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The Evolution and Future of Mediation: Reconnecting with our Activist Roots

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The purpose of this article is to recount some of mediation's past, consider its current state, and offer a few thoughts on development trends for the future, asking the question whether we are doing "justice" to the "mediation movement" we have created. Unfortunately, one can rather easily argue that mediation's special qualities--its voluntariness, safety, self-determination and capacity--have lost a measure of their shine. In fact, it is this author's suggestion that the greatest threat to mediation is likely its successful institutionalization. At stake is whether mediation is a path to best solutions, or merely to barely sufficient ones.

The history of mediation has been well described in the leading texts of our field. See, for example, Jay Folberg and Alison Taylor's

Mediation, An

Alternative to

Litigation,

and Chris Moore's *The*

Mediation Process. Historically, the

essence of mediation--a presumably wise and trusted "third party" assisting others to reach agreement--has deep roots in many cultures. For our purposes, I would like to fast-forward to the period after the Vietnam War, when the modern mediation movement "took off."

While there was a good deal of mediation development in the labor-management sphere before the 60's (primarily through the Federal Mediation & Conciliation Services) and also with regard to transportation (National Mediation Board), there was very little mediation in the private sector, courts or agencies prior to 1970. Following the activism and divisiveness of the Vietnam War, a number of talented and motivated social activists asked the important question: "Knowing what we are against (war), what are we for?" While there were many answers to this question, a theme of "participatory democracy" emerged in the form of

neighborhood justice centers and the community mediation movement. The San Francisco Community Mediation Board panel model developed by Ray Shonholtz grew during these early times as an inspiration to the formation of community mediation programs. The National Association for Community Mediation (NAFCM) was founded during this period as a technical assistance center for the development of community mediation. On other fronts, the Conciliation Courts movement, over time, morphed itself into "court-connected family mediation," now present in virtually every state of the union. The efforts of John Haynes, OJ Coogler, Steve Erickson, Joan Kelly and others led to the development of the Academy of Family Mediators and the growth of private sector divorce and family mediation. SPIDR, the Society of Professionals in Dispute Resolution, began as primarily a labor-management arbitration and mediation group, and quickly expanded to consider the full range of court, agency and public policy dispute resolution. NAME (the National Association for Mediation in Education) spurred widespread development of peer mediation programs in the schools, later succeeded by CRENet, the "Conflict Resolution Education Network." It was also during this time that Frank Sander introduced the "Multi-door Courthouse" concept of courts offering a broad range of dispute resolution opportunities beyond litigation.

All combined, I have come to call this 25-year period of development, from perhaps 1970 to 1995, mediation's "silent revolution." Mediation grew rapidly during this period with little attention or fanfare. Despite substantial challenges in terms of funding and public education, and to the satisfying surprise of mediation advocates, mediation became rather remarkably institutionalized during this period and since. Why? The answer is easy: common sense! It simply makes sense as both a matter of public policy and individual choice to, if one can not work things out directly, sit down with a trustworthy mediator to try to figure things out before waging World War III in the courts or an administrative due process hearing. The result is that state and federal courts and agencies across the country now routinely ask disputants to mediate prior to being given access to a judge or hearings officer, absent emergency or abusive circumstances. Mediation has become a critical component of judicial and administrative docket management; without it, one wonders how we would manage our ever-expanding contested case load.

Unfortunately, this "silent revolution", of mediation being so thoroughly integrated

into our courts, agencies and society, has not been without its costs and risks. Primary among these challenges are the quality of mediation services being offered. Without in the moment offering answers, let me list what I see as some of the greatest challenges mediation faces with such broad acceptance and institutionalization:

1. **Access to State Sanctioned Mediation is Increasingly by Due Process Adjudicatory Filing Only**

One of the paradoxical truths about the growth of mediation, particularly in contrast to its private sector, entrepreneurial beginnings, is that, as things have evolved, the path to obtaining state-sanctioned and subsidized mediation services is now commonly the filing of a court complaint or petition or an administrative due process complaint. It is not that including mediation as part of court and agency procedures is bad per se. The challenge is that these programs tend to dominate the landscape, actually cutting into innovative private sector mediation growth. To a disputant, it seems that not all that much has changed. The gatekeepers of dispute resolution in our society have remained the same. To a substantial degree, mediation has become just another hoop to jump through on the way to an adjudicatory resolution. While mediation initially showed promise of changing not only the way we resolve conflict, but also the way we think about conflict, with court and agency adoption and institutionalization, it seems more like the "same old system," just with one more hoop to jump through on the way to our mythical day in court.

2. **Community Mediation Programs Are Dramatically Under Funded**

Our failure to come up with a reasonable and sustainable way to fund community mediation in the United States is nothing less than an embarrassment. Are we saying that the most powerful and richest nation on earth can spend over a trillion dollars on a war that gets us no clear positive results, but can not spend perhaps 50 million per year to adequately fund community dispute resolution throughout our land? Our building one less B-2 bomber would allow us to fund community dispute resolution services in this country for more than 10 years. What are our priorities as a nation? Why are we not protesting in the streets about this? Mediators need to become activists on so many fronts, but this does not

come naturally to many "peacemakers." By our own inaction and our failure to create conflict regarding the dramatic under-funding of community mediation, we as mediators participate in and support this abomination. If ever there were a smart investment for our country to make, it would be to elevate community mediation services to the respected place in our society that these programs so richly deserve. I, for one, am tired of being quiet about this and encourage you to join me in shaking cages and challenging our political leaders on this critical issue.

