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All in the Family

Darwin and the Evolution of Mediation

By Nancy A. Welsh

Maybe I've been thinking about evolution more than is normal for the average lawyer. I have a 5-year-old son who is fascinated by every species of dinosaur. As a result, I read to my son nearly every night about the events and the evolving cast of creatures that populated the Triassic, Jurassic and Cretaceous periods. Since the Triassic period began 240 million years ago, this provides a real sense of perspective.

I wonder how Charles Darwin would use his theory of evolution to explain the many strange and wonderful variations of mediation that have flowered in the past decade. And although there seems to be increasing tolerance and even appreciation for different approaches to mediation — evaluative, facilitative, transformative, broad, narrow — I wonder how Darwin would react to the strong opinions expressed by many mediators, regulators and commentators about what mediation *is* and *is not*.

Mediation constantly evolving

I think Darwin might urge us to acknowledge that “real” mediation did not spring fully formed and perfect from primal chaos. Instead, “real” mediation can evolve and is evolving into many

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different forms, depending primarily upon the environments in which the process is struggling to survive and even aspiring to thrive. As Craig McEwen wrote recently, perhaps with an unconscious nod to Charles Darwin's theory of evolution, “context matters.”

Darwin's theory of evolution describes adaptations as responses to environmental needs and opportunities. His theory makes no judgments about whether these adaptations *should* take place. The theory of evolution simply exposes that adaptations *will* take place to enable a species to survive in a changed environment. A warmer climate, different food sources, more aggressive predators — all of these trigger adaptations.

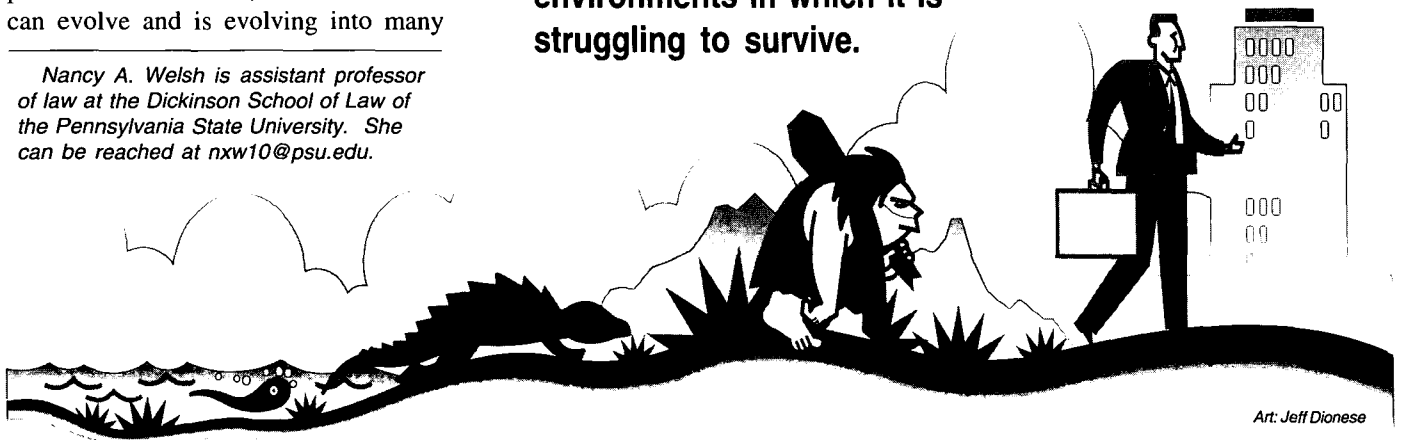
Sometimes these adaptations have been significant enough that isolated members of one species have developed

into a new subspecies, different but still related enough to be able to intermingle and procreate. Sometimes, however, the adaptations have been so extreme that a whole new species has been created. Nonetheless, both the original and new species generally remain part of the same family — branching off the same limb of Darwin's “great Tree of Life.”

Inspired by Darwin and his theory, Christopher Honeyman, John Lande, Grace D'Alo and I (along with a helpful, participatory audience at a SPIDR conference session) conducted a rather unscientific inquiry, in which we explored the different models of mediation that have arisen in different contexts. We did so in order to try to understand how each context may have made certain adaptations necessary, perhaps even inevitable.

We can hope that the results of our

Darwin might suggest that ‘real’ mediation did not spring fully formed and perfect from primal chaos. Instead, it is evolving into many different forms, depending on the various environments in which it is struggling to survive.



Art: Jeff Dionese

inquiry are instructive. On the other hand, our inquiry may be merely irreverent or even somewhat fanciful. You will have to be the judge.

