

Advocating for Understanding – Why the Understanding-based Mediation Model Works

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INTRODUCTION

A recent Harvard Law School workshop focused on an “Understanding-based” mediation model.² The principal difference between an understanding-based model and most other mediation models is that understanding-based mediation is conducted largely without the use of individual or private caucuses.³

This article will argue that the non-caucus model of mediation is a better model for the resolution of disputes than models that employ private caucusing as a prominent part of the proceeding. The article will begin by defining mediation in the context of the Understanding-based model. The mechanics of a mediation conducted in the Understanding-based model will then be compared to and contrasted with the mechanics of a mediation where private caucusing is used. Next, the article will examine the mindset of the mediator in the context of the special demands placed on the mediator in the understanding-based model. Finally, the article will argue that the this model provides a better framework for decision-making in the context of dispute resolution than traditional mediation models. This in turn gives the parties a better opportunity to obtain the best possible resolution of their dispute.

I. DEFINING “MEDIATION” IN THE UNDERSTANDING-BASED MODEL

Mediation is by nature a flexible process that can have a number of different definitions.⁴ Some define it simply as “assisted negotiation.”⁵ Robert H. Mnookin and Gary J. Friedman define mediation in the understanding-based model as “a voluntary process in which the parties make decisions together based on their understanding of their own views, each other’s, and the reality they face.”

This succinct, powerful definition is worth examining closely as it has important implications for mediation pro-

ceedings conducted in the understanding-based model.

As do most mediation models, the understanding-based model defines mediation as a “voluntary” process. Even in court-mandated mediations, mediators usually inform the parties that while they have been ordered to attend the mediation, they are free to leave the mediation at any time.⁶ The voluntary nature of mediation helps lower the risk associated with the process and encourages the parties to participate actively in the mediation.

The Mnookin -Friedman definition also emphasizes that the *parties*, and *not* the *mediator*, make the decisions in the mediation. This notion – that the mediation belongs to the parties – is a central element of mediations conducted in the understanding-based mediation model.

The Mnookin -Friedman’s definition of mediation also makes clear that during the mediation the parties will make the decisions *together*. Mediations conducted in the understanding-based model require the parties to adopt a problem-solving approach to the dispute. The mediation will only succeed if the parties work collectively with the mediator to try to resolve their dispute. The understanding-based model reinforces this principle by keeping the parties together in the same room throughout the mediation.

The Mnookin -Friedman’s definition also stresses that *understanding* will be an essential part of the mediation proceeding. The mediator will work with the parties to help them *understand*. This understanding will entail not only an understanding of their own view of the dispute, but the view of the other party as well. The understanding-based model contemplates that the level of understanding required for the parties to obtain the best solution to their dispute can only be obtained if the parties are able to communicate with one another. Private caucusing is thought to prevent direct communication between the parties.

Finally, the parties’ decisions during the mediation will take into account the *reality* they face. In the understanding-based mediation model, “reality” for the parties flows from a clear understanding of each other’s interests and from the strengths and weaknesses of their legal claims. Professor

Friedman refers to this process as “bringing reality into the room.” It is thought that by keeping the parties in the same room the mediator is best able to make sure the parties have all the information they need to make solid decisions.⁷

Mediations conducted in this model reflect this definition. In the understanding-based model, the mediator will work tirelessly to vest control of the process in the parties, to foster a collective and collaborative problem-solving approach to the dispute, to establish understanding as the lynchpin of the mediation, and to introduce reality to the process at every turn.

II. MEDIATION IN THE UNDERSTANDING-BASED MODEL CONTRASTED WITH TRADITIONAL MEDIATION MODELS

The principal distinction between the understanding-based mediation model and other traditional mediation models is that in the understanding-based model the mediator generally conducts the mediation with the parties in one room, whereas in most other mediation models the mediator will periodically separate the parties during the mediation and speak with each party privately.⁸ While this distinction is straightforward, it spawns a number of important implications for the manner in which the mediation is conducted that serve to distinguish the understanding-based model from traditional mediation models.

Most traditional mediations begin with an opening statement by the mediator.⁹ During this statement, the mediator will usually bring the parties together and explain the process. The opening statement will clarify the mediator’s role in the process and will often confirm the mediator’s neutrality.¹⁰ The mediator will often summarize his or her preparation in advance of the proceeding and will explain the confidential nature of the proceeding. Usually, the mediator will explain to the parties the ground rules that will govern the mediation. Finally, the mediator will seek a commitment from the parties to make a good-faith effort to resolve the dispute.¹¹

In a mediation conducted in the understanding-based model, the process begins with the “contracting” stage of the mediation. Many of the same subjects covered in an opening statement are also addressed in the contracting stage of an understanding-based mediation. As in most mediations, the mediator will establish contact with the participants, explain the process, clarify the parties’ intentions and ability to mediate, and negotiate the ground rules.¹² However, the *manner* in which the mediator deals with these issues is different in the understanding-based model.

Instead of making an opening statement, the mediator in the Understanding-based model will work to make contact with the participants by actively seeking to understand them in a more conversational fashion. The mediator will demonstrate his or her listening skills at every opportunity and will help the parties appreciate that *understanding* will be the lynchpin of the process. The mediator wants the parties to understand that virtually everything the mediator will

do during the mediation will reflect his or her desire to raise the level of understanding in the room to the highest possible level. Ultimately, the mediator in the contracting phase seeks the informed consent of all parties to proceed with the mediation in a problem-solving fashion.

