

BOOK REVIEW

METHODOLOGY IN ACTION: ON CONSISTENCY, ACCURACY AND PROFICIENCY IN MEDIATION

TRANSFORMATIVE MEDIATION: A SOURCEBOOK – RESOURCES
FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS.

By Joseph P. Folger, Robert A. Baruch Bush, and Dorothy J.
Della Noce, Editors. A joint publication of the Association for
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Study of Conflict Transformation (2010).

Reviewed by Ran Kuttner¹

INTRODUCTION

Over seventeen years have passed since the first edition of Bush & Folger's *The Promise of Mediation*.² Edited by Bush and Folger together with Dorothy Della Noce, *Transformative Mediation: A Sourcebook – Resources for Conflict Intervention Practitioners and Programs*³ offers a new and important contribution to our understanding of the promise of mediation, this time not necessarily because of the particular ideology of the transformative approach, but because of the manner in which this volume demonstrates how mediation scholarship can further develop mediation proficiency. The promise of mediation and the future of its institutionalization as a respected, distinct profession lies in the field's ability to develop methodologies with coherent theoretical grounds and systematic, consistent professionalization and implementation processes. The authors contributing to this volume do just that, persistently emphasizing the linkage between the theoretical foundations of the transformative approach and the continuous

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² ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).

³ JOSEPH P. FOLGER, ROBERT A. BARUCH BUSH & DOROTHY DELLA NOCE (EDS.), *TRANSFORMATIVE MEDIATION: A SOURCEBOOK – RESOURCES FOR CONFLICT INTERVENTION PRACTITIONERS AND PROGRAMS* (2010).

construction of the practice of mediation as they see it, thus inspiring further development of more systematic, consistent methodologies in other mediation ideologies.

In this volume the theoretical foundations gain further clarity, and the implication of these foundations in practice is examined in new terrains, exploring how transformative mediation is implemented in various contexts (family mediation, organizational settings, multi-party processes, etc.), thus nurturing the branches of a tree well rooted.

NOURISHING THE ROOTS

The main focus of the first part of the book is the premises and principles of the transformative framework. The clarity of the framework and of its theoretical underpinnings is essential in order to move on to its implications to the practice, which are described at length in the second and main part of the book. The first two chapters, by Bush and Folger, mainly repeat the foundations laid in previous writings and summarize the core practices as taught in Transformative Mediation trainings. The authors demonstrate the consistency of these practices with the theoretical foundations. The practices were never before articulated in the Transformative Mediation literature outside of training manuals.

In the third chapter Baruch Bush clarifies the theoretical grounds of empowerment and the challenges involved in allowing self-determination in the mediation process. Through self-critique, he discloses his failure to fully grasp and understand the principles of empowerment and their implications to the practice in the Landlord-Tenant case, detailed in the first edition of *The Promise of Mediation*.⁴ Bush elaborates on both the qualities and the challenges that the mediator faces in her own transformation journey to become a transformative mediator (Chapter 9 provides a detailed reflection of the gradual transformation journey of a community mediation center over a period of eight years). He explains that in the earlier phase, though as a mediator he was not “pushy” with regard to outcomes, he was still pushy with regard to process issues. In the second phase he learned to develop what is a very non-intuitive and somewhat controversial skill of allowing parties to have self-determination also with regard to process issues (p.

⁴ See BUSH & FOLGER, *supra* note 2, at ch. 6.

54), pushing traditional understandings of non-coercion and mediator's support to an extreme. Bush's transparency allows the reader to better understand the obstacles and misconducts of exercising empowerment and self-determination in mediation. Though Bush relates in this chapter various criticisms of the notion of empowerment found in the literature following the first edition of *The Promise of Mediation*, it could have been enlightening to discuss different understandings of the term, for example, Sara Cobb's concept of empowerment, which holds different theoretical foundations and emphases.⁵

