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IV. DISCOURSE PATTERNS OF COMPETENT TRANSFORMATIVE MEDIATORS

Given our concern with mediator practice competency, we discuss markers of transformative practice here with a focus on mediator discourse. The focus on discourse allows us to solidify fundamental but abstract theoretical concepts (such as empowerment and recognition), so they can be coded and analyzed by assessors, and just as importantly, taught to assessors.

We introduce here three levels of mediator discourse at ascending levels of complexity: means, moves, and strategies. Each has an important role, but each provides different insights on the competence of the mediator. The role of each of these levels in assessment will become more apparent when we discuss the assessment process itself in a later section.

A. Means

In mediator discourse, the "means" are the linguistic "forms" a mediator intervention takes, such as reflection, summary, or question. Mastery of certain basic linguistic forms contributes a certain degree of fluency to mediator discourse. However, because this basic level of discourse has no inherent meaning or function, assessment at this level alone provides little insight on competence in transformative practice. For example, a summary could be used to open up a party-to-party conversation (transformative practice) or to shut it down by changing the topic or the speaker turn (contrary to transformative practice); a question can be used to follow the parties' conversation for elaboration (transformative practice) or to change the topic of their conversation (contrary to transformative practice). Therefore, the "means" of mediator intervention, while important, are less informative regarding practice competence than how he or she uses them in context. Assessment of competency requires that we look at a more complex level of discourse.

B. Moves

The next level of complexity is discourse "moves." A useful way to think of discourse "moves" is as "meaning-making units," or to borrow a term from Boyatzis, "codable moments." A single turn at talk is often made up of multiple moves. "Moves" provide insight on how a mediator structures his or her turn in the interaction in response to preceding interactions—taking into account the means of intervention as well as specific linguistic features, such as noun and pronoun use, that demonstrate how the

mediator is orienting to the prior turns at talk. Because mediator moves key into "local" context (prior turns), they provide valuable insight on competence (especially with respect to whether the mediator is "following" the parties). However, moves still focus primarily on the mediator's behavior turn-by-turn, and provide relatively little insight into the purpose of that behavior, its consistency or inconsistency over time, its effects on the ongoing interaction, or the overall character of the interaction being shaped.

C. Strategies

Finally, a further level of complexity is discourse "strategies," recurrent patterns of moves that braid together over time. Because strategies, in the communication sense, refer to patterns over time, they are viewed and understood retrospectively. Of the three levels of discourse outlined here, strategies provide the greatest insight on competence because they reveal the coherent function of mediator moves over time in terms of how the mediator uses and combines various moves to consistently support party efforts at empowerment and recognition—revealing the purpose of the mediator's interventions, the effects of those responses on the continuing interaction, and the overall character of the interaction being shaped through the discourse. Said another way, strategies provide a way of analyzing and describing collections of mediator moves (made by using such means as summaries, reflections, questions, and statements), as they appear in context, in terms of their responsiveness to the parties' interactions and their effects on ongoing interaction.

In the Interactive Rating Scale Assessment, "moves" are the units of coding or the "codable moment," and "strategies" are the units of analysis on which decisions about mediator competency are based. We will return to this distinction later in this Article. But first, it is important to illustrate what we mean by moves and strategies in the discourse of competent transformative mediation practice. In the subsections that follow, we discuss five essential discourse strategies of competent transformative practice, as well as typical mediator moves that make up each of those strategies. We begin each subsection with a description of the strategy and its importance to transformative practice. We describe mediator moves that support each strategy, and provide examples from actual mediator interventions. We also describe mediator moves that would not be supportive of each strategy (i.e., that would be contrary to competent transformative practice).

1. Strategy 1: Orienting the Parties to a Constructive Conversation

"Constructive conversation" is an important root metaphor for mediators working in the transformative framework. This metaphor is significant for transformative practice at a number of levels. First, it is a distinctly Relational metaphor, embracing the joint participation of all concerned parties in a constructive dialogue. Second, because of its Relational roots, the conversation metaphor embraces the two signature dimensions of transformative practice: empowerment and recognition. It is an inherently empowering metaphor, as its introduction conveys the message that mediation is simply the familiar process of conversation in which participants are presumed competent. At the same time, introduction of this metaphor orients the parties to the possibility of interpersonal recognition built through dialogue. Third, by focusing the mediator on the importance of

party-to-party conversation, the metaphor supports mediator efforts to engage in a microfocus on the parties' interaction. Finally, the conversation metaphor allows for a definition of success that goes beyond agreement alone, as a successful conversation can result in greater understanding of the other, of choices to be made, and of potential consequences, whether agreement is reached or not.

