

## **What has the mediation movement accomplished over the past 20 years? How have we changed the way people think about and deal with conflict?**

"Twenty-five years ago, mediation was heresy...The adversarial system was the only way to resolve differences."

"Positioned mediation as a mainstream alternative to litigation."

"We have effectively protected the mediation space as generally confidential, private, and secure."

"Having alternative approaches to conflict is important and more people are starting to understand that."

"The way we think about/deal with conflict: (1) Expanded our ability to conduct both/and thinking; (2) Note to self—emotions are not directives; (3) Those interested in learning about the value of mediation/ADR could acquire access; and (4) Focused on ensuring leader and leadership development programs are equipped with training and practice around ADR."

"Widespread acceptance of mediation in legal community."

"(1) It has been institutionalized in organizations (by policy) and governments (by law) around the world; (2) It has changed the way law schools teach negotiation such that a more collaborative approach is valued, understood, and practiced; (3) It has embraced the importance of dealing with emotions as an integral part of the conflict resolution process; (4) It has started to develop its own body of evidence based research (Peter Coleman, The 5 Percent) rather than rely sole on intuitive knowledge; (5) It has inspired a younger generation of mediators (not just the recovering attorneys) through peer mediation programs in schools and through negotiation and mediation classes in law schools; (6) It has stabilized the ethical practice of mediation through standards and codes of conduct; (7) It has created specialized fields of mediation practice that have fostered great depth of insight. Of significance at this time is restorative mediation which is poised to engage in the reform of the criminal justice system. Also related, has been the work to bring the values of the mediation field to the prison population; and (8) It has embraced technology and developed online mediation capacity such that when the Covid-19 push came, the field was ready to meet the challenge and run with it."

"Starting to professionalize the profession of mediator, getting it on the agenda of lawmakers and judiciaries in some jurisdiction |(and in some leading to favourable laws)

"Got right: No licensure."

"The brightest spots that I am aware of are restorative justice in the courts and particularly in the schools, mediation in family and divorce disputes, and greater use of stakeholder processes in public policy creation. What we got right is the centrality of bringing people together to understand each other, to address problems together, and to be part of crafting a way forward."

"We have made many people realize that interest-based and mutual-gain outcomes are possible, which, in most cases, are far better for both parties than the costly win/lose or lose/lose outcomes in power play or litigation."

"Mediation has provided an alternate for many people. It can be a flexible process customized for each situation. It provides a process where parties can be in control of the outcome and talk directly to each other to resolve conflict."

"There has been progress in teaching mediation in law schools but there is a long way to go. Law schools must come to recognize that we are in the business of resolving conflicts and litigation is just one tool in the toolbox."

"Divorce mediation is all that I can speak to with authority. It is now sufficiently mainstream that many couples choose it as their first-choice way of getting divorced and avoiding lawyers. There is a significant pool of individuals who want nothing to do with attorneys. Sometimes, I am the beneficiary of that bias. Most of my clients find me online (Mediate.com and Google). They just want to treat each other amicably as they get their deal done and move on. There may be moments of drama, but those are rare."

"I think that mediation may have been the best thing to happen to family law. That's an area where mediators can dive into joint interests and understand people's true motivations for settling, and coming to a workable solution in the best interests of families."

"The most visible areas of progress in mediation are family law and small claims matters. There is also a growing use of mediation in mid-sized (\$20–100,000) litigation simply for economic reasons."

"The mediation movement has gradually changed the way courts, the public, members of the legal community, and the federal and state governments see the value of and benefits to be gained by allowing and supporting ADR. It has revolutionized the framework of resolving disputes at all levels of our society, from the micro-levels to the macro-levels, involving persons of every race, religion, origin, location, occupation, and is improving our outcomes and reducing tension and friction."

"We have learned that there are many ways to mediate and that different tools fit different problems. We are learning how to mediate across cultures and to understand different models of mediation other than the white middle class roles."

"We are making room for innovation in the field, including concepts from other disciplines, such as neuropsychology and business, and embracing other ADR approaches, such as facilitation and restorative practices."

"The field is constantly evolving. Only one thing remains the same, the individuals who serve as mediators are bright, talented and compassionate. Whenever I attend a gathering that includes mediators, I am struck by their kindness, generosity, and understanding."

### **What did we get wrong?**

"No general standards, not a real profession in all jurisdictions, not used preventively (enough), still the 'alternative'. We are a super fragmented profession. Mostly relying on anecdotal evidence."

