

DISCUSSION DRAFT

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Think Piece V: Assessing Mediation Quality

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This “Think Piece” was prepared as a part of the “Dialogue Forum”, given leadership by the Centre for Dialogue at Simon Fraser University, Vancouver, Canada. Glenn Sigurdson has been coordinating the effort. It is an ongoing collaborative initiative of a number of practitioners (including Howard Bellman, Frank Dukes and Barry Stuart) and representatives of stakeholder groups from differing sectors in the U.S. and Canada. For further information regarding the Forum, contact Glenn Sigurdson at cse@direct.ca.

As the purpose of the Think Piece was to generate discussion, it is purposefully irreverent and impertinent.

INTRODUCTION

Over the past couple of months I have made a number of attempts to draft a paper and each time have thrown it away and started over. One version was relatively “scholarly”, quoting a variety of sources that have wrestled with this general area. It was pretentious, pedantic and not very enlightening. Another attempted to be prescriptive, suggesting the “answers” in a fairly challenging manner. Of course, I found that quite uncomfortable. My best draft may have been a set of arguments on why the entire effort to define quality was ill conceived. I concluded that was avoiding the challenge.

With the clock ticking and facing the expectations of my colleagues I started over. This version of a paper is designed to engender and, to some extent, structure discussion around the topic of “quality”. It has more questions than answers. Those “answers” that are suggested are intended to engender discussion. Ultimately, both the questions and the answers reflect only my own experience, values and prejudices.

Four sets of questions kept recurring as I consider this matter of “quality”:

1. What do we mean by “quality”? Do we know it when we see it?
2. Why do we care about quality?
3. How would quality be measured? Who would measure it?
4. What do would you do if you knew what quality was and could measure it?

I end by throwing all caution to the winds and attempting to identify a series of criteria and questions by which to evaluate the process, the intervention and the outcome.

A. DEFINING THE PLAYING FIELD FOR THIS “THINK PIECE”

The “field” of “(alternative)” dispute resolution has grown so broad and “morphed” and been adopted or redefined into so many sectors, settings and institutions that has become like “the housing industry”¹ or, perhaps, the military industrial complex. Perhaps the greatest measure of the success of the “field” is that so many wish to be defined as a part of it. Perhaps our preeminent association, ACR, best embodies this all things to all persons approach:

*ACR represents and serves a diverse national and international audience that includes more than 7000 mediators, arbitrators, facilitators, educators, and others involved in the field of conflict resolution and collaborative decision-making. Anyone interested in the field of conflict resolution is welcome to join.*²

For purposes of this Think Piece I propose that we move away from considering a “diverse...audience”, “and others” and “anyone interested” to the piece of the “field” with which I have familiarity and in which seems to be the most common denominator for the rather select and not very diverse group of practitioners engaged in this exercise. Perhaps, what we have to say will have relevance and hold interest for others. Perhaps not.

The piece of the field that I propose as the focal point for this Think Piece has the following characteristics:

- It involves multiple parties
- The parties include organizations, usually from the public and private sectors
- The organizations are represented by individuals (or representatives)
- They are assisted by an intervenor (mediator, facilitator or?)³
- They engage in face-to-face exchanges
- Their engagement is triggered by some specific set of concerns or issues
- Their purpose is to reach agreement on some outcome
- That outcome may be

¹ As the eloquent Howard Bellman long ago noted (and I take literary license with his observation) real estate salesmen, bricklayers, mortgage bankers, electricians, siding salesmen and roofers may all be part of the housing industry but they are not all roofers. I am going to look at “quality” from the point of view of the roofers, not the industry.

² Description of ACR from its website.

³ As I will discuss further, an understanding that one is an intervenor into the conflicts and concerns of others is a realization for those of us who are selling these processes.

- Substantive undertakings (such as design of physical project or a process)
- A regulation or legislation
- A joint policy or joint policy statement
- An exchange of views for the purpose of making some joint statement or communiqué
- Others?

Conversely, it does not have the following characteristics:

- It is not for the purpose of communication.
- It is not merely advisory or consultative⁴
- It does not knowingly or strategically exclude certain parties or interests (i.e. it does not build a coalition)
- Others?

This is not to suggest that other processes are illegitimate, unworthy or of lesser worth. They are, however, outside of the purview of this Think Piece.

Question: are these process criteria meaningful? Do they define a distinct and recurring set of situations?

