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MEDIATION IDEALS V. MEDIATION REALITY

Most mediators espouse the ethical standards of mediation; we appreciate the values and ideals they embody. For many of us, neutrality is synonymous with ADR, and it is a significant element of how we identify ourselves and how we explain and promote our work.¹ However, despite our professed adherence to the tenets of Self-Determination/Voluntariness, Confidentiality, Neutrality/Impartiality, and Fairness,² mediators do not always “walk the talk.” Research demonstrates that there is a mismatch between mediation ideals and mediation reality, that what we mediators tell parties about self-determination and impartiality/neutrality is often contrary to what we actually do.³

Mediators Don’t Have Any Power, Right?

In describing mediation, many of us tell our clients that we have no formal authority in the process and that our role is simply to help them discuss their issues. Although our job is to guide them through the mediation process, we often tell parties, sometimes explicitly and sometimes implicitly, that mediators have no power and will not exercise power over anyone in the room. All decisions, we tell them, are expressions of their own ability to choose their own outcomes; agreements are never coerced.⁴

However, despite our protestations, the truth is that we do indeed have power in and over the process. In his 1987 article, “The Dynamics of Power in Mediation and Negotiation,” Bernie Mayer explained:⁵

Mediators are ... invested with a great deal of power by the mediation process. Whether or not they consciously choose to exercise it, mediators inevitably use their influence at every point of the intervention. *This is neither good nor bad*; rather, it is a necessary consequence of the structure of the intervenor’s role in conflict resolution. What mediators can choose is whether to exercise this power in a deliberate way and with a specific purpose (emphasis added).

Mayer further wrote that “[t]he mediator usually has personal power in the ability to articulate the issues and interests of concern to the parties and in the rapport established.”⁶ To many mediation consumers, especially those who hire mediators to help manage conflicts, these are givens and constitute the essence of why certain mediators are repeatedly retained – and why others are not.⁷

Isn’t Settlement the Point?

It is well-understood in the literature and in practice that the dominant story of mediation is settlement.⁸ Indeed, as the 2008 “ABA Final Report on Mediator Quality” makes clear, at least

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in the civil litigation context where parties are represented by attorneys, one of the primary goals for both lawyers and mediators is to settle the case.⁹

What recent scholarship also makes clear, however, is that that when discussing mediation with their clients, many mediators deny their power even though they admit (in private) that their goal in mediation is “to get a deal”¹⁰ In essence, some mediators promote the idea of fostering self-determination and neutrality/impartiality in resolving conflicts, but do not actually practice it.

Mediators may use a variety of tactics to pressure parties to settle, including setting time limits and even threatening to withdraw if there is no settlement.¹¹ After all, there are significant institutional pressures within many court systems that see mediation primarily as a docket control measure.¹² Court-annexed mediation programs often encourage mediators to satisfy the court’s objective to move cases along.¹³ As Forrest Mosten has noted:

[a]n overriding problem of court mediation is the coercive pressure on the mediators to clear dockets by settling cases. Rather than being selected for the benefits of citizen empowerment and satisfaction of result, many court programs are encouraged and supported by the judiciary to relieve them of staggering caseloads. ... Court mediators, particularly staff mediators, receive the not-too-subtle message that settlement rates and low time spent per case are the criteria for job retention and advancement. This pressure to settle can trickle down to mediation participants. Appointments become scarce, time to mediate is limited, and issues available for mediation are restricted (citations omitted).¹⁴

The tensions between mediator ideals and mediator reality are also reflected in the private sector. Why? As the research indicates:

Mediators are influenced by their own professional agenda and interest in settling cases. After all, mediation is also a business, which means ensuring a steady and reliable referral base, visibility in the field, and building a reputation. This in turn makes mediators more susceptible to allowing self-interest to influence their conduct in the mediation process, and creating an inevitable impetus to use pressure and coercion (Citations omitted).¹⁵

Indeed, many mediators take great pride in their high resolution rates and view them as a measure of “successful” mediation.¹⁶

Watch Out for Your Worldview

Settlement rates increase when the neutral plays a more active role in the process, according to most studies. Moreover, the impact of the neutral’s approach on participants’ evaluations depends on what the mediators do, when they do it, and what approach the parties expected.¹⁷ In short, party satisfaction is related to mediator artfulness and ability to meet expectations.

