

Development of Mediation Practice in the United States

Jay Folberg

Resumen

En este artículo, el Decano Folberg describe el desarrollo de la mediación en los Estados Unidos. Hace décadas inició con experimentos tempranos llevados a cabo por cortes que buscaban reducir la carga de casos; y por programas comunitarios que buscaban proveer alternativas más baratas para quienes no podían pagar un abogado, o mejores alternativas para casos en los cuales la relación era un tema sensible, como divorcios o disputas laborales continuas. Hoy en día, la mediación es la principal manera de resolver disputas, y ha sido adoptada por todos los profesionales del Derecho. La Mediación es considerada una profesión en sí misma, proveyendo un servicio especializado para todas las áreas del Derecho, incluyendo casos comerciales altamente complejos. Este artículo ofrece una mirada al futuro del campo en nuestro país.

Palabras clave: Mediación, Historia, Estados Unidos, Profesión, Desarrollo, Futuro, Métodos Alternativos de Solución de Conflictos, Resolución de Disputas

Abstract

In this article Dean Folberg describes the evolution of mediation in the United States. Decades ago, it started with early experiments carried on by the courts to reduce caseloads; and by community based programs, to provide cheaper alternatives for people that could not afford a lawyer, or better alternatives for relationship sensitive cases as divorces or ongoing labor disputes. Today, it has become the main way to resolve disputes, and is embraced by all legal practitioners. Mediation is considered a profession in itself, providing a specialized service for all areas of the law, including highly complex commercial cases. This article provides a look into the future of the field in our country.

Former Dean and Professor Emeritus at the University of San Francisco School of Law. Coauthor of *Resolving Disputes; Theory, Practice and Law*, Aspen Publishers (2010), as well as other books on ADR. Mediator and arbitrator with JAMS and heads the JAMS Institute.

Key words: Mediation, History, United States, Profession, Development, Future, Alternative Dispute Resolution, Conflict Resolution

As interest in mediation increases in Ecuador, it may be helpful to know about the beginning of mediation practice in the United States and its evolution. Although mediation is now an important part of our legal culture in the US and used extensively to settle all types of legal claims, it required decades of experimentation and struggle before it was accepted as a better way to resolve disputes. Ecuador will find its own unique path to the use of mediation, but a look at the development of mediation in the US may help explain how and why mediation is now our dominant form of dispute resolution. This may also give a glimpse of the future in Ecuador, regardless of the path to get there.

Beginning in the 1960s the United States saw a flowering of interest in alternative forms of dispute resolution. The period was characterized by strife, conflict, and discontent on many fronts. The Vietnam War, civil rights struggles, student unrest, labor unrest, growing consumer awareness, challenges to gender roles, and protests against racial discrimination all produced distrust of the status quo and more demand for court redress. Legislation created many new causes of legal claims, reflecting society's lower tolerance for perceived wrongs. Conflicts that in the past might have been resolved by deference, avoidance, or resignation were directed to the courts. Increased prosecution of drug-related crimes, which have a constitutionally based priority to speedy trial in the US, also increased the demands on the courts. Court resources were not increased proportionately, and civil case dockets became more backlogged.

Domestic relations case filings also soared. With the adoption of no-fault divorce and the general increase in the divorce rate in the US, court-connected family mediation services proliferated, partly to conserve judicial resources and partly to provide better outcomes for children. Parents more readily accepted a custody and visitation plan that they created with the help of a court mediator than one imposed by a judge and filed fewer post-divorce motions following mediation. This served as an example of how courts could be more proactive in managing their increasing caseload by providing settlement services.

At the same time community-based mediation programs grew up outside the courts to resolve neighborhood disputes. Some legal service programs began experimenting with mediating and arbitrating cases in which neither party could afford lawyers. Business people, who could afford lawyers but could not afford to wait for a court trial, increased their use of private arbitration and mediation, particularly for time-sensitive cases such as disputes involving ongoing construction projects. As all types of civil suits became more complex and expensive to prepare for trial, through extensive motion practice and use of experts, interest in alternative forms of dispute resolution increased.

Judges, motivated by a wish to relieve civil caseloads and reduce delay, convened bench-bar committees to recommend alternative methods to resolve cases. Local experimentation led to successes that were replicated and refined in other jurisdictions. A rich array of court-connected alternative dispute resolution (ADR) processes developed. Traditional settlement conferences conducted by judges were augmented and sometimes replaced by more innovative dispute resolution options. Informal "settlement weeks" and case evaluation panels, both using volunteer lawyers, led to institutionalized programs, often imposed by statutes and court rules that required litigants to engage in ADR.

Mediation, often conducted for the court by lawyers in their own offices, became the most popular form of court-directed ADR. Some courts hired full-time staff to manage cases in ADR programs, as well as provide mediation. The Alternative Dispute Resolution Act of 1998 required all federal district courts to establish an ADR program. Participation in some ADR processes, including mediation, can be compelled in federal courts, as in many state courts.