The next phase of both traditional and understanding-based mediation models begins the process of gathering information. In traditional mediations, this process is often commenced with opening statements from the parties directly involved in the dispute. The parties are given the opportunity to present the highlights of their cases to the mediator in front of the other party and its representative. This can be a volatile and emotional process. Mediators in traditional models often exercise a high degree of control at this stage of the mediation, and in general parties are not permitted to be overly argumentative.¹³ At the end of this initial joint session the mediator will often question the parties directly to understand better their interests and positions.

The gathering of information in the Understanding-based model tends to be more conversational and less structured than in most other mediation models. The objective at this stage of the mediation is to develop the issues by setting out all information necessary to identify and establish the dimensions of the particular issues needing resolution.¹⁴ The mediator and the parties will work collectively to identify all relevant facts, including economic, emotional and other factors that contribute to each party’s views and concerns. During this phase the mediator will help the parties establish clearly where the parties agree and disagree. In some instances, this process is facilitated by written submissions from the parties or their lawyers.¹⁵

Unlike in most traditional mediation models, at this stage of the understanding-based process, the lawyers are often front and center. The mediator will probe the legal positions of the parties by asking their lawyers about the strengths and weaknesses of their case. The mediator will work to insure that the parties themselves, and not just their lawyers, appreciate the strengths and weaknesses of each side of the legal issues involved in the case. Again, the objective is to discuss the case in such a manner that all parties in the room will better understand the case when the mediation concludes. This process helps the parties to appreciate the potential risks associated with trying the case on the merits.

The examination of the legal claims can be a painstaking and sometimes painful process. Mediators in the understanding-based model will hold the lawyers’ feet to the fire and ask the difficult questions associated with their respective cases. This can be difficult and challenging for the lawyers in the case, many of whom may not be comfortable discussing the weaknesses of their case in front of their own clients, let alone in front of the opponent and his or her counsel. But the understanding-based model presumes that it is only by having this discussion with all parties together that both the parties and their lawyers will truly increase their understanding of the case.

In most traditional mediation models, the mediator will not subject counsel to a difficult examination of the weaknesses of their legal claims while all parties are in the room. Instead, these discussions most often occur during individual caucuses. In many traditional mediation models, mediators use the initial private caucuses to provide counsel for the parties with the opportunity to argue their cases in an attempt to convince the mediator of the correctness of their positions.¹⁶ The mediator will ask many of the same tough questions of counsel during these sessions, but these conversations will not be heard by the other party or its representative.

As the mediation proceeds, the mediator might use private caucus sessions to identify and explore underlying interests and goals and to clarify each party's perspective.¹⁷ Many mediators use the private caucus to ask direct questions of the parties and their representatives, such as, "How do you assess your own case?" "What are your weaknesses?" or "What do you really want?"¹⁸ The mediator then uses the answers to these questions to help create a framework for settlement.

The mediator in traditional mediation models may also use private caucuses to encourage the parties to speak more openly and to disclose confidential information in order to identify barriers to settlement and to assist parties to overcome these barriers.¹⁹ The mediator may then commence "shuttle diplomacy," brainstorming with each of the parties individually to identify settlement possibilities, carry perspectives back and forth and suggest settlement proposals. In some mediations, the mediator will continue to move between the parties in caucus sessions and will not suggest any further joint session until the end of the process.²⁰

It is here that the difference between mediating under the understanding-based model and other mediation models becomes most pronounced. At this stage of most traditional mediations, the parties may well spend most of their time in separate rooms, and the mediator shuttles back and forth between them. In the understanding-based model, the mediator keeps the parties together. It is important for the mediator in the understanding-based model to view the *interaction* between the parties and help the parties recognize counterproductive patterns of conflict that may keep them divided.²¹ Once these patterns have been recognized, the mediator may be able to help the parties establish an alternative means of communicating.

This requires the mediator to manage the conflict in the room effectively. The mediator in the understanding-based model will focus on two separate, but equally important, aspects of the conversations between the parties. On the one hand, the mediator must closely observe the manner in which the parties communicate, which demands that the mediator focus on *how* the parties talk about these issues.²² At the same time, the mediator must focus on *what* the parties describe as the content of their issues. This dual focus on the "how" and the "what" can be a key factor in the mediator's ability to facilitate a resolution of the dispute in an understanding-based mediation.²³ Placing the parties in separate rooms

would deprive the mediator of the opportunity to observe the interaction between the parties.

Eventually, in both traditional mediations and in mediations in the understanding-based model, the parties will begin to develop options for resolving their dispute. In many traditional mediation models, this process occurs during individual caucuses. The mediator meets with each party privately and works with them to generate options for settlement. By shuttling back and forth between the parties, the mediator works to move the parties closer together and toward a settlement.

