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Exploring Deeper Wisdoms of Mediation: Notes from the Edge

Abstract

Excerpt

Mediation draws many people into the field of conflict resolution with a promise of rewards like an income stream added to an existing professional practice or agreements pulled from the fires of bitterness and frustration. But for Jim Laue there was more. As a consummate mediator, Jim was equally comfortable mediating technically complex regional disputes, potentially explosive community disputes, and emotionally charged interpersonal disputes. His career began years before a well defined field existed. He came to this work as did others of his and the next generation, determined to address issues of social justice. His mediations during the civil rights era explicitly leveled playing fields and reshaped political tables in every community he touched. Later work with President Carter, in Texas, Indiana, and the Washington, D.C. area continued intervention models established decades earlier.

Keywords: *alternative dispute resolution (ADR), distributive justice, interactional justice, Jim Laue, mediation, procedural justice, social justice*

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EXPLORING DEEPER WISDOMS OF MEDIATION:

NOTES FROM THE EDGE

Margaret S. Herrman

Introduction Mediation draws many people into the field of conflict resolution with a promise of rewards like an income stream added to an existing professional practice or agreements pulled from the fires of bitterness and frustration. But for Jim Laue there was more. As a consummate mediator, Jim was equally comfortable mediating technically complex regional disputes, potentially explosive community disputes, and emotionally charged interpersonal disputes. His career began years before a well defined field existed. He came to this work as did others of his and the next generation, determined to address issues of social justice. His mediations during the civil rights era explicitly leveled playing fields and reshaped political tables in every community he touched. Later work with President Carter, in Texas, Indiana, and the Washington, D.C. area continued intervention models established decades earlier.

Jim promoted social justice well before a field emerged. A very personal philosophy shaped a corpus of work rooted in a world view that incorporated respect for people regardless of their social station. He also believed, given the right environment, anyone can and will act decently toward an adversary. Respect and decency are transcendent beliefs Jim probably learned from family and community ties. We will never know the exact origins of Jim's beliefs, but one message is clear. Whether consciously or subconsciously, mediators are guided by their inmost values. I even suspect that interventions probably reflect transcendent values as much as, if not more, than policies developed by programmatic, national, or legislative bodies.

Justice May be Complex, But Not Abstract

Jim's multifaceted interpretation of justice serves as the referent value for this paper. Analysis concentrates on expressions of justice in mediations involving interpersonal disputes - a practice often categorized as alternative dispute resolution (ADR). Specifically, this paper examines how mediators' beliefs might shape social interactions that promote justice during mediation, in exchanges between disputants, and in outcomes.

Jim Laue's work addressed several forms of justice simultaneously. He invariably identified people with a stake in the mediation and persuaded them to participate

regardless of whether they represented social elites or community outcasts. If they were outcasts, or just not versed in negotiation strategies, or not well-informed or well-organized, Jim found resources to secure their participation and prepare them for the road ahead. Some of these activities, foreign to many interventions today, were very much a part of ensuring that **procedural justice** characterized the intervention. For Laue, procedural justice included the following: making certain that (1) the steps in the process are clear (2) actions of the mediator are consistent with a person's understanding of the process and (3) key stakeholders would participate fully- not in name only. Rules more common to contemporary mediations (e.g., rules of confidentiality, information development and sharing, communication between people and the mediator between sessions, who pays for the intervention, etc.) were also discussed and confirmed during the earliest stages of an intervention

Achieving **interactional justice** (e.g., ensuring that all people are treated fairly, with respect, and recognized as equal participants with legitimate concerns) could be tricky given the often explicit cultural and power disparities in Jim's mediations. To cope with these challenges, Laue interventions were characterized by early and continual attention to information sharing and continual expressions of respect for all people. Weaker people were given a voice. More powerful participants were encouraged to remember any political disincentives should they contemplate leaving the table.

Distributive justice or equity in outcomes (i.e., achieving goals in a balanced outcome) was the bottom line of a Laue mediation, but rarely easy to achieve since most of these interventions entailed long-standing needs to redistribute community, governmental, and sometimes personal resources. In such situations, the powerless must have good negotiating skills that spur powerful elites to relinquish resources they have grown to accept without question. Just outcomes were often achieved because Jim interpreted power in its broadest sense. He was creative and never shy in helping people understand all their sources of leverage. Yet, even while Jim educated and coached behind the scenes, he also stood aside so that people could talk about their needs and make demands.

