

In Search of the Rosetta Stone of the Mediation Profession

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Although people have their choice today of an ever-growing number of "how-to" books and articles about the mediation process, this plenitude was hardly always the case. In fact, back in the early 1950s in the United States, three young mediators with the Federal Mediation and Conciliation Service (FMCS) drafted a 62-page memo on the subject of their work which included 120 different techniques of mediation, many of which would be familiar and useful to practitioners today. Their pioneering work, however, was neither recognized nor encouraged by the FMCS; in fact, it was suppressed. This article focuses on the reasons for the suppression of that work, providing an overview of the vast changes that have taken place in mediation's history and the federal labor-management mediation agency over the past half-century.

In early 1953, less than six years after the creation of the U.S. Federal Mediation and Conciliation Service (or FMCS),¹ three FMCS mediators stationed in Detroit wrote a 62-page memo in which they described their job — what it was to be a mediator — and listed 120 separate mediation techniques.

The fact that FMCS mediators wrote *anything* in those early days of the professional mediation field is itself remarkable. For the most part in that era, mediators were too involved in "doing" to reflect much on what it was they

were doing. In addition, until very recently, FMCS has had an oral tradition and a reluctance, if not opposition, to writing.² Most FMCS mediators in the early 1950s had little formal education, and only a few had a college education; most were former trade unionists with less than a high school diploma. Official case reports were brief and terse, and mediator notes made during mediation sessions were typically destroyed after agreement was achieved.

So Why Did They Write?

Back in the 1950s, the FMCS regional office in Detroit, which covered Michigan and Indiana, had a practice of scheduling hour-long gatherings of the mediators once a month to talk about issues and developments in collective bargaining. Three of the youngest mediators in the ten-mediator office used this rather casual forum as a springboard to get the regional director's approval to survey their 23 regional colleagues on how they understood the mediator's job, and which techniques they used in their work.³

Over a period of several months, as time from the normal work allowed, these three college-educated mediators drafted a 62-page document in the format of a memo to their regional director. They titled it: "Report on The Federal Mediator: His Responsibilities, Functions, and Techniques." They dated it February 24, 1953 and, rather than putting their own names on the document, indicated it was from a: "Committee on the Federal Mediator, His Responsibilities, Functions, and Techniques."

While they consulted with their colleagues during the discussion and writing, the three mediators did most of the work because they were willing and able to do so, and because their colleagues, with less formal education, did not see much merit in the project.

Their report was given to their regional director and labeled: "Confidential Use of the Federal Mediation and Conciliation Service Staff Exclusively." The regional director shared it with other regional directors and a few people in the FMCS national office. Although the report had not been made public, within a very short time after the regional director received it, other Detroit mediators reported to the regional director scenarios like this:

In the midst of a case, as a mediator began to use a mediation technique, one of the parties would ask the mediator: "Mr. Mediator, was that Number 29 or 75?" As the embarrassed mediator struggled to respond, the questioner and everyone else had a hearty laugh at his expense. ("His" is the accurate adjective since there were only two women mediators in FMCS at the time.)

The embarrassed mediator, upset with his young colleagues who had written the document, complained to the regional director. The regional director, who was never really comfortable with this "academic stuff," agreed with the complaining mediators. He immediately called everyone who had been given the report and ordered that all copies be returned. As the copies were retrieved, they were destroyed. From that point on, mediators denied that such a report had ever been written.

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A few years went by, no reference was made to the report or the 120 techniques. When I joined FMCS ten years later, there was no reference to the list during training or orientation in the national office or field. Nor is it mentioned in the *FMCS Annual Reports* during that period, although those reports do state something to the effect that FMCS is "constantly on the lookout for new and better ways to train mediators." In addition, a mediation and collective bargaining bibliography, written as an internal FMCS document in 1963, failed to list the memo.⁴

Some copies of the 1953 memo did survive. I acquired two copies in my work on the FMCS history. The copies were provided about ten years ago by retired mediators, who handed them to me with a smile of remembrance of the long-ago controversy. Neither retiree could recall exactly how they happened to have the paper, or whether they had ever thought of surfacing it once the controversy of 1953 had subsided. Stamped on the first page of one copy was the name of a former regional director, who later became national deputy director of FMCS.

The 120 Techniques

In this shrouded report on mediation practice from long ago, each technique was given a title and an explanation running from as few as six lines to as many as 30 lines.

My reading of the 120 techniques suggests that the list has stood the test of time. In fact, mediators today could learn a great deal from this list. Current mediator training programs cover many of the topics on the list. Certainly, the list could be used in a current mediation training session for mediators working in any sector.

