

# THE *Indian* Arbitrator

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## EDITOR'S NOTE

*Mediation is being celebrated as a panacea for all problems. But will the new found enthusiasm last? Seminars and conferences are now being hosted to regularize the system of mediation. According to us, mediation should not be viewed as just another system of ADR, to resolve disputes. It should be developed to transform humanity to a more tolerant society and as a vehicle to maintain harmony in the society. It should be viewed as a culture rather than a system. In this edition, we have included a Commendation on IIAM Community Mediation System by Mr. Justice M.N. Venkatachaliah, Former Chief Justice of India. There is also an article by Mr. James Melamed on the future of mediation. IIAM would look forward to the support of public spirited people and organizations to partner with us in spreading the message of mediation for a positive social transition.*

*We look forward to your suggestions and comments in making this magazine more useful.*



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## Bringing Justice to your Doorsteps IIAM Community Mediation Service

: ANIL XAVIER

People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible. Sometimes there may not even be a clear legal remedy for the problem. Conflict often results in a breakdown of communication, expectations as well as hurt feelings and defensiveness among individuals. The longer conflicts persist, the worse problems seem to get.

In the past, parties in dispute often felt they had no choice but to take the matter to court. Now, a growing number of people are choosing another option that allows them to avoid the aggravation and expense of a lawsuit. People have started to realize that court isn't always the best place to settle a dispute between private parties. They are looking at an option to find workable solutions by sitting down and talking face to face. The option is MEDIATION.

Mediation provides a process where people can make a decision on their own and feel comfortable doing that, rather than a decision being imposed on them, where one party is definitely not happy with the outcome.

A study conducted by the Ministry of Law reveals that at the current rate it will take 324 years to dispose of the backlogs of cases in Indian courts. The denial of justice through delay is the biggest mockery of law, but in India it is not limited to mere mockery; the delay in fact kills the entire justice dispensation system of the country. This has led to people settling scores on their own, resulting in a growing number of criminal syndicates and mob justice in various parts of the country and reflecting the loss of people's confidence in the rule of law.

Case adjudication or dispute settlement through conventional "litigation system" focus on rights and remedies and resolve the case, but not the problem. Mediation focuses on needs, empowerment, restructures perspectives or relationships and seeks to resolve the underlying problem. Law is being utilized as a modality for healing and helping, not only for resolving problems.

Behind almost every human conflict someone feels dismissed, discounted, disenfranchised or disrespected.

Unresolved tensions that may have simmered below the surface can resurface and make situations difficult. Even if angry words are not spoken, an appearance of "peace" may not be truly peaceful at all. Underneath the still waters, there may be a turbulent bed of emotions. Mediation seeks to help parties find an authentic peace, not a faked one.

In our experience, we have seen that "an open mind and an extended hand will always work".

But where do people go to get the problem resolved by mediation? The system has to be authentic, legally acceptable and the mediators should be trained and under ethical guidelines and review. Even though, presently there are court-annexed mediation centres, they cater the requirements of litigants, whose cases are pending before courts and referred to the centre. Where do people find good mediators, who can assist the parties to settle the issue before it aggravates to a litigation? Moreover the system should function as a vehicle to create harmony in the society and promote legal compliance in general.

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on rights and remedies  
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Community Mediation service should not be too late or too remote from the community level to nip the budding emergence of conflicts. Thus, the development of a more proximate, indigenous mediation mechanism will help to prevent deeply rooted conflicts from erupting into communal violence.

It is in this context that the Indian Institute of Arbitration & Mediation (IIAM) thought of the possibility of establishing Community Mediation Clinics as an inexpensive option. The motto is; ***"Resolving conflicts; promoting harmony"***.

IIAM Community Mediation Service will serve as a mechanism in bringing into the consciousness of the society the effectiveness of grassroots-level arrangements to bring forth harmony in community, providing a safe environment for people to air grievances to reach a peaceful resolution. Community mediation means neighbours helping neighbours to solve problems and resolve disputes.

Setting up of Community Mediation Clinics in all villages of each state with a view to mediate all disputes will bring about a profound change in the Indian Legal system. Conflict management programs with the formation of such centres will serve to defray tensions in societies and prevent them from erupting into violence. It is also a process that can mould a more peaceful society. Conflict prevention is one of the keys to the success and harmony in the society.

Community Mediation Clinics enhances access by helping to bring justice to the society. It aims to prevent the underlying conflict (or the need to go to court) and advance compliance with the law in general. People would get a platform near home to settle their cases without the trappings of a court. It helps preserve relationships by avoiding the embarrassment of being hauled into court, and by giving people the opportunity to air concerns that a court would rightly ignore when evaluating a legal claim. Through a system that resolves disputes before it requires adjudication, it is hoped the legal system will be freed up to deal with more serious cases.

The Mediation Clinics would function with an efficient team of mediators who are selected from the local community itself. The people so selected would be given an orientation program by IIAM, and a certificate of recognition would be issued. IIAM will also implement high standards of ethics as laid down by the International Mediation Institute (IMI), The Hague, Netherlands (which has endorsed the IIAM Community Mediation Service).

