

Mediation in the Mainstream

Daniel Rainey, Chief of Staff
The National Mediation Board

ABA Mediation Week

October 17, 2012
The Werner Institute for Negotiation and Dispute Resolution
Creighton University
Omaha, Nebraska

[Full Title]

Good evening. Before we get started, I'd like to thank everyone at the Werner Institute for the invitation to be here tonight,

I've been coming to Omaha on a pretty regular basis since the 1990's – back then the US Department of Agriculture was a client and they had an office out here that I visited. The National Mediation Board, where I now work, has jurisdiction of dispute resolution in the airline and railroad industries in the United States, and as most of you know, the headquarters of Union Pacific Railroad is just down the road from the Law School - and I've been here in Omaha a number of times to visit UP.

I'm delighted to be here tonight as part of ABA Mediation Week, and to talk with you in what Leonard Cohen calls, "just the other side of intimacy."

I'll confess to having some anxiety about giving this talk. First of all, I'm not sure who you all are. I think we've got in this room lawyers who approach mediation one way, transformative practitioners who approach conflict engagement a very different way, students who are just starting to study conflict, old pros who have a long established practice, and heaven knows who else.

Since this is Mediation Week, I thought I should talk about mediation, and the first question I confronted when I was preparing for tonight was which "mediation" I should talk about. As things have developed, I'm associated with four academic programs in dispute resolution – one in a law school, one in a counseling program, one in a business school, and one in an industrial and labor relations school. They all have mediation as one element of their curriculum, and, as

you might imagine, they each approach conflict engagement a bit differently. And then there's the mediation that the National Mediation Board does, which is statutory and non-voluntary, and another animal altogether. In the end, I chose to decide which mediation to talk about by not deciding.

Basically, from whichever direction I use to come at the concept of mediation I am bound to say something that someone will at best disagree with, and at worst will trigger the well-known propensity of conflict resolution professionals to debate semantics and terminology.

We do that a lot. Is our field Alternative Dispute Resolution or Appropriate Dispute Resolution? Conflict Resolution? Dispute Resolution? Conflict Engagement? Should I be facilitative? Transformative? Narrative? Directive?

I'm reasonably sure that if the modern conflict community had been around with Aquinas back in the 1200's, we would have been right in there, debating how many angels could mediate on the head of a pin.

Anyway, bear with me for a while, and we'll have some time at the end of my remarks for discussion about the choices I've made in approaching the concept of mediation, in which I hope you will join, vigorously.

As I'm sure you know, this year's theme for the week is "Mediation in the Mainstream: From the Courthouse to the Conference Room," so I've borrowed that as a theme for my remarks tonight.

[Mediation In The Mainstream]

The title graphic up on the screen now is a vivid representation of the Nile River as it fractures into the Nile Delta - it's a pretty good visual metaphor for my take on the current state of mediation, and I'll concentrate on it a bit later in our discussion tonight.

I've been doing conflict engagement work of one kind or another, including mediation, for quite some time now, and I can tell you that there was a time when mediation was anything but "mainstream" in the minds of most people. I think my mother is a good example.

[Photo of Nina Lorene Stanphill Rainey]

That's my mother there - as you can see, I come from a somewhat unusual family. My mom died over a decade ago, but when she was alive she had a little trouble coming to grips with the way I made a living. She used to look at me about once a year, usually around Thanksgiving or Christmas when we were all together, and say, "Tell me again - what is it you do?" So, I would go into an explanation about third parties and interests and BATNA's and WATNA's - and she would look at me and say, "Ohhh." A year or so would pass and at the next Thanksgiving or Christmas, she'd look at me again and say, "Now . . . what is it you do?" So I'd go through reactive devaluation and sinister attribution and somatic markers and human needs theory - and she'd say, "Ohhh . . . and they pay you for that?" She never quite got it, but I'm sure, wherever she is, she's happy that I'm now mainstream.