In the understanding-based model, the process of generating options is quite different. The mediator will lead the parties in a brainstorming exercise, usually with the understanding that no evaluation of any option generated will occur until later in the mediation. By postponing evaluation in this manner, the parties have more freedom to generate and invent more creative solutions to the problem.²⁴

Eventually, the parties will begin the process of evaluating the options. This, too, is done collectively, with encouragement from the mediator to evaluate options not just in terms of how the parties might meet *their* needs and interests, but how they might satisfy the needs and interests of the *other party* as well. Once options have been identified that might meet the needs of both parties, the mediator assists the parties in understanding the consequences and implications of each option.²⁵

The final stage of mediating under any mediation model involves coming to agreement. In most mediation models, the mediator's preference dictates whether the mediator or the lawyers for the parties will draft the agreement. Generally, mediators in the understanding-based model will draft the agreement. If this task is undertaken by a mediator in any mediation model, the mediator must take care to reflect as accurately as possible the parties' intentions as to what the agreement is and how it will take effect.²⁶ If there are areas of the agreement that must by necessity be resolved in the future, the mediator should identify such areas clearly and, if possible, include processes that might help to resolve such issues.²⁷ The parties may have the agreement reviewed by accountants, lawyers and others. While the mediator should not become attached to the agreement as drafted, modifications should be undertaken in a manner that is consistent with the parties' priorities as articulated during the mediation.²⁸

III. THE MINDSET OF THE MEDIATOR IN THE UNDERSTANDING-BASED MODEL

Keeping the parties in the same room throughout all the difficult conversations that may occur during a mediation creates a special challenge for the mediator, and the understanding-based mediation model demands a higher level of interpersonal skill on the part of the mediator. Professor Mnookin describes the challenge as follows:

The challenge for the mediator in our model is that with parties or lawyers that are caught up in a conflict dynamic that makes it hard for them to communicate effectively with each other, it takes a high degree of skill from the mediator working within the same room to help them disengage and promote understanding. And what has to be acknowledged is that separating them can be a lot easier, because you don't have destructive interaction between the parties. So I think the challenge of our model that has to be acknowledged is it requires a higher level of interpersonal skill in terms of dealing with conflict than a caucusing model does."²⁹

There is no doubt that the individual caucus, used judiciously in the hands of a skilled mediator, can be an effective tool to diffuse tension during a mediation. In many instances, diffusing tension in the room can benefit the parties and help them work toward resolving their differences.³⁰ But are opportunities for the parties to create a better settlement lost when the private caucus becomes the prevailing practice at a mediation? Are some mediators too anxious to diffuse the tension in the room?

In fact, many mediators utilize the individual caucus early and often in their mediation cases.³¹ Professor Mnookin believes that, particularly in court-annexed mediation, mediators may be too quick to separate the parties:

My view is that in court-annexed mediation today, there is too much reliance on caucusing. I am not of the view that caucusing is never appropriate. But what troubles me about the caucus model very much, is that it gives the mediator too much power to manipulate the parties, and it puts the mediator in the position where the mediator is the only person that knows what's going on. For example, the lawyers often say "I want to meet separately because I don't want the other side to hear the mediator's evaluation of my case." But my own view is that mediators are tempted — during what they call "reality testing" — to go to one side and beat up on them — and, if anything, almost exaggerate the weaknesses of their case. Then they go to the other side and do the same thing.

Someone once said to me, "I know what mediation is all about. You take one party into one room with their lawyer, and you beat up on them and you lie to them about how bad their case is. Then you take the other party into the other room, and you beat up on them and you lie to them about how bad their case is. And then both sides are so frightened they'll settle." In our view, that's not what mediation is all about.³²

Of course, mediating in the understanding-based model is all about empowering the parties in the mediation and helping them to understand that they are in the best position to decide what constitutes the best resolution of their problem. The fact that use of the private caucus inherently results in the mediator wielding greater power over the proceeding

is one important reason that the understanding-based mediation model has very little room for individual caucusing.

The mindset of the mediator in the understanding-based model is also different from the mindset of the mediator in other types of mediation models. The mindset must reflect the mediator's understanding that it is the parties, not the mediator, who will determine whether a dispute should settle and, if so, what the terms of that settlement ought to be. Professor Mnookin describes this mindset as follows:

We encourage a mindset where the mediator is dedicated to trying to help the parties, but where he or she understands that the conflict is ultimately the parties' to settle. In our model, the mediator is not going to judge him- or herself by simply whether a settlement is reached. We think success ought to be defined by the mediator as, "have I really helped both these parties understand what their opportunities and risks are in litigation, explore carefully a variety of other options, and make decisions about what's in their interests, and whether they want to take those chances or not?" And in my view, if the parties have gone through that process and have really come to grips with it, and they still want to roll the dice in court, for whatever reason, I've helped them think in through carefully.³³

In the understanding-based model, the mediator is not an advocate for settlement and does not set out to drive the parties toward settlement. Rather, the mediator works as a "non-coercive neutral to help the parties negotiate an agreement that better serves their interests than [do] their alternatives."³⁴ The mediator does not work to provide the parties with an opinion of the value of the case, nor does the mediator pressure the parties to settle the case.

Yet, while the mediator in the understanding-based model is a non-coercive neutral, he or she is not powerless. Professor Friedman has described the mediator as "an advocate for understanding" who can be "radically subjective — but for *both* sides in the dispute."

