

THE PARTIES HAVE A VOICE: USE IT OR LOSE IT!

In the early days of the ADR movement, mediators, lawyers, and conflict resolution scholars heeded the need for disputants to tell their stories in mediation. The community justice centers that sprang up around the country trained mediators in this empowerment model and still do. Everyone seemed to acknowledge, implicitly or explicitly, that at the heart of most conflicts are people with unmet needs who cannot find peace through formal court procedures, (invasive discovery, exclusionary rules of evidence, direct and cross examination, winners/losers), vicarious spokespersons (lawyers, agents, representatives), or institutionalized behaviors (grievance procedures, Roberts Rules of Order). In fact, disputes are not things: they are social constructs and a significant part of the dispute exists only in the minds of the disputants.

Bad, sad, mad feelings are perceived as caused by someone else who, either by an omission or a commission, harmed us. Then we tell ourselves a story in which we are the victims, they are the perpetrators. The other person will eventually create a different story, particularly if the case becomes a lawsuit, in which she is now the victim (defendant) or at least is not the perpetrator (legally defensible behavior). Unless those stories are transformed, the naming, blaming, and claiming will continue and no true peace will be found, although a winner and a loser in the storytelling contest will be declared in court or arbitration. Americans believe that our constitutional right to a lawyer and a trial, by a jury of our peers, constitutes justice, but most cases in Texas are ordered to mediation. If the case settles in mediation, where is the justice?

If we get to actually have a voice at the mediation table, and we are acknowledged, even validated, for our point of view, though we may never agree on exactly what the true story is, we are more inclined to seek and find a solution that *seems* just because the *process* was just. The private, informal telling of our story to the other party, or the mediator, can actually be more fulfilling and empowering than publicly responding to formal questions from lawyers who are staging the show for a jury of strangers, or a judge. If our nemesis listens, summarizes what we said, and even sometimes apologizes, our cup runneth over.

If you are a lawyer or judge, by now you are chafing at the bit. What about the case in which true harm has been inflicted on the client (plaintiff) by the defendant? What about being able to prove, scientifically, that the plaintiff is entitled to recover from the other party? What about protecting your client's legal rights? If your client is the one who is expected to apologize, that will hurt the lawsuit-won't it? If extensive, expensive discovery has already been done, shouldn't any settlement be achieved by carefully analyzing the strengths and weaknesses of each party's evidence and arguments? In fact, shouldn't any settlement of a lawsuit be based entirely on the issues and the legal merits of each party's case? How can a settlement reached in the shadow of the law ignore the law? Is there a dark side of ADR in which litigants walk into some gum ayah twilight zone, happily in denial of the sterner realities that comprise true justice: the public acknowledgment of wrong, the creation of precedent, and the "punishment" of the loser? Doesn't society need legal guidelines as a prevention of further bad behavior?

This is the position taken recently by a jurist, Judge Patrick Higginbotham of the United States Court of Appeals for the Fifth Circuit. According to Judge Higginbotham, mediation of a pending lawsuit should always be based on a rigorous analysis of the legal issues and merits of each party's case. Some lawyers and mediators would agree. Others might note that this sounds more like judicial settlement than a true problem solving session.

So far this writer has not taken a position, but in the interest of full disclosure let me say that, although I am a lawyer, I do not totally agree with his honor. I also do not subscribe to a blanket, transformative approach. Even when a future relationship is at stake, I do not believe that a mediation session should be a twilight zone of warm, fuzzy sentiments nor a refereed legal debate between lawyers (agents) about the relative merits of their "story" (case). I do believe that *justice* demands that parties in a conflict have a *voice*, an opportunity to speak and be heard, at the mediation table, and that in many lawsuits the merits of each party's case and the probable outcome at trial help to define the bargaining zone.

