Kluwer Mediation Blog

Where Have All The Idealists Gone? Long Time Passing

Jeffrey Krivis (First Mediation Corporation) · Friday, March 20th, 2015

A commentary on the future of mediation, 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 attention. 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 put 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 of the current mediators have within themselves and how those controversies will or will not change the trajectory of mediation in the future. Finally, we will take a look at how to maintain the dynamic nature of a field that has been swallowed into the large menu of options available to the litigator.

History

Over the years, a common theme heard among litigators after a grueling case where one side loses

has been that there must be a better way to manage disputes. In the mid -1970s, 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, focusing 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 to 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, 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 utilized 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 reach 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.

The Drift of Mediation

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 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, instead relying 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.

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.

Adapting To The Adversarial System

The idealists in the mediation movement have struggled to maintain the vision of the forefathers and foremothers who discovered the process. This has led to a complicated but critical discussion about which parts of the process are working and which are not. The central focus of the process that has been under scrutiny is whether or not to conduct a joint session, a key communication piece of the process. Many believe that giving up on the joint session is relinquishing the ideals of its founders to the economics of the marketplace. The answer lies in viewing joint sessions as part of the dynamism that sparked the ideals of self-determination and empowerment, not as static, formulaic components that one does because it is so written in the books. The concept of a joint session is actually a fluid opportunity to advance both the cooperative and competitive players up the field. On the cooperative side, it can be done with or without clients present, depending on the issues that have surfaced at the time. On the competitive side, it allows the mediator a chance to lead by example and suggestion, essentially coaching parties to make appropriate arguments that fit the informal setting of a conference room as opposed to a courtroom. It can be done on an as needed basis as opposed to early on when tensions are high and the mediator has not had a chance to diagnose the impediments to the case.

The debate about self-determination and empowerment seems to be about the neutrals wanting a certain type of experience that often parties either are not interested in, or don't comprehend its value to their cause. It is also irreconcilable with the introduction of deception into the process with impunity. As a service industry, the role of the mediator is to help optimize the objectives of the client, which often has nothing to do with self-determination, control and some of their other ideals identified. Sometimes they just want a deal so they could close the file in a way that process is not their priority. Other times they need to deescalate and find a soft landing before settling. The mediator is deputized with finding that sweet spot and helping them through the passages of conflict, knowing full well that folks might not be truthful and open, a concept that would not be permitted in an adversarial proceeding.

What Approach Actually Works?

In order to help the parties reach their goals, sometimes the most effective and transparent exchange of information occurs early on and privately, before the parties ever have a chance to meet each other in a joint session. If that works, why not use it? If it doesn't work, mediators always have other tools to use, including various hybrid forms of joint meetings to call upon. Remember, lawyers have their own constituents to consider, and many are bottom line people who are not as process oriented as the mediator. While process counts, it only counts if it is effective in generating movement in the negotiation and ultimate resolution of the case. To focus on process for process sake only is to be naïve about the goals of the participants to mediation.

Like the adversarial process, the mediation process has an interconnectivity of parts that make the whole greater than its sum. It is the organization of the parts that requires creativity and flexibility in order to be successful. In other words, following static formulas designed to fit into a format that doesn't address the interests of the constituents at the table no longer works. The idealists who started the mediation movement recognized the need to tease out the best components the process has to offer in order to create movement toward settlement. They identified the importance of demonstrating to the advocate whatever available financial opportunities existed while concurrently inserting client satisfaction and empowerment into the mix. This is where the crystal ball of the future could be bright or the process could be part of the junkyard of other ideas designed to support the adversarial system.

Addressing The Needs of The Legal Community

What is it that the mediation community can do to address the mindsets of lawyers who have their own constituents to address? To begin with, demonstrate to them through process behavior that the community understands their goals. This might involve calling for a joint session in a way that explains why it makes sense and what impact it will have on the process, and then get their feedback on the approach. This is contrary to simply setting up a full room with anxious people who don't know what to expect and are at the height of disagreement and anxiety.

What happened to the great idealists and their vision? Many simply adapted to and became the establishment. Mediocrity became the norm as the economics of the system drove idealists away from the larger purpose of control of outcome and empowerment. Idealists like Gandhi went on to lead a nation. King created a tribe of followers that to this day keeps the fire burning for civil rights for all mankind. Is there still a larger purpose the mediation community could provide in the future that is reminiscent of the leadership of Gandhi and King?

Make Some Music With Lawyers

I grew up in the 1960s and 70s where music and art were transforming the world with strong inflections of missionary zeal for disruption and harmony. While it is not completely accurate to compare the work of mediators to musicians, understanding the parallel structures about listening and teamwork help enlighten our future. Music in particular is a metaphor for what mediators actually do with the time they have with the parties. Art is our way of painting a masterpiece out of a blank cloth.

Consider a blues tune. It is almost always written using the standard One, Four and Five chords in a certain specified order. Yet, there are blues tunes written every day that have their own sound and flavor. They adapt to the current state of affairs. Many current blues tunes have hip hop and rap tracks attached to them. Older blues tunes might carry a country rhythm. In the early days of rock and roll, blues became loud and stinging, yet it was still the blues. When comparing mediation to music, I'm not referring to elevator type music that blends in and is simply background noise. This is hard driving, biting riffs with creative melodies that rely on regenerating itself depending on the mood of the group that is playing and the audience that is listening. As each new phrase is developed, the next phrase takes shape.

