

EXPECTATION AND REGRET

A Look Back at How Mediation has fared in the U.S.

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“God made man because he loves stories.”

Yiddish Proverb

In May, 2013 I was invited to offer keynote comments to the Civil Mediation Council in London for their 7th National Conference. The question I was asked to address was: “What should we in England learn from the U.S. mediation experience?” The question regarding the U.S. experience was, and remains, intriguing. What might others profitably take from the explosive growth of court, community and privately offered mediation over the last 25 years in the U.S.? What hind-sights can we offer? What is similar and what is different from the English and U.S. experiences now that, by some measures, both countries have succeeded in marrying mediation into their civil law systems and legal cultures? More important from my perspective, what regrets and appreciations do Americans hold and what would we change if we could go back and do it all over again?

Survey and Interviews

I could have opined on all this myself but I used the occasion of this invitation to reach out to some of the veterans who helped develop mediation in the U.S. For three months, I engaged in a slow “talk-a-thon” in which I contacted some 40 people, many of whom I know personally, and others by reputation. I asked them if they would be willing to share their views with me on a confidential basis by doing a very brief survey (Annex-1) followed by a 20-minute phone interview (Annex-2). Twenty-five of them responded, a few out of kindness, some out of pity, more because I pestered them. The survey results are attached (Annex-3) as well as the comments I took from the phone conversations, roughly grouped (Annex-4).

In a moment, I will summarize the major ideas I took from these conversations but first some disclaimers. The survey and interviews were done with a primary focus on looking back, not prospectively. I was interested in regrets, doubts, and misgivings by people who have done a lot of mediation and helped shape some of its presence in the U.S. This

was not a technically robust study. There was no literature review, no control group, and no meaningful analysis of variables, no spreadsheet of similarities and differences, and no examination for standard deviations. And, there was no real hypothesis other than a belief that people who have done something for a long time usually have instructive hind-sights, insights and misgivings.

Worse yet, the interview questions were “blunt” and closed ended leaving little opportunity for the more nuanced answers everyone would have liked to have given me since the practitioners I spoke with (some of whom are also teachers, trainers, and researchers) are all extremely reflective practitioners and articulate thought leaders for the U.S. mediation movement. Even more lazily, I completely avoided defining mediation. In the U.S., this matter of precisely defining mediation is an endless entertainment when the different tribes, clans and races of mediation gather together for their annual soirees. It is also a bottomless pit of pontificating.

Here are a few additional facts. 25 people filled out the survey and 24 were interviewed. 10 respondents were women, 15 men. The average age of all respondents was close to 60, the oldest 74, the youngest 38. 23 are Caucasians, 1 is Hispanic, and 1 is an indigenous American. Most practice their mediation work in the private marketplace. A few do mediations for local community mediation centers and an even smaller number are volunteer mediators in the courts. Many make a significant portion of their livelihood selling their time and expertise. 14 are trained in the law, 6 come with social science backgrounds, 2 have professional training in education, and 1 each come from social work and the life sciences.

The primary types of cases they mediate are as follows:

- Commercial - 7 (28%)
- Courts - 6 (24%)
- Family – 5 (20%)
- Public Policy -3 (12%)
- Community -2 (8%)
- Organizational – 1 (4%)

- Crisis intervention – 1 (4%)

8 of the people I interviewed work on the West Coast of the U.S., 6 on the East Coast, 5 in Alaska or Hawaii, 6 in the Midwest and 2 work primarily outside the U.S. 40% do 9 or less mediations a year. 10 do between 10 and 19 cases per year. 1 does between 20 and 29 cases per year and 10, more than a third of the group, do 30 or more cases per year. In response to my forcing of categories (which everyone uniformly hated), their self-described styles of mediation are as follows:

- Facilitative – 18 (72%)
- Evaluative – 5 (20%)
- Transformative – 1 (4%)
- Narrative – 1 (4%)

The interviews lasted 20 to 60 minutes each. I spoke to a few people twice and I had follow-up correspondence with some by e-mail. I promised everyone I spoke with a copy of this paper.

What I Heard

Woody Allen once said he believed the cup of life is more than half full but it probably has some arsenic in it. Unabashedly interpreted through my own filters, and looking primarily at the arsenic, I found five interconnected stories, all of them careening into each other, and all of them full of smaller and larger paradoxes: lots of “goods” and lots of “bads” in a cocktail of odd flavors that no one really ordered. Frankly, for me, interpreting all this was a bit like is like reading Mark Twain’s writings. Twain was for war and against war, boldly in favor of rich people, unabashedly supportive of poor people. He loved God and the devil and was famously for alcohol and strongly against it. The landscape of themes I heard was similar.

Story #1 - “The Decline and Decay of True Mediation”

With a few exceptions, most of the people I interviewed talked about a loss of first principles and an erosion of the fundamentals articulated three decades ago. “Mediation no longer looks like what we imagined,” one person said. “People see it as a numbers game,” said another. “It’s been a race to the bottom line, said a third, separate meetings, damages and remedies, just move the case.” As it has become institutionalized, legitimated and respectable, mediation looks and feels different both in the way it is described and the way it is applied. Some of the core values and premises that shaped our approaches at the beginning – voluntarism in coming to the table, a shift away from other experts telling you what to do, the repairing of fractured relationships, the idea that people can be the architects of their own negotiated solutions – seems to have eroded.

The essence of the story is this: mediation has changed in response to bureaucratic imperatives and the workings of the marketplace. It isn’t all bad but most of those I spoke to think it has degenerated and gotten worse and some fear it is following the Eric Hoffer trajectory. Hoffer was an American social critic and moral philosopher, a committed iconoclast, a perennial cynic, and a general all-purpose fly in everyone’s ointment. He said: “Every great cause begins as a movement, becomes a business, and eventually degenerates into a racket.”

Story #2 – “The Pull of the Courts”

Of the 25 people I interviewed, the vast majority have worked in or around America’s judicial systems as litigators, court officials, judges, or judicial adjuncts. Several helped pioneer well known court mediation programs. Even for those who had spent less time there, the influence of the courts on mediation figured prominently in every conversation. Ambrose Bierce, a rough contemporary of Mark Twain and author of *The Devil’s Dictionary*, once described the court system as a machine in which you go in as a pig and come out as a sausage. Some of that seems to have rubbed off on mediation.

The collective story from the interviewees is one of yin and yang, light and shadow, blessing and curse. Judiciaries have been a powerful source of mediation diffusion and

popularization. Once they started exerting serious gravitational pull, however, mediation changed. We all understand this. Courts and other bureaucracies adopt mediation for their own reasons, largely as administrative strategies for docket management, saving money, or reducing time to trial. High volume programs that handle sometimes tens of thousands of cases have created a variety of practices. Some have in-court “speediation” for certain small cases. Others require everything to go to mediation. Some do a wholesale outsourcing to volunteer community programs for most civil and family matters. Other courts handle their own cases internally with court mediators. A few simply push litigants out the door to find their own mediators.

The mixed blessing of the courts theme repeated itself in a majority of interviews. “Mediation is part of the culture of the courts now,” said one of the interviewees but “parties who are forced into mediation often get poorly trained mediators” with insufficient triage, little case screening, too few opt-out provisions, and not very much evaluation, support or training.² On the other side of the equation, a thriving private marketplace for some elite mediators would not have occurred without the courts normalizing it. The essence of this story is this: the courts have given a strong and important imprimatur to mediation but not without unintended and, for some at least, corrosive consequences.