Competent transformative mediators often introduce the conversation metaphor early in the session, as they describe the mediation process and the mediator's role in their opening comments. The conversation metaphor also can be a useful touchstone for mediators throughout the process. When mediators feel pulled toward narrowing, directive, or solution-focused behaviors that would place their agenda above the agenda of the parties, the conversation metaphor reminds the mediators of the purpose of mediation and that the focus should be on the parties' interaction and their choices about whether and how to have their conversation.

a. Supportive Moves

Certain mediator moves demonstrate that the mediator is orienting the parties to a constructive conversation. Two that are quite typical are:

1. Using a metaphor of conversation to describe mediation or the mediator's role (including such words as "discussion," "chat," "talk," etc.); and
2. Identifying inherent constructive possibilities in having a conversation, such as talking over differences, increasing clarity and interpersonal understanding, seeing choices, and making decisions.

Consider this example, taken from a mediator's opening comments, where the italicized text illustrates the mediator using the conversation metaphor and pointing to inherent constructive possibilities:

> *Example 1: "I see my role as a mediator to assist you in conversation and discussion. So that, I'm not going to be making any judgments about what I think is best for you. That, I think you are the two people who are in the best position to make those judgments. And, if you're having some differences about what's best for you and your children, then this is a place for you to talk, talk over the differences, um, and I see my role as helping to clarify your thinking about them, helping you to clarify your thinking, in the sense of understanding your own goals, your own needs, and understanding the other person's."*

b. Non-Supportive Moves

At the same time, it should be noted that certain mediator moves do not support an overall strategy of orienting parties to a constructive conversation, including:

1. Using metaphors that disempower the parties by positioning the mediator as an authority figure or expert: such as, referring to mediation as a "hearing" and using related legal terms; referring to the legal, therapeutic, or substantive expertise of the mediator; assuming an analytical stance "above" the parties;

2. Using metaphors that suggest that the outcome is more important than the conversation itself: for example, negotiation, settlement, problem-solving, problem, and solution; and
3. A focus on agreement as the definition of success.

Because these moves are contrary to competent transformative practice, the mediator with a transformative orientation should avoid them.

2. Strategy 2: Orienting the Parties to Their Own Agency

Party agency is another important concept for transformative practice. "Agency" is "a person or thing through which power is exerted or an end is achieved." In the transformative framework, mediators orient the parties to their own agency—that is, their own potential ability to exert power or achieve certain goals in the mediation session.

Orienting parties to their own agency is a strategy directly tied to empowerment. It means using language that signals the parties' ability to act and to decide, if they so choose, as well as language that signals the parties' central role in the mediation. This is in contrast to language that signals that the mediator has the central role in the process. In general, a mediator is utilizing this strategy when he or she conveys to the parties that "this is all about you," rather than "this is all about me." This is often as easy to identify as what pronouns the mediator generally uses (i.e., more "you" talk than "I" talk). Another way to identify this strategy is through moves that show the mediator "getting out of their way," as opposed to "getting in their way."

a. Supportive moves

Certain mediator moves demonstrate that the mediator is orienting the parties to their own agency. Some that are quite typical are:

1. Using the second person subject, singular and plural ("you"), in questions, summaries, and reflections;
2. Using second person possessive adjectives ("your"), in questions, summaries and reflections;
3. Using parties' names in the subject position of a sentence, thereby "constructing" them as people capable of action;
4. Downgrading mediator agency (e.g., emphasizing mediator role as "assisting" or "helping," or otherwise disclaiming mediator power or authority);
5. Using reflections that "follow" a party's own comments;
6. "Getting out of the parties' way" (e.g., allowing the mediator to be interrupted or corrected); and
7. Offering reflections of a party's comments in a tentative manner, especially by using "check-ins" or ending with an open, questioning tone (e.g., "is that what you were trying to say?").