The mediators so selected will be persons who shall be having a good repute in the local area to whom people shall have faith because of his/her integrity and sense of fairness in public dealing; and shall include educated youth, ladies and elders. People having experience in dispute resolution and community interactions will be preferred. Peacekeeping is a profession and can be a vocation. It is a belief, a value and a way of life. We have many people in our community who believe in peace and practice peace making. The Clinics will have experienced lawyers, retired judges and former civil servants as patron mediators.



IIAM Community Mediation Service has the potential to shape powerful conflict transformation partnerships. Such approaches often have the power to heal even profound social wounds, so that the system can become a vehicle for creating a loving and caring world.

We are mindful that cultural "clicks" do not happen overnight. We must devise workable ways of implementing them and build broad public support for those changes. As Mahatma Gandhi has said, "There is not a single virtue which aims at, or is content with, the welfare of the individual alone. Conversely, there is not a single moral offence which does not, directly or indirectly, affect many others besides the actual offender. Hence, whether an individual is good or bad is not merely his own concern, but really the concern of the whole community, nay, of the whole world."

While launching the IIAM Community Mediation Service, the Chief Justice of India, Hon'ble Mr. Justice K.G. Balakrishnan had hoped that Community Mediation Clinics could be established in at least 100

villages by 2010 and in every village by 2015. Such peace building processes could be greatly strengthened if organizations, people and society join together and cooperate. As a business opportunity and simultaneously to fulfill the Corporate Social Responsibility, we urge corporate houses, public spirited individuals, associations and clubs to join with us in implementing the IIAM Community Mediation Program, which has a clearly defined mission and a vision statement, combined with a sound implementation strategy and a plan of action

firmly rooted in ground realities. We can join together for an enduring process of positive social transition. Partner with us to create a loving and caring world.

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**Commendation on IIAM Community Mediation Service by Hon'ble Mr. Justice M.N. Venkatchaliah, Former Chief Justice of India.**

## M. N. VENKATCHALIAH

Former Chief Justice of India

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### **A COMMENDATION OF IIAM COMMUNITY MEDIATION SERVICE VISUALIZED BY THE INDIAN INSTITUTE OF ARBITRATION & MEDIATION.**

*The Indian Institute of Arbitration & Mediation (IIAM), a registered society, has innovated an extremely effective idea of a decentralized, socially oriented and inexpensive Dispute Resolution Mechanism to serve the needs of the common people obviating their recourse to more expensive, embittering and protracted litigations in the courts of law. The formal dispute resolution mechanisms are wholly inappropriate to the aspirations and needs of the common people for speedy justice.*

*I had the privilege of being on the Advisory Board of IIAM along with Mr. Justice J.S. Verma, Former Chief Justice of India, Mr. Justice K.S. Paripoornan, Former Judge, Supreme Court of India, Mr. Prabhat Kumar, Former Cabinet Secretary & Former Governor of Jharkhand, Dr. Madhav Mehra, President of World Council for Corporate Governance, UK, Dr. Abid Hussain, Former Ambassador to the US, Mr. Sudarshan Agarwal, Former Governor of Sikkim, Dr. G. Mohan Gopal, Director of the National Judicial Academy and Mr. Michael McIlwrath, Chairman, International Mediation Institute, The Hague.*

*The Hon'ble Chief Justice of India inaugurated the "IIAM Community Mediation Service" on the 17<sup>th</sup> of January 2009 at New Delhi. Every participant extolled the great potential of this innovative scheme to bring justice to the doors of the common man under a scheme which provides for voluntary participation with the assistance of experienced lawyers, retired judges, former civil servants and other public spirited people who will act as mediators to bring about a just and mutually acceptable solution to potentially litigative situations. In the formal system there is always a loser and a winner, but Community Mediation provides a win-win situation for both sides. This will promote peace and harmony in the society. It will provide a quality of justice equal to or even better than in the formal dispute resolution system.*

*Indian Institute of Arbitration & Mediation is willing to provide the know-how for establishing such "mediation clinics" by public spirited institutions, Corporates and all those who realise that in the last analysis, their own well-being consists in and depends on peace and tranquility in the society at large. IIAM will provide free of cost advice and technical support and even "build, operate and transfer" the Mediation Clinics, which can be run on minimal financial support.*

*I have great pleasure in commending to all Institutions, particularly Corporates and other public spirited persons interested in the welfare of society, to participate in this exciting experiment of bringing justice between man and man in a society which is tending more and more towards strife and friction. The legal system as it now stand has not been able to provide inexpensive, satisfactory and timely solutions to peoples' problems.*

*I must commend the dedicated work of Sri. Anil Xavier, a promising lawyer with a fine sensitive social conscience, in developing the innovative institution of "IIAM Community Mediation Service".*



M.N. VENKATACHALIAH



## Think ...

### CONFIDENCE

Once, all village people decided to pray for rain.  
On the day of prayer all people gathered  
and only one boy came with an Umbrella,  
that's Confidence

### TRUST

Trust should be like the feeling of a one year old baby when you throw him in the air,  
he laughs.....because he knows you will catch him;  
that's Trust

### HOPE

Every night we go to bed,  
we have no assurance to get up alive in the next morning  
but still you have plans for the coming day ;  
that's Hope



# A View of Mediation in the Future

: JAMES MELAMED

*No one really wants to go to mediation. People would rather be working, caring for their family or doing something fun. Yet, people go to mediation for one simple reason: the alternatives are even worse. The leading options are no resolution or court.*

I do my best to stay on top of the phenomenon and evolution of mediation. How is mediation growing and changing in the US and world? If one looks toward the future with an open mind, it is mind-blowing to consider where mediation may be going.