"I'm currently publishing a paper that shows that mediation is NOT well known among the public (and when they are familiar with the term, it is often misunderstood), so I have a hard time answering how the mediation community has 'changed the way people think about and deal with conflict.' While research shows that participants are highly satisfied with mediation, those who have never used mediation do not think of it as a way to resolve conflict because they do not know that it exists or what its key attributes are."

"By selling mediation as a panacea for all litigated disputes, we weaken the argument that mediation is the best way to resolve relationship-related disputes, from employment to small business owners to school-related issues."

"(1) Reproduction of the very same inequalities, hierarchies, and exclusions other attempts at achieving social justice were hoping to address, (2) Failure to attend to diversity—exclusion and marginalization of minorities, (3) Inability to understand, manage, and address discrepancies in power, and (4) Misuse of the term mediation as a generic name for many different forms of problem solving and conflict resolution."

"We haven't done any meaningful marketing—ever—especially on a national scale. We have no nation-wide certification. We have polarized into the Community Mediation 'Systems Change' camp vs. the Legal Profession's 'Systems Maintenance' camp. We have become distracted by the 'purity wars' around which style of mediation is the best. This distraction limits innovation and fosters division."

"My greatest disappointment has been the way the settlement conference has become the dominant model for mediation (at least in CA). Ignoring the imprecision of language, which is somewhat bothersome, the saddest thing for me is that parties to this kind of mediation, where they never even see one another, will never have the opportunity that a true mediation provides: the potential for a process and resolution that resolves disputes at the deepest level possible for the individuals involved."

"Mediation has, however, become more of a legalistic process in the U.S. where parties often do not get to talk to each other, deals are made in shuttle diplomacy by the mediator and the attorneys, and usually underlying interests are not dealt with as effectively. This settlement conference model can be very effective as ONE type of mediation, but as attorneys, judges, and courts have become more involved in the mediation process it seems to have become

the default in some states—especially in large urban areas. Given the amount of systemic racism and implicit bias that exists in the world, I can easily see this effecting the mediation process for many disenfranchised citizens and people of color.”

“[Having] allowed participants to distort the process through an over adherence to the idea the participants ‘own the process.” The participants may choose to participate in mediation, but the process belongs to the mediators. Of course, the substantive decision (to agree or not, and what to agree upon) rests with the participants through the core value of self-determination.”

“I was very hopeful that the community mediation programs would make some grassroots changes in resolving disputes and thus educate the populace in methods of positive approaches to conflict. I was hopeful of the efforts to introduce the concepts in all levels of education. Unfortunately, much of the energy was diverted to training mediators with the hope of creating a career. We over trained and under promoted. Our greatest shortcoming has been consumer education. We spent so much time fiddling with who could and who couldn’t mediate and what credentials they needed to do so. Our consumers had no idea what a good mediation service looked like. Had little sense of their role in the process and were left again to be paternalistically shown how a seasoned professional resolves disputes. They still cannot differentiate between mediation and arbitration.”

“(1) Absence of collaborative leadership results in high fragmentation and sub-optimal development of the field; (2) Still an overwhelming focus on dispute resolution to the exclusion of facilitated negotiation; (3) Poor/amateur marketing of mediation; (4) The field does not inspire users/general populace with credible evidence of value and practical tools; (5) Widespread lack of adequate investment in the field’s restraints development—e.g. absence of empirical research into mediation theories and practices; (6) Mediation remains dominated by English-speaking mediators; (7) Mediating is not recognized by average users as an independent profession due to reluctance of most mediators to permit skills transparency (e.g. feedback) and to be credentialed; (8) Few mediators invest in the field—e.g. via participation in mentoring and practice programs; (9) Little real collaboration among mediators/provider bodies to envisage and plan for growth in the field; (10) As a result, the field is seriously under-funded.”

### **What are the biggest challenges currently facing the mediation movement?**

“Scope—need to address the larger problem of the deterioration of public discourse, especially at the national level.”

“The biggest challenges remain changing the mindset and dispute resolution culture of lawyers, judges, legal academics, and politicians about the virtues of mediation.”