Dave Davies, the brother of Ray Davies and songwriter of the band The Kinks, summed it up like this:

> "You see, I like to be moved, and certain tones can agitate your emotions in a certain way – give you focus – whereas a pristine and totally on the button sound might be too ordinary. We're so used to a whole array of sounds – traffic and people arguing and laughing – that when something sounds a little bit off from what you expect, you notice it more. It's ragged. I tend to call it "the imperfections that make it sound perfect" – those little nuances that a lot of people would say, "Oh, redo that" or "do it again." A lot of musicians have such a fear of getting it wrong that they ruin the whole thing. It has to do with confidence, rather than if there's a right way or a wrong way. If the confidence and the intent are pure your paying will sound confident and pure. That's how I feel." Playing, performing and producing music are

> a lot like painting, I think. The brush stroke moves slightly and you end up with something you didn't intend. "Wow, what's that? Oh, I'll keep that bit. It's nice." I do that with music. The more anal you get – the more you want to get to a point of precision – it becomes something that I don't believe is real art. Art has to go a bit askew. It has to be a bit wrong –whatever that word means –for it to be right."

Looking into the crystal ball of the future of mediation, I can't help but learn from artists and musicians as they struggle to create sounds and pictures out of imperfections. It is this imperfection that drove me to find ways to adapt the elegance of mediation to the complexity of the legal system. The economics of the legal system has pushed the mediation movement away from elegance and into a spiral of creative compromise. For the future to exist, the spiral must be slowed down such that mediators recognize the importance of economic factors, while subtly encouraging the human side into the equation. My own personal journey has found a way to slow down this spiral by gravitating to the techniques used in improvisational music and theater.

Using Improv In Mediation

Improvisational music and theatre are probably more akin to the methods and strategies of accomplished mediators. The foundation of improvisation is based on teamwork, listening for the unstated and knowing that mistakes are part of the rhythm and beat, and that they should be embraced, not put down. Jazz musicians are particularly adept at learning the basic building blocks of songs such as chords and rhythms, and applying those building blocks in their own repertoire of responses. They do exactly what mediators do – they read the mood of the room, listen to each other and start playing.

This musical approach is precisely what is missing in many of the current approaches to the practice of mediation. Making something up on the spur of the moment is antithetical to what lawyers (and mediators) are taught. Theatre actors are not constrained by formulas, scripts or structure. They operate in a world where reactions to stories that are unfolding are immediate. Mediators can do the same thing as musicians who are riffing with each other. Like musicians and actors, mediators rework pre-composed pieces such as great stories in relation to unanticipated ideas. This means we are prepared with ideas, examples and questions that keep the music, or in our case, the negotiation moving forward.

The Arguments With Myself About The Future

The use of improvisational music and artistry is what unconsciously drew me in to the field in the first place, and has kept my gears going and gives me inspiration for the future. When I hear educators try and "teach" the methods of mediation, I can't help but think that they are missing the link between theory and reality. This holds true when lawyers simply want to start the process of a mediated settlement by exchanging numbers. While that works sometimes, it usually misses the intermediate step that involves the integration of playing the notes that create the melody of our process. For the future of mediation to hold any place in the balance of the legal system, it must hold firm on allowing the mediator to be the artist to use all the colors of the palette that are necessary to make the process an experience worth investing in. If not, mediation simply becomes an exchange of offers and demands without any context or understanding. It must also integrate the transparency that underlies the legal system so that advocates have a sense of familiarity and respect with the process.

Despite these goals, as a lawyer, I confess to being drawn to the urgency of a case that cries out for closure under almost any means. Short-circuiting the process to get an agreement can be appealing to my sense of urgency. While there is nothing wrong with being a dealmaker at any cost, in the end the process tends to be compromised and the experience of the parties less than desirable.

Upon reflection, is it possible to carry on the traditions of King and Gandhi in our field without getting drawn into the normal channels of the mundane world of litigation? Can the tension between the "idealism" and "practical" genius that King and Gandhi presented as a strategic vision of hope for the future carry forward in mediation without being homogenized, twisted and diluted. Is there a way to preserve the initial strain of idealism that inspired the lawyers and non-lawyers alike to call "mediation?"

These questions are part of my ongoing struggle as a practitioner. It is part of the crisis of purpose that began this discussion, and that could lead to further deterioration of our ideals in the future. The humanitarian purpose of the process cannot be taken away by the legal system or it might die out. Yet, I am constantly encouraged by the willingness of decision makers to embrace a humanitarian process when it is presented in a proper and safe way by the mediator. The downward spiral of the process and the negative comments I hear are from people who haven't been able to connect with the mediator or feel a sense of trust in the mediator's presence. My sense is that many mediators transitioned from jobs where the skillset was very different and they believed that just because they tried hundreds of cases or sat in judgment of others that they could make music without learning the repertoire of chords and scales that it takes for the music to play.

