

The Mediator as Medium

Reflections on Boxes: Black, Transparent, Refractive, and Gray

By Wayne Brazil

At the close of a mediation in a business case not long ago, one of the lawyers told me that my approach was new to him. He said other mediators he had worked with tended to remain “black boxes” — meaning that what they were thinking (about the case, about how to move the negotiations toward a deal) remained largely a mystery. He had been surprised (maybe even unnerved) by how freely I disclosed and discussed what I was thinking, what I thought was happening in the negotiating process, and how various behaviors or moves the parties were considering might affect the health of the mediation process.

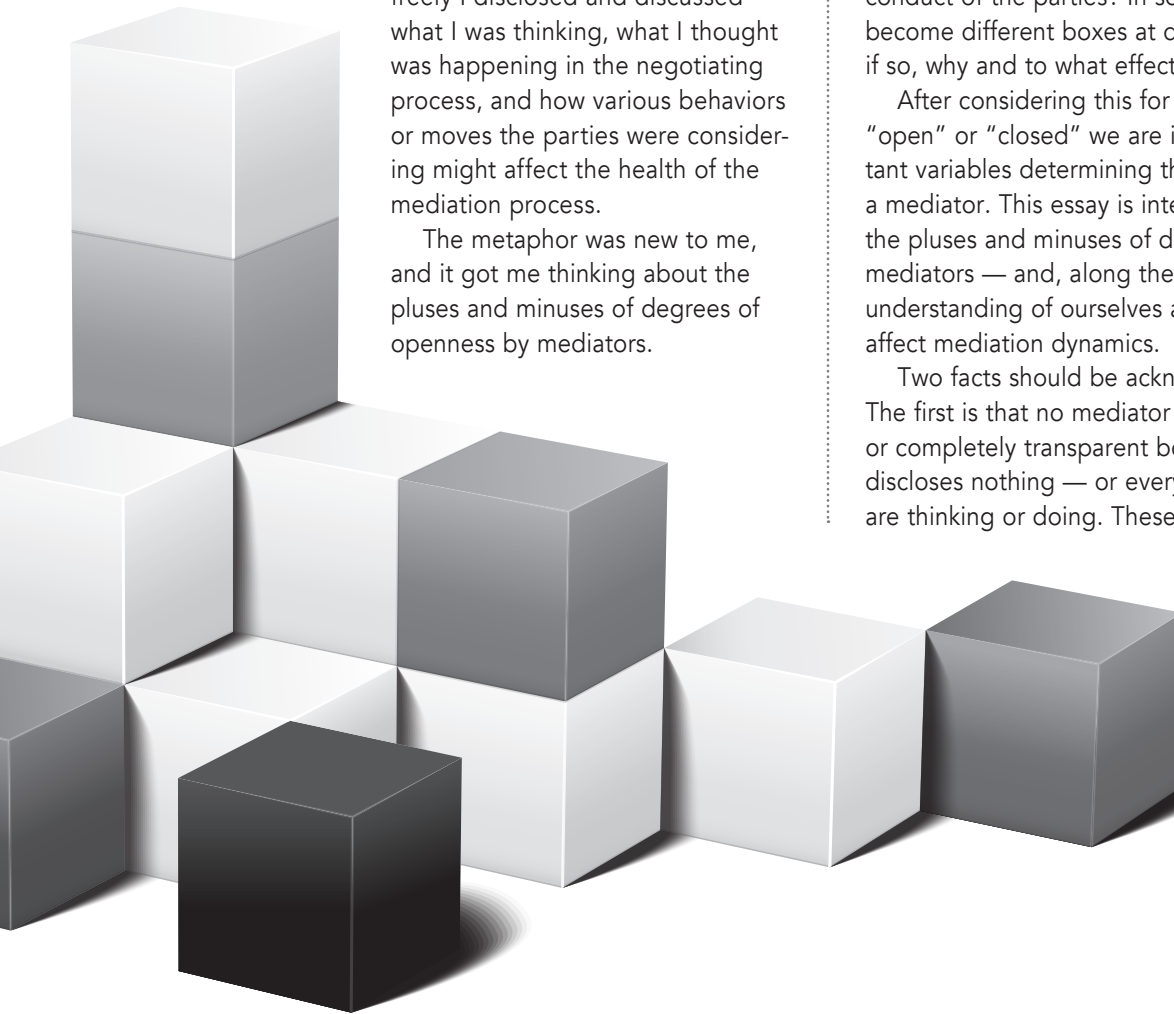
The metaphor was new to me, and it got me thinking about the pluses and minuses of degrees of openness by mediators.

