

ADR and the Talmud[©]

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The Talmud is an ancient text of the Jewish people and comprises the historical compilation of oral law, interpretations of the written law and a multitude of commentaries by the rabbis and sages over the centuries. It is emblematic of our accumulated knowledge, wisdom and scholarship. The study of Talmud is a significant experience of Jewish identity and survival over the centuries, and its importance to the Jewish people cannot be underestimated. Its methodology of deep inquiry, constant questioning and the incessant search for "truth" is passed down through the ages, past any obstacles contemporary life throws at this type of study and yearning. Unfortunately, in modern Jewish culture generally the Orthodox consistently maintain this tradition of rigorous study and intellectual discipline. Growing up non-orthodox, I never formally studied the Talmud, but have learned throughout my adult life as an architect, mediator and arbitrator to appreciate and embrace the "to and fro" of the Talmudic method. I believe that navigating the Talmud's intellectual and spiritual intricacies is in many ways similar to an ADR neutral's search for truth and fairness in the dispute resolution processes, especially in mediation. As such I feel a deep affinity with this tradition and carry it with me into each session I serve on as an ADR neutral. The vigorous and emotional exchanges between parties, the reliance on the documents and exhibits as "shared text", the conversation as it moves back and forth through the difficult stages of resolution or dissolution all reflect the intensity of the study of the Talmud. The task of the neutral, as it is with the scholar, is to be an interpreter and filter for the story unfolding, and through this process serve as a conduit and catalyst for the emergence of a greater understanding among the participants. In such a capacity the neutral and the scholar participate in a "conversation" greater than themselves, beyond the limitations established by contract terms, legal constructs and the issues of the conflict itself.

The Beauty of the Page

The Talmud is a visually rich and metaphorical delight. A typical page is shown in the illustration below:



A page of the Talmud

When you look at the page of the Talmud today, you will find the Hebrew text of the Mishna (circa 200ce-the first Codex of written rabbinic interpretation featured in the middle of the page.

Interspersed between the Hebrew of the Mishna are further interpretations in Aramaic, which are called the Gemara.

The Aramaic word Gemara means "tradition." In Hebrew, the word Gemara means "completion." Indeed, the Gemara is a compilation of the various rabbinic discussions on the Mishna, and as such completes the understanding of the Mishna.

The text of the Mishna is quoting rabbis who lived from about 100 BCE to 200 CE. These rabbi are called the Tanaim, "teachers".

The text of the Gemara is quoting the rabbis who lived from about 200 CE to about 500 CE. These rabbis are called, Amoraim, "explainers" or "interpreters."

Surrounding the text of the Talmud are various rabbinic authorities comments from several different later periods

Central to each page you see the text of the ancient oral law surrounded by subsequent explanation, discussion, interpretation, and commentary by various rabbis and scholars throughout the ages. One can see from this beautiful layout not only the graphic presentation but also the “roadmap” of this Talmudic search for understanding, wisdom and the “kernel of truth” that may hide within this structure. The subject of this vigorous debate can range from the rules of everyday Jewish life and ritual to deep ethical and legal conundrums of jurisprudence. The traditional picture of Talmudic study is one of student pairs engaged in heated discussion and argument over each word, searching within a labyrinth along a Mobius strip. The image is delightful. Can you see the analogy of the Talmud’s guiding organization and methodology to that of the voluminous exhibits of tabbed three ring binders presented before an arbitrator on a complex construction case? Add to this the note taking, underlining and feverish search through tabs to keep up with the presentation of the case, and you begin to feel the rhythm of the Talmudic method.

The “Balance of Imbalance”

In reading the text, *“The Talmud and the Internet, A Journey between Worlds”* by Jonathan Rosen, I was struck by several statements he writes that make evident stunning parallels between the Talmudic method and the web-like digital world of the internet. If you add to this pair the multifaceted condition of the ADR neutral engaged in a difficult arbitration or mediation, the picture he paints is succinct;

“...the Talmud, so clearly crafted by querulous men in a constant state of disagreement and argument, poring over the mundane details of contemporary life and then taking flight in wild inventive riffs....” (p. 86)

What neutral can’t relate listening to the fanciful machinations of an advocate building their client’s case? How often has a neutral had to endure the repetitive mantra of a single incident told multiple times which one party feels so strongly proves their point while the other dismisses it as irrelevant or trivial? Yet, this is the heart of the Talmudic method according to Rosen, this side by side, point counterpoint culture so revered by scholars so rich in learning and the “balance of imbalance”. If you are one that seeks absolute truth and are uncomfortable with ambiguity and contradiction then Talmud will drive you crazy, and ADR will do the same. To be a construction arbitrator or mediator is to dwell at the intersection of architecture, law, ethics, psychology, autobiography and theater with the ever present boiling of human emotions lying under the surface waiting for the moment the plug might blow. As such you are in the midst of the Talmudic dialectic,

“...inside the tangle of...conflicting lives and truths...a gathering of profound contradictions...making room for all the contradictory elements.” (Rosen p.62-64)

Neutrals uncomfortable with this uncertainty, mutually exclusive facts and partial truths will not last long in the ADR business, nor with the study of Talmud or other disciplines that search for truth but embrace its ultimate inconclusiveness. You either take joy in this condition or find another line of work-- and maybe religion too!