Chapter 4, by James Antes, describes in detail the certification and coaching process that transformative mediators undergo. This chapter is well suited to the first section on theory, as the thorough coaching and evaluation process cannot be disconnected from the theoretical grounds. The trainee is asked to demonstrate the accuracy required from transformative mediators while articulating why she did what she did in the mediation session based on the theoretical grounds of the framework. There is no room for unexplained moves or usage of intuition as a justification, as the transformative mediator is expected to act from a clear understanding of the premises and principles of the framework and their implication to the practice. The mediator's work is methodological, not coincidental, accurate and not without clear vision and reasoning. It may seem disempowering and dogmatic at first to ask a mediator to provide clear reasoning for each and every one of her moves, but this is not the case: the mediator is empowered to establish firm grounds and to master the framework within which she is working, helping her to arrive at a clear understanding of where she is coming from and why she is acting the way she does in each moment of the mediation session. This is an expectation not different from what we, as mediators, ask our clients to do during mediation—to articulate accurately, with clear vision and reasoning where they are coming from when making certain claims. Do we ask the same from ourselves? Do we fully grasp the premises that underlie our actions as mediators? It seems that the transformative approach offers us a worthy challenge for deepening our practice. "Competent practice," writes Antes, "emerges from basic premises about people and conflict. Mediation practice is not simply a collection of 'dos' and 'don'ts' but instead is the application of these basic premises in the moment-to-moment events of conflict interaction"

⁵ See Sara Cobb, *Empowerment and Mediation: A Narrative Perspective*, 9 NEGOT. J. 245 (1993).

(p. 89). However, I wonder whether this expectation is not at times too rigid (or even religious): “When a signpost event occurs, the mediator is at a crossroads, where one of two (or more) paths may be taken. The transformative path includes the type of interventions that are compatible with the transformative orientation. The non-transformative path(s) include(s) interventions that are commonly recommended by advocates of other mediation perspectives but which are not compatible with the transformative framework” (Antes, p. 81). I wonder if there is a third way, which requires less of a dramatic choice—“either you’re one of ours or you’re one of them”—a way that is neither fully justifiable within the transformative framework, nor inconsistent with its orientation, even if stemming from theoretical grounds different from those of the transformative approach.

The coaching process is also consistent with what Della Noce clarifies in Chapter 7. Elaborating on the communication-based foundations of the transformative approach, Della Noce, a communication professor like Folger, clarifies that a communication perspective of conflict embraces three principles: (i) conflict interaction is understood through attention to micro-analysis of specific verbal and nonverbal cues; (ii) meaning is socially constructed, emergent and interpretive; and (iii) context is critical to understanding how people construct and interpret meaning (p. 147). Transformative shifts, therefore, can be identified only with and by examining micro-moments of communication, and this is consistent with the coaching process, which includes micro-focusing on and analyzing the mediator’s responsiveness in moments of interaction. The contribution of communication scholarship is evident and well clarified in this chapter, and hopefully we will see more scholarship in the ADR field that synthesizes lessons and methodologies learned in communication studies.⁶ Della Noce also emphasizes the relational foundations of the transformative framework, clarifying that the empowerment and recognition shifts sought for and identified by the mediator are interactional shifts, i.e. identified not at the level of a single individual but in the interaction constructed between individuals. This is an important and

⁶ For recent examples see A.C. Garcia, *Negotiating Negotiation: The Collaborative Production of Resolution in Small Claims Mediation Hearings*, 11 DISCOURSE & SOC’Y 315 (2000); Linda L. Putnam, *Discourse Analysis: Mucking Around with Negotiation Data*, 10 INT’L NEGOT. 17 (2005); Phillip Glenn, *A Mediator’s Dilemma: Acknowledging or Disregarding Stance Displays*, 26 NEGOT. J. 155 (2008); Phillip Glenn & Ran Kuttner, *Dialogue, Dispute Resolution, and Talk-in-Interaction: On Empirical Studies of Ephemeral Phenomena*, 5 NEGOT. CONFLICT MGMT. RES. (forthcoming Feb. 2012).

also non-intuitive and somewhat controversial emphasis, as we normally tend to focus our attention on the individual as the primary unit of analysis. Further discussion on the differences and potential synthesis between the relational constructionist theory offered by Della Noce and that offered by social-constructionist theorists, one of whom she only mentions in a footnote (McNamee)⁷, can add to this discussion. Chapters 5 and 6 bring research-based support to the relational worldview and its view of interpersonal conflict.