“(1) Forging collaborative, mediative leadership; (2) Becoming a true, independent profession; (3) Achieving genuine diversity; (4) Encouraging non-lawyer mediators; (4) Making mediation a pre-requisite to both litigation and arbitration despite strong resistance from litigators and arbitrators; (5) Facilitating empirical research into mediation techniques; (6) Improve teaching of mediation and establishing mediation/negotiation as a core part of curricula for all students; (7) Developing new technology functionality to aid mediation and encouraging widespread understanding and acceptance of the role and value of technology in mediation.”

“Expansion—There seems to be many more people interested in working in mediation than there are opportunities to work in mediation. There has been too much effort put into providing mediation training and not enough work generating support to develop programs.”

“Mediation being seen and framed in many jurisdictions as the ‘pitiful sister’ of the real DR heroine, which is a legal approach, with established full-time practitioners. Just to illustrate this: we still refer to what we offer as an alternative. In many countries there are far more mediators than cases. And we did not take care of the next generation of mediators (we lose many big potentials to other professions). Within the mediation profession we have lack of coordination/leadership, we do not agree on what mediation is and how it should be carried out between various jurisdictions. Moreover, we mostly focus on trying to get the biggest part of a small piece of the pie of DR (the alternative corner) instead of focusing on the full pie of which we should have a larger part.”

“Massive lack of good critical thinking skills, negotiation skills, values clarification, collaborative skills and the ability to see positive outcomes of conflict. We are a group of folks who seem to be conflict avoiders trying to make conflict go away from a consumer base of conflict avoiders who simply do not want to deal with it.”

“Biggest challenge and opportunity is most capably responding to the pandemic and increasing digitization of the field to fully embrace online mediation. Every case is now an online case. What is optional is getting physically together. My guess is that at least half of all mediation will be still done online when Covid-19 someday passes.”

“We need to find better ways to engage effectively with stakeholder communities, most particularly policy makers and the legal profession. We need to do a better job of de-mystifying the process and providing ‘how-to’ assistance to the user community.”

“Over-regulation, dilution of privacy and confidentiality protections.”

“Not letting the modality get so rigid that the tools/process become primary, instead of a focus on identifying the most appropriate mechanisms to address a particular conflict.”

“Lack of diversity is a huge problem. I would like to see us seize this moment when the BLM movement has galvanized such broad support and gathered momentum to bring change and diversity to our profession.”

“Trying to make ADR work, both arbitrations or mediations, and to empower the parties with the ability to write their own outcome, instead to 9 or 12 jury members, or a random judge.”

“Deciding when and how we can help in major crisis situations in the world and how to do that effectively.”

“Providing protection to consumers... keeping people from providing services that they call mediation which are not mediation...establishing objective standards for assessing mediator skills, abilities, temperament, and knowledge...establishing supervision programs and opportunities for new mediators to gain experience...establishing a process for precluding/restricting/eliminating mediators who are doing harm or not doing mediation and calling it mediation....keeping the legal community from taking over the field of mediation and telling attorney mediators that is it.”

“Thinking too small, too limited, and not providing the public with a clear idea of what mediators can provide in all walks of life.”

### **What are the biggest opportunities?**

“Public education—the potential value and uses of conflict resolution and problem solving are still underappreciated.”

“Diversity—need to integrate the field in terms of both practitioners and users.”

“The greatest opportunities are upstream, away from the courthouse, where the conflict first emerges. Orienting society and developing the basic skills of mediation that can be applied by regular members of society in their place of work, at home, in clubs, places of worship, is where the ultimate opportunities lie. This has already started to happen in the field of HR mediation where the Society for Human Resource Management expects senior level HR professionals to be able to mediate difficult employee relations situations as a neutral.”

“(1) Expanding the use of mediation beyond dispute resolution and into facilitated negotiations by persuading people that they can be better negotiators and can achieve better outcomes when a professional neutral is engaged; (2) Attracting large scale funding by demonstrating mediative leadership in the field with a clear vision and mission.”

“Extraordinary professionals in different areas of expertise being mediators in respective areas or being enthusiastic about mediation.”

“We need to think creatively about the effective use of mediation outside of the traditional disputes context (e.g., as tool for better and longer lasting policy, agreements, and pre-dispute conflict management).”

“To create a more peaceful society we need to engage people in dialogue where they are at, not just in the court or other legal venues.”

“Frame mediation as the real deal—the better and more flexible way for the majority of cases. In fact, a legal approach should be the alternative. We need to start with a mediation step (which can take any form from just a discussion on what process to follow between those involved to a full-scale first mediation session). Online mediation and technique will certainly help. We as a profession are far more flexible than the legal profession and are able to embrace the new technical opportunities presenting themselves.”

