In Practice

The Past, Present, and Future of Mediation as Seen through the Eyes of Some of Its Founders

Stephen B. Goldberg and Margaret L. Shaw

This article is drawn from interviews with thirty-one of mediation's "founders," those pioneers who began mediating in the 1970s and 1980s, when the field was young. They describe what first attracted them to mediation and why they have remained active in the field. Some told us that they have found it to be both intellectually challenging and interpersonally satisfying to assist disputing parties in their search for a mutually acceptable resolution they could not find on their own. Others see mediation's collaborative approach to decision making as a means of bringing about social and political change that might be otherwise unattainable. The mediators also described the changes they have observed since they entered the field: mediation's dramatic growth, institutionalization in the judicial system, and market domination by lawyers and retired judges. Among the concerns they expressed were the prevalence of a mediation model that focuses primarily on the legal strengths and weaknesses of each party's position, and the dollar amount that should resolve the dispute, with little interest in creative outcomes. Other concerns are a lack of quality control of mediators and trainers, and unproductive debate about whether the "correct" approach to mediation is evaluative, facilitative, or transformative. The mediators who work on public policy matters, including environmental disputes, were the most positive about the opportunity for creativity in their work,

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considerably more so than those mediators whose practice is primarily business/commercial. The mediators' views of the future of mediation are remarkably similar — their general sense is that the type of mediation that takes place in the shadow of the courts is likely to increase and to become even more routinized than it is at present. Several respondents told us that they also expect to see substantial growth in the use of mediation to resolve public policy issues. Many of these mediators predicted that this type of mediation is likely to be carried out by organizational insiders, rather than outside interveners. As one mediator said, "Maybe there's a new set of mediation roles for people within traditional institutions, not just for free-standing neutrals."

Key words: mediation, mediation practice, alternative dispute resolution, mediation standards, mediation training, commercial mediation, public mediation, future of mediation.

Introduction

Until the 1970s, formal mediation activity in the United States was largely confined to the mediation of labor contract negotiations by the Federal Mediation and Conciliation Service and various state mediation agencies. In the 1970s and 1980s, however, mediation spread to new areas: business and commercial, family and divorce, environmental, public policy, neighborhood disputes, and even prisons.

One could speculate endlessly on the reasons for the re-emergence in the 1970s of a process that in its simplest form — one person helping others to resolve a dispute — is undoubtedly as old as mankind. Rather than contribute further speculation about the reasons for the growth of mediation, for this study we interviewed thirty-one people who were at least in part responsible for that growth — those who began providing mediation services in the 1970s and 1980s. (We conducted each initial interview over the telephone but asked some follow-up questions via electronic mail.) We asked them a series of questions about what had attracted them to the nascent field of mediation, why they had remained in the field, what changes they had observed in the field, whether they viewed those changes as positive or negative, and where they anticipated mediation would be ten to fifteen years from now. In brief, we sought to elicit their views on the past, present, and future of mediation.

Study Participants

Our process of selection for this study was neither random nor scientific. We interviewed people whom we know either personally or by reputation,

who had both entered the field during the relevant period and remained in the field. This provided us with a long-term perspective on the development of mediation. We included people with experience in those areas in which mediation has been most widely used since the 1970s: business and commercial, construction, product liability, employment, divorce, labor–management, neighborhood, environmental, community, and public policy.

The mediators in our study entered the mediation field from diverse backgrounds. Slightly more than half (sixteen) are lawyers. Inasmuch as mediation typically deals with disputes, and many disputes lead to court filings, the high proportion of lawyers in the first wave of mediators is hardly surprising. Furthermore, it is generally agreed that a motivating force behind the growth of mediation was the search for alternatives to the court system. Thus, lawyers who knew first-hand the problems of the legal system led the effort to provide alternatives to that system — and one of the primary alternatives was mediation.

The nonattorney mediators whom we interviewed were engaged in a variety of occupations at the time they first became involved in mediation. Three were graduate students, two were professors in fields other than law, and nine (including some of the lawyers) had labor backgrounds. Others included a peace/civil rights activist, an ombudsman, an Outward Bound program leader, a family therapist, a youth gang worker, and a conscientious objector performing alternate service at a student housing project in Belgium.

What Drew Them to Mediation?