## **Mediation is different things to different people.**

The first thing we need to appreciate in thinking about the future is that mediation is different things to different people. For most participants, it is a means to an end: resolution. For mediators, it may be a satisfying and challenging occupation. And for courts and agencies, mediation may primarily represent a means of managing expanding dockets on tightening budgets. More specifically:

**For Practitioners**, mediation at its best represents a satisfying opportunity to assist others to most capably resolve their own situations. For those mediators who professionally “make it,” there is the great feeling of making a living while doing good. Numerically, most mediators are actually volunteers, usually associated with community programs and are not paid at all. Community programs offer heroic service and typically operate on shoestring budgets. Historically, the most motivated community mediators often moved into the “professional ranks” (charging fees for service). Of late, however, it seems that the private mediation market has shifted more and more toward the legal system and, increasingly, attorneys bring their talents to the mediation profession. This includes the increasing

“panelization” of the field (private panels like JAMS and AAA) as well as court, agency and practice area panels. The field of mediation is really now closer to “100 fields of mediation” as our work has “Balkanized” into new and exciting practice areas such as elder, foreclosure, mass disaster and marital mediation. This growth and innovation in mediation tends to take place in the private sector as creative and entrepreneurial mediators consider new conflict areas that can benefit from mediation’s solution-focused approach to conflict.

**For Participants** (disputants), no matter how well-intended mediators may be, mediation is like going to the dentist (except that mediators do not offer pain killers). Mediation for participants is realistically a choice of evils. No one really wants to go to mediation. People would rather be working, caring for their family or doing something fun. Yet, people go to mediation for one simple reason: the alternatives are even worse. The leading options are no resolution or court. People do not want to be in mediation no matter how nice, creative and effective a mediator you are, even if you serve warm cookies. They want to move on and to have things be better. People do not like conflict. People do not share mediators’ zeal for the mediation process. People want a fair result as quickly and inexpensively as possible. As we think about mediation services and systems in the future, it is important to remember that mediators and the mediation industry remember this driving force for participants: “a fair result as quickly and inexpensively as possible.”

**For Courts and Agencies,** mediation has been primarily an issue of case management. Judges were selected or elected to “judge,” not mediate nor coordinate mediation programs. From a perspective of docket management, courts and due process agencies recognize their need for mediation (assisted voluntary settlements) to manage their caseload. If more cases can be settled through mediation at earlier and earlier points and at lower and lower costs, fantastic. Mediation ultimately is what allows courts and agencies to deliver due process consideration to those cases most needing it (and helps courts balance their budgets).

### Our “Day in Court”

Closely examined, “adjudication” in America is far more myth than model. Sure there is the iconic courtroom battle and appeal to the Supreme Court for “justice.” However, as a matter of day-to-day living, the courts are largely irrelevant for most of us. When courts are engaged, most people fear them. Most of court time is spent on criminal and domestic relations matters. In terms of providing satisfying and timely resolution of civil and commercial disputes, satisfaction rates with courts are not high.

Legal representation is also more myth than model. Even in situations like divorce, a necessarily legal event, in California today only 20% of those getting divorced have even one attorney involved in their case! Why? One dominant reason: cost! Only 20% of Californians faced with the intrinsically legal event of divorce can afford the over \$10,000 per party average cost of divorce legal representation. Ask any family how much they have budgeted for legal services? People may not be drawn to mediators, but they are even less drawn to expensive attorneys and courts.

In the Federal District Courts, there is discussion of the “vanishing trial.” Most recent statistics show only 1.2% of filed cases are actually tried to a judge or jury. While one might applaud such settlement statistics, the reality is that people settle because they are burnt out, exhausted and broke. In the federal courts, we have the most righteous “cream of the crap” litigation, where people have hired legal counsel at great expense to “sue the bastards.” Even in this most vitriolic context, 98.8% of the cases settle. So much for our imagined “day in court.” Even when people pay the big bucks for legal

vindication, there is at least a 19/20 chance that they will in fact end up settling. Would people file lawsuits if they knew this? Is there some other way we can catch the other side’s attention?

In reality then, we really have a settlement system far more than a litigation system (in spite of all the dust in the air). In this context, perhaps it makes sense to ask the question: What would be our best possible settlement system?

