

Where have all the idealists gone? Long time passing

An essay on the future of mediation – and a look at its past

By Jeffrey Krivis

With special thanks to Pete Seeger for inspiration

A recent discussion among a seasoned group of neutrals about the struggles of the professional mediator caught my eye. Some complained that the trend in litigated cases was to reduce the value of the mediator to a commodity, due to the constraints put on them by the litigants who were not process oriented. Others viewed the responsibility of keeping the process dynamic and interesting on the mediator, the traditional guardian of the process. Whatever the reason, there was a consensus that there is a trend to marginalize the process and the neutral. This quote from an unnamed source summarizes what some say has become of our field:

> Professionalism historically proceeds through a number of stages, starting with the discovery of useful techniques, creative development, and systemization of skills. Next comes professional self-consciousness, the search for legitimacy, and the beginning of territoriality and proprietary behaviors. This is followed by a codification of rules and ethics, escalation of fees, formalization by attorneys, legislators, and judges, and formal certification. Finally comes dismissal of the impecunious, grandfathering of the unqualified, marginalization of the unorthodox, and promotion of the mediocre.

This sentiment has created a tension between the journey of so many well intentioned people who adopted the humanitarian aspects of the mediation movement as a type of savior for the legal system, and the economic realities of an entrenched civil justice system that is less favorable to change.

In order to envision the future of the profession, it is helpful to start with a snapshot of the past and understand the internal stressors that dominate the field. This article will include an examination of the debate many mediators have within themselves and how those controversies will or will not change the trajectory of mediation in the future. We conclude with a look at how to maintain the dynamic nature of a field that has been subsumed into the large menu of options available to the litigator.

Back in the '70's

Over the years, a common theme heard among litigators after a grueling case where one side loses is that there must be a better way to manage disputes. In the mid-1970's, legal scholars from around the nation came together to review ways to make the legal process more user-friendly and accessible. They concluded, among other things, that a multi-door courthouse with processes that were designed to fit the forum to the dispute might be worth considering. Mediation was at the centerpiece of the discussion because it allowed parties to control the outcome, focused on self-determination and empowerment of the parties.

The first legal system to adopt the vision of these legal scholars was the Neighborhood Justice Center. Although disputes had legal overtones, they generally involved personal relationships where the focus was on the parties themselves, and what could be done to assist them with their ongoing relationships. This fit squarely within the goals of mediation, and success was overwhelming. Indeed many of the leaders from the Neighborhood Justice Centers were prominent members of the local and national bar associations.

Observing the success of the mediation process in their own backyard planted the seeds for later adaptation into the civil justice system.

Those who served as early mediators were creative and enthusiastic, trusting their intuition, prioritizing the importance of ongoing relationships, and seeking more wisdom that they could impart to their clients. The early neutrals were both visionaries and idealists in the same spirit as Mahatma Gandhi and Martin Luther King. They prided themselves on being authentic, kind and nurturing. They were sure that the use of friendly cooperation was the best way to achieve a fair outcome of any dispute, even if it involved competitive components. These folks had unique, artistic talents that highlighted interpersonal harmony as the gateway to case closure. Some mediators entered the field because they were on a journey of self-discovery and improvement, and wanted to help others on the journey. The process of dispute resolution was the mechanism to follow that chosen path. These idealists were naturally drawn to the mediation process because they could help people find a better way and inspire them to grow.

Early adopters

To appreciate any new movement it is helpful to understand the motivation of the early idealists who planted the first seeds. Many were disillusioned lawyers,

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often referring to themselves as "recovering attorneys." Others were devout supporters of the civil justice system (judges, professors, trial lawyers) dedicated to its ongoing improvement. All had the same goal of making the process of settling conflict less adversarial and more peaceful. Early mediators were evangelical in their idealism for the field, and rightly so. A new opportunity to create massive change in the way legal disputes were being managed was at stake and the chance to reshape that system was presented. In a way they followed the paths paved by other famous idealists who reshaped the world. For example, Gandhi adopted a form of practical idealism, a philosophy whose non-violent approach was designed to achieve goals focused on ethics and virtue to defeat the British Empire. Like mediation, this philosophy recognized the need for compromise in its approach to reach higher goals. Visionaries like Gandhi and the early mediators had one thing in common – following the moral high ground allowed them to adapt their movements to fit the arc of history. They maintained their visions while maintaining flexibility of process to achieve their dreams.

The idealists in the early mediation movement actively adopted a vision some authors referred to as the "promise" of mediation. This vision was primarily concerned with disputes that were interest based, meaning they focused on the needs or concerns of the parties. The process of mediation was intended to address those interests, and then manage the conflict with the goal of party empowerment. Lawyers, psychologists and those generally interested in improving the human condition joined forces to provide interest-based training and design processes whose central theme was improved communication between the parties, with negotiation following an understanding of what was at stake.

The communication component of the process was understood to begin with a "joint session" in which parties had a chance to vent, tell their story and be heard. Following the joint session, the mediator would then conduct private meetings where communication continued and the process of negotiating a resolution of the dispute began. Scholars wrote books that broke the process into component parts that had various names, but one part was consistent throughout – namely, the case would always begin with a joint or plenary style session – a session that encouraged parties to sit across the table and hear each other out.

