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“Mediation Goes Mainstream”—Taking The Conference Theme Challenge¹

Joseph P. Folger

I have come to realize that I am getting old. In a couple short years, I will have been working in the field of mediation for thirty years. I became involved in the early 1970's when a friend of mine asked me to join the Center for Conflict Resolution in Madison, Wisconsin. I was a graduate student in Communications at the time, but I did a great deal of practitioner work at the Center before I ever studied conflict processes and mediation as a research scholar. At heart, I am a conflict practitioner who has had the privilege in my academic role to be able to study and develop mediation and conflict resolution work.

Having been involved in the field for quite some time, I have attended many mediation and conflict conferences. Over the past five years alone, I have spoken at about twenty conferences in five different countries. Some of these conferences were national, others were state or local meetings. State conferences like this one, the Southern California Mediators Association's meeting, are very important to the dispute resolution field. They provide the backbone of mediation practices across the United States by creating networking opportunities, initiating policy development, and advancing learning for practitioners. I want to congratulate and thank you for the work that you do in organizing these events and in providing a wide range of support to mediation practice in your state.

What's in A Theme?

Although mediation conferences tend to be quite different in many respects, I have noticed that they all share one thing in common. There is a widespread practice of ignoring the theme of the conference during the conference itself. I have thought about this and have tried to figure out why. I doubt whether it is intentional. Would people actually pay a conference fee and attend just to try to defy the conference planners? This seems somewhat unlikely — although stranger things have happened at some conferences. It is more likely, however, to be unintentional — people simply ignore the fact that the conference organizers have put a lot of thought into choosing a

1. This article has been taken from the keynote address given at the SCMA conference.

timely or provocative theme. Attendees barely notice that the theme is woven through break-out sessions and discussion topics. Participants tend to ignore conference themes the way vegetarians ignore lima beans, hairdressers ignore client requests, hotel guests ignore tipping maids, or most of us ignore statistical evidence.

I think today offers a perfect and much needed opportunity to change this trend. I stand here at the beginning of this conference on a mission. I want to be the Calvin Klein of the mediation field. I want to have us take note of conference themes the way Calvin made us take note of underwear. I am urging that you take the theme of this conference — “Mediation Goes Mainstream” — seriously throughout this meeting. I’d ask that you notice it, think about it, and above all discuss it with each other and the presenters throughout the sessions. Why is it important to focus on this theme? There are several pressing reasons.

1. Different Visions of “Mediation Goes Mainstream”

Looking closely at this conference’s theme is important because the phrase “Mediation Goes Mainstream” has very different meanings and significance to various people at this conference, as it does to people in the field at large. It is in some ways a litmus test for what people expect mediation to be. In preparation for this keynote address, I talked briefly with three people who are on the organizing committee for this conference, and were involved in choosing the theme for this event. I asked each one, “What does this theme mean to you?” and “Why was it chosen?” Their responses were enlightening because of the differences they revealed.

Two of the people said that “Mediation Goes Mainstream” referred to how mediation has been institutionalized as a process within the courts and other dispute resolution settings. In other words, how it has been mainstreamed into dispute resolution forums. They said that having this theme at this conference is a celebration of the fact that the institutionalization of mediation has occurred to a significant extent in the field at large as well as in Southern California. It is a testament to how attorneys and judges now know about mediation and are willing to refer a substantial number of cases to mediation programs and practitioners in California and elsewhere. It celebrates the fairly widespread establishment of court-based programs that appear to be here to stay.

The third person I asked about the theme had a very different view of its meaning and significance. For her, “Mediation Goes Mainstream” meant finding the variety of ways that mediation, its tenants and skills, could be applied to everyday life for a multitude of people. Mediation has the potential to change people’s approaches from this perspective. Going mainstream from

this perspective refers to the broader upstream impact that mediation can have on a community, organization or society. It places an emphasis on the process and communication skills that can be the cornerstone of mediation wherever it is practiced.