B. WHAT IS QUALITY?

We could spend a great deal of time on this question. However, let me suggest three possible definitions:

1. **Quality of the process:** Did the process that was received match the process that was delivered? (The Bellman matrix helps us here.) Are there qualities of a process that are inherent in its nature?
2. **Quality of the intervention:** Did the intervenor do “right” things? How does the intervenor compare with other intervenors?
3. **Quality of the outcome:** Was it successful or not? Is success defined by the purpose of the process?

There are a myriad of other possible approaches and there are innumerable sub-questions. However, I suggest we start with these.

⁴ Thus, I am not considering the “communication” or “consultation” columns, in Howard Bellman’s array of processes.

C. WHY IS QUALITY A CONCERN?

There appear to be variety of reasons why quality has emerged as a concern. Not all are explicit. Do they require or suggest different ways of looking at quality? Should we pay attention to some and ignore or even discredit others?

1. There are practitioners out there who are not providing a service and process that “we” regard as appropriate or “good. But
 - Who determines what is good?
 - Does “good” differ between the parties? The parties and the intervenor?
 - Is the perceived problem a disconnect between what is promised and what is delivered?
 - No consensus? Oh well, 50% is good enough!
 - The environmentalists are leaving the process? Oh well, we’ll just go on without them! (It will still be a consensus, just not of all the parties.)
 - This was supposed to be an off-the record exploration unless otherwise agreed? Never mind, after all this effort we really need to make it public!
 - We are all here as individuals. Don’t worry, we are just noting your affiliation for “information”.
2. If we don’t tell people what they should look for and what they should be concerned about, how can they be informed consumers of our processes?
 - Who should be defining what they should look for?
 - Is there an inherent conflict of interest if we define quality for the processes we are “selling”?
 - Do consumers know that they want or what they should want?
3. It is a necessary step in the accreditation process: This raises the whole debate of why accreditation is or is not a desirable outcome for the field.⁵ With tongue somewhat in cheek, some of the arguments seem to be
 - It would inform and protect the users of the process by ensuring that only qualified practitioners provide the service. But
 - Do we know what makes a qualified practitioner?
 - Does it make them less wary than they should be given the level of knowledge?
 - “Qualifications” may not be quality and most existing lists focus on hours of training (which is itself is not accredited and may not have much correlation with “quality”, as is yet to be defined).

⁵ Accreditation sometimes seems to be driving the debate, “we need to define quality so we can accredit”. Perhaps it is what we should do if we could define quality. This would make it seem less like protection for those in the field and more like an effort to give consumers an ability to exercise caveat emptor.

- If we don't do it, someone else might.
 - The fear is that some particular group (lawyers) might impose their qualifications as a basis for accreditation.

- It will limit entry (there isn't enough work to go around now)
 - This is necessarily implicit
 - Too many people chasing too little work will lead people doing what they shouldn't just to get the work.
 - Other professions do this?

- It will greatly enhance opportunities for those who provide training (albeit for jobs that don't exist).

- At present, accreditation masquerades as lists of "approved" practitioners available from various agencies and organizations. The ability to accredit or maintain a list is a source of power and control: "If we keep the list, we can start to control access to work."⁶ But
 - What are the criteria for getting on lists?
 - Are they the right criteria?
 - Do the criteria mirror the "qualifications" and beliefs of those who keep the lists? If not, where do they come from?

D. HOW COULD QUALITY BE MEASURED?

If we assume that we know what quality "is" and what we are, therefore, measuring, we then must determine how to do the measuring.

Pre-intervention quality assessments: Most efforts to date are intended to measure the quality of the intervenor, not the intervention or process. The two most common attempts at measurement are applications to serve on various lists and Requests for Proposals (RFPs) from potential clients. The latter are becoming particularly ubiquitous as the field becomes increasingly institutionalized. The following seem to be the most important measurements:⁷

- **Experience:** number of hours, number of cases, types of cases.

⁶ A particularly troublesome (to me) aspect of this is where the keeper of the list also provides funding if parties to a dispute use names from their list and their approach or preferred process.

⁷ I suggest that the RFP process is most successful at measuring quality in terms of the ability to respond to RFPs.

