Looking Forward in Mediation

Today's Successes and Tomorrow's Challenges

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What We Have Accomplished?

As two members of the first generation of what now is considered the field of dispute resolution, we cannot help but be impressed by how mainstream we have become. Within the American Bar Association itself, the Section of Dispute Resolution currently boasts approximately 17,000 members, including a large number of nonlawyers. Arguably the most vibrant Section in the ABA, it began in the 1970s as the "Special Committee on the Resolution of Minor Disputes." The committee subsequently was renamed the "Special Committee on Dispute Resolution," after which it evolved fairly quickly into the Section on Dispute Resolution in 1993. Beyond the Section, virtually every meeting and continuing legal education effort of many other ABA sections, including Tort Trial & Insurance Practice, Litigation, Administrative Law, and Labor and Employment, features at least one session devoted to mediation or arbitration, frequently both.

The changes in the ABA reflect the changes in legal institutions. The embrace of alternative dispute resolution, particularly mediation, by court systems has been nothing short of revolutionary. Hastened by the passage of the Civil Justice Reform Act of 1996, which required all federal district courts to adopt plans to reduce delay in their civil caseloads, virtually every court has instituted some sort of mediation program. Some states, following the lead of Florida and Texas, have adopted legislation or court rules mandating mediation in the overwhelming majority of civil and family cases.

A few federal agencies began as early as the 1980s to experiment with the use of mediation to resolve significant public disputes. Among the leaders was—and remains—the Environmental Protection Agency, which has used mediation extensively to resolve disputes over the remediation of hazardous waste under the statutory scheme that created the federal Superfund. With the participation of the EPA and the Department of Justice, private mediators have been instrumental in settling numerous disputes over the allocation of hundreds of millions of dollars in cleanup costs among hundreds of parties. As another example, the federal Equal Employment Opportunity Commission, having sponsored a successful pilot program conducted by the Center for Dispute Settlement in the 1990s, now routinely offers mediation to the majority of people who file charges of discrimination with the agency.

Several federal agencies also have experimented with the use of regulatory negotiation. Disparate stakeholders concerned about the content of a proposed rule or regulation, assisted by a neutral facilitator, have succeeded in negotiating joint recommendations to administrators on highly contested and controversial regulations. Although much less numerous than the instances where specific disputes have been mediated, these experiences offer a promising model for enabling broad public participation in the resolution of contentious public controversies.

Some state and local agencies also have been active in applying what we have learned about mediation to public disputes. Notable successes have involved the siting of locally unwanted land uses, such as hazardous waste dumps or even schools or hospitals, in or near residential neighborhoods. The District of Columbia Office of Planning, for example, recently sponsored the mediation of the locally controversial creation of an Alzheimer's unit that required zoning approval. In experiments with less global disputes, the attorneys general in Massachusetts and Maryland developed programs to mediate individual consumer disputes while tracking disputes in order to pursue patterns of unfair practices.

There was an early commitment to use mediation to resolve community disputes. The result of experiments supported by the federal government in cities such as Atlanta, Washington, D.C., Houston, and Honolulu, and by local groups such as the Community Boards in San Francisco, have produced a fabric of community mediation centers across the country. Although the funding of such centers has waxed and waned over the years, with some not stable enough for anyone to guarantee that they will survive the next funding cycle, the community mediation center movement has been remarkably resilient. Now supported by their own association, the National Association for Community Mediation, the centers continue to rely primarily on enthusiastic volunteers to provide mediation in a variety of neighborhood and minor criminal disputes.

Starting in the 1980s, some of the organizations that ran community mediation centers began experimenting with introducing mediation into elementary and secondary schools. From those seeds, the growth in school-based peer-mediation programs has been little short of astronomical. Today, many of the largest public school systems in the country have embraced some sort of mediation programs,

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albeit with varying degrees of training and commitment. The JAMS Foundation recently announced an initiative designed to expand these programs by spurring the training of all public school teachers in conflict resolution skills.