Out with the Adversaries, in with the Collaborators and Peacemakers

The study participants' attraction to mediation came from a variety of sources. For those with experience in the adversarial approach used in courts and arbitration, the contrasting collaborative approach of mediation was compelling. Perhaps the best-known example of someone whose experience with the adversarial system led him to embrace mediation is that of Frank Sander, who was at the time a Harvard Law School professor of family law. During a sabbatical in Sweden in 1975, Sander "began to reflect on my experiences in dispute resolution in the U.S., noting that the courts often made things worse in divorce cases, but that labor arbitration worked pretty well to solve a variety of problems." Sander wrote down some of his ideas "about ways of resolving various disputes and sent them off to some of my colleagues at Harvard Law School for comment."

These ideas ultimately led to his famous article, "Varieties of Dispute Processing," which he presented at the 1976 Pound Conference (F.R.D. 1976), and which many consider to be the birth of the mediation movement. "[T]here's something magic about [mediation] that grabs

people . . .," Sander told us. "[W]hen people get into mediation, in many cases . . . they're subsumed . . . in the warmness of mediation, and the potential of the process to get [to a resolution] more amiably and more quickly."

Collaboration also attracted Craig McEwen, who told us that he saw mediation as "another kind of collaboration as contrasted with the more coercive feel of court decision-making." For Carrie Menkel-Meadow, it was her experience as a Legal Aid lawyer that led her to mediation. "[W]inning the case didn't solve the problem . . . ," she told us. "I would win a lawsuit and the next day the welfare department would change the regulation. So I was more interested in solving legal problems than winning lawsuits. And I thought mediation was a better way to do that."

Because arbitration, like litigation, is an adjudicative process, some of us with experience as arbitrators were drawn to mediation for reasons similar to those expressed by Menkel-Meadow. Thus, Steve Goldberg said:

> I had been doing an awful lot of arbitration in the coal industry, and I was making plenty of money, so that was fine. But I'd go to the same coal mine time after time, and essentially arbitrate the same dispute — different people, but essentially the same dispute, and I became very frustrated that I was deciding cases, but not solving problems.

Labor arbitrator Marcia Greenbaum told us that she found mediation to be a "more logical and beneficial way to resolve disputes, in terms of catharsis, cost, and outcome." And religious traditions of peacemaking, in particular those of the Society of Friends (Quaker), Mennonites, and Buddhists, played a role for several mediators, among them Gail Bingham, David Hoffman, Jean Paul Lederach, and Christopher Moore.

Intellectual Challenges

Another frequently mentioned reason for being attracted to mediation was its intellectual challenge — could the mediator assist disputing parties to find a mutually acceptable resolution of their dispute that they had been unable to find on their own? For example, what drew Margaret Shaw to mediation "was the challenge and satisfaction of really trying to understand what mattered to the people you had in front of you, figuring out what the particular Gordian knot in their situation was, and helping them see and untangle that. It's both intellectually and interpersonally satisfying."

Similarly, Linda Singer said that she was initially not very interested in mediation, but "became more and more intrigued intellectually. . . . I was really turned on by the ability to get people who had been fighting to come up with solutions. And by my own ability to figure out what was important to people and help them get at least some of it. It really was magical."

Social and Political Change

Still others told us that they were attracted to mediation because they saw in its collaborative approach to decision making a means of bringing about social and political change. In addition to citing his Quaker background as an influence, Christopher Moore told us that mediation seemed to reflect the principles of both Martin Luther King and Mahatma Ghandi. "I was concerned," he said, "about how we could have significant social change, and have it done in a manner that was peaceful, respectful, and did minimal harm."

Bernard Mayer also saw mediation as a way to further his personal and political goal of "working with people on some very difficult issues in their individual and collective lives, and doing it in a way that was fundamentally using an empowerment model. . . . We were trying to give some real meaning to the concept that was thrown around a lot in the sixties of participatory democracy — what that really looked like in practice . . . but that also has an interpersonal manifestation."

In their interviews with us, William Ury and Susan Carpenter took the broadest view of all concerning their attraction to mediation as a means of achieving social and political goals. They saw collaborative decision making fostered by mediation as necessary for global survival.

"The conflict that most drew my attention," Ury explained, referring to the Cold War, "was the prospect of nuclear war that was the Sword of Damocles hanging over all of us. I never quite understood why it was worth threatening the whole human race for a conflict between the Soviet Union and the United States."