When you mediate, are you a “black box” in the eyes of the parties? Or, at the other end of the metaphoric spectrum, are you a “transparent box?” Or does the way you handle your role fall somewhere along the continuum between those extremes, so the parties see you as a “gray box” or a “refractive box?” Do you try to adjust the degree of your transparency from case to case, depending on the personalities and conduct of the parties? In some mediations, do you become different boxes at different junctures — and, if so, why and to what effect?

After considering this for some time, I think how “open” or “closed” we are is one of the most important variables determining the nature of our role as a mediator. This essay is intended to help explore the pluses and minuses of degrees of openness by mediators — and, along the way, to enhance our understanding of ourselves and how our behavior can affect mediation dynamics.

Two facts should be acknowledged at the outset. The first is that no mediator is a completely black box or completely transparent box all the time. None of us discloses nothing — or everything — about what we are thinking or doing. These are matters of degree, of location along a spectrum.

The second reality is that our ability and inclination to be transparent (or inscrutable) is a product of some blend of our personalities, our philosophy of mediation, our strengths and weaknesses (analytical intellect,



emotional intelligence, experience), and our sense of what parties want from us (which can vary from case to case and from moment to moment). Shaped by influences from so many sources, the degree of our openness is not something over which we have, or should have, full control. But the degree of openness matters, and we should try to understand how. I have found that using the box metaphors has deepened my understanding and elevated my honesty about how I am doing my job.

Much of the discussion that follows assumes a mediation that includes at least some caucusing, but some of the observations about mediation dynamics could apply in any mediation setting.

Black-Box Mediators

Black-box mediators keep their cards close to their vests. They rarely, if ever, disclose their views about the legal viability of the parties' positions, what other parties are communicating to them in caucuses, or the participants' underlying interests, personal values, or long-range goals. These mediators listen but disclose little. They absorb what they are hearing, but very little light passes through them.

Apparently many sophisticated lawyers and clients are comfortable with the black-box approach. They engage only mediators whose worldliness and negotiation-wisdom they have confidence in. They want their mediator (not the parties) to remain in control of the process because they believe that it is by capitalizing on the mediator's experience that they have the best chance of striking a deal. They view the negotiation process as a ritualized game, a chess match in which no one expects either the neutral or the other parties to be fully forthcoming, even in private caucus.

They want a mediator who has developed good instincts about what is going on beneath the verbiage and about how much play there might be in the positional joints. They want mediators who can "read" carefully between the lines, who can spot and accurately interpret subtle, oblique (sometimes unintentional) signals, who will "hear" everything parties tell them in caucus with a skeptical, filtering ear, and who simply will not believe what parties say their bottom lines are.

Parties who are acculturated to the black-box approach don't expect (or even want) their mediator

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to explain what she is thinking or what informs her approach at any given juncture. In this view, a mediator who shows her analytical cards is merely creating opportunities for parties to use perceived or feigned fault with her reasoning as an excuse for refusing to change their offers or demands.

These negotiators even welcome being pressured by an evaluative or directive mediator — because they expect their mediator to pressure the other participants. They believe that it is only by exerting sustained pressure on all parties that their mediator will be able to reliably identify, for them, the real limits on the parties' willingness to compromise.

In short, they hire mediators who will do whatever it takes to keep the parties in the game well into extra innings and who will push well past the points the parties have told them they would ever be willing to go. They want their mediator to keep pressing until the deal gets done — or until everyone finally concludes that there is zero chance the parties will reach an agreement.

Gaming the Mediator

Black box techniques can be more threatening (to prospects for sustaining and succeeding in a fragile mediation process) when negotiators believe that some or all of the parties and their lawyers will be trying to "game" the mediator.

Gaming can include actively misleading the mediator (by lying or otherwise) about anything that might be a factor in the negotiation dynamics. It can include efforts to play on a mediator's emotions, personal values, ambitions, or needs. A gamer might, for instance, allude to his firm's interest in hiring the mediator in other cases or to the likely need for a second (paid) mediation session in the case at hand.

When negotiators believe that gaming is infecting the process, they will worry even more that mediators will harm prospects for settlement if they insist on interjecting their own substantive analysis into the process or on purporting to explain another party's views or plans.

Transparent-Box Mediators

"Transparent-box" mediators would, in theory, freely disclose and discuss what they are thinking, what they see happening in the negotiating process, and how various behaviors or moves the parties consider might affect (positively or negatively) the health of the mediation process.