Story #3 – “The Domination of Lawyers”

If “ownership” can be defined as a combination of “dominion and domain,” lawyers increasingly own mediation. With that comes the marriage of adversarial skills into the practices of negotiation, settlement, and resolution, perhaps a natural fit in many ways, but not quite the exact paradigm Fisher and Ury seemed to suggest in *Getting To Yes* (1981) and not quite the theory of mediation repeatedly described in 25 years of subsequent and often repetitious books. In *The Devil’s Dictionary*, Bierce defined litigation “as a process of giving up your skin to save your bones.” At conferences and other mediation gatherings, not a few attorney mediators often introduce themselves as

² I recently read that the high-building window washers in New York City (a guild) are not allowed to ply their craft until they have completed over 2,000 hours of training

“recovering lawyers,” perhaps a salvaging of their own bones. Mediation has offered a self-professed pathway out for interested attorneys. In turn, they have shaped the mediation process with their own original training and instinct.

In my interviews, most mentioned one and sometimes two problematic aspects of the lawyer love affair with mediation. The first is simple: hegemony, a takeover of mediation work and a slow but steady disenfranchisement of non-lawyers. The largest mediation organization in the U.S. is the American Bar Association’s Section on Dispute Resolution with 17,000 members. Non-lawyers can join as affiliates but have an almost second class status. Increasingly, mediation is seen as “lawyer-work”.

The second matter is attorneys “gaming” the process. This takes a variety of forms. One is using mediation as free or low-cost discovery, a little peek at the other side’s case, with no real intention of using the process to negotiate resolution. Another is insisting that clients never meet face-to-face and consigning the mediator’s role to shuttling offers and demands between them with no joint sessions. A third is having all communication go through the attorneys rather than talking with clients. A fourth is a hard focus on money. All of this results, in the words one of those I interviewed, as “the loss of the emotional work I used to do with clients in mediation” and the de-emphasis on relationships that seemed to be a hallmark of mediation in the early days.

Story #4 - “The Profession that Isn’t”

Major professions like medicine, law and engineering, and even with what are sometimes called the more “minor” derivative professions like planning, policy analysis or counseling, have certain things in common. They have a reasonably developed body of specialized knowledge. They have evidence-based diagnostic tools. They have codified intervention procedures, a code of ethics, a career path for new entrants, and some level of public oversight or reassuring self-regulation with consequences for people who cheat or fail. Fields that have most or all of these tend to have higher levels of occupational legitimacy.

When it comes to the development of a real profession, the people I interviewed hold contradictory notions. A few believe the early “social movement” themes of building communities and transforming the American notion and practice of justice were, and still are, antithetical to formal profession development. One said “there was a misguided notion in the early days that mediation was some kind of counter-culture. That did a disservice to the maturing of the field.” The larger majority of those I interviewed feel that mediators missed the boat and the moment to create a profession has passed. Having never met a metaphor that I couldn’t mix, the frogs have jumped out of the wheelbarrow and the toothpaste is out of the tube. A very few of the people I spoke with think it still can happen. “There doesn’t seem to be a real field” of mediation said one person, “just lots of little micro-marketplaces.”

Certification and standard setting schemes, the bedrock of any profession-building effort, have been hotly debated by competing associations, each holding fast to its own organizational imperatives. Today, in the U.S., and in England I suspect, there really are no broadly accepted and reasonably encompassing certification standard which would be central to a bona fide field and profession. Quite the opposite. In the U.S., courts certify for their own needs as do other administrative tribunals. The Federal Emergency Management Agency (FEMA) has its own cadre of mediators as does the Department of Interior (DOI) and the Environmental Protection Agency (EPA). Resourceful Internet Solutions (RIS), the parent company of www.mediate.com, offers a certification as do other academies, centers, institutes, and training entities. (One of the most promising I believe is the International Mediation Institute (IMI) which has partnership arrangements with MATA in the UK and the American Arbitration Association in the U.S. to help mediators achieve qualification recognition.)

The overall story here is about what is missing: a professional platform that can legitimately unify many diverse styles, applications and practices together in a common affiliation.

Story #5 – “The Search for Identity”

“Identity” – psychological, social, professional, national -- glues us together. It makes us definable and recognizable. It represents uniqueness, both “kindred-ness” and differentiation. Beyond the semantics of “dispute resolution,” “conflict management,” “ADR,” or “peacemaking,” mediators don’t have a unified identity. We don’t have a way of saying to the world who is kindred and who is not. What this leaves us with is a yearning for something that would distinguish the “us” from people who are not “us”, not in a pejorative way, but in a way that is somehow more factually and verifiably grounded.

In the U.S., we mediators are victims of our own short history and perhaps the hubris of our original missionary zeal. We have seen tensions, fissures, and tectonic fault lines, not just between competing organizations, but between lawyers and non-lawyers, volunteers and professionals, generalists and specialists, and the high priests of the “schools” of mediation we call facilitative, evaluative, narrative or transformative. In the U.S., and even within the ambit of the courts, the practice of mediation is diverse and contextual. There are labor mediators, family mediators, business mediators, construction mediators, community mediators, insurance mediators, school mediators, Native People’s mediators, and so on, all of them with stylistic differences.

Truth is that we know very little about our actual practices, what is similar, what is different, what works in one context and doesn’t in another, and even more precariously, between what might constitute weak practice, strong practice, good practice and bad practice. The researchers haven’t helped us much in ways that are practical and usable, not because they aren’t smart, but because they don’t have good grist to work with. Mediation is actually “invisible,” said one of the people I interviewed. We don’t really know what others who call themselves mediators do.

Without some sense of clarity and definition, how can we possibly arrive at workable standards and certifications or any of the other rudiments of a field or profession? How do we do meaningful research, diagnostics, and theory building? Mediators seem hungry for this kind of definition and at the same time are repelled by the boundary setting and exclusion that may be needed to achieve rigor. “There are pluses and

minuses to defining “mediator,” said one of the interviewees; “it would help some of us, but not all.”

The U.S. and England

I would never claim to fully understand the circumstances of the U.K. I can barely get my arms around what is happening in the U.S. Still, let me share a few impressions of where matters may be similar and different. I leave it to everyone in both countries to educate me where I have gotten things wrong.

Some similarities first. As in the United States, the mediation world in England appears to be Balkanized and fragmented. The English have considerable practice and style diversity and the same proliferation of micro-marketplaces as we have in the U.S., with most mediators working in the penumbra of the courts or at least with courts and litigation as some central reference point. There are also many thousands of mediators with little or no work and a few elites who rightfully or wrongfully, fairly or unfairly, get a lot of it. In both of our countries, the mediation economy seems out of kilter: high need, high supply, low demand.

As in the U.S., the English have many judges and retiring senior lawyers who are taking up the practice of mediation, who feel they are intrinsically qualified, who have little idea as to what they don't know, and who seem to find little value in in-depth training. Like us, they seem to have the same run-of-the-mill tensions between lawyer and non-lawyer mediators. They also have competing organizations struggling for primacy, though no one has quite defined what “primacy” would mean or what it would look like if it was achieved. In both countries, community mediation centers seem to be underfunded and may be suffering some attrition.

More dangerous, I think, is the occasional substitution of mediation for evidentiary hearings, to my mind, a truly misplaced impulse by government which diminishes people's procedural rights and gives our work a bad name. Like us the English don't

seem to have national standards, though in the U.S. we are getting closer through the Uniform Mediation Act which will strongly influence the way mediation evolves in the courts.³ As in the U.S., the U.K. seems to have quickly developed a cadre of elite mediators. And as in the U.S., users have little to say about how mediation is developing, there is very little data to help inform discussions, and the future of mediation tends to be a “fact free” conversation.

