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THE LEGAL AND CULTURAL ROOTS OF MEDIATION IN THE UNITED STATES

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Judith A. Saul♦

Abstract:

Mediation developed in response to labor unrest in the early twentieth century and social unrest mid-century. Courts began using it in the 1970s to manage crowded dockets. Court and community-based programs evolved and expanded during the 1980s and 1990s. They offered mediation as an alternative to the courts that allowed party self-determination, creative solutions and a quicker response. Research into the mediation process raised questions about the extent to which the reality of mediation matched the claims its proponents made. It revealed that mediators focused on solving problems and getting agreements often did so at the expense of party self-determination. In response to this critique, new models of mediation developed that focused on interaction instead of transaction. One such model, transformative mediation, brings rhetoric and reality together. It understands conflict as a crisis in human interaction and focuses not on conflict resolution but on conflict transformation. It trains mediators to support party decision-making and inter-party perspective-taking. The mediation field will do best in the future by accepting its diversity and supporting the different models of mediation that have evolved.

Keywords: US mediation history; transformative mediation.

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Mediation is well-established in the United States. This paper will explore its roots and how it came to be widely used by both the courts and communities. It will then describe research into mediators' activities and the resulting critique. It will describe the new models of mediation that emerged and the recent willingness of the field to acknowledge its own diversity. A closer look at one of those new models, transformative mediation, will clarify the differences offered by these new models. Finally, the paper will take a brief look at one possible future of the mediation field.

Mediation Emerges in Response to Labor and Social Unrest

The formal use of mediation in the US is linked to the labor unrest that occurred during the 1800s and early 1900s. Workers unions demanded higher wages and better working conditions. The companies resisted. The resulting unrest disrupted business. Strikes by workers were sometimes met with violence. One result was the development of collective bargaining, with mediation as the primary process used. Probably the first "professional" mediators were the "Commissioners of Conciliation" appointed by the Secretary of Labor in 1913. In 1935, the US Congress passed the National Labor Relations Act, instituting collective bargaining in labor-management conflicts. The Federal Mediation and Conciliation Service was formed in 1946, providing a staff of full-time mediators ready to facilitate negotiations between unions and management. The mediation done in collective bargaining was between groups, with appointed or elected representatives negotiating on behalf of workers and management. The process itself was intervener-directed and solution-focused.

The next major development in the history of mediation was tied to the civil unrest of the 1960s. During this period, cities throughout the country experienced tension over race and discrimination, particularly as it related to education and housing. Detroit, Los Angeles and Boston were among those cities where the police response to demonstrations led to further conflict and, in some cases, to riots. In response to this wide-spread civil unrest, some community activists and labor mediators thought of applying the methods used in collective bargaining to restore calm by bringing groups together to talk. The public and private sectors provided support and created new organizations to respond to this need. In 1964, the US Department of Justice created the Community Relation Service to provide these services. National foundations, especially the Ford Foundation, and the American Arbitration Association, already an established ADR (alternative dispute resolution) provider started the National Center for Dispute Settlement in Washington, DC and the Center for Dispute Settlement in Rochester, NY. Meanwhile a prominent labor mediator began the Institute of Mediation & Conflict Resolution in New York City. Mediation was still being used primarily between groups, but here it was used as an alternative to the streets.

Court-Based and Community Mediation Programs Develop

Around the same time, courts found themselves dealing with a large number of minor criminal cases that seemed ill-suited to legal intervention. These cases were between relatives, acquaintances and neighbors. They often involved harassment, minor assaults or payment disputes. The increased mobility and urbanization that marked this period meant that many people couldn't turn to family members or other traditional resources to resolve these conflicts. So people turned to the courts with situations that were not easily resolved by judicial intervention. These disputes tended to involve strong emotion and situations where it was difficult to determine the truth. Even when the courts dealt with these cases, a verdict of guilty or innocent rarely resolved the situation. In fact, many situations were on-going, leading to continued conflict and return appearances in court.

In response, the courts experimented with alternative ways to handle these cases. In 1969, the city prosecutor in Columbus, Ohio developed a program that offered mediation as an alternative to a judicial hearing, creating the first court-based mediation program. The mediation was provided initially by law professors and then by law school students. The program succeeded in diverting many of these cases from the courts and in allowing people to deal with the disputes between them in ways that seemed most appropriate to them. As this program proved successful, other courts began developing mediation programs. The already established centers in Washington DC, New York City and Rochester began taking such cases from the courts as well.

In 1977, in response to interest in these court-based mediation programs, the Department of Justice started three Neighborhood Justice Centers in Atlanta, Kansas City and Los Angeles. These built on the idea of a "multi-door courthouse," where situations would be evaluated and sent to the most appropriate forum rather than simply being sent to a prosecutor or judge. These programs were evaluated in detail and proved successful. Though only the one in Atlanta continued past the original grant, they served as models for community mediation programs.

