

## **Does the Institutionalization of Mediation Help to Reform Institutions or Does it Distort Mediation?**

Fellow panelists, session organizers, and fellow participants, it is a true honor and privilege to be with you today on this final roundtable to discuss a subject that I can deeply about – namely the institutionalization of mediation.

I will begin my brief remarks with setting some context and providing some definitions, next I will answer the question – does institutionalization of mediation help to reform institutions or does it distort mediation -- from my perspective and I will end with some recommendations for the future.

Definitions and Context – In a 1997 article I wrote, *Institutionalization: Savior or Saboteur of Mediation?* I included this definition for institutionalization:

“I use the term “institutionalization” to refer to any entity (governmental or otherwise) which, as an entity, adopts ADR procedures as a part of doing business. Some examples include schools that develop peer mediation programs, courts that establish rules to govern referral to ADR procedures, and government agencies that incorporate ADR processes in developing rules and regulations.”

For purposes of my remarks today, I am going to confine myself to a reflection of the institutionalization of mediation in the context of the judicial or court system. I do so for 2 reasons, the first is that I believe that the institutionalization of mediation in the court system is one of the most profound developments for judicial systems in the modern era and second, it is with the courts that I have had the most experience with institutionalization. Prior to my current appointment on the full-time faculty of Mitchell Hamline Law School, I worked for the Florida

Supreme Court in the United States implementing what was the first court system to embrace mediation in a comprehensive manner by adopting a state statute that authorized the trial judge to send (order) any civil case to mediation subject to very limited exceptions. The law also required the Florida Supreme Court to adopt rules of procedures, training standards, qualifications for mediators and a code of conduct and grievance process. I spent 2 decades in Florida doing all of that.

Another piece of context; however, is relevant. I am a lawyer licensed to practice in NY; however, I never practiced traditional law. My first job out of law school was working in a NY City public high school running a peer mediation program – teaching the students to be mediators, assisting them in mediating, doing follow-up and conducting conflict resolution discussions in classes. While working in the school, I also volunteered at a community mediation center mediating neighbor disputes and anything else that walked in the door.

I say this because I learned mediation and honed my skills as a mediator with the understanding and belief that mediation was an opportunity for individuals to meet together to talk about their concerns and to decide what (if anything) they wished to do. I also saw first-hand during these experiences, the transformative nature of mediation – what happens when individuals are provided the time and space to experience opportunities to feel empowered and opportunities to recognize and understand the other person.

As I move into the segment where I answer the question, I offer to you three definitions of mediation. The first is from the EU Directive on Certain Aspects of Mediation in Civil and Commercial Matters (2008)

- **Directive 2008/52/EC of the European Parliament:** Mediation a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to **reach an agreement on the settlement of their dispute with the assistance of a mediator**. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

The other two are from the United States – the first from the Model Standards of Conduct for Mediators which was written and adopted by the American Bar Association, the Association for Conflict Resolution and the American Arbitration Association. I was privileged to be one of the drafters of this document.

The second US definition comes from the Uniform Mediation Act which is a model for states to adopt.

I note for you the difference between the Standards of Conduct definition and the other two. Under the standards of conduct the process is about facilitating communication and negotiation and promoting voluntary decision making. There is no mention of settlement or agreement – those words do appear in the EU directive and the US Uniform Mediation Act.

I highlight this for you because I believe it is directly related to the impact that institutionalization has had on the definition of mediation and by extension the process itself.

In the 1980's when mediation was first becoming institutionalized in the United States' courts, early proponents of mediation who like me grew up in the community mediation movement, wondered the exact question you posed –

when mediation became institutionalized, would mediators and mediation change courts or would courts change mediation and mediators?

Sadly, thirty years later, in the US it is clear that while mediation may have had some impact on courts and litigants, the courts have been much more powerful in changing mediation and mediators.

I'd like to step back and provide, for your consideration, that whether one sees institutionalization as ultimately a good thing or ultimately one of concern, depends on how you think about the purpose or goal of mediation and I'd like to offer 2 primary options based on work of my colleague Professor Baruch Bush from Hofstra University Law School in NY:

1. Efficiency
2. Humanistic

The efficiency argument for setting up court-connected mediation goes something like this – rather than having judges who are expensive and busy needing to make rulings in all of the cases, wouldn't it be more efficient if people could use mediators to assist them in making settlements for themselves? It is the "technocratic" approach to make settlement faster and cheaper. And to determine if the mediation program is successful, we can look at how many agreements/settlements are reached. And actually, we can also assess the effectiveness of the mediators by looking at how efficient they are in getting settlements.

