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Mediation and My Life: Moments and Movements

By *Lela Porter Love*



Backstories

Long before I had ever thought about mediation—much less considered it as a career path—I had several memorable experiences, ones that I now understand influenced

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my later choices. They became stories I told about justice and dispute resolution processes.

***At Palm Beach Private School and Home, 1959:
Injustice***

I was in fourth grade and just beginning to be sensitive to peers—and relationships with boys. I was sweet on one boy but wore the bracelet of another, which signified a connection. One day, one of the boys in the class held out my chair as I approached my desk. I was pleased by this seeming courtesy. But when I went to sit down, the chair was swiftly removed and I was suddenly on the floor, shocked. Classmates found this funny and laughed, and then I did, too. I was impressed by the joke, even though I was the butt of it.

Later that same day I was home for dinner with my parents and siblings. Wanting some fun and wanting to share the joke played on me, I went to my father's chair and held it for him. He looked very pleased at my good manners. When he went to sit down, I whisked the chair away, and he fell to the floor. No one spoke or laughed. There was an awful silence. I was taken upstairs and spanked—even though that was unheard of in my family. I got no dinner. I thought I was very unjustly treated, and I never forgot how that felt. Much later I learned that at the time, my Dad (who seemed very athletic, playing tennis every day at 64) had had back and heart issues, and the fall I caused was scary for my parents. I never had the chance to tell my story, nor did I have the full picture at the time. The disinterest in my "side" of this incident—and my not being informed about the details of my Dad's health—are what made this stand out as a never-to-be-forgotten injustice.

On the Road in Tanzania, 1970: a Justice Event

The scene remains vivid in my mind. I had recently arrived in Tanzania to work for a development project sponsored by Harvard University and the Max Planck Society. My work was to be starting a jam-making project, as Tanzania imported jam but enjoyed an abundance of sugar and fruit. Before my work began, I was riding in a Land Rover down a rural road. Sitting in the front seat next to the driver, I was the sole White female, the only person who was not a local Tanzanian, and the only one in the car who did not speak Swahili beyond “Jambo” (“Hello”).

Suddenly what seemed to be rocks were thrown at the windshield. The driver slammed on the brakes, and all the men jumped out of the Land Rover to chase the children who had thrown the rocks (though it turned out that the rocks were actually dried cow dung). I was left alone by our vehicle on a dirt road in Africa.

A little time went by. I started to wander up the road in the direction the men had gone, and then a crowd of people with raised machetes came running toward our car. That was pretty scary. Before they got to me, though, village elders—each of whom had an umbrella to mark his station—came toward the car along with the men I was with and a group of three boys, who seemed to be the ones who had thrown the cow dung.

Everyone—men, women, and children—converged on a flat open area near the car, and the villagers, their machetes down, made a circle with the elders, the boys, and the men from our car in the middle of the circle. I was off to the side but a part of the circle around the men, boys, and elders.

The elders asked the men what had happened, and the drivers recounted: the cow dung was thrown at the car; it could have killed everyone by shattering the windshield

and causing a crash; this was especially bad with a visitor (me).

The elders asked the boys what had happened.

The boys said that they were just playing—no harm was meant, and the men chasing them acted like they were going to kill them. (All this was translated for me by someone from our car.)

Next the elders said to the boys, “What should be done?”

The boys said they should receive a certain number of blows each from a stick. I forget the number of blows—it was more than three, and they were real blows. The boys took their hits right in the middle of the circle. Then everybody shook hands with everybody—including the boys. This took a long time; *everybody* shook hands with everybody. The atmosphere was positive. The tension was gone.

I had never witnessed such a satisfactory justice event. Everyone told their story and retained their dignity, the community seemed healed—and I never forgot it. Knowing what is possible in heated conflict with proper interventions sets the bar high in terms of goals. This event primed me to want to get similar healing results.