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However, far too many mediators exercise their power to encourage resolution without sufficiently considering how their practice choices in the mediation room reflect their own worldviews – the cognitive, ethical, and perceptual frames with which all people make sense of their experiences. Our worldviews operate subconsciously to form the foundation for our biases about what is “good,” “fair,” “moral,” and “just.” Unfortunately, most of us never consider how our worldview may reinforce the dominant social paradigm of contemporary society. Our unconscious application of the dominant worldview can unintentionally disadvantage marginalized, disenfranchised, and other oppressed people and can quash genuine participant expression and self-determination.¹⁸

How do mediators wield this power? We can choose which party narrative to emphasize, for example. We may disengage and delegitimize narratives that conflict with our own – particularly when those narratives relate to issues of racism, oppression, and ethnicity – by changing topics, focusing away from personal experiences, and honing in on settling the “presenting issue in controversy” alone. Even with the best of intentions – to foster neutrality or to ensure equal time and equal opportunity for all parties – we sometimes favor some parties over others.¹⁹

Understanding What We Want from Our Mediations

This is just a brief overview of the vast volume of scholarship on mediator power, ethics, and practice. What becomes clear from the literature is that as mediators, we practice a craft that has great social and institutional value – one that can engage people in creative problem-solving or manipulate them into settling their disputes for reasons that may be beyond our conscious intent. However well meaning mediators may be, our ethical guidelines clearly articulate the ideals of self-determination and impartiality/neutrality. We must work either to honor those ideals, in word and deed, or acknowledge their limitations and find a different way to define mediation’s core values.

We must strive as practitioners to better appreciate the profound impact we have on our clients’ lives, to better understand how we use our powerful positions, to appreciate that our process is based upon our unique cultural orientations. We must be mindful of our practice goals and truly understand how we bring our whole selves – the good, the bad and the ugly – to our work.

Lastly, we must appreciate that when we focus on “facts” while parties want to focus on relationships or experiences, we disenfranchise people and subvert the very nature of self-determination. When mediators concentrate too much on settlement and not enough on process, we risk abusing our privileged positions as neutral process guides. We risk introducing our own needs, wants, desires and opinions into the process. If mediation is truly to result in durable solutions that reflect the parties’ needs and interests, mediators must start with Socrates’ sage advice – Know Thyself.

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As Baruch Bush and Joseph Folger have said, “Purpose Drives Practice.”²⁰ Your practice should explicitly reflect your purpose and intentions, and ethical practice requires that your explanations match your actions in each and every case.

What is your purpose when you mediate?

¹ Mayer, Bernard S. *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*. San Francisco: Jossey-Bass (2004).

² See generally, *Mediator Ethics Information*, on the Georgia Office of Dispute Resolution (GODR) website, at http://godr.org/index.php?option=com_content&view=article&id=65&Itemid=70, (last accessed January 30, 2011) and in particular, Appendix C, Chapter 1, which sets forth the *Ethical Standards for Mediators* registered with the GODR. See also, *Model Standards of Conduct for Mediators*, issued by the American Arbitration Association, American Bar Association, and the Association for Conflict Resolution, adopted September 2005, <http://www.abanet.org/dispute/webpolicy.html#8> (last accessed January 30, 2011).

³ Wing, Leah. *Mediation and Inequality Reconsidered: Bringing the Discussion to the Table*. Conflict Resolution Quarterly, 2009 (26)(4).

⁴ GODR, *Ethical Standards for Mediators*, Standards 1(A)(1), (2) and (10).

⁵ Mayer, Bernard. *The Dynamics of Power in Mediation and Negotiation*, in C. W. Moore, ed., *Practical Strategies for the Phases of Mediation*. Mediation Quarterly, no. 16. San Francisco: Jossey-Bass, Summer 1987, at p. 75.

⁶ *Id.*, at p. 80.

⁷ See generally, *Final Report, ABA Task Force on Improving Mediator Quality, April 2006 - February 2008*. American Bar Association, Section of Dispute Resolution, 2008, <http://www.abanet.org/dch/committee.cfm?com=DR020600> (last accessed January 31, 2011).

⁸ Bush, R.A.B., Joseph P. Folger, *The Promise of Mediation, Revised Edition*. San Francisco, CA: Jossey-Bass (2005), at 19.

⁹ “Eighty-eight percent (88%) of the users and 92% of the mediators surveyed indicated that in about half or more of their cases their goal is to settle the case.” *Final Report, ABA Task Force on Improving Mediator Quality, April 2006 - February 2008*, p. 7.

¹⁰ Gerami, at p. 446.

¹¹ *Id.*, at 445.

¹² Heise, Michael. *Why ADR Programs Aren't More Appealing: An Empirical Perspective*. Journal of Empirical Legal Studies, 2010 (7)(1).

¹³ Mosten, Forrest. *The Institutionalization of Mediation*. Family Court Review, 2004 (42)(2), at 297 – 8

¹⁴ Mosten, at 298.

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¹⁵ *Id.*

¹⁶ Gerami, at 445.

¹⁷ Wissler, Roselle L. *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*. *Conflict Resolution Quarterly*, 2004 (22)(1-2), at 81.

¹⁸ Goldberg, Rachel. *How Our Worldviews Shape our Practice*. *Conflict Resolution Quarterly*, 2009 (26)(4).

¹⁹ Wing, at 401.

²⁰ Bush, Robert A. Baruch, et al., "*Mediation: Principles and Practice – The Transformative Framework*," Hempstead, NY: Hofstra University School of Law, Institute for the Study of Conflict Transformation, Inc., (2005). Training manual for Hofstra University School of Law Mediation Clinic, Basic + PINS Mediation, February 2008, Instructors: Judith A. Saul and Robert S. Thaler, Esq., at p. 18.

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