NURTURING THE BRANCHES

The second and main part of the volume is dedicated, as mentioned, to the implications of transformative mediation theory to its practice in various settings. Divided into four sections, the editors focus on courts, family, organizational and multi-party settings. They made an interesting choice to start with the courts, the most controversial and commonly designated as inappropriate for the transformative style of mediation. It is claimed that transformative mediation may suit cases where there are long-term relationships, but in one-time transactions, or when under the shadow of the law, the transformative approach is less appropriate or effective.⁸ Folger refutes this claim in Chapter 8, bringing empirical evidence from seven court-connected programs as reported by their directors. It does not take Folger long, three pages into the chapter, to quash the common criticism by concluding that “based upon their experience with court-referred mediations, these program directors indicated that they could not envision a court case that would not be appropriate for transformative mediation” (p. 167). This conclusion, even if less controversial in light of the evidence presented by Folger, is definitely provocative. It would be interesting to see if and how those who made the arguments against the effectiveness of the transformative approach in such settings would respond to the evidence brought by Folger in this chapter. Folger walks the reader through the various challenges the directors had to face while implementing this mediation framework in the courts, thus offering a roadmap and tools to help others answer potential resis-

⁷ See FOLGER ET AL., *supra* note 3, at 155, n.69.

⁸ See Bush and Folger’s earlier response to this claim in ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (NEW AND REVISED EDITION) 218-221 (2005).

tance and misperceptions in these settings, where judges, court administrators, lawyers and disputants are inclined toward more conservative interpretations of the mediation process.

Chapter 10 elaborates on the tension between the values of transformative mediation and what may appear as contradicting lawyers' values. Here, the authors, Miller and Bush, refute an additional common assumption—that lawyers should eschew transformative mediation even more than other conservative forms of mediation, since its open-ended nature allows less control by the lawyer and more tempting moments for party's disclosure that from a lawyer's perspective may be regretted afterwards. The interesting argument the authors make is that even though transformative mediators believe that it is better to engage rather than avoid conflicting issues, at the end of the day parties' self-determination prevails, and if parties' determination is to follow her lawyer's advice to refrain from engagement, the transformative mediator will have less of a tension with the lawyer than the facilitative or evaluative mediator, who may put less emphasis on party-and-lawyer's choice. In a way, the notion of empowerment appeals not only to the party but also to her lawyer, and that should make the lawyer feel more comfortable with the transformative framework than with other mediation frameworks. If empowered, the authors conclude (p. 226), lawyers may transform destructive adversarial conflict dynamics they were drawn into. This has to do with their own well-being, which transformative mediation has the potential to positively affect.

This conclusion may be perceived as naive or unrealistic. So does the analysis, in Chapter 11, of the alternative that transformative mediation offers to restorative justice processes. Following the theme of parties' self-determination, Bernard Le Roux explains, using his experience with restorative justice processes in the Swedish court system, that the transformative ideology should replace the ideology and practice of restorative justice where the mediator's attempt to impose a certain structure and stage-model framework robs both the victim and the offender of their ability to exercise self-determination and be empowered, an essential step for transforming their conflict-interaction. The analysis is somewhat preliminary and refrains from discussing the dangers or limitations of exercising the transformative ideology without adapting to the unique complexities of the victim-offender context. This chapter, in particular, exposes the need for the development of the psychological theory that underlies the transformative approach,

regardless of the authors' repeated assertion that this is a communication-based model. Just as the communication-based scholarship in this volume is contributive, so would be psychology-based scholarship that expounds on the preliminary psychological grounds offered by Bush when describing some themes from Carl Rogers' work in his chapter on empowerment. In the context of the restorative justice discussion, for example, I wonder whether it is as simple as granting self-determination and parties' control that would allow a shift from destructive to constructive conflict interaction in cases where the parties arrive at the process after having at times a history of harsh encounter.

