A Meditation on Mediation

by **Randolph I. Gordon**

Roots

As must be immediately apparent, the word "mediator" and "immediately" have a common root: *medius*, meaning middle. To speak of something as "immediate" is to say that there is no intermediary or intervening member, medium, or agent, that there is actual contact or direct personal relation. Mediation involves a mediator or intermediary and consequently, at its core, is antithetical to the concept of immediacy. That, I contend, is why it works.

Mediation is, quite literally, the process of bringing people together by keeping them apart. In the context of legal disputes, the parties involved have demonstrated an inability to communicate effectively so as to resolve issues between them. This is hardly surprising since the word communicate derives from the Latin *communicare*, meaning "to make common." The parties, to their own detriment, have been unable to work together to achieve their common good. One of the principal tasks of the mediator is to create an environment in which the parties can work independently to achieve the common good by removing from the negotiation process the interference of dysfunctional communication.

In this context, the mediator acts as conduit and translator actively listening to the desires and concerns of each party and, free from issues of ego, personality, or self-interest, transmitting clear and effective messages. The mediator need only—indeed, should only—transmit across a narrow band in order to be effective. The static of past wrongs and misunderstandings must be systematically screened out to produce a sanitized, but effective, message with a focused purpose: to resolve the dispute. The direct personal interaction which has engendered the dispute is filtered through the mediator, leaving only the residue of addressable concerns.

The Classic Pattern: *The Phantom Tollbooth*

The classic pattern of mediation is set out in the children's story, *The Phantom Tollbooth*. Once upon a time there were two kingdoms, Dictionopolis (the city of words) and Digitopolis (the city of numbers), the kings of which had stopped speaking to one another because they disagreed on whether words or numbers were more important. They disagreed, consequently, on everything. In effect, they *agreed* to disagree.

This slender reed is all that is required, however, for them ultimately to reconcile their differences. With the assistance of an intermediary, a boy named Milo, who, with their permission, undertakes the rescue of the Princesses Rhyme and Reason, the kings resolve their differences: words and numbers, they conclude, are of equal importance. This humble parable contains within it the elements of the classic mediation: a dispute, a breakdown in communication, an intermediary, an agreement to a common process, and a reconciliation.

The Continuum

Moving along a continuum from negotiation towards arbitration and litigation, one encounters an increase in both the formality and the extent to which the decision-making power is transferred from the parties to an independent authority. In negotiations, there are virtually no formalities and the parties retain all settlement authority. By contrast, a jury trial is replete with the formalities accreted over a thousand years of common law, and the parties have yielded virtually all control over process and result to the judge and jury. Mediation shares features of both extremes. As in arbitration or litigation, the mediator is a neutral figure whose commitment is to the process, not to the result. Consequently, the degree of comfort which the parties have with a mediation, and hence the effectiveness of the process, is directly related to the confidence in the independence and integrity of the mediator. Parties are exquisitely sensitive to any asymmetry in the relationship between the mediator and either party, just as they are to the appearance of bias in an arbitrator or judge. Anything less than strict neutrality is almost invariably fatal to the process.

Unlike the arbitrator or judge, however, the mediator is not cloaked in formal authority and is powerless to impose a solution upon the parties. In this sense, mediation is far more like negotiation with a facilitator. The mediator has no more authority than the parties have given. This fact constitutes both the greatest strength and greatest weakness of mediation.

The strength lies in the fact that the parties, who are most knowledgeable respecting the circumstances, remain empowered. How often, particularly in the context of business disputes, do

lawyers or judges understand the subtle tradeoffs possible in a complex business relationship? By remaining empowered, the parties are capable, if the barriers to effective communication can be removed, of arriving at a better solution than one imposed by even the best-intentioned outsider.

The weakness arises from the mediator's lack of judicial powers of compulsion. As a consequence, containment of the parties within the mediation may be difficult. The authority of the mediator or, rather, the perceived authority of the mediator, is all important. In a recent mediation I had before a United States district court judge, it was clear that appointment by the President of the United States and life tenure together with the badges and indicia of authority were critical in making the process work. Having the parties and attorneys leaping up out of their chairs whenever the mediator enters the room is a nice place to start. But, strictly speaking, it is not necessary. The integrity of the mediator, the confidence reposed in the mediator by the parties or their attorneys, the evident commitment to the process, a prevailing spirit of optimism, the competence and perspicacity of the mediator, the financial investment of the parties in the mediation, and even the sense that the mediator is really "working hard" can often provide the mediator with enough informal authority to address the task at hand.