Although court ADR processes vary from jurisdiction to jurisdiction in the US, they share some common elements. Court ADR, and mediation in particular, is intended to:

- relieve each attorney from being the one to initiate settlement discussions
- provide a stimulus or requirement for attorneys to explore settlement early
- promote or require involvement of key decision makers
- use attorneys as neutrals to augment judicial resources
- provide more flexibility than formal adjudication
- avoid involving the judge who will preside at trial if there is no settlement

One perhaps unintended consequence of mandatory court-connected ADR programs, particularly mediation, has been to educate attorneys and business executives about the potential of non-binding forms of ADR. Even though most cases entered the court programs involuntarily, satisfaction rates were generally high. Occasional complaints about the quality of volunteer mediators or bureaucratic restrictions could be remedied by having mutually respected mediators serve for a fee privately outside the court. Corporate and insurance clients faced with long waits in court and increased litigation expenses pushed for more use of private ADR. Plaintiffs' lawyers, reluctant at first, became more supportive of mediation when they realized that it could speed the collection of damages for clients in need and payment of their contingent fees. Greater

efficiency, lower costs, more control, less risk, and improved outcomes were the driving forces for increased use of both court-based and private mediation. The seeds were planted for what would later become a change in the legal culture regarding how disputes are resolved.

The practice of mediation in the US has matured into a new profession during the past couple of decades. Existing private organizations providing ADR services had a growth spurt. The American Arbitration Association, which was arbitrating tens of thousands of cases in the 1980s, expanded and promoted the use of commercial mediation. The Center for Public Resources, now the CPR International Institute for Conflict Prevention & Resolution (CPR Institute), supported primarily by corporate counsel and law firms to promote the use of appropriate dispute resolution, collected pledges from hundreds of major corporations and then law firms promising to use ADR to resolve disputes, rather than pursue litigation against one another. The largest private ADR provider organization founded in 1979 as Judicial Arbitration and Mediation Services, now JAMS, has grown to 25 centers nationwide and has international affiliates. Local and regional groups of attorneys, as well as individual lawyers, retired judges, and others, offer mediation in every legal market. Listings of mediators can be found in telephone directories everywhere in the US, and their advertisements are a mainstay of legal newspapers and magazines. Some law firms advertise their expertise in representing clients in mediation.

Most state bar associations now have active dispute resolution sections. The Dispute Resolution Section of the American Bar Association is one of the largest sections, attracting more than 1,000 participants to its annual meeting and sponsoring numerous publications. Dispute resolution courses are a regular part of law school curriculums. Some law schools offer LL.M. and certification programs in ADR. There has also been a proliferation of mediation training programs for lawyers. The demand side has not quite caught up with the increasing supply of mediators, but dispute resolution seems to be a growth industry.

Whether due to mediation or other factors, civil filings in some state courts have declined, as ADR has been much more widely used. In California, for instance, civil filings in all state trial courts between 1998 and 2007 decreased over 14 percent, from 1,700,445 to 1,461,111 (Judicial Council of Calif., 2008). There has been a dramatic decrease in both the percentage and actual number of cases going to trial in federal and state courts. In the federal courts, the percentage of civil cases reaching trial fell between 1962 and 2002 from 11 percent to 1.8 percent. Over a 25-year period, the number of jury trials in 22 states showed an absolute decline of more than 25 percent (Galanter, 2004). More recently, civil jury trials in California Superior Courts from 1998 to 2007 decreased over 59 percent, from 1,902 to 767 (Judicial Council of Calif., 2008). The exact relationship between the decrease in the percentage of filed cases

being tried and the increased use of ADR in courts and privately is not clear, but many have pointed to mediation as a cause for the change.

The eclectic "movement" of those who early promoted mediation as an alternative to more traditional ways disputes were resolved has given way to efforts to define mediation and set standards for its practice. Schools or approaches to mediation, sometimes distinguished by differing philosophical or value assumptions, have emerged and compete for centrality. Facilitative, transformative, evaluative and therapeutic mediation, as well as other approaches, each have their own following and application. Specialized practices of mediation, particularly among lawyers and health professionals, also marks the maturing nature of mediation practice.

Credentialing and certification of mediators is seen by some as the path to public acceptance, enhancing confidence in mediation and creating a profession. Others see credentialing as the antithesis of a creative alternative and of flexibility in shaping the mediation process to the dispute and the needs of the parties.

More mediators appear to be offering their services for a fee or including mediation in the services they provide through their agency based work. However, relatively few have given up their day jobs to depend exclusively on mediation income. Interestingly, growth of fee for service mediation appears to have occurred more in civil litigation and commercial cases than in family, labor and ongoing relationship cases where mediation began. Mediators, who early on set out to promote the concept to lawyers and business people, now seem to lament that lawyers and corporations have embraced mediation and made it their own.

Speculation twenty years ago about how the courts would deal with mediation confidentiality and the enforceability of agreements to mediation, as well as agreements resulting from mediation, has been replaced by analysis of many case decisions and comparisons of different court conclusions. The call for legislation and court rules to promote the use of mediation has given way to debates over different approaches among states and the crafting of a Uniform Mediation Act.

Mediation has blossomed and become an important part of the dispute resolution landscape in the US. The foundation has been built for mediation in Ecuador, but the long-term identifying characteristics and unique path of establishing mediation have not been determined. This is a wonderful time to be part of this new practice in Ecuador.