Flowering From a Common Stock

The field's commitment to justice is similar but not identical to Jim's vision. As in Jim's day, communities in North America continue to evade dealing with broader issues of distributive justice. Similarly, work within the field that might address root causes of distributive injustice has largely lain fallow. Only recent discussions

of participatory democracy and community collaboratives among dispute resolution colleagues have begun to resurrect a broader agenda.

In large measure the field stepped in to offer structural innovations to protect procedural justice, changes focused midway between macro issues (e.g., economic disparities) and micro issues (e.g., individual frustration and alienation). Indeed, cries of injustices associated with court procedures in the 1970's prompts continued growth in the field 20 years later. Tremendous strides have been and continue to be made. Even so, procedural changes in courts, or elsewhere, as difficult or as spectacular as they might be, influence only a segment and not a full spectrum of social justice issues.

A substantial percentage of North American mediators work with micro disputes coming out of courts, schools, corporations, etc. Existing formal codes of conduct and standards of practice speak to concerns about procedural justice. Still, I question whether national codes, legislated regulations, and even policies of local dispute resolution programs affect distributive and interactional justice in any particular mediation. National and even local policy bodies can only hope to influence mediator actions through statements of ideals, possibly through periodic continuing education and monitoring, and as a last resort through sanctions. Mediators can, however, dismiss external norms even when they work through an established program. Influence is even weaker when mediators maintain private practices outside the scope of organized ADR programs or professional organizations.

Justice for Individuals

By the time we reach adulthood, we have been exposed to a cornucopia of philosophies and values, each influencing our personal world views. The process begins in childhood and probably continues throughout life. Still, a great deal of conditioning occurs well before any mediator learns about mediation. Mediation training subsequently shapes process skills and perceptions of personal efficacy (cf, Riflcin, 1994; Schwerin, 1995; Zumeta, 1996) and from time to time may even validate and focus quiescent values learned much earlier in life.

Many trainers would attest that a portion of every class is made up of people who have been quite effective in their careers but are experiencing malaise. The trainees' work has been rewarding on one level, but they have a nagging feeling that something is missing. Perhaps the philosophical underpinnings of their current work are inconsistent with their transcendent beliefs about themselves and fellow

humans. Perhaps a trainee is not even aware of the disconnect. Perhaps the disconnect has not been articulated. Cognition of the disconnect can surface during training, but the learning process usually does not stop with training. The same philosophies that may have propelled a trainee into the field will also shape and support a mediator's interpretations of skillful or reflective practice in actual mediations.

By looking backward to childhood teachings, we are admittedly peering over the edge of the field, seeking possible roots that may ground reflective practices, practices that acknowledge "the connectedness of all things to each other and to the whole (to an) overriding unity in the universe that allows us to see ourselves in each other and the other in ourselves." (Zumeta, 1996:12) The following questions are raised in this paper: Why are some mediators more comfortable with a philosophy of connectedness than others. Why do some mediators allow that small space of time when mediators sense their personal vulnerability to conflict to emerge? I suspect that it is during that short space of time that mediators are predisposed to attend acutely to helping others achieve justice on many levels.

Ideally mediators approach every intervention with an intent to do a good job and certainly to do no harm. Their efforts begin when they establish an environment for positive problem solving, put people at ease, make participants aware of the mediation model to be used and act in accordance with the model described. Process clarification and mediator role modeling contribute to an environment supportive of procedural justice. Distributive and interactional justice begin when mediators help people talk about important facts, demands, concerns and feelings. Support for expressions of respect and recognition further improve the probability that perceptions of interactional justice will continue well beyond immediate agreements or other outcomes.