Susan Carpenter told us that in graduate school she had studied

> global survival issues, the interrelationship of population growth, resource depletion, and environmental degradation, and my big "a-ha" looking at these complex global issues was that there were good technical solutions to all those problems, and that the real difficulty, the hurdle for resolving them was not technical, but was procedural. There was no process that enabled these parties to come together and engage in a productive discussion that led to agreement. So . . . [I] began learning everything I could about consensus building.

Staying Involved with Mediation

Whatever drew them initially to mediation, once our respondents experienced it, they were captivated. Some were delighted at the constantly changing topics of the disputes in which they became involved; others enjoyed the opportunity to become involved in the lives of others. Nearly all commented on the pleasure involved in assisting participants in mediation to resolve their dispute, often a dispute that had become life consuming.

"You're helping people, you walk away, and you feel good about it," Marvin Johnson told us, and Michael Lewis said, "I really enjoy helping people put their own personal jigsaw puzzle together in a way that makes sense to them."

David Hoffman appreciates the opportunity that mediation affords people to share stories that have no place in a courtroom. "For some [people] . . . who have been enmeshed in conflict for years," he said, "the opportunity to . . . talk about their issues . . . and speak from the heart about what this conflict means to them is an opportunity to be heard in a way that the courts don't provide. They always have a story, and in court there's always going to be some legal objection to their telling part of it. But I'm interested in hearing all aspects of it, and it doesn't matter if some of it's hearsay."

The mediators also described the excitement they feel when, in the course of a mediation, the likely resolution of a hard-fought conflict becomes apparent. Peter Adler made this point vividly. "When something happens and people gain clarity into something that was one-dimensional for them, and then all of a sudden they can see that there's more dimensions than one, people start to get unstuck," he said. "I just love that. Yeah, and it's not about how much I made, it's not about the case, it's just something special . . . that's the million dollar moment for me."

The hope of bringing about social and political change that attracted some to mediation continues to keep them in the field. For Marcia Greenbaum "mediation is . . . a way to contribute to the social good, [by bringing] some peace to a workplace that might otherwise be less friendly or more hostile."

Howard Bellman took an even broader view of the societal value of mediation. "I'm not a philosopher, but I do think that the quality of life in my community, in my country, can be threatened by the inconvenience that comes out of disputing," he said. "On the other hand, disputing and making it inconvenient for other people is evidence that democracy is here, because we're free to annoy each other. . . . And so I believe that to the extent that we can invent methods for managing disputing that don't disallow conflicting points of view, society and the body politic are the beneficiaries."

William Ury's mission hasn't changed. "I'm still trying to stop people from killing each other" he told us.

For Zena Zumeta, who had been a labor negotiator doing "things that . . . were really tough, hard-hitting, manipulative, and fun," mediation permitted her to be the same person professionally as personally. Mediation, she told us, enabled her to "look at connections between people and to make use of those in the sense of having people understand that there were those connections, that relationships were important, to feel what a caring concern about people could do to help them change."

Witnessing Mediation Grow and Change

An Expanding and Institutionalized Field

All the mediators we spoke with agreed that today's mediation landscape bears little resemblance to what they saw when they began mediating. Most strikingly, the use of mediation has expanded dramatically.

"[M]ediation has become in many areas sort of the mainstream practice," Christopher Moore explained. "It's very, very common in family, it's common in public disputes, in hazardous waste management. It's really been dramatic if we look over, say, the last thirty-five years or so, when I think it really took off."

Peter Adler told us that when he started mediating,

> mediation was kind of a neat little idea, and the thought was that this would be very good for little problems on the courts' dockets — trees, dog poop on the sidewalk, all that kind of stuff, and certainly not anything serious. But, what we learned is that things that are "little" to some people are big to the people who might hold those problems. And we've learned that the processes, techniques, and strategies and values actually are quite pertinent to huge numbers of different sorts of problems and conflicts and disputes and different types of litigation.

Impact on the Legal System

Perhaps the most significant change our respondents noted is the extent to which mediation has become institutionalized in the judicial system. Nearly all the mediators who spoke to us recognized that the judicial embrace of mediation is a major reason for its increased use, which they consider to be a positive development. They were also pleased that lawyers have been able to make productive use of mediation.

"Lawyers have developed some serious skills in dealing with mediators," Francis McGovern told us. "They are far more sophisticated in the way in which they broach issues, they'll suggest the negotiation path, they will pick mediators based upon the mediator's style that they think would be most appropriate for a given case. So they play the mediator, use the mediator, turn the mediator to their advantage in an adversarial proceeding. That to me is a relatively new phenomenon."