Over my years at the NMB I've seen other evidence that mediation has not always been a clear concept in the public mind. The Board's offices are in Washington, DC, where everyone has to come to get "processed in" as they say at the Office of Personnel Management. New employees at the Board have to go over to get their paperwork filled out for employment and to get their ID's issued. New employees have come back with ID's for the National *Meditation* Board - which is not a bad concept, really - and for the National *Medication* Board - which is probably more appropriate for many of the current residents of DC.

But how mainstream has mediation become?

[Logo from the TV show *Fairly Legal*]

We've now even had a tv show - granted, a very bad tv show, but a tv show nonetheless - that glorifies the profession.

But, television shows notwithstanding, if you think about "mediation in the mainstream" in the sense of being generally known, understood, and accepted as a "normal" part of the landscape of conflict and dispute handling, we may still be a bit misunderstood.

Yesterday morning I was sitting in the airport in Washington, waiting to board the plane for Omaha, reading the Washington Post – a very reputable newspaper. My attention was caught by this headline: “Mediator Allocates Theater Slayings Fund.”

[Photo of Ken Feinberg]

The related article was about Ken Feinberg allocating the funds from the Colorado Relief Fund. In the article, he was identified, multiple times, as “Mediator Feinberg.” I suspect that most people reading the article would not think twice about the use of the title mediator – although in this case he’s actually a Special Master – nor would they split hairs over the role differences between a mediator and a special master.

After I told Bryan I would speak on Mediation in the Mainstream, I started thinking about what that meant, and whether I thought it was really an adequate or apt description of where we are in the conflict engagement field.

Even in the face of Fairly Legal, my mother, and the Washington Post, I concluded that “mainstream” *is* an apt description of mediation at this point in the development of the field of conflict resolution – if you agree that there is a “field” of conflict resolution.

More people do know about mediation now than was the case a few years ago, and if they don’t always get the fine points of difference between mediators, arbitrators, and special masters, they at least understand that there exists this group who, as a profession, help people work through tough issues and tough times.

[Graphic of the Nile Rive and the Nile Delta]

But the more I thought about it, the more I thought that, when it comes to conflict engagement, many of us are well past the mainstream of mediation - we are way down in the delta.

But before we get off into that discussion, let me talk for a couple of minutes about why I think it’s legitimate to think of mediation - traditional mediation as we’ve come to know and practice it with families, communities, co-workers, etc. - as a very strong current in the mainstream of conflict engagement.

You might think I'm weird, and you might be right, I'm going to talk for a moment about art. I think the class that I've most enjoyed in the almost 40 years that I've been teaching university courses is one called "Reading the Arts." It was a core course in an alternative undergraduate education program at George Mason University back in the late 1970's, and it was designed to encourage students to think about intellectual activity as an event not isolated by fields or departments or areas of study. I learned a lot teaching it.

I'm going to mix a couple of metaphors - the delta metaphor for fanning out from traditional mediation, and another metaphor drawn from the world of art.

[Still Life with Oranges - 1900]

That's a still life - very traditional and realistic - painted by the Dutch artist Piet Mondrian in 1900. It has everything you could ask from a realistic painting - appropriate color, realistic treatment of shadows and light, recognizable perspective, and so on. The guy could paint.

One of the things that happens in the education of an artist - and, by the way, I consider conflict engagement to be much more art than science - is that you are forced to learn the basic rules that govern visual representation - the grammar and syntax, if you will, of the particular art form. When I was an undergraduate student in a design program, I wanted to be *avant-garde*, like all 19 year olds, but my art instructors kept making me learn how to deal with shape, shadows, color, and light by drawing figures and still life studies. Mondrian obviously mastered the grammar and syntax of painting better than I ever did. He clearly learned the basic grammar and syntax of his art.

[Mill on the River by Moonlight - 1903]

By 1903, Mondrian was painting canvases like this one - still essentially realistic, but beginning to bend the grammar and syntax of visual art to investigate various elements of the image.

[Windmill at the Edge of the Water - 1904]

A year later, with this painting of another windmill, he seems to be settling into an interest in shape. Still, the basic grammar and syntax of representation is there, but the relationship of space to negative space and the exaggeration of shape is clearly becoming a branch of the “delta” into which Mondrian is moving.