There are, however, important differences. We now have many more mediators, associations, institutes, centers, and academic programs in the U.S. which makes the job of getting even a rough consensus infinitely more difficult than when the 25 people I interviewed began their collective and individual journeys. We also have fifty different state court regimes (more if you count territories and sovereign Native nations) overlaid with a federal court system, all of whom tend to want to maintain their own prerogatives. Enabling legislation, definitions of confidentiality, notions of privilege, mediation regimes, and political and funding support differ dramatically. English mediators, on the other hand, may be able to enact national standards and practices more easily than we have because of their smaller numbers and tighter geography.

A Few Last Perspectives

I have probably painted the U.S. experience more negatively than I should but perhaps, as someone once said about Richard Wagner’s music, “it’s better than it sounds.” Much good has occurred these past several decades. On the other hand, the focus of this particular effort has been on hindsight, early hopes, and the corners of sadness that some of the U.S. pioneers now experience when you ask them. But as English mediator groups consider their future, a few other perspectives may be useful, if for no other reason, than as a reminder that we are dealing with something at once simple, complex and slippery when we talk about “mediation.”

First, mediation as we know it today in the U.S. actually has a very long tail behind it. It precedes what Michael Leathes has called “The Big Bang” of the Roscoe Pound

³ See <http://www.mediate.com/articles/umafinalstyled.cfm>.

Conference in 1976.⁴ It goes back to the early mercantile guilds of the late 1700s and early 1800s, gains governmental formality in the labor turmoil of the 1900s with the Wagner Act, is used quietly and effectively by the U.S. government for segregation and discrimination disputes in the 1960s, adapts into community and court mediation systems in the 1970s, and then creeps into many other corners and crevices of state and federal administrative procedure.

Much of what has occurred can be looked at as another example of how often new practices seem to acquire careers and “lives” of their own. As famously described by Everett Rogers (*Diffusion of Innovations*, 1962), new ideas, technologies, and social strategies rarely remain static. There are classic J- and S-curves that describe these trajectories. Things are born, grow, adapt, and evolve. They die in one form and are reborn in others. Why would mediation be any different?

Second, even though we all love our own theologies of practice, we know that mediation isn't one single thing. Some call it “facilitation,” others “consensus-building,” and still others think of it as “collaborative leadership” or “cooperative governance.” Mediation goes by many names and reflects different ends by often similar means. The great story of mediation in the U.S. over the last three decades has been its protean malleability. Mediation shows up in many interesting settings and for many interesting and useful purposes. It takes place in the different practices of “collaborative law,” “deliberative democracy,” “civic dialogues,” “family conferencing,” “peer mediation,” “settlement weeks,” “joint fact finding,” and “appreciative inquiry”, to name just some of them.

Third, let's assume that the correct way of mediating lies in the eye of the beholder and that the work all of us beholders engage in sits in different contexts, domains, and settings. Further, let's be generous and assume we really are collectively adding value even though we probably go about things in different ways. There are many common elements between us.

We share a philosophy of applying good discussion processes that allow people very high levels of participation in untangling big messes, often of their own making. We

⁴ Michael Leathes, “The Future of ADR in 2020,” Opening Plenary Panel, Singapore Alternative Dispute Resolution Conference, 4-5 October, 2012.

share a common tool box of diplomacy, communication, negotiation and problem solving skills. We share similar instincts for preventing conflicts from escalating unnecessarily. We share a notion that we should comport ourselves with reasonable dignity and not embarrass people even when we have to help them confront harsh realities. We share similar habits of undertaking reasonable preparations and careful and often tailored designs in our applications. We share the idea of including the fullest possible diversity of problem “holders” and the different voices and viewpoints they bring to the table. We share a belief in negotiation over unfettered fighting or endless friction-filled litigation for matters that are likely to settle anyway. We share the practice of helping people talk and listen to each other. And we share the paradoxical exercise of optimism, patience, and pragmatism in human affairs.

Fourth, even with these shared values and techniques, the current mediation energy in the U.S. and England appears to sit in the specialized micro-marketplaces of mediation: family, commercial, workplace, construction, public policy, and the like. In business-speak, a micro-marketplace is *“a narrowly focused market that aggregates multiple vendor offerings, content and value-added services (such as comparison of features) to enable buyers within a particular industry, geographic region or affinity group to make informed purchasing decisions.”*⁵ That is where the drive, adaptive creativity, and the balancing of better need, supply, and demand equations seems to be taking place.

These days, the more inventive and productive hot spots of mediation probably offer the best organizing opportunities, initially for some kind of smaller strategic “summit” processes to crystalize and articulate similarities and differences and then, if successful, to create the right kinds of confederations that will pursue common agendas but respect the differences between us. Co-existence is the theme, not unification. I always worry that attempts to create tightly controlled umbrellas over or hardened firmaments under different groups inevitably breeds contempt, resentment, and friction. In a fast moving world, nimbleness has high value. Alliances, partnerships and specific collaborations may be better than forced mergers.

⁵ <http://www.gartner.com/it-glossary/mm-micro-marketplace/>

Finally, we need to remember that mediation is very, very old stuff, something that has been around in most cultures for long spans of history. New mediators tend to think they just discovered or invented it. They adopt it, adapt it, and use it for their own instrumental purposes, usually with good intentions and probably with generally good outcomes, or at least ones that don't seem to create great harms. This is not new. We are hard-wired for this as social animals. In one sense, all we have seen these past thirty years in the U.S., and perhaps in England, is a further transformation of that ancient meme-like impulse to help people find good solutions to the problems that vex them. Whatever happens next in both countries, I remain optimistic that it will continue that deeper and longer tradition.

Annex-1
SURVEY

1. Number of years practicing as a mediator. Check one.

- Less than 10
- 20 to 25
- 26 to 30
- 31+

2. Region you do most of your mediation work in. Choose one only:

- East coast
- Southeast
- Upper Midwest
- Gulf region
- Mountain states
- Southwest
- West coast
- Alaska and Hawaii
- International or outside the 50 states

3. Year of original mediation training and name of first trainer.

Year: _____
Name of First Trainer _____

4. Are you officially “certified” as a mediator? If yes, by whom?

**5. How important is certification with some existing body or organization to your actual work?
Choose one only.**

- Very important
- Important
- Slightly important
- Occasionally important
- Irrelevant

6. Number of mediations you typically now do in a year

- _9 or less
- _10 to 19
- _20-29
- _30+

7. Professional background

Highest degree: _____
Field, discipline, or subject: _____

8. Your current age _____

9. Ethnicity (check the one you most typically use when asked for an identifier)

- American Indian, Native Hawaiian, or Alaska Native
- Asian
- Black or African American
- Caucasian
- Hispanic

10. Which word comes closest to the way you think of mediation (choose one only).

- A profession
- A business
- A vocation
- An avocation
- A calling

11. Your primary substantive area of mediation work. Choose one only even if your work crosses multiple areas.

- Commercial
- Courts
- Family
- Community
- Education
- Labor
- Health care
- Workplace
- Public policy
- Organizational and ombuds
- Crisis intervention

12. Best descriptor for your practice. Choose one only even if you practice in more than one way.

- Facilitative
- Evaluative
- Transformative
- Narrative

13. Who typically pays for, or sponsors, your mediation work. Choose one only.

- Both parties pay
- One party pays
- An agency or organization pays
- I volunteer

14. Do you or your sponsoring organization provide disputants with a set of standards, a code of conduct, or a statement of ethics?

- No
- Yes - please cite:

15. Please rank order the factors you consider to be the most crucial to the mediation successes you have experienced (1=High / 5=Low).