The problem with our current legal system is then not that there is too much litigation or that not enough cases settle. The issues are: 1) when in time do cases settle; and 2) what is the quality of those resolutions? And perhaps it is worth asking: Did those situations need to become “legal cases” in the first place?

In reality then, we really have a settlement system far more than a litigation system (in spite of all the dust in the air). In this context, perhaps it makes sense to ask the question: What would be our best possible settlement system?

Mediation, whether a part of or separate from court or agency jurisdiction, offers disputants the opportunity to dramatically reduce their costs (delay, money, stress, relationship) and has been shown to double the likelihood of full compliance with agreed-upon results (compared to judicial orders or attorney settlements). People are in control in mediation. Nothing can be imposed on them. Mediation offers the opportunity for most capable

discussions and most capable solutions, rather than barely sufficient discussions and barely sufficient solutions. Even among those that do not reach agreement in mediation, over 90% still recommend the process to a friend in a similar situation. Mediation has rapidly become the “day in court” we perhaps never really had.

### Do We Need to Sue?

#### Getting the Other Side to Pay Attention

One thing I hear often is “we need to file the lawsuit so the other side will pay attention to us.” The lawsuit acts as a sort of glass of ice water we throw in the other side’s face. Kind of hard to ignore a glass of ice water in the face! So, it is sometimes suggested that mediation can only happen when a party has so effectively captured the other’s attention with a formal court filing conferring jurisdiction on the court.

While there is clearly a good measure of truth to the fact a legal action does catch the other side’s attention, I would not be surprised to see this approach change appropriately change in the future.

Let's get creative for a moment. Knowing that all court options remain in the background, we might imagine a new system where a court or community program might establish "mediation jurisdiction" - perhaps not formal authority but socially compelling authority to encourage people into mediation.

Or maybe web sites will develop where one can (publicly) "threaten to sue" another. Such web site might, for a price that is a small fraction of a court filing, post a public notice of an "Intent to Sue" (including an abstract of the claim). Such posting might be held in abeyance during a 30 or so day period (perhaps the time would be set by the one who posts the notice?) while the other side is given an opportunity to work things out, be that online or in person. An email might be sent to the other side saying something like:

*"I am planning to sue you for (describe circumstances) unless we can reach a mutually acceptable resolution within \_\_ days. To help achieve this desired resolution, I am willing to \_mediate; \_arbitrate;\_ and to do so \_face-to-face or \_online, and I will contribute \_\_% toward such resolution fees. Please promptly respond letting me know if you are also prepared to so effectively work toward resolution without our needing to file our lawsuit against you."*

If the other side is not willing to so work toward resolution (or perhaps if no resolution is achieved), then it might be that the website "threat to sue" would be posted for some time for the public to note. Just as people do not like word of a pending lawsuit against them to get out, my guess is that people would not like word of pending "threats to sue" to become known. Just an idea. It is a new world. "ThreatToSue.com" is now taken.

This further informs our consideration of ways mediation can grow in the future. What mediation does effectively is to expedite discussions and improve the quality of settlements. We effectively move statistically predictable settlements to an earlier point in time, saving money, untold stress, limiting the damage to relationships and creating better, if not best, results. We may, in fact, be able to move many of such resolutions out of what we have traditionally understood to be our "legal system."

What does all this mean about our relying on courts and due process agencies for the delivery of mediation services? Should the filing of a lawsuit or due process complaint (legal jurisdiction) be the public's ticket to mediation services? Why in the world (other than catching the other party's attention) should the filing of a lawsuit be needed or desired as the first step to settlement? Why legalize and polarize only to bring

people back together? Might we catch the other's attention and induce participation in some more constructive and less expensive way?

## **The Biggest Conceptual Issue for the Field of Mediation.**

### **To What Extent Within – To What Extent Beyond the Traditional Legal System?**

I was doing some reading on the development of mediation in Denmark. I am going to Copenhagen in the fall and thought it would be interesting to get a bit of background information and perhaps make a contact or two. And so, in researching mediation in Denmark, I found that this concluding comment rang so very true for the development of mediation in the U.S. and perhaps in all countries:

*"The development of mediation in Denmark will depend on whether it is viewed by policy makers and practitioners as another set of pre-trial settlement procedures or rather as a altogether different system of quality dispute resolution that exists alongside the existing court structure."* (Mediation in Danish Law: In Retrospect and Perspective" by Vibeke Vindelov, Professor of Law, University of Copenhagen)

While this is somewhat an oversimplification, it is so helpful for us to examine the nature of our systems for the delivery of mediation services. Is mediation in the United States to be defined as a "*pre-trial settlement procedure*," or as part of an "*altogether different system of quality dispute resolution that exists alongside the existing court structure*"? Or, perhaps, both?

Is the future of mediation that it is little more than a judicial due process settlement device? If so, how did this happen? Has our legal system come to swallow mediation?

That we are even asking this question is a bit ironic in that, when the modern era of mediation began in the U.S. in the late '70's, courts and attorneys did not generally welcome mediation, if only because it represented change. Now the concept of someone other than an attorney mediating a situation is quite foreign to attorneys.

