What Would You Change ABOUT MEDIATION?

Considering Changes Proposed from the Other Side of the Atlantic

A blog about mediation across the pond prompted this commentary about mediation and dispute resolution in this country.

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Last fall, Matthew Rushton, British editor of *The Mediator Magazine* posted a thought-provoking article on his blog titled "Six Things I'd Change About Mediation."[1] Although I do not ordinarily read this blog, the editor of the *Dispute Resolution Journal* asked me whether Rushton's observations and suggestions had any relevance for the U.S. market. His comments do have relevance,

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even though mediation markets are not the same in the U.S. and the U.K. Below I summarize Rushton's proposed changes, discuss their relevance to U.S. markets, and end with a revised list of suggestions that I believe would help improve alternative dispute resolution services on this side of the Atlantic. I would like to hear your thoughts as well and invite you to send them to me by e-mail.

Rushton's "Six Things"

Rushton's six suggestions for change can be summarized as follows:

1. Accept the reality that the market is insufficient to employ all mediators. Rushton's key point was that mediation is "barely happening at all" in the U.K. and that there are far more mediators than mediations. His solution? To "accept the reality of the present, and looking forward, craft our plans proportionately and appropriately." All of Rushton's remaining suggestions relate in some form to the issue of mediator oversupply.

Mediator oversupply is a problem in the U.S., although perhaps not to the extent it is in the U.K. In some U.S. markets, a handful of mediators work on most of the cases. As I discuss in the second part of this article, it is hard to get started as a mediator and harder still to build a sustaining practice.[2] For this reason many lawyers combine a law practice with being a part-time mediator.

2. Eliminate the presumption that mediation is morally superior to litigation. Rushton criticized mediators who push mediation as "morally superior" to court proceedings, and also expressed concern about the level of competition between mediators and mediation organizations for work. He commented that the "lofty arguments" offered in this search for market share "rest on a supremely idealised vision of mediation which is common to all websites and text books, but which I sense is a world away from the grudging, bloody and resentful climb-downs of mediation in practice."

Rushton is right when he states that mediation is not somehow "morally superior" to litigation or other dispute resolution services in all instances. For some disputes and disputants, litigation or even arbitration is a better approach. Whether mediation is the right choice for a particular dispute depends on the dispute, the parties' needs, interests and capabilities, and many other factors.[3]

In reviewing this point, Rushton also wondered why mediation hasn't become more of "a pillar of the legal system." This statement erroneously assumes that mediation is simply a component of that system. Many on this side of the Atlantic also think of mediation as an alternative way of processing claims, which often means that mediation isn't thought of for many matters until they are in the legal system.[4] However, mediation can offer much more than the settlement of claims. In many cases the best time to use mediation is well before the parties' positions solidify into "claims." We broaden the market when we view mediation as a service that overlaps with or complements the legal system, not simply as a component of that system.

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3. Stop overselling training. Rushton stated that the training and accreditation markets were taking advantage of people interested in becoming mediators, thus contributing to the oversupply. He argued that providers need to be honest about the ability of newly accredited mediators to find work as a mediator.

U.S. lawyers too have become accustomed to frequent pitches for mediation training from a wide range of sources—law schools, bar associations, nonprofits and other organizations. I have personally talked to several lawyers and retired judges who paid for training and then wondered how to get work. We might ask, what makes it so easy to market this training to lawyers? I believe that part of the problem lies with a fundamental change in the U.S. practice of law. Over the last 30 years (and before the current market correction), law practice has become a highly competitive business. This has made lawyers (and clients) unhappy. This unhappiness, together with a desire to help clients solve problems, has led many lawyers to seek an escape through mediation training.

A U.S. mediator who responded to Rushton's article on her blog pointed out that basic mediation training in and of itself doesn't prepare you to work as a mediator. She wrote, "In what other profession are 40 hours of training deemed suffi-

cient for producing qualified service providers-professionals who are supposed to be helping others with vexingly complex interpersonal problems and sensitive issues?"[5] Minimum requirements for mediators in court-annexed mediation also promote the impression that basic training is all you need. That is not the case. For this reason, private and non-profit firms that offer training and/or accreditation services should be more straightforward about the limits of basic training.

4. Reallocate existing resources, experience and goodwill. As a solution to the issue of overselling training, Rushton recommended that greater attention be paid to training effective mediation advocates, as opposed to mediators. Rushton concluded, "Resources wasted training more mediators would be more usefully and valuably spent on advocacy training. And who knows? It might even grow the field."