Consider a situation where two mediators are working on very similar cases - a personal injury case with approximately equal damages, a comparable cast of protagonists, similar injuries and medical histories, etc. One mediator, well versed in the facts, legal precedent, and the relevant legal culture uses an evaluative style: i.e., listens to the facts; analyzes what is presented against relevant legal theory, judicial temperament, and standards in the relevant court; compares demands with similar settlements; possibly offers feedback on best case outcomes; and develops an agreement that balances the factual/legal needs of all people. The second mediator, also well versed in the facts and the local climate, uses a transformative style: i.e., listens to the facts; analyzes according to legal, financial, and emotional salience to all of the people; probes hidden agendas and emotional needs; provides

support for sharing of insights and acknowledgments; and develops an agreement that works with factual and socio-emotional needs. Both mediators settle the case.

Which intervention has the greater probability of sending the parties away with a sense that they have been heard, and that justice has been served? There are no absolutes here. What if one of the parties and/or an attorney and/or insurance adjuster is amoral and a bully? What if one of the parties is reclusive and will not talk? What if one is totally unrealistic about what a court would award and his/her attorney actively encourages the fantasy? What if the complainant's life will be forever changed as a result of an injury? The what ifs could go on for several pages. If handled skillfully, both styles of mediation potentially afford procedural and some forms of distributive justice. The bully and the dreamer can be handled with aplomb by both mediators. But what of the recluse? What about needs that go beyond monetary awards to damages for the person suffering long term, life changing consequences? I suspect in these two instances that a transformative mediator has a better opportunity than does an evaluative mediator to structure exchanges that support perceptions of interactional justice. In advocating a transformative approach, The Promise of Mediation (1994) reminds us that mediation presupposes more than linear logic and reconciling facts and figures. Failure to explore hidden agendas and emotional dynamics in relational conflicts, and even in many stranger-to-stranger disputes, potentially produces superficial agreements that may evade or ultimately negate longterm perceptions of distributive and interactional justice. In simplistic terms, all the money in the world may not be a just exchange for denial, disrespect, discounting, or intimidation. But, how do mediators move beyond superficial manipulation of an intervention to reflective practices that allow people to experience a full spectrum of justice responses? Answers lie partially with the training a mediator receives and in large measure with values each mediator internalizes as a result of a life-time of experiences.

Acknowledging the Potential of Spiritual Roots

Jim Laue was a deeply spiritual man who never separated process techniques from a wellspring of beliefs that shaped strategic process decisions. Indeed, like Jim, we all embody a capacity to be more than process mechanics. We are all affected by personal feelings, biases, and values. I would also venture to say we are all spiritual creatures who have been shaped by many experiences including imprints of a spiritualbase that may be implicitly, if not explicitly, expressed through one of the world's great wisdom traditions. That spiritual base, or "a broader scope of human involvement that emanates from the inner essence of a person often

implies action born of a commitment which may or may not be informed by allegiance to a particular (wisdom tradition)." (Said and Funk, 1996: 1) The spiritual base also functions as one of several filters through which we interpret social interactions and relate to others. For example, core spiritual values coincidentally associated with skillful mediation - justice, love, compassion, empathy, charity, understanding, forgiveness, personal tranquility, respect for people, and comfort with our inability to demand that others change - comprise invisible hands guiding a mediator's actions.

By comparison, society as a whole, including many institutions turning to mediation like courts, schools, governments, business, and communities, embodies contrasting secular values. Skepticism, egoism, objectivity, needs for hierarchy, authority, predictability, rigidity, authoritarianism, a sense of perpetual chaos, hostility, and pugnacity fall into this second set of values.

I would like to believe that mediators lean more toward the first set of values than the second. Realistically, however, we all struggle to overcome secular icons that promote the second set over the first. The issue is one of supporting mediators in their struggle so that values like justice, empathy, and trust take precedent during a mediation. One way to provide support or renew commitment is to consciously examine possible sources of our values.

Four themes, certainly not an exhaustive set but a place to start, help articulate complementarities between two wisdom traditions and facets of justice so important to dyadic or small group mediation. The themes are the following: (1) mediator as guide, (2) growth out of chaos, (3) the gift of ritualized listening, and (4) spiritual values of impasse. One hypothesis, certainly open to testing, might be that mediators willing to work beneath the surface of a conflict (i.e, based on a transformative style) may coincidentally subscribe to a world view that embraces values like empathy, love, and compassion. A second hypothesis might be that the four themes to be examined imply ways of mediating that also assume certain world views and support all three forms of justice defined earlier.