And, if we are honest about the situation on the ground today, when it comes to "*mediating the litigated case*," it can accurately be said (perhaps with 98% accuracy) that attorneys have come to almost completely dominate the "*legal mediation marketplace*" (at least those cases that pay). Despite any initial hesitations about mediation, attorneys and courts now commonly recognize that,



“hey, if mediation is to take place and legal issues exist, it likely makes sense to have an attorney mediate that case.” Needing to tie all the legal strings together with legal drafting further convinces everyone involved of the need for an attorney mediator. In situations where people are represented by attorneys, all of this is fortified by representational attorneys (rather than end user disputants) commonly making the selection of the mediator.

To be honest, perhaps as I am an attorney, all this does not bother me that much. It can in fact be effectively argued that, if folks have somehow come to find themselves in a legal context, it does make sense to have the “most capable” mediator and one with a legal background and legal drafting ability may well fit that description.

Still, one can just as surely ask whether the situation really needed to be filed in the courts and be legalized in the first place. The “legalization of the mediation” is further reinforced and dramatically impacted by attorney scheduling needs and what seems to be an unconscious adoption of a “hearings” mentality for mediation. Mediation in the legal context is now too often “crisis,” one-day, single-sit mediation, as if it does not make sense to let the parties and advisers think about things overnight or for a week or two.

If we had a more capable mediation model, we might have the option of two or three meetings (or whatever is needed) available to participants, perhaps on separate days with time in-between for the mediator and others to electronically communicate to further the discussions. With a bit of creative thought, it might be that we could come up with far more capable, less stressful mediation options where people could get their desired legal guidance between sessions as much as at sessions. Even during a session, a cell phone call or two can go a long way at a small fraction of the cost of a day of legal representation. If there is time for participants to communicate with legal and other advisers either at a mediation or between sessions (email, text, phone), we can elevate participant capacity and save substantial and unnecessary legal fees.

If only because of the costs of attorneys and legal filings, it is almost certain that mediation will continue to grow beyond our courts. There are in truth many points during a dispute cycle where mediation may make sense

and we should encourage and respond to resolution impulses whenever they exist. We would, however, be making a huge mistake to exclusively rely on courts and agencies (requiring legal filings for jurisdiction) to be the exclusive delivery system for mediation services. Without powerful creative private sector and widely available community mediation initiatives (that do not require adjudicatory filings), we are, however, at risk of the legal system swallowing mediation.

### **Shifting National Culture – Funding Community Mediation**

Our family recently experienced the value of community mediation. Our situation involved neighbors one of which was building a large house. The complaints included the hours of construction, barking dogs, dust, parking, and, in time, harassment and assault. We got involved as the neighborhood started to take sides. We were lucky to have an available and effective community mediation program to call upon. Swift mediation literally saved our neighborhood. And, unbelievably, it did not cost a penny. If we would have needed to figure out who paid for what part of the mediation, this neighborhood saving initiative would never have taken place.

*Without powerful creative private sector and widely available community mediation initiatives (that do not require adjudicatory filings), we are, however, at risk of the legal system swallowing mediation.*

There are thousands, if not millions, of stories of community mediation helping individuals, families, neighbors and entire communities. Still, somehow, “in the richest nation on earth,” we have not seen fit to reasonably fund community mediation. In fact, the lack of funding for community mediation is an embarrassment that I am personally tired of participating in. How dumb can we be? We need leadership on this issue and we need this leadership now! President Obama, are you paying attention?

In one single move, the President and/or Congress could shift American (and perhaps world) consciousness about mediation. A quick Google search reveals the reported cost of a B2 Bomber to be 2.2 billion dollars. An equally quick review of the National Association for Community Mediation web site ([www.nafcm.org](http://www.nafcm.org)) reveals 948 organizational members (programs). For ease of math, let’s call it 1,000 community mediation programs in the U.S. My quick calculations indicate that, *if the United States builds one less B2 bomber, we can fund each and every community mediation program in America with*

*\$100,000 per year for 10 years.* Will you join me in making this happen?

I also get excited when I think of community mediation programs being supported to harness the administrative and communication capacities of the Internet. More capable use of the Internet will allow community programs to become known, provide education, better administer services, and better offer a variety of convenient communication modalities. With so many common needs, it seems foolish that we would find these answers program by program. A measure of integrated development clearly makes sense. To the extent we need to communicate with numerous participants at low cost, enhancing community mediation operations with a most capable technical infrastructure makes abundant sense.

These are the kind of activist political goals that the mediation community may wisely consider. It can be argued that the mediation community would be wise to

demand that our political leadership make mediation available without the need to see lawyers and file lawsuits. Intriguing is whether mediators will become activists and advocates for responsible funding of community mediation services. While some may suggest that mediators should be “neutral” in all things, argument can be made that mediators removing themselves from such policy debates robs our society and the world of one of our most valuable social voices.

