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EXPERT OPINION

'I'm right.' 'No, I'm right.' New techniques for Mediating High-Conflict Disputes

Bill Eddy and his co-author, Michael Lomax, in their new book, "Mediating High Conflict Disputes," remind us that a mediator must be willing to cut off reflections about who pushed whom first, and instead, focus on how to play nicely.

By Elisa Reiter and Daniel Pollack | June 22, 2021

Kindergarten teacher, licensed counselor-social worker and lawyer/mediator. Bill Eddy has done them all. Eddy presents with the perfect background to mediate disputes involving people prone to high conflict. The potential for conflict is heightened in family law disputes. Eddy and his co-author, Michael Lomax, recently wrote *Mediating High Conflict Disputes*. They offer a new approach for mediation, geared toward the most difficult of litigants. Dwelling far less on back story, their

"New Ways for Mediation" method focuses on four stages, giving the client tasks to complete at each phase (p. 41):

State of Mediation Process	Client Mediation Task
Stage 1: Establishing the Process	Asking Questions
Stage 2: Making the Agenda	Making Their Agenda
Stage 3: Making Proposals	Making Their Proposals
Stage 4: Making Decisions	Making Their Decisions

This new structure allows litigants to focus on problem-solving, and eases the mediator's job in guiding the process. They urge us -- whether we are mediators or attorneys or those who are enmeshed in mediation as other participants -- to refrain from:

- FUHGEDDABOUD trying to give the parties insights into their own behavior (p. 25).
- FUHGEDDABOUD emphasizing the past. Focus on the future (p. 26).
- FUHGEDDABOUD emotional confrontations or opening up emotions (p. 27).
- FUHGEDDABOUD telling clients they have a high conflict personality (p. 28).

These four items, which Eddy and Lomax dub as "fuhgeddaboudits" don't make deals. Pushing for insight, dwelling on past conduct, getting sucked into the vortex of emotion, or pointing out how difficult someone is being -- all these just squelch making a deal. To help us better understand their position, Eddy and Lomax invoke both Kubler-Ross's stages of grief and healing (denial, anger, bargaining, depression and acceptance), as well as a catchphrase of the 2020's: polyvagal theory.

Can we recognize high conflict people? Eddy and Lomax urge practitioners to listen carefully to the words of those who have come to mediate. Does the client/lawyer/third party player:

- Speak in all-or-nothing words?

- Take any responsibility for their current position?
- Cast blame on others?
- DO THEY COMMUNICATE IN ALL CAPS ALL THE TIME?
- Have a pattern of extreme behavior?
- Make threats?
- Shade the truth?
- Hidden or destroyed property?
- Have a history of being litigious?
- In public, do they humiliate the other party?

While these factors are not necessarily indicators of a High Conflict Personality (HCP), they may be. Eddy and Lomax contend that HCPs can be very persuasive in blaming others. They urge their readers to beware of confirmatory or hindsight bias, where someone has only one theory of the case, and ignores any data that does not fit that theory. They argue that neutrality is essential in mediating disputes for one or more high conflict people.

Alternatives suggested include considering:

- Pre-mediation coaching (between the party and attorney, or between the party and a therapist;
- Meeting jointly or via shuttle mediation (the former where the parties remain in the same room, the latter where the mediator buzzes like a bee between caucus rooms, where the opposing litigants are warehoused through the mediation day);
- Meeting in person or via videoconference;
- Whether there have been accusations of domestic violence, and if so, how best to make everyone feel safe about participating in the process of mediation.

The stages delineated above -- asking questions, making an agenda, making proposals and making decisions -- are all goal oriented, and future focused. In terms of polyvagal theory, by being action oriented, those participating in the process have little time to cast aspersions, to wallow in self-pity, or to be lost and unable to decide

how to proceed. We are urged to politely focus the parties to think rather than react. To achieve such thought:

- One person makes a proposal.
- The other person may ask questions: who, what, where or how, but not "why." Why not why? Because to ask why is frequently a hidden way of casting blame.
- The person who received the proposal can then respond "yes," "no," or "I'll think about it." (p. 53).

As before, Eddy and Lomax urge everyone to appreciate the EAR method: Empathy, Attention and Respect. Empathize with the participants. Give them your attention, and use language showing that you are engaged. Give respect to each party, and to each lawyer. They caution, however, that the mediator cannot allow the parties, nor their representatives, to hijack the process. The mediator must maintain structure and control.