The art of mediation requires sensitivity to the psychological aspects of the case. The science of mediation requires putting a value on the Best Alternative to a Negotiated Agreement (BATNA). If that BATNA is trial, a careful litigation risk analysis must occur or no Reservation Point can be established. Only the disputants can place a higher or lower value (not necessarily in dollars) on the subject of this mediation as compared to their respective BATNA's. An accurate bargaining zone can then be determined. Artful mediators assist in all of these tasks, facilitating resolution of psychological and substantive sources of conflict by providing a powerful, appropriate ritual.

What exactly has negotiation theory got to do with justice? Quite a lot has been written in answer to this question. A review of the literature (social science, business, marketing, and legal scholarly output) reflects a deepening awareness that negotiation theory and research should be applied to mediation if that process is to reflect the most enlightened and best practices. As a mediator I am exposed to many of these issues: that parties need to be heard by someone at the mediation, either the other party or, at the very least, the mediator, and that attorneys, who will be litigating if the case doesn't settle, need to protect their clients from admissions against interest or from revealing strategic information. As an attorney I know that the case should settle in the zone of positive agreement, somewhere between the most probable trial outcomes each attorney predicts, or the settlement is not efficient (value has been left on the table). Unfortunately the pretrial predictions are unstable because someone will lose and there are too many variables in trial to have a high degree of confidence in a statistical prediction.

In future articles I will address some of the science of mediation questions but I now want to look at the art and the justice issues. In many cases, and as mediators you will be thinking of some of yours, non legal and non monetary issues are just as important to the parties as the law or a favorable distribution of tangible resources. I am thinking of business and marriage partnerships, employment and intellectual property disputes, community and environmental conflicts in which the people issues loom large.

A disputant should have an experience of justice as well as an end to conflict, whether in court or in mediation. Our constitutional right to a day in court embodies the ancient ritual of the

harmed being heard by the harmer in a safe setting where power and shame can be reapportioned. The victim seeks to reclaim power and dump the shame by transferring it to the perpetrator. This transformation of a perceived injury in the mind of the grievant exists irrespective of any actual blame on the other party. Our cultural ritual provides an opportunity for the plaintiff to shame the defendant through a formal, dramatic presentation of proofs and arguments and for the defendant to do the same. The ritual prevents bloodshed, attempts scientific objectivity, and provides precedent for the public as well as for the disputants. It is supposed to reveal the truth. To the extent the mediation process can accomplish some of these same objectives justice is achieved, both in terms of the outcome and of the process.

It is the responsibility of the mediator and the settlement advocate to co-design, manage and deliver a mediation experience that meets a client's need for procedural justice and includes a rigorous analysis of the legal and factual issues in the case. Attorneys are very good at the latter but only the actual parties in interest can voice their feelings, strongest preferences, values, deepest needs and dreams for the future. Even though the conflict has become a lawsuit, the parties still have a private vision of what they really want. They may believe that the vision is unrealistic, and in terms of legal remedies it may be, but in mediation, as every mediator reading this will attest, some dreams come true.

Every case must be considered on its own merits: the relationship of the parties; the respect they may still feel for each other on some level; their shared and complimentary needs; the strengths and weaknesses of their legal positions; their cognitive and emotional intelligence; age, gender, ethnicity, religion constituency and numerous other factors. Advocates and mediators must attend to all of these factors. Very few litigants get to tell a full, uninterrupted story in the courtroom but they are carefully prepared by their lawyers for the version they will tell on the stand. If witness preparation time can be allocated for that process, why not for the mediation process? If 95% of civil cases never go to trial, why are advocates spending more time getting clients ready to testify than to actively participate in negotiating a settlement in mediation? Collaborative lawyers already practice this way. If all mediation advocates prepared clients as thoroughly as for trial, the experience of justice could actually be more intense than it would ever be in the courtroom. Is this a risky and naïve idea? Without careful coaching and a well-managed process, perhaps, though I have seen it works. With careful preparation of a reasonably mature client, and a mediator who delivers a ritual with protection for all, mediation can deliver the best experience of justice any litigant could hope for. Satisfaction with the mediation process already exceeds satisfaction with the trial process, irrespective of outcome. We can all do more.

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