University of Strathclyde Mediation clinic

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Issue 2

Mediation Matters!

The quarterly newsletter of the
University of Strathclyde Mediation Clinic

Inside this issue

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Editorial

Welcome to the second issue of Mediation Matters! It is the start of a new year and I wish everyone a successful, peaceful and productive year, both in your mediations and your life in general. You may notice that the format of the newsletter is much improved, thanks to the efforts of Adrienne Watson, who has kindly offered to be assistant editor. It is also beneficial for me to have someone to discuss the content and planning of the newsletter with.

We are privileged to have some great contributions in this issue, which I hope you will all enjoy. If there is anyone who wants to write something on any topic relevant to the Clinic or mediation generally, please let me know. My email address is p.scott@strath.ac.uk.

You may notice that there is a definite gender imbalance in the contributions to this issue. It would be good to try and get a better balance in future issues and I will try and ensure that that occurs.

In this issue we have what will be regular contributions from the Director, the Chair and Pauline McKay, who writes ***Clinic News***. My column, ***Patrick's Ponderings***, focuses on the preparation and signature of Agreements to Mediate.

Ben Cramer has written a thought-provoking article on ***Steps to an Ontology of Mediation***. Ben explores some of the thought processes behind a mediation, and how they shape the mediation. The article draws on Ben's personal experiences, and he shares with us some intimate thoughts behind what works and what doesn't.

Learnings of a New(ish) Mediator provides an interesting and somewhat humorous insight by Alan Jeffrey on his perspective of confronting mediation, and its concomitant challenges.

Tom Scade's contribution, entitled ***Reflections on Neutrality and Impartiality by a Novice Mediator*** deals with the vexing question of how mediators, whether novice or experienced, confront this paradigmatic issue and the article provides a useful guide to dealing with this concept.

Aitana Rius Fabregat shares with us her experience and knowledge of ***Mediation in Spain***.

Jonathan Rodrigues offers an interesting view from the perspective of the parties. ***Sorry Mediator! Can you Speak my Language?*** provides some useful tips and triggers a warning to us to always be cognisant of the needs of the parties. We, as mediators, often look at the mediation process from our perspective.

Finally, there are two book reviews. Kathryn Mannix was a keynote speaker at Mediate 2022, Scottish Mediation's annual conference, where she discussed her recent book, ***Listen***. Gordon McKinley reviews this work. And I review Tony Whatling's new book, ***Dealing with Disputes and Conflict***, which is a self-help book for lay mediators.

I hope and trust that these articles will provide some interesting and informative content for our mediators.

I would like to take this opportunity to remind our members about the Clinic's upcoming conference on the 18th of March. The event is hybrid but, unless we have enough face-to-face registrations, we may have to consider switching it to online only. I urge all members who are able, to register for the conference, and particularly the face-to- face option. Please also share the conference details with any of your contacts who might be interested in attending. We have some excellent presenters and the conference promises to be an event that should not be missed.

Finally, I would like to inform everyone that there has finally been a judgment in one of the 'car park' cases. In these matters, a company that administers car parks at shopping centres, sues respondents for parking there for longer than the designated time, claiming administrative and penalty charges in addition to a substantial fee. I am sure that a number of our mediators have dealt with at least one of these matters and, if you have, you will be aware that respondents have raised some legal defences to the claims. The claimant was disinclined to debate the merits of these defences at mediation, adopting the attitude that that was for the courts to decide. Well, the court has finally decided. A matter from the Kilmarnock Sheriff Court went to a hearing and judgment was granted in favour of the claimant, with expenses to be argued soon, and all of the legal defences in that matter were dismissed. Whilst that judgment is not binding on other Sheriffs, it does offer a good indication of what will likely happen in similar cases.

Enjoy this newsletter and the next issue will be published at the end of April. If you would like to contribute an article, please let me know. I would need to receive it by early April.

Patrick Scott
Editor

I would like to take this opportunity to remind our members about the Clinic's upcoming conference on the 18th of March... We have some excellent presenters and the conference promises to be an event that should not be missed.

From the Director .....