The second section in part two contains chapters on the implementation of transformative mediation in family settings, which seem to be a more natural ground for the transformative framework. An important argument Simon makes in his informative opening chapter on divorcing couples is that the focus on improving connection does not necessarily mean withdrawal from the divorce process, but acceptance and ability to go through this difficult process with a sense of strength about their own/mutual ability to manage the conflicts along the way. Parties' self-determination is also the main theme of the following chapter, where Greenberg discusses parenting-coordination planning for divorcing couples. In these settings intervention is needed to help high conflict families with ongoing unresolved conflicts and their day-to-day management. The parenting-coordinator does have decision-making authority, unlike a mediator. In these situations, Greenberg explains, the use of this decision authority cannot be productive as these families both rely on the court-ordered parenting plan but are unable to follow through on any such plan.

Alas, it seems once again that a more in-depth psychology-based theory is needed in order to further clarify what may be parties' needs in these harsh situations. It is not clear whether this ideology/belief in parties' needs overshadows the complexities of such high conflict situations. The author rightly emphasizes that choosing to incorporate the transformative mediation framework in parent-coordinator work is more than anything else a statement about the assumptions of the mediator, the way in which she understands and analyzes destructive conflict interaction (p. 280). The question that comes to mind is the question of the fine line between a governing theoretical framework and an overly-imposed ideology; how does one guard herself from painting reality with certain brushes in a sweeping manner, of approaching life's com-

plexities with an agenda that may eventually be limiting? How does a transformative mediator manage the potential tension between the firm ideological grounds foundational to the transformative approach and the premise that transformative mediation approaches conflict situations with no agenda? In any case, this chapter's emphasis on parties' self-determination in the context of a process where the third party has decision-making authority conveys an important message: that those who have that authority should use it with much restriction and make use of it only when having no other choice but to make a decision for the parties.

Chapter 14 does include psychology research on the topic of the chapter, marital conflicts. The authors suggest that transformative family mediators can help couples "fight well," consciously muddying the distinction between mediation and therapy, claiming that "the lines between these two processes have become increasingly blurred" (p. 303). They offer an additional role for family mediators, a role traditionally reserved to marital therapists until now. The last chapter in this section discusses how transformative mediation can make a difference in elder mediation, since elders are commonly treated in a non-respectful manner.

The following section focuses on transformative mediation in the workplace. Following Lisa Bingham's report in the first chapter on the REDRESS project of implementing transformative mediation at the US Postal Service, Chapter 17 follows the theme of organizational change and suggests that "empowerment and recognition provide more than just an effective response to conflict. These ideas also provide guidance and direction in constructing organizational life itself" (p. 341). The authors, Maria Stalzer and Wyant Cuzzo, are focusing on the introduction of a new value set that not only provides a basis to approaching conflicts but also introduces a new value set that can change day-to-day decision-making. This fascinating chapter brings the story of such an organizational transformation—a medium security prison, of all places, which in spite of its strict hierarchical command/control environment underwent a meaningful transformation. It is interesting to witness the work of a transformative mediation-oriented consultant, who implements the value of empowerment on all levels, allowing the participants in the program to determine how it unfolds and to experiment with ways that ideas of empowerment and recognition "might positively impact the way the facility did business" (p. 355). Another interesting and uncommon insight the authors bring is that "the likelihood of that culture change occur-

ring is heavily dependent on how provocative the workplace dispute resolution system is in its ideology and approaches” (p. 357), uncommon in light of the more common belief in meeting an organization where it is and taking small steps towards change. This provocative attitude that challenges the status quo of organizational culture and the notion of following the participants’ agenda may seem to be in conflict with each other at first, but the integration between the two offers an interesting and challenging view of organizational transformation through a consultant’s implementation of the transformative approach.

In the following chapter Folger focuses more specifically on team building in organizations, starting with the underlying communication-based premise that requests for team building often stem from self-perceived deficiencies in the team’s interaction (p. 360). While in mediation processes a central criticism of the transformative approach revolves around the difficulty most mediators have with the assumption that the goal of the process is to help restore communication rather than to problem-solve, in the team building realm such criticism is less likely to have similar magnitude, since team building processes indeed often require focus on communication-building without necessarily having a designated problem in need of resolution. Therefore the potential of transformative-facilitation in dialogue-driven processes has more likelihood of becoming mainstream. Notwithstanding, Folger challenges the team building intervener to maintain a mindset of improving the quality of the conversation rather than seeking the resolution of problems. While Folger calls the team building intervener a “consultant” when mapping the steps of the Transformative Team Building Process (p. 372), it is almost similar to the framework presented in mainstream facilitation literature.