Most mediators today would recognize some techniques by their assigned titles, for example: 2. Ignoring Dropped Issues; 6. Exploration; 9. Rearranging Issues; 20. Reality; 28. Timing; 32. Listening; 60. Creating Doubt; 63. The Suggestion of Arbitration; 73. Highlighting the Best Possible Alternative; 75. Saving Face; 86. Keep Them Talking; and 92. The Deadline.

Other titles from the 1953 memo may be more puzzling than informative, for example: 13. Crossing the Table; 52. Pointing the Arrow; 78. The Round Robin; 79. Visual Arts; 83. The Bulldog; 100. The Telegram; and 102. Paying the Piper. I am currently working on a subsequent article, in which I shall deal more extensively with many of these intriguing 120 techniques.

Why Suppress or Deny?

Given the current plethora of writers and written materials on mediation, how can the suppression and denial of the 1953 memo be explained? Does the embarrassment of mediators, the FMCS oral tradition, or the lower educational level of mediators at that time offer an adequate explanation?

The sarcasm inherent in the question on "techniques" could well have been embarrassing to the individual mediator and FMCS. The question seems

to suggest that the mediator was working from a "play book" applying formulas developed by others, and not really acting very professional.⁵

Throughout its half-century-plus, an oral tradition has been a hallmark of life at the FMCS. Most mediator information was gathered orally, and shared orally. Reading and writing were a distant second. A distinct characteristic of the 200-plus mediators whose oral histories I have recorded thus far is that they are *all* talkers. They talk easily and often. The written word was not as comfortable for them. The way these mediators learned techniques was by observation and discussion, not reading and writing. They are very proud of their oral skills. Most mediators from that era would probably say that writing the list was a mistake. The fact that the agency discouraged writing encouraged the oral tradition.

The educational level was another influence during that period. Almost without exception, mediators were recruited from the labor movement, and had a high school education at the maximum. Their success as union representatives was based more on people and political skills, not academic study, reading or writing.

The combination of those three factors — embarrassment, oral tradition and lower education levels — can provide a plausible explanation as to why FMCS so comfortably and completely suppressed the existence of the report and the list of 120 mediation techniques. Even those who might have favored the list must have distanced themselves from it once the controversy heated up, feeling that was better for them, mediation and collective bargaining.

My interview of two of the three 1953 memo writers explains their motives in developing the report. They were young, ambitious, new to mediation work, not long out of an educational setting, willing to think of their work in academic terms, and eager to learn from their colleagues. They also saw it as a way to make their boss, the regional director, look good, and thus help their status with him. Their boss had minimal formal education. They appeared to have no negative recollections of the suppression and denial of their report. Both had spent many years in FMCS after 1953, and so there recollections were likely moderated by many other intervening events.

The "Mystique Theory" of Mediation

While I am not uncomfortable with embarrassment, oral tradition, and lower educational level as possible explanations for the report suppression, I offer another explanation for consideration. I'll call it the "mystique theory" of mediation. In this theory, the mystique of the process is crucial to making it work. If the parties know too much about the process, they have less faith in it, and thus the process is less effective.

Accordingly, mystique theory recognizes that some of what the mediator does with the parties is undefined, unexamined, and even mysterious. Another way of expressing this would be to describe the mediator's work as art. Therefore, to convert the mediator work of art into a list of 120 specific options would minimize the significance and difficulty of the work. In a

sense, the 120-techniques list converts mediation into something anyone with the list in hand could do. For the good of the parties, who need a settlement, it is best for them not to know so much that the process doesn't work for them. Knowing that it works is enough; to know more is to know too much.

Mystique Theory Illustrated

In suggesting the mystique theory explanation, I am influenced by my early experience as a staff mediator with the Minnesota State Conciliation Service in 1961. During my first several weeks on staff, I accompanied a very experienced mediator to observe his work. On a long automobile ride to a case with my mentor, he offered his explanation of how mediation works. It went something like this: As the mediator talks with the parties, he will very soon hear their expressions of hopelessness about their situation. The mediator helps the process by supplying a fog to engulf the parties and further obscure their view of any solution. When the process is ready for the mediator's help, the mediator, standing outside the fog bank covering the parties, will see two hands emerge from the fog, one from the union and one from management. The mediator clasps the two hands, joining them together to produce the solution the parties needed. At this point, the parties are so confused and frustrated in their pursuit of a resolution, they will accept any solution offered by a friendly source, the mediator.