At George Washington University, 1980: Teaching Philosophy of Law and a Clinic

I was employed by George Washington University and its National Law Center in 1980, and part of my job was teaching an undergraduate course on the philosophy of law. In preparing for the course, I remember being struck by a description of the adversarial system as one in which two sides fight as relentlessly as possible on opposing sides, each saying the worst about the other and the best about themselves, so that a neutral person in the middle, judge or jury, could best decide the truth. This description was in keeping with some of my trial practice training at

Georgetown Law School. While my law school education had neglected philosophy, I had been well taught to use theatrics that could sway decision-makers. For example, it was important to consult and touch my client as often as possible to indicate I liked and trusted them and valued their input (regardless of whether I felt that way). Using such techniques, whatever trust and credibility I, as a lawyer, might have would be shared by my client. Such tricks, however, struck me as the opposite of seeking, much less finding, truth or justice. Recalling the injustice I felt when I was punished for the joke I played on my father, I was leaning toward an approach where disputants educated each other about their perspective and agreed on a just outcome, as had happened in Tanzania.

This perspective was enhanced by further exposure to literature about alternatives to litigation in preparation for teaching the philosophy of law course. New ideas from the 1976 Pound Conference, particularly Frank Sander's multi-door courthouse, which featured, among other processes, mediation, were influential. In 1980 I had no firsthand experience in mediation or formal consensual dispute resolution procedures. What I did learn firsthand that year was how to establish a successful law school clinic by starting a small business clinic where law students at the National Law Center represented businesses. This became a springboard for developing a very early mediation clinic in 1985.

At a Community Dispute Resolution Center in Brooklyn, 1983: Taking Mediation Training

In 1983 I moved to New York with the plan to get part-time work as a lawyer and explore mediation and arbitration—the two key alternatives to litigation that I was inspired about following my George Washington philosophy of law course. For mediation, I signed up for the basic training

at the Brooklyn Mediation Center, a training delivered by Josh Stulberg and Margaret Shaw, two masters of their trade. I was mesmerized learning how a philosophy or vision of conflict resolution could be put into nuts-and-bolts practice. Whether it was a neighbor dispute, a landlord-tenant matter, or a family fight, I liked “putting the rubber to the road” to give disputants an exciting path to transform their often-dangerous conflict into an opportunity to create a better future. In a 24-hour training I learned how to conduct a mediation: how to begin, how to listen, how to develop an agenda, how to generate movement, how to caucus, and how to bring closure. It was these very elements I would spend decades exploring once I had begun a Mediation Clinic and had (in 1986) joined with Josh Stulberg as a trainer. But what works as an elegant and simple theory in a classroom doesn’t always work in practice. Still ahead was the trial by fire.

Cases and Turning Points—Seeing How Theory Plays in Practice

Arbitration in New York Civil and Small Claims Court

In 1983, at the same time I was pursuing mediation, I signed up as an arbitrator for New York Civil and Small Claims Court Programs, wanting to explore and compare various roles of neutral interveners. Civil court paid a small per-case stipend to arbitrators, and small claims arbitration was volunteer work. I recall that the only memorable feature of a very short training for arbitrators in Small Claims Court was that I should never tell parties my award because the court, in such a case, “did not have the resources to protect the arbitrator.” (The court mailed out notices of the arbitration award a few weeks after the hearing.) The few times I broke this rule, I was very sorry I did. Once a party knew your opinion or award, all they wanted

to do was change your mind and change the outcome, which could get uncomfortable, if not dangerous.

I found arbitration difficult. The two sides always told very different stories, and I had to find the “facts” very quickly. I often worried that I was wrong in terms of understanding the truth of the situation, though I took some satisfaction in providing the best procedural due process I could devise. That meant I was careful to explain the process in an opening statement; gave each side uninterrupted time to explain their case and present their evidence; welcomed questions about what had been said and asked my own; and mainly tried to be respectful of each party. In the civil court program, six arbitrations were scheduled in one morning or afternoon window, and the result was that most cases settled either before or at the scheduled arbitration time. The attorneys were there with their files and were prepared to present a case, and consequently the settlements flowed easily, though, as an arbitrator, I did not participate in the negotiations. These early settlements made the program seem like a success, though they did not, *per se*, enamor me of the arbitration process. In small claims court, a rapid fire of cases resulted in the need to make fast decisions, as the court clerks were eager to process paperwork so they could leave on time. The speed that was needed to keep the court functioning contributed to my feeling that arbitration was “arbitrary,” but even putting that feature aside, I was haunted by thinking that if I knew everything about a case, I might have made a different decision.