The last chapter in this section offers a fascinating analysis that aims at grounding conflict resolution education (CRE) in a transformative theory of conflict. It fits within a section on organizations as according to the author, Lisa Hershman, “transformative principles and practices . . . have the potential to serve as a coherent basis for coordinating all of school’s academic, prevention, and youth development activities” (p. 383). Well grounded in child development theory, Hershman demonstrates how empowerment and recognition, i.e. the construction of a self separate from others with a capacity to appreciate views different from one’s own, is central to children’s development. However, though it is true that well-managed conflicts are important for acquiring these skills,

conflict settings are yet to be proven ripe for empowerment and recognition shifts among children.

The last area of implementation is multi-party settings. In the first chapter in this section the authors, Judith Saul and Scott Sears, undertake a difficult task, to point out the uniqueness of a transformative/relational approach to facilitation in relation to other existing models of mediation. This application of the transformative/relational approach is more difficult than in other settings because facilitation processes are often not problem-solving but communication-based. Indeed, while the authors emphasize their unique standout of having clear theoretical grounds on which to base an emphasis on “supporting individuals and groups in their learning” (p. 415) and on supporting the group’s engagement with conflict instead of focusing on people’s hopes for “tangible progress on their specific issues” (p. 415), in practice their highlighted premises bear much resemblance to what mainstream facilitation scholarship offers. The following chapter also presents preliminary stages of exploration of implementing transformative mediation in multi-party settings. Sub-titled “an emerging initiative,” Bush and Folger’s chapter describes the potential contribution of the transformative approach in ethno-political conflicts. The bottom-up, parties-driven emphasis is uncommon in ethno-political conflict intervention, they explain, where the complexity of the setting influences interveners to rely heavily on their conception “of how conflict should be managed or must evolve” (p. 419). It is somewhat surprising that the persistent priority placed on self-determination is not questioned even once when the authors address conflicts involving other cultures. Self-determination is a foundational value in the culture in which Bush and Folger write, but that perspective is not universal. Consistent with the authors’ emphasis on bottom-up processes, there is room for focus on the importance of track-two and people-to-people initiatives; peace agreements signed by leaders are not sufficient for sustainable co-existence among the citizens, and this is another theme that the transformative approach can further emphasize in the context of ethno-political intervention. Bush and Folger discuss the importance of sustainability, explaining that the transformative approach, with its emphasis on ongoing relations and transformation of destructive conflict patterns, has a lot to offer.

The final chapter in the volume does make the claim “know your own cultural assumptions as best as you can and continue to learn” (p. 447). The author, Kristina Paranica, describes her inter-

ventions in Native American culture and the added value of using the transformative approach there when taking into account the cultural differences. She emphasizes at length the advantages of the transformative approach; however, further elaboration on the foundational differences between the organic worldview (in search of social harmony) that underlie Indian culture and the relational worldview that Bush and Folger made significant effort to distinguish from the organic worldview,⁹ may enrich the discussion. Indeed, the author describes cultural differences that challenged her to adjust (e.g. the different perception of time, the inappropriateness of reflecting back utterances of elders), but the more foundational discussion on the need to compromise the premise of self-determination in “a culture who responds in the plural pronoun ‘we’” as opposed to “a culture who responds in the singular pronoun ‘I’” (p. 434) is left untouched. In these closing pages of the volume, a volume that reinforces Bush and Folger’s assertion from the introduction that “there is little doubt that a clearing is now firmly established for transformative practice in the conflict intervention landscape” (p. 4), there is more room to discuss the inconsistencies and inaccuracies, the tensions and even the places of self-doubt, as part of a reflection on the implementation of the transformative approach to mediation. Such a discussion will not lead to the abandonment of the transformative approach but to a richer understanding of the challenges the consistent and accurate transformative mediator is facing, a discussion that would enrich the ongoing journey of developing the transformative methodology and proficiency.