The effective mediator, in order to maximize the likelihood of a successful process, must create a dynamic equilibrium, acting as both an authority figure and a leader. As an authority figure, the mediator has at the outset a reservoir of informal authority upon which to draw which serves to contain the parties within the process and to maintain stability and order. The tone of the mediation must be set by the mediator, not the passions of the parties. In practice, this is easier than it sounds. After all, the parties have agreed upon the mediator and the process, invested time and money, and the mediator controls the agenda and, often, the physical plant. As a leader, however, the mediator must shatter complacency and illusion and take the parties outside of themselves to observe the dispute as it would appear to outsiders. In other words, having established a framework of stability and order, the mediator will often systematically inject chaotic elements into the proceeding: uncertainty, doubt, insecurity, to unsettle the stable, but unproductive, stasis which has deadlocked the parties. Powerful tools available to the mediator enable the mediation to simulate a "pressure cooker" environment within which the hard shell of self-justification developed during the course of litigation is cracked and the parties are asked to cast off pretense and come to grips with the risks and uncertainties of their positions while contained within the process. The pressure cooker not only cooks hotter and faster, but it tenderizes. And during this process, the mediator ought not to be surprised if a lot of steam is released.

The Pressure Cooker

The pressure in a pressure cooker is created by an increase in kinetic energy within an enclosed space—a pot with thick metal walls, a lid that clamps down, the application of heat, and a method of releasing excess pressure without explosion or injury. Mediation functions along similar principles. By creating a spatial separation, controlling the agenda and, often, the physical plant, eliminating dysfunctional communications and personality issues, and by taking advantage of a number of social constraints, mediation can increase the pressure on the parties beyond levels which can be achieved in negotiations without a blowup or walkout. When release of excess "pressure" is necessary, the mediator can permit the party to vent pent-up emotions privately without the adverse consequences of such expression in the presence of the other party. If a safe environment for the expression of feeling has been created and the party has been heard, the party will often recognize the value of resolving the

legal and business issues without asking the legal process to address emotional issues which it is ill-equipped to handle. The walls of pressure cooker mediation include the loss of face associated with walking out, the commitment to the mediation process engendered by the investment of time or financial obligation, the control of the physical plant by the mediator, the desire to persuade a neutral party of the correctness of one's position, the agenda established by the mediator, the consequences of failure to resolve the matter, and the authority of the mediator. Having embarked upon the mediation agenda, the parties are constrained from abandoning the process until completed. The heat is nothing less than the recognition of the risks of litigation including, yes, attorneys' fees. Focusing on the disastrous consequences of prolonged litigation is turning up the heat.

Jarndyce v. Jarndyce

Experience appears to bear out the value of this analogy. The mediation process is the contained environment and the challenge of the mediator is to establish a process and to motivate the parties so things get cooked faster short of a blowup or walkout. Time, risk and expense of litigation are features common to nearly every mediation because they not only constitute a significant basis for commitment and containment within the process, but they are the most certain visible consequence of failure to resolve the dispute. In one case, it was sufficient for me to point out to the parties the fact that there were eight lawyers sitting around the table to disabuse the parties of any hope of a simple and inexpensive solution at trial. In another case, a chart demonstrating that a total victory would barely exceed the expenses of litigation was sufficiently persuasive for one of the parties to exclaim, "Well, obviously, we have to settle this thing!" Lawsuits making lawyers wealthy and benefiting no one is part of the popular culture and literary tradition. Although deeply troubling to members of the profession, the fear of litigation does have its uses in encouraging settlement.

Consider this paragraph respecting the case of Jarndyce and Jarndyce from Dickens' *Bleak House*:

> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant who was promised a new rocking horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors have come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffeehouse in Chancery Lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.
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> Jarndyce and Jarndyce has passed into a joke. That is the only good that has ever come of it. It has been death to many, but it is a joke in the profession.

The chances are, when the heat is turned up during a mediation, someone in the room is thinking: "Jarndyce and Jarndyce."

Mediating in the Adversarial Model: One Story

Although classic mediation involves an independent mediator, it is possible for similar factors to be brought to bear by the attorneys themselves. In order to illustrate this, I will have to ask for your patience while I share a personal story.

Several years ago, I was invited to a community meeting in a church in the Midway area and asked to make a presentation to a number of families concerned about their proximity to the Midway Landfill. These families were all to the west of the landfill and all the available evidence suggested that the effluent or leachate, which raised concerns respecting health hazards and property values, was flowing to the east, away from their homes. These individuals had not participated in a large multiple plaintiff legal action which had settled shortly before and, having bided their time, now found themselves two weeks from the end of the limitation period on their claims. I spoke to the families and advised them that based upon what I knew, their claims were only of modest value, and might well be exceeded by the costs of experts and litigation. The truth was, I confessed openly (I was in a church, after all), I was not eager to undertake representation in situations where expectations were likely to be disappointed. I suggested that it might be possible for me to contact the Seattle city attorney's office to obtain an extension on the statute of limitations, to file administrative claims, and to establish a series of mediation sessions in which each of them would have an individual meeting with assistant city attorneys and the opportunity to reach a settlement. The settlement would, I suggested, provide only modest compensation and might be constructed so as to reserve claims for unknown health problems which might manifest themselves in the future. To my surprise, not only did all 19 households ask me to pursue this approach, but the city agreed to each element of the proposal.

