

INTEREST-BASED MEDIATION

Interest-based mediation sits two stakeholders with or without their problem-solving attorneys at a table along with a mediator to solve a problem. Caucus can be used if needed. Participation is voluntary thus producing the least restrictive environment. The process excludes Rambo tactics, manipulation and bullying. This power-balanced mediation is a safe place to workout creative solutions without judicial intervention. Common interests are explored shifting the focus from position-based wants to interest-based needs. Success evolves from mutual respect, mutual interests, shared decision-making and shared accountability. Open discussion of differences and disagreements generate “creative tension.” The underlying belief processes, needs and diversity of all are sought to understand their decision-making and behavior. Mediator skills make a paradigm shift from solely cognitive to cognitive and affective. Interest-based mediation is an innovative practice providing for early intervention and a fresh start at conflict resolution.

Although not on the topic of interest-based mediation, the following research is beneficial in understanding interest-based mediation as presented here:

Fisher, Roger, Ury, William, & Patton, Bruce. *Getting to Yes: Negotiation Agreement Without Giving In* (2nd Ed). Boston: Houghton, Mifflin, 1991.

Goldratt, Eliyahu M., *What is this thing called Theory of Constraints and how should it be implemented?* Great Barrington, MA: North River Press, 1990. *Theory of Constraints for Education*, 1999.

Gordon, T. *P.E.T. Parent Effectiveness Training*. New York, NY: New American Library, 1975.

Mnookin, R.H., Peppet, S.R., & Tulumello, A.S. *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. Cambridge, MA: Harvard University Press, 2000.

Conflict has been a growth business over the last twenty-five years. The adversarial process depends upon the development of an outcome through confrontation. Confrontation remains costly in terms of time, resources and people. Even litigation winners are often unsatisfied due to the negative aspects of the judicial system: isolation, alienation, hostility, blaming, stalling, stone-walling, threats, etc. Widely differing decisions by judges based merely on their discretion contributes to a desire for more control and flexibility over the outcome.

Position-based mediation came on the scene and was a step forward but required the parties to sacrifice with the compromise and usually back-down from their positions. Often position-based mediation has damaging side effects by unavoidably emphasizing differences and maximizing the conflicts. Relationships tend to become entangled with the problem and locked into each side’s position. When the parties and their attorneys are locked into positions they are unable to find common ground.

A multidimensional process was needed. Evolving as a natural extension, interest-based mediation serves as a powerful process and thus another option in the ADR toolbox. Increasing ADR options support Sandra Day O’Connor’s quote that “the courts of this country should not be the place where the resolution of disputes begin.

They should be the places where disputes end-after alternative methods of resolving disputes have been considered and tried.”

This natural expansion of remedies moves mediators and attorneys into a paradigm shift requiring the adoption of new procedures, attitudes and skills. Interest-based mediation reframes our practice of dispute resolution and better equips the participants to deal with future disputes and attorneys to accomplish Chief Justice Burger’s call to return to the role of *healers of conflict*.

Recent advances in technology have created progressive clients who seek legal services that are more streamlined and efficient. These new consumers of legal services are knowledgeable and want more control and privacy over the process. They are trained to “cut to the chase” and aim at closure within a structured environment. Clients want to be fairly treated and ultimately satisfied with the solution.

With these changes from the outside and conflict as a growth business the delivery of legal services has been impacted resulting in an array of new approaches for dispute resolution. The paradigm shift is toward less stress, restrictions, cost and time and toward more client control, options, privacy and unity. The focus is moving from party-position to party-interest. To do this requires not only cognitive attorney skills but also affective skills. Interest-based mediation reframes our practices, re-evaluates our values and calls for our best.

This presentation will cover the components of interest-based mediation, sources used in their development and the Mediator’s role:

1. Establish an Operating Structure

The following two models of resolving conflicts contributed to the development of this structure for Interest-based Mediation: Dr. Thomas Gordon’s ‘*No-Lose Method*’ developed in the 1970s and applied to parent-child relationship. Jeff Sebo’s *Socratic Dialectic Theory* presented that, contrary to conventional construction, both Socrates and Plato used the same strategy.

Gordon, T. *P.E.T. Parent Effectiveness Training*. New York, NY: New American Library, 1975, p 139.

Sebo, Jeff. “The Socratic Dialectic.” *Dialogue: Journal of Phi Sigma Tau* 47, 2004, 1-11.