Leaving the courts after arbitrations, and particularly after dark, I worried about being followed or accosted by disputants in a way I would never worry if the service I provided had been mediation. Nothing of that sort ever happened, though I did usually take the precaution of traveling home with another arbitrator. In my teaching career,

I spent a fair amount of time comparing and contrasting arbitration and mediation (my husband joked that my gravestone would say “she knew the difference between arbitration and mediation”), and, in addition to more usual markers of difference, I never forgot the feeling of being an arbiter who probably made at least one side angry or unhappy and who might have made the wrong decision because the “facts” I found were only my best guesses of what had transpired. Mediation, in contrast, offered the possibility of achieving a “win” for all parties.

***Mediation at the Brooklyn Mediation Center—
Community Cases—and the Mediation Clinic at
Cardozo Law School***

My first mediation cases, immediately following the training program in 1983, were community cases at the Brooklyn and later Manhattan Mediation Centers, community dispute resolution centers under the umbrella of the New York Peace Institute. The cases involved everything from neighbors disturbed by noise or cooking odors to family members with issues about children or unpaid debts or housing, or fights between parents about kids, disputes between landlords and tenants, and even “love” triangles. These were labeled “minor” disputes by the legal system, but they definitely were not minor to the disputants.

I recall one tenant coming in and placing a mouse on the mediation table and former friends violently shouting at each other or throwing their drinks or pens at each other or (often) breaking down in tears. Once, when a funding cutback for the courts resulted in a plan to cut the armed court officers at the Brooklyn Mediation Center, a mediator strike was organized. In other words, the cases were not easy because disputants were passionate and often angry, and that made a community center a wonderful place to

learn the art and science of mediation. If you could do it there, you could do it anywhere.

What was most exciting was that the theory of mediation I had so loved when taught by Josh Stulberg and Margaret Shaw worked in practice. Time and again, after telling their stories, parties would come to some accommodation. For me, it was like an addiction—to take something difficult and bad and help change it into something workable, good, and promising.

By 1985 I had proposed to Cardozo Law School the creation of a Mediation Clinic. Cardozo's dean, Monroe Price, embraced new ideas and quickly agreed to establishing one. The most difficult hurdle for the clinic was convincing Mark Smith, the then-director of the Brooklyn Mediation Center, to allow a law school program in his center. Mark thought that law students might import an "attitude" of arrogance and adversarialness that would be disrespectful to his staff and counter to the philosophy of the center. Because our agreement was that Mark retained the power to exclude any law student who didn't behave, he gave it a try. That first year we had one arrogant law student who was disrespectful toward the center staff, but armed with the threat of expulsion, Mark and I were able to teach the student some manners.

In a school with many popular clinics, the Mediation Clinic became the most sought-after clinical program in the school, thanks to the remarkable opportunities it offered students. I had the privilege of seeing cases from the vantage point of being a mediator myself as well as that of introducing law students to the practice and watching them apply the theory in the service of disputants. Result: the practice of mediation was even more exciting than my dives into theory had been.

Trust and Estate, Commercial, Family, and Other Cases

When I was a student at Georgetown Law School, one of my achievements had been to receive recognition for the highest grade in Trusts and Estates—due, I think, to the fact that my mother, my only surviving parent, died during the course of the semester, and I was acutely attuned to the various issues raised. So whenever I had the chance, I would mediate cases involving family disputes over wills and trusts. In family cases there was always the legal issue (e.g., did the testator, the maker of the will, have testamentary capacity? Was the testator unduly influenced?), but then there was a plethora of non-legal issues (the conduct of holiday events, the distribution of photographs or other items of non-monetary value, sleeping arrangements for children with aunts and uncles, how various children addressed the elders). Nearly always, principles collided, and the need for equality—equal shares from parents—had to be balanced against the principle of need—shares should be adjusted according to need (e.g., where descendants needed money for education). A stand-out moment for me was addressing the Committee on Trusts and Estates of the Association of the Bar of the City of New York and seeing the surprise on attorneys' faces that helping clients address non-legal issues in mediations, in my judgment, was critical to making acceptable deals that settled cases and sometimes allowed family members to reconnect with each other. By the time I was addressing bar committees, it seemed obvious to me that attorneys should uncover and help clients deal with all the issues that were blocking resolution—not just the legal causes of action—so the surprise of committee members was a surprise for me.

