Lessons Learned: Mediation as a Healing Art

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Thirty years ago, then-Chief Justice of the United States Warren Burger stated, “Our legal system has become too costly, too painful, too destructive, too inefficient for a truly civilized people.” In making this comment, Chief Justice Burger was leading the charge for alternative forms of dispute resolution, including mediation, to “produce acceptable results in the shortest possible time, with the least possible expense and with minimum stress on the participants.” Today more than ever litigants need to make choices about the allocation of scarce resources, because today’s legal environment is radically and fundamentally different than it was 30 years ago. The role of mediation has become a firm part of the practice of law, and its implementation offers skills for peacemaking and healing.

In law school, we were professionally trained in developing skills of advocacy. We were taught that in litigation there is usually a winner and a loser. We were not taught that when a dispute arises among parties, there are multiple levels of peacemaking that may occur. This article discusses mediation as a tool of peacemaking and ultimately a tool of advocacy that supports President Abraham Lincoln’s admonition to:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.

The Advantages of Mediation vs. Trial

Proponents of mediation point to privacy, control, convenience, economy, timeliness, self-determination and mutual respect as the primary advantages of mediation versus contested litigation. In a private setting away from the glare of publicity or a public hearing, disputing parties’ discussions—which can often be personally embarrass-
ing—are limited to the participants, their lawyers and the mediator. Control and self-determination allow the parties to negotiate and determine the outcome of their settlement rather than having to adhere to decisions by third parties.

The solution that is generated should be one that all the parties can live with. Convenience and economy allow the parties to schedule mediation when all can devote the necessary time to resolve the issues and by working together toward a common goal that is mutually acceptable. The parties share in the expenses and costs equally. This eliminates the need for costly discovery or protracted pretrial motions and hearings. Lastly, mediation is a form of dispute resolution that is conducted with dignity and mutual respect. Elimination of the acrimony and emotional stresses that are associated with trial are beneficial to the parties in helping them to move from a place of conflict to one of cooperation.

Mediation as Peacemaking

Peacemaker theorists believe that participants of mediation are challenged to develop creative solutions to often-complex legal issues. As lawyer–mediators, it is incumbent that we develop competencies in peacemaking and the art of resolving disputes by mediation. Peacemaking and mediation challenge the lawyer to be compassionate and to understand the art of facilitative healing. If lawyers are to serve as “healers
of human conflict,” they must create a neutral space where the disputants feel safe to acknowledge their conflict.

Prerequisites of a Successful Mediation
Empowering the parties to take control of the dispute and to resolve their differences in a collaborative way generates the success of facilitative mediation. This requires that mediators must possess skills beyond just learning the procedural aspects of mediation. The success of the mediation is dependent on recognition of attributes, attitudes and underlying biases of both the mediators and of the parties and on knowledge of how to overcome those things that create roadblocks to resolution.

Initially, disputants arrive at the mediation table with an already-established emotional feeling about the situation and the other party. They may be angry, hurt, disappointed, upset or even apathetic. Each of these underlying emotions generates a certain type of response by the disputant based on their individual personality traits. The responses may be impulsive, critical, manipulative or controlling. This challenges the mediator to recognize the dynamics of the underlying communication between the disputants, both verbal and nonverbal, and to use effective strategies to get the parties inspired and engaged in their self-resolution process while diverting the destructive behaviors that are unproductive.

In everyday life, we:
? routinely come into contact with people who believe that something is true even when it is not;
? recognize that some people simply do not want to face the facts because they think they are right and the other person is wrong;
? see people who are in denial and do not believe they have done anything wrong or caused someone harm;
? see people who avoid a situation because it is simply too painful for them to face; and
? hear people who blame other people for their actions.

In everyday life, we can choose to ignore these types of attitudes. In mediation, however, the mediator must deal with these underlying existing attitudes. The successful mediator is adept at establishing rapport between the parties and keeping the communication going in an open and engaging manner. The mediator must set acceptable boundaries and keep the balance of power in check. Recognizing that each small compromise is a resolution, the mediator focuses the parties’ attention to that resolution as commendable and helps build continuous trust in the process that an ultimate resolution to the problem is attainable.