[The Red Tree - 1908]

Nearly a decade after the realistic still life, Mondrian is painting nature in what some would consider a gross distortion of shape, color, and space.

[The Gray Tree - 1911]

And three years later, he’s taken the form/space distortion even further. At every step he’s moving away from the basic grammar and syntax of realism, but you can see the basic foundation of that grammar in the work, even as it distorts.

[Composition in Oval with Color Panes II - 1914]

A couple of years later he’s abandoned realism altogether, producing canvases like this oval composition (which is one of many variations on the same theme).

[Composition (example of compositions from the 1920’s and 1930’s)]

Into the 1920’s and 1930’s, Mondrian is painting these pure studies of shape, color and space for which he is, probably, best known.

[Broadway Boogie Woogie - 1943]

In 1943, he produced his final complete painting - Broadway Boogie Woogie - that is perhaps his ultimate shape/color/space study, and a painting that completes Mondrian’s adaptation and “distortion” of the basic grammar and syntax of realistic visual depiction. This painting sold in 2006 for \$2.9 million dollars at Christie’s auction house.

[Graphic of Still Life With Oranges and Broadway Boogie Woogie]

So, why spend time at a mediation conference talking about the evolution of a Dutch painter from bowls of fruit to Broadway Boogie Woogie?

Because just as there is a grammar and syntax for visual art, there is a grammar and syntax for third party intervention, and we have, in the United States, used interest-based approaches to mediation as the developmental bed for that grammar and syntax.

[Nile Delta Grammar with Grammar and Syntax]

There's plenty of room for disagreement here, but in the mainstream of conflict engagement, where we find what we most often think of as "traditional" mediation, we have:

- 1) A common language - parties, third parties, interests, positions, etc.,
- 2) A common process - the North American Model (moving from issue clarification through interest discussions and option generation to agreements), and
- 3) Common functions - facilitating communication, handling information, and managing group dynamics.

If you observe any basic mediation training in this country you'll observe these common elements, and if you look at many, if not most, degree programs in dispute resolution, you'll find some entry level discussion of the grammar and syntax of mediation that features these commonalities - in fact, there's one such training/education experience going on this week here at Creighton for the resident students in the dispute resolution program. Basically, we all learn to paint a good still life - to do basic mediation guided by the North American Model - as a way to understand the basic elements of human interaction that underlie the more "distorted" - and I use that word lovingly - expressions of conflict engagement.

I said all that to say this - mediation is, I think, a fundamental element in the mainstream of conflict engagement - as the theme for this week says, "from courthouse to conference room."

The grammar and syntax of mediation is the backbone of skills training in venues that vary from 40 hour training programs to 32 credit hour (or more) degree programs.

The grammar and syntax of mediation guides family mediation, divorce mediation, employment law mediation, community mediation, labor grievance mediation, and so on. For law schools, mediation is so mainstream that it is now not possible to be a top tier law school without some form of ADR (usually mediation) as part of the law school education process. All of this relies on the basic grammar and syntax of interest-based mediation and negotiation. Virtually every court system in the US uses court-referred mediation to handle cases before litigation, and in places like British Columbia, the court system is instituting mandatory mediation for many cases. Mediation is, definitely, in the mainstream from the courthouse to the conference room.

But as a profession we do so much more than mediation - we don't just paint our still life over and over, and we don't stay out of the delta, if you'll allow my tortured mixed metaphors.

What are some of the branches down in the delta? There's some very neat stuff, really.

[Nile River and Nile River Delta Graphic]

Down one branch you have the transformative movement, with really interesting work being done by people like Jean-Paul Lederach - working in Latin America and elsewhere to empower local groups in the search for something beyond mere coexistence. We have a colleague who has been working in Sri Lanka for years, before and after the civil war in that country, applying transformative mediation approaches by using online and mobile technology. He once told me that he doesn't care if he ever "settles" a single issue – his goal is to transform social relationships so that his kids don't have to grow up in the same environment in which he grew up. That's down the delta a bit from mainstream mediation.