Institutionalization is not viewed as an unalloyed good, however Judicially ordered or strongly encouraged mediation has led those lawyers who are not interested in settlement to use mediation for other purposes. "Sometimes [the lawyers] are not interested in a settlement at all, at least that day," Eric Green explained. "It's just a step they have to go through. . . . [Too often] people engage in mediation with the idea that it's just going to be a protracted-type process that's going to give them more time in the litigation to either postpone the day of reckoning, or gain more information . . . rather than really rolling up their sleeves and working hard to find a settlement."

Peter Adler agreed. "Lawyers learn how to game any system pretty fast. I've heard lawyers say 'we'll go through this bullshit, but we won't put on much of a case, because we really want to get to the big show.' "

A Profession Dominated by Lawyers and Judges

Judicial encouragement of mediation has vastly increased the supply of mediation-ready disputes that have at least some relation to the legal system. This, in turn, has enabled substantial numbers of lawyers and retired judges to enter the mediation marketplace as providers of mediation. Indeed, there was a general sense among the mediators we interviewed that lawyers, including retired judges, now dominate the mediator market.

Some respondents expressed concern that while the first generation of mediators was motivated primarily by the intellectual challenge and emotional satisfaction of aiding disputing parties to resolve their disputes, some of the more recent entrants view mediation differently. "I think for many of them," said Bill Hartgering, "it's . . . something for them to do when they retire. And they can be very good at it, but . . . I don't think that [they] would see this as a calling. The whole alternative dispute resolution movement was a different way of looking at resolving disputes, and we've lost a lot of that."

Some participants also expressed the concern that a mediator who is primarily interested in mediation for financial reasons may be tempted to engage in ethically dubious practices in an effort to increase his/her caseload and income (see Brazil 2007).[1]

"Suppose 70 percent of your income comes from doing cases for the insurance company [in a case that you are mediating]? Do you have an obligation to disclose that to the other party?" asked Josh Stulberg. "The widespread reported practice was 'it's none of that party's damn business that 70 percent of my income comes from the other party.' I found that stunning, and frankly, I think it's wrong not to require disclosure."

Loud Debates over Styles and Approaches

As the use of mediation has expanded, the amount of research and writing devoted to mediation has also grown. Howard Bellman noted that when he began mediating, apart from one book (Simkin 1971) and one "obscure" law review article (Fuller 1971), "there wasn't any literature in the field. . . . During the span of my career, mediation went from being a little counterculture outside of labor relations to being blessed by the courts, the law schools, and other . . . bastions of the establishment, and being incorporated into the culture. And that has allowed for legitimization of this process, which has allowed us to [be] smarter about it — examining it through research, judging it, and so on."

Gail Bingham made a similar point: "We have established a more robust and rigorous pursuit of research and reflection in this field. Reflective practice is a long held value, but it has become more professional, with

academics from many disciplines who ask interesting questions and bring the rigor of intellectual thought to these kind of practices."

Some respondents lamented, however, that the growth in research and writing has encouraged unproductive debate among mediators and scholars concerning the "correct" approach to mediation. Homer LaRue's comment was typical of many: "One of the things that I've become increasingly disturbed about is that we've gotten into too much debate between evaluative and facilitative mediation, transformative. Any mature mediator will tell you that during the course of a single mediation, he or she might use techniques from any of these approaches. . . . We're losing some of the art by trying to make it doctrinaire and rule-bound."

Training and Standards

The mediators we spoke with also expressed widespread concern about the lack of quality control, both of mediators and trainers. "We train too many people," Howard Bellman argued, "we don't train them well, we don't monitor them well, we don't have any sort of an effective oversight, all that stuff that we always talk about."

Carrie Menkel-Meadow worried that "everyone and their mother now thinks they can mediate. So I'm very concerned about quality. I'm not one to say that we all need licenses, but I see a lot of . . . crappy work out there . . . a lot of people just want to do this . . . and they say 'I'm a mediator.' And there's virtually no official quality control other than the market."

Several mediators also told us that they worry about the growth of mediation models that focus primarily on the legal strengths and weaknesses of each party's position and on the dollar amount that should resolve the dispute.