In the late 1970s and early 1980s, mediation programs grew rapidly. The community mediation field benefited initially from federal funding through the Law Enforcement Assistance Initiative. State and local governments also made funding available. Foundations were joined by private organizations like the American Bar Association and the American Arbitration Association in supporting community mediation programs. Over 200 programs were begun between the mid-1970s and the mid-1990s. Some courts established programs during this period, but the major growth was in the community mediation field.

The cases handled by all mediation programs expanded beyond the original misdemeanor cases to include small claims cases, custody and visitation cases, juvenile delinquency and status offense cases, and victim-offender cases. Private practitioners emerged during this period as significant providers, especially in divorce cases, though this area of growth is outside the scope of this paper.

Community-based centers differentiated themselves from court-based programs in several significant ways. They expanded their areas of practice to include cases that would never go to court, like roommate disputes and conflicts in schools between students. They also supported collaborative community relationships by offering facilitation of intergroup conflicts in neighborhoods. Unlike court-based programs, community centers were committed to the availability of mediation at any stage of a conflict. They were also committed to building capacity in local communities so they recruited and trained community members to be their volunteer mediators. By training volunteers and educating community members as well as by offering mediation and facilitation in response to a wide range of situations, the community mediation centers sought positive systemic change in their communities.

As community mediation programs expanded, accepting the kinds of court cases described above, the higher courts took notice. With increasing backlogs, they saw alternative dispute resolution methods as a possible remedy. In 1988, Florida passed a law authorizing civil court judges, at their discretion, to order any case on their dockets to mediation. In 1990, the US Congress passed the Civil Justice Reform Act, requiring every federal district court to develop a case management plan. It recommended the use of ADR processes as one possible remedy to the backlogs. This spurred the development of pilots of court-ordered and court-referred mediation programs, as well as programs that used other ADR processes. By the end of the 1990s, over half of the 94 federal court districts offered or required mediation. It gradually became the primary ADR model used by the courts, outpacing the previous front-runner, arbitration. Mediation made sense to the courts since it produced settlements. And since most courts created rosters of mediators, they defined the qualifications of their mediators. Many courts required that mediators be lawyers or other professionals with content expertise. They usually required mediation training as well, though sometimes for only a minimal number of hours.

Research Critiques the Mediation Process

At this point in its development, mediation was well established in court-based and community programs as an alternative to traditional court processes. The differences between the two kinds of programs were most evident in the level of cases handled and in who the programs used as mediators. Though community centers had the explicit goal of handling many kinds of disputes from many different sources, the reality was that in these programs, as in court-based programs, most cases came from the justice system. Though in one sense the mediation field was doing well, some mediation practitioners & scholars were discouraged by what was happening.

To understand this disappointment, it will be useful to take a step back and consider the mediation process and what it offered. Mediation is generally considered to be the first place on the

continuum of alternative dispute resolution processes where a third party in involved. But it is still a process that leaves decision-making in the hands of the parties.

Figure 1 (below) – The ADR Continuum

It offers a less formal process than those "higher" on the continuum, allowing direct engagement between the parties.

As described above, mediation was developed to provide an alternative, first to the unrest in communities and then to the clogged case processing system of the courts. Though almost all mediation was affected by the shadow of the law, it promised new ways to deal with conflict that had party self-determination at its core. As part of that promise, both court-based and community programs articulated a specific set of benefits. By using cooperative problem-solving and supporting a non-adversarial approach, they promised creative solutions and win-win agreements. By moving family conflicts like divorce, custody and visitation from courts to mediation, programs promised enhanced communication and better ways to deal with strong emotions. By providing easy access to mediation, either through referral or parties' own choice, they promised faster, easier access to resolutions. Community mediation centers claimed additional benefits. By training volunteers, they sought to build capacity for people to handle their own disputes. By accepting conflicts not involved with courts, community centers sought to strengthen neighborhoods.

But this rhetoric was not consistent with the practice of mediation. And this was true of community programs as well as court-connected programs. Research done in the 1980s noted this gap between the rhetoric and the reality. The reality this research demonstrated was that mediation did not realize its articulated goals because the process employed by mediators was not sufficiently different from the process used by interveners higher on the dispute resolution process continuum. Mediators were oriented toward settling cases and, in the process, they often strayed from the idea of party self-determination.