As a mediator and not a theologian, I approach this little journey by examining what two particular wisdom traditions say about guiding people, positive aspects of chaos, ritualized listening, and the power of impasse. Given the natural boundaries of any paper, my reflections are limited to Taoism and Christianity, although Buddhism and various traditions of native North Americans also speak to and of these themes. The following will explore selected passages from the New Testament and the Tao Te Chiniz, thus providing a sense of balance between the

Western and Eastern traditions. My hope is that as we explore possible spiritual roots, or at least acknowledge possible connections between our work as mediators and deeper insights available to all of us through various wisdom traditions, we might enhance our ability to support justice in our mediations. Woods (1996), for example, speaks of her need to capture her feeling of "emptiness," a Buddhist concept, before each mediation.

Mediator as Guide

Perhaps the first decision new mediators make, as they learn skills and begin to work on their first few cases, is how directive they will be in conducting interventions. Mediators are taught to step back from the brink of deciding outcomes, but they still control the shape and direction of the intervention as a whole. For example, mediators who rely on caucuses and shuttle diplomacy, while reducing or excluding joint dialogue, maintain a much tighter reign on the flow and timing of conversations.

Our vague understanding and imprecise labeling of mediator styles makes it risky to predict why some mediators prefer a caucus predominant model over a dialogue predominant

model. One explanation could be that some mediators sincerely believe that people possess the

wisdom to find their way through a mediation to a satisfactory outcome. Another is that some mediators are more comfortable with expressions of emotions during a mediation. Both might be less inclined to separate people, feeling instead that interactional justice emerges only after negative perceptions are aired and confronted.

Where might these beliefs originate? Both Christianity and Taoism address the issue. For example, if you assume that a mediator is the "master" of a mediation, the metaphor in Chapter 17 of the Tao Te Ching speaks to the benefits of non-directive leadership:

"When the master governs, the people

are hardly aware that he exists,

Next best thing is a leader who is loved.

Next, one who is feared.

The worst is one who is despised.

If you don't trust people,

you make them untrustworthy.

The Master doesn't talk, he acts.

When his work is done,

The people say: "Amazing":

We did it, all by ourselves!"

Ideally every mediation presents opportunities for participants to create solutions. Mediators choreograph the creation process when they make choices such as relying less on the external authority of the role (i.e., professional credentials or a court) and more on personal qualities like compassion, optimism, and affirmation. When the choreography is subtle or less controlling people take ownership, they "do it themselves," and I suspect that their perceptions of interactional justice are greatly enhanced.

Chapter 10 of the Tao Te Ching also states the value of less coercive approaches.

"Giving birth and nourishing,

Having without possessing,

Acting with no expectations,

Leading and not trying to control,

This is the supreme virtue."

Until mediation participants grasp their capacity to make good decisions, they may subconsciously prefer mediators to take control, even to drive outcomes. As with judicially imposed solutions, however, a significant number of such people then ultimately rebel against both the process and the mediator as a surrogate authority figure. A wise mediator learns to step back from this precipice, to act instead in

invisible ways that encourage self determination. When people fashion solutions they deem relevant, fair, and feasible, distributive justice is also well served.

The Emmaus story in Luke 24 provides a wonderful metaphor for a journey of change couched in non-directive guidance. In the story, Mary Magdalene and other women go to the tomb after the crucifixion only to find the tomb empty. Peter then inspects the tomb to confirm what the women had found. The group's consternation generates a lot of discussion that spills over as two members of the group begin walking toward, Emmaus, a town some miles away. Somewhere along their journey Jesus joins the travelers - never announcing who he is, never saying: "Hey guys, here is the best interpretation for what you saw this morning." Instead, Jesus asks a lot of questions: "What did you see?" "How do you interpret what you saw?" "What do the scriptures suggest that might help you understand what you found?" By the time the trio reached the outskirts of Emmaus, everyone was probably tired, but no closer to solving the riddle. So, instead of offering to accompany the travelers into Emmaus, Jesus started to break off the conversation by walking in a different direction. Nevertheless, the travelers prevailed upon Jesus to continue the conversation and to join them for dinner. During dinner, Jesus still did not identify himself. It was not until the tired trio finished eating that they began to suspect Jesus's identity and the meaning of what they had seen; and only after Jesus disappeared at the end of the evening did the travelers more fully understand the day's events. The Emmaus story demonstrates that indirect routes to problem solving take time. They also require safe environments that support contemplation and exploration. Finally, solutions often emerge after an extended dialogue shades into fatigue.

