

## Book Extract

# What's Wrong With Mediation These Days, and How Can We Fix It?

BY WILL PRYOR

While the virtues of mediation are sung by a chorus, its practice has developed some warts. We have come a long way from the “village elder” image of mediation, to today’s commercial, profitable practice of mediation. Mediation can be fairly characterized as a “growth industry,” so “growing pains” are inevitable, and deserve our attention.



## TOO MUCH MEDIATION?

Even a “short and happy” guide to mediation must address the cultural phenomenon of “too much mediation.” Has the use of mediation become, in a sense, too popular? As mediation began taking hold in the 1980s and into the 1990s, no advocate of ADR in general and mediation in particular could have envisioned what the practice of mediation in many markets has become. Nor would many pioneers in the field of ADR say that today there is not a need for some course correction. The essence of mediation, the reason for mediation, is to assist parties to a dispute to achieve resolution. Has the commercialization of mediation in recent years moved us away from what mediation has always been about? Occasionally the answer to the question has to be “yes.”

In 1987, the Texas legislature passed an “Alternative Dispute Resolution Procedures Act” that states up front the policy of the state “to encourage the peaceable resolution of disputes.” The statute goes on to provide a bare

bones list of what “alternative” methods of dispute resolution are contemplated—mediation being the only one of true significance—and then grants courts throughout the state the discretion to refer pending lawsuits to mediators. The statute is simple, and its purpose unequivocally laudatory.

Who would have imagined that twenty-five years later courts in the highest population areas of the state would adopt standard, computerized scheduling orders that include a mediation referral for *every case* on the docket?

Would the founders of the ADR movement not be surprised to learn that after decades of referrals, some courts have become addicted to mediation referral as a means of docket control, and some judges require litigants to mediate over and over again? I have mediated matters where I learned that the parties had already mediated four or five times. In these circumstances there can come a point when one of the litigants begins to figure out that the court is never going to allow their case to be tried, so they “roll over” and give up their claim or defense. When the mediator reports to the court that the matter has settled, it is easy to anticipate the court’s reaction: mediation worked again! This practice is abusive; it is an unintended consequence of an overall experience leading to too much of a good thing.

While mediation is often described as a “win-win” opportunity, a chance for both sides in a dispute to come away satisfied, there is a chance, if you are an experienced mediation participant, that you have become disenchanted with the process, or at least had a recent experience that left you shaking your head. The multiple referrals to mediation of a single case, the referral of cases over the objections of the parties, or the referral by the court of a case that has no realistic prospect of settling, are all symptoms of something being askew.

There are several manifestations of the “too much mediation” syndrome:

- too many mediations scheduled on a “half-day” basis;
- too many mediations where the participants just show up, not having allowed the mediator a chance to prepare;
- too many mediations where parties intentionally send client representatives with less than full authority to negotiate a settlement because, “if it’s not going to work, why send our top decision makers?”;
- too many mediations where the participants insist on avoiding the “joint session” that is a hallmark of the process; and
- too many mediations where the prospect of failure becomes a self-fulfilling prophecy.

Too often, these days, mediation has become an added layer of expense and delay in the process of litigating, a far cry from the noble objective of efficient and amicable dispute resolving. Too often lawyers, as they will do, figure out ways to manipulate the mediation process and use it for purposes that have nothing to do with dispute resolution.

## SECOND CLASS JUSTICE?

Mediation has also been challenged by those who believe the poor and disadvantaged are increasingly being diverted to “lower class justice” and discouraged from pursuing the quality of justice only afforded to those with the means to hire lawyers and litigate. Our obsession with “quantitative” results, our goal of moving cases through crowded courts, it is reasoned, is resulting in “qualitative” imbalances.

## THE GREAT PHILOSOPHER

Yogi Berra once famously observed, “No  
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## Book Extract

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one goes to that restaurant anymore—it's too crowded." My observations about recent developments in the practice of mediation may sound a similar note. If the use of mediation is so flawed, why is the practice of mediation expanding and its overall popularity increasing? Because it works. Here's how we can make the way we practice mediation better.

### ALL TOGETHER NOW

Years ago it was a standard practice at the outset of a mediation to convene the parties in a "joint session" or "joint caucus." Skipping this joint session was unthinkable. The concept of creating a space and an opportunity for a dialogue has long been considered an integral part of the process. Mediator training courses devote a substantial portion of the overall curriculum to the conduct of the joint session.