I served on the panel of the US District Court of the Eastern District of New York and in that capacity, as well as getting random referrals, would mediate commercial

cases. Were such cases “all about money” or were they, like the trust and estates cases, frequently about relationships and non-legal matters that, if resolved, would provide momentum for the resolution of money issues? I usually found that concerns about respect, a need for recognition and sometimes apology, or some symbolic adjustment that showed care, could spark momentum toward a monetary agreement.

The Long Island Cases—It Works in Smaller Cases, but Does It Work in “Big” Ones?

“Have you read Owen Fiss?” That question was asked as I shook the hand of the Salvadorans’ civil rights attorney on the morning of the first day of mediation about a situation between the Town of Glen Cove and Salvadoran day laborers there. The question was particularly apt given the constitutional questions raised by the case. Yale Law Professor Owen Fiss was “Against Settlement”—the title of his brilliant article (Fiss, 1984)—so it was either a harsh or a funny way for an advocate to start a mediation. I replied, “I believe you will be pleasantly surprised.” And after the mediation he was.

The Owen Fiss moment came in 1992, after tensions between immigrant day workers and the town had brewed in Glen Cove, Long Island, for four years. A large group of workers gathered daily to meet up with contractors and agree on a day wage on a busy street in Glen Cove early in the morning, and the city responded by passing an ordinance that prohibited pedestrians from soliciting employment from someone in a motor vehicle and also prohibited motorists from hiring workers from their vehicles. A class-action lawsuit followed alleging the ordinance violated constitutional rights of freedom of speech and of equal protection. Write-ups about the situation in major media, as well as the cost and delays of litigation, heightened ten-

sions. An Immigration and Naturalization Service raid on the gathering place for workers and employers (the “shaping point”) exacerbated the situation.

As memorable as the Owen Fiss comment was the way the two Salvadoran day laborers started the mediation: “It is such an honor to have such very important people come to listen to our problems.” The warmth and appreciation of the two class members created a glow that infected the rest of the day and created a positive trajectory for the dispute. By day two (one week later), options were created to resolve the litigation: a collaboration to craft a new ordinance that would further the town interest in early-morning traffic safety on a busy thoroughfare and insure the constitutional rights of the plaintiffs; a plan for translating public notices into Spanish and ensuring that the city soccer field would be available for all; a commitment that the police would have diversity training, some Spanish language ability, and a protocol for dealing with non-English speakers in crisis situations; the provision of a platform for the police to address community interests at Salvadoran meetings; and ideas for a new shaping point.

The same principles guided the conduct of this case and the conduct of other types of cases: involving the real parties (the Salvadoran plaintiffs—despite their lawyers not wanting to do that initially) and giving them a platform to speak, setting up the room (we had a round table in the public library), and arranging comfort coffee and food to maximize chances of success (we began each day with coffee and breakfast snacks, partially to ease what might be different arrival times of the different cultural groups), addressing all issues (not just the legal causes of action), being mindful of the agenda structure (we started with the “easy”—or easier—issue of the use of the city soccer field by the Salvadorans who couldn’t read the English postings about playing and signing up), and so on. These formulas

for practice worked across the board: in mediating class-action litigations, community cases, trust and estate matters, workers comp, EEOC, and commercial cases.