Down another branch there are Peacebuilding/Community Building efforts like the ones undertaken by the Center for Mind/Body Medicine in the occupied territories of Palestine. There, interveners don't address resolution of the overarching conflict – they deal with people caught in a severe systemic conflict environment by teaching them methods for blunting the effect of day-to-day trauma.

One branch leads to the kind of Access to Justice/Rule of Law work being done by the InternetBar.Org and PeaceTones. Local artists in conflict and post conflict areas assign rights to some of their work, which is then marketed by PeaceTones, with 90% of the proceeds going back to peacebuilding and community building projects in the artists' communities. In addition, PeaceTones third parties conduct access to justice and rule of law courses for the artists and their communities.

Off on another branch is the ODR work being done in e-commerce by groups like eBay and Modria - handling 60 million disputes every year using the basic grammar and syntax of offline mediation. The United Nations Commission on International Trade Law (UNCITRAL) is using standard mediation and arbitration forms as a framework for developing standards for dispute resolution for commerce that crosses national and legal borders, and the EU has decreed that, by 2105, all low value, high volume commercial disputes in the EU will have to be handled using an ODR platform.

Down the branch that runs through the North of Ireland, you find work using a narrative approach to build community and conduct reconciliation talks in a very divided population.

Down yet another branch are projects addressing cultural adaptation of mediation styles like the Sulha project that I'm involved with in Palestine. Zoughbi Zoughbi, the Director of Wi'am, a Palestinian Community Mediation Center, is leading an international group looking at how practitioners of Sulha, a traditional form of mediation in Arab cultures, and practitioners using the basic grammar and syntax of western mediation can learn from each other.

All of these are "distortions" of mediation in one sense, but all of them, at the base, are about parties, third parties, sometimes fourth parties, interests, managing communication, managing information, and managing group dynamics - the grammar and syntax of mediation.

[Mediation in the Mainstream Graphic]

In my view, mediation is both *in* the mainstream *and* a way to define the mainstream of conflict engagement, and as someone who most often does something other than classic mediation, I'm ok with that.

As I've tried to demonstrate, even though there is a grammar and syntax that gives structure to the practice of mediation, the ability to creatively violate the basic rules is central to the practice of mediation as we've come to know it, and is the root of creative applications of conflict engagement.

The ABA seems to agree. The final report of the ABA Alternative Dispute Resolution Section Task Force on Mediator Credentialing was released last week. It does not endorse a national accreditation plan for mediation, finding that credentialing would “. . . operate to exclude new methods of resolving disputes, or . . . more generally . . . constrain the evolution and growth of mediation as a method of dispute resolution.”

As my life-partner, Julia, says, most of us are drawn to this work because on a very basic level, it “feeds our souls” while at the same time having the capacity to do great good in lives that are troubled. Whether it's settling a case out of litigation for parties who can't afford litigation, or healing torn family relationships, or creating dialogue among factions who are killing each other, or helping those in conflict find ways to exist in the face of conflict, we use the basic tenets of our craft to, we hope, do good. And we sometimes don't even know the good that we do.

Over 15 years ago I was involved with a co-mediator in a classic workplace mediation between two employees who had been friends, but who had suffered a melt-down in their relationship because of competing interests in their office. My co-mediator and I worked with them for a day and a half, and during lunch on the second day we decided that we were not going to be able to help the two parties - so basically we fired them. We told them that we were sorry, but we didn't think we were making any progress and that we did not see any way forward. We offered to refer them to another mediation team, and we took our leave.

Several years passed, and one day I ran into one of the parties while I was in his building to meet with another group. After saying our hello's he said to me, “I never called to thank you for helping us so much when we were having all those problems.” As it turned out, after Jan and I walked out of the room, they looked at each other and said, “Wow - if they're so frustrated they just give up, we must be in pretty bad shape.” They continued talking, worked out their problems, and became friends again, going out to lunch on a regular basis until one of them retired.

Mediation works. Conflict engagement based on the grammar and syntax of human interaction that we learn in mediation training works. In practice, it feeds our souls, and it does good for the parties who come to us for help.

Mediation **is** in the mainstream - and personally, I'm glad it is.