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# Mediation Mythology

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The publication of *Interim Guidelines for Selecting Mediators* (Test Design Project, 1993) is a major step toward securing "professional" status for mediators. I put the word "professional" in quotation marks here to indicate that any enterprise does not automatically and naturally evolve into a profession. Rather, a "profession" is the result of active promotion and exists when certain conditions of occupation are met. Social scientists, in fact, use the term "profession" with self-conscious specificity to denote a formally associated, self-regulated occupation with a technical, expert knowledge base that makes claims to serve public and ethical goals.

A guaranteed market for dispute resolution services now exists as the result of state and federal legislation (twelve states and the federal government have passed legislation mandating the use of ADR). As a consequence, it is incumbent upon those who would claim to offer professional service as mediators and dispute interventionists to provide what is the normal quid pro quo in such circumstances: a promise to maintain high standards of performance and commitment to public service goals through testing, certification, and self-regulation. These "professional" practices legitimate the political bargain exchanged in the legislative creation of the market, while simultaneously serve the interests of those within the profession by limiting access to practice. The creation of guidelines for selection of mediators is a tangible and visible marker of this implied political/professional contract.

Having garnered legislative success in the creation of a market for mediator services, what is the standard of practice that the guidelines seek to institutionalize as the profession's consideration in the bargain? Before attempting to answer this question, let me acknowledge that the guidelines specifically state that their promoters do not intend them to be part of a single scheme of qualification for entrance to mediation practice. Despite this disclaimer, however, the guidelines are offered as a major innovation for securing "long-term success of the field" by

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insuring "quality of service" (Test Design Project, 1993: 1). Although the guidelines are meant to be "only tools for programs wishing to test mediators" and target training, the results should, according to the authors of the guidelines, influence training and selection of mediators. They are intended to do so because, as the guidelines state, "it is quite hard either to retrain, or get rid of, bad mediators" (Test Design Project, 1993: 1).

What is the conception of quality mediation and public service embodied in these guidelines? Unfortunately, the guidelines perpetuate the disabling mythologies that have characterized the promotion of mediation in the United States for the last two decades. The central myth — that the mediator is a passive and neutral facilitator in an innovative process of informal, nonbinding dispute resolution — is taken for granted in the guidelines. A continuation of this mediation mythology, either in explicit terms or by implication, creates false expectations which disappoint users and practitioners of mediation alike. I shall briefly elaborate on the elements of the mediation mythology which are sometimes directly stated and other times implied within the text of the *Interim Guidelines* (see also, Kolb and Kressel, forthcoming).

### **Innovation**

Mediation proponents often begin by making claims for mediation as part of a larger set of claims concerning the range of mechanisms and techniques available for responding to, handling, or resolving troubles, problems, disputes, and conflicts. The implication here is that mediation is a unique, relatively recent, and peaceful innovation and that, until this recent invention, American society, perhaps the world, was without peaceful means of dispute resolution (Test Design Project, 1993: 1).

This is simply untrue; the range and practices of various forms of historically available peaceful dispute resolution are well documented (see Auerbach, 1983). For example, the Federal Mediation and Conciliation Service has existed since at least 1903 (Kolb, 1983). It is true, however, that the United States experiences a higher level of interpersonal violence than most other industrialized nations, although the nation has, at the same time, extraordinarily well-developed and extensively-used systems of litigation, arbitration, and mediation. The relationship between the two — conflict and the availability of dispute resolution mechanisms — is relatively indeterminate.

Mediation, one of several forms of peaceful dispute resolution, is certainly not a recent or new phenomenon; it has been practiced informally and formally for centuries. What is new and recent — and characteristically quite modern — is the organized effort to promote mediation as a distinct institution and process, and to carve out a sphere of paid occupation in this ancient practice.

### **An Informal Process**

Even more significant to the mediation mythology than the claim of invention is the claim to informality. Unlike the case with other methods of dispute resolution (such as litigation or arbitration), the mediation mythologists claim that mediation is informal, with no specified rules of procedure. This informality or lack of specifiable procedure conveys a sense that it is a personal, individualized process adapted by the mediator and the parties to the unique circumstances of the immediate situation, the particular parties, and the dispute (Test Design Pro-

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ject, 1993: 2). To the authors of the guidelines, this individuality is a problem inhibiting quality and effectiveness, and something that training and appropriate selection procedures can overcome. Although the guidelines decry informal and individualized processes, they nonetheless repeat the claim that mediation practice is tailored to personal needs and circumstances — something individually fashioned by different mediators in different situations.