Adoption by the courts

A major shift took place when lawyers grafted the mediation process onto adversarial litigation, where the focal point of the dispute was highly competitive zero-sum games. Courts throughout the U.S., Canada and the U.K. encouraged and even mandated the use of mediation to help streamline caseloads. The process became wildly successful and has been used in the same fashion as other improvements to the civil-justice system such as depositions, interrogatories and so on. Unfortunately, a tension occurred between the mediation process and the adversarial system of justice due to the different designs of each system. The adversarial system was inherently competitive and required arguments by counsel to a referee who would then search for the truth based on positions taken and evidence presented. The mediation system was intentionally cooperative and based more on dialogue, not arguments, in which the parties heard each other and then negotiated between themselves with the help of a referee. Both systems were elegant in their design, but when transplanted onto each other, the tension between cooperation and competition escalated.

The *adversarial* system is a set of independent parts forming a whole. It is primarily made up of processes like depositions and motions designed to gather and shape information so that it could be utilized to support the position of the advocate. This is contrary to an *inquisitive* system where the third-party referee is more involved in a neutral approach to investigating information and evidence from the case in order to come to a fair outcome. Both are searching for the truth through different means. Mediation is styled as an inquisitive process but is not necessarily designed to search for the truth, but rather to find agreement, also known as the "deal." In reaching for the deal, mediation promotes confidentiality as its centerpiece while both adversarial and inquisitive systems require transparency. The critical difference is that in adversarial and inquisitive processes, both sides are required to be fully informed of the evidence presented and have an opportunity to respond. Mediation of litigated cases can successfully proceed with impunity because of confidentiality.

Confidentiality can be at direct odds with both the adversarial and inquisitive systems because there is no penalty for deceptive behavior in mediation. The adversarial system, with transparency as its foundation, punishes deceptive behavior with sanctions in a way that attempts to promote honesty. Deceptive behavior ranges from twisting the truth to outright misrepresentation of evidence. In mediation of litigated cases, this has led to a dependence on positional bargaining in order to get more of the limited resources available. This dependence is contrary to the integrative or cooperative form of bargaining that the early idealists had in mind who shepherded the promise of mediation.

Mediation drift: From joint sessions to shuttle diplomacy

Like any new service or product, people started to alter the process of mediation in the adversarial system to meet their objectives. Litigators needed to find out quickly if appropriate resources (money) were available for their case. In order to learn if the process of mediation would be fruitful, litigators encouraged the mediators to bypass the basic essence

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of what drew the idealists to the field in the first place, self-determination and empowerment through communication. Instead, litigators appropriately sought to jump into the negotiation phase of the process in order to diagnose the availability of proper settlement funds. From a process standpoint, this meant avoiding any opportunity to present their case in a joint format to the other side, but to rely on private conversations with the mediator which may or may not involve transparency, depending on how much the advocate trusted the mediator.

Some parties pushed back and encouraged the use of a joint session, particularly if there was an emotional roadblock that needed addressing. Others approached the joint session as a means to make legal arguments and display conduct normally reserved for the courthouse. Legal arguments conducted in joint session were often disturbing in that it tended to alienate the parties as opposed to bringing them together.

Some mediators passively permitted this process to occur, and joint meetings of parties and counsel began to be poorly received. Since the goal of a legal dispute is to resolve a conflict through negotiation or trial, advocates chose to see the mediation process as a chance to understand how their opponent viewed the end game of a case without putting all their chips on the table. Lawyers concluded that it was not a good use of their time to be in the same room with their opponents, and mediators began to take on the role of settlement judge, using shuttle diplomacy exclusively to resolve disputes. In some cases, the lawyers never had the chance to actually see their opponents throughout the process. Many cases settled this way, though client involvement was substantially reduced.

The net result of this drift from a client-centered or empowerment approach to a straight distribution of resources through shuttle diplomacy was an outpouring of criticism by the mediation community that "their" process was taken away by the legal community, and that they were no longer satisfied with their roles as neutrals. The mediation community continued to reap substantial financial rewards for acting as neutrals, but professional satisfaction was at an all-time low. The legal community continued to embrace mediation but viewed it more as a means to an end, not as a dramatic finish to the case. This led to some dissatisfaction with the mediation process. Some mediators continued to be communication oriented, attempting to maintain the usefulness of joint sessions despite resistance from their clients. Many of those mediators found a drop off in their business because they were not viewed as dealmakers. Unless the mediator was viewed as someone who could "close" or "settle" a case, they began to be seen in the marketplace as too soft, often viewed as commodities as opposed to the artists the idealists had envisioned.

Case closure

The economic drive that directs a litigator to get the best possible deal for their client hit head on with the mediation movement that was concerned with harmony, cooperation and of course, confidentiality. This impact was forceful and disruptive to the idealists in mediation who maintained a type of ministry in their work, with some forgetting the importance of flexibility. The question was not whether the process of mediation was going to be thrown in the big heap of rubble that represented many other unsuccessful services piled onto a dysfunctional adversarial system. The real question was whether lawyers and mediators could adapt this confidential process to fit the needs of the litigated dispute at the bargaining table, while balancing the importance of case closure.

Next month: Part two – Addressing the needs of the legal community, or "making some music with lawyers"

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