Elements of mediation

In order to have a basis for comparing different models of mediation, it is necessary to begin with a template. Imagine that the following characteristics are deemed typical of the community mediation process:

- The process includes the actual disputants;
- The process includes a third party;
- The disputants and the third party communicate with each other regarding the following: matters at issue, positions, interests and possible solutions;
- The disputants and the third party try to negotiate a resolution of the dispute;

- The disputants do most of the communicating and negotiating;
- The disputants generate the solutions;
- The mediator's role is to be the facilitator of communication;
- A primary focus is probing for the parties' underlying interests and finding a solution that addresses those interests;
- The process is primarily conducted in joint session; there is no or rare use of caucus;
- The mediator has no or very minimal information about the case prior to the formal session;
- Attorneys are not present;
- Legal norms are generally not the focus of — and maybe not even be relevant to — the discussion; and
- The mediator keeps disclosures confidential.

After establishing the template, the

next step is a comparison of this list of characteristics with the characteristics of other mediation models being used in different contexts. My colleagues and I chose to compare this model to those used in four other contexts — in special education mediation in Pennsylvania (D'Alo),¹ mediation of dependency issues in Arkansas (Lande),² labor-management mediation in Wisconsin (Honeyman) and mediation of court-connected, nonfamily civil cases in Minnesota (Welsh).

Significant variations

Table 1, which compares these five models, demonstrates that while there is some consistency among the models (see shaded boxes), there are also striking variations. We anticipated some of these variations. For example, it is no surprise that attorneys participate in labor, dependency and (nonfamily) civil

Table 1 — Comparing Models of Mediation

Characteristics	Community Model	Special Education Mode	Dependency Model	Labor-Management Model	Civil (Nonfamily) Model
Process includes actual disputants	Yes	Yes	Yes	No	No (varies)
Process includes third party	Yes	Yes	Yes	Yes	Yes
Disputants and third party communicate with each other regarding the following: matters at issue, positions, interests and possible solutions	Yes	Yes	Yes	Yes	Yes
Disputants and third party try to negotiate a resolution	Yes	Yes	Yes	Yes	Yes
Disputants do most of the communicating and negotiating	Yes	Yes	No (varies)	No	No
Disputants generate the solutions	Yes	Yes	No (varies)	No	No
Mediator's role is to be facilitator of communication	Yes	No (varies)	No (varies)	No (varies)	No (varies)
A primary focus is probing for parties' underlying interests and finding solution that addresses interests	Yes	Yes	Yes	Yes	Yes
Process is primarily conducted in joint session; no or rare use of caucus	Yes	No	Yes (varies)	No	No
Mediator has no or very minimal information about the case prior to formal session	Yes	No (varies)	No (varies)	No	No
Attorneys are present	No	No	Yes	Yes	Yes
Legal norms are generally a focus of — certainly relevant to — discussion	No	Yes	Yes (social welfare norms as well)	No (industry norms are focus)	Yes
Mediator keeps disclosures confidential	Yes	Yes	Yes	No (varies)	Yes

mediation sessions but not in community sessions. Similarly, it is not news that caucus is used frequently in many models of mediation but not in others.

This comparison also yielded some surprises, however. For example, it is likely that many mediators assume that all mediators keep disclosures confidential. It is also likely that many mediators assume that the disputants themselves inevitably attend and do most of the communicating, negotiating and generating of solutions. This assumption certainly seems consistent with the principle of self-determination, which is regularly described as fundamental to the mediation process regardless of the context involved.

While the disputants do appear to be present and play a central role in the typical classic community mediation and in Pennsylvania's special education

their positions ... Certainly what we do is we try and elicit their participation, but in some ways it may be disempowering to ask them things where they need the help of professional advocates."

Finally, in nonfamily civil mediation in Minnesota it is the attorneys, not the disputants, who do most of the communicating, negotiating and generating of solutions.

Variations linked to environment

Are these variations accidental? Alternatively, do they represent nefarious co-optations of mediation? Or can these variations (or adaptations) be explained, understood and even accepted by applying the theory of evolution? Using Darwin's approach, it appears that environmental factors are largely responsible for the adaptations we observed.

present. Similarly, community activists who were interested in extending democratic ideals and empowering the "common man" were behind the development of the community mediation model, which relies upon the disputants' direct participation. In contrast, the dependency mediation model in Arkansas arose out of the professionals' dissatisfaction with the system.

"It's not like there was this huge consumer demand banging on the door saying we want ... our dependency mediation," noted Lande. "It's a response of professionals, judges, typically attorneys [and] child welfare agency officials who are saying 'Hey, the system isn't working so well. Can we find something that's going to work a little more smoothly and improve the situation for the various constituencies involved?'"

The models of mediation that have developed in each of these contexts reflect the concerns, desires and dissatisfaction of those who introduced the process. In a sense, these individuals established the climate to which the mediation model had to adapt in order to enter the new environment.