Why Do We Do This?

Every ADR neutral has their reasons for practicing this judicial art form. Some might enjoy the power and authority that comes with the territory, others the deference shown them by the skillful, sometimes brilliant, attorneys plying their trade, and others who feel significant, possibly omnipotent while conducting a proceeding. Some, and maybe

the best relish in profound humility the trust given them to find fairness and justice in their cause and to end a generally unpleasant and unprofitable episode in the personal and professional lives of those before them.

I, for one, take comfort in ambiguity and contradiction, in the "the allure of wise skepticism," as Ruth Calderon says in her essay "We Enter the Talmud Barefoot". She describes the Talmudic "text" as sacred in the religious sense, but argues that it should be regarded as raw material for individual creation and interpretation similar, "...in the way the artist attribute power to their paints, or poets to their words..."

*....."Ambivalence and opposition to the text are an integral part of the study experience... Interpretive skills, hermeneutics, criticism, and empathy serve the study...well.
<http://www.culturaljudaism.org/ccj/articles/26>, "WE ENTER THE TALMUD BAREFOOT", Ruth Calderon The Center for Cultural Judaism)*

Here the analogy resonates between the various methods a neutral has to call upon and the study of the text and commentaries of the Talmud. The richness of the experience stems from the tradition of this interaction of text, law and human behavior. Applying individual interpretations to the documents and contracts submitted, the laws cited, and the differing personal narratives of the case unfolding before a neutral is the essence of the ADR process. The responsibility of the neutral is to envelop oneself in the material like the Talmudic scholar. Anything less would be a disservice to the disputing parties.

Who Owns the Process?

The question I pose here by illuminating parallels between the Talmudic method and the ADR process is to challenge the "orthodoxy" of attorneys' control over the current state of ADR in construction. I wish to lobby for opening the door to others who may be equally suited through professional experience and interpretive skills to help prevent and resolve design and construction disputes. In this same article Calderon challenges the grip the Orthodox has on entry to the study of Talmud and argues forcefully for opening those doors to other scholars especially women for the contributions they can make.

"Yet the challenge in this rich reservoir remains as vital as ever, continually attracting a new circle of people to join the community of Torah scholars, irrespective of the views or opinions of the "veterans....The revolution happens when new minds, free of conventional, established ideological commitments, delve and blend and create within the greatest Jewish textual treasure of all time, to produce a creation that is simultaneously subversive and peace inspiring" (Calderon)

In a similar way I ask the question, "Is the current state and future of ADR in construction too important to leave entirely in the hands of the "veterans"? A provocative question, yes. The parallels between the secular entering the study of Talmud and the non-attorney neutral entering the ADR venue, when narrowly defined as "legal", are revealing. In my experience most construction disputes do not involve complex legal issues, rather a breakdown in communication, a loss of trust, a challenge to integrity, which now precludes the possibility to resolve the dispute on their own through negotiation. This is a profoundly different condition, one more like literature than law. Opening the process to "outsiders" with industry knowledge and the requisite skills must be expanded in order to challenge the self-imposed constrictions of the orthodoxy and to allow the development of creative conflict prevention and resolution strategies earlier in the process, before a dispute becomes a claim. Here, the power of the Talmudic method to instigate serious and creative conversations might release new ideas, interpretations and possibilities.

Who in the field is thinking creatively about this and presenting ideas to the stakeholders and controllers, that is-- the insurance carriers, the contract drafters, and the construction attorneys representing their clients? What new ideas are being floated and tested that might become a normal part of standard business arrangements that include neutral based, built in methodologies of prevention as part of the design and delivery process? How long before these preventative measures are part of the "text" of every construction contract, demanded and rewarded by sureties, an altogether proactive approach, rather than the current reactive system controlled by the current gatekeepers? Creative "Talmudic" problem solvers of many disciplines need to be at the table.

No matter the laments I share, truly the reason I enjoy and am humbled by serving as an ADR neutral is this exhilaration I feel taking part in the tradition of Talmudic discourse—the argument, the positing, and witnessing the unwinding of a great drama that unfolds before you as an arbitrator or mediator. Sometimes it's tense and unpleasant, or confusing and difficult to follow, other times comical or regrettable, audacious and fearless, even boring and tedious. One thing is always certain: the Talmudic dialogue of questioning, of opinions forming and changing, of surprise and doubt, of the discovery and joy in the search for truth, justice if possible, and wisdom if lucky.

"Both the contemporary scholar and the Talmudic sage understand God as the ultimate study partner, one who sowed signs throughout the text: hints, allusions and riddles. By deciphering their meanings year after year, the student can get closer to what God meant and attain a sense of intimacy with the Creator. (Calderon)

If, as my Rabbi stated to me recently that being a mediator or arbitrator is an "invitation to a stalled conversation", then I accept this invitation gracefully, in humility and within a tradition far greater than myself. In this manner I see the ultimate parallel between ADR and the Talmud.

Sources:

The Talmud and the Internet: A Journey between Worlds
Jonathan Rosen
Farrar Straus Giroux (September 2000)

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<http://www.culturaljudaism.org/ccj/articles/26>

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