The steps of this Interest-based Mediation Model are:

- Establish procedural guidelines and ground rules
- Attorneys mutually agree on options
- Identify Participants’ wants and needs
- Formulate mutual interests and solutions
- Gather and offer information
- Generate and develop solutions through brainstorming
- Write/sign agreement or adjourn/reschedule next meeting

2. Nurture Relationships

Much is written on relationship building. The following influenced this model:

Effects of Conflict on Relationships

“This is the critical factor in any relationship: how the conflicts get resolved, not how many conflicts occur. I now believe it is the most critical factor in determining whether a relationship will be healthy or unhealthy, mutually satisfying or unsatisfying, friendly or unfriendly, deep or shallow, intimate or cold.”

Gordon, T. *P.E.T. Parent Effectiveness Training*. New York, NY: New American Library, 1975, p150-151.

Dynamics of Conflict

“Conflicts can push people away from each other or pull them into a closer and more intimate union; they contain the seeds of destruction and the seeds of greater unity; they may bring about armed warfare or deeper mutual understanding.”

Gordon, T. *P.E.T. Parent Effectiveness Training*. New York, NY: New American Library, 1975, p 149.

Bullying

The *American Medical Association* in 2002 warned that bullying is a public-health issue with long-term mental health consequences for both bullies and their victims. What is bullying? Behavior that is deliberately aggressive, persistent and intended to scare or hurt another person. Examples include: hitting, taunting, name calling, rumor spreading, social exclusion, extortion and insulting emails.

Lemonick, *TIME*, April 18, 2005, pg. 144-145.

“Tricky Tactics”

There are those who know only “tricky tactics” which may be in the form of deception, lying, passive-aggressive, etc. Any of these tactics are illegitimate when they unilaterally dictate the process and are not reciprocal. There are two responses to this: put-up with this behavior or respond in-kind. Either way interest-based mediation will fail.

Fisher, Roger, Ury, William, & Patton, Bruce. *Getting to Yes: Negotiation Agreement Without Giving In* (2nd Ed). Boston: Houghton, Mifflin, 1991.

Facts?

People believe “something to be factual if it supports what they already believe even if the ‘fact’ is not true and is proven not true. Psychology professor at the University of Western Australia in *Psychological Science* states that people believe a ‘fact’ that fits their views even if it’s clearly false. “

Begley, Sharon, *The Wall Street Journal*, February 4, 2005.

3. Communicate Effectively

Communication techniques have long been the cornerstone of mediation and much is available to the Mediator. This outline will specifically examine the following:

Active Listening

Silence is passive listening, which allows the other person to talk. Active listening is more effective than passive listening because it involves both the sender and the receiver. “The receiver does not send a message of his own-such as an evaluation, opinion, advice, logic, analysis, or question. He feeds back only what he feels the sender’s message meant-nothing more, nothing less.” Gordon believes that the required attitudes for the active listener are:

Want to hear what the other participants say and take the time to do it.

Want to help with this problem.
 Accept the other participants' feelings.
 Trust the process.
 Appreciate that feelings are transitory and can change over time.
 See the other participants as separate/different from you and how you think.
 "Without these attitudes, the method seldom will be effective; it will sound false, empty, mechanical, insincere."

Gordon, T. *P.E.T. Parent Effectiveness Training*. New York, NY: New American Library, 1975, p 49-61.

Cognitive – Affective Skills

Thinking is cognitive and interest, values, feelings, emotions are affective. The following research expands on this:

Bloom (1956) taxonomy of the affective domain included changes in interest, attitude and values, and the development of appreciation and adequate adjustments.

Krathwohl (1964) offered a classification system for affective classroom behavior, which increases along a continuum through internalization into the personality. This included receiving, responding, valuing, organizing and characterizing by a value or value complex.

Anderson (1981) categorized the affective dimension to include characteristics of values, self-esteem, anxiety, interests, locus of control, attitude and preferences. Essential features include involved feelings and emotions, be typical of the thoughts or behaviors of the person, must have intensity or strength of feelings, must have a positive or negative direction or orientation of feelings and must have a target for which the feeling is directed.

Walberg (1984) review of the literature revealed reinforcement, cures, and feedback, and cooperative learning as the three top instructional effects for the affective domain.

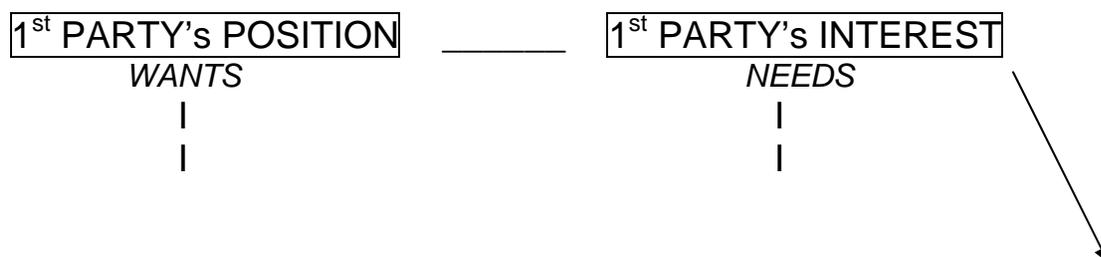
McNabb & Mills (1995) defined affective as increasingly more complex. Complex affective behaviors are culturally derived and frequently endemic to a community based upon religious values, implications from ethnic groups and influences of parenting.

