

## **It's All About Reaching Neighborly Solutions**

**FORUM COLUMN Los Angeles Daily Journal July 24, 2009**

By Victoria Pynchon

Nearly every condominium complex harbors an outlaw - the man, woman, couple or family who refuses to follow the rules, such as the college kids who blast the woofers off their stereo system at 3 a.m., the elderly woman who doesn't clean up after her dog or the raucous family that plays "Marco Polo" in the community pool after midnight.

Offended and outraged, other homeowners make demands on their volunteer board, which contacts the (often unresponsive) management company. The homeowners association board does its best. It issues warnings to procure compliance to no avail. Eventually, someone reads the covenants, conditions and restrictions. They learn that the board has enforceable legal duties and that the homeowners have actionable legal rights.

Many of these disputes make their way to the Los Angeles County Bar Association's Dispute Resolution Center in West Hollywood. And some of them make their way to me.

Welcome to community mediation - the non-zero-sum, value-based, rights-seeking, joint session transformative dispute resolution process. We're well trained and we're free.

But can we deliver justice?

Maybe it was just my g-g-generation, but I went to law school because I was interested in justice. I was a VISTA volunteer (the domestic Peace Corps) in the early 1970s and a paralegal volunteer at Legal Aid in East Harlem in the mid-'70s. I was a peer counselor at a home for teenage runaways while still a teen myself, and in my early 20s, I was a suicide prevention hotline volunteer on Long Island. A desire to alleviate suffering and create a more just society wasn't just something I said on my law school application. It was pretty much the entire reason I decided to go to law school.

I remained optimistic about the ability of our courts to deliver justice long after my peers had shrugged off their ideals in favor of a deeper cynicism than I could allow myself to feel. I remained a righteous crusader for my clients' causes until my last day as a justice.

It took me exactly one hour of mediation training to decide that negotiating the resolution of lawsuits as a third-party neutral was my own right occupation and a better way to deliver justice than the adversarial system was.

Only after I'd abandoned legal practice for an ADR career did I begin to hear the case against mediation. Legal anthropologist Laura Nader claimed that mediation constituted a full-frontal assault upon the rights gained by marginalized citizens during the civil rights era. According to Nader, both the theory and the practice of mediation shave the necessary rough ideological edges off party claims and foster what she calls "coercive harmony." Mediation's emphasis on conciliation, argues Nader, factors out cultural notions of justice, which requires a rights-remedies analysis, and replaces them with an emphasis on compromise and relationship. By screening out all unpleasant and divisive concerns, mediation removes from our justice system critical issues of race, class and gender. Other critics of mediation have chimed in with Nader, arguing that the least powerful and most marginalized citizens were being diverted out of the justice system at the precise moment that it had begun to resemble the society it serves

So the central question remains. Can mediation - a process that focuses more on party interests than party rights, a process that insists on compromise rather than victory, a process largely in the hands of society's (primarily white male) elders - can that process deliver justice? Back to first principles we go.

The highly influential American legal philosopher John Rawls once suggested that justice could be reached by agreement. If Rawls were right, that would make him the patron saint of mediators. Rawls argued that the principles guiding a just society are the ones individuals would agree to with the crucial proviso that they do not know where they themselves would end up in society, on the top or the bottom. Given this constraint, no individual or group could tailor the principles of justice to his or her special talents or circumstances. A legal system premised upon agreement (which is pretty much what democracy is) will be just only if the rule-makers do not know whether they'll be male or female, black or white, Latino or Arab, Christian or Jew, in the new order. A society based on such rules will be deeply committed to human rights and economic equality. Inequalities would only be tolerated if they most greatly benefited the least well off.

Nice in theory. But the rule makers - voters - do know what their place in the social order is, as do the parties to litigation. In that circumstance, can justice be reached through agreement? I think so and I have a short community mediation story that demonstrates it.

Condominium owners John and Betty Jones (not their real names) were being driven to distraction by their neighbors who arrived home at 2 a.m. only to commence a Pekinese rodeo in their upstairs apartment. The indomitable Kathryn Turk, who convenes mediations for the Los Angeles County Bar Association's Dispute Resolution Services in West Hollywood, managed to procure the attendance of an homeowners association board member with full authority to take the actions necessary to settle the dispute.

John Jones had practically memorized the covenants, conditions and restrictions governing the board's duties and the homeowner's rights. His wife repeatedly broke into tears as she described sleepless nights spent on the living room couch where the upstairs neighbor's early morning antics were the least disturbing. The volunteer board member was sympathetic but at a loss for solutions. She'd contacted "management" and sent warnings to the miscreants, all to no avail.

Only punitive measures would do at this point, said Jones. The covenants, conditions and restrictions called for sanctions to be imposed on rule-breakers but lacked a means of implementation and enforcement. The homeowners association representative indicated that she not only had the board's authority to settle the matter but the power to impose any necessary and reasonable rules to flesh out the covenants, conditions and restrictions' inadequate policies.

"We want monetary sanctions imposed," Jones was saying, "sanctions that can be made liens against the property just as HOA dues can be."

"What about notice?" I asked. "And a hearing? There's nothing in the rules about the procedure for imposing sanctions."

"24 hours!" shouted John. "If they don't comply, a \$500 sanction to be made a lien against their property. And another \$500 for every day they continue to violate the noise restrictions contained in the CC&R's."

I wondered aloud whether Mr. and Mrs. Jones understood that the bylaws they were suggesting could be used by their scofflaw neighbors against them as easily as they could be used by the Joneses.

"Oh."

Silence.

"What set of rules do you think would be fair?" I asked.

Two hours later, we had achieved what my con law professor would have called "procedural due process" - a set of rules that would likely pass constitutional muster.

Whether justice and fairness are, at some level, hard-wired into us or culturally controlled, it seems that Rawls' conception of justice by agreement based on enlightened self-interest might flow more or less naturally from a mediated dispute resolution forum where the disputants, rather than a third-party "neutral" are in control.

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