These very inconsistencies – that the mediator can be both non-coercive and an “advocate,” and can be neutral and “radically subjective”, combine to give substantial power to the mediator. That the mediator is so empowered is ironic as well.

The mediator in the Understanding-based model of mediation must work to empower the parties so they can resolve their dispute themselves in the best possible fashion. Nonetheless, the mediator’s role as an advocate for raising the level of understanding between the parties generates great power for the mediator. For once the parties and their representatives appreciate and accept that the mediator is committed to helping all parties better understand the dispute, the mediator is able to ask the most difficult and pointed questions of each side with less risk that he or she will be perceived as biased or favoring one side over another.

In this way, keeping the parties in the same room can be a liberating experience for mediators accustomed to separating the parties during mediations. The parties in the understanding-based model hear all the mediator’s difficult and important questions posed to both sides and, in this way the, mediator is able to demonstrate neutrality. When the parties are cloistered in separate rooms, the mediator must remain cognizant that parties can easily perceive bias if, for example, the mediator is in one room more often or for longer periods of time than he or she is in another. Perceptions that the mediator is biased, of course, seldom help the process.

For Professor Friedman, how the settlement is reached is as important as the settlement itself: “The significance of mediation as an alternative method of resolving conflict lies in the process of examining, clarifying and adjusting human relationships in all their intricacy and emotional depth.”³⁵

When mediation is viewed in this way, it is easy to see why the private caucus is viewed as anathema to the process as, when parties are cloistered in separate rooms, the mediator cannot meet the demands imposed by this process.

IV. THE UNDERSTANDING-BASED MEDIATION MODEL IS A BETTER MEDIATION MODEL THAN MODELS THAT RELY ON PRIVATE CAUCUSING

A. The Understanding-based model incorporates principles of negotiation analysis that enhance the decision-making process.

The understanding-based model is deliberately designed to give the parties the best chance to make good decisions during the mediation and is consistent with the elements of good decision-making that have been identified in the field of negotiation analysis.

I have thus far described in general terms the manner in which mediations proceed in the understanding-based Model. Mnookin and Friedman have identified five specific

stages that generally occur during an understanding-based mediation. These five stages are:

1. Contracting;
2. Developing the issues;
3. Working through conflict;
4. Developing and evaluating options; and
5. Concluding agreement.

The first and last stages clearly occur at the beginning and the end of the mediation, but the middle stages tend to intersect and overlap.³⁶

Howard Raiffa, emeritus professor of managerial economics at Harvard Business School and at Harvard’s Kennedy School of Government is an expert on negotiation analysis. He uses the acronym “PROACT” to identify five basic ingredients of good decision-making. Professor Raiffa concludes that for a party to obtain good results during a negotiation, the party must:

1. Identify the **P**roblem;
2. Clarify the **O**bjectives;
3. Generate creative **A**lternatives;
4. Evaluate the **C**onsequences; and
5. Make **T**radeoffs.³⁷

Raiffa describes PROACT as “a way to make smart choices happen.”³⁸

The similarities between Raiffa’s PROACT framework and Mnookin’s and Freedman’s five stages in an understanding-based mediation are striking. Identifying the Problem involved in a proposed decision is analogous to the Contracting phase of the understanding-based mediation. Clarifying the Objectives is similar to the Developing the Issues stage in an understanding-based mediation. Generating Alternatives and Evaluating the Consequences would be covered during the Developing and Evaluating Options stage of an understanding-based mediation. Finally, the making of Tradeoffs would occur in the Concluding Agreement stage of the understanding-based mediation.

PROACT does not contain the Working through Conflict stage that often flows throughout an understanding-based mediation. Yet this makes sense given that in a negotiation there is not necessarily conflict present. In any event, Raiffa’s five basic ingredients of good decision-making seem to be an inherent part of the process of the understanding-based model. The understanding-based mediation model is similar to Raiffa’s model for good decision-making during negotiations in that both are designed to “make smart choices happen.”³⁹

B. The understanding-based mediation model promotes joint-decision making which is inherently more likely to create value for the parties.

In a negotiated settlement, *both* parties necessarily believe the negotiated outcome leaves them at least as well off as they would have been were there no agreement between

them. To this narrow extent at least, almost any negotiation can be said to create value.⁴⁰ However, value can also be created where a deal is reached that, when compared to other *negotiated* outcomes, either makes both parties better off or makes one party better off without making the other party worse off.⁴¹ Usually, if the parties have been unable to negotiate a solution to their dispute without the help of a mediator, it is this second type of value creation that can be explored in the mediation to produce a win-win outcome.