3. Mediation Systems Based Solely Upon Volunteers Threaten Mediation Quality and Value Recognition

There are an increasing number of articles at Mediate.com, and comments to those articles, questioning the sustainability and impact of basing court, agency and community mediation exclusively on volunteer work. Please do not read me wrong here. I do believe that a good measure of volunteer mediation is a good thing. It is a great way for mediators to get started, and volunteers help to create a mutually supportive social fabric in our society that is sorely needed. But too many community, court and agency mediation programs are based exclusively on volunteer mediation. The result is that there is a constant recycling of mediators, with the more talented and confident mediators commonly moving on to mediate for pay, be that in the private sector or as part of a compensated public sector program. This results in challenging training and quality control needs for community programs and in a lowered overall level of services provided.

4. Court and Agency Mediation Programs Are Steadily Asked to Do More with Less – Where Does It End?

I was recently teaching an advanced mediation course at Pepperdine Law School, and one of the participating California State Facilitators (a program that handles child support issues . . . separate somehow and unfortunately from the court-connected custody/visitation system in the state), and one of the state facilitators made a comment along these lines: "These techniques and approaches you are teaching are great, but they are irrelevant to the work we do. What you describe, no matter how appropriate, healthy and empowering for participants will not work because they take a measure of time we do not have. Collaboration and capable problem solving are

luxuries we can not afford. Last year we had up to two hours with a couple, but now it is one hour max, really 45 minutes, to allow time for the paperwork we also need to turn around, so what do you suggest as techniques for us to resolve these challenging issues in 45 minutes?"

My answer was that I suggested a new technique: that the state facilitators go on strike. I asked the question, "What will you do when they say only 30 minutes next year, and only 20 minutes the next? Do we as mediators have no boundaries? Are we simply pawns in the 'administration of justice'?" How can we tolerate this stupidity and be true to our roots and to the importance and potential of mediation in our society and the world? We are corrupting the very meaning of mediation. Mediation, with so much initial promise of helping participants reach the most satisfactory results following most capable discussion, has sadly descended into a docket management device. If we do not speak up to defend quality mediation, who will?

5. Being a Silver Haired Lawyer or Retired Judge is Not Enough to Offer Most Capable Mediation Services

While extensive legal experience, including experience participating in and running settlement conferences, is surely valuable as one transitions into the world of mediation, such extensive legal experience is not itself sufficient to offer most capable mediation services. Lawyers and judges do not want to hear this. Unfortunately, it is often hard to tell someone who thinks they know how to resolve disputes ("I will just share my wisdom and experience with them and they will see the light") what they do not know. In fact, the whole "settlement conference mentality" threatens the best that mediation has to offer. Building on a "hearings mentality," civil and commercial mediation tends toward crisis mediation, where we get together early in the day with a goal of settling the case by the end of the day and, if this does not happen, there is often a view that the mediation has been a failure.

How did we become so dumb? I am quite convinced that the driving force here for "single-sit crisis mediation" is the difficulty of scheduling the mediator, lawyers, parties, etc. Because of the challenge of "finding a free day" for the mediation and the expectation that it will be completed, one way or the other, in a single day, we rob participants in the system of the

ability to "sleep on things," to gain additional information, to consider additional possibilities--in short, to most capably address the issues. Certainly there is a part of us all that wants to resolve mediated disputes at the earliest possible time, but to assume that the only model available is a single-sit crisis mediation is to make a huge mistake. The result again is a tendency toward barely sufficient dialogue and barely sufficient solutions, rather than most capable dialogue and most capable solutions. In terms of moving toward resolution in individual cases, I am quite convinced that the greatest movement does not take place around the table, or even in the mediation setting, but commonly as participants "sleep on things" (or more accurately, are not able to sleep . . .)

By assuming that a result, if it is to be achieved, will be achieved in a single day, we impose an overly pressurized environment on participants. There is nothing wrong with meeting a second or third time or continuing the mediation online or by phone. Critically, a second or third meeting gives us time between meetings to creatively work our magic with strategic phone calls, emails, or separate meetings. For us to impose a single-day "hearings mentality" on mediation is to miss the essential opportunity that mediation offers--one of healing, genuine resolution and most capable solutions. Our unconscious hearings mentality, frequently resulting in lawyer domination of the discussion, robs participants of their opportunity for genuine resolution. The way it is, we can expect that there will be an offer at the end of the day that we will either need to "take" or "leave." Crisis mediation is not negotiation at its best, but too often an overly rational and hollow substitute for true resolution. I surely do not have a problem with single-sit crisis mediation being a service in the marketplace. What I fear is that this approach has become the marketplace.

Moving Beyond Institutionalized Mediation Mediocrity

The harmonizing theme of these observations and many others that can be made, such as the virtual lack of research as to what really works best in mediation, is that the mediation process, which offers so much potential in terms of most capable problem solving, is being denied its opportunity to best develop and serve our country and the world. Following the broad acceptance and institutionalization of mediation, we have retreated to old habits, trusting the

judicial and legal gatekeepers to "carry the mediation ball." While the acceptance and adoption of mediation by the courts and agencies is at one level to be celebrated, at another, it is our greatest challenge. The resulting co-option and acceptance of mediocre processes, resources and results is a threat to mediation. I wish I could say that things are getting better in this regard, but they are not. They are getting worse. And so, just as we sounded the "battle cry" three decades ago that "there is a better way," we need to do this again, and now. And if not us, who? The fate of mediation in our society and the world hangs in the balance.

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