Here's what I hope for: That the demoralization and dilution of the process gets reversed by education of the new marketplace of lawyers who are coming out of law schools firmly educated in the value of mediation as a client driven method in their litigation strategy. That the law schools spend precious time training and educating the value of client centered dispute resolution that balances the importance of respecting the critical role of litigation counsel and their relationship to their clients. This is contrary to the original great thinkers of the 1970s who tended to dismiss lawyers from the equation. If anything, legal advocacy in mediation is an art just like the role of the mediator is that of an artist. They go hand in hand and should work together mentoring others to create a trend that respects the symbiotic nature of the relationship. This will be challenging particularly with uneducated mediators who are solely motivated by late career billable hours to make up for earlier economic challenges.

A Practical View Of The Future

Recognizing the importance of adapting the process so that the marketplace continues to appreciate and use it, there are a number of trends that will impact the future of mediation in the court system:

1. *Settlement Counsel* – More and more mediators are viewed as leaning toward one side or the other (plaintiff or defense; employee or management; etc). The selection of the mediator is often dependent on trying to stack the deck with a mediator who is actually a disguised person who takes sides. Some might say this selection process is fine because the mediator, contrary to a judge or arbitrator, has no say in the outcome. But those who serve as a mediator know that this is not the case. Mediators can effectuate an outcome favorable to one side or the other by the messages given to each side about the likelihood of success in the range the parties are seeking. Thus, lawyers will continue to push for mediators who either follow their ideology or simply find support in their marketplace. This is no different than electing a political leader who supports your view of the

world. As this approach matures in the future, it is possible that mediators will be selected to represent one side or the other, and the mediation process as we know it will be designed with at least two mediators carrying the water for their constituency. This may not be such a bad thing as it will allow the advocates to continue to do what they do best, which is argue for their position. But under this system their arguments will be directed to their privately selected mediator, who will then sit down with the privately selected mediator from the other side and negotiate.

2. *Government Mediators* – The civil justice system cannot accommodate the volume of cases that are scheduled for trial because there are not enough courtrooms or judges available. This is a known fact that has led to confirmation of statistics that more than 95% of all civil actions are resolved without a trial. Yet, the judges who manage caseloads are encouraging parties to settle out of court with the assistance of a third party. If the third party mediator is no longer viewed as impartial, and the parties simply want to get to a bidding contest, the government in their infinite wisdom will start manufacturing budgets that include space for more and more court mediators who are paid by the taxpayer and are available at the whim of the judge. This is not so far fetched when looking back at the emergence of court mediators both on the appellate level and in the Equal Opportunity Employment Commission who have been government employees for years. These government mediators have done great work and it wouldn't be surprising if the civil court system decided to utilize that model. It is very similar to what is happening in health care with physician's assistants. In the past, patients would make an appointment with an intern for a routine check up. Since there are not enough internists available for the population as a whole, physician's assistants have emerged as their replacements.

3. *Private Commercial Mediators* – The role of private commercial mediators who are viewed as truly impartial and effective in facilitating resolution will not be eliminated in the future. These highly paid consultants could emerge as a small but sought after group who handle complex cases that have not been commoditized by insurance interests. When disputes that have been categorized by professional actuaries, the value of private commercial mediators is diminished. The owners of those disputes, largely insurance companies, have developed highly successful actuarial tables that value certain streams of disputes. A mediator who pushes outside the categories will be met with resistance due to the economic pressures on the claims analysts. This will result in less use of mediation in commodity areas such as personal injury and employment, and perhaps more use in commercial and business cases.

4. *Interpersonal Mediators* – A growing number of disputes that involve interpersonal relationships do not have access to appropriate processes through the civil justice to handle their concerns. There will be a trend among skilled advocates to recognize the need to engineer these types of disputes toward mediators who are specialists in managing interpersonal relationships. This type of case will fit in squarely with the concept of mediation formulated in the neighborhood justice center but will be transformed to apply to areas of family law, workplace issues and other similar claims that are relationship driven.

5. *Commodity Mediators* – The area where routine disputes that are part of larger economic systems managed by institutions such as insurers will need a mechanism for efficient resolution. The court system will be the default in order to initiate the process, but corporate institutions will put pressure on their counsel to lower transaction costs (code for attorney fees). As a result, these lawyers will look to friends and colleagues who practiced in their field to serve as mediators in abbreviated processes that are completely focused on a zero sum exchange of dollars that occurs over a relatively short period of time

Conclusion

We are artists. We are idealists. We are mediators. We need to reshape our approach while at the same time carry our vision forward and express leadership to those who find value in our service, recognizing we are in service to them, not to ourselves. This type of leadership does not mean acquiescing to every whim of the people who hire us. It requires an adjustment of our ideals in a way that shows them direction, so that their goals can be achieved while we do the heavy lifting that carries the torch for self-determination and empowerment. This might not work every time we set a case in motion, but aspiring toward a higher goal is a noble purpose.

For me, I will continue to make music in a manner that listens to the needs of my audience, while making sure they get refreshed each time they come to the table to have a listen.

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