Adherents to even the purest forms of transformative/facilitate mediation, however, are likely to find it very difficult to be completely transparent. In mediations that include any caucusing, the mandate of confidentiality can be one challenge. As mediators move between caucuses, parties may ask them to keep certain information confidential. Parties who understand that their mediator is bound to honor confidences will assume (even when it is not the case) that their mediator is not disclosing the full relevant contents of her mind.

Fear of being misunderstood, or of having to take too much time off the mediation clock to make sure that the motive behind or the implications of their messages are not misunderstood (e.g., as reflecting bias or a formed judgment), also can push back a mediator's pursuit of transparency.

The transparent ideal can be further compromised by the advocate's conduct. Parties often assume that the people in the other caucus are not telling the mediator everything relevant to their case valuation or to their settlement decisions, or that they are

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telling the mediator things that they don't really believe or that are based only on unsupported hope. Repeat players in commercial mediations may be likely to assume that the other side is manipulating the flow of information to the mediator to try to influence her thinking not only about the merits of the dispute but about the limits on the offers or demands they would even begin to view as credible or worthy of response.

In these senses, each side may believe that the other side is trying to manipulate the mediator to gain leverage in the negotiations. Thus, each side assumes that the other side will remain, in some measure, a black box to the mediator. So even if the mediator's promises of confidentiality did not limit (and thereby possibly distort) the light that flows through her from one side of the dispute to the other, each party might well believe that the managed and manipulated 'flow' of inputs to the mediator makes the promise of transparency a mirage — and a potentially dangerous one, at that.

Counter-productive Transparency

I aspire to be a transparent mediator, but I realize that ironically, some means I use to try to illuminate the negotiation process might push its reality deeper in darkness, at least when the parties are self-consciously examining the negotiation process and looking for ways to find leverage in it. In pursuit of transparency (and on the theory that productivity of negotiations varies with the amount and quality of the information that moves across party lines), I often try to explain or describe to the people in one caucus things that have happened, sentiments that have been expressed, or moods that have prevailed in the other caucus. In effect, I say, "Here is what you need to know about what's going on in the other room to make the best decisions about how you could advance the negotiation ball with your next communication or your next move."

Being more open about the situation in the other room than a black-box mediator would be, however, could have the perverse effect of making each group I caucus with less open with me. Each group might fear that I will disclose too much or disclose something whose sensitivity or implications I don't fully grasp. Or parties might fear that I would unintentionally

mischaracterize or misread conversations that feel private but that under my rules about confidentiality often aren't — because no one has attached the label "secret" to the communications I share or because it has not occurred to anyone to ask me to keep secret something as nebulous and variable as the tone or mood in a room. So, savvy and cautious negotiators who watch me talk more openly than other mediators do about the situation in the other room might well react by trying to disguise their actual thinking or true feelings or retreating into non-communicative modes.

The "Refractive-Box" Mediator — Ubiquitous and Valued But Not Transparent

Regardless of where on the spectrum between black and transparent boxes they might place themselves, most mediators are likely, at least some of the time, to act as refractors — bending light that is too bright, too hot, too linear, and ultimately too simple as it moves through them from one caucus room to the next. The dictionary definition of refraction is: "1: the deflection from a straight path undergone by a light ray or energy wave in passing obliquely from one medium (as air) into another (as glass) in which its velocity is different. 2: the change in the apparent position of a celestial body due to bending of the light rays emanating from it as they pass through the atmosphere; also: the correction to be applied to the apparent position of a body because of this bending."

So understood, "refraction" is a term that attaches with uncanny exactitude to roles mediators very often play: redirecting, reframing, and reducing the velocity of some emanations from one party to another; adding curvature to and de-energizing some communications; even electing not to permit some emotions, words, or characterizations to pass through them at all in order to reduce the destructive force with which they would otherwise strike the other side.

The refraction function is perceived as essential and invaluable by many participants in mediations in litigated cases. Refraction is an assumed, expected, even demanded feature of the skilled mediator's role in commercial cases. Even if they are not fully aware that they are doing so, parties often may choose mediators because of their skill in refraction.