Even in extreme, emotionally charged circumstances, a joint meeting can provide a unique opportunity for the parties to come together and express their anger, frustration, hostility, and regret. So often the revealing of these human emotions is a necessary and critical step in the psychology of resolution.

In recent years the joint session has fallen out of favor with many, who argue that it will be too "emotional" or "adversarial." As a mediator it is imperative that you listen to these sentiments, which may be true. But you should also ask what is meant by, "too emotional." Does the party understand that a trial would also be "emotional"? Might it not be helpful to be able to express their anger and upset to the other side, face to face?

Those who express this objection should therefore be encouraged to explore the advantages of getting together with the other side.

Another common objection to a joint session is that it is simply unnecessary and will

be a waste of time. Counsel may even agree that they don't need a joint session, and ask the mediator to "just go back and forth a couple of times" in order to determine whether the case can be settled. This reveals a forgotten sense of how mediation works, and of the value of face-to-face communication. In a world where the preferred means of communication is email, are we not forgetting the power of human interaction?

Human nature is such that the things we do repetitively become routinized, we become mechanical about them. A lawyer or client attending their hundredth mediation thinks they have "seen it all." To these participants, the process is scripted. "Just go back and forth a couple of times," means that in their experience, it seems like everything they learn at mediation can be gleaned in the first couple of moves.

Many experienced and highly regarded mediators share the view that the joint session is too risky, and too often counter-productive. How did we get to this point? How did we get from our perspective twenty years ago, when skipping a joint session was unthinkable and unheard of, to today, when many experienced participants routinely skip this step in the process?

My perspective is that lawyers, over time, began to use the joint session in an overly adversarial and confrontational manner, posturing in front of the other side, and showing off for their own client. Threatening and criticizing your opponent can be a way of compensating for weaknesses in your position, and your lack of preparation. If you have a strong position, why not lay out the facts and let them speak for themselves? If joint sessions become too emotional, confrontational or adversarial, it is because lawyers have made them so.

What is needed is more education, and a better understanding by the participants of how to use the process effectively, particularly the chance to dialogue face to face with the client on the other side of the table.

Joint sessions are a good thing, when used correctly.

### NO PREP IS NO GOOD

In recent years, mediation participants have a tendency to just show up at my office, having failed to communicate anything about the case, leaving me clueless as to the kind of dispute I have before me. Such lack of preparation was infrequent when mediation first became popular.

It is easy to understand that everyone is busy, and that the chance to send the mediator an email briefly explaining the case, the status of settlement negotiations, etc., sometimes just slips away. Why do intelligent people, all of whom are desirous of resolving a dispute, go to the time, trouble and expense of scheduling a mediation with an experienced mediator, and then not allow the mediator an opportunity to use that experience to tailor the process to benefit them? This is not good advocacy on the part of counsel.

### I AIN'T GOT TIME FOR THIS: THE "HALF-DAY" MEDIATION PHENOMENON

When I began mediating disputes in the late 1980s, I was rarely asked to schedule a mediation on a "half day" basis. Most mediations, after all, were taking place as a result of a court order, and the order never referred to a limited or restricted time frame. Consequently, by implication or otherwise, the obligation to mediate was generally considered to be a "full day" obligation.

These days I average around three or four half-day mediations *each week*. Have the rules changed? Have court orders changed? No. What has changed is how mediation is perceived, now that the participants have been to dozens, if not hundreds of mediations.

A few years ago I received a call from the lawyers on opposite sides of a case I was to mediate a few days later. They explained that although they were on my calendar for a full day, "nothing ever happens until around 4:30 in the afternoon, so instead of coming to your office in the morning, could we just come around 2:00?" To these lawyers, the process of mediation had lost whatever drama it ever

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held for them. They had been to enough mediations where seemingly “nothing happened” until the late afternoon, so the lesson they learned is that it is mysteriously just the positioning of the hands on a clock that reveals whether a settlement can be achieved. They should have learned a different lesson, about the process and the steps that the participants must go through.

Parties to a negotiation often have to walk up, or down, a *ladder of expectations*. This takes time. A claimant in a personal injury matter who has, for over two years, expected to realize at least \$100,000 in compensation from a defendant may, after two hours of mediation, be confronted with a new reality: despite his long-held expectation, his lawyer and the mediator seem to think the value of the case is only in the

range of \$50,000. The claimant processes this information, is at first resistant to it, but finally reaches a comfort level with the new potential recovery, and steps down the ladder. Three more hours go by. The claimant learns to deal with the depressing suggestion that the claim may, in fact, be worth only \$35,000. The claimant takes another step. That evening, the case settles for around \$20,000. It would not have settled had a three- or four-hour time limit been imposed. Intellectually, it seems simple: just speed up the process and people will naturally make decisions in whatever time frame is allotted. No they won't. It's not the way people work.