- Emotional rapport between parties
- Creative new possibilities
- Urgencies and deadlines
- Discovering compatible interests
- New information

16. We sometimes hear mediators talk about practice “horror stories”. Rank order from 1 = high to 5 low which factors you think are most egregious in creating bad practice problems:

- Mediating with insufficient time
- Pressuring people to agree
- Mediating with no training or experience
- Bias towards one side
- Lack of analytic, negotiation or communication skills

17. What one phrase from the following list comes closest to defining the way you think of “good” mediation? Choose one only.

- Everyone satisfied
- Effective process
- Fair to all
- Cost efficient
- Smart outcome

18. When you started mediating, what one book and author was most influential?

19. What one book and author do you find most influential today and recommend to others?

20. Overall, how current are you on mediation research findings, academic debates, and theory building?

- Very familiar
- Somewhat familiar
- Familiar
- Slightly familiar
- Unfamiliar

21. How important and useful to your practice are research findings, academic debates, and theory building?

- Extremely important
- Important
- Somewhat important
- Occasionally important
- Unimportant

22. What is the primary source of your information on what others are doing in the area of mediation? Check one.

- Books
- Academic journals
- Blogs and newsletters
- Conferences or workshops
- Discussions with friends and colleagues

23. If you could make one change to the way mediation is taught to others in courses, workshops and training programs, what would you do? Choose one.

- More emphasis on negotiation
- More emphasis on communication
- More emphasis on mediation process
- More emphasis on apprenticeship
- More emphasis on building a practice

24. Check one only. Overall, the embrace of mediation by U.S. courts and administrative bodies is:

- A big positive
- A slight positive
- Neither a positive nor a negative
- A slight negative
- A big negative

25. Check one only. Currently, anyone who wants to can call themselves a mediator.

This is:

- A big positive
- A slight positive
- Neither a positive nor a negative
- A slight negative
- A big negative

26. Innovations like mediation tend to follow a growth curve. Check one only.

Mediation today is:

- Mature
- Somewhat mature
- Neither mature nor immature
- Somewhat immature
- Immature

Your Name: _____

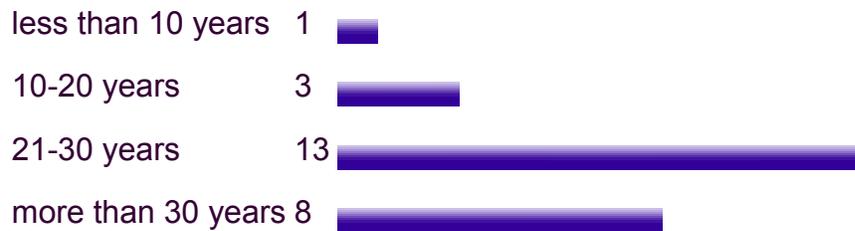
What phone number is best to reach you at? _____

Annex-2
INTERVIEW AND DISCUSSION QUESTIONS

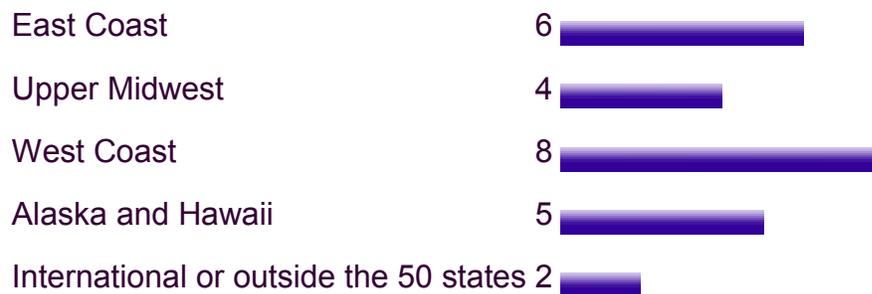
1. Anything further you want to add from the survey to help me understand your general profile and the views you bring?
2. Interested in your specific hind sights, regrets and criticisms in four areas and what you would do different if you could influence it.
 - a. *Practice development*. Applications of mediation in the settings you work in; the style or kind of mediation you practice.
 - b. *Theory building*. Research, the development of explanatory or predictive theory, evaluation frameworks.
 - c. *Pedagogy*. Teaching and training; how mediators learn their craft.
 - d. *Mainstreaming*. Institutionalization and organizational acceptance; how agencies, corporations and organizations have incorporated mediation.
3. I want to go back to a few questions on the survey. At the moment, anyone can call themselves a mediator. You said overall you thought this was _____. Why did you say that? (*Big +, Slight +Neither + nor -, Slight -, Big -*)
4. You said the embrace of mediation by U.S. Courts and administrative bodies is _____. Why do you think that? (*Big +, Slight +Neither + nor -, Slight -, Big -*).
5. Another question on the survey had to do with “practice horror stories.” Can you tell me about one that comes to mind?
6. What would you tell mediators in other places that have democratic or parliamentary governing structures to avoid based on U.S. experience?
7. Last, anything else you want me or the mediators in England to know?

Annex-3 SURVEY RESULTS

Number of years practicing as a mediator?



Region you do most of your mediation work in:



Year of original mediation training and name of first trainer:

- 1987 - John Haynes
- 2004 Straus Institute (Peter Robinson, Jim Stott)
- 1985 - Peter Adler, Keith Hunter and Dee Dee Letts
- 1978 Edie Prim
- 1965 - Wisc. Employment Relations Board
- 1989 - Richard Faulkner, Dallas, Texas
- 1984-85 John Barkai
- 1973 - Thomas Colosi
- 2000 George Mason University

1981-82 Sabilla Borigter; 1989(?) Edith Primm/NJC of Atlanta

Josh Stulberg 1986

about 1977 Josh Stulberg

1991 - Certificate in Dispute Resolution - Pepperdine University (informal training prior to that)

1991, Ann Yellott (AZ), though had mediation 'course' from Chris Moore in 1984 at CU; other CR (PSW) - 1988

1987 Bill Lincoln

Jean Fargo

1981 Neighborhood Justice Center

1981 Syracuse Community Mediation Center

1993. Metropolitan Mediation Services

1992 - David O'Connor

1978 Eddie Prim

Lawrence Susskind. 1 semester and several 1-day workshops, and then I started teaching mediation with him shortly after wards.

Federal Judicial Center (settlement conferences and case management) -- late 1980's

Are you officially “certified” as a mediator? If yes, by whom?

Mediate.com

No

Certified as a Senior Mediator by Mediate.com; as a Distinguished Neutral by CPR International Institute; selected as a Best Lawyer and Super Lawyer in ADR

No legal/official "certification" here that I know of.

no

No

no

Yes. New York State Office of Court Administration

Nope. Unless you count certain rosters in which case I'm on a couple at UNDP and the EMC.

Yes-by several courts (USDC WD MI & WDNY, Michigan State Courts), private & public panels (CPR, etc.)

Yes, Florida Supreme Court and on the Minnesota State Court Roster

no

No

no (though in the CR method I use - PSW - I have the right Harvard PON 'pedigree' - we can talk more)

Yes, National Center for Collaborative Planning and Community Services (Bill Lincoln's organization in 1988)

Mediation Center of the Pacific

no

I don't think so---unless it's like common law marriage

I have a certificate from MMS and a number of other training certificates. Not sure if that makes me official or not.