Consider again the text of *Example 1*, above, from a mediator's opening comments, this time noting how the (different) italicized words and phrases orient the parties to their own agency and simultaneously downgrade mediator agency:

> *Example 2: "I see my role as a mediator to assist you in conversation and discussion. So that, I'm not going to be making any judgments about what I think is best for you. That, I think you are the two people who are in the best position to make those judgments. And, if you're having some differences about what's best for you and your children, then this is a place for you to talk, talk over the differences, um, and I see my role as helping to clarify your thinking about them, helping you to clarify your thinking, in the sense of understanding your own goals, your own needs, and understanding the other person's."*

An important point to notice in comparing *Example 1* with *Example 2* is that, in the same "piece" of discourse where the mediator oriented the parties to constructive conversation, she also oriented them to their own agency. This is what was meant earlier by discourse being multifunctional. The mediator accomplished multiple discursive goals within a single turn at talk by braiding together a pattern of multiple moves in context.

This second example of the strategy of orienting the parties to their own agency is a series of reflections directed to each party. This series of reflections followed an interchange between the parties about one party's proposal that took approximately twenty turns at talk between them, and is notable for how it orients each of the parties to their own agency through the italicized segments:

> *Example 3: (Mediator) So, you have some details you want to talk about here I think, as far as . . . but I just wanted to, not let drop, the, uh, comments you were making about the philosophy you were bringing to your thinking in developing this, and your reactions to it, Bill. And it sounded as though you were saying, Anne, that you, you wanted to, be able to maintain yourself, and the kids when they're with you, in a standard where you feel you're not being short-changed. That, you're not living at a poverty level, and that that's gonna take help from Bill. A lot of . . . .*
>
> *(Anne) I have no income. I'm in school.*
>
> *(Mediator) And, and Bill, you were saying that, you're, you really essentially do want that, to the extent . . . but you're not sure that you have income available, to provide everything as you see it on the list now. But . . .*

b. Non-Supportive Moves

As was true with regard to the prior strategy, it is worth noting that certain mediator moves do not support the strategy of orienting the parties to their own agency, including:

1. Using terms that orient the parties to the agency of the mediator, especially frequent use of the first person by the mediator ("I," "me," "my," or "we");

2. Acting in ways that assert mediator authority (e.g., interrupting the parties or setting ground rules for the parties); and
3. "Normalizing": advancing the mediator's interpretation of the party's situation over the party's own interpretation, by "convinc[ing] them that theirs is a normal, resolvable problem" and "undermin[ing] the uniqueness of each problem definition by normalizing the situation."

Because these moves are contrary to transformative practice, the mediator with a transformative orientation should avoid them.

3. Strategy 3: Orienting the Parties to Each Other

Mediators who practice in the transformative framework also orient each of the parties to the presence of the other party (or parties) in the session—or, said another way, to the participation and connection of both (or all) concerned parties. Orienting the parties to each other is a strategy directly related to supporting inter-party recognition—to supporting opportunities for the parties to build interpersonal understanding should they choose to do so.

A foundation for the possibility of recognition is laid when the mediator uses simple language that orients the parties to the participation and connection of all involved, such as "both of you," or "all of you," or "together." Likewise, allowing party-to-party talk, when the parties choose to engage in it, also provides a foundation for the possibility of recognition as interpersonal understanding is built through direct dialogue.

An important caveat attaches to this strategy, however. As Bush and Folger have noted, recognition is always subject to empowerment. It is a matter of party choice, and thus, although the mediator can lay the foundation through this strategy, the mediator should not force recognition. While the possibility of recognition begins with an awareness of the other— which mediators can foster—empowerment requires that mediators leave it to the parties to choose what to do with that awareness.

a. Supportive Moves

Certain mediator moves demonstrate that the mediator is orienting the parties to each other. Some that are quite typical are:

1. Using the conversation metaphor (it takes two!);
2. Using the second person plural subject;
3. Making explicit references to "the other" (by name, or terms such as "both of you," or "each of you," or "together");
4. Allowing parties to speak of and for each other (that is, to step into the other's shoes);

5. "Checking in" with a party who has not been "in" the conversation for a period of time, to orient the speaking party to the other party's presence, and to "make space" if that party chooses to talk;
6. Allowing significant segments of uninterrupted party-to-party talk (sometimes understood as a move of "intentional silence"); and
7. "Following" party-to-party discussions thorough inclusive summaries—summaries that include important topics or themes that each party has raised and make extensive use of the second person ("you") as well as the parties' names.