I undertook representation of my clients with the clear written understanding that if settlement was not able to be reached through mediation that they would have to seek other counsel if they chose to pursue litigation. In any event, they would have gained time to obtain such counsel, and administrative claims—a necessary condition precedent to commencing suit—would have been filed.

To the credit of Vicki Seitz, now Southwest District Court Judge, then of the city attorney's office, who championed the proposal, we were able to agree upon an extension of the statute of limitations for 90 days, and a series of mediations was scheduled. Comprehensive claims were filed for each household and, within 60 days, we had settled 17 of 19 claims during three long days of back-to-back mediations.

What happened?

Why did it work?

Elements of Success

First, both sides were committed to the process and approached it in good faith and with remarkable optimism. The city and the claimants had every reason to want to resolve the matter short of litigation. The power of optimism—belief in the process and prospects for success—is essential for the mediator and helpful to the extent found within the parties. The more confident the parties are that a mediated solution can and must be found, the greater the commitment—and probable success—of the process.

I had made it clear that I was committed to the mediation of the disputes by my disclosing to the city, as I had to my clients, that if settlement was not reached, other counsel would have to appear in my stead. Unconsciously, by abandoning any implied threat of litigation, I had assumed the role of quasi-mediator, dedicated to the process, and in a remarkable demonstration of homeopathic magic, my commitment to the process evoked a similar response from the city. In retrospect, although the city undoubtedly recognized the risk that failure to settle would have them looking at some other (perhaps less reasonable) attorney, the efforts of the city attorneys clearly reflected positive commitment to the process, not fear of the unknown.

Second, the clients had the opportunity to hear and be heard. The truth is, in many cases, the mediation process gives the client a chance to hear and to be heard in a way that a trial does not. What is more, the client's

subjective sense of having had his or her "day in court" is often better satisfied by an exhausting day of mediation than by three weeks in the courthouse. The pace and progress of a successful mediation is much faster than the ponderous procedures in the courtroom and far more in keeping with client expectations respecting legal proceedings as established in the media. Trials with the full panoply of administrative procedures and due process simply would not do well on prime-time television. A complete description of a trial would include: waiting for assignment to a judge, voir dire, exercise of challenges, legal motions, side bars, lengthy examinations which all too often are stilted, tedious, intermittant and discordant, often obscure evidentiary objections and rulings, review of jury instructions, scheduling of witnesses, and jury deliberations. The average trial is simply not what the client expects. The client expects both less and more: less time, more opportunity to simply "have it out." In many respects, mediation satisfies these expectations better.

Third, the clients did not experience the inflationary effect that prolonged litigation has on expectations.

In this case, the success was achieved by mutual commitment to the process, recognition of the risks, expenses and uncertainties of litigation, and the extraordinary sensitivity of the assistant city attorneys to the need of these clients to air their concerns. The city, as a large governmental body, is capable of an apparent neutrality which is difficult for an individual party to exhibit. Hence, the communication was not obstructed by ego, personal animus, or the heat generated by the adversarial process. The particular elements that rendered this particular process successful, however, continue to impress me as significant: (i) commitment; (ii) hearing; (iii) minimization of what I call "legistagenic" effects (expectations arising from the legal process, itself).

Eliminating the High Cost of Legistagenicity

In the world of subatomic particles, the Heisenberg Uncertainty Principle asserts, in essence, that the observer affects the events observed. In the medical field, physicians have long recognized that medical treatment itself can have deleterious consequences on the complex biochemical system which is the human body. Such consequences are labeled as "iatrogenic": induced by medical care or treatment. In dealing with complex social and economic relationships, litigation will, itself, induce distortions which, with appropriate care for the correct etymological antecedents, I have labeled "legistagenic." Clients who only want "X" at their initial conference, are outraged when they are offered "2X" on the eve of trial and crushed by a jury verdict of only "3X." How often do clients approach attorneys with a clear understanding of the appropriate measure of legally cognizable damages? More often than not, the client's perception of injury and expectations respecting compensation are shaped by the legal system. How often does litigation persist in order to recover damages which did not exist at the outset? How often are business relations made untenable by the prolongation of litigation? How do you know, as attorneys, that the parties do not, behind your back, actually like one another? Mediation is one way to eliminate the often unacceptably high costs of legistagenicity.

Where in litigation anything said by a party is a weapon, in mediation there is the shield of confidentiality. Where in litigation there is cunning, in mediation there is candor. Where communication between the parties in litigation confronts a wall, in mediation there is a corridor. Where in litigation there is a tendency toward hyperbole, in mediation there is the pressure for realism. Where in litigation there is delay, in mediation there is speed. Where in litigation actions must be taken which only indirectly contribute to the end result, in mediation there is a concentrated focus on resolution of the dispute itself.

In mediation, litigants find the last, best chance for resolving differences without abdicating their power to control the result. As a consequence, mediation serves the individual need for communication, understanding, security, conservation of resources, and peace. ☐

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