Massachusetts Council on Family Mediation

no

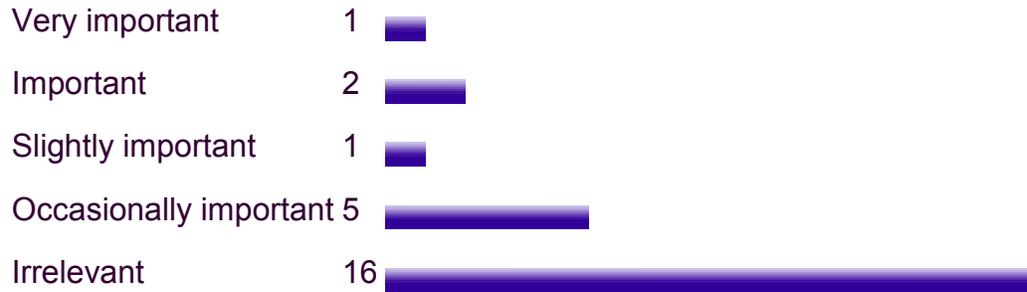
No, but was affiliated with respected providers, which served a function similar to certification

No

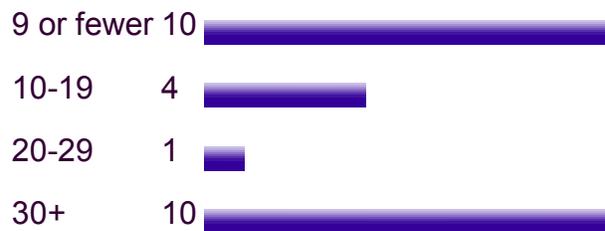
No

How important is certification with some existing body or organization to your

actual work?



Number of mediations you typically now do in a year:



Professional background: highest degree and field, discipline or subject:

BA Psychology - JD Law

J.D. 1980, LL.M Dispute Resolution '06

J.D., William S. Richardson School of Law, Univ. of Hawai'i, 1978

PhD Sociology

LL,M (Labor Law)

JD

JD (didn't quite know how to answer the previous question ' cut I'm not sure how to define mediation)

Ph.D (Philosophy); JD (Law)

MS in Conflict Analysis and Resolution

JD

JD

law degree 1972

MS, JD

PhD, Social Psychology

Adult Teaching Credential in Building and Remodeling

MSW

JD 1975

Conflict Resolution PHD

Master of Science, Biology

J.D.

JD

JD (law degree) and MPP (public policy)

Ph.D. -- History -- Harvard University -- 1975; J.D. -- University of California, Berkeley -- 1975

Your current age:

56

60

66

74

75

56

54

67

38

51

5`

66

58

52 next week

63

65

63

54

56

66

6

67

55

68

68

Ethnicity (check the one you most typically use when asked for an identifier)

American

Indian or Alaska Native 1 

Alaska Native

Caucasian 23 

Hispanic 1 

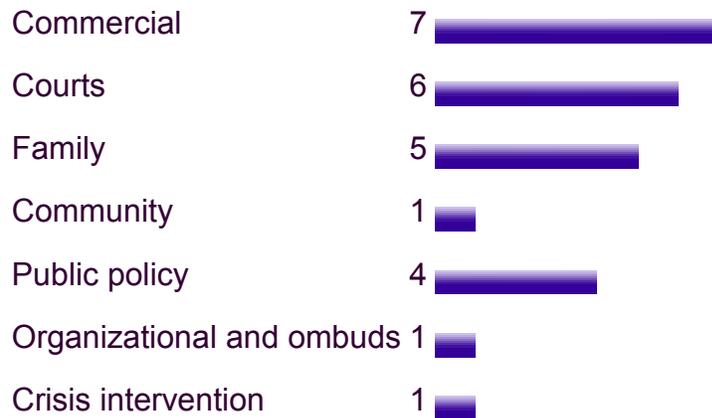
Which word comes closest to the way you think of mediation:

a profession 15 

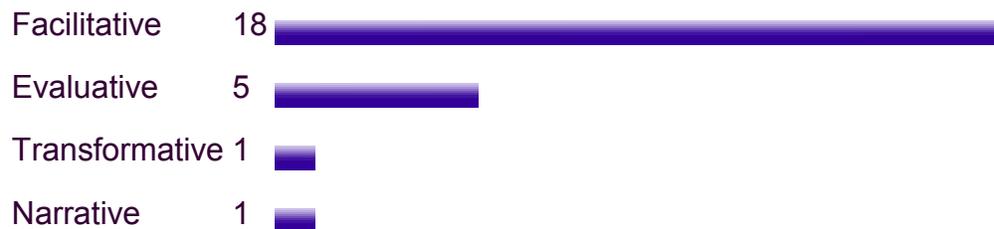
a business 1 

a calling 8 

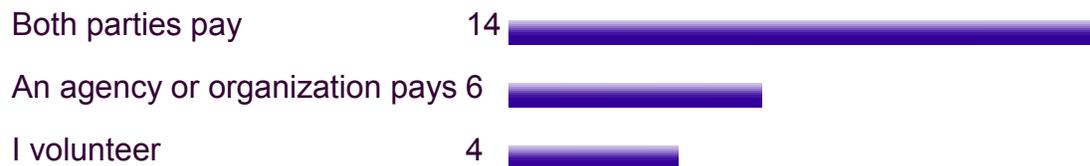
Your primary substantive area of mediation work. Choose one only even if your work crosses multiple areas:



Best descriptor for your practice. Choose one only even if you practice in more than one way.



Who typically pays for, or sponsors, your mediation work?



Do you or your sponsoring organization provide disputants with a set of standards, a code of conduct, or a statement of ethics?



If yes, which standards?

Mediate.com Model Standards and Model Family Standards

this is required field but I said "no"

Code of Mediators Conduct

Not to parties but to mediators

n/a

n/a

sometimes provide a cite to the Supreme Court's Guidelines

Model Standards of Conduct

I provide a set of "rules" around my own role and the nature of the process. I've taken adapted them from Susskind's Handbook on Consensus Building. I make reference to the ACR s standards but don't include them.

firm's General Rules for Mediation

Model Standards or Minnesota Rule 114 Standards

JAMS

Code of conduct

JAMS

ACR

commonsense

JAMS, Inc.

JAMS, Inc.

Please rank order the factors you consider to be the most crucial to the mediation successes you have experienced (1=High / 5=Low).

- 1: Urgencies and deadlines 70
- 2: Creative new possibilities 74
- 3: Discovering compatible interests 74
- 4: New information 83
- 5: Emotional rapport between parties 87

We sometimes hear mediators talk about practice "horror stories". Rank order

from 1 = high to 5 low which factors you think are most egregious in mediation:

- 1: Bias towards one side 47
- 2: Lack of analytic negotiation or communication skills 64
- 3: Pressuring people to agree 65
- 4: Mediating with no training or experience 79
- 5: Mediating with insufficient time 96

What one phrase from the following list comes closest to defining the way you think of “good” mediation? Choose one only.

Everyone satisfied	6	
Effective process	12	
Fair to all	3	
Smart outcome	4	

When you started mediating, what one book and author was most influential?

- Getting to Yes - Fisher and Ury
- Ken Cloke, Mediating Dangerously
- Getting to Yes - Fisher, Ury and Patton
- Getting to Yes

- James Freund
- Lewicki
- Techniques of Labor Mediation - Walter Magglio
- Thomas Kuhn's Structure of Scientific Revolutions
- (There were few if any books on mediation in those days) so I choose: The Dance of Anger by Harriet Goldhor Lerner
- Josh Stulberg Managing Conflict

Chris Moore

Getting to Yes - Fisher and Ury

Only one? Chris Moore's Mediation Process, and Rubin & Pruitt's Social Conflict

Getting to Yes

Getting to Yes

Lou Friedberg Social Conflict

GTY

Getting to Yes

Adler

Bindler & Grinder: Frogs into Princes

Larry Susskind's work

Howard Raffia, The Art & Science of Negotiation (Harvard, 19 82)

What one book and author do you find most influential today and recommend to others?