McNabb & Mills, *Education*, Vol.115, No. 4, Pg. 590, Summer 1995.

4. Focus on Interests, Not Positions

When positions are different, people usually assume their interests are different but in reality there may be common interests. Usually there are several possible positions to satisfy a party's interests. Interests can be developed into options by framing illustrations and suggestions.

The Mediator can move the mediation, the parties and the attorneys from wants to needs as outlined by the following model:



Gestalt Theory states the whole is greater than the sum of the parts. The strength of the participants is more than the sum of each participant's resources.

Integrity is the rigid adherence to a code of behavior resulting in soundness, completeness and honesty.

The Right Thing the Right Way

The right thing done the right way is right.

The wrong thing done the wrong way is wrong.

The wrong thing done the right way is wrong.

The right thing done the wrong way is wrong.

Mark Twain "Always do right. This will gratify some people and astonish the rest."

6. Brainstorm

Alex Osborn developed brainstorming in 1941 when he was a partner in an advertising agency in New York. His objective was to provide a structure for his employees to generate advertising ideas. He felt the most important element was the "free-flow" of ideas. This he encouraged through mutual respect and acknowledgement of all the employees. He did not allow any employee to judge the other employee's ideas. There are no wrong ideas. His brainstorming groups should contain five or less people. A leader and a recorder were assigned. They could be the same person or different people. The leader identified the issue and explained the rules. Everyone contributed and these contributions all had value. The ideas were not discussed. All ideas were recorded without any bias and visible for all to see. A time limit was set to complete the brainstorming. Anyone could just jump-in and start the process or the leader could start by passing an object around to the employees who each then had a turn. When the time limit was reached the brainstorming stopped and all the employees discussed these ideas. After a full discussion the ideas were evaluated.

7. Respect People Differences

How a Person is Wired affects the overall conflict dynamics including how they process information, connect, communicate, etc. Some of these components are:

- Neurolinguistic components
- Communication styles
- Non-verbal communications styles
- Skills and abilities
- Values, feelings, attitudes, interests, etc.
- Cultural differences
- Brain dominance
- Sensory modes
- Patterns of human behavior

Theory of Constraints dictates that the mediation can move no faster than the slowest participant. "Recognizes that the output of any system that consists of multiple steps

where the output of one step depends on the output of one or more previous steps will be limited (or constrained) by the least productive steps.”

Goldratt, Eliyahu M., *What is this thing called Theory of Constraints and how should it be implemented?*
Great Barrington, MA: North River Press, 1990. *Theory of Constraints for Education*, 1999.

The Mediator’s role in Interest-based Mediation follows:

1. Establish an Operating Structure

Remember this process is voluntary and can be terminated at any time
Create a positive and relaxed atmosphere
Empower attorneys, parties and mediator as process facilitators
Recognize the whole as greater than the sum of the parts-Gestalt
Disclose mistakes of facts and law
Steps: Establish procedural guidelines and ground rules
Attorneys mutually agree on options
Identify Participants’ wants and needs
Formulate mutual interests and solutions
Gather and offer information
Generate and develop solutions through brainstorming
Write/sign agreement or adjourn/reschedule next meeting

2. Nurture Relationships

Build relationships through listening, respect and competency
Don’t alienate
Validate the right to make mistakes and still contribute
Remember people don’t care what you know until they know you care
Model non-defensive and non-offensive behaviors
Make it as painless on the other side as possible
Attack the problem not the person
Be supportive of those working hard on resolution
Recognize values, feelings, attitudes and emotions
Be kind and gracious

3. Communicate Effectively

Do no harm
Be courteous
Seek first to understand and then to be understood
Reason on the merits rather than pit wills against each other
Interact face to face as much as possible
Prohibit threats, criticism, bullying, inappropriate anger and surprises
Communicate through all senses: visual, auditory, kinesthetic
Stay alert to nonverbal communications
Avoid vague or antagonistic terms
Prohibit inflammatory, sneaky, arrogant and deceptive actions
Use first person (“I”) not second person (“you”)
Ask questions but don’t give unsolicited opinions
Praise the positive actions of the other side
Be clear and specific
Appropriately express emotions, fears and frustrations
Don’t reinforce negative behavior