"[C]ommercial disputes often are just 'how much money?' or 'how little money?' " said Michael Lewis. "Occasionally you get a commercial dispute in which there is a little more nuance, and people are trying to do things, or are willing at least to think about doing things differently. But in the commercial world, I think, there's much less ability to help people do things differently."

[I]n the early days," observed Margaret Shaw, "lawyers who brought cases into mediation were more open to thinking creatively. Now many simply want us to persuade the other side that they're wrong."

Leonard Riskin told us the following story:

> About three years ago, I had a case between two small businesses, so the owners were there. . . . The lawyers — very experienced and articulate men in their mid-fifties — would not allow their clients to speak in the joint session. I tried to explain that having the clients speak could be really helpful, yet the lawyers absolutely refused, and one of them said "I have never attended a mediation in which the clients spoke in the joint session."

> . . . The irony was that the two clients were still friends, and during the breaks, they were talking to each other in the hall. I started mentioning this incident to mediators in other states, and they told me they see this quite a lot. That certainly undercuts all the aspirational promises of mediation, such as bringing people together and [promoting] self-determination.

Gary Friedman also told us that he thinks some of the original promise of mediation has been compromised. "For me mediation was really about flipping the basic professional assumption that we knew better than people in a dispute about what they should do with their lives," he explained. "The people that came to mediation in the beginning really got that. . . . [O]ver time that changed because lawyers got involved, and said, 'Well, this is a settlement conference, we know how to do this.' "

A number of mediators expressed concern that the field has become too specialized and routinized. Christopher Moore said that "because of the specialization dynamic, people get locked into one area of practice. One of the most wonderful things about my practice has been the cross-fertilization of ideas. You can take an insight from doing a family case . . . or any interpersonal case, and apply it to big public or international conflicts. . . . I worry that the specialization may prevent some of the great cross-pollination of ideas. "

Leonard Riskin described visiting a mediation firm whose members had "created a template, in which mediations began with a joint session and then stayed in caucuses for the remainder of the day. That was just the way it was. And I think that that format is more and more common. It bothers me to see this degree of inattention to what's going on in an individual case."

Variations in Practice Areas

Several mediators noted that concerns can vary according to practice area. For example, Steve Goldberg said that he found an obsession with financial settlements to be less of a concern in labor–management mediation than in business/commercial disputes.

> [I]t's a whole lot easier for me to get the parties to focus on interests in labor-management cases than it is in most business cases — unless there is an on-going relationship between the disputing parties in the business case, like there is in a union–management situation. . . . Whether or not a mediation will be at least partly interest-based is influenced primarily by whether or not there is a mutual interest in the relationship.

Howard Bellman agreed that the parties to labor–management disputes are more open to innovative problem solving because of their "level of recognition of the value of their underlying relationship.

David Hoffman told us that parties in family cases:

> Look to the mediator to help them identify options on the issues with which they are unfamiliar, such as taxes. The parties in these cases seem to be somewhat less interested than the parties in commercial cases in knowing what a court would do — but they do want to know the ballpark within which a judge might decide such issues as asset division and the amount of alimony or child support. They are also guided by their own internal sense of fairness, even if that differs from what a judge might decide. In the commercial cases, the primary value that the parties and counsel are seeking in a mediator is to help them price the case, and also to help them do the choreography of what Margaret [Shaw] aptly calls the "dance for dollars." They are often looking for clues from the mediator as to the other side's likely response to an offer.

The mediators who provide services in public policy matters — often related to environmental issues — were the most positive about the opportunity for creativity in their work. According to Susan Carpenter, "The range of creativity can be much greater in the public policy area . . . particularly if you are able to work upstream on issues, as so many government agencies are doing today. . . . Many agencies are shifting toward a more collaborative practice, . . . and they want a mediator to come in and help them design a conversation so that issues and perhaps potential outcomes can be outlined up front — it's more conflict prevention than intervening."

"I've mediated disputes," she continued, "where everybody's hot under the collar, people claiming 'my right as a citizen is involved.' People are battling with arguments over values. . . . People rarely say, 'pay me this much and I'll go away.' . . . What some will say is, 'If we can all work this out, it will probably be better than either a court or agency decision.' "

Lawrence Susskind told us that he thinks the opportunities to be more creative as a public policy dispute mediator arise partly from the fact that there are more issues involved in such conflicts, in comparison to typical commercial disputes, which creates greater opportunity for creative trade-offs, and that mediation is also less a matter of routine in public policy matters.