While community and some court mediation programs grew primarily by relying on the services of volunteers, the past 25 years have witnessed the growth of a vibrant class of professional mediators. Many of these mediators began by providing neutral services within their existing professional practices as lawyers, planners, academics, psychologists, or social workers. Some of them since have succeeded in building practices focused entirely on providing mediation or other neutral services, such as case evaluation.

These neutrals practice in a variety of settings. Some court systems, notably almost every federal court of appeals, employ small numbers of mediators to mediate full-time for the court; some administrative agencies and private companies, schools, and hospitals employ mediators or ombudsmen to resolve internal disputes or respond to complaints from customers, students, or patients. Many neutrals practice by themselves or in small organizations. JAMS, the only national for-profit company offering the services of full-time, professional neutrals, maintains 23 offices across the country, with approximately 200 full-time mediators and arbitrators. It currently generates approximately $100 million in annual revenue. The oldest of the large provider organizations, the American Arbitration Association, continues to maintain a nationwide roster of neutrals. In some cities local companies offer mediation and arbitration. In a related illustration of the maturing of the field, JAMS has created the JAMS Foundation, supported wholly by contributions from its neutrals and employees, that funds innovative work in the dispute resolution field performed by governmental entities and nonprofit organizations.

Our own careers have followed a pattern similar to that of the field as a whole. We have been active for 35 years in promoting the field and in starting dispute resolution organizations in community and public settings, as well as in teaching and evaluating various methods of dispute resolution. We now spend most of our time as full-time professional mediators and arbitrators.

Along with our colleagues who have been heavily invested in the growth of the field, we believe that we all can claim significant victories. There is little question that the growth of mediation has drastically increased parties' access to processes that permit direct participation in the resolution of their own disputes. Extensive literature suggests that such participation significantly increases the level of satisfaction with the resulting resolutions—win or lose. Although much remains to be learned, there is evidence that the use of mediation has led to high rates of resolution and to satisfaction with the results.

Another significant development is that mediation is being used to resolve increasingly high-stakes disputes, including significant class actions and mass torts. As one example, mediation produced a resolution of the nationwide class action brought in 1997 on behalf of African-American farmers against the U.S. Department of Agriculture for racial discrimination in the administration of USDA's farm credit programs. The settlement has resulted in almost a billion dollars of benefits going to a class of approximately 22,000 farmers.

Mediation also has resolved major employment discrimination class actions against significant firms in the financial services, automobile, and retail industries. Some of the class actions have spawned programs that offer or require mediation, and perhaps arbitration, of all disputes between the companies involved and their employees.

The benefits of the process have become obvious regardless of the size of the dispute. Mediators have been involved in settling both the individual and classwide disputes arising out of the massive destruction caused by hurricanes in Florida, Louisiana, Alabama, and Mississippi. Additionally, given the track record of mediation in producing settlements of some of the huge class actions surrounding the collapse of Enron, we can anticipate that the process will be used as well to resolve the many disputes surrounding the subprime loan debacle.

The Challenges Ahead

The impressive accomplishments of the recent past should not hinder us from trying to understand and tackle some perplexing anomalies. At the same time that there are pockets of heavy mediation use, the geographic spread of the process is uneven. Law firms that represent clients in mediations daily in California may rarely, if ever, mediate disputes arising in other parts of the country. In some states, virtually any civil case can be referred to mediation for an attempt at resolution before trial; in others, courts' use of mediation is virtually nonexistent.

Another perplexing problem is that demonstrated success has not necessarily resulted in continued stable funding. Because of their lack of resources, many court programs continue to rely on inadequately trained or supervised volunteer mediators. Others require the parties to pay for private mediators, although the public court systems provide access to judges at little or no charge.