Who controls access to the food source? (Who controls or can strongly influence the flow of cases required for institutionalization of mediation?)

In Pennsylvania parent advocates were organized. Their support had the power to spur the institutionalization of mediation; their opposition had the potential to hinder it. In the courts in Minnesota, nonfamily civil mediation did not really become institutionalized until the state courts' judges decided to begin ordering litigants into mediation. In Arkansas, according to Lande, there is "a really disorganized constituency of parents in dependency cases. They are in no position to organize so it is really the professionals' dissatisfaction, the judges, the lawyers, the case workers who are the ones triggering the mediation, and they are the people whose support is needed for successful institutionalization, whose opposition is feared."

Indeed, judges have a particularly potent role in dependency mediations.

Just as animals adjust their behavior to maximize their food supply, so must mediation programs adapt to the expectations of the people who control their case referrals.

mediation, this is not true in labor mediation, dependency mediation or nonfamily civil mediation.

Honeyman explained that it is often not feasible in labor mediation to include all of the disputants.

"On one side there are 850 teachers," he said. "They don't fit in a room ... [B]y the time each side has a professional negotiator, which they have, you may be having a lot of your conversations with the disputants' representatives' representatives' representatives. You are a long way from the people who are at the bottom of the dispute."

In dependency mediation, the parents often attend, but it is difficult to generalize about their level of participation.

"[It] varies a lot," said Lande. "Given the characteristics of the parents in our program, many of them have problems asserting themselves and communicating

What is the climate of the new environment? (Whose dissatisfaction with the status quo triggered the introduction of mediation?)

In Pennsylvania, the parents of children with special education needs, also called parent advocates, played a key role in establishing the special education mediation system. They were unhappy with the due process hearing system, which they perceived to be too costly, too time-consuming and too likely to result in embittered relationships between schools and families. They wanted to be sure that mediation was different.

"The real goal of the process was direct communication between the parent and school district," said D'Alo.

Perhaps the program's origin helps to explain why the disputants themselves do the talking in this model of mediation and attorneys are not allowed to be

Mediated agreements will not become enforceable until they have been reviewed and approved by a judge. In each of these contexts, in order to achieve institutionalization, the model of mediation had to adapt to meet the expectations of its key constituencies.

In nature, changes in food sources explain many of the adaptations in animal species. In mediation, certain groups control mediation's food supply — cases. Thus, it becomes necessary for mediation programs to adapt to the expectations of the groups that control case referral.

What coloration will reduce the likelihood of being attacked by predators? (What norms are important to those whose support is needed and whose opposition is feared?)

The professionals who participate in mediation sessions hopefully have concerns about the extent to which a solution meets the needs of the disputants. Beyond this, however, they are very likely to be concerned about the extent to which this solution is either consistent or inconsistent with their professional norms.

For lawyers and judges, these will be legal norms. (Arguably, in court-connected mediation, both the disputants and their attorneys have made external legal norms important by seeking access to the court.) For union and management representatives, these will be industry norms. For social workers participating in dependency mediation sessions, these will be social welfare norms.

Some of these norms will be formal. Others may be informal and even reflect local cultures. All of the professionals believe in the value of these norms. Inevitably, these norms have a huge impact. Indeed, it is quite reasonable to expect that dispute resolution professionals will adapt their mediation models to local norms, in order to avoid provoking hostility and gain support.

Yet, the influence of these norms may be hard to accept, particularly if the professionals' norms conflict with mediators' preconceptions of "real" mediation. At our conference session, one participant asked how s/he could

best inform a local district attorney that his rules or norms did not apply to a mediation pilot project within the courts. If Darwin serves as our guide and mediators hope to garner support rather than opposition, we should ask a more realistic question: How can mediators expect that the district attorney's norms will *not* apply?

What are the characteristics of the food source? (Who are the disputants?)

The variations in these models also seem to represent adaptations to the general characteristics of each group of disputants.

For example, Lande described the population of clients involved in dependency mediations as "typically ... people who have a lot of problems. They often have alcohol and drug abuse problems. They often have mental

that the mediator takes an active role in proposing solutions. Once again, we see the model of mediation adapting to meet the needs of the disputants in a particular context.

Using the Darwinian metaphor

The Darwinian metaphor may indeed help us understand and accept that models of mediation will vary from context to context, as a result of the adaptations that are required for survival in that context. This leads to the conclusion that no model of mediation represents the one true model of mediation. Every model — including the community/facilitative/transformational model — reflects and has grown out of a particular environment. Each model needs to be evaluated to determine the extent to which it meets the needs of that particular environment.

A focus on interests may be one of the few common characteristics that distinguishes the diverse members of the 'mediation family' from other dispute resolution species.

health problems. They often are low income, and ... these are redundant problems ... [I]f you want to talk about power imbalance, this is it. You've got the agency, which is the 800-million-pound gorilla, versus these poor parents who have lots of problems."