The temptation for mediators to "tell" solutions is very clear. Sometimes mediators lose faith in the ability of people to fashion optimal solutions for themselves. Sometimes frustration (as possibly Jesus felt when he walked away from the duo at the outskirts of Emmaus) promotes solution-giving. Sometimes "telling" is in response to time restraints fostered either by the mediator's style or schedule, by the mediation participants, or by the program within which a mediator works. No matter what the exact cause, constricted time undermines unhurried dialogue, as described in the Emmaus story. When time begins to dictate the pace and flow of a mediation, problem solving processes that promote distributive and interactional justice tend to evaporate.

Growth Out of Chaos

People come into a mediation feeling that the situation is chaotic. A conflict exists, more often than not involving deeply personal problems between the protagonists. Apprehension, confusion, and dread are common, and so are two coping mechanisms. Either people depend on their mediator as a font of wisdom, or they take dogmatic positions. Chapter 72 of the Tao describes the scenario and offers a response:

"When they no longer trust themselves,
they begin to depend on authority.
Therefore the master steps back
so that people won't be confused.
He teaches without teaching,
so that people will have nothing to learn."

Chapter 65 of the Tao echoes the theme.

"The ancient Masters
didn't try to educate the people,
but kindly taught them to not-know.

When they think they know the answers,
people are difficult to guide.
When they know that they don't know,
people can find their own way."

Distributive and interactional justice are difficult to achieve when one or several people subscribe to dogmatic interpretations of a problem or to positional demands - i.e., when people think they know THE answer. A task, then, for a mediator is to jog belief systems, to gently guide people into doubt. If people in conflict embrace

positions out of fear, creating doubt about that position can open doors and stimulate their thinking.

Gentle questioning, going beyond the obvious, not taking anything for granted, diving below the surface, even reality testing are all techniques that can create doubt and thus a need to explore new ideas. In pushing people beyond what they know into unexplored feelings, facts, connections, and possible solutions, the mediator creates more chaos. According to theories of problem solving, the mediator fractionates positional bargaining into underlying interests while simultaneously preventing premature closure. From the standpoint of the Tao, the mediator is teaching people not to know so they can eventually find their own way. It is not until people fully explore all of their options that true distributive justice can emerge. In other words, you have to make a mess before you can help people clean up the mess.

As people struggle through "not knowing," there is a risk that out of deference to the mediator, people will relinquish their power to the mediator. As they do, they give up their capacity to create personally satisfying outcomes. The story of the good Samaritan in Luke 10 explores the fallacy of assuming that those in authority provide the greatest help in a crisis. In the story, Jesus explores the role of neighbor as helper. A man was mugged while walking from Jerusalem to Jericho, and left for dead by the roadside. People you might expect to help, a priest and a Levite, saw the man but did not stop. Some time later a Samaritan - someone you would not expect to help - passed by and stopped. The Samaritan dressed the wounds and took the man to an inn where he could be nursed. The next morning, the Samaritan quietly departed after leaving money for the man's longer-term care.

The man suffered through a chaotic beating, and, like many people coming into a mediation, probably assumed the worst. When culturally accepted helpers became aware of the man's plight, they were powerless to do anything - as are many judges and lawyers. Perhaps they were aware that their skills did not extend to the type of wounds the man suffered. Perhaps they were already overburdened by the demands of their positions. Perhaps they could not risk censure or a liability suit, if their assistance should hasten the man's death. It was the "outsider" who took the risk. Yet even then, the outsider did not take credit for the man's healing. He simply provided a means for healing. Procedural justice provides a means for interactional justice to occur. Interactional justice, however, is only fully realized when an authority

figure foregoes mandating solutions so that people grasp their personal capacity to fashion solutions themselves.

The Ritualized Gift of Listening

Mediation offers an opportunity for people to lament in a safe environment. When people step into a mediation, they simultaneously step out of their ordinary interactions. Mediators signal the change with assurances of confidentiality, and by providing a neutral, and private setting. Normal "rules" of dialogue are suspended in a safe space that supports explorations of inner feelings away from public scrutiny.