Another example of the unreliability of public funds is provided by the state offices of mediation. Begun as pilot projects in a number of states in the mid-1980s, state offices of mediation attempted to provide a platform for the provision of mediation in public disputes. By all accounts, the state offices were successful, offering mediation services to disputes that had proven intractable to resolution through existing processes. However, when state budgets became tight a few years later, many state offices failed to survive or survived with severe reductions in their ability to deliver services.

Despite the growth in a cadre of professional mediators, there is no predictable career path through which professional dispute resolvers can be developed. To the young graduate of a law or other professional school, it

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seems unsatisfactory to respond to the question of how one might become a mediator that the best—perhaps the only—way to develop a practice as a mediator is first to work as a litigator until one ages sufficiently. Although some academic programs have evolved—for example, the George Mason University program offers both master's and doctorate degrees in dispute resolution—it is not apparent that the resulting degrees provide stepping stones to a professional practice.

Ironically, one of the biggest enemies of successful mediation may be the institutionalization that we all applaud as a milestone in the development of the field. Among the dangers of adoption of mediation by courts and administrative agencies is the tendency of those institutions to envelop their mediation schemes with multiple rules. To the agency or court, the rules are necessary to ensure that any court- or agency-sponsored program is accountable to the bureaucratic needs of the institution. For the mediator, those same rules may be viewed as an obstruction to creating a mediation process that responds to the needs of the parties. Another problem with institutionalization is the routinization that may cause a new process to become simply another hurdle to getting a civil trial or obtaining a hearing before an administrative law judge.

In addition to these concerns, there is the issue of diversity. There is little question that the current pool of professional mediators is made up largely of white males. This demographic seems to have held steady despite the diversity of many pools of volunteer mediators. Although there are some notable exceptions, the universe of professional mediators does not reflect the demographics of the larger society, or even of the lawyers who tend to be pivotal in the choice of mediator for a given case.

Given the substantial increase in the use of mediation in the past 25 years, it seems fair to opine that use will continue to increase over the next 25 years. The challenge of the field will be to solve two essential problems: maintaining vibrant, flexible processes in the face of increased imbedding of mediation into standard court and agency processes, and demonstrating the value of mediation so that the next budget crisis does not result in a loss of mediation opportunities.

It also will be important to focus on the elements that might define a career path for would-be professional mediators. At the same time, we should take pains to preserve the ability of nonprofessional mediators to continue their enormous contributions to community mediation efforts with the appropriate training and support. This will not be an easy task. The history of many professions is that the members of a new profession have a tendency to attempt to raise the drawbridge, forbidding anyone else to practice in their professional domain without undergoing the same training or mentoring requirements they endured. Much of the vitality and growth of the mediation field has come through the innovative and dedicated work of volunteers. The field should continue to support their efforts.

Beyond the needs of the "field" as we have conceived it is the reality that mediation has barely penetrated the consciousness of the politicians and diplomats who govern our country and other world powers. The past few years have provided disheartening examples of destructive ways in which governments approach conflict and only rare examples of constructive, mediative approaches. In order to realize the full potential of the processes we espouse, we may have to expand our horizons beyond the interpersonal or even the substantial legal disputes that define most of our practices to the ways in which politicians deal with one another and governments deal with their own citizens and with the rest of the world. There are a few promising indications in this regard. An ad hoc group of those practicing in the public sphere
primarily in this country has banded together to explore ways in which we might convey more powerfully the ability of collaborative techniques to enable progress on the most contentious public issues.

Although a few private, nonprofit organizations, including the Consensus Building Institute and Search for Common Ground, have begun to venture into developing processes to address disputes in other countries and internationally, it is obvious from a cursory glance at any daily newspaper how much more should and could be done. We recently witnessed the difficulty of changing the normal discourse. During the campaign for the Democratic nomination for president, Senator Barak Obama indicated that he would be willing to meet with leaders of countries with which the United States currently is at odds without precondition. Although he was criticized for that stance by both conservatives and liberals, one can only hope that Obama's appeal to young people signals, in part, a desire for more inclusive, participatory decision making and the responsibility of public leaders for resolving disputes. ◆