This gap was especially stark as researchers looked at what mediators actually did, not just what they promised. And the gap was present across programs, for volunteer mediators and attorney mediators, though to a different degree. Researchers found that mediators' practice generally involved controlling the "process" of mediation. Most mediators used a stage model, guiding parties through a series of steps that structured how parties talked to each other. While this, in and of itself, had the effect of controlling content, most mediators were more overt in limiting what parties talked about. By being selective rather than inclusive in what they responded to, mediators shaped the conversation in a direction that, in their opinion, increased the chances of solving the problem. They tended to prioritize concrete topics over emotional content. They contained conflict through the use of ground rules and

caucuses. Since mediators were actively involved as problem-solvers, they had to understand the situation so they asked lots of questions, made suggestions and used their position to influence or persuade the parties. Other mediators, practicing what is now called evaluative mediation, went even farther. In many court-based programs, mediators were expected to have content expertise so that they could evaluate the strength of each side's arguments and predict likely court outcomes. Thus mediators subtly or not-so-subtly offered advice as a way to ensure that any agreement reached met either their own sense of what was right or fair or the court's standards.

The practice of mediation developed in this way because mediators were focused on problem-solving or transactional bargains. With programs dependent on the courts for cases, their interest in pleasing the courts outweighed their commitment to party control. The practices described above made sense because their goal was to solve the problem and/or resolve the case. Research revealed not only increased mediator directiveness but sometimes activities that bordered on coercion of the parties. Because of the process' informality, there were little or no legal protections for parties.

Though mediation always struggled with differentiating itself from the courts, it was in danger of losing its way as an alternative. The attempts made over the decades to demonstrate mediation as a fundamentally different process were not being realized. Instead, party control and party choice were diminished. Communication between parties was restricted. Emotions were contained. Mutual problem-solving was replaced by mediator-led problem-solving. Mediators overtly or subtly evaluated the "facts" of the case. Creativity was stifled as mediators sought to ensure that courts would approve of any agreement reached during the process. While mediators maintained that they were facilitating a process that was very different than other ADR processes, experience and research did not support that claim. Instead, mediation had shifted its focus to the production of agreements at the expense of its own "first principle," party self-determination. As a result, parties failed to see mediation as fundamentally different and rarely sought out mediation on their own initiative. Researchers and social justice advocates critiqued process as being dangerous for women, racial minorities and others who were apt to be less aware of their rights and in less powerful positions.

The Mediation Field Responds to the Critique

So mediation was at a crossroads in the early 1990s. On the one hand, it was well-established, used widely by the courts either through court-based programs or by referral to community mediation centers. But on the other hand, it was in danger of losing its uniqueness. The largest growth was occurring in the most directive end of the process, with attorney mediators beginning to overwhelm mediators without professional degrees. And as mediators became more directive, what was actually happening in the mediation room didn't feel all that different to the parties.

The response of the field to this critique varied. Some, especially courts that were disposing of large numbers of cases through mediation and the attorney-mediators who served them, were satisfied. Others considered the critique and began to develop new forms of practice in an attempt to to re-establish the uniqueness of mediation. What emerged at this time were communication-focused practices. These stood in contrast to the settlement-focused practices that were most prevalent. Those developing these new forms of practice also worked to break the hegemony of the mediation field, asserting that these were not just different techniques or styles but new models of practice.

These communication-based mediation models defined new goals in an attempt to return to what was unique and valuable in mediation. They reasserted the value of party self-determination. They focused not on transaction but on interaction. The major new models were transformative mediation, narrative mediation, insight mediation and understanding-based mediation. Though there are significant differences between them, their shared focus on interaction yielded a set of common ideas. One is that for mediation to be a unique process that yields sustainable agreements, a mediator needs to focus on something other than, or at least something in addition to, settlement. Instead, they posited interactional change as key. And these models agreed that this interactional change could not be generated by top-down, mediator-driven interventions.

This development led to an expansion of the ADR continuum referenced earlier. Mediation processes could now be differentiated based on the degree to which parties are in control versus the degree to which the mediator is in control.

Figure 2 (below) – Expanded ADR Continuum

A Closer Look at One Response - Transformative Mediation

Taking a closer look at one model that focuses on interaction, transformative mediation, will help to make this important development more concrete. Transformative mediation brings rhetoric and reality together. It aims at conflict transformation not conflict resolution. It takes seriously the notion that parties should be the ones in control, not only of content but also of process. Transformative practice is based on a different understanding of conflict. Most transactional mediators, whether facilitative, problem-solving or evaluative, understand conflict as a clash of power, rights or interests. Transformative mediators, in contrast, understand conflict as a crisis in human interaction. Thus the mediator's focus is on interaction.

It is important to define clearly the difference between resolving conflict and transforming it. Resolution is about reaching an agreement, hopefully a good one, whether by good one means just, fair or win-win. Transformation is about something else. It's about a change in the quality of the

interaction between the parties. This change in interaction comes about as a result of a shift in each person's sense of their ability to deal with the situation they face and their ability to consider the perspective of the other. It is important to emphasize that what is talked about here is transforming conflict interaction - not people. Both resolution and transformation can happen and often do. Parties in transformative mediation sessions reach agreements at about the same rate as those involved in other mediation processes. And parties in problem-solving or even evaluative mediation may leave the mediation with the ability to communicate more effectively. But while parties may accomplish both, research indicates that mediators must choose. It is not possible to focus on these two different ends since each requires different practices.