The mediator in the understanding-based model plays an important role in the value-creation process. The mediator “explores the interests of the parties and their resources to see what value-creating opportunities there might be that are perhaps outside of the conflict at hand. These opportunities usually arise from the way the parties are situated.”⁴²

In other words, value-creating opportunities often arise because parties are *differently* situated. Differences between parties are often more useful than similarities in helping parties to reach a deal. Differences can set the stage for trades through which value is created.⁴³

The understanding-based model presumes that understanding the differences in how parties are situated, proceeded by careful examination of their true interests, is best done with the parties working collectively in the same room. In this way the “process of examining, clarifying and adjusting human relationships in all their intricacy and emotional depth” has the best chance of resulting in the best solution.⁴⁴

Indeed, this presumption in favor of joint decision-making is not without basis. It is consistent with what experts in negotiation analysis have recognized as the power of joint-decision making:

In the joint decision-making perspective, negotiators can be creative in the actions they take and the decisions they make Joint decision-making jettisons the restrictive assumption of common knowledge. It widens the scope of its vision to include the invention of strategies, creation of new alternatives, and increases or decreases in the number of parties.⁴⁵

Joint-decision making, in turn, can result in every mediator’s dream scenario:

A joint decision-making perspective emphasizes the opportunities for cooperation between two parties — and helps them avoid falling into the trap of negotiating solely on the basis of what is individually rational. By adopting a joint decision perspective, negotiators can better conceive how communication will facilitate the drafting of joint agreements to the benefit of both sides. Through cooperation, negotiators might explore agreements based on a process of joint decision-making that are mutually superior to disagreements born of separate interacting decisions — the no-agreement state. In highlighting the role of joint decisions, we raise the possibility of a win-win solution to the negotiation problem.⁴⁶

By keeping the parties together and working together, the understanding-based model creates an environment where decisions can be made collectively and where joint decision-making can flourish. This in turn increases the possibility that the parties may collectively create value and arrive at a win-win solution to their problem.

Conversely, mediation models where the parties caucus privately and attempt to negotiate a resolution to their dispute are not as likely to result in the creation of additional value for the parties because such an arrangement does not promote the best possible decision-making. Professors Mnookin and Friedman identify important stages of their mediation model as involving first the development and then the evaluation of “Options” for resolution. Raiffa, on the other hand, in his listing of the factors necessary for good decision-making during a negotiation, speaks of creating “Alternatives.” There is a distinction between the two terms:

In negotiation parlance, a distinction is made between the alternatives each party might pursue individually (external to the negotiation) if negotiations break down and the (internal) alternatives that might be jointly negotiated and jointly pursued. The term “alternatives” is reserved for choices external to negotiations and the term “options” is used for collective choices internal to negotiations. The generation of alternatives is usually a solo act, whereas the generation of options may involve joint deliberations.⁴⁷

Grounded in negotiation analysis, the understanding-based model incorporates this important distinction. It contemplates that “options” for resolution will be generated by the parties working together in the same room during a collective brainstorming exercise. The parties in the understanding-based model will endeavor to generate collective choices that are internal to the negotiations and the result of joint deliberation.

When the parties to a mediation are separated during a private caucus, they are not likely to generate options that are the result of joint deliberation. In fact, they are more likely to generate “alternatives” for resolution which will often be “external” to the negotiation. They are often the product of the “solo act” that private caucusing produces rather than the product of collective decision-making, and therefore are less likely to create additional value for the parties. In turn, the alternatives for resolution generated during private caucusing are less likely to result in a win-win scenario.

C. Use of the private caucus during mediation increases the likelihood that the parties will perceive that the mediator is biased.

There are several practical problems that can arise during a mediation in which the private caucus is relied upon to obtain a resolution of the dispute. Regardless of whether the mediator conducts an understanding-based mediation or a mediation where private caucusing will be employed, it is

essential that the mediator remain neutral. If either side develops a perception that the mediator is biased in favor of one side or the other, resolution of the dispute can be difficult to obtain.

Caucusing with each side individually places substantial pressure on the mediator to avoid the appearance of bias. The most obvious example of mediator conduct that can result in the perception that the mediator has chosen sides arises when the mediator spends more time privately with one side than the other. The mediator may have excellent reasons for spending more or less time with each party. The danger, however, lies in the perception created when he or she does so.

When the parties do not witness all conversations the mediator has with all of the parties, there is a danger that one side will perceive that the mediator is not treating them fairly. This is an immediate threat to the parties' prospects of negotiating the best resolution of their dispute. This simple but potentially important issue is not present when the mediator in the understanding-based model keeps the parties in one room.

D. The understanding-based model decreases the likelihood that the mediator will manipulate the parties in the name of promoting settlement.

The nature of private caucusing, which results in the mediator shuttling from room to room conveying information to each party, places substantial pressure on the mediator to convey information from party to party in a productive fashion. Indeed, *how* the mediator conveys this information can be as important to the progress of the mediation as *what* information is conveyed. This places enormous power in the hands of the mediator, but also creates a dilemma as the mediator may be tempted to manipulate the information he or she delivers to the parties with the aim of settling the dispute.

There is increasing debate in the mediation community about whether, in utilizing "tools" to break impasse during a mediation, mediators in fact manipulate the process.⁴⁸ Because the line between "management" of the mediation and "manipulation" of the parties can be perilously thin,⁴⁹ private caucusing, which empowers the mediator and places a premium on the content of mediator communication, increases the likelihood of mediator manipulation.

When private caucusing takes place, the information exchange is "managed" by the mediator. For example, the mediator may over-report the extent of progress being made in the negotiations or may pessimistically report the threat of stalemate just when settlement is close at hand. Each of these techniques could have the effect of urging a party to make the final necessary compromises.⁵⁰ Mediators may take a proposal to the other party as "their own" settlement proposal to help one party save face.⁵¹ Whether one views the foregoing as legitimate "management" of the mediation in the name of reducing reactive devaluation, or as mediator "manipula-

tion" of the process, the power of the parties over the resolution of their dispute has decreased and the power of the mediator has increased.

