The Californication of Mediation

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> *This post is unlikely to win me friends on America's West Coast and it may even see my US mediation teaching visa withdrawn, however when the issue even has its own Facebook group called Save the Mediation Joint Session and Promote Party Participation with over 50 of the world's top mediators signed up, then the patient is more critical than I thought.*

The rise and rise of the mediator's proposal [1] and other evaluative interventions by many of our number, along with the relentless demise of the joint session, are all part of a larger lurch to the right for mediation practice.

And if we look for ground zero, inevitably all roads lead to Southern California where we are told the joint session is almost non-existent in that most mature of markets, Los Angeles.

There in the City of Angels it seems the caucus only model, with the mediator's proposal at its heart, has taken root and is now blooming in the desert air.

Carried aloft on the hot and dusty winds of the Santa Anas, blowing westward through the canyons of LA and out over the Pacific Ocean, these changes are coming to all of us.

And there's debate about how it all came to this – just how did the mediator's role reduce to that of water carrier between rooms and how did counsels' default process come to position their client – not for resolution – but for the inevitable mediator's proposal?

There's even a name for it – jockeying for *'advantageous impasse'* where counsel dig in and actually hope for advantageous impasse so that the mediator's proposal is predicated on the 'right' number.

In many parts of the US, the mediator's proposal has now become the endgame rather than a rarely used intervention technique in only the most intractable of cases. Much has been written on the subject, even from those in the eye of the storm.

Earlier this month, respected Los Angeles mediatior Jan Schau writes in her piece *The Dreaded Mediator's Proposal: Intrusive or Necessary?*

> *"... In the last five cases which I've mediated, I've been asked (or perhaps volunteered?) to prepare a mediator's proposal in each of them... I know this is controversial.*
>
> *I tell the parties that I am willing to propose terms which may help to break an impending impasse once I have sufficient input from each side as to what is possibly acceptable. Then I set out to write out all of the terms I can think of and set a "value" that I think each side may agree to. And then, like the parties, I sweat it out until they respond..."*

And for many years Californian neutral and author, Victoria Pynchon, has been tracking this issue. Way back in 2009 she advised "... whether parties to litigation should engage in joint session bargaining at some point in the process is a hot topic at the moment because joint session practice is nearly a dead letter in one of the most active and sophisticated mediation markets: Los Angeles... Most attorneys do not like to begin their mediated negotiations with a joint session and neither do many mediators. The reason most often given is everyone's desire to avoid a polarizing set of zealously adversarial presentations".

And Kluwer's own Jeff Krivis, a veteran of the LA mediation scene, has been warning for sometime this is happening in his backyard in posts on this blog like *The Preventable Death of Mediation* and *The Settlement Drift*.

The wider profession is, I'm pleased to report, at last realising these folks aren't waving – they're drowning.

In a wonderful piece in this month's ABA Dispute Resolution Magazine by Eric Galton and Tracy Allen called *Don't Torch the Joint Session* they open by saying "... Have you heard? Perhaps you have witnessed or participated in a very disturbing trend in mediation – the avoidance of a joint or general session including all counsel and parties in decision-making. This phenomenon, which is "reshaping" the customary mediation process, is increasingly evident throughout the United States. In our view, this phenomenon is market driven and is resulting in the structural dismantling of the mediation process.

> *"Many of us have wondered what the mutant child of the marriage of law and mediation might look like. Now we know: deconstruct the process and turn mediation into the more familiar judicial settlement conference"*

And then there is my own call to arms a while back *In Praise of Joint Sessions.*

> *"I have resisted thus far saying what I really think of a mediation process where the parties never meet as my aim is to present a balanced debate. But I cannot conclude without observing that, in my view, shuttle mediation has arisen, in part, out of a laziness by mediators. Why?*
> *It's just easier to work separately – it's far less effective in so many ways, but it is easier. Because, you see, the air is just not as thick in caucus and it takes less effort to breathe there"*

[1] *A mediator's proposal is a set of settlement terms advanced by a mediator in an effort to settle a dispute when the parties have reached an impasse. The mediator's proposal is made on a double-blind basis to all parties in separate communications; the parties are asked to accept or reject the terms as proposed, with no modification or counteroffer, within a specific time frame*. Thanks to John DeGroot's *The Mediator's Proposal: A Great Tool For Yesterday's Disputes*