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Who Took the 'Me' Out of Mediation?

By Deborah Rothman

A recent article by *Daily Journal* staff writer Laura Ernde quoted Thomas J. Stipanowich, professor at Pepperdine University School of Law and academic director of the Straus Institute for Dispute Resolution as saying, "Although arbitration was set up as an alternative to the expensive and time-consuming process of going to court, lawyers have started bringing the same litigation tactics to the arbitration process, creating higher cost and delay."

"Litigization" - a term coined by my colleague Gerry Phillips - is beginning to have an equally negative impact on the mediation process, though in the opposite way. While mediation has the potential to be a successful, cost-effective and occasionally transformative process for the participants, the dual trends toward streamlining and spinning have created unfortunate unintended consequences, including less client satisfaction and lower settlement rates.

Having been a full-time mediator and arbitrator since 1991, I have witnessed the substantial trajectory of mediation's development from the time a handful of us presented lunchtime mediation trainings to groups of trial judges. At the time, mediation was still such a new concept that in some meetings we literally had to explain the difference between mediation and arbitration, and for years afterwards, many attorneys and judges still used the terms interchangeably.

Even when the differences were firmly understood, it took years of Bar and other CLE presentations to persuade litigators that being the first to propose mediation of an expensive, disruptive lawsuit did not constitute a sign of weakness. Eventually the Legislature passed pilot legislation authorizing judges to order smaller cases into mediation, lawyers routinely recommended mediation to their clients and clients embraced mediation as a way to end the bloodshed and financial drain of litigation.

Those were, in retrospect, the halcyon days of mediation. Attorneys were pleased with the accolades they got from their clients for encouraging - perhaps contrary to their pecuniary

interests - clients to engage in mediation and to compromise rather than continue to pursue litigation; the parties were delighted with their ability to participate in shaping the resolution of their costly disputes; and mediators began to think of themselves not just as "recovering litigators," but as "peacemakers."

With the proliferation of mediation, mediators began to specialize not just in the art of the mediation process, but in specific areas of law. At the same time, a sufficient knowledge base existed that attorneys could call on their firms' or their associations' members to get invaluable feedback about the strengths and weaknesses of prospective mediators.

Perhaps unsurprisingly, the success of mediation contained the seeds of its undoing. Some litigators began to look for ways to gain a competitive edge in mediation. (That oxymoron should have been a tipoff.) Thus began the era of "spinning" the mediator. It began with innocent-sounding statements like "My client will not take less than $100,000," which later in the mediation turned out not to be the bottom line at all, and jibes, like, "Come on, don't let us down, you wouldn't want to ruin your stats," as if mediators were solely responsible for thesuccess of the mediation. Occasionally an attorney would ask a mediator to outright lie to opposing counsel for the purpose of gaining an advantage.

Mediators were not blameless. Attorneys and judges, seeing how much satisfaction - and remuneration - mediators found in their work, began to enter the ranks of the profession in seemingly ever-increasing numbers. When the market eventually became over-saturated, some mediators' efforts to distinguish themselves from the pack resulted in over-the-top conduct, such as publishing articles that outlined methods by which an attorney could "manipulate" the other side in mediation, and boasting settlement rates that approached 100 percent.

Having participated in numerous mediations, and often having taken mediation training themselves, attorneys in mediation naturally tried to shape the process, hoping to gain an edge. They began comparing this week's mediation to last week's, complaining to Mediator A that he or she had not elicited an offer of money at a time in the day when, at Mediator B's mediation last week, there was an 'x' amount of money on the table. The message was clear: mediators' success could be measured by so simple a yardstick as the number of dollars on the table by a certain time of day, as well as at the end of the mediation, regardless of the differences in parties, issues, cross-complaints and opposing counsel. Some mediators learned to be double agents, leading each side to believe that they were getting a slight edge over the other side.

Many attorneys tried to streamline the process, or cut to the chase, hoping to make the mediation more efficient for their clients. It is a canon of mediation practice that "the right number at the wrong time is the wrong number." Perhaps some attorneys were suspicious about the motives of a mediator who charged by the hour. Thus began the era of "no joint sessions." Although the importance of joint sessions is stressed at mediation trainings, mediators suddenly scurried around to find ways to successfully mediate cases while still accommodating litigators'

demands that the mediation consist solely of caucuses.

To be fair, some attorneys' insistence on the elimination of joint sessions was born partially out of a desire to shave time off the mediation process and thus to save the parties attorney's fees. And while other attorneys justified this request in terms of not wanting to give the other party free discovery, or not having prepared their client to speak in the presence of opposing counsel, some had more cynical motives. They had discovered over time that when joint sessions occurred and the attorneys allowed the mediator to shape the process, mediators were sometimes able to get the parties to talk about their respective feelings of betrayal, hurt and embarrassment, and occasionally to acknowledge the pain the dispute had caused to each others' families. Although "kumbaya" was rarely sung, the catharsis that sometimes resulted from these joint sessions was powerful. Plaintiffs lost their desire for revenge when they reconnected with their litigation adversaries in a neutral and supportive environment. After reminiscing about the pre-dispute days when their families were friendly and their business relationship was mutually gratifying, defendants lost their desire to bloody their former enemies.

From some attorneys' perspective, this was the problem with joint sessions - they undermined the preparatory work the attorneys had done with their clients to get them the best possible deal. Many a plaintiff's lawyer told his or her client, "The mediator will tell you that the other side would like to apologize to you, but don't fall for it - they're just trying to get you to accept less money." That kind of thinking reminds me of a scene in the motion picture "*Invictus*," in which the captain of the rugby team rebuffs his girlfriend's advances the night before a championship game, saying, "No, I have to be angry for the game."

This focus solely on legal issues, the distribution of money and a maximally efficient process deprives the mediator of a host of tools by which the dispute could be resolved to the parties' mutual satisfaction and produces unintended consequences, especially for what Riskin and Welsh refer to as "one-shot players" who, unlike attorneys and certain corporate parties who are "repeat players," would greatly benefit from a more customized mediation process that addresses their particular interests and values. Riskin, Leonard L. and Welsh, Nancy, "*Is That All There Is? 'The Problem' in Court-Oriented Mediation*" George Mason Law Review, Vol. 15, 2008. And unlike the rugby captain in "*Invictus*," one-shot players who are deprived of the closure that mediation can offer are not likely to get a second opportunity.

By trying to keep emotion out of the settlement process and depriving their own clients of an opportunity that time and again has proven more important to the disputing parties than cash, attorneys are also inadvertently sabotaging the chances of settlement. In a fascinating study brought to my attention by my colleague Phyllis Pollack, the President of SCMA, Jonah Lehrer in "*How We Decide*," Houghton Mifflin Harcourt 2009, shows that people actually need to experience emotion in order to make decisions, and argues that good and satisfying decisions require the use of both the rational and the emotional parts of the brain. Perhaps attorneys' success rate at keeping the negotiation focused on the bottom line helps account for the declining

rate of mediation settlements.

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