Anything Melamed writes

Ken Cloke, Mediating Dangerously

Eye of the Storm Leadership - Peter Adler

Anything by Peter Adler

Lon Fuller - "Mediation, Its Forms and Functions" - a law review article

The Culture Code - Rapaille

malcolm gladwell

The Middle Voice - Stulberg and Love

Axelrod's Evolution of Cooperation

influential: Getting to Yes; recommend: articles by Wayne Brazil

i don't have a single book -- depends on context

too many to choose from

Anything by Ken Cloke

same (though Social Conflict now has Kim as a co-author)

Marketing Your Services - Putman

Highly situational but in mediation class I use "Difficult Conversations"

Ken Cloke, "Resolving Personal and Organizational Conflict"

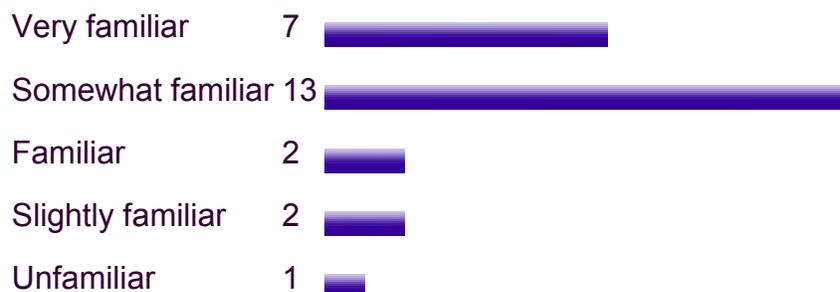
Eye of the Storm Leadership

Mediating Legal Disputes, Golann; Mediation Representation, Abramson;

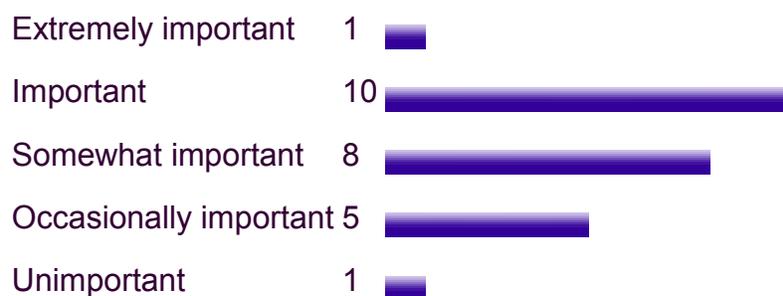
Practice of Mediation, Franke & stark

Not sure: have to think about it.

Overall, how current are you on mediation research findings, academic debates, and theory building?



How important and useful to your practice are research findings, academic debates, and theory building?



What is the primary source of your information on what others are doing in the

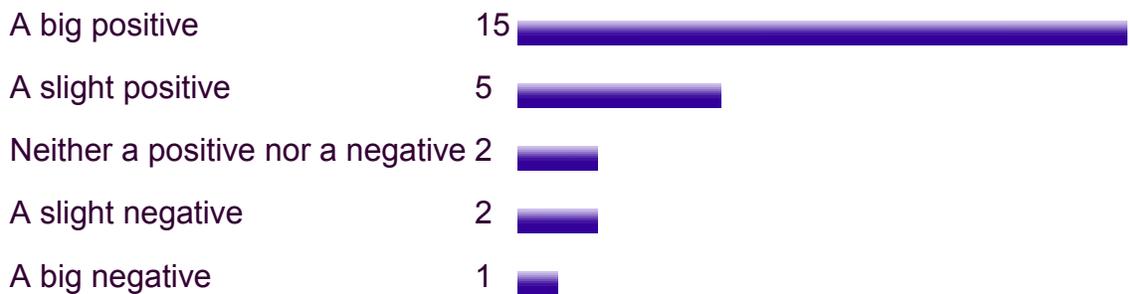
area of mediation?



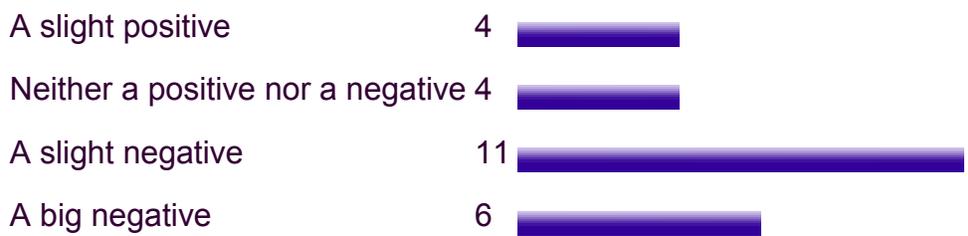
If you could make one change to the way mediation is taught to others in courses, workshops and training programs, what would you do?



Overall, the embrace of mediation by U.S. courts and administrative bodies is:

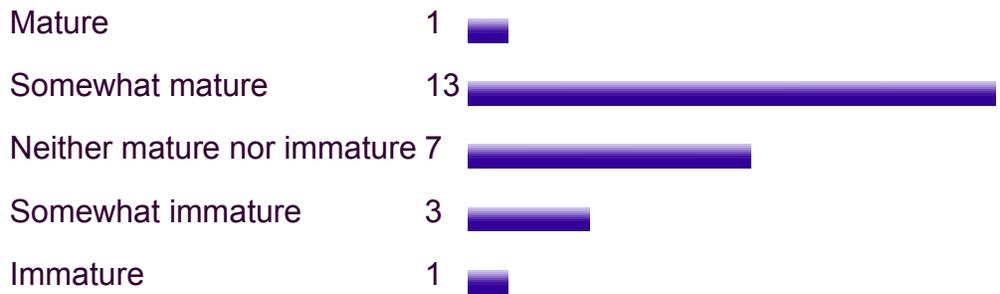


Currently, anyone who wants to can call themselves a mediator. This is:



Innovations like mediation tend to follow a growth curve. Check one only.

Mediation today is:



Your additional comments and questions:

Mediation in the U.S. is in terrible shape. Breaches of confidentiality and pressure put on the weakest parties are common as are mediations conducted entirely in separate caucus, a major reason for confidentiality breaches. "Don't trust the mediator" is a common refrain among the lawyers whose primary interests mediators serve. There being no standards, few are followed and mediation as a profession is more joke than reality.

One of the most critical goals and benefits of mediation at its best is to motivate those whose approach and values are more power-based, competitive and individualistic oriented to particular conflicts to see and accept the value in relationship-based, collaborative, consensus-building approaches to systemic, long-term, adaptive resolution processes

My practice is limited to mediating litigated cases. The survey is fairly broad and encompasses approaches that don't always find their way into litigated cases.

I would have had different responses to some of these questions if I could have. For instance, on the last three, I had do respond to "neither a . . ." and would have preferred to respond to "both a . . ." Also, why ask about ethnicity and not gender? My preference would have been neither! Anyhow, this gives us lots to talk about!

The significant drawback of US courts embracing mediation is that it has

routinized practice and focus of mediation, reducing its creativity, putting blinders on its practitioners regarding use of mediation for policy/social disputes, and impoverishing racial/ethnic diversity of mediator pool.

I'm looking forward to seeing the results of the survey!