In 2009, I mediated another class-action suit involving another Long Island town and its Section 8 Housing program. A class of minority plaintiffs challenged the administration of the town's program because it resulted in discriminating against Black and Hispanic applicants by favoring applicants who lived within the town. Again, the mediation began (after an opening statement by the mediator) with an actual plaintiff recounting to the town's Section 8 program administrator what it had been like to apply for the program. The plaintiff's sad and moving story brought the administrator to her side—an administrator shocked to be sued after all her efforts. Later the same day, the administrator opened her files to the plaintiffs' attorneys, shortcutting a long discovery process and thereby building trust. Balancing inconveniences, one session was held out on Long Island, and the second was held in the fancy law offices of plaintiffs' *pro bono* attorneys in Manhattan. The Long Island session allowed for the town to share its files with the plaintiffs' attorneys. The Manhattan session was a distributive, positional bargaining session about the remaining—and big—issue of the amount of money to be paid to the plaintiffs. The sides traded offers and counteroffers of monetary amounts that didn't appear likely to converge. When town officials realized that the plaintiffs wanted a seven-figure settlement, they announced that such a settlement would be the end of the town's participation in the housing program because it exceeded the six-figure cap on the town's insurance. "If the settlement of this case is more than the town's liability limits, then we will be forced to shut down the Section 8 housing program." What a bad result that would be for the *pro bono* counsel! As the mediator, bringing the parties

back to their interests—a housing program that best served poor constituents and was “doable” to run—was sufficient to resolve the issue, even though a seven-figure settlement would have enhanced the litigation track record of the *pro bono* counsel. The case settled for an amount of money just south of the town’s policy limits thanks to uncovering the BATNA of the town’s exiting from the Section 8 program altogether. Asking the *pro bono* counsel the simple question of whether they wanted to be responsible for shutting down a housing program for persons in need worked magic. They did not.

These Long Island cases strengthened my belief in ensuring that the parties are given a platform to speak so that their issues (not just legal causes of action) are addressed and their voices can inform the process, in providing a neutral and comfortable setting with arrangements for food and adequate breakout space, a thoughtful speaking order, an invitation to discuss all issues of concern, respectful listening, time for reflection and creative problem-solving in uncovering and highlighting the underlying interests, in trying to build an adequate information base before jumping to option creation. These were the lessons I had learned from community cases, and they still applied in large multi-party, multi-issue cases. Learning about George Mitchell’s mediation in Northern Ireland, where he used similar standard practices, reinforced those lessons.

Louisiana Workers’ Compensation Cases and EEOC Cases

In 1992 and 1993, Josh Stulberg and I were asked to provide a skill-building workshop and a training manual for mediators in the state of Louisiana’s Workers’ Compensation Program. Prior to the training or writing, we asked to

observe cases and had the exciting opportunity to travel around Louisiana and participate in a variety of cases.

Going into this assignment, I worried that the training and practice I was used to might not serve well in worker's comp cases, which were dominated by attorneys and insurance adjusters, often together with the one lone worker seeking compensation sitting by a lawyer who didn't want the client to speak. I was used to an emphasis on parties, rather than professionals, and didn't know how sessions overbalanced with professional representatives would play. But what we found was that the same principles applied. Let the parties speak! We were given the chance to observe and participate in cases while we were in Louisiana, and we wove our case experiences into the training program.

In one case, for example, a worker seeking considerable compensation was given the floor. "You don't think I have a serious back injury?" she asked. "Let me describe my evenings. I have to lie on the floor of *my* kitchen while my daughter-in-law, whom I hate, cooks dinner in *my* kitchen. Everything is *wrong* for me—the smells, her using my pots and pans, the food she cooks, but I am immobilized and helpless in my own kitchen due to my back." It was not the stack of papers that convinced the insurance adjuster about the severity of her injury but the worker's passion in telling her story and the details that just could not be fabricated.

Consequently, we emphasized in the training allowing parties to speak, setting up the space with everyone on the same level around a conference table (instead of using the traditional hearing room, where the neutral sat elevated and apart), and using familiar techniques to generate movement (reality-testing, thoughtful agenda-setting, exploration of the BATNA, and the like). I came away impressed that what worked in "small" cases and worked

in “big” cases (e.g., the Long Island cases) also worked in cases dominated by (sometimes jaded) professionals.

Articles, Textbooks, and Stories Mediators Tell—Inspiration and Impact

“The Risks of Riskin’s Grid” with Kimberlee Kovach

There was a time in my career when I wasn’t that interested in dispute resolution-related writing. What I wanted to say was already being well said by others—by Frank Sander, Josh Stulberg, Baruch Bush, Lon Fuller, Carrie Menkel-Meadow, Roger Fisher, and other of my hero pundits. But when I was sitting on a panel at an Association of American Law Schools meeting sometime after 1994 (when Len Riskin had first published his grid of mediator orientations) and I saw Len Riskin draw and describe his grid, I realized that the narrow evaluative mediator he described was not a mediator as I knew it at all but was more related to an arbitrator.