The trained mediator is attuned to the parties’ verbal communication and is assessing the tone, pitch, volume, speed and intensity of the disputant’s spoken word. The mediator is also in tune to the nonverbal communication that is being generated by the parties. Maintaining eye contact
keeps the channel of communication focused and directed. Facial expressions reflect people’s emotions and attitudes and provide the mediator with the nonverbal feedback needed to provide direction or to redirect the conversation.

As human beings, we develop certain likes and dislikes and we all have biases of one kind or another. In self-reflection, the mediator has to recognize what existing biases they have regarding people or situations. During mediation, these biases must be overcome so that the mediator can remain neutral. Allowing biases to enter the mediation process is destructive because one party may justifiably feel that the mediator has transitioned from the role of mediator to that of an advocate.

**Dynamics of Mediation as a Healing Art**

While the focus of the legal system is to provide a legal outcome based on the facts and the law, the mediation system recognizes that in many instances the parties will, by necessity, continue to be in contact with each other long after mediation. For example, in a neighbor dispute, the parties leave mediation but return to their homes next door to each other; employer–employee disputes require the employee and employer to continue performance in their work environment; and family disputes require continuation of the family relationship.

Skill development during the resolution process will empower the disputants to improve their own conflict-resolution skills. During the process the disputants are directed to focus on how to listen, how to communicate, how to evaluate, how to compromise, and how to take responsibility and control of their own dispute and to seek alternatives to resolutions that they can live with. This personal skill development then can be applied to other conflict situations in which they may find themselves in the future.

Often in mediation, the conflict before the mediators is only the continuation of a deeper underlying issue in need of resolution. For example, consider a neighbor dispute where one neighbor is complaining of the overhanging branches of the neighbor’s trees into his or her yard. During this mediation one party says, “Well, that never seemed to be an issue with you before, so why is it an issue now?” Although there may be valid reasons why the branches have now become a problem, the trained mediator will explore the deeper underlying sub-issue that may exist. For example, it might simply be that the neighbor’s feelings were
Information obtained during mediation that was subsequently improperly disclosed.

Lawsuits against mediators have been filed in a number of different disciplines. In 2011, in a family law matter, a woman in Tennessee filed a $15 million suit against the mediator claiming that the mediator had given her husband legal advice following the mediation. The court dismissed the lawsuit and concluded that whether the advice had been made in her role as a mediator or outside the role of mediator there would be no liability. In that case the court reasoned that if the statement had been made during the mediation process, then immunity would bar the claim. On the other hand, if it was made outside the mediation process, then she owed no legal duty to the plaintiff.

Conclusion
Mediation has come to age in the new millennium. As courts continue to become backlogged, lawyers, judges, plaintiffs, defendants, employers, employees, neighbors, landlords, tenants, husbands, wives, and many, many other individuals and disciplines are turning toward mediation as a swift and successful resolution to their disputes. In addition, mediation provides healing to the wounds surrounding the dispute and provides skill-building for the disputants to apply to future potential disputes.

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forces the long-lasting effects of positive behaviors.

Ethical Ramifications for the Mediator

The most widely used set of standards governing mediator conduct today is found in the Model Standards of Conduct for Mediators. Development of these standards was a collaborative effort between the American Arbitration Association, the American Bar Association’s Section of Dispute Resolution, and the Association for Conflict Resolution, formerly the Society of Professionals in Dispute Resolution. In 2001 the Uniform Law Commissioners, in collaboration with the American Bar Association’s Section on Dispute Resolution, created the Uniform Mediation Act, which provides numerous examples of ethical dilemmas facing mediators. To date, the act has been adopted in a dozen states (but not in Arizona). For those who are serving in a court-connected mediation program, there is a comprehensive set of ethics set forth in the National Standards for Court-Connected Mediation Programs.

Promoting confidence in the mediation process and the use of mediation as a peace-making tool has been around for the past 30 years as standards of conduct for mediators developed. In the past three decades, lawsuits against mediators were infrequent because of the confidential nature of the mediation process. However, as the use of mediation has increased, so have the lawsuits against mediators.

Claims against mediators most frequently appear in failure to disclose conflict of interest cases and breaches of confidentiality. These conflict of interest cases address neutrality by examining whether the mediator had any biases and, if so, whether the mediator refrained from acting on them. Most cases dealing with breach of confidentiality involve information obtained during mediation that was subsequently improperly disclosed.

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