Transformative mediation has a different definition of the mediation process: "mediation is a process where a third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they discuss and explore various topics and possibilities for resolution." The goals of a transformative mediator are to support party decision-making and inter-party perspective-taking. They reflect the reorientation of the mediator from transaction to interaction, from conflict resolution to conflict transformation.

A hallmark of transformative mediation is a clear connection between purpose and practice. Transformative mediators have a clear sense of what they are trying to accomplish with each intervention. They make no distinction between process and content because from a communication perspective, the two are not separate. Choices about process affect content so parties are the ones to decide how to have their conversation. Transformative mediators attend to the moment to moment interaction between the parties not the problem and its potential solution. They follow rather than lead, never using manipulation or pressure. They avoid leading because doing so assumes that the mediator, not the parties, knows what is best in a given situation.

Other ADR processes focus on resolution without attending to conflict transformation. This is one reason people seek alternatives to court. Getting an agreement may solve a problem. A court verdict may settle a case. But the conflict between the parties may not end, leaving people caught in negative, destructive interaction. Resolution without conflict transformation is also a problem for the courts since agreements reached that leave parties in conflict are less likely to be implemented and/or to be sustainable.

Though resolution may be court's focus, research indicates that what parties care most about is conflict transformation. The process of conflict transformation allows parties to reconnect with the best in themselves and then to re-establish positive connection with others. Interaction shifts to become more positive and constructive. Agreements that result from such improved interaction are often more sustainable. But more importantly, future interactions tend to be more positive and less conflictual.

Even this brief overview makes clear that transformative mediation, like other interaction-focused models of mediation, presents a clear choice. The process is very different than the process parties experience in court. It is also different than models of mediation that focus on transaction, on getting an agreement. Because any parties involved in conflict are interaction, it is appropriate for all kinds of disputes, not just those where parties have on-going relationship.

Mediation's Future

It is useful now to go back to mediation's roots and on to its branches. Mediation developed as an alternative way to respond to conflicts. At first, the field considered mediation as monolithic, generally asserting that there was a single, universally-used mediation process. This hid the real differences in the way that mediation was practiced. Over the past decade, the mediation field has gotten clearer about its own diversity and has become pluralistic. Different mediation models are acknowledged and co-exist. It is important to continue to clearly define models so that the differences between them are better understood. Mediator qualifications, training and standards of practice need to be tailored to fit different models. There also need to be different ways to evaluate success.

Mediation rests on the principle of self-determination, honoring the right of parties to make choices for themselves. Choice is good for the mediation field as well. The field will do well to consider the possibility that diversity is key to its success. By clarifying the differences between mediation models, the field offers clear choices to parties involved in conflict, to courts referring cases and to those interested in being trained as mediators.

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FIGURE ONE:

The ADR Continuum

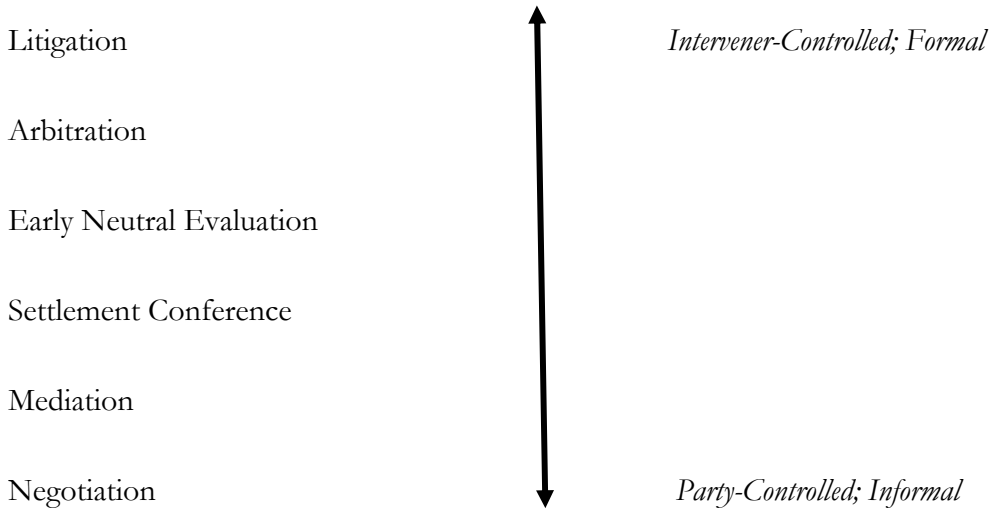

FIGURE TWO

Expanded ADR Continuum