
Review Essay

Improvisation, Mediation, and All That Jazz

Howard Bellman

Jeffrey Kravis. *Improvisational Mediation: A Mediator's Stories of Conflict about Love, Money, Anger and the Strategies that Resolved Them.* San Francisco: Jossey-Bass, 2006. 336 pages. \$35 (hardcover) ISBN: 0787980382.

Mediation as an Improvisational Art

Improvisation has become a topic of increasing interest to mediators and mediation educators in recent years. For example, in October 2004 the Program on Negotiation convened negotiation and mediation practitioners, actors, jazz musicians, and psychiatrists, as well as academics from a variety of disciplines for a seminar entitled "Improv and Negotiation." (See Balachandra 2005.) In addition, the 2006 Annual Conference of the American Bar Association, Section of Dispute Resolution, included a panel on improvisation moderated by Jeffrey Kravis whose book is reviewed here, as well as a plenary session entitled "Where Mediation is a Stage and There is No Script: Lessons from the World of Improvisational Theater."

The suggestion that mediators improvise is especially appealing because it associates mediation — and mediators — with the artistry of jazz musicians and improvisational actors (Balachandra et al. 2005). It elevates the perception of the work, and it raises intriguing questions about the training of mediators. What do we know about the improvising of musicians and actors? How are they trained in that skill? Are some individuals better suited to such training and, therefore, for such work? What insights can mediation and mediation teachers gain from looking at improvisational artists and thinking about what they do?

Howard Bellman is a practicing mediator and an adjunct professor at the Marquette University Center for Dispute Resolution Education. His e-mail address is belmediate@aol.com.

Jazz musicians, at their best, seem to draw on an endless supply of ideas as they construct never-heard-before music — without any apparent deliberation. Likewise, improvisational actors often amaze their audiences with their apparently effortless ability to respond cleverly and immediately to the just-invented prompting of other actors. These artists seem to have an infinite repertoire, instantaneous access to it, and an uncanny knack for using these repertoires seamlessly and in harmony as ensemble performers.

Comparing the improvisation of actors and jazz musicians to mediation — when mediation is working well — is easy. Mediators, too, must work “in the moment.” Hesitations by a mediator are perceived as significant. (The rests in music and the silences on stage are as much a part of the performance as the notes and the dialogue.) Mediators must also respond to advance the ensemble process among the negotiators (the parties in dispute and their representatives), a process that is largely unrehearsed. They, too, need a repertoire and must draw from it in a manner that is appropriate to the particular case. Like improvising actors and musicians, on some days mediators are brilliant, and some mediators are brilliant more often than others.

Individual talent is a significant component of all these pursuits. (Some mediators, for example, seem to have a better “ear” for the interests and dispositions of others and a more empathetic nature.) Also, both improvisational performers and mediators need a repertoire of ideas and must call on a body of norms and expectations to govern the ensemble performance (negotiations, in the case of mediators).

The norms and expectations of jazz include certain conventions of harmony, chord structures, tempos, and rhythm. Musicians who are strangers to each other can improvise together because they have learned those conventions, perhaps at a conservatory. They will probably perform better if they do so again and become more confident of their shared expectations or if they take some time to talk it over before they get started. Their repertoire is probably derived from listening to other musicians both “live” and on recordings. Their talent guides their choices as they retrieve from their repertoire but do not simply replicate. The music that they have experienced is influential — you may be able to tell to whom they have listened. However, their performances are not memorized and, by definition, they follow no musical score or, in the case of actors, no script.

Mediators are also able to work with strangers, particularly if they share with them some expectations about how the process will work. If all involved in the negotiations have been trained, perhaps in a formal program, to anticipate certain role definitions, ethical norms, and methods for finding common ground, the mediation can move ahead smoothly. If they meet again, those expectations will be more grounded and greater

efficiency may result. If not, the mediator and the negotiators are well advised to spend some time before the negotiations begin agreeing on ground rules and strategies.

Although these shared expectations enable both mediators and jazz artists to improvise, it is the rapid retrieval of past experience and the tailoring of that past experience to suit the current situation that is the intriguing heart of the matter. Given an individual with the requisite personal attributes, inherited talents or acquired skills or both — what is the process whereby the music that she heard previously or the mediation that he witnessed or read about is brought forth and quickly modified to fit the case at hand? How does he or she do it? And how might that skill be taught and improved?

Successful Mediators Share Their War Stories

The title of Jeffrey Krivis's book, *Improvisational Mediation: A Mediator's Stories of Conflict about Love, Money, Anger and the Strategies that Resolved Them*, suggests some examination of all this, but, in fact, there is none. The book, whose author is a highly regarded mediator, consists mainly of thirty very brief, very well written, and easily read case histories based on the actual experiences of the author and his friends. Each case is followed by a few paragraphs of analysis entitled "What Happened?" and a few numbered paragraphs under the heading, "What Strategies Can We Learn?" It ends with "The Mediator's Hip Pocket Guide to Strategy," which consists of about forty "advanced techniques" for avoiding and overcoming deadlocks. There is no discussion of improvisation *per se*.

The mediators in Krivis's stories rarely make a mistake. They are even-tempered, authoritative, and very readily trusted by the negotiators. These mediators are never deceived and fairly quickly divine that which will bring the matter to a settlement. They are highly evaluative, superbly elicitive, and even transformative in their methods exactly when those strategies are called for, and even vary their methods as appropriate within a particular case.

One might quibble with some of these mediators' ethical judgments or a few of their tactical moves; and a flop or two could have been instructive. However, we can learn a great deal from a virtuoso's "greatest hits" collection. Furthermore, the mediators in these stories, in the main, do seem to be improvising.