When the mediator uses the power provided by the private caucus, he or she is presented with a tempting opportunity to manipulate the parties in an effort to induce a settlement. In truth, the individual caucus presents the mediator with a golden opportunity to apply pressure to the parties. Many mediators will admit that as the gap between the parties narrows and the time allotted for the mediation begins to run out, they sometimes push the parties to settle the case. In many instances, the mediator walks a fine line between encouraging the parties to settle and manipulating them into doing so. According to Professor Mnookin:

Too many mediators, and it's completely human, tell themselves, "if the case doesn't settle, I've failed." And the reason that mindset is dangerous is that if that's how the mediator judges himself or herself, almost anything goes in furtherance of reaching the desired outcome, which is a settlement. This is not a manipulative process. The mediator should be always analyzing things in terms of strengths and weaknesses. It's not a matter of saying to one side, "you're going to win, or you're going to lose." In my mind it's more probabilistic. It's not so much them wanting the mediator's judgment as to what the odds of winning or losing might be, as it is them needing help to really unpack all the risks."⁵²

When the mediator views his or her role as being a neutral advocate for *understanding* in the mediation, the opportunity for mediator manipulation of the process is significantly reduced. Instead of advocating settlement of the dispute, the mediator helps the parties educate themselves. When the parties finally *understand* each other's interests, they can decide whether, and if so how, they want to resolve their dispute. The power remains with the parties to the dispute. Manipulation of the process by the mediator decreases the likelihood that a resolution will emerge that results in real justice for the parties.⁵³

E. The understanding-based model simplifies the confidentiality issues associated with mediation

One of the key challenges for any mediator is meeting the expectations of the parties with respect to confidentiality.⁵⁴ Mediators cannot promise that the mediation will remain entirely confidential, as disclosure could be compelled by the legal process.⁵⁵ Generally, however, it is thought that an expectation of confidentiality is critical to a successful mediation process.⁵⁶ Parties to a mediation can be wary and guarded in their communication if they believe the information they reveal may later be used against them in litigation.

A challenge for the mediator in the understanding-based model is that the parties and their representatives may be

reluctant to share confidential information with the other parties to the dispute, and there is a limit to what the mediator in the understanding-based model can do to encourage full disclosure of all information.

Professor Mnookin frames the mediator's dilemma this way:

We want parties to understand that of course there may be risks associated with disclosure. But there is no way for a mediator to make someone disclose something they don't want to disclose. I'm very candid about that. I can't assure either side that the other is being completely forthcoming. Most of the information will come out before trial anyway. My experience is that in mediation, [if] the information [is] helpful to one's case they are quite eager to share! It's pretty hard under today's civil rules of procedure to have surprises anyway. My own experience is that it's often quite possible to get out the basic information necessary for each party to objectively evaluate the strengths and weaknesses of their cases, and that's really the goal.⁵⁷

Although Raiffa's "FOTE" — "Full, Open, Truthful Exchange of information"⁵⁸ — is not always obtainable in an understanding-based mediation, FOTE rarely occurs at all in mediations where the private caucus is employed.

Confidential information disclosed to the mediator during a private caucus can create a dilemma for the mediator. During a private caucus, a party may choose to share information with the mediator that the mediator is not prepared to share with the party on the other side of the dispute. Such a party may be reluctant to share the information with the mediator unless the mediator is both willing and able to maintain the desired confidentiality.⁵⁹ The mediator must then decide whether the information is useful in moving the process forward and, if so, what he or she should do with it. This not only empowers the mediator, but creates a genuine risk that through an innocent slip of the tongue during a private caucus or at another point in the mediation, the mediator could divulge some or all of the information conveyed. Such an event has the potential to derail the mediation completely.

Admittedly, the understanding-based mediation model will not always be based on FOTE. Nonetheless, the simple fact that the parties remain together should generally result in more information being shared. Not all communication during negotiations is good news. Mediations in all models are vulnerable to bluffing, threats, trickery, exaggeration, concealment, half-truths and outright lies. But these factors can be counteracted by positive activities — mutual exchange of documents, clear statements of interest, "confessionals," and joint-brainstorming and problem solving.⁶⁰ Traditional mediation models where the parties caucus privately can produce these activities as well, but there is less *sharing* of information than in the understanding-based model.

The understanding-based model removes some of the complicated issues surrounding the disclosure of confiden-

tial information that can plague traditional mediation models. The mediator in the understanding-based model does not have the burden of keeping track of which statements he or she is permitted to convey to the other side. The risk of an accidental disclosure of confidential information by the mediator is eliminated. The odds of the mediator making a partial or misleading disclosure for the purpose of encouraging settlement are reduced. The elimination of these risks is another positive attribute of the understanding-based model.

E The understanding-based model is more likely to salvage the relationship between the parties than models where the private caucus is present

Perhaps the most valuable aspect of the understanding-based model is that it gives the parties to the dispute the best chance to resolve their differences in a collaborative fashion. As the mediator works with the parties to increase their understanding of each other's interests, communication often improves. The mediator has the opportunity to help the parties identify barriers to communication and create new, more effective ways to convey their thoughts and feelings. When a collaborative resolution is reached, the relationship has a legitimate chance to survive, or even to grow, subsequent to the mediation.