*(to be continued)*

*(Author: Jim Melamed co-founded Resourceful Internet Solutions (RIS) and Mediate.com in 1996. Before this, Jim founded The Mediation Center in Eugene, Oregon in 1983 and served as Executive Director of the national Academy of Family Mediators from 1987 to 1993. Jim is past-Chair of the Oregon Dispute Resolution Commission and a member of the Oregon State Bar. Jim teaches Mediation at the Pepperdine University School of Law's Straus Institute for Dispute Resolution)*



## Think ...

### Take the following quiz.

You don't need a pen, pencil or paper.

1. Name the five wealthiest people in the world.
2. Name the last five Heisman trophy winners.
3. Name the last five winners of the Miss America contest.
4. Name ten people who have won the Nobel or Pulitzer prize.
5. Name the last half dozen Academy Award winners for Best Actor and Actress.
6. Name the last decade's worth of World Series Winners.

How did you do?

THE LESSON: NONE of us remember the headliners of yesterday. There are no second-rate achievers on the above quiz. They are the best in their fields. But the applause dies. Awards tarnish. Achievements are forgotten. Accolades and certificates are buried with their owners.

Now here's another quiz. See how you do on this one:

1. List a few teachers who aided your journey through school.
2. Name three friends who have helped you through a difficult time.
3. Name five people who have taught you something worthwhile.
4. Think of a few people who have made you feel appreciated and special.
5. Think of five people you enjoy spending time with.
6. Name half a dozen heroes whose stories have inspired you.

Wasn't that a lot easier?

THE LESSON: The people who make a difference in your life aren't the ones with the most credentials, the most money, or the most awards. They're the ones who care enough to spend personal time and effort for you.



## 'Apology Matters'

### The Power of Apology in Family Mediation

: TONY WHATLING

Roger and Anita had been locked in conflict on a whole range of issues for over six years since they divorced and more recently over contact arrangements in particular. They had come to mediation on the advice of Anita's solicitor, to attempt to resolve the latest problems. Anita said that she wanted to improve the consistency, frequency and reliability of contact between the children and their father. Roger meanwhile described how he was desperately trying to juggle time with his children, serious work pressures as director of a hi-tech company, and the imminent arrival of the first child of his new marriage.

The mediator, (who I was 'live supervising' as her professional practice consultant), had listened carefully to the 'stories', skilfully demonstrating her impartiality and 'listening-with-understanding', as the characteristically differing historical accounts of adversarial actions between these two adults unfolded.

Anita looked and sounded extremely tense, her whole demeanour and vocal tone being one of barely suppressed fury. She seemed incapable of saying anything other than with a 'clenched-teeth' anger and bitterness. Roger on the other hand, when responding to Anita, looked and sounded guilty and defensive. In his communication with the mediator however he presented as 'super reasonable', a manner that seemed only to increase the simmering fury and rage of his ex-wife. The mediator duly made good in-depth individual summaries, as a prelude to moving the couple on to the 'issues exploration' stage. She skilfully 'mutualised' and

'reframed' their respective negative accounts of each others' behaviour as demonstrating a strong commitment to sorting things out for their two children' through mediation. She then proposed that this might be a good time to move on to exploring what each of them was

hoping to gain from the meeting. To my surprise I then heard her say, 'just before we move on though, I wonder if there is anything else that you wanted to say to each other about the past'? I was puzzled by this question as it seemed to be at odds with her preceding move, that of the more conventional - 'O.K. now that I understand the background it's time now to move on'. Thoughts like 'opening cans of worms' came to mind, or in more contemporary parlance, I was thinking I would not choose to 'go there'. Knowing the family therapy background of the mediator I even began to wonder how far she was aware of maintaining the boundary between therapy and mediation.

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What followed however demonstrated that she perhaps intuitively sensed something about this couple that had in turn inspired her question. After what felt like a very long and contemplative silence, Roger turned to look at his ex-wife and said, in what sounded like a genuinely authentic tone of contrition, "I just want to say to you how sorry I am for how badly I treated you after we separated, it was very vindictive. I know that I did lots of things to upset and hurt you and that those things upset the children too. I want to apologise for that, I really am very sorry. I am not apologising for leaving you, because I still believe that our marriage was at an end. But I am apologising for the way I did it, it was inexcusable, you did not deserve that and neither did

the kids." The visible impact on the Anita, over the next few minutes, was as though a heavy cloud had gradually begun to lift, as if for her the 'lights were coming on again'. She looked at once surprised, confused and tearful, as though many conflicting thoughts crowded her mind. Again a very long and heavy silence followed, as all three other people in the room waited and wondered how she would respond. Finally she turned to face her ex-husband directly for the first time in this meeting and said "We have both done many stupid and hurtful things to each other in the past six years". After another long pause she added, "But we do have two wonderful children and perhaps it is time now to try to stop doing those things to each other and to see if we can put things right, for their sake."