Interestingly, the eclectic practices and flexible strategies of the mediators in these stories belie the implication of the book's title that there is a single discrete method that we could call "improvisational mediation." They succeed because they perceive what will be helpful and they do it, whether it is evaluative, facilitative, etc. They employ many, perhaps all, methods. If the title of this book is intended to suggest that the reader will learn a method, it is, again, misleading. (This title, as many are, could be a publisher's tactic.)

The same inference may be drawn from the copious cataloging of skills, tactics, tools, and tricks of the trade throughout this book. It seems intended to give the impression that the book is a reference manual to be kept close by and scanned when the going gets rough. (Try to picture a mediator in the hallway between caucuses doing just that when one of the parties in dispute walks by on the way to the rest room.) Mediation, at its most challenging, can consist of subtle, nuanced, idiosyncratic signals and communications, as the author obviously knows. The nuggets that the author offers are replete with truisms and formula, as well as advice, the value of which is entirely dependent upon the situation.

Some examples of truisms include:

Look for clues to deeper psychological issues.

Create an atmosphere where both sides feel free to open their hearts, listen, and have compassion for each other.

'Read minds' by observing body language and listening closely.

Discuss common concerns.

Discover what people really value.

Check the reliability of your information.

Some examples of situational tactics are:

Consider your audience.

Make a settlement recommendation only when you sense all parties are receptive to change.

Deliver bad news with pacing and patience.

Use the techniques of the trickster sparingly.

Some formulae include:

Stress the probability of immediate financial gains over the possibility of winning in court.

Provide a spectrum of possible damages to each party, with the likelihood of settlement shown as a percentage.

Break perceptions into component parts: reports, inferences, and judgments.

Stagger the presentations to shift the balance of power and keep the parties off balance.

Jump-start the defense offer by leading them to expect a high settlement demand below the maximum value of the case.

Use the 'fishy calculator' method to combine authority from all the defendants in a multi-defendant case without their having to disclose their contributions to each other.

These tricks of the trade too suggest a publisher's input. Another jazz comparison comes to mind: great jazz artists have been persuaded by recording industry executives to record with string sections, with the objective of appealing to a wider market. The artistry of the featured stars shines through, but it is not their best work.

Kravis, to his credit, understands that improvising in mediation is not simply replicating tricks of the trade. In his introduction, he writes:

Do I expect you to follow these stories slavishly? Of course not! No two mediators work the same way, and no two cases are the same. In fact, mediators need to change their approach not only from case to case but also within the same case, as many of the stories in the book make clear. That's one of the things that makes being a mediator such an interesting profession. Every mediation is a fresh challenge. With your tools and skills and wits about you, you just jump into the center of the conflict and try to bring it to a successful conclusion. (3)

This understanding is also expressed in the introduction to the "Hip Pocket Guide," and it is exactly right.

Seeking the Science behind the Stories

So how does one get from the stories to the performance? Not by memorizing axioms. How do we assimilate the specific strategy lessons and call them forth in the midst of negotiations? Given that "no two mediators work the same way, and no two cases are the same," how do such variables function? These fundamental questions about the reprocessing of experience that seem to be the essence of improvising are not examined in this book.

Finally, it would have been especially interesting to learn how the mediators in these stories prepared for their cases. What, if anything, did they do in advance that either facilitated their judgments during the mediation sessions or brought the negotiators into the "ensemble?" In a number of the stories, reference is made to "pre-mediation" contacts and information, and these contacts seem to prompt some of the mediators' critical judgments.

Here is an excerpt from a story titled "The Silent Mover:"

The mediator had chosen to meet privately with each side instead of beginning with a joint session, and his first meeting was with Marion (the plaintiff). He could see from the legal briefs that this case was all about money and property, but he knew that Marion already had plenty of money. . . . He agreed with Deborah

(Marion's attorney): there must be more to the story. He wondered what the silent mover would turn out to be, and he knew he would have to open up the Pandora's box of Marion's emotions to find out. So instead of beginning the conversation by saying, "How much do you want?" and sticking with the legal concerns, he chose to view the case through a "relationship lens" and to play the role of therapist, discussing issues that had no legal relevance to the dispute. (208)

This mediator was prepared and selected a strategy that succeeded in achieving a fine settlement. Clearly, he had informative contacts before determining the course he would take.

However, in this case, as in the other stories in the book where preparation is evident, the reader is left wondering: Where did the mediator get her information? Were her contacts with the parties prior to the session in the form of briefs, or telephone conversations, or interviews? Was it in those exchanges that the mediator gained the confidence of the negotiators and valuable insights into the key underlying factors? Why are those contacts not considered as important as what happened at the "mediation session?"

In other words, are some of the judgments made during the session that seem to be a function of the mediators' improvisation in fact the result of preparation and planning? Were that the case, the comparison to jazz and "improv" performances would not necessarily be compromised. There is a difference between preparation and playing from a score or a script. However, none of this is examined.

Unfortunately, the "take-aways" (the truisms, formulae, etc.) in this book are of dubious value. They may give the reader the erroneous impression that there are templates and recipes to be committed to memory, the antithesis of improvisation. Such content may be calculated to make the book more attractive, but it does not make it instructive and only adds to the misleading nature of its title.

Indeed, despite its title, this book does not examine how mediators improvise as they guide disputing parties toward settlements. Still, mediators at every stage of development could certainly improve their own repertoires, and thus their ability to improvise, by reading these stories — possibly over and over. A mediator who assimilated the lessons of these stories and retrieved and tailored them as needed would indeed be much the richer, probably in every sense.

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