When the private caucus is used extensively in a mediation, the relationship between the parties is not given this same opportunity to recover. The parties are often prevented from communicating directly, especially if the issues between them are particularly volatile or emotional. New patterns of communication are difficult to create when the parties are cloistered in separate rooms. To the extent that it may be a necessary part of the resolution of the dispute, the healing process between the parties may be delayed or simply tabled due to their failure to confront the difficult issues underlying their dispute.

Professor Friedman writes eloquently of the challenge

and opportunity presented by mediating cases in the understanding-based model:

Our normal tendency is to want to forget about the past, sever ties, and move on. Yet people who are willing to face what has happened between them and to speak honestly to each other about it, while also addressing what they want for the future, have the chance to reach a settlement that has integrity. That is the challenge and opportunity that this process presents.⁶¹

By keeping the parties in the same room and encouraging a collaborative decision-making process, the understanding-based model gives the parties the best chance to resolve their dispute and preserve their relationship.

The potential to preserve relationships makes the Understanding-based mediation model an effective dispute resolution tool in divorce and family law cases. The model “works well and is very powerful in the family context. When couples are divorcing, their spousal relationship is ending, but if there are kids, there is a need to help parents who are divorcing get to a point where they can do business together.”⁶²

Mediation models that separate the parties and promote settlement through shuttle diplomacy by the mediator simply do not provide the parties with the same opportunity to confront and address the communication issues that must be resolved if the relationship is to survive.

It would be a mistake to assume that the preservation of relationships is relevant only to divorce, family and other personal disputes. Professor Mnookin points out that the understanding-based model is a particularly powerful tool for the resolution of business disputes as well:

[I]n most business disputes this model works exceedingly well. It was put very well by the executive vice president and general counsel for Motorola. He said to me once, “who do business people get into conflicts with? They get into conflicts with their employees, their regulators, their distributors, their suppliers and their customers. With which of those groups do we not have long-term relationships?”⁶³

The understanding-based model gives parties to a business dispute a framework based on established principles of negotiation that provides them with the opportunity to engage in a collective problem-solving exercise that in turn gives them the best opportunity to craft a win-win resolution of their dispute. It gives them the opportunity to create new value in their negotiations and is less likely than mediation models that rely on private caucusing to trap them in purely distributive bargaining.

V. CONCLUSION

The understanding-based model of mediation is a better model for the resolution of disputes than mediation models that rely on private caucusing as a tool to help parties resolve their disputes. The model consistently empowers the

parties to engage in joint decision-making and problem-solving to create their own solution to their problem. It deliberately and consistently reduces the opportunity for the mediator to exercise control over the proceedings and deliberately to induce the parties into settling the dispute.

At the same time, the understanding-based model empowers the mediator. Once the parties acknowledge and agree that the mediator will serve as an “advocate for understanding” in the process, the mediator is in a position to demonstrate his or her neutrality while asking the parties and their representatives the difficult questions most likely to help the parties understand their individual and collective realities. Because the mediator remains in the room with the parties as much as possible, the likelihood that any party might perceive a bias on the part of the mediator is reduced.

The understanding-based model gives the parties an excellent opportunity to preserve their relationship. As the mediation evolves into a problem-solving exercise, communication barriers can be identified, removed and replaced with greater opportunity for productive, meaningful dialogue than in mediation models that separate the parties and their representatives from each other. Finally, because the understanding-based model is based upon sound principles of negotiation, the process is more likely to produce a win-win result than models where private caucusing is actively employed. The understanding-based model emphasizes the power of joint decision-making and maximizes the opportunity for the parties to engage in a problem-solving exercise characterized by joint decision-making processes. A problem-solving exercise with parties committed to joint decision-making is more likely to create value for the parties than a mediation conducted largely with the parties cloistered in separate rooms.

The understanding-based model places significant demands on the mediator that are more challenging than those faced by mediators using a private caucus mediation model. The mediator must manage the conflict in the room. The British social philosopher Stuart Hampshire wrote that “the skillful management of conflicts [is] among the highest of human skills.”⁶⁴ For all of its strengths, the understanding-based model requires a mindset and a skill set that is quite different from those required for mediators in models that rely substantially on the private caucus. For mediators willing to work to acquire these skills, and for the parties willing to face each other and attempt to work through their differences, the results can be rewarding.

ENDNOTES

1. In June of 2004, I attended a week-long Advanced Mediation Workshop at the Harvard Program of Instruction for Lawyers (“PIL”). The course was taught by former Stanford professor and mediation pioneer Gary J. Friedman, and by Harvard Law School professor Robert H. Mnookin, chair of the Harvard Law School Program on Negotiation. Certain quotations in this article of Professor Friedman are taken from my notes made during the Harvard PIL workshop. Professor Mnookin’s quotations are from the workshop and from comments made during an interview conducted with him at Harvard Law School in December of 2004. I would like to thank Professor Mnookin for taking the time to meet with me to

discuss his thoughts on the Understanding-based model of mediation.