Actively listen and acknowledge what is being said
Keep focused and on track
Recognize and address chronic conflict
Eat the elephant one bite at a time
When the other side feels heard they are more apt to listen to you
Remember the solution is interdependent requiring mutual reliance

4. Focus on Interests, Not Positions

Don't claim a position because you have to back down even to compromise
Save the time and money of preparing/defending a position
Look beyond the positions to mutual interests
Be persistent in pursuing your interests not a position
Don't assume interests are different when the positions are different
Attorney and client interests are different but each important/legitimate
Attorneys are faithful to client's interests not a position
Interests motivate people
Usually there are several possible solutions to satisfy an interest
Focus on the future with the end in mind
Develop interests into solutions by framing illustrations/suggestions
Know the difference between your wants and needs
Acknowledge others' wants and needs
Solution reflects needs not wants
Identify available resources besides money
Recognize "creative tension" and use it to reach a solution
Be prepared and follow the process so a strategy can appear
Brainstorm but don't quarrel
Be proactive and participate in the process so you own the outcome

5. Employ External Standards

Seek common ground, a level playing field, honesty and integrity
Keep it simple and safe-KISS
Volunteer and verify
Generate incentives to keep going and solve the problem
Yield to reason not pressure
Do the right thing the right way
Reference experts and third parties

6. Brainstorm

Use the mediation to give the problem a fresh start
Generate many ideas/options but don't prejudge
Don't force commitments during brainstorming
Proceed at the pace of the slowest participant
Discuss and evaluate all ideas/options in light of the big picture
Give as much to the other side while still meeting your needs
Remember pigs get fat and hogs get slaughtered
Acknowledge another's point of view without agreeing
Concessions are contagious
Celebrate little successes
Recognize settlements agreements are of different magnitudes
Carefully commit to one settlement solution

7. Respect People Differences

Identify different communication styles and personality traits
Distinguish right and left brain people
Recognize different levels of technology know-how
Determine individual capabilities, moods, emotions and values
Accommodate cultural, social, background and gender differences
Raise awareness of perceptions/blind spots
Avoid personal peculiarities or idiosyncrasies

This Interest-based Mediation model has developed as the logical extension of our current practices using position-based mediation. Interest-based Mediation is especially beneficial in situations with on going relationships such as special education.

Will this model benefit you and your mediations? You may want to circulate the following check list to potential mediation participants.

Are You a Candidate for Interest-Based Mediation?

- Can you put the anger aside & reason on the merits?
- Do you have interests & needs you want respected?
- Will you collect & bring the necessary paperwork?
- Can you refrain from games & play by the rules?
- Will you disclose all discoverable documents?
- Will both parties participate & co-schedule?
- Is your privacy important?
- Are you ready for closure & resolution?
- Do you want to maintain control but seek to work in a structured process?
- Do you desire to minimize the legal process?
- Is an ongoing relationship desirable?
- Do you desire to end the dispute in an orderly fashion?
- Do both parties seek a voluntary & equitable settlement agreement?
- Can you focus on the future not on the past?
- Can you agree to do the least harm to the other party & yourself?

© 2006 Sandra Burns, PhD, JD All Rights Reserved – Used by Permission

Biographical Sketch

Sandra Burns has practiced law in Texas for over 25 years including work as a mediator and ad litem. She has been instrumental in developing the training curriculum and application of collaboration in the Texas civil courts. Degrees include a PhD in Education from the University of Texas at Austin and a JD from St. Mary's School of Law in San Antonio, Texas. She has taught school law at Texas A & M—College Station and Commerce and graduate level special education classes. Currently she sits on the Board of Directors of the Learning Disabilities Association of Texas and serves as Chair of the Alternative Dispute Resolution Section of the Dallas Bar Association. Her areas of research include mediation, collaboration and special populations.

Sandra Burns, PhD, JD

Preston Commons West 300 - 8117 Preston Road - Dallas, TX 75225

Telephone: 972-601-2176

Email Address: burns@attorney-mediator.com

Michelle Sutton is an attorney working for the Dallas County Probate Courts in guardianship proceedings. She has been a mediator for over 6 years and has co-presented training on interest-based mediation to Texas attorneys. Michelle received a BA and MLA from Southern Methodist University, a MBA from Oklahoma City University, and a JD from the University of Tulsa College of Law. She currently sits on the Board of Directors of the Texas Collaborative Law Council and the Advisory Board of several Dallas based nonprofit organizations serving people with special needs. Prior to becoming licensed to practice law, Michelle was a teacher for the Dallas Independent School District.