Consider the following example from an opening discussion between a mediator and the parties, and how the italicized portions emphasize that mediation is something the parties engage in together:

> *Example 4: "Um, what about your, um, your guidelines for discussion, in terms of what you think will make a most productive meeting for the two of you. Are there any requests you would make of each other about the communication process? Any suggestions that you would have, based on, you know, kind of understanding that you've worked with a mediator, and have had conversations with each other? Any suggestions you would make?"*

b. Non-Supportive Moves

Again, it is important to note that certain mediator moves do not support the strategy of orienting the parties to each other, including:

1. Focusing party attention on the mediator and away from each other;
2. Focusing party attention on "the problem" and away from each other;
3. Discouraging party-to-party talk through:
   (a) Ground rules;
   (b) Use of caucus;
   (c) Ignoring a party who is trying to engage; or
   (d) Non-verbal behaviors that "cut off" a party; and
4. Stopping party-to-party talk when it happens, through
   (a) "Turn shifts" (changing who may speak next);
   (b) "Topic shifts" (changing the subject);
   (c) Interruptions;
   (d) Use of caucus; or
   (e) Specific "sanctions" (e.g., "speak for yourself" or "speak to me").

Because these moves are contrary to transformative practice, the mediator with a transformative orientation should avoid them.

4. Strategy 4: Supporting the Parties' "Conflict Talk"

Supporting the parties' "conflict talk" is an essential strategy for a transformative mediator, and a key difference between the discourse of transformative and the discourse of problem-solving mediators. For transformative mediators, it is critical that the parties at least have the opportunity to talk with and hear each other, no matter what the ultimate outcome. The underlying premise is that, for decisionmaking (empowerment) and interpersonal understanding (recognition) capacities to develop through conversation, conversation must be allowed to happen. Hence, the mediator must be comfortable in the presence of "conflict talk," and orient toward supporting rather than containing it.

We use the term "conflict talk" to refer to interactions in which the parties "oppose the utterances, actions, or selves of one another in successive turns at talk," as well as those in which one party constructs an opposition between himself or herself and the other party in a single turn at talk. The key feature is its oppositional nature. The transformative mediator works to support this talk between the parties because conflict talk is functional. Studies of the discourse of conflict demonstrate that people conduct important social acts in the midst of conflict interactions. For the transformative mediator, it is as the conflict unfolds from moment to moment that the parties can learn new information, present themselves in new ways, create new understandings, and make informed decisions. To support these possibilities, the mediator follows that unfolding conversation, listening for places of difference, contention, or heat, where choices can be highlighted or possibilities for building greater interpersonal understanding emerge. Said another way, both empowerment and recognition opportunities emerge—and shifts happen—in the midst of "conflict talk."

a. Supportive Moves

Certain mediator moves demonstrate that the mediator is oriented to supporting the parties' conflict talk. Some that are quite typical are:

1. Using minimal encouragers at party pauses to encourage a party to continue speaking ("Mm-hmm," "Go on," "Okay");
2. Using key word encouragers, that is, keying in to a term a party uses that seems to carry heat ("Support, as in . . . ?");
3. Using open reflections (reflections that "follow" the content and emotional tone of party "conflict talk," and "check in" with that party on the accuracy of the reflection);
4. Using reflections and summaries to mark points of disagreement (not just agreement or common ground);
5. Using reflections, summaries, and questions that "follow" conflict storylines;
6. Asking questions that invite elaboration of "conflict talk;" and
7. Allowing multiple themes or storylines to develop in the course of conversation (including conflict-related themes and not just themes or storylines that seem tangible or solvable).

Consider the following example, noting how the mediator keys in on the word that marks a point of disagreement, and how she ends with a questioning, open tone that invites the party to say more.

Example 5: (Party) Um, the main issue that I think we're both very stressed and scared about is money, the financial aspect. And then I think, time is also an issue for him, because of Coleen. That's not an issue for me.