I was able to observe his techniques for enhancing the fog and feelings of hopelessness. His primary technique involved talking in often confounding metaphors and making ambiguous references. For example, when no offer had been made by the parties when he felt one should, he would say, with dramatic gestures: "I've been looking into the rain barrel, and I don't see anything but water." or "I don't see any coconuts on the bar."

Frequently, parties hearing such remarks would ask each other what he was talking about. If they asked him, he would just repeat himself and add more of the same. Finally, when the parties reached the necessary point in their thinking, they would ask the mediator if he had any suggestions. At that point, the mediator would become very specific and prescriptive in both content and process terms. And frequently, that would lead to settlement.

I had a similar experience with a senior mediator I worked with in the mid-1960s at FMCS in Milwaukee. He had invented a fictional character called "Sam Lapetus" whom he would play in his conversations with the parties, telling jokes with a comic dialect. The first few times I heard him play Sam, I thought it was a real person; the stories were both comprehensive and engaging. Without exception, Sam Lapetus' story led the parties away from the subject under discussion and instigated an exchange of jokes and stories. Finally the mediator, usually as the Sam Lapetus character, would suggest a content or process solution, which more often than not became the basis of settlement.

It can certainly be argued that neither of these examples seems very respectful of the parties. Both styles of mediation seem to be personality-dri-

ven, promoting the idea of the parties' helplessness and place their settlement too much in the hands of others. Since neither example can be explained systematically or logically, they manifest characteristics of mediation as art or mystique.

Another example illustrating the mystique theory involves the parties' self-delusion. An African-American mediator (a rarity in the 1960s by the way) had been a very successful national mediator for FMCS. His explanation for his success, during an era when racial bigotry prevailed, involved what he called a self-delusion consisting of several steps:

- The parties needed a settlement, having failed to achieve one in direct bargaining or with the help of the local FMCS mediator;
- The National Director of FMCS, the premier mediation agency, had sent this particular mediator to help them, and no other choice was offered;
- Therefore, to overcome their typical reaction to a black, they choose to identify this black as positively different from any black they had ever known. He was not just good, he was exceptional. He was better than any other mediator could possibly be.

As a result of this self-delusion, the parties credited the mediator with exceptional skill, greeting his ordinary actions and suggestions with great respect. In other words, the parties credited the mediator with more impact on their settlement than he felt he deserved. Thus, the parties created a "mystique" around this mediator, not allowing themselves the opportunity to examine clearly what he said or did to help them. And it worked.

What Life was Like in 1953

In interpreting the past, historians suggest that the entire historic context must be appreciated. That is appropriate in trying to understand what FMCS did with the 1953 memo and the 120 techniques. Collective bargaining was not a very mature process in 1953 and, in fact, had only existed in a few industries before World War II. During the war, real collective bargaining was suspended, based on the unions' commitment to forego the rights to strike and a War Labor Board that ruled on labor agreements. Following the war, free, widespread collective bargaining began.

In 1953, collective bargaining, and its companion mediation, were still very much in development. If mediators and the FMCS took seriously the statutory language obligating them to promote and nurture collective bargaining, the "burial" of the 120-techniques list is more understandable. The access of the parties to the 120-techniques list, in their view, must have been seen as threatening to adolescent collective bargaining and mediation, and therefore, something that must be suppressed and denied.

The writings of Thomas Kuhn may be useful in contrasting 1950s-style collective bargaining and mediation with the current style of workplace dispute resolution. Kuhn (1962) introduced the concept of paradigm to explain how scientists practice problem solving, and how an established paradigm,

within a specific scientific discipline, must be challenged and rejected to create scientific progress based on a new, replacement paradigm. The social and economic paradigm of the 1950s projected stark dichotomies: The USSR versus the U.S., communism versus freedom, the Korean War, racial segregation. Labor and management relations and collective bargaining fit within these overarching dichotomies, as unions attempted to establish their legitimacy and wrestle rights and prerogatives from management. Strikes, some of which were violent and lengthy, were plentiful in the 1950s. The very language of negotiations displayed passion, aggression, and threats, all of which limited the parties' thinking to very few options.

In contrast, today strikes are rare and nonviolent, problem solving has largely replaced aggressive, hard-nosed bargaining; mutual interests are recognized and numerous options are considered. And thus, a new paradigm has emerged.

Mediators from the 1950s might argue that the blessings of an expanding economy and the patient work of artful mediators helped the parties muddle through a difficult period. For those mediators, protecting mediation techniques from detailed examination made their work more effective and nurtured collective bargaining at a critical time. Thus, the mystique of mediation fits their paradigm.

Why the Forgotten Rosetta Stone?