CONCLUSION

It seems that the transformative framework’s internal discourse can be enriched by a more attentive and non-refuting dialogue with voices in the ADR field different from its own. It seems, to use the transformative approach’s vocabulary, that there is a certain amount of self-absorption in this internal discourse. Much of the writing is focused on proving itself right, and others wrong at times, while lacking recognition of the dilemmas and complexities offered by the internal discourse of other frameworks. This, in a way, presents a non-constructive manner of managing its tensions with other mediation frameworks. There is a sense of

⁹ BUSH & FOLGER, *supra* note 2, at ch. 9.

over-simplified criticism of other frameworks (for example, it is an inaccurate generalization to assert that “the advice commonly offered to facilitative mediators to . . . limit the expression of emotions” [Antes, 142] or that facilitative divorce mediators always begin with the mediator asking “are you of the opinion that the marriage should end at this time?” [Simon, 250]). Rather, a fruitful discussion may consist of describing in a more nuanced and empathic manner the differences between different frameworks, where scholars who also tame the settlement-driven drive (for example in family mediation, restorative justice cases or facilitated processes) present ideas different from but at times consistent with the transformative framework. This may be contributive and challenging to both transformative scholarship and practitioners not following the transformative premises. It would allow many good mediators, who do not wish to conform to the transformative methodology, to better relate and be influenced by some of its premises and practices.

This does not undermine the achievement of this volume. While we still seek to convince that mediation is a profession, that to become a mediator one needs to study and practice far beyond a 30- or 40- or even 60-hour course, the transformative framework provides us with a reliable demonstration of this argumentation. One does not need to be in agreement with its theoretical grounds, nor with how mediation is practiced by a transformative mediator, in order to applaud the consistent, methodological manner in which it continues to build its proficiency, an outstanding case in the emerging ADR field. With its clear theoretical foundations, training codes, growing body of empirical validation, and gradual attempt to develop its unique fingerprint in various areas, this volume demonstrates that the consistent reliance on theoretical premises furthers the transformative mediator’s proficiency. Even though many questions are left unanswered, the transformative framework leaves the mediation room and meets the growing need to shape the role of the conflict specialist beyond and outside of the mediation process.¹⁰ With its clear theoretical foundations and set of practices, this volume pushes the boundaries of the transformative conflict specialist’s intervention capabilities and offers the promise of transformative conflict intervention in team building, group facilitation, organizational culture change, crime-related mediation, marital problems, education, ethno-political and cross-

¹⁰ See BERNARD MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* (2004).

cultural conflicts. In most cases they push the boundaries not only of the transformative approach but of the field at large, as they offer new terrains and blur the distinction between the work done by the conflict specialist and other forms of intervention and consultancy (e.g. marriage consultancy or organizational development consultants).

I remember a private conversation with Baruch Bush, in which I spoke of “the art of mediation.” He stopped me, gently correcting: not art, craft. There is no room for romanticizing, no place for symphony of choice. The becoming of a professional mediator requires hard work and much theory-based practice, where one cultivates the proficiency of knowing how to act—not because of some unexplained intuition but by having established firm grounds in the foundations offered by the theoretical premises and principles. In the pre-postmodern world, this is called being methodological; in modernist terms, this is how proficiency is gained. If there is a promise in this phase of institutionalizing mediation, exactly four decades after Lon Fuller’s seminal and visionary article “Mediation – Its Forms and Functions,” it is in its professionalization, in offering further proof that mediation is a profession with significant theoretical grounds—be it transformative, narrative or whatever methodology is acquired and practiced. We can be critical of the transformative approach (and I am), we can disagree with its theoretical foundations or its practice (and I am),¹¹ but we ought to be inspired by the continuous nourishing and nurturing of transformative mediation, and the growth in proficiency which results. And I am. Kudos to the Association for Conflict Resolution for joining the Institute for the Study of Conflict Transformation in publishing this book, hopefully thus conveying to its many members the message of mediation proficiency and helping with the ongoing move away from problem-solving and towards communication-based, relational understanding of the service conflict specialists have to offer.

¹¹ Ran Kuttner, *Striving to Fulfill the Promise: The Purple House Conversation and the Practice of Transformative Mediation*, 24 *NEGOT. J.* 331 (2006).