Lamenting is important to a mediation and to the development of interactional and distributive justice in several ways. First, skillful mediators approach a mediation "not knowing" (e.g., Woods idea of emptiness). While mediators may ask for summary information about a complex dispute, most understand that even detailed summaries frequently fail to reflect the full scope of a dispute. It is also axiomatic that hidden dynamics - motivations, fears, and concerns - have blocked settlement prior to mediation. Listening while people talk about the conflict provides an excellent way to uncover these dynamics. Second, lamenting allows a person in pain to explore that pain in the presence of a sympathetic other. It is not unusual for people to plumb the depths of their grievance. The simple act of crying out helps heal while also providing valuable insights to the mediator and other participants to the mediation. This is important, since it is not uncommon for people to walk into a mediation never having heard the full story.

Chapter 27 of the Tao delineates an excellent philosophy for a mediated approach to listening.

"A good traveler has no fixed plans

and is not intent upon arriving.

A good artist lets his intuition

lead him wherever it wants.

A good scientist has freed himself of concepts

and keeps his mind open to what is.

Thus the Master is available to all people
and doesn't reject anyone.

He is ready to use all situations
and doesn't waste anything.

This is called embodying the light.

What is a good man but a bad man's teacher?

What is a bad man but a good man's job?"

If mediators make assumptions about the parties and/or outcomes, they risk shutting down critical conversation. Procedural, distributive, and interactional justice are all on the line. The magic of listening is nicely explored in John 4. In this story, Jesus meets a Samaritan woman at the well in the center of Sychar. It was late in the day. Jesus was thirsty, and the disciples were off searching for food. So, Jesus sat by the well in the center of the town to rest. A Samaritan woman arrived at the well at the same time, and Jesus asked her to help him get some water. The woman is shocked by the request. Why would he ask her, a woman and a woman from a depreciated culture? Jesus then reframes his request. Her act would be an act of kindness, a gift. The woman is satisfied, and they begin a conversation. Jesus asks the woman about herself. She replies by telling him some of her life story - a story with a dark side. It is not long before the woman expresses amazement a second time. She feels she has said very little to Jesus, yet he appears to understand her very well.

The story describes how strangers, and mediators are strangers, can ask a few well chosen but simple questions that validate and encourage people to talk. Mediators begin the process, as

well as setting the stage for perceptions of procedural and interactional justice, when they welcome participants into a mediation with statements such as the following: "I appreciate your being here today," or "it is important that everyone feels comfortable with what we will be doing." A mediator's opening statement

further validates stories by encouraging people to speak for themselves and by encouraging everyone at the table to listen and to take notes as new ideas are brought forward in stories. Thus, complete recitations are supported.

As in the story of the Samaritan woman, mediators encourage lamenting when they listen quietly, refrain from interrupting, and refrain from setting artificial time limits. The result is that people gain confidence and clarity, in particular, confidence that what they have to say contributes to the interaction and clarity about their needs, options, and possible solutions.

Spiritual Values in Impasse

The fourth theme connects spiritual insights and the process of calling impasses. In mediation, impasses loom as potential failures. Yet frequently, just as an impasse is called and doors seem to close, other doors open. This illustrates the Taoist idea of the power of opposites. Letting go of a mediation as a result of calling an impasse may actually encourage participation and active problem solving.

The specter of an impasse seems to emerge either when people have made impassioned opening statements replete with personal attacks or when a mediator begins to write an agreement. After people complete their opening statements, the mediator must choose to shift the process either into a caucus or dialogue phase. This juncture calls for close observation of people's reactions. Dialogue helps when initial lamenting drains some of the heat, when people are calmer, or when they hear something new that changes their understanding of the problem. Caucuses help if emotions remain high and negative, or if attacks have shut doors or backed someone into a corner. When people block new information and/or when accusations or complaints continue unabated, people may be signaling that they are not ready, for whatever reason, to put time and effort into shaping a mutual outcome.