"In the public policy field, it's more unusual," he explained. "People might participate in one of these things and that's it. Also, the people that participate in public disputes usually represent some other constituency. They are a spokesperson for a stakeholder group rather than just for themselves, and I think that that causes them to . . . take their responsibility of bringing something back for folks very seriously. And I think it leads them to work harder to really generate a resolution, not just go through the motions."

Howard Bellman agreed that there is greater likelihood of creative problem solving in public policy matters than in business/commercial matters, even if the mediator does not become involved until the matter has evolved into litigation before a court or administrative agency. He told us that, "By the time I get involved, it's not unusual that there's some kind of enforcement effort underway — and thus the matter is subject to the kind of lawyer-like depictions that the commercial cases have. Yet the remedies are such that there's a lot of room for creativity. . . . One situation that I've had experience with is when the remedy has to do with the cleaning up of something, let's say a river. There's an infinite variety of ways to approach the cleaning up of a river. . . . So there's just more . . . room for creativity."

The Future of Mediation

We asked these mediators to envision the future of mediation over the next ten to fifteen years. Their predictions were remarkably similar — their general sense was that the type of mediation that takes place in the shadow of the courts is likely to increase and that such mediation is likely to become even more routinized than it is at present. "There's no question in my mind that it's still growing," said Carrie Menkel-Meadow, "and there will be more of it. Litigation is getting even more expensive . . . so all the quantitative reasons will push it."

"I think it will continue to broaden in its application and become more common, probably become more routinized and rule-based," said Eric Green. Craig McEwen agreed. "What I worry about most," he said, ". . . is how the court-related mediation is going to evolve, if at all. . . . I fear that in economic times of retrenchment, we will see more routinized and narrow case processing called mediation."

Several mediators told us they expect to see particularly substantial growth in the use of mediation to assist in the resolution of public issues, an area where mediators such as McEwen see greater prospects for creativity. "I think . . . there will continue to be new opportunities for people to do creative work in the public sector," he said.

> Bernard Mayer expressed a similar view. "There will be two or three fundamentally different approaches," he predicted, "that will be more and more differentiated and unfortunately isolated from each other. First, there's the high-level approach to do high-level cases, which I think will be increasingly dominated by the legal profession and increasingly rights-based. . . . A second level will be court-related mediation work by people who are paid a lot less, though the work they do is very skillful and demanding, but that will be primarily about helping the court deal with its burdens. . . . And then I think there will be a third level of people trying to deal with more policy issues and more community-based problems. And I think this is where some of the most creative work will continue to be done."

Those who practice in the public policy context draw a distinction between their work and the work of those who practice in the shadow of the courts. As Chris Carlson put it, the work of mediators in the public sector involves "engaging citizens in policy making and implementation," and "getting people from across sectors working together on tough issues, and dealing with the conflicts that naturally arise in that process."

In predicting growth in public policy mediation, several mediators cited President Barack Obama's January 26, 2009 Executive Order providing that government should be transparent, participatory, and collaborative (see Federal Register, Volume 74, Number 15). Citing that order as well as a subsequent Presidential Memo on Regulatory Review (Federal Register, Volume 74, Number 21), Howard Gadlin commented that "both memos . . . speak to opportunities [for collaborative conflict management] in the areas of public policy and give a feel for the tremendous amount of energy and activity going on in . . . the federal government these days."

Linda Singer agreed. "We have," she said, "a president who is pushing conflict resolution. . . . On my good days, I think the government will use mediation more, both fund more community mediation and use mediators more in doing their work. If I were younger and wanted an exciting new project I'd look at legislatures . . . for mediating new programs. I'd look at mediating a new health program."

Josh Stulberg expressed similar hopes.

> [M]y hope would be we're going to get involved one way or another in public education policy, health care, energy. It strikes me that those areas are extraordinarily exciting in terms of trying to play a facilitative, leadership role in helping to both shape and implement new initiatives in those areas. Whatever health care looks like in fifteen years, I'm sure it's still going to involve people who believe they ought to get a lot of things that somebody else doesn't want to pay for. So there's a lot of work to do. I don't know what the context will look like, but to me, the exciting possibilities are taking a more prominent visible role in shaping those discussions.