Hard to know where to start, Peter. The field has changed so since the early 70"s. You have to love the acceptance and even embrace of ADR. But the downsides are serious -- some perversion of the process, new gaming of the process by lawyer s, loss of enthusiasm for possible creativity of mediation (now it's more just a settlement, at least in the types of cases I do.) With the current legal downsizing everyone is jumping into mediation. I don't want to pull the ladder up behind us but that sure adds to a watering down of the process which at least in the kinds of cases I do becomes more like an evaluative settlement conference than an opportunity for understanding/creative solutions. We can add to the quality of the process by the personal skills we exhibit but at the end of the day it becomes just about a number. In the (redacted) courts are sending all employment cases and some other types to mediation as soon as they are filed, without even a preliminary conference with the judge. This adds to the loss of the qualitative difference that I think once distinguished mediation, at least in the eyes of those of us who are idealists (even without being dreamy idealists.) So, I look forward to the interview and to hearing what you are funding from others.

Two questions left unanswered because answers offered simply did not reflect my views

Have been away, thought today was the deadline, would very much like to participate with Peter

Sorry I can't figure out what one book i recommend.....

Difficult to answer some of these because I think it is highly situational. New information may be critical to success in one case and irrelevant in another.

Same with emotional rapport between the parties. "Bias" may be terrible in some

situations but not that big a deal in others. Likewise I think the "maturity" of the field depends on context (e.g., divorce vs. business disputes)

They keep making better idiots

Mediation's "maturity" depends upon the market. It is far more mature in Los Angeles than in other parts of the country.

I don't fit this profile very well -- as I conducted "mediations" (of sorts) for 25 years in the form of judicially hosted settlement conferences. I have been a private mediator and arbitrator with (redacted)for only 18 months. I think one important vehicle for mediator education is "shadowing" other mediators and discussing with them how they approach their work and respond to circumstances they encounter during mediations. More shadowing and mentoring would contribute more to mediator education than more formal training. I also think mediator education would be enhanced considerably if it included more effective vehicles through which parties or participants in real mediations could provide feedback/suggestions to their mediators after their mediations have been concluded. We need to learn more, and more directly, from the people we are trying to serve. They have a lot to teach us - - and we fail to tap this potentially wonderful resource. We rely too much on teaching ourselves. We think too much of ourselves and too little of the participants in our mediations. Theory and practice are nice -- but we need to greatly expand the means by which we get real, critical, useful input from those who try to use our services.

[SUBMIT CHANGES](#)

Annex-4
WHAT PEOPLE SAID

ON CHANGE AND LOSS

- *Mediation no longer looks like what we imagined. It has changed, not just subtly, but profoundly.*
- *Perhaps it was inevitable but I regret “specialization.” There was, and is, great value in work across different areas. Perhaps there is still room for course corrections.*
- *As a result of the mainstreaming we all hoped for in the early days, mediation has become routinized, robotic, and cookie-cutter. Most people seem to now look at it as a numbers game. Formerly robust human interactions have become hollowed out. We have lost some of the energy and flexibility and for sure we have seemed to lose the centrality of “justice” which used to be central.*
- *It’s been a race to the bottom line: separate meetings, damages and remedies, and just move the case.*
- *At the start, it wasn’t just about “settling.” It was about talking with each other. That early notion has been severely diminished. I have a sense of loss but that said, but I also have a sense of excitement about continuing possibilities.*
- *The whole idea of party empowerment has gone missing.*
- *I’ve got the sense that mediators have put on blinders and said: “we must work within existing law.” Who says? This actually eliminates the once strong themes of giving voice, finding innovative solutions and improving relationships.*
- *Mediation seems more and more like a truncated arbitration process but without the legal protections. It has moved away from direct communication by parties and having them talk and understand each other’s background needs. Now it’s just “settlement.”*
- *There is a political ideology behind my thinking. The early tensions between our “social movement” and “business” aspirations has created a big split. However, it’s a battle that was lost. The social movement part was anti-bureaucracy and*

anti-professional and based on building a “democracy” theme. I’m nostalgic for that piece which has gotten lost in the rapid rise of the courts and the marketplace

- *There was, and still remains, an early paradox. On the one hand, we wanted people to solve their own problems rather than simply turning to experts. Now, we have become the experts.*
- *I work in a triangle of balancing (1) power and rights; (2) recognizing each other’s humanity; and (3) finding practical solutions. No. 2 is a smaller and smaller part of the equation, less and less wanted.*
- *The sense of service that was there at the start has eroded. Now it’s making money, getting settlements like they are scalps on a belt, building reputations, and moving the case.*
- *As mediation has gotten progressively more legalized and lawyer-centric, mediation has lost its “EQ” (emotional quotient).*

ON THE COURTS

- *I used to see mediation as an antidote to the many downsides of litigation. Today, most of my regrets sit in the area of institutionalization. Most of the early mediation administrators in the courts were impassioned, committed and insightful. Further generations have tended to have little exposure to the work itself. They are young and inexperienced and they are the interface between the public, the courts, the mediation program and the Bar. These systems need reinvigoration. Those guys need training.*
- *I would not have mandated every case to go to mediation. A lot of them just aren’t appropriate and parties just go through the motions. That’s why settlement rates in court programs seem to be dropping.*
- *Its remarkable how mediation has developed in so many settings. There’s lots of diversity without having a field. That’s probably because it has been driven courts. Good that the courts have embraced the process. It has help move*

enormous numbers of people into using a better option. It is now familiar, routine and expected.

- *Mediation may be at an inflection point. Some courts now send every civil case to mediation. No screening. No triage. No real preparation. Very little respect for mediation, just a docket clearing exercise. Those indiscriminate cases in a big barrage have few opportunities for creative problem solving.*
- *The courts have clearly eclipsed community programs and sucked all the oxygen out of the community impulse.*
- *Mediation is part of the culture of the courts now. One problem is that parties who are forced into mediation often get poorly trained mediators. Moreover, there are too few opt-out provisions. The blanket “you must go to mediation” court regimes are doing a disservice. What if we said every case “must go to trial”?*
- *Judges are leaving the bench to open practices, especially in Florida and Texas. This robs the judiciary of talent and seems to have perverse effects on expectations. Turns mediation into settlement practices. They tend to bang heads which is what they learned to do on the bench. I also see a lot of insider trading. Judges and lawyers send each other case. Worse yet, I have seen judge-mediators requesting postponement of summary judgments on their own initiative to keep mediations alive.*
- *Mediation is now primarily an adjunct to the courts and to litigation.*
- *I mediate but also litigate and have seen some real atrocities of process by former judges. They routinely make “rulings” and “pronouncements” and break confidentiality by giving their reports and advice back to judges on the bench.*
- *One of the positives of courts doing mediation is that private practice mediation is buzzing for high end cases. Lawyers in those cases just don’t want to roll the dice and get a court mediator.*
- *Public programs have been chronically underfunded.*

ON LAWYERS

- *More and more I see mediation cases simply commodified into damages discussions between lawyers. There is a loss of the emotional work I used to do with clients in mediation. At the other end, the commodification of mediation is all about hours and billings.*
- *Mediation has become a tool of manipulation by government, insurers and commercial interests. We don't really have a self-righting system now.*
- *It's ironic. The trial lawyers have turned mediation into trial "lite." It's a new forum for pursuing their adversarial advocacy skills. They have also become the new class of mediators.*
- *There is a trend away from joint sessions, having all communication go through the attorneys, keeping clients in separate rooms, and having the mediator serve as the shuttle.*
- *The settlement numbers of the LA county court system's mediation program (10,000+ cases a year) have dropped steadily. Best guess is lawyers tell their clients not to settle, and then settle the cases later.*
- *Insurers also now routinely game the system. They simply don't make decision-makers with real authority available.*

ON FIELD AND PROFESSION

- *Way too much focus these past 20 years on "schools" of mediation when in reality we all do bits of everything. There is just too much "right way" and "wrong way." This has been polarizing and paralyzing.*
- *We mediators are a field of conversation, not one of collective action. We talk a lot but just don't work together very well.*
- *There doesn't seem to be a real field. Just lots of little micro-marketplaces.*
- *I see a move toward hyper subjectivity. Mediators specialize in their areas and disregard fact patterns.*
- *I would have made it more about collaborative leadership and de-emphasize all the lawyers. We should have brought in other expertise from family practice,*

commerce, and planning. We should have been multi-disciplinary from the beginning instead of law-centric.