2. Information on the Harvard Program of Instruction for Lawyers can be found at www.harvard/pil.edu. Information on the Harvard Program on Negotiation can be found at www.pon.harvard.edu. Professors Mnookin and Friedman consented to use of the term "Understanding-based Model" to describe their model of mediation. The Model had its origins in their early work at Stanford and Harvard Law school. The model has been used in their mediation practices for years, and is currently taught by professor Friedman and former Harvard professor Jack Himmelstein at the Center for Mediation in Law. Information on the Center for Mediation and law can be found at www.mediationinlaw.org.

3. The term "individual or private caucuses" refers to that part of a traditional mediation proceeding where the mediator places the parties and their representatives in separate rooms. This permits the mediator to speak with each party privately. During the private caucus, the mediator will often shuffle back and forth between the parties, conveying information and perhaps settlement offers.

4. See, for example, the description of Mediation in the Model Standards of Conduct for Mediators set forth by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution in the preamble of its final draft dated April 10, 2005: "Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute." See, also, L.L. Fuller, "Mediation – Its Forms and Functions" (1971) 44 S. Cal. L. Rev. 305 at 318 [footnote omitted].

5. Owen V. Gray, Protecting the Confidentiality of Communications in Mediation, (1998) 36 Osgoode Hall Law Journal, Vol. 36, No. 4 at 669.

6. In New Hampshire, mediation is often court-ordered pursuant to New Hampshire Superior Court Rule 170. Whether the process is treated as voluntary seems to vary from mediator to mediator.

7. Gary J. Friedman, J.D., A Guide to Divorce Mediation, (New York, New York; Workman Publishing, 1993) at 8.

8. Bennett G. Picker, Mediation Practice Guide, a Handbook for Resolving Business Disputes (hereinafter the "Mediation Practice Guide") at page 31. See, also, C.W. Moore, The Mediation Process: Practical Strategies for Resolving Conflict, 2d ed. (San Francisco: Jossey-Bass, 1996) at 319-320; C.W. Moore, "The Caucus: Private Meetings That Promote Settlement" (1992) 16 Mediation Q. 87.

9. Mediation Practice Guide, *supra*, at 31.

10. *Id.*

11. *Id.*

12. Harvard Law School PIL – Advanced Mediation Workshop June 2004, Memo 1, page 3.

13. Picker, *supra*, at page 31.

14. Harvard Law School PIL – Advanced Mediation Workshop, June 2004, Memo 1, page 5.

15. *Id.*

16. *Id.*

17. *Id.* at 32.

18. *Id.* at 33.

19. *Id.* at 32.

20. *Id.*

21. Harvard Law School PIL – Advanced Mediation Workshop, June 2004, Memo 1, page 5.

22. *Id.*

23. *Id.*

24. *Id.* at 8.

25. *Id.*

26. *Id.* at 10.

27. *Id.*

28. *Id.*

29. Interview with Professor Robert Mnookin, December 29, 2004.

30. See, generally, C.W. Moore, "The Caucus: Private Meetings That Promote Settlement", *supra*.

31. Picker, *supra*, at 32.

32. Interview with Professor Mnookin on December 29, 2004.

33. Interview with Professor Mnookin on December 29, 2004.

34. Harvard Law School PIL – Advanced Mediation Workshop, June 2004

35. Gary R. Friedman, J.D., A Guide to Divorce Mediation, *supra*, at 7-8.

36. Harvard Law School PIL – Advanced Mediation Workshop, June 2004, Memo 1, page 2. These stages are fairly self-explanatory and have been described in general terms in earlier sections of this article.

37. Howard Raiffa, with John Richardson and David Metcalfe, Negotiation Analysis (Cambridge Massachusetts and London, England; The Belknap Press of Harvard University Press, 2002) at 15.

38. *Id.* at 16.

39. *Id.*

40. Robert H. Mnookin, "Beyond Winning – Negotiating to Create Value In Deals and Disputes" (Harvard University Press, Cambridge, MA and London, England; 2000) at 12.

41. *Id.*, citations omitted.

42. Interview with Professor Mnookin, December, 2004.

43. Beyond Winning, *supra*, at 14.

44. A Guide to Divorce Mediation, *supra*, at 8.

45. Negotiation Analysis, *supra*, at 83-84.

46. *Id.* at 84-85.

47. *Id.* at 17-18.

48. See, generally, Coben, James R., Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception, Just Resolutions, Vol. 10, No. 1 (Issue No. 27) November 2004 at pages 9-11.

49. Coben, *supra*, at page 9.

50. *Id.*

51. *Id.*

52. Interview with Professor Mnookin on December 29, 2004.

53. Coben, *supra*, at page 11.

54. See, generally, J. Folberg & A. Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation (San Francisco: Jossey-Bass, 1984).

55. Protecting Confidentiality, *supra*, at 668.

56. Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation, *supra*, at 264.

57. Interview with Professor Mnookin, December 29, 2004.

58. Negotiation Analysis, *supra*, at 86.

59. Protecting Confidentiality, *supra*, at 672.

60. Negotiation Analysis, *supra*, at 83.

61. A Guide to Divorce Mediation, *supra*, at 10-11.

62. Interview with Professor Mnookin, December 29, 2004.

63. *Id.*

64. STUART HAMPSHIRE, JUSTICE IS CONFLICT 35 (2000).



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