I agree with this for several reasons. As any mediator knows, the skills of counsel can greatly affect both the outcome of a mediation and the quality of the process. These skills include preparing for mediation, knowing when the time is right for mediation, and the ability to identify options not provided for in the justice system. Lawyers should also be trained on the range of advocacy skills needed, and the benefits of various dispute resolution options.[6] Currently, even if they think of mediation, many lawyers believe they can handle the negotiations just as well themselves, or that mediation will just not work. That may be because they do not understand or appreciate the listening and communication, bridge-building, and trust-enhancing skills that a good mediator can bring to the table.

Training lawyers in a wide range of dispute resolution skills could help revitalize the legal services market as well. Lawyers who help clients navigate the range of dispute resolution options have the potential to become trusted advisors and build long-term, mutually beneficial relationships with clients.[7] Finally, many lawyers could also benefit from more training as counselors. What counselors do is help clients understand both legal and relationship issues, as well as other components of conflict. Much mediation training for lawyers assumes that the lawyers have experience as counselors. Many do not.

5. Promote a wider recognition of different styles. Rushton criticized the notion that there is a single "universal ideal" for mediation. He argued that "much of mediation has to be improvised" and that "mediation defies standardisation, and to thrive must continue to do so." Rushton also suggested, based on anecdotal reports, that there was a shortage of evaluative mediators in the U.K. He recommended not only a "wider recognition of different styles, approaches, and models" but also "some rigorous market research which could guide mediators toward styles that are wanted and needed."

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To my knowledge there are no statistics on the number of U.S. mediators practicing different styles of mediation, although anecdotal evidence suggests that there is no shortage of evaluative mediators. Some U.S. lawyer/mediators may have difficulty not being evaluative. Having noted that, however, I agree with Rushton's warning against attempting to standardize mediation and mediator styles. Some mediators offer strict models of "transformative" or "facilitative" mediation and others blend models. Many good mediators use a range of styles. In my view, developing a consensus on ethical standards and "best practices" is a better way to go.

6. Discourage or shut down panels. Rushton complained of both the "pointless proliferation of panels" and the fact that the same people filled all the panels. He argued that the panels offered, but did not provide, "an assurance of quality."[8]

I disagree with Rushton on the efficacy of panels. Panels can be very helpful to consumers if they are well defined and developed in response to consumer demand. The panels (and rule variations) offered by the American Arbitration Association, for example, help both neutrals and consumers find the type of expertise they need. The AAA also rigorously screens, trains and evaluates its neutrals. These are things both neutrals and consumers should consider when making choices to join or use a particular organization or panel. I do agree with Rushton, however, that it is important for organizations and the profession

to do ongoing research to better define and meet the needs of those who use our services.

Read's "Six Things"

Here are my suggestions to improve the U.S. market for mediation in particular and more broadly for dispute resolution services.

1. Broaden the concept of the "mediation market." A broader understanding of "dispute resolution services" and their functions might help the legal model evolve more toward the medical model. Under such a model, there would be: (1) preventative services (i.e., "treatments," such as training, coaching and facilitating) that promote healthy communication and minimize unproductive conflict, (2) elective voluntary services (treatments using various forms of mediation and other non-binding approaches, such as early neutral evaluation and non-binding arbitration) to resolve actual disputes and repair or prevent further deterioration of the parties' relationship, (3) more aggressive "intervention services (treatments like binding arbitration or litigation), and (4) follow-up services (treatments such as conflict audits, coaching, and teaching follow-up mediation). Mediators could provide all of these services except those in category 3.

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2. Train lawyers as problem solvers and a wider range of advocacy skills. As discussed above, lawyers and litigators should be taught appropriate advocacy skills for mediation and arbitration, and why skills in those settings differ from those used in negotiation or litigation. Such training would also help lawyers take advantage of opportunities afforded by new rules that facilitate the unbundling of legal services and the use of limited scope representation.[9]

3. Pay more attention to the emotional needs of the client in selecting the mediator. Parties must have trust in the mediator if the process is to move forward. Since conflict is uncomfortable and an unpleasant state to be in, parties come to mediation with many different feelings, most of which are negative. Parties who have strong feelings of anger or sorrow or guilt generally need to feel safe, forgiven, and cared for in order to trust the mediator. All parties also need to feel heard by the mediator. Matching a mediator's style and skills to the parties' emotional needs is just as important as some other mediator selection criteria. However, attorneys who select the mediator may not take this into account.

4. Improve mentoring and outreach programs. Because mediation is not just a process but more of an art, it takes practice to get to a level where it is done well. Incorporating ongoing practice and mentoring opportunities in training would be a good thing. When I started I was fortunate to have had the opportunity to mediate on a regular *pro bono* basis through a court-sponsored program supervised by more experienced mediators.