Again, this is not the case. A large body of empirical evidence exists which demonstrates that, despite claims to the contrary, the mediation process is routinized. It is not adapted by or responsive to individual parties, their particular characteristics, individual claims or situations. It is true that mediation is not governed by publicly available rules — written in texts, statutes, and cases, as is law, for example — but it is governed by what mediators have been trained to do and routinized repetition of this training to diverse situations and persons (Harrington and Merry, 1988).

### **A Neutral Third Party**

Mediation mythology borrows from the traditional legalized conceptions of dispute resolution by claiming that mediation is facilitated by an impartial, neutral third party (Test Design Project, 1993: 8).

The meaning of neutrality is obviously complex. It may mean that the third party is disinterested with respect to the parties; or, the third party may, unlike the judge, be disinterested with respect to the claims and arguments the parties offer. The mediator, however, like the judge, is not disinterested or neutral with respect to the importance and priority of resolving disputes, and not neutral with regard to the virtues of the process he or she oversees as the means for resolving disputes. Mediators are also often not neutral with regard to the interests of their profession.

Moreover, mediators are not procedurally neutral with regard to the parties. Research (e.g., Cobb and Rifkin, 1991; Greatbatch and Dingwall, 1989) has shown that mediators affect the moral assessment and legitimation of claims during the mediation process by the ways they structure the interchange between the parties, in terms of the sequencing of storytelling, and the framing of responses and what needs to be responded to. In other words, researchers have shown that mediation, like law, is not a neutral process but one with specific techniques and procedures that create differential hurdles and burdens of proof for the parties in the process. In this analysis, the claim to neutrality is not a description of the process of mediation or the role of the mediator but a technique — a linguistic device — mediators use to authorize their activities.

### **An Unofficial, Nonbinding, Nonauthoritative Process**

Although mediation is often described as an unofficial process which produces nonbinding, voluntary outcomes, it has been sufficiently institutionalized so that participation is not voluntary. I should emphasize here that I believe the guidelines are better on this point than the other elements of mediation mythology; the guidelines (Test Design Project, 1993: 2) recognize that mandated mediation is now a feature of the institutional practice, and the impetus for the guidelines.

Sometimes parties are required to participate in mediation because it is legislatively mandated, ordered by court, or stipulated by contract; where such formal requirements are not present, participation is also not entirely voluntary.

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The routine recourse to mediation creates a bias against those who do not participate, with the result that they are often negatively characterized and thus stigmatized as adversarial by those who rely on mediation to resolve a good share of the dispute caseload. Because people are often required, directly or indirectly, to go to mediation, the outcomes, while not always reported and often stipulated to be confidential, nonetheless become part of the ongoing, formal, authoritative and binding processes of dispute resolution.

### **A Powerless Third Party**

The most often repeated myth about mediation is that the third party helps others resolve a dispute or plan a transaction but lacks power to impose a solution — the mediator, unlike the judge or the arbitrator, is unable to impose an outcome without the agreement of the parties. This tenet is central to the entire conception, practice, and mythology of mediation. Were mediators able to make independent decisions about how a dispute ought to be resolved, or negotiation completed, it would raise serious and complex issues about securing stable and predictable process, insuring equality of parties, and generally protecting the interests, and perhaps rights, of the parties. This, in the end, would undermine virtues of the process: informality, efficiency, and efficacy.

Mediation mythology promotes the mistaken notion that mediators are passive participants in a process shaped by forces they have not deployed. Again, this is untrue. Although mediators are claimed to act without power, to be unable to impose a decision as judges and arbitrators do, they nonetheless regularly act with authority and power (Silbey and Merry, 1986). Mediators claim authority for themselves as experts, as agents of some other official authority, or for the task or the process. They do so in numerous ways, sometimes by denigrating the alternatives to mediation (e.g., litigation) and sometimes by talking about their training and experience. Mediators also exercise power by manipulating the immediate situation of mediation, and the interactions and communication between the parties, in order to control and shape the outcomes.