With the help of the mediator the couple went on to reach agreement on a new contact schedule. Inevitably we never heard how well the new arrangements worked out but they did not return to mediation. Given the long-standing history of habitual conflict, it would perhaps be naive to suppose that everything would be plain sailing from then on. However, I was left with a powerful sense that something very special and very important happened in the room that day. Not for the first time, I learned something from clients about what they wanted and needed. They provided valuable information on how we could further develop our practice as family mediators. It also left me wondering about how many other couples in mediation might benefit from the emotional release that can come for both the 'perpetrator' and the 'injured party' from such communication. From recent experience of running training workshops on the subject and a study of the limited range of literature, it becomes clear that apology, is a very complex business. Each of us will have our own highly idiosyncratic values and opinions on the issues, differences that would certainly need to be understood and respected, if we were to be invited to 'go there' when involved in a dispute.

The OED defines apology as 'To acknowledge and express regret for a fault without defence'. These last two words 'without defence' can be seen to feature substantively in the key elements of a genuine apology. In his excellent paper, ('What it means to be sorry: the power of apology in mediation', *Mediation Quarterly*, Vol. 17, Number 3 (Spring 2000)), Carl Schneider defines the three key elements as:

"a). Acknowledgement:...a ritual whereby the wrongdoer can symbolically bring themselves low - in other words the humbling ritual of apology, the language of which is often that of begging for forgiveness" [Jeffrie Murphy in Carl Schneider op. cit.],

"b). Affect: - "In order to truly accept responsibility the offender must also be visibly affected personally by what s/he has done."

"c). Vulnerability: The offending party is placed in a potentially vulnerable state in offering the apology knowing that the chance exists that it may be refused. More than anything else, it is vulnerability that colours apology."

Schneider goes on to explore the potential application of these ideas to mediation and comments, 'Apology, however, is clearly not about problem-solving. Nor is it about negotiation. It is, rather, a form of *ritual* exchange where words are spoken that may enable closure'. '...there is often a felt need for some acknowledgement of the harm done, a need for some acceptance of personal responsibility for the injury inflicted, in short, an apology.' (Schneider op. cit.)

What soon becomes clear is that, unlike the couple referred to above, many would-be apologisers may need help from the mediator. The person contemplating the giving of an apology may have concerns including for example, 'Will I be able to find the right words?' - 'Will my apology be rejected so that I lose face?' - 'Will it be used against me in the negotiations?' - 'Will it be reciprocated, where I believe that the other side has also offended against me?'

For the 'injured party', the concerns might be, 'Am I prepared to consider fully accepting an apology?' - 'Would it help me and/or the situation?' 'Is the time right or are my emotions still too raw?' 'How will I know it is really meant & not just a trick to get them off the hook?' 'Will it mean that what happened and all the hurt that I feel did not matter?' Whilst for some couples these issues might be explored in joint session, it is likely that one or more individual caucus meetings with the mediator will be required so as to provide greater 'face-saving' security and 'informed choice' for each party. For example, such a 'side-meeting' could provide the opportunity to review some of the questions referred to above for perceived 'perpetrator' and 'victim'. It might also be necessary to consider just what it was that was being apologised for and why. For example, Roger was quite clear that he was not apologising for ending the marriage but for how he had gone about it.

So given the complexities referred to above, why indeed would a mediator 'go there'? It seems likely that a significant number of mediation referrals will include people for whom 'getting on with life' is contingent on what Schneider calls 'repair work' and 'closure'. He goes on to say, 'Divorce mediation offers just such an opportunity for clients to acknowledge that they have

acted in ways that have created injury and are sorry for the damage that they have done to their marriage and their spouse." (Schneider op. cit.).

The predominantly 'Individualist Problem Solving' model of mediation adopted in the UK, discourages such potentially 'therapeutic' dialogues between mediators and parties in dispute. John Haynes described the discussion of emotion as 'un-useful dialogue', [Unpublished UK workshops and 'Haynes on Haynes' Video Tape 'Michael and Debbie case']. Such a discourse would be more the domain of a 'Transformative Mediation' model, (Robert A. Baruch Bush & Joseph p. Folger 'The Promise of Mediation' 1994), or 'Narrative Mediation' (John Winslade & Gerald Monk 2001).

Judging by the responses I get at training workshops, there is substantial interest amongst the family mediator community in these issues of facilitating constructive emotion and apology. In the process of developing materials for these workshops I have defined a list of potential 'need-indicators', based on observations of clients behaviour, i.e. that lack of 'closure' and wish for apology, may be a key issue blocking the negotiation process. An example might be that when it becomes clear that negotiations are at an impasse, perhaps characterised by persistent failure of one party to produce verifying documents or valuations, or reluctance to settle on a specific issue despite logical financial indicators. When challenged about this, a person perceiving themselves to be the 'injured' party might for example say to a perceived 'perpetrator', "If you had not betrayed me and our children by committing adultery and deserting us, we would not be in this financial mess now, I don't think you will ever know how much pain and damage you have caused to me and the children". It has also been possible to produce a list of model questions that mediators might use to enquire into the potential for emotional discourse and/or apology, when perhaps they sense that an apology seems to be 'lurking in the wings waiting for a cue to come on stage'. In the joint session, one example might

be, 'Sometimes when people split up, the reasons behind it can go on being very upsetting and painful for the people involved. When that happens it can make it hard for one or other person to put it all behind them and move on, how far would you say that might be happening here?' Here the question has deliberately been left open so that either party is free to respond rather than to have directed it at the perceived 'victim'. So even if the latter is reluctant to respond, the perceived 'perpetrator' might facilitate a discourse on the issue.