(Mediator) "Time. . . . time in the sense . . . ?"

b. Non-Supportive Moves

Again, it is important to note that certain mediator moves do not support the strategy of supporting the parties' conflict talk, including:

1. Preventing the possibility of conflict talk in advance ("preemptive containment")98 through ground rules that limit:
   (a) How long a party may talk;
   (b) How parties may talk; and
   (c) What they may talk about;
2. Terminating conflict talk when it occurs ("reactive containment") through:
   (d) Turn shifts (changing the speaker);
   (e) Topic shifts (changing the subject);
   (f) Interruptions;
   (g) Use of caucus; and
   (h) Specific sanctions;
3. Failing to respond to conflict talk and its accompanying emotional tone;
4. "Normalizing" (see above);
5. "Mutualizing"—changing a party's interpretation of a situation from one which places blame or responsibility on the other by framing the problem using a mutually acceptable definition;
6. "Future focus"—stopping or discouraging "conflict talk" about the past by shifting the parties' conversation to talk about the future;
7. Reframing—changing a party's definition of a situation so that the conflict is laundered out and the situation is redefined as a solvable problem, changing a party's statement of a position into a statement of an interest, or changing a party's statement of a value that is in conflict to a statement of an interest; and
8. "Softening" a party's "conflict talk."

Because these moves are contrary to transformative practice, the mediator with a transformative orientation should avoid them.

5. Strategy 5: Supporting the Parties' Decisionmaking Process

For the transformative mediator, the emphasis on party empowerment requires that the mediator highlight all possible decision-points and offer them to the parties. Moreover, the mediator makes no distinction between so-called "process" and "content" decisions. Mediation is viewed as an ongoing process of decisionmaking by the parties—whether to stay, who should talk when, what to say, what not to say, whether to listen, how to listen, how to talk, what to do, etc. In terms of practice, this means (1) the mediator should avoid making any decision that could be made by the parties, and (2) the mediator should note the possible decision-points and offer them to the parties, but the mediator should not force decisions upon the parties.

a. Supportive Moves

Certain mediator moves demonstrate that the mediator is oriented to supporting the parties' decisionmaking process. Some that are quite typical are:

1. Using reflections or summaries to highlight available decision-points and call them to the attention of the parties (making no distinction between process and content decisions);
2. Using reflections, summaries, or questions to offer decision-points to the parties;
3. "Checking in" with the parties through questions when decision-points are noted;
4. Pairing any mediator suggestions with "tentatives" that downgrade mediator decisionmaking authority (e.g., "I just," "it might," and "I don't know"); and
5. Offering any mediator suggestions with a number of alternatives to emphasize the possibility of party choice.

Consider the following example from the early moments of a mediation, noting how the mediator emphasizes opportunities for party decisionmaking in the italicized segments:

Example 6: (Mediator): Okay. So is this a list of agenda items, is this where you want to start . . . ?

(Party): It's a list of what we need to split up . . .

(Mediator): Okay . . .

(Party): uh, what we need to do with the kids . . .

(Mediator): Mmm-hmm.

(Party): um, I don't know what you want to do, I mean, we . . .

(Mediator): Okay.

(Party): see, we don't have that many things, like house and, stuff . . . Um, I don't know what you want to do first.

(Mediator): I certainly want to do what you want to do. But you have in that packet of information I gave to you an outline of the two major areas that

normally need to be talked about, and that's children, of course, and the division of . . .

(Party): property . . .

(Mediator): your assets.

(Other party): Um-hum.

(Party):Yep.

(Mediator): So wherever you might want to start. It might be good to, um, you know, start with what you feel might be either more urgent, or important to you, or you feel you need to get a little more clarity, or more information first before we can go further. I don't know . . .

b. Non-Supportive Moves

Again, it is important to note that certain mediator moves do not support the strategy of supporting the parties' decisionmaking, including:

1. Making choices for the parties;
2. Taking choices away from the parties;
3. Narrowing discussion in a way that limits party choices;
4. Favoring certain choices over others;
5. Orchestrating or managing the parties' interactions through so-called "process" choices; and
6. "Closing" (disregarding unresolved topics that arose in the conversation as agreement begins to appear).

Because these moves are contrary to transformative practice, the mediator with a transformative orientation should avoid them.