These are two very different visions of what "Mediation Goes Mainstream" can and should mean. The former marks the current state of practice and the establishment of on-going programs. The latter suggests that mediation is a process whose core skills and impact can extend beyond the institutional settings in which it is currently practiced. Although these are not the only two interpretations of "Mediation Goes Mainstream," they're visions deeply rooted in the field at large.

Looking closely at the different visions of what going mainstream means is important because these differences reveal deeper divides among us about what we think mediation should be as a process and as a dispute resolution service. There are many people at this conference and in the mediation field who believe that the institutionalization of mediation within the courts and other settings have changed the mediation process so radically that it has lost its core; it has diminished its defining, "alternative" characteristics of the process. In this view, the very process of mainstreaming has tended to turn mediation into a forum of dispute resolution that is not all that different from what it is intended to replace, threatening its identity as a non-adjudicative process (Bush forthcoming 2003). The first vision of going mainstream has made the second vision nearly impossible.

There is ample evidence to suggest that taking mediation mainstream has proved threatening to what many believe to be the core values of the process (Bush and Folger 1994; Folger 2001; and Bush forthcoming 2003). Allow me to give you one vivid example of the possible effects of mainstreaming from a study that some colleagues and I have recently completed. The Institute for the Study of Conflict Transformation was asked to conduct an in-depth benchmarking study of court-annexed mediation programs in Florida (Della Noce, Folger, and Antes forthcoming 2003). At each court studied, we interviewed all key stakeholders of the programs, including judges, attorneys, clients, mediators and program directors. In one of the programs involving a family mediation, five judges made case referrals to private mediators in the local community. Each of these judges made referrals to mediators based on their assumptions about the quality of service mediators could provide. As we interviewed the judges in this program, four of the five of them said that they

referred their toughest cases to one particular mediator who was known to be effective in settling these cases. An attorney who frequently represented clients in divorces at the court told us in her interview that she had filed a complaint against a mediator who the judges relied upon heavily for referrals. As it turned out, the mediator who had a complaint filed against her by the attorney was the same mediator the four judges referred many of their cases to. The attorney explained that she filed a complaint against this mediator because of the way the mediator conducted her practice. The mediator never allowed the parties in the same room together, she swore at the parties constantly and she told the parties that she knew the judge personally and what he would do if the case went in front of him. Despite her controversial approach to mediation, this mediator was highly successful in the eyes of the judges who referred a large number of cases to her. The judges valued her mediation because of the high settlement rates she achieved.

In one sense, this type of practice is the direct result of mainstreaming mediation. The institutions that secure mediation practice make demands on the process and, as a result, shape what it becomes. It is the context in which mediation is practiced that significantly influences practice and molds the process in its own adjudicative image.

This effect of mainstreaming mediation was also apparent in the philosophy of one judge at the same mediation program who had a clear sense of why he referred cases to some mediators and not others. He said that over the past several years he had kept the “batting averages” for the list of private practice mediators that were available for case referrals. Batting averages were the rates of agreement that the mediators achieved. This judge indicated that he would not refer cases to a mediator if the mediator did not have a batting average of at least 90%. He held a strong conviction that there is no point in referring cases to mediators who “just sit there and be neutral.” For this judge, neutrality did not support the creation of settlements, and achieving settlements is the major — perhaps only — goal of the process. If cases were not removed from his docket by mediators, then there was no point in referring cases to them. Private mediators were “out of business” if they did not meet the demands of institutionalization within this court-based program.

The evolution of mediation practice has been heavily influenced by the mainstreaming route it has taken. Being highly directive and evaluative in the service of reaching settlements is now a widely practiced form of mediation especially in settings where mediation has been embedded in institutions that demand efficiency at all costs. It is openly discussed and defended, even though it is rarely taught in standard mediation trainings. More importantly, it is supported, indeed demanded, by court systems that have brought mediation into the mainstream. For some, however, it is a form of practice that rede-

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defines the essence of what mediation is, and what makes it an alternative dispute resolution process. The issue of "what mediation is" is deeply embedded in the theme of how mediation has gone mainstream. This is why consideration of this theme is so crucial at this point in the development of the field.