Alongside these more hopeful predictions, some mediators expressed caution. "Obama's whole approach is so much what we're trying to teach," said Frank Sander. "But there are so many roadblocks that one can imagine. . . . It's very hard to get a sense of whether he'll be able to use the magic of mediation to solve some of these difficult problems and show people the potential of it."

Interestingly, many of the mediators who work in the public policy area predicted that growth in the facilitation of collaborative processes is likely to be carried out by organizational insiders, rather than outside intervenors. "I think [mediation] will have a strong presence, but it may

not be what we're expecting," explained Susan Carpenter. "I don't think there will necessarily be more jobs for mediators. I think there will be more training of staff people to mediate or use the skills of mediation internally. . . . [In today's economy], the resources available for hiring a facilitator are going to become less just as the interest in using the tools of mediation increases. So what agencies are interested in is training people internally to be effective problem solvers both within their agency and with their external public groups."

Peter Adler gave us an example of what Carpenter described:

> The U.S. Forest Service has set up a whole series of collaboration initiatives that utilize a so-called mediator to do the same things we do, but their rules are somewhat different and their roles are somewhat different, and they have very little interaction with other mediators. . . . They don't know anything about our journals, our language, our jargon, they don't know what a BATNA [best alternative to a negotiated agreement] is, and they may not understand the intellectual distinction between interests and positions, but they get it. They get this stuff, and they do it. They do it all the time. So what I think is happening is that the ideas themselves that underlie the premises of mediation will find lots and lots of traction in lots and lots of places. And it may not be called mediation, it may be called lots of other things . . . but they're moving along and taking the same ideas and the same fundaments and deploying those ideas in very interesting ways.

Lawrence Susskind provided another example. At MIT, where he is on the faculty of urban studies and planning, he created a joint program with the United States Geological Survey called the MIT-USGS Science Impact Collaborative or MUSIC, for short. "The tagline," he explained,

> is we're trying to harmonize science, policy and politics . . . by training a new kind of professional to be in the middle between all of them. . . . And I'm working with the Interior Department to create a new job classification called Science Impact Coordinator, and we're arguing that the agency needs to have people who can work in the interface between the scientific part of what the agency's doing and the advocates in the community and the policy makers who will ultimately adjudicate what happens. And these are agency positions for people who can be credible as neutrals.

"So if it's true," Susskind continued, "that statements from the Obama administration represent a different level of government commitment to collaborative processes, then maybe there's a new set of mediation roles for people within traditional institutions, not just for free-standing neutrals."

Other Interview-Based Mediator Studies

We are aware of two other studies based upon interviews with practicing mediators: Deborah Kolb's (1994) *When Talk Works: Profiles of Mediators*, and Marian Roberts's (2007) study of British mediators, *Developing the Craft of Mediation: Reflections on Theory and Practice*. Both of those differ from ours in their focus on mediator styles and models, subjects that we did not explore. They are similar to our study, however, in their focus on mediators' attitudes toward their work.

For her book, Deborah Kolb and eleven colleagues conducted in-depth interviews with twelve mediators, three of whom were also among the group we interviewed. These interviews led Kolb to a conclusion about mediators' attitudes that is very different from ours. According to Kolb, it is a myth that mediation is a "helping" profession in which mediators can make a difference in peoples' lives. It is also a myth that the work is uplifting. Rather, Kolb concludes, the work of the mediator is lonely, emotionally draining, and stressful. She also reports that of those mediators who were in full-time practice at the start of her study, only one remained in full-time practice at the end.

The mediators in our study were considerably more enthusiastic about their work than were those studied by Kolb, reporting as reality what Kolb describes as myths. The reader will recall, for example, Michael Lewis's comment on his pleasure in "helping people put their own personal jigsaw puzzle together in a way that makes sense to them," Peter Adler's description of the excitement he feels when "people start to get unstuck. . . . That's the million dollar moment for me," and Marcia Greenbaum's view of mediation as a means to "provide justice in the workplace. [and] contribute to the social good." In further contrast to Kolb's study, nearly all the mediators who were in full-time practice at the start of our study have remained in full-time practice.

The differences between Kolb's findings and ours are notable, partly because, as noted, there was some overlap in the mediators we studied, and partly because the British mediators whom Marian Roberts studied were as enthusiastic about mediation as were the mediators in our study. According to Roberts, they were "curious about their work, dedicated, fascinated, loving and even obsessed by what they are doing."