That moment propelled me into writing, in 1998, with Kimberlee Kovach, “The Risks of Riskin’s Grid” (Kovach and Love, 1998). Kim and I thought that if mediators took on a decisional or evaluative role, this would undermine parties communicating with each other because they would be trying to convince the mediator and also undermine the creation of self-determined outcomes. I thought criticizing the “evaluative” mediator would be an unpopular stance, but, given my love for mediation as I understood it, I felt it was a worthy “hill to die on.” From that point on, I was led into academic arguments and debates. After that article, I wrote many more, plus book chapters, commentaries, tributes, magazine columns, training and teaching manuals, and letters to editors. What stand out as a few major endeavors follow.

The Middle Voice with Josh Stulberg

I conducted mediation trainings from 1986 to the present, using the framework and content from Josh Stulberg's book, *Taking Charge/Managing Conflict* (Stulberg, 1987). What a pleasure it was for me to be invited to work on a new book with Josh based on *Taking Charge* but modified by our long experience in training mediators. In 2009, *The Middle Voice: Mediating Conflict Successfully* (Stulberg and Love, 2009) was published.

Dispute Resolution: Beyond the Adversarial Model with Carrie Menkel-Meadow, Andrea Schneider, and Jean Sternlight

Starting in 2005, writing a series of textbooks with a wonderful team of co-authors (the “chick book” until Michael Moffitt joined the team in 2018), provided a unique learning opportunity—both in negotiating with co-authors and in broadening my own horizons and perspectives on the ADR world.

Stories Mediators Tell with Eric Galton and Stories Mediators Tell: World Edition with Glen Parker

I love stories, and I love mediation, and I long wanted to marry the two to share these passions. I believe my best project to date is the publication of two books of stories told by mediators (Galton and Love, 2012, and Love and Parker, 2018). Not only were the books well received, but since their publication I have enjoyed many story-telling events around the world with mediators sharing their adventures. So many remarkable breakthroughs happened in private mediation rooms—never publicized. Understandings grew, long-standing hatreds abated, and deals were born. Telling the stories seemed like a magical gift to the world. I felt the stories opened a window to the private mediation rooms,

allowing an adversarial world to take a deep breath and appreciate another, better way to address conflict.

Other Moments in My Career

Giving Cardozo's International Advocate for Peace Award to Archbishop Desmond Tutu of South Africa; former President Jimmy Carter; former senator and Northern Ireland peace negotiator George Mitchell; Peter, Paul and Mary; and Paul McCartney (to name a very few of our luminaries) were "highs" in my career. Bringing these people visibly into the camp of Cardozo's "advocates for peace" enhanced a sense that we had a real movement toward human collaboration.

A course on mediation at Central European University in Budapest every summer since 2000 has created an international community of scholars and mediators and friends. Serving as host for the International Mediation Leadership Summit in the Hague in my 2009 chair year of the Section of Dispute Resolution of the ABA felt like the crest of a powerful wave that gathered mediators worldwide before sending them to their many shores. Since that event, many events and publications have brought the international mediation community closer together. I remember pausing at the Peace Palace during the event and thinking, "I can stop here. This is the peak." Or, in St. Petersburg, at the International Legal Forum in 2018, placed between the minister of justice from Serbia and the assistant minister of justice from Russia in a plenary session on "The Future of the Legal Profession," I thought that if Russia and Serbia are moving toward mediation, this field has come far. And I have been very lucky to be along for the ride.

A Full Circle “Peace Train”

One night I was driving with a close friend who said, “I’m going to play something for you,” and he cued up “Peace Train” by Cat Stevens. I had never heard it, and I hit repeat over and over. Both the spirit and the words captured something about what I was striving for, what made me happy. Moving in some Darwinian or Teilhard de Chardin progression toward relations between people that embody understanding, collaboration, and the possibility of unity, I smiled as Cat Stevens sang:

*Oh, I’ve been smiling lately,
Dreaming about the world as one. . .
Oh, Peace Train take this country. . .
Something good has begun.*

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