to Charlene and Rick): Both of your lawyers are working hard and are good at protecting you. But neither of them is saying that you don't face any risks in litigating. I think it makes sense if we ask each of them to clarify your legal strengths, and then talk about risks.

B. The Strengths of Each Side's Legal Position

The point here is likely obvious to most lawyers, particularly if they are looking at mediation from the outside. For the parties to have as full a picture as they can, which is our goal, it's important they understand both the strengths and risks of both side's legal positions. Lawyers are going to be more comfortable sharing their sides' risks if they have first been able to explicate their strengths. When we return to the dialogue, my challenge is to keep the focus on increasing the parties' understanding of the law and how it impacts the possibilities for the parties working together to resolve their conflict. I will, not surprisingly, use "looping" to gain that understanding.

With everyone in agreement, the legal conversation commenced when Carl invited Rob to begin.

Rob: Our position is clear. The contract for the first book had the standard clause giving Rick the right of first refusal on Charlene's next book. The next contract, the one for the second book, has an addendum that gives Rick the right to publish all remaining books that Charlene writes in the series, spelling out the terms of the compensation as well, the royalty percentages, et cetera.

Rob read the addendum aloud: "All future titles to be published by author as part of the Growing Up series shall be published by publisher.

The provisions of the agreement (earlier agreement) shall apply to all titles listed in the series."

----- XXXX -----

Comparison Between Judicial Process and Various ADR Processes

JUDICIAL PROCESS	ARBITRATION	MEDIATION
Judicial process is an adjudicatory process where a third party (judge/ Other authority) decides the outcome.	Arbitration is a quasi-judicial adjudicatory process where the arbitrator(s) appointed by the Court or by the parties decide the dispute between the parties.	Mediation is a negotiation process and not an adjudicatory process. The mediator facilitates the process. Parties participate directly in the resolution of their dispute and decide the terms of settlement.
Procedure and decision are governed, restricted, and controlled by the provisions of the relevant statutes.	Procedure and decision are governed, restricted and controlled by the provisions of the Arbitration & Conciliation Act, 1996.	Procedure and settlement are not controlled, governed or restricted by statutory provisions thereby allowing freedom and flexibility.
The decision is binding on the parties.	The award in an arbitration is binding on the parties.	A binding settlement is reached only if parties arrive at a mutually acceptable agreement.
Adversarial in nature, as focus is on past events and determination of rights and liabilities of parties.	Adversarial in nature as focus is on determination of rights and liabilities of parties.	Collaborative in nature as focus is on the present and the future and resolution of disputes is by mutual agreement of parties irrespective of rights and liabilities.
Personal appearance or active participation of parties is not always required.	Personal appearance or active participation of parties is not always required.	Personal appearance and active participation of the parties are required.
A formal proceeding held in public and follows strict procedural stages.	A formal proceeding held in private following strict procedural stages.	A non-judicial and informal proceeding held in private with flexible procedural stages.
Decision is appealable.	Award is subject to challenge on specified grounds.	Decree/Order in terms of the settlement is final and is not appealable.

No opportunity for parties to communicate directly with each other.	No opportunity for parties to communicate directly with each other.	Optimal opportunity for parties to communicate directly with each other in the presence of the mediator.
Involves payment of court fees.	Does not involve payment of court fees.	In case of settlement, in a court annexed mediation the court fee already paid is refundable as per the Rules.

Comparison Between Judicial Process and Various ADR Processes

MEDIATION	CONCILIATION	LOK-ADALAT
Mediation is a non-adjudicatory process.	Conciliation is a non-adjudicatory process.	Lok Adalat is non-adjudicatory if it is established under Section 19 of the Legal Services Authorities Act, 1987. Lok Adalat is conciliatory and adjudicatory if it is established under Section 22B of the Legal Services Authorities Act, 1987.
Voluntary process.	Voluntary process.	Voluntary process.
Mediator is a neutral third party.	Conciliator is a neutral third party.	Presiding officer is a neutral third party.
Service of lawyer is available.	Service of lawyer is available.	Service of lawyer is available.
Mediation is party centred negotiation.	Conciliation is party centred negotiation.	In Lok Adalat, the scope of negotiation is limited.
The function of the Mediator is mainly facilitative.	The function of the conciliator is more active than the facilitative function of the mediator.	The function of the Presiding Officer is persuasive.

The consent of the parties is not mandatory for referring a case to mediation.	The consent of the parties is mandatory for referring a case to conciliation.	The consent of the parties is not mandatory for referring a case to Lok Adalat.
The referral court applies the principles of Order XXIII Rule 3, CPC for passing decree/order in terms of the agreement.	In conciliation, the agreement is enforceable as it is a decree of the court as per Section 74 of the Arbitration and Conciliation Act, 1996.	The award of Lok Adalat is deemed to be a decree of the Civil Court and is executable as per Section 21 of the Legal Services Authorities Act, 1987.
Not appealable.	Decree/order not appealable.	Award not appealable.
The focus in mediation is on the present and the future.	The focus in conciliation is on the present and the future.	The focus in Lok Adalat is on the past and the present.
Mediation is a structured process having different stages.	Conciliation also is a structured process having different stages.	The process of Lok Adalat involves only discussion and persuasion.
In mediation, parties are actively and directly involved.	In conciliation, parties are actively and directly involved.	In Lok Adalat, parties are not actively and directly involved so much.
Confidentiality is the essence of mediation.	Confidentiality is the essence of conciliation.	Confidentiality is not observed in Lok Adalat

A Role Play to Demonstrate the Differences Between Adjudication and Mediation “*The Family Portrait*” FACTS:

Their father died recently, leaving the family property to the two sons. Their mother died earlier, so both parties are the sole surviving heirs. Their father's will is clear regarding the family home and his other personal property - everything has been divided fifty-fifty. However, the will mentions that the family portrait, an original painting by a famous Indian Painter, of their parents and grandparents, and which is a cherished family possession is to go to the father's "favourite child". The will does not name his favourite child. The two brothers cannot agree on who the father's

favourite child is. Exercise: Resolve the dispute using (i) arbitration (adjudication) and (ii) mediation. Exercise (i) Arbitration (Adjudication)

The arbitrator has to first decide upon what the "issue" in dispute is : Which child fits the definition of the "favourite child"?

Each party (child) presents reasons to the arbitrator as to why they believe that they were the favourite child.

The arbitrator evaluates the evidence and decides who fits in the definition of "favourite child" - the painting is awarded to that child.

No compromise is permitted. The arbitrator must make a decision as to who is right and who is wrong depending on (i) the meaning of "favourite child" and (ii) an appraisal and comparison of each party's evidence as to why they were the "favourite child".

----- XXXX -----