2. Valuing Mediation: What do we Want?

"Mediation Goes Mainstream" is a theme that prompts us to look not only at our sense of what mediation is, but what we value about it and what we want to accomplish by doing it. It leads us to ask, what should the cumulative impact of our work be? If 10,000 mediations are conducted in California over the next three months, what difference should it make? Whom should it affect and how?

The debate about what the value of mediation is and whether mediation should go mainstream goes back to the 1970's. Some of the earliest pioneers who started the first community mediation centers in this and other states, made strong arguments against affiliating any mediation program with the courts. They saw the potential impact that courts and other adversarial institutions could have on programs and the practices that are placed within them. For them, mediation was about process and human connection; how people interact in conflict and about the sense of community that can be built when conflict interactions are addressed in a truly non-adversarial way. Their decision to shun affiliation with the courts was based on a desire to protect these core values. They foresaw the potential impact that institutionalization could have on practice.

But there are many other views of what the value of mediation is. There are those who believe that mediation's primary value is its ability to efficiently dispose of cases. For others it is the delivery of justice and fair settlements. For some it is a place to realign power between unequal parties. For still others it allows for and supports the transformation of the parties' communication. There are huge differences in what people within this field believe the core value of mediation should be (Bush and Folger 1994; Della Noce, Bush and Folger 2003; and Bush forthcoming 2003).

It is easy for us to think that these diverse values can be easily reconciled, or that we as a field can easily let "a thousand flowers bloom." But the reality is that mediators and program directors make decisions that give clear priority to some values and not others (Della Noce, Folger and Antes forthcoming 2003). The forms of practice we are allowed to engage in are

often determined by the policies and program decisions where we practice. These expectations lead to difficult choices and ethical dilemmas for most practitioners. When a program provides thirty minutes for a small claims mediation, do we do it? When a school administrator wants a peer mediation program put in place in order to “keeps the kids in line” do we set one up? When a court-based small claims program uses a “boiler plate” agreement form that shapes what settlements must look like in all cases, do we restrict ourselves and the disputants to using that form? When a court-based family mediation program only makes referrals to practitioners who have 90% agreement rates, do we change our practice to meet the threshold and get the work? Our answers to these questions will depend on what we value about mediation and what we think it should deliver in the short and long term.

The theme “Mediation Goes Mainstream” allows us to seriously consider what our underlying values are and what choices support or undercut those values. This is a key issue for all practitioners to address and it can be front and center in the discussions we have at this conference.

3. Discussing Ideological Differences within the Mediation Field

The third reason we need to take the theme of this conference seriously is based on the need for discussion and debate about the core differences I have just outlined. As a field, we need to find a way to deal with our differences and to communicate clearly about them. This conference encourages us to engage each other about our views of mediation and the premises that underlay those views. Such careful examination and discussion does not happen often.

As a field, we do not do conflict resolution well when it comes to our own issues. The field tends to be conflict adverse. Practitioners and theorists frequently have not found a way to conduct the tough conversations that would model the very principles we espouse for our mediation clients. There is strong hesitation to explore the deep-rooted differences that exist among us (Della Noce, Bush and Folger forthcoming 2003). In some ways, this is understandable. Given that practitioners have very different conceptions of what productive conflict is and how to support it in mediation, having productive conflict interaction among us will inevitably be difficult. The differences in the way we conceive of mediation, its values, goals, and what makes it productive, makes dialogue about those differences a potentially threatening enterprise. The very grounds on which to have the difficult conversations seem questionable because of the underlying differences we hold.