- **Training:** hours of training⁸
- **Education:** level and substantive areas of expertise

Of these, experience may be the most relevant measure if one assumes that survival and continued engagement by clients is an indicator of at least a minimal level of performance. However, some lists suggest that as little as 200 hours meet a requirement to be regarded as “senior” or “experienced”. In the types of cases contemplated in this paper, 200 hours would seldom complete a minimally complex case.

RFPs often ask a question such as “describe your philosophy of mediation (or facilitation)”. This may be the only attempt to understand the values that the intervenor brings to the effort.

There has been some discussion of setting up the equivalent of moot courts and evaluating potential or aspiring intervenors. There are obvious challenges for any attempt to collapse a complex process that may take considerable time and includes on-line and off-line conversations into a manageable exercise for evaluation.

Quality assessments during the intervention: I have only been involved in one situation where there was someone in attendance from an agency (that also happened to be a party) that was attempting to measure quality of intervention. They were asked to leave. I have found in my own practice that it is helpful to pre-commit to a session relatively early in the process where the topic will be a joint assessment of progress, ground rules, the intervenor and the efforts of the participants.

Post-intervention quality assessments: Generally, attempts of this source have relied on interviews with and questionnaires given to the participants. Some appear to focus on outcomes. In certain settings – like court diversion programs – there is considerable evidence that just being heard makes people feel better (even though agreements reached are often not implemented). There were some early attempts at assessing the quality of outcome in complex disputes. Unfortunately the assessors attempted to apply an external measure of substantive success and the publication of their findings resulted in serious consequences for the leadership of the party who they deemed could have “done better”.

If we had a sense of what constituted quality, careful post-intervention reviews might be an important tool.

AN IMMODEST PROPOSAL

⁸ Unfortunately, there is neither a demonstrated link between amount of training and quality of intervention nor any control over content or quality of training. The assumption (as with many other professions) seems to be if you expose them to enough, something useful will occur and may stick.”

In order to focus this discussion I will suggest some possible “quality points” for the process, the intervention and the outcome. They are the answer to the question, “If someone came to me and asked me these questions, what would I tell them?”

A. THE PROCESS

In this section I will suggest some possible fundamental qualities or values that are claimed for the types of process I am considering.

4. **Clarity:** The purpose and the intended outcome of the process are clear and are explicitly agreed to by the participants. (communication, consultation or consensus?)

Questions: Does the Bellman matrix provide a basis for determining and comparing outcomes?

5. **Voluntary:** the participants in the process are there by choice and not by mandate. This would suggest that they make an informed suggestion that it is in their self-interest to participate. This is not to suggest that no coercion is involved (“I will not negotiate under threat?!”). They may not like their choices but they do get to make them.

Question: how do we deal with labor disputes where mediation may be required or imposed as a step in the process. Does it “prove” or “disprove” the importance of “voluntariness”?

6. **Self-determination:** the participants in the process have the information necessary to make an informed choice as to whether or not to engage in the process. What might participants want to know? In my own experience, recurring questions seem to be
 - How long will it take?
 - What will it cost?
 - How much time and effort will it require?
 - What if it doesn’t “work”?
 - Will I be worse off?
 - Will they make it look like my fault it failed?
 - They’ll know more about me
 - They’ll know my arguments
 - We’ll have used up many of our resources
 - Will I be better off?
 - (Reverse of the above)
 - What if it works?
 - Compromises?
 - Certainty?
 - Will they be bound by the agreement?
 - What if they violate the agreement?

Questions: how do we identify the right questions? Are they a combination of the questions asked by the clients and those that intervenors think should be asked? Is a process involving both “camps” (such as this or the development of the “ten principles a best way to go)?

7. **Fairness:** Are all participants in the process able to participate at a level that they would define as “fair”. How would “fair” be defined? Elements might include:
 - Access to information
 - Independent ability to assess information (especially scientific and technical information)
 - Time to become informed
 - Time to fully communicate with members/constituents/principals
 - Choices are not limited by ability and resources to participate in the process (e.g. travel expenses, cost of taking time off from jobs, etc.)
 - Other

Question: How do the participants define fairness? If the process isn’t proceeding in a fair manner, who should make the “call”? What should they do?

8. **Inclusiveness:** Are there those who are disadvantaged by not participating?
 - Has some party with a direct interest chosen not to participate?
 - It seems somebody always wants to leave somebody else out (they are unreasonable”)
 - Are there provisions for adding other participants?

Question: How do you differentiate between a process to settle a dispute vs. a process that creates a coalition that overpowers minority interests by exclusion or going forward without them?

