

# Approximate Memories - A mediator's journey

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This morning I was greeted with the news that Julian Barnes' **The Sense of An Ending** had been named this year's winner of the Man Booker Prize. A wonderful read, in part about how our memory deceives us, it struck me as an appropriate point of departure for this blog post. Like Barnes' narrator, "I need to return briefly to a few incidents that have grown into anecdotes, to some approximate memories which time has deformed into certainty. If I can't be sure of the actual events any more, I can at least be true to the impression those facts left. That's the best I can manage."

I think of my first exposure to mediation, 21 years ago. I'd been practicing corporate-commercial law for 12 years and was increasingly plagued by the notion that the ladder I was climbing was leaning against the wrong wall.

I noticed an ad in the **Ontario Reports** (a publication of our Law Society containing recent decisions of import) for 2-day Mediation Training. I had no idea what was involved but in my growing state of desperation was prepared to explore almost anything that might lead to an alternate career (we won't go into my exploration of long haul trucking or elementary school teaching in this post).

There were about 15 of us in the hotel meeting room in downtown Toronto. In the first few minutes the instructor, flown in from British Columbia, explained the kind of mediation that he would be focussing on and I can still remember the hair standing up on the back of my neck. I thought, "This is it! I could do this!"

What he went on to teach us was a form of mediation routinely then used in his home jurisdiction and certain parts of the United States in which a facilitated haggle was used to settle motor vehicle insurance claims.

What we participants didn't know until later was that the company promoting the training session had a serious problem: they had pre-sold hundreds of mediations to motor vehicle insurers in Ontario, building on their success in British Columbia, but had no mediators in this province. The training session was really a 2-day interview of potential mediators and anyone showing a hint of promise was taken aside and offered an opportunity to first observe and then conduct an actual car accident mediation. It was a classic toss into the deep end of the pool strategy.

Very soon I was mediating 3 or 4 cases a month and I enjoyed it right from the start. But as I read more about mediation and attended further training sessions, including two in Colorado, I became increasingly confused. "Good mediators", I learned, were unceasing fountains of wisdom and creativity, leading hapless disputants to "win-win" solutions through facilitated integrative bargaining focussing on "interests" and "options" and "BATNAs". The image was that of the dynamic leader at the whiteboard, marker in hand, exhorting parties through a brainstorming session.

What a far cry this seemed from my own mediation experience where the challenge was simply to keep litigants and their counsel in the building, engaged in the bargaining back and forth process until the apparent bottom lines could be ascertained and then to test whether the remaining monetary gap could be bridged.

My confusion escalated to profound anxiety with the publication by Baruch Bush and Joseph Folger of **The Promise of Mediation** in 1994 with its premise that by focusing on what the author's referred to as the "Satisfaction Story of Mediation" (mediation is effective because it permits parties to settle disputes quicker, cheaper and in a more satisfying manner than traditional methods) we mediators were failing to live up to the "promise" referred to in the title. This promise was encapsulated in the author's "Transformation Story" according to which "The unique promise of mediation lies in its capacity to transform the character of both individual disputants and society as a whole."

Naturally, being a child of the 1960's and then only being in my early 40s, I, like many others in the field, wanted to live up to this promise. Of course I was interested in not only changing people but changing the world as well. I did what I could to learn the tools and techniques of a "transformative" mediator. The only problem was I couldn't seem to get my car accident cases settled any more. Injured plaintiffs, insurance adjusters and their lawyers had, it seemed, surprisingly little interest in being transformed.

This was all happening at a time when there seemed to be increasingly acrimonious debates among mediators about what constituted "real mediation" with the suggestion that whatever it was it wasn't the facilitated haggling sessions I was being paid to conduct.

For me these issues and tensions resolved themselves over time as I developed a comfort level about what I do and how I do it. No longer much interested in transforming people, much less the world, I now see my role, 3 or 4 times each week, as hosting the occasion for parties to settle their law suit in a way that works for them on an "all things considered" basis. In my jurisdiction we call these occasions "mediations".

Hosting these occasions requires a clear sense of process together with certain skills and tools. I have come to see myself as a craftsperson providing a particular service which has value for its consumers. As would any craftsperson, I strive to deliver these services with a high degree of integrity and a commitment to continually looking for ways to improve. I still enjoy it very much and look forward to doing it for many years to come.

The word, "mediation" is used to describe a wide array of different processes that play out in a variety of different contexts - each process with its own proven utility. Perhaps we have stretched this word beyond what is helpful but I suppose there's no going back. Still, I think it's important to keep this in mind as we learn about what other mediators do and how they do it.