### **A More Effective Process**

Finally, mediation mythology generally claims that mediation is more efficient, less expensive than other processes, and more effective. Although the *Interim Guidelines* are relatively silent on these parts of the myth, implicitly the guidelines do give support to it. The mediation mythologists assert that mediation is faster because it is informal and less confined by procedural rules than law and law-like processes. Mediation is supposed to be cheaper because it is faster and because it does not require formal representation, although representatives often do participate. And, it is also supposed to be more effective — mediation produces better solutions because it is not hindered by rules, past practices, traditions of acting and assumptions about good outcomes. Because it is a more “open” process, it can get to the heart of whatever the issue is, and work on that rather than on the veneers produced by alternative discourses, such as law and rights.

It is true that mediation is cheaper and faster than both arbitration or litigation, but it is not clear that the solutions are deeper or better, or sometimes even different. Repeated studies have shown, for example, that in divorce mediation, women systematically come out with less financial support and smaller property settlements (see, e.g., Kelly and Gigy, 1989; Kelly and Hausman, 1988; Walker,

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1992; and Ray and Bohmer, 1992). Studies have also shown that the outcomes produced by mediation and court processes are similar in cases involving minor disputes, small claims, and minor criminal matters, (Silbey, 1990).

## Conclusion

The *Interim Guidelines for Selecting Mediators* promote a mythology that is broader and already more effective than the specific screening device created by the guidelines is likely to be. That mythology has been quite successful in generating support for the institutionalization of mediation and the establishment of both a market and an occupation in the practice of mediation.

The guidelines may prove successful, however, in furthering that mythology — and thus the professionalization of mediation — by appearing to create techniques to insure that mediators fulfill the mythological requirements of the role: passivity, informality, neutrality, and efficiency. If the guidelines become widely adopted, they will also restrict access to the occupation by defining occupational prerogatives that will debar some persons from sharing in them. Furthermore, if licensing does eventually follow, the guidelines will have gone a long way toward providing authoritative, legal consequences to private, and I would suggest, mistaken determinations of what constitutes good and ethical mediation practice.

## REFERENCES

- Auerbach, J. (1983). *Justice without law? Resolving disputes without lawyers*. New York: Oxford University Press.
- Cobb, S. and Rifkin, J. (1991). "Practice and paradox: Deconstructing neutrality in mediation." *Law & Social Inquiry* 16 (1): 35-62.
- Greatbatch, D. and Dingwall, R. (1989). "Selective facilitation: Some preliminary observations on a strategy used by divorce mediators." *Law and Society Review* 23(4): 613-642.
- Harrington, C. and Merry, S. (1988). "Ideological production: The making of community mediation." *Law and Society Review* 22(4): 709-735.
- Kelly, J. and Gigy, L. (1989). "Divorce mediation: Characteristics of clients and outcomes." In *Mediation research: The process and effectiveness of third party intervention*, edited by Kenneth Kressel and Dean Pruitt. San Francisco: Jossey-Bass.
- Kelly, J. and Hausman, S. (1988). "Mediated and adversarial divorce: Initial findings from a longitudinal study." In *Divorce mediation: Theory and practice*, edited by Jay Folberg and Ann Milnes. New York: Guildford Press.
- Kolb, D. (1983). *The mediators*. Cambridge, Mass.: MIT Press.
- Kolb, D. and Kressel, K. (forthcoming). "The realities of making talk work." In *When talk works* by Deborah Kolb and Associates. San Francisco: Jossey-Bass.
- Ray, M. and Bohmer, C. (1992). "A comparative study of mediated, attorney-negotiated and judicially assisted divorce. Final report to the Fund for Research in Dispute Resolution. Washington: National Institute for Dispute Resolution.
- Silbey, S. and Merry, S. (1986). "Mediator settlement strategies." *Law and Policy* 8(1): 7-32.
- Silbey, S. (1990). "On the relationship between state theory and sociological research: An example of minor disputes processing." In *Studies in law, politics and society*, edited by Susan S. Silbey and Austin Sarat. Greenwich, Conn.: JAI Press.
- Test Design Project. (1993). *Interim guidelines for selecting mediators*. Washington: National Institute for Dispute Resolution.
- Walker, J. (1992). "The effectiveness of mediated divorce settlements in England." Final report to the Fund for Research in Dispute Resolution. Washington: National Institute for Dispute Resolution.