Instead of engaging differences, we tend to want to believe no differences exist, or that the differences are insignificant. Despite the wide-ranging views of the nature and values of mediation, there is a strong desire in the

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field to believe mediation practice is essentially all the same. The field tends to ignore the great variances in practice that actually exist and tries to minimize it by attributing it to differences in style or personal taste. This willingness to ignore existing differences can be seen in the way research is conducted, policy is developed, and training is designed. There is little desire to fully acknowledge the real differences that do exist among the alternative forms of practice, and to articulate the ideological differences on which these alternatives are based. Finding common ground among them is often a rhetorical guise for not wanting to acknowledge the differences in practice that actually exist.

Leaders in the mediation field often interpret attempts to clarify differences and to articulate the implications and premises of alternative forms of practice as indictments of established training and practice protocols. Articulating differences is taken as a threat to choice rather than a clarification of it.

For the past ten years I have been working with a group of colleagues who have been developing and clarifying the transformative framework for mediation practice. The essence of this approach is that mediation allows for the possible transformation of the parties' communication. Through mediation, people can find new ways of interacting that allow them to make clearer and more confident decisions about whatever issues or concerns have arisen between them. In the transformative view, conflict is a crisis in human interaction. Productive third party work supports the parties in their efforts to move through this crisis to reach whatever outcomes they desire. This is the view that Baruch Bush and I articulated in *The Promise of Mediation*, and has been more fully developed in the work done with the US Postal Service REDRESS program and many other projects (Bush and Folger 1994; Folger and Bush 1994; Folger and Bush 1996; Antes, Folger & Della Noce 2001; Folger and Bush 2001; Antes and Saul forthcoming 2003). What has been interesting to me, and sometimes unsettling, is the way in which some sectors of the field have responded to our attempt to clarify and give shape to the transformative vision of practice, a vision that has been around since the ADR movement began. Although our efforts have been met with enormous support, they have also met deep resistance and strong efforts to silence and at times ridicule the articulation of this form of practice.

Quickly, here are two examples of such resistance. I was asked to speak at a conference a few years ago with the express purpose of "making peace with the field." This request was in actuality a request to move back from

the articulation of the differences in forms of practice, and to instead suggest that transformative mediation was not significantly different from other more directive, problem-solving forms of practice. This request came from a deep urge to address differences in the field by denying them. One way to dispel conflict is to assume that it does not exist.

I was also asked to be the keynote speaker at a national mediation conference and was told before the conference started that threatening letters had been sent from one of the members because I had been chosen to speak about transformative practice. Conference organizers advised me to enlist personal security while I was speaking. As stated earlier, in my experience, the conflict management field does not deal with conflict well.

Taking the Challenge

I am suggesting that the “Mediation Goes Mainstream” theme offers all of us a chance to both recognize that the field is at an ideological crossroads, and to find ways to think through what this means for each of us and our work. This ideological divide in the field is not one that is only relevant to certain areas of mediation practice. It is not that community mediation is behind one ideological vision of practice while family mediation is in another ideological camp. Rather, it is a horizontal split that cuts across almost all arenas in which mediation is practiced. Mediation practice is not all the same within any one arena of practice. There are different forms of victim-offender mediation, peer mediation, family and divorce mediation, as well as corporate, civil, an community practice. These differences within arenas of practice all stem from different and identifiable ideological commitments. If I had to make one prediction about the evolution of the field, it would be that the field will eventually split, not by arenas of practice, but by underlying ideological commitments of practitioners. Discussing these ideological differences today will help us to understand the roots of the divisions that exist among us.

The ideological crossroads the field faces can energize and enlighten us. It can offer clarity about alternative forms of practice as we look closely at our underlying assumptions about what we want mediation to be. But it requires that we face the challenge directly. We need to find a way to talk honestly about these differences, and to make clear choices about what we want mediation practice to be, even if it means that there is little common ground among various forms of practice. I encourage you to use this conference to look at the crossroads the field faces, and I invite you to have the difficult conversations with colleagues about these core issues. This is the “Mediation Goes Mainstream” challenge.

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