How to get to the end game? The parties must have information with which to make proposals (e.g., recent revisions to the Texas discovery rules, and mandatory disclosures, may actually be helpful), to help the parties make an agenda of issues, to make proposals as to how to resolve issues and to ask questions, and to finalize their decisions, by memorializing them in writing. To achieve the goal, mediators may find themselves redirecting the parties – don't tell someone to stop blaming the other party; instead, give them something to do. Yes, the HCP may be angry, difficult and demanding. By keeping the HCP focused, an accord may be reached. The mediator's goal is not to achieve one view of a past incident. It is to craft terms to allow the parties to resolve their current issue, and in a divorce case involving property and/or in a suit affecting the parent child relationship, to focus the parties on creating terms that they can live with, to govern future conduct, to divide their estates in a just and true, fair and equitable fashion, and to craft terms that serve the best interest of minor children.

HCPs need stroking, not correction. HCPs need reassurance that they are being heard. Even when an HCP is behaving in a negative fashion, mediators must strive to reframe and reinforce positive and forward movement – in each party, lest one think that the other is being favored by the mediator. Mediators must wear one hat,

however. A mediator cannot give legal advice to the participants. A mediator can write up terms, via a shorthand rendition, in a Mediated Settlement Agreement or declare an impasse and advise the court of the impasse.

Each party's agenda should set out a list of proposed topics. Each party should then make proposals about the line items in their respective agendas. While decision making is difficult, especially for HCPs, decisions are the endgame to mediation. As to the preparation of agendas, there is no need for an opening statement. Instead, mediators focus on asking each party for their initial thoughts and questions about the decisions that their case raises. Value may have been given in the past to let parties vent. Eddy and Lomax argue that the very act of venting may blow up the mediation by:

- Allowing the parties to be preoccupied with the past.
- Inciting intense negative emotions driven by those memories.
- Confronting the other party with their past bad acts, often causing one party to walk away from the mediation altogether.
- Keeping the parties treading water, rather than striving to reach the end of the race.
- Avoiding problem solving. Don't wallow in "Now you can see why I feel the way I do" nor on "This is why I'm in the position I'm in." Instead, focus the parties on moving forward.

A good mediator will find similar issues in each party's agenda, and then try to achieve an accord on which issues to address first. For big topics, such as who is to be awarded a home or a business in a divorce that is property driven, or who is to have the right to establish the primary domicile for the minor children, the mediator may need to place a time limit on the initial discussion. The mediator must manage the agenda, however, and not allow either party to hijack the process. Remember, there may be more than one HCP in the mix.

Proposals should address who will do what, where and when. The other party then has the opportunity to raise questions about the proposal. This keeps the parties focused on what to do, rather than dwelling on the past, or allowing harsh feelings about the other party to cloud the objective of reaching an agreement. Many negotiated settlements involve splitting the difference. It behooves the mediator not

to make note of this truism at the outset, lest an HCP start with an unrealistic figure in the hopes of driving a higher settlement. One secret shared – Bill Eddy has sometimes asked each party to essentially cast a secret poll – by writing down the farthest the party is willing to go to settle a given issue. He views the ballots under the table or in private; if there is overlap in figures, there is a possibility of settlement.

Mediation is hard. How is this new method wrapped up in polyvagal theory? This new method forces the mediator to listen for and be responsive to each party's body language, facial expressions, language and emotions. It assures that the mediator will reframe and get each party to identify what is happening with each party, to reframe to a point of regulation, and to then reengage the party in the mediation process. Said differently, just because a golfer shot a ten on a par four hold, does not mean that the golfer cannot shake off that bad hole and have a fresh perspective when teeing off on the next hole.

Mediating High Conflict Disputes is an easy read, with highly relatable information, whether you are a mediator, a litigant, or an expert engaged in helping any of those individuals prepare for or engage in mediation. The authors tout their "New Ways for Families" program, which is geared to help parties enhance their skills for mediation by managing their emotions, being flexible, moderating their behavior, and checking themselves throughout the mediation process. More information about their counseling alternative, including a workbook, can be found at www.HighConflictInstitute.com. The biggest benefit: Learning to negotiate in ways that will serve individuals in mediating their issues on their own in the future. The methods described can be used for large group mediation (workplace, estate and guardianship cases).

In the 21st century, most cases are settled out of court. We have to be open to resolving cases in new and better ways. If COVID-19 taught us anything, it taught us the importance of being flexible, rather than casting blame. Eddy and Lomax teach us that, like a teacher separating kindergarteners on the school yard, a mediator must be willing to cut off reflections about who pushed whom first, and instead, focus on how to play nicely.

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