“Ethnic groups in the United States where English is not spoken will require trained bilingual members of the group.”

“Mediation is a flexible and creative process. The current crisis has demonstrated to the world its potential to be adaptable, flexible, creative, accessible, informal, safe, and secure. Technology has become relevant in a big way in mediation.”

“Continuing to use an expansive vision of mediation, both formal and informal to further incorporate meaningful conflict and dispute resolution in additional sectors of society.”

“Both the challenge and opportunity are to listen more to those who are working in and developing other processes to encourage dialogue and not consider mediation the primary default. We would do better to consider mediation as part of a vast array of ways—many of which do not include someone in a mediation-like role—to support civil society by encouraging respectful dialogue and encouraging participatory democracy. We all need to work in whatever way we can to be part of the culture reckoning around equity in our society, address lack of diversity in our own organizations, and figure out how and whether we can assist in encouraging constructive dialogue to help our society address the huge challenges we face. There are many processes for encouraging citizen participation in government. To the extent we can, we should assist in those.”

“Shifting usage to ADR from court systems, lessening the number of trials our legal system sees.”

“Empowerment through experience generation.”

#### **What should be our strategic priorities moving forward?**

“Funding, data, leadership and coordination, better marketing.”

“Full development of online mediation with affordable, easy access.”

“Greater inclusion of clients and mediators of color.”

“Consumer education, education, and more education.”

“Education of the public about the many benefits of mediation.”

“Continuing support for quality assurance initiatives; driving technology-based tools for mediation education, assessment, and process use; more and better engagement of policy-makers and the legal profession.”

“More outreach for young people to have restorative justice options in schools.”

“Focusing on training and mentoring new mediators who bring new ideas and a passion for the process.”

“Identifying additional sectors/industries/institutions that could benefit from increased capacity to resolve conflict and finding entry points to influence those entities to adopt additional conflict resolution practices.”

“Mediation organizations forming strategic partnerships with universities and industry to scale mediation up.”

“Mediation embedded in the workplace.”

"More attention to the continuum of options for conflict resolution, beginning with self-help, and ending with litigation rather than having litigation in the center."

"Protecting the mediation process from laws that are not designed by mediators but by lobbyists and attorneys who do not understand the process."

"Ensuring mediators are qualified and uphold professional standards."

"Certifying mediators in a way that the public will see as a true profession."

"Innovation, marketing, certification for specific practice areas (e.g., elder mediation, workplace, complex commercial, land use...), promoting a wider integration of mediation or 'mediation lite' services that meet the needs of society."

"Greater education of mediators about the psychology of conflict resolution."

"Our trainings should look more like psychological and therapeutic trainings, with tools that encourage creative and kind engagement."

"Greater use of mediation to resolve political conflicts in the U.S. and in other countries."

"(1) A deep dialogue without our own ranks about equity and diversity, based on the new literature about the embedded structures and ways of thought that need to change in society and then develop action steps; and (2) Learning from and being part of experimental processes that are encouraging participatory governance, usually at the local level, and rebuilding commitment to an faith in democratic government and governance."

#### **What are your hopes for the mediation movement over the next 20 years?**

"Mediation becomes the first process people turn to when they need to resolve conflict (the default rather than the exception)."

"That mediation training providers change and add to their curriculum. Field experience thorough mentoring should be an integral part. Marketing and ODR should be fundamental as well—not as an add on training, but part of the foundation!"

"It will find creative ways to be more inclusive of diversity especially as regards age and race."

"To have an association or entity that works as strongly and as effective as JAMs without being ex judges."

"Nurturing good mediators and allowing the market to select the best."

"The mediation field needs viable careers that do NOT start with needing 20+ years of experience in a related field. Mediation does not have to be a retirement move for burnt-out litigators."

"Flourishing of mediation in different sectors of the community."

"More evidence-based research."

"That mediation will continue to support the world, finding more peaceful ways of addressing the inevitable conflicts that challenge us. It is important for us to own and protect the sanctity of the process and not allow the participants to undermine its integrity."

"Training and development of informal social mediators to address conflict early where it emerges in society."

“That it becomes mainstream at every level of dispute and particularly for disputes between the average person on the street so that it helps deal with the massive access to justice crisis that faces most people, other than the very well resourced.”