The humanistic approach for court-connected mediation is that mediation provides a way of helping parties to strengthen themselves and relate to each other as they work through conflict. That mediation is actually a better way for

people in conflict to resolve their differences – even if it is not the most efficient way to do so. For those of you familiar with “transformative mediation” this should sound familiar to you because Baruch Bush along with Joe Folger for the authors of *The Promise of Mediation* and birthed the transformative mediation movement.

For me, the problem with the efficiency approach is that if you mediate you know that giving people the time and space to voluntarily make decisions is not always super-efficient. In fact, students of conflict know that it takes time for people to move from feelings of anger, upset and disappointment to understanding, willingness to move on, or apologetic. In fact, one could easily make the argument that arbitration or even litigation is more “efficient.” And if one really is mediating – and not evaluating, directing or deciding – it is completely up to the parties/participants whether there is a settlement. This means that assessing mediators on how many settlements they reach will result in more and more directive behavior and rewarding “mediators” for doing what is anathema to mediation – removing decision making from the parties. In fact, focusing on settlement as the desired outcome for mediation leads to an undermining of the very value and contribution that mediation can make.

So if it isn't obvious, I will state clearly, I subscribe to the humanistic approach and rational for mediation.

Let's look at some of the other impacts of institutionalization:

- On the positive side, there is a whole lot more mediation going on and many more people know and use mediation than had done so prior to this move towards institutionalization. It is important to note that studies

confirm that voluntary mediation programs are not utilized as often as those where participants are directed (or ordered) to use mediation. And importantly, satisfaction rates do not drop off even in light of the order to use the process.

- Institutionalization has brought on the development of extensive rules, procedures, and standards of conduct. There are some positive aspects to this but overwhelmingly, I worry that this development changes a “flexible” process to one that is more rigid and we risk losing the soul of mediation. To illustrate this point, if institutionalized, the institution is responsible to ensure quality and this brings in to play credentialing and the potential for ignoring/demeaning non-traditional credentials such as life experience in favor of academic degrees, licenses to practice law, etc. This has an impact on who gets to mediate and the diversity of mediators.

One of the things I learned quickly while working in a judicial system – judges like to talk to and listen to other judges and if they need to, lawyers but there isn’t a lot of respect for those from other professions.

Consequently, when courts became involved in mediation, the focus was on lawyers and former judges as mediators. As a mediator (and a law professor and a lawyer), it is my experience that often lawyers and judges have to remove a lot of legal baggage before they can truly take on the role as mediator – so it is the opposite of how court’s have approached this issue. Florida developed comprehensive training standards and then an extensive set of continuing education requirements. Might this also become a problem in terms of costs and who can retain the certification?

- Another trend that we have begun to see in the United States is the use of separate sessions to the exclusion of joint session. In many cases, the participants do not ever sit together. Research completed by the Maryland Conflict Resolution Office (MACRO) found that the more time that was spent in caucus, the more the participants reported a sense of powerlessness; an increase in the belief that conflict was negative and an increase in their desire to better understand the other. Over the long term, the research showed that the case was more likely to return to court for enforcement and the participants were less likely to report considerations of the other and their own self-efficacy.

This research was extremely significant because it included both an immediate assessment and a longitudinal assessment as well as the direct observation of mediations so that interventions and responses were all coded and then analyzed. If there is time, I will share some of those findings as well.

- Now why are we seeing this increase in caucuses? I believe it is directly connected to the increased involvement of lawyers as the primary participants and let's face it, lawyers are most comfortable with the traditional judicial process and as a result, they are changing mediation to fit that model rather than allowing themselves to be changed to adopt a more humanistic approach to mediation.
- A final point I will make about the impact of institutionalization and that is who administers the programs and with what lens? I believe that it is critical for these programs to administered by someone who understands the values of a mediator and runs the program from that framework. As

the programs becomes more and more administrative, it is more likely that a technocrat will be interested in doing so ... and the cycle will continue down the technocratic path.

In light of all of this, my recommendations to all of us is that we need to be proactive in protecting mediation's core value – it's soul and the first step would be reclaim the definition of mediation. Not every alternative process is mediation – mediation is a distinct process which relies on the opportunity for individuals – the actual parties to a dispute – to exercise self-determination. There may well be a place for evaluative and advisory processes, but these are not mediation and if we wish to continue to institutionalize it, we need to honor these boundaries or at the end of the day, mediation will no longer exist and someone will need to invent a new process that embodies these attributes.