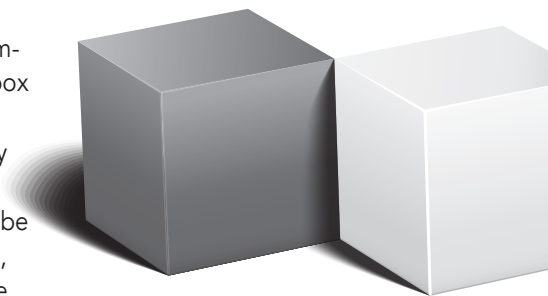
The assumption (by the parties) that their mediator is performing her refraction function can further cloud a transparent box. Even parties who have no experience with, or who would have no affinity for, the black-box approach often expect and want their mediator to refract. They expect their mediator to have a better feel than they do for the personalities and dynamics in the other room, and, therefore, to be in the best position to determine which kinds of messages would be most productively received at which points — and how to adjust their delivery. They expect their mediator to be in the best position to decide what to emphasize, how to lubricate communications that might generate friction, and how to soften the landing of heavy shells. They expect their mediator to know what to say and what to leave unsaid, and through all this "management of messages," to smooth edges, blunt knives, and prevent grievous wounds (to parties or process) from being unintentionally inflicted.

I expect no less of myself. But when I take on this responsibility, I now realize that I darken the hue of my box, distancing myself even further from the transparent model to which the foundational philosophy of the mediation movement and my conscience make me feel I ought to bear allegiance.

When Black-Box Negotiators Meet "Transparent" Mediators

How are lawyers and clients who have been acculturated to black-box approaches likely to react when they encounter a mediator who plays his or her role with greater transparency, a mediator who, in caucus, tries to engage with them in analysis of law and evidence, explicitly tries to explore underlying interests and concerns, and asks at multiple intervals for their suggestions about how to manage and structure the negotiations?

Some negotiators probably are most comfortable with a black-box approach by their mediator because they know they — and the other side — also will be black boxes. As noted, above, when each side



anticipates that the other will keep important secrets from the mediator, e.g., secrets about their analyses and about what is driving their negotiation strategy, neither side expects the mediator to be a reliable source of information about the other negotiators. Parties who expect their “opponents” to “manage” the flow of information to the mediator and to limit what the mediator can communicate may place little value on analytical openness by the mediator.

Such parties might even fear a mediator’s analytical meddling. A mediator who offers substantive feedback to the parties (e.g., about the strengths and weakness of the case) that is based on intentionally incomplete or misleading inputs from both sides might end up unintentionally skewing the negotiations in a direction for which no one is prepared, thus upsetting the artificial balance necessary to make parties feel comfortable enough with final offers and demands to make a deal.

There also is a distinct possibility that parties who have been “acculturated” to the black-box approach will view a mediator who adopts an open style as naive — and not as a reliable source of worldly wisdom about any factor that bears on settlement strategies or decisions. In other words, there is a substantial risk that when parties who are accustomed to a black box encounter an open approach, they will infer that their mediator doesn’t understand how negotiations among sophisticated parties in big cases really work, what their signals, silences, and moves really mean, or what kinds of terms might be “business viable.” Ironically, this fear of *naivete* could make negotiators more distrustful (of the wisdom) of a transparent-box mediator than they would be of a black-box mediator whose approach they have become comfortable with.

Lawyers who think of themselves as sophisticated negotiators and have had considerable experience negotiating in similar kinds of cases with similar kinds

of adverse parties might also feel that their ability to capitalize on their skills and instincts would be compromised by an intellectually open and energetically engaged mediator. They might assume that a black-box mediator is much less likely to interfere with the “natural” negotiation dynamic between sophisticated opponents — and thus less likely to disrupt its rhythm.

Cynical negotiators might even fear that a mediator who is purporting to use a transparent style is actually just using different techniques to game them. Lawyers accustomed to working with black-box mediators might view transparency and inclusiveness by the mediator as calculated and disingenuous, as a cover for a subtle effort to get inside their heads and manipulate them into a settlement. Stated differently, they might fear that the mediator’s transparency is a device for gaining access to their most sensitive and pivotal information and concerns, a verbal smoke screen intended to hide what is in fact a form of black boxism. Parties who fear this kind of subtlety are likely to be even more secretive about their real views and positions.

Conclusion

Thinking about my role as mediator through these box metaphors has helped me understand more clearly that lawyers and clients can have a wide range of expectations and preferences for mediator behavior — and that part of my job is to identify the place on the box spectrum or the blend of approaches and techniques that the participants in each mediation will be most comfortable with and that they will find most productive.

My “mediator box” usually is a blend of partly cloudy transparency and refraction. It is not perfect, and I am not perfectly comfortable with it, but on my best days it is a product of an active dynamic between my experience and views and the expectations and wishes of the parties I try to serve. When it is rooted in this kind dynamic, my box is as consistent as I can make it with the fundamental values that animate our field. ■



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