As a result, it makes sense that these disputants would rely upon their attorneys to speak for them in the mediation sessions.

Honeyman pointed out that in labor mediations in the public sector, "you are dealing with political entities on both sides ... It's difficult to make decisions in a political environment ... And for that reason, frequently it falls to the mediator to put on the table a proposed solution, or in some way engineer the putting on the table of a proposed solution even when that solution may have been at the back of [everyone's] mind ... but nobody was willing to own it."

In this environment, it makes sense

Further, the Darwinian metaphor suggests that we should be prepared for the extinction of models of mediation that fail to adapt to new or changed conditions. Indeed, Darwin perceived a certain harsh beauty in this:

"The affinities of all the beings of the same class have sometimes been represented by a great tree. I believe this simile largely speaks the truth. The green and budding twigs may represent existing species; and those produced during each former year may represent the long succession of extinct species ... As buds give rise by growth to fresh buds, and these, if vigorous, branch out and overtop on all a feebler branch, so by generation I believe it has been with the great Tree of Life, which fills with its dead and broken branches the crust of the earth, and covers the surface with its ever branching and beautiful ramifications."

Common characteristics

Does the application of the theory of evolution also require us to accept *every* “ramification,” present and future, as mediation? Even if we embrace diversity, shouldn’t we expect that members of the “mediation family” on the “tree of dispute resolution” will be distinguished by unique, core characteristics?

The cat family, for example, includes the domestic cat, the lion, the tiger and the jaguar. No one would mistake any of these species for the other, yet they all possess enough common characteristics — retractable claws; similar skeletons with compact, rounded skulls, long backbones and long tails; and rough tongues covered with papillae — to be identified as members of the same family.

The challenge is identifying the core set of unique characteristics that

our models. It is also reflected in the proposed Uniform Mediation Act.

The second and last characteristics, however, may be most important. Both suggest that exploring and using the parties’ underlying *interests* is central to the mediation process. Does this mean that every model involves explicit use of interests? Not necessarily. As Lande suggested when he discussed dependency mediation: “People aren’t necessarily asking explicitly for interests, but I think that drives a lot of the discussion.”

This apparently unique element — a focus on interests — is not reflected in many definitions of mediation. It is not even contained in the current draft of the Uniform Mediation Act. And yet, our unscientific inquiry raises the possibility that this may be one of the few common

theory illustrates rather dramatically that adaptations and the development of new forms of mediation are inevitable as mediation enters new environments. Indeed, use of the theory helps to wean us from the sense that any particular model of mediation should be dominant or should have general application across environments. The power of each individual environment cannot be ignored.

As to the search for core principles, the theory of evolution is less immediately helpful. If asked, Darwin might counsel patience and skepticism in our struggle to create a uniform definition of mediation or generally applicable regulations. Evolution requires time as species (and families) engage simultaneously in experimentation and distillation. Ultimately, we may need to wait more than a mere couple of decades for a common set of core characteristics — the distinguishing characteristics of our “mediation family” — to fully emerge.

No model represents the one true model of mediation. Each has grown out of a particular context and should be evaluated based on whether it meets the needs of that specific environment.

distinguish members of the “mediation family.” Table 1, which earlier illustrated many inconsistencies among our five models of mediation, reveals a surprisingly small number of consistent elements:

- A third party is present;
- The disputants and the third party communicate with each other regarding the following: matters at issue, positions, interests and possible solutions;
- The disputants and the third party try to negotiate a resolution; and
- A primary focus is on probing for parties’ underlying interests and finding a solution that addresses these interests.

The first of these common characteristics seems pretty obvious. It is clear that mediation has to include a mediator. The third of these characteristics — the focus on trying to negotiate a resolution or settlement — may be controversial. Yet, this characteristic was common across all of

characteristics that distinguishes the diverse members of the “mediation family” from other dispute resolution species.

Results of evolution unpredictable

So, does Darwin help us as we seek, simultaneously and somewhat paradoxically, both to embrace diversity among our various models of mediation and to find the core principles that unite us in our diversity?

The theory of evolution definitely aids us in embracing diversity. Applying the

Endnotes

¹ These mediations typically involve cases in which parents or guardians of children negotiate with representatives of schools over assessment or adequacy of services provided for children with special needs.

² Also termed child protection mediation, these mediations typically involve cases in which children have been removed from their homes based on claims of child abuse or neglect. In the mediation, the parents typically negotiate with the state child welfare agency regarding the actions they must take to permit the return of their children, what services should be provided for children and parents, where the children should live while the case is ongoing, and visitation, among other issues. In some dependency cases, the parents and the agency try to reach an agreement regarding the termination of parental rights or other permanent placement of the children.

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