New mediators also have the disadvantage of not being known. Often counsel select mediators they (or a party or a partner) know. Having experienced mediators act as a mentor to new mediators can remedy the lack of exposure to some extent. Mentors could introduce the new mediator to parties and counsel. Having a mentor's friendship, support and recommendation can go a long way to helping a new mediator's career. However, little mentoring is being done. A few mediators are offering paid mentoring services. I urge mediation organizations, bar associations, and other organizations that provide training, to develop additional mentoring programs for new mediators.

5. Educate consumers and the public at large. It is essential to educate the public about their dispute resolution options. All of the above would make it easier to educate consumers so that they could identify what they want out of a process, both short and long term, and make informed decisions as to how to go forward. While dispute resolution providers have information about dispute resolution on their Web sites,[10] many consumers don't know where to look or how to evaluate the options. We have a long way to go to make the variety of dispute resolution options widely understood.

6. Research what mediation users want. Although some studies have been done, we could use much more rigorous research on how consumers view different forms of mediation and their assessment of how the process worked in real cases.[11] With research of this type, mediators and mediation providers could improve their customer focus. Focusing on what consumers want and need is important not just because of the possibility of

repeat business, but to provide the desired service at the highest possible level. It is also possible that the needs of users could change over time. The only way to find this out is to keep researching what users want.[12]

Conclusion

We neutrals offer a range of services that can help people in need. We should continue to think about how we can work together to improve our profession. ■

ENDNOTES

[1] Matthew Rushton,"Six Things I'd Change About Mediation," *The Mediator Magazine Editors Blog*, available at http://tinyurl.com/yemx4jt (Oct 7 2009).

[2] This creates a market for books about how to succeed as a mediator. See e.g., Jeffrey Krivis & Naomi Lucks, *How to Make Money as a Mediator (And Create Value for Everyone)* (Jossey Bass 2006).

[3] See John Lande, "The Movement Toward Early Case Handling in Courts and Private Dispute Resolution," 24(1) *Ohio St. J. on Disp. Resol.* (2008).

[4] Jeff Bean, "Lawyers & Mediators: Mediation Isn't Mediation," available at www.mediate.com/articles/beanj1.cfm (Sept. 2009).

[5] Victoria Pynchon Blog, "It's Not You, It's Me-diation," negotiation law blog at http://tinyurl.com/ykbng4e (Nov. 4, 2009). Many lawyers and non-lawyers who take mediation training have other training and/or experience with counseling. It would be useful to develop a list of widely agreed-to skills and attributes for each type of dispute resolution service that would-be mediators could use to identify gaps in their skills. A mediator's mix of training and experience should be taken into account in determining his or her qualifications to provide a given service.

[6] There are more books on mediation than mediation advocacy. Dwight Golann's *Mediating Legal Disputes* (Aspen 1996) and John W. Cooley's two-volume *Creative Problem Solver's Handbook for Negotiators and Mediators* (ABA 2005) are both useful although they don't cover the full range of mediation options. Kenneth Cloke's *Mediating Dangerously* (Jossey-Bass 2001) is a valuable work that lawyers could use to help clients navigate public policy and other disputes that are not easily addressed by the legal system.

[7] Rules of professional ethics support the attorney's role as an advisor. E.g., Mo. Sup. Ct. R. 4-2.1 ("In representing a client, a lawyer shall exercise independent professional advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation." See John Lande & Forrest Steven Mosten, "Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law," 25(1) *Ohio St. J. on Disp. Resol.* 25: (2009), for a good discussion of issues involved in advising clients.

[8] Rushton also announced that he was starting a new Internet service (see www.disputesloop.com)—a combination social networking and marketplace site—that would allow corporate subscribers to post requests that neutrals could then respond to. In addition to these functions, the Web site allows for the posting of reviews, subject to some constraint and oversight. In the United States, a social networking-marketing site like Rushton's could raise ethical issues, particularly for lawyers, and could compromise a mediator's appearance of impartiality. Social networking pitfalls for lawyers are discussed in Will Hornsby, "When Testimonials Meet Tweets: Thoughts on the Ethics of Web 2.0," 35(1) *L. Prac.* 37 (Jan./Feb. 2009).

[9] See, e.g., Mo. Sup. Ct. R. 4-1.2.

[10] The AAA publishes a number of guides to alternative dispute resolution, which can be viewed on the AAA Web site (www.adr.org). See also the Early Case Assessment Tools at www.cpr. adr.org.

[11] See, for example, ABA Section of Dispute Resolution, Final Report of the Task Force on Improving the Quality of Mediation (April 2006-March 2007). See also Bernard Mayer, *Staying with Conflict: A Strategic Approach to Ongoing Disputes* (Jossey Bass 2009) ("The deepest meaning of marketing is to identify the real needs of our potential client base, to develop services that genuinely answer those needs, and to articulate or frame those services in a way that speaks to potential users.").

[12] ABA Section of Dispute Resolution report, *supra* n. 11.