Perhaps the difference can be attributed to the fact that Kolb's study was carried out in the early 1990s, while the Roberts study and our study took place thirteen and fifteen years later, respectively. Some support for this view lies in Kolb's attribution of part of the stress reported by her mediators to factors that, while still present to some degree, were considerably more prevalent in the early 1990s, such as a greater difficulty obtaining clients (prior to the widespread institutionalization of mediation), the fact that mediation was at the time, "an emerging discipline in which there

is little consensus on major aspects of practice" (Kolb 1994: 487), and the absence of consensus about "what a mediator should be trained to know and do, or, indeed, whether any training beyond some kind of generic education in negotiation and mediation is necessary" (Kolb 1994: 487).[2] Whatever the explanation, the mediators interviewed in both our study and the Roberts study reported a continuing enthusiasm for their work wholly at odds with Kolb's finding to the contrary.

Conclusion

We find many things striking about our interviews with these "founders." One is the genuine wonderment expressed by so many at having somewhat serendipitously wandered into work that "sang" to them, and that now, some forty years later, has truly become formalized into a "field." Another is their sense of privilege in witnessing, at this juncture in time, that field's tremendous growth and institutionalization.

We found an idealism, if not from time to time a bit of dreaminess, among these early mediators, including a determination to change the culture of disputing. Mediation is for many a "calling," a part of a larger cause or socially valuable enterprise. These individuals' statements about what drew them to mediation convey their excitement and satisfaction in finding what they came to consider their life's work. And they are justly proud of their writings, teachings, and program designs, which have contributed to people seeing and doing things differently.

On the other hand, another common theme that emerged is questioning and concern about where the field of mediation is headed. To some degree, at least with respect to the mediation of cases in the shadow of litigation, practitioners have some real concerns about the effects of institutionalization. Will only lawyers have credibility in handling these cases, when alternative dispute resolution (ADR) initially attracted individuals from a broad variety of backgrounds? Is mediation in these kinds of cases just about money, with creative resolutions giving way to a more prosaic kind of horse-trading over numbers? And will clients choose only mediators with subject-matter expertise, or mediators who are only facilitative, only evaluative, or only transformative, as if good mediators are not facile in more than one area? Of equal concern is a perceived lack of quality control in the field, among trainers and mediators alike.

Lest this group of founders be dismissed as aging curmudgeons, they also expressed excitement about the kinds of neutral work being done outside the litigation context, and identify green shoots of hope in the rhetoric of the relatively new administration of Barack Obama. They take heart, for example, in watching Obama speak, act, and model ways of behaving in an interest-based, collaborative manner. And they point to new work being done within institutions and in the public policy arena. Josh Stulberg, for example, talks about "playing a facilitative leadership role in

helping both to shape and implement new initiatives" in the areas of public education policy, health care, and energy. Peter Adler talks about the U.S. Forest Service "setting up a whole series of collaboration initiatives to utilize a so-called mediator to do the same things we do," and Lawrence Susskind talks about "training a new kind of professional to be in the middle between law, science, and politics."

These kinds of initiatives and ideas offer a great deal of promise for the generations of mediators and disputants who follow. "Don't give up your day job" need no longer be the proverbial advice to new mediators. While, except for retired judges, becoming established as a mediator takes considerable time, it is now possible to make a very good living mediating cases "in the shadow of the law." Furthermore, opportunities increasingly abound for using collaborative processes in state governments and legislatures, in the health-care arena, and in traditional institutions. Thus, while the efforts of the founder generation may have led to the institutionalization of mediation, at least in the shadow of the law, for those who follow, the field may offer a promise with a different vibrancy, and with the potential to transform the culture of disputing in a variety of different contexts.[3]

NOTES

We acknowledge with great appreciation Amy Glass, our friend and fellow mediator, whose questions posed at our "Senior Mediator's Group" in 2008 sparked and informed the idea for this article.

1. For a perspective on this issue that is slightly different from that expressed by Brazil, see Goldberg and Shaw (2009).

2. Compare Susan Carpenter's comparison of mediation in 1976 to what she sees today: "It's changed so dramatically. I think back then it was totally experimental. . . . [T]here was a lot of discussion about which techniques worked, which were legitimate. We talked about when to apply the tools. Do you wait for deadlock? And is it appropriate for a mediator to do things that don't necessarily lead to agreement? All of that has been worked through."

3. The "founders" advice to those currently considering a career in mediation is set out in Shaw and Goldberg (2010).

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