Most mediators call an impasse when they sense the futility of the parties going down the road together. But many times calling an impasse is not the end of the story. A short passage in the Luke 24 story of Emmaus illustrates what can happen when an impasse is called. In the story, Jesus has journeyed with the two travelers for the better part of a day, and still no eyes have opened. Jesus moves to leave the travelers as they approach a fork in the road. He assumes futility. His companions can't see the answers to their quandary. But, when Jesus moves in a direction that would take him away from Emmaus, and away from the travelers, they call him back. "Walk with us further." "We want to continue to discuss this thing." The

same things happens in mediation! To be called back to a mediation table is potentially positive. The request may signal a breakthrough and perhaps the first sign that people are committing their personal resources to working through the intervention.

A second risky transition occurs when a mediator explicitly begins to write a formal agreement. Regardless of how mediators shift the process, it is common for people to react suspiciously. Tensions rise because no matter how positive the potential, people are being asked to make commitments to a future that is unknown. People are being asked to walk out of the darkness of their conflict into the light of the future. The transition seems similar to the sun hitting your eyes after you have driven through a long tunnel.

The story of the blind man in John 9 frames a relevant metaphor.
While Jesus was out

walking with his disciples, he crossed the path of a blind man. Jesus stopped, commented on the man's condition, and then did something extraordinary. He spit on the ground, then reached down and gathered the spit up with dust. He then placed the mud on the man's eyes. Next he instructed the man to walk to a local river to wash his eyes. It was only after the man bathed that his sight was restored.

I don't know about the social customs of the era in which the book of John was written, but today spitting on the ground could be interpreted as an affront. Still, Jesus did not stop there. He covered the man's eyes with mud, drawing attention to his blindness, and making it more complete. Next he told the man to act on his own to remove the mud. In the story the man's sight did not return until the man took responsibility for washing away the mud. So too in mediation. After hours, days, or months of a mediation, a mediator is not predisposed to congratulate or offer condolences for a person's blindness. Calling an impasse seems logical if people appear incapable of working through their blind spots. About 10% of the time, people appear relieved that a mediation is ending. They accept an impasse letter and move to the next forum. However, about 90% of the time, just as in the Emmaus story, people pick up the reigns of their mediation. How else will distributive and interactional justice emerge?

Summary

If a mediation is successful at any level, the mediation encompasses some form of transformation. The mediator controls the procedural dynamics of an intervention, and therefore is most capable of ensuring procedural justice.

Notes

1Laue interventions tended to focus on large, multi-party disputes, but definitions of various facets of justice apply just as easily.

2The idea here is akin to the adage in statistical analysis: "garbage in, garbage out." If a mediation does not begin with the right people in full participation, dissatisfaction will emerge along the way and the usefulness of the outcome will be doubtful.

3Sanctions for conduct violations necessarily respond to clearly evident acts of unprofessional behaviors, clear sins of commission. More subtle style lapses, lapses in judgment and personal values that might undercut just interactions or outcomes are virtually impossible to monitor externally.

I would also argue that controls due to peer pressure and/or market forces are myths. Peer pressure depends on close scrutiny by peers and a willingness to confront bad practices. More established professions have experienced breakdowns in policing by peers. Mediation should expect similar problems. Market forces will remain problematic so long as the public is not sophisticated in choosing their mediator and attorneys seek mediators that reinforce problem solving models that mimic arbitration or worse.

4Indeed, he decried the loss of values in our field as a whole. The proliferation of skills oriented workshops would invariably provoke Jim to ask: "But, where are the values?" "What happened to the values?"

5Steiner (1981) frames the contrast as between culturally preferred expressions of dominance and gamesmanship (and various other forms of external power) over elusive personal qualities that build community (or what Steiner calls them internal power). Boulding (1989) compares it to power based on violence versus power based in love. The parallel in mediation would call upon positional negotiation and reality tests, among other tactics, when a mediator uses external strategies and empathy, compassion, or role taking when internal strategies are in play.

6As Rifkin (1994) notes, the basic training someone receives might be the best predictor.

7This is true even for the youngest participants in a mediation. If one of the key participants is a child, mediators often seat the child next to the mediator, giving the child a power seat in the room. mediators will then reinforce the power of the child to participate fully by asking the child gently but directly to make their opening statement first, while a parent's remarks are delayed to follow remarks of the child.

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