9. **Ownership:** The process belongs to the participants collectively. Is not owned by an agency nor is it owned by the intervenor. They understand the process in which they are participating and control all decisions.
10. **Empowerment:** the overall goal of the process is to empower the participants to make their own, informed decisions in pursuit of mutual agreement.

B. THE INTERVENOR

1. **Role:** Does the intervenor understand that they are intervenors in the affairs of others?
2. **Values:** Does the intervenor understand and espouse the process values listed above?
 - Do they defend them against the parties?
 - Are they willing to “walk” if they are violated?

3. **Independence:** Is the intervenor independent of the parties?
 - Importance of full disclosure?
 - How are they selected?
 - How are they managed?
 - Who can fire them?
 - How are they paid?
 - Do they have views on the substantive issues?
 - Are they benefited by the outcome? How?

4. **Experience:** Is there reason to believe that the intervenor knows what they are doing?
 - Importance of references?
 - Experience with “this” process?
 - Familiarity with structural, cultural and social context?
 - Is substantive knowledge important? Why?

5. **Chemistry and trust:** If any party is not comfortable with the intervenor it severely limits the intervenor’s ability to be helpful. Even if the chemistry is poor for no discernible reason, the parties should dispense with their services (or the intervenor should withdraw).
 - Do you trust the mediator enough to tell them things that could “hurt” you?
 - Do they understand and accept what is most important to you?
 - Do they have sense of the appropriate and what is and isn’t important?
 - Do they push you? Challenge some of your assumptions?
 - Do they help you become better negotiators?

C. THE OUTCOME

The first measure of the outcome should be whether or not the outcome of the process (communication, consultation, consensus) is what the participants expected. Where there is a substantive outcome (e.g. agreement of the parties) there are a number of questions that the participants should consider (and that the intervenor should press them to consider).

1. **“Implementability”:** can the agreement be implemented?⁹
 - Was there a rush to agreement just to have a “success”?
 - Is it feasible financially, technically, politically, institutionally, socially, and culturally?
 - Are the responsibilities for implementation clear?

⁹ I learned from Barry Stuart the importance of doing a “dry run” of the implementation of a complex agreement as a means of highlighting possible glitches and conflicts.

- Are the time lines for implementation clear?
 - Is a dispute resolution process needed for resolving unforeseen problems?
 - Are the their consequences for failing to implement?
 - Is the agreement public? Is there some provision for public review and comment? Should there be?
- B. **Commitment:** Different agreements require differing levels of commitment and continued or future effort by the parties if they are to be implemented successfully. In one situation not opposing an agreement may be sufficient. In another the public commitment of all of the parties is necessary if implementation is to be successful. A number of questions might be asked:
- Is the level of commitment to the agreement sufficient to achieve implementation?
 - Have principals and constituents ratified it formally?
 - Are the parties willing to publicly commit to the agreement?
- C. **Future relationships:** agreements often define a new relationship or even quasi-organization for implementation.
- Is the relationship clearly defined?
 - Are the expectations of each of the parties clear?
 - Do all of the parties have a role in the implementation?
 - Is sufficient time set aside for the relationship and the implementation?

FINAL THOUGHTS

The most important element in ensuring a quality process and quality intervention is to enable those who would use such processes and engage the services of intervenors to be informed consumers. This requires that we be clear and explicit in terms of what we do and what we know and what we do not know. It requires clarifying rather than muddying choices.¹⁰ And it requires intervening in a manner that permits and enables potential process participants to make their own choices, separately and collectively.

The second element is for intervenors to more clearly understand and espouse a set of essential principles that define their work as intervenors. The basis for making difficult choices during the process of intervention should be a clearly defined set of values. The intervenor should be explicit about these values in their discussions with process participants or those who are considering participation in a process.

¹⁰ An egregious example of our tendency to muddy definitions to appease concerns within the intervenor community was one of the “best practices” documents where it was agreed that “facilitation” and “mediation” were synonyms. An important opportunity to differentiate quite different but equally legitimate roles and functions was missed.

It is important to remember that our processes are not a magic bullet. They will not always work. They are not always appropriate. They can make situations worse. As intervenors we do not have the right to make these determinations for the parties. And, s experts(?) and professionals(?) in the use of these processes we should not always offer our services even if some or all of the parties choose to go forward.