



Making some music with lawyers: Where have all the mediators gone?

The original idealism in mediation has largely been lost as economics drives the idealists away

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(Part 2 of a two-part essay)

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 1960's and '70's 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 helps 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 they were 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 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 playing 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 to "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 1970's 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 that 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:

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. While some might say this selection process is fine because the mediator, contrary to a judge or arbitrator, has no say in the outcome, 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 of 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 room and negotiate.

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 percent 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 internist for a routine checkup. Since there are not enough internists available for the population as a whole, physician's assistants have emerged as their replacements.

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 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. **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.

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.

Artist, idealist, mediator

We are artists. We are idealists. We are mediators. We need to reshape our approach while at the same time carrying our vision forward and express leadership to those that find value in our service, recognizing we are in service to them, not us. 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 the 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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