Since its discovery in 1799 near the mouth of the Nile, the Rosetta Stone has come to represent the key to understanding something previously confounding or mysterious. The Rosetta Stone, a black slab of basalt inscribed with two ancient Egyptian scripts and a Greek script, provided the most important key to understanding Egyptian hieroglyphics.

The meager amount of written material on mediation in 1953⁶ and the willingness of the FMCS to suppress this report, stands in sharp contrast with the tremendous volume of written materials, conferences, training sessions, and uses of mediation today. While mediation had been used in labor-management disputes for nearly 50 years in 1953, it was hardly a well understood process. Certainly mediation garnered media attention during that era, particularly when a strike occurred. However, the media primarily reported that a dispute was being mediated, without any details that might illuminate the process. It is this lack of detailed knowledge of mediator techniques, combined with the FMCS suppression of this uncharacteristic mediator writing project, and the casual discovery of their work in the midst of an avalanche of current mediation writings, that invites the Rosetta Stone title.

While attending a SPIDR (Society of Professionals in Dispute Resolution) conference recently, I was struck by the contrast between the late 1990s and 1953, when the Rosetta Stone memo first appeared. At the conference, a workshop speaker explained a transformative mediation technique she had used successfully in a business dispute. Having assumed that one participant was uncooperative in the process because he felt hurt and

injured by the other party, she began to see him as an injured child in need of comfort and nurturing. Then she began to envision herself holding this man as a child in her arms as she cuddled him in a rocking chair. As the meeting droned on, she continued to rock and give nurturing comfort until the man began to respond positively to the mediation process. (This technique is not on the 120-techniques list.)

Today's unstoppable willingness of mediators to talk and write in open forums about the mediation process, including unusual techniques they had tried, has accompanied the expanded use of mediation into disputes beyond of the labor-management sector over the past 25 years. Such willingness to discuss processes and techniques has not always been the case, as the burial and denial of mediation's "Rosetta Stone" illustrates.

1. The Federal Mediation and Conciliation Service was created by Congress in 1947 as the replacement for the United States Conciliation Service, which had been mediating labor-management disputes since prior to World War I.

2. While working as an FMCS mediator in Milwaukee in the late 1960s, I wrote an essay on the potential for using mediation in civil rights and community disputes. As required by agency regulations, I submitted the essay to my regional director for his approval before submitting it for publication. After several weeks of not hearing from him, I inquired about the paper's status. My regional director said he hoped I had forgotten about it. Then he argued I should not submit the work for publication, urged me not to write anything more, and suggested writing wasn't good for my career. In spite of his strong, clear message, I asked him to send it to the national director for his reaction. A month later, he called saying that the national director had given his approval, so he was reluctantly agreeing. But he wanted to make some suggestions. I accepted them because they were not substantive. Finally, he dictated the disclaimer that must appear with the publication. Lastly, he reminded me that I had not been hired by the FMCS to write. My essay was published in the *Monthly Labor Review*. (1967)

3. The three Detroit mediators were David Tanzman, Irvin Gerard and Irving Paster. Tanzman and Gerard remained in the FMCS for many years; Paster left after just a few years.

4. "Annotated Bibliography of Mediation and Other Selected Labor-Management Subjects" (An eleven-page FMCS internal agency paper circulated in 1963). An expanded version of this paper was issued two years later: "Mediation and Mediators: A Summary of Published Materials." (FMCS, 1965. pp.67.) The author of this essay worked on the latter version. I have no recollection of hearing or seeing the Detroit mediators' paper, and I had access to the extensive library of the U.S. Department of Labor for my research.

5. In the introduction to the 1953 memo, the techniques are referred to as "the mediator's bag of tricks."

6. Former FMCS mediator Charles Rehms, writing in 1965 as a professor at the Institute of Labor and Industrial Relations, University of Michigan-Wayne State University, reviewed the literature on mediation and contrasted its meagerness with the extensive literature on collective bargaining negotiations. Rehms wrote: "Mediation is perhaps the least studied subject in the field of industrial relations." And of course, this was even more the case 12 years prior to the Rehms review. He cites only seven studies or descriptions of mediation in 1953 and before. They included two books, two journal articles, two published papers, and one unpublished paper.

REFERENCES

- FMCS (Federal Mediation and Conciliation Service), 1953, 1954, and 1955. *Annual Reports*. Washington: U.S. Government Printing Office.
- Kuhn, T.S. 1962. *The structure of scientific revolution*. vol. 1 (Foundations of the Unity of Science). Chicago: University of Chicago Press.
- Rehms, C. 1965. The mediation of industrial conflicts: A note on the literature, *Journal of Conflict Resolution* 9 (1): 118-126.