It is, of course, true that a half-day, or less, is appropriate for some cases. Courthouse “settlement week” programs, where volunteers mediate cases at the courthouse in only an

hour or two, have been successful and popular for years.

## ENDING ON A HIGH NOTE

The reason that mediation has become popular, that it endures in the face of abuse and misuse by lawyers, overdependence on mediation by courts, and the “too much mediation” syndrome—the reason that mediation will continue to flourish—is because it works. By keeping sight of the essence of mediation: to assist parties to a dispute to achieve resolution, and of such essential elements as face-to-face interaction, preparation, and time, there are simple, mostly intuitive things that users and mediators can do to improve the process. ■

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## ADR 360°

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(at least in its forms in the shadow of the courts and also in large commercial and business disputes) is morphing into arbitration, non-binding arbitration, med-arb or judicial settlement conferences. Are lawyers inappropriately controlling the process in ways that may not be in the best interests of their clients—the consumers who pay for mediation? Are the parties themselves (consumers) sometimes highly unsuitable for productive voluntary conflict resolution? Is mediation often being conducted in a manner not truly geared to the fair, timely and cost-effective solution of the controversy the participants have brought to the table? Such unproductive purposes, practices and influences might include (wittingly or unwittingly by either or both of the parties and their lawyers) overzealous advocacy, an historical and pervasive adversarial and combative predilection in our culture and by derivation the legal community, the goal of protracted litigation, the goal of keeping conflicts alive, other practices that increase its cost and inefficiency, and a drift toward co-opting mediation into an adjunct of court-connected ADR and a litigation-type arbitration process (see Jacqueline Nolan-Haley, “Mediation: The ‘New Arbitration,’” 17 *Harv. Negot. L. Rev.* 61 (Spring 2012; available at [bit.ly/QvKdpe](http://bit.ly/QvKdpe)), in the section

entitled “*Why Mediation is Shifting Toward an Arbitration Zone*”). According to Bill Eddy, personalities drive conflict; he discusses certain personality types that make conflict resolution difficult, and outlines approaches to resolving disputes for difficult personality types (see Bill Eddy, *High Conflict People in Legal Disputes* (HCI Press 2009); William A. Eddy, *High Conflict Personalities: Understanding and Resolving Their Costly Disputes* (2003)).

If the answers to the above questions are significantly in the affirmative, would this raise professional, ethical and mediation suitability questions, possibly thwart informed and knowing participant (consumer) control over the mediation process, and hurt the search for justice and equity for the participants? Similar issues are implicated by the Part 2 discussion about the reality that arbitration has become the new litigation, increasing complexity, inefficiency, costs and the time to resolve disputes.

## CONSUMER NEEDS

From a different perspective, have consumer expectations for mediation (if in fact such expectations have been or can be determined) become currently difficult to meet, given the following empirical indications: (i) its increasingly limiting form, (ii) its increased cost of delivery, (iii) its limited time allocation, (iv) challenges to resolution of the underlying conflict, (v) failure to recognize that some

mediation participants for personal reasons are predisposed to continuing rather than resolving conflict, (vi) failure to tailor mediator selection to the dispute and its participants, and (vii) an overabundance of enthusiasm and optimism for this still-evolving arrival on the conflict resolution spectrum? Arthur Pearlstein outlines the relevance of happiness studies as applied to disputes in general and specifically to the field of conflict resolution; unhappy people and people with conflict-prone dispositions (sociopathic, borderline and narcissistic personality disorders) are especially likely to find themselves in unproductive and destructive conflict situations (see Arthur Pearlstein, “Pursuit of Happiness and Resolution of Conflict: An Agenda for the Future of ADR,” 12 *Pepperdine Disp. Res. L. J.* 212; available at [bit.ly/1jqkV7e](http://bit.ly/1jqkV7e)). These types of people fail to see any part of their conflict situations as coming from within because they attribute their problems entirely to external sources. Of particular relevance to a discussion of effective consumer-friendly use of dispute resolution is Pearlstein's conclusion that these types of people are often geared to keeping conflict going, because it keeps them at the center of attention—exactly where they want to be. Conversely, happiness can have a major positive impact on the engagement of conflict and its resolution. Pearlstein ends by suggesting the field of conflict resolution engage in a

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