To return to where we started then, what Roger had clearly decided to do was to say what he wanted to say to Anita and to take the enormous risk that it might be rejected or be thrown back in his face. What he said in his own words, is also graphically expressed by the words of Carl Schneider, - 'An apology is often a means of saying, "Yes, there has been a terrible wound here, for which I am truly sorry. My intention is not to destroy you. I am ending this marriage, but I would like to close that door gently, not slam it shut.' (Schneider op. cit.).

It seems likely that as mediators we may lose a significant number of clients from mediation, whether at intake or later stages in the process where this need for 'emotion talk' and/or apology might neither occur naturally, nor be detected by the mediator. Recent mediation outcome statistics for 'not for profit sector services' show 'agreement rating' of around 52% [for all Mediation cases], and 'conversion rate, [all clients], of around 50%, across the whole country. How many of the other 50% might have benefited from such an opportunity to unblock emotion and to engage in what has been so influentially defined as 'un-useful dialogue'? Heightened awareness to 'apology matters' might well bring the opportunity for mediators to facilitate more of the sorts of discourse that was so impressively managed by Roger and Anita.

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### *Interested to contribute Articles?*

*We would like to have your contributions, provided they are not published elsewhere. Articles should be in English. Please take care that quotations, references and footnotes are accurate and complete. Submissions may be made to the Journals Division, Indian Institute of Arbitration & Mediation, PDR Bhavan, Second Floor, Foreshore Road, Cochin - 682 016 or editor@arbitrationindia.com.*

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## India's 2009 Budget: Proposal for ADRM

Under the new measure proposed in India's 2009 budget, there is a proposal for setting up of the Alternative Dispute Resolution Mechanism (ADRM), as a part of pro-market reforms. The ADRM, aimed at encouraging foreign investments, will ensure fast track resolution of transfer pricing disputes between the tax authorities and foreign companies.

## ICC takes tougher stance on Arbitrator availability

The ICC Court will, from 17 August 2009, require arbitrators agreeing to serve in ICC proceedings to disclose details about their availability as well as their independence. Each arbitrator will now receive, from the Secretariat of the Court, a form entitled Statement of Acceptance, Availability and Independence, in which the arbitrator is invited to confirm that he or she expects to be able to make available the time and effort necessary for prompt and efficient conduct of the case. Arbitrators are also asked to indicate the number of cases in which they are already involved and any foreseeable competing demands upon their time in the following 12–18 months. The ICC Court is of the view that greater transparency is called for in relation to arbitrator availability.

## International Commercial Arbitration – Appointment of Arbitrator

The Supreme Court of India in “Citation Infowares Ltd. v. Equinox Corporation” (2009 (5) UJ 2066 (SC) examined whether it had the power to appoint an arbitrator in a commercial dispute where the contract was not governed by Indian law but the Arbitration and Conciliation Act, 1996 (the Arbitration Act) was not specifically excluded in the contract. The Chief Justice of India ruled that unless it is specifically excluded in an agreement between the parties or by implication, the provisions of Part I of the Indian Arbitration Act apply to international commercial arbitrations, even though the contract is governed by foreign law. Part I of the Indian Arbitration Act provides for, among others things, the appointment of arbitrators.

## Incorporation of Arbitration Clause by Reference

The Supreme Court of India in “MR Engineers and Contractors Pvt. Ltd v Som Datt Builders Ltd” (JT 2009 (9) SC 374) examined the issue of whether an arbitration clause contained in a main contract can be incorporated by reference into a subcontract. The Supreme Court of India also discussed the applicability of the arbitration clause contained in the main contract to the disputes arising in relation to the subcontract and laid down certain conditions for incorporation of the arbitration clause by reference. This decision lays down certain important principles with regard to the scope and intent of Section 7(5) of the Arbitration and Conciliation Act, requiring parties' conscious acceptance of an arbitration clause from another document as part of their contract before such arbitration clause can be read as part of the subsequent contract.

## Conference on “Place of Arbitration” at Tunis

The ICC and the Chartered Institute of Arbitrators will jointly organize a conference on “The place of arbitration: does it matter?” on 23-24 October 2009 in Tunis (Tunisia). The conference will focus on the increasing tendency of delocalisation of the arbitration process.

## “Moving Mediation” Conference at the Hague

“Moving Mediation” marks the 10th anniversary of the introduction of court-connected mediation in the Netherlands. The conference will be held on 19 November 2009 at the Kurhaus, The Hague. Emphasis is given to customized dispute resolution, i.e. the choice litigants must make between settlement, mediation and waiting for a court judgment. The aim of the conference is also to promote the mutual exchange of knowledge and experience. There will also be consideration of the dilemmas posed by court-connected mediation.

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