LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

FRIDAY, JULY 28, 2023

PERSPECTIVE

A new paradigm for mediation: the role of "bearing witness

By Jan Frankel Schau

In Abraham Verghese's beautiful and best-selling novel, "The Covenant of Water," he creates a column known as "The Ordinary Man" – where one of the main characters, Philipose, is described as follows: "His art, so he tells himself, is to give voice to the ordinary in memorable ways. And by so doing, to throw light on human behavior on injustice."

For the past thirty years or more, the "art of mediation" has transformed from the original vision of a joint session and a chance for the parties to hear out one another's perspectives in conflict, to a 1980's style "Art of the Deal" negotiation. Now that so few cases get to trial, and so many are mediated before a lawsuit is even filed, perhaps there is a role for mediators to serve as "witness bearers" instead of being focused upon as expert negotiators.

Consider the case of four young women who came to a mediation after College graduation with a deeply buried and embarrassing secret: all four had been subject to intolerable sexual abuse by their assistant coach while they were in High School. Instead of reporting the behavior to their parents, their Coach, their psychologists or their school administration, they each remained silent for their Senior years and throughout College.

It was only after the statute of limitations was extended in California in January, 2023, that one of the girls contacted a lawyer who was advertising that she represented many young female athletes with similar claims. When the lawyer, upon intake, queried the young woman, she was not surprised to learn that there were others who had also been subject to sexual abuse by this assistant coach and had also chosen not to come forward. She reached out to the other girls from the team and they agreed to retain her, although all of them were very reluctant to make this matter public in a trial or other legal action.

The case would be challenging. Like many cases that are brought years after the standard statute of limitations, memories fade, witnesses become unavailable, and hard "evidence," such as cell phone records or diary entries disappear. The case had little chance of prevailing at trial. Still, these girls were 17 at the time of these lewd and sexually charged messages. In some instances, they were not yet sexually active and did not know how to respond to the intimate questions their 20-year-old assistant coach was prodding and prying out of them.

Instead of getting down to the business of negotiating a settlement, the mediator felt called to listen, and without having to reveal anything of her own past, could speak from the heart to acknowledge these girls' courage and sincerity. She could act as a "witness" in the way a member of a church congregation might, rather than one who is subpoenaed and sworn in through the formal processes of court and subject to the strict rules of evidence, including both direct and cross-examination. She could, after hearing their compelling stories, say "good on you" for coming forward and making sure that this behavior is never again tolerated at your high school.

So what's in it for the "employer" who has just been confronted with something far less than "testimony" and certainly less reliable evidence than would be necessary to get a verdict of high six or low 7 figures? For the employer, the mediator can acknowledge that this kind of conduct would not be consistent with the values or ethics of the school. The mediator can find out whether this was ever reported by anyone and the circumstance of this young employee's departure. The mediator, while encouraging the school district to "make this right" by its former students, can express her relief and reinforce that had the girls given notice to the school of this behavior, the school administrators would have acted upon it immediately.

The process of mediation has evolved so that most commercial mediators are now adept at striking a deal that all parties can abide by. Perhaps, given the contentious climate of our society, it's time to return to a more compassionate and less "judgmental" approach. The deals will come, but at the outset, the notion of "bearing witness" should not be overlooked.

Paradoxically, the rules of confidentiality are being threatened by the State's legislators, who are trying to pass a Bill (Assembly Bill 924) which would have required mediators to "snitch" or report unethical or fraudulent misconduct even if it takes place during mediation. Although the justification for such a requirement makes sense (preventing scurrilous lawyers from taking advantage of their clients, their opposing parties or even their mediator's unfairly or unethically), this would instead undermine one of the chief tools of mediation: confidentiality.

Consider the PAGA case in which a plaintiff's attorney seeks to sue a company for $1 million. During the mediation, it becomes clear that the lead plaintiff's case is terrible, and he will only be paid $10,000. The remaining 50 employees will each take $5,000, and the balance will be for attorneys' fees, in the amount of $740,000. In a broad sense, this may appear to be unethical, requiring the mediator or defense counsel to report the conduct to the State Bar. However, the employer is positioning the company for sale and cannot afford to be engaged in an expensive lawsuit, nor does she want to risk all of her non-management employees becoming agitated and deciding to sue or leave the company due to past practices, including failing to consistently pay meal premiums when meal periods were taken late.

If we, as a profession of mediators working in litigated cases, want to continue to evolve and serve, the confidentiality of the process and the negotiations must be excepted from the rules of reporting required (as they are in the new Rule of Professional Conduct, Sec. 8.3 (d).

So where do we go from here? Undoubtedly, the future of mediation, as almost every other facet of our lives, will be affected by artificial intelligence (AI). When used appropriately, AI has the capacity to analyze data, understand neuro linguistics, manage cases and evaluate claims. What AI cannot do is show empathy or creativity: characteristics that are called for by human mediators. Lucky us!

In her upcoming book, Senior Rabbi Sharon Brous, IKAR synagogue in Los Angeles, writes "The Amen Effect: Ancient Wisdom to Mend our Broken Hearts and the World." The book cover describes the premise as "In an era riven by loneliness, social alienation, polarization and ideological extremism, let's reclaim the simple act of showing up for one another."

It is a simple, yet ancient notion, that we are all strengthened by our collective experiences and, without judgment or shame, can simply say "Amen" to express our approval, our relief and the inevitable closure that must happen in order to open a new Chapter of our own very personal narratives.

Coretta Scott King once said: "The greatness of a community is most accurately measured by the compassionate actions of its members." In this sometimes vicious and divisive world, mediators have an opportunity to step up and listen with our hearts and souls beyond our legal training and analytic minds. We owe that to our community. And, maybe, we can push our own profession to a place of greater compassion. In so doing, maybe we can even cast some light on human behavior and injustice without being bound by the scrutiny and strict adherence to the rules of evidence with which we were trained.

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