- *There was a misguided notion in the early days that mediation was some kind of counter-culture. That did a disservice to the maturing of the field.*
- *The American Bar Association Section on Dispute Resolution is a marker. It has 17,000 members who are or want to be mediators. Non-lawyers have some kind of second class status. That tells the story in a nutshell.*
- *There really aren't any broadly accepted certification standards. Some people in Europe get 800 hours of training. Some people in the U.S. get 8.*
- *Mediation is completely dominated by mediators looking for cases. Its 100% need. 100% demand. 0 to 10% demand. Lots of "ambulance chasing."*
- *On the other hand, lots of mediators mean lots of choices for users.*
- *If we are a profession, we are the most unregulated one in the world. We really need some kind of licensing.*
- *We could have created a meaningful domain of work that has some boundaries by declaring here are who we are, what we stand for, and what we do. We didn't. The moment to create a real profession is probably past us now.*
- *There has been a regrettable competition of organizations and associations on matters of standards and credentialing. This actually reflects the lack of a clear model or vision of what mediation is and could be. That's not to say all mediation has to be one thing. However, in the U.S., we have no consensus document on what good mediation and sound practice is, and no real authoritative body. An authoritative body has downsides but it would have been better than the current anarchy and proliferations of rules. I have no doubt that if we had gone down the road of something more unifying, we would have encountered other problems and perhaps marginalized some valuable bits, pieces and strands.*
- *It's really hard to certify mediators across all areas. So why do it? The marketplace figures this out by itself.*

- *I was lucky and have a thriving practice. When the courts got into this, it was a game-changer. But they did it for docket reasons which have brought lots of parties to me.*
- *My worry is about competence. The volunteers in the courts have actually had a corrosive effect. They have gotten used to having no checks on their behaviors as mediators. I have this stereotypic image of a gray-haired lady mediator in our court. She is wearing a gypsy skirt and big bangle earrings and professes at the start that she is a Baha'i or Unitarian and that she brings those values to the table. People like this send a signal to lawyers and judges that you better go find a pro.*
- *Looking back, I think certification was a side issue. We got trapped in an odd set of discussions about volunteers vs. professionals.*
- *As in the health world, we might have distinguished between mediators as specialists versus lay people taking care of their own health.*
- *It would be good if we had states doing roughly the same thing, at least in the judicial context. The public doesn't get it. We don't talk to them in their language. Swe probably should have commissioned a PR firm to send out a smarter story. The Uniform Mediation Act gives us a foundation. It has the basics but allows for many different brands.*
- *At conference in in the current literature, I don't see a lot about ethics.*
- *Most mediators seem to fail at developing versatility. They want to be one thing or another, facilitative or evaluative, communicative or negotiatory.*
- *We missed the boat. When we could have developed a serious competency and credentialing system, we spent all our time arguing with each other. Now, the moment has passed and mediation has dissolved into a thousand different schemes, practices, and branding efforts.*
- *If we had seized the moment, we would now see a body of people with some stronger intellectual frameworks, a body of documented robust practices, deeper and more meaningful work, and a stronger connection between what people learned in school or training and what they do. Consumers would know what they are getting and where to go for a particular problem.*

- *We really don't have a safe professional home.*
- *I teach and also run a clinical program. Some of the horror stories I have seen and heard include excessive directness and inappropriate legal and social advice*
- *We don't actually teach people much about the business end of mediation, how to find cases, how to charge, how to be organized, and the ethic of pro bono.*

ON PRACTICE AND IDENTITY

- *There are pluses and minuses to defining "mediator." It would help some of us, but not all.*
- *We sure lost a lot of time growing up and not getting along.*
- *The field of practice is really uneven. Some people seem to be very fine mediators but with others I sense their confidence far exceeds their skill. I say this having been in mediation as a participant. However the cure to that could be worse than the problem if we just get more cookie-cutter approaches.*
- *What we didn't realize and factor in 25 years ago was how much up-front work there is in mediation.*
- *There has been a big tension between lawyers and non-lawyers which created a lot of unnecessary friction. Opportunities to organize the field were squandered.*
- *Mediators drift into all the positional bargaining that lawyers bring to their cases instead of staying with interests which is what we know how to do and makes us different.*
- *I see a shakeout going on. Lots of people who claimed to be mediators are leaving it behind.*
- *There is some kind of balance we need to achieve between empowering communities and poor people and the provision of services in the paying marketplace. We haven't found it, and may never.*
- *Tell those English folks that I love what they have done with their restorative justice practices.*
- *I wish we had much stronger studies of cost/benefits.*

- *You asked about horror stories. That's a container for specific practices: shutting down case too fast; insufficient time in the face of some imposed court or lawyer deadlines; getting too directive.*
- *Mediation is a cobbled together set of practices presented in a bundle. We probably need to unbundle it and do a better job of evaluating the discrete pieces.*
- *I have stopped acting as an arbitrator and just focus on mediation. Reason: one tough award and people suddenly think you are biased.*
- *Upfront we should have set up a more robust apprenticeship model for learning and feedback rather than rely of classes, simulations and writing.*
- *Mediation research doesn't really inform my practice. On the other hand, the negotiation research seems far more pertinent.*
- *I haven't really seen good work out of the universities on the quality of results.*
- *Our field needs "sunshine." We don't know what we actually do, only what we describe.*
- *I worry about the continuous loss of diversity.*
- *There was, and perhaps still is, a dilemma: let things grow organically or try and intentionally become a profession. I think the answer is in: we have no real standards, a vocabulary and terminology that is meaningless, and no real association on par with other professional groups*
- *It would be nice to actually have some research on different styles of mediation*
- *Mediation is actually invisible. Lots of people do it and we don't really know what they do. In fact, we don't know what any of us do and everyone thinks they do it well.*
- *In all the theory that has come out, would have been nice to really describe the small number of themes and the many variations and patterns.*
- *When I look around at the current landscape of mediation I see lots of little recipes and formulaic simplifications that got bundled together*
- *The missing part of most training programs is diagnostics.*

- *Our models are Western culture based. If I was in charge, I would require much more on other cultural notions of risk, high and low context, and who talks to whom, when, and how.*
- *We have to get away from the formulaic. We have a structure, for example in the Pepperdine “Star” model but even that is too static. I have learned to be much more improvisational. I study theater, music, art, and the neuro-science of trial lawyers. I recommend you don’t read Chris Moore on mediation. Nothing against him but you would do better reading Truth and Comedy, The Reptile, and The Art of Persuasion.*
- *I worry that mediators don’t refresh themselves. There is an unrecognized toxicity that builds up when you absorb everyone else’s trauma. In part, this probably leads people to a more evaluative style.*
- *Our job now: motivate the next several generations of mediators to move away from power and authority based processes to ones that focus on relationships*