In summary, a number of important points should be highlighted regarding mediator moves and strategies, in light of the goal of using these discourse markers to assess mediator competence. Given the multi-functional nature of discourse noted earlier in this Article, it should be apparent that some mediator moves can support more than one strategy, depending on how the moves are used in context. Moreover, not every move in a given strategy must be employed by the mediator in order for the mediator to be competent in that strategy. This is where the personal "style" of the mediator may be taken into account. For example, some mediators may show a preference for orienting the parties to each other by "intentional silence," while others may make ample use of summaries, yet all may be working competently within the transformative framework. Said another way, no mediator should feel compelled to use every move identified here in any given mediation, and it would not be helpful to mediators to create an assessment process that suggests that they should focus on using every available move in order to demonstrate their competence, no matter what the context.

We should also note that there are more than thirty different mediator moves identified here that characterize competent practice in the transformative framework, and more than thirty different moves identified that would be contrary to competent practice. A checklist that attempted to capture mediator competencies at the level of discursive moves would be unwieldy for an assessor. At the same time, a checklist tends to ignore the context in which moves are enacted, as well as the interactive effect of the move employed. These observations support our conclusion that a rating scale that can capture competence at the strategy level is both a more appropriate and user-friendly approach to assessing mediator discourse.

For all of these reasons, we have chosen "strategies" as the unit on which to base our assessment process and our rating scale. That is, "strategies" are the unit of analysis on which decisions about mediator competency will be based, while "moves" are the unit of coding or the "codable moment." The importance of this distinction will become clearer in the next section.

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VI. IMPLICATIONS

We began this Article by noting the challenge mediator quality assurance initiatives present to the field. Despite creditable motivations for pursuing quality assurance initiatives, many respond to such initiatives with suspicion and mistrust, noting their potential to close the field, standardize it, or impose hegemony upon it. Our analysis, however, suggests that these fears and other objections to performance-based testing do not reflect a flaw in the concept of performance-based testing as much as they do a flaw in the way that concept has been executed in the mediation field to date. What we have presented here is a model for a performance-based assessment process that is theoretically, empirically, and methodologically grounded, and therefore both reliable and valid. As a result, it avoids the practical pitfalls of earlier attempts as well as the universalizing assumptions underlying those attempts, which raised valid concerns with standardization and hegemony.

We suggest that this model, while directly applicable only to transformative mediation, is instructive for the field as a whole. It provides a roadmap for scholars and practitioners of other frameworks to develop theory-specific approaches to performance-based assessment methods that are grounded in research on the actual practices of mediators in that particular framework and are methodologically sound. At the same time, this roadmap presents a challenge to the field. Our work suggests the fundamental importance of theoretical, empirical, and methodological grounding for future efforts to create performance-based assessment tests. Each of these dimensions may prove problematic for the field. First, a recurrent criticism of the mediation field is its lack of theoretical grounding. Yet, before scholars and practitioners can create a valid and reliable performance-based assessment method, they must be able to articulate the theoretical framework they are using, and the definition of mediator success in that framework. In the current climate of the mediation field, with its marked tendency to

present the field as a monolithic entity and practice as generic and neutral in terms of theoretical frameworks, articulation of theoretical frameworks presents a serious challenge to the status quo. Second, the field as a whole, and policymakers in particular, have shown reluctance to draw upon insights from empirical research to enlighten practice and policy. This may be because insights from empirical research have tended to challenge the prevailing mythologies of mediation

Nonetheless, our work highlights the importance of drawing upon empirical research about what mediators actually do in order to construct valid and reliable assessment processes. At the same time, empirical research in the mediation field deserves renewed attention as theoretical frameworks develop and comparative studies become more feasible. Finally, the need for methodological grounding in mediator assessment initiatives suggests the importance of collaborations between practitioners, policymakers, and scholars who can construct and execute valid and reliable research. Unfortunately, the field has shown some antipathy towards scholars in the past.

Despite these considerable challenges, it is our hope that this example of the Interactive Rating Scale Assessment will stimulate greater theoretical, empirical, and methodological rigor in the field. The field as a whole can only benefit from greater clarity regarding the nature of good mediation practice and the sources of diverse views on what that means.