It's great to see another ***Mediation Matters!*** on the virtual printing press. Since the last one a new batch of students has passed the Mediation in Practice class and they are ready to start on the journey to expertise and, ultimately, artistry. I'm confident that our lead mediators will provide the mentoring and encouragement new practitioners need. Each year confirms my view that co-mediation is the right model for the Mediation Clinic.

I was therefore pleased to see a short piece in last week's Kluwer Mediation Blog called '*Let's Talk About Co-mediation*' by Andrea Maia. Andrea is based in Brazil, and it seems that co-mediation is relatively little used there, apart from in training and some specific contexts needing mediators with different professional backgrounds. She's clearly been inspired to think further about it and suggests some situations where it may be particularly helpful: large groups, complex cases, or to achieve a balance in gender or some other traits.

This got me thinking about my own experience, which probably contributed to the co-mediation model we use in the Clinic. Two things strike me about it:

1) Most of my positive experiences of co-mediation took place when I routinely worked with the same person; and
2) The best part, for me, was always the chance to debrief at great length with someone who had lived through the same case.

To expand on the first point a little, we all have our own way of doing things, our style, or, as one writer described it, our '*mediation signature*'. But we may not know it. Co-mediating reveals our own style by showing us someone else's. For example, I may think we've heard enough on a particular issue and decide it's time to move to another topic; just at that moment my fellow-mediator opens it up further. Why did they do that? Or the opposite: I've spotted what I see as the key to the whole dispute; just as I'm about to pursue it the other mediator changes tack to something else entirely.

After a while the penny dropped. Not only might my co-mediator have perfectly good reasons for doing things differently, but my own reasons might be invisible to them. I could easily plough on with my chosen angle and walk roughshod over the other person's carefully crafted questions or, worse, silences. I had to learn to pause, step back, and watch someone else at work. Soon you learn to respect each other's choices. And if something really troubles you, take a moment to speak to them in private (and make it clear they're welcome to do the same if they can't fathom something you've done).

This is the germ of reflective practice. I had to be able to explain the reasons for my choices to this fellow-professional and in so doing had to explain them to myself. Which leads to the second point: the instant debrief. Mediation is quite an intense activity, a form of performance requiring complete concentration. When the clients finally leave, I feel drained for a moment; then I have a strong urge to babble about what just happened. Spouses, partners and pals naturally have limited patience for this, but the person who just shared the experience often wants to chew it over too. There's no substitute for debriefing while it's all still vivid.

This is precious time to carve out our distinctive style. The co-mediator almost always spots things I miss, and I learn something new every time. Similarly, I'll have impressions or hypotheses that never occurred to them. By chatting freely, in an unstructured and intuitive way, we're starting the process of reflecting. We sift what we think works, agree or disagree about what didn't and generally forge our identity as mediators. Hopefully we also get some positive feedback about things we weren't even aware of doing, building our repertoire by learning from what went well and what didn't.

Having expanded on these two co-mediation thoughts, a third occurs to me: at its best, the whole is greater than the sum of its parts. When two people are working well together, the clients benefit from two sets of expertise and experience. Not only will each of us have areas of

strength; we also act as observers and critics of each other's work, raising our game and expanding the range of possibilities at clients' disposal. That would explain why I often use co-mediation for the most challenging and complex cases, with good results.

To conclude, while co-mediation was initially a pragmatic choice for the Clinic, allowing novice mediators to get started alongside experts, it has a great deal more to offer as a long-term practice option. It's worth investing some time to get comfortable with our fellow practitioner; the chance to debrief is a fantastic bonus; and the clients are almost certainly getting more 'bang for their buck' from two committed people. I look forward to learning more from those of you who regularly co-mediate in the Clinic – do please get in touch if you have additional thoughts or ideas.

Charlie Irvine[1]
Director, Mediation Clinic

[1] ***Charlie Irvine is the Course Leader on the University of Strathclyde's MSc/LLM in Mediation and Conflict Resolution and Director of Strathclyde Mediation Clinic. He is an experienced mediator specialising in organisational and workplace disputes. Charlie's academic work focuses on mediation in the justice system, and he is currently completing PhD research into mediation participants and their reasons for settling.***

From the Chair .....

On behalf of your Board… A very Happy New Year to you and yours!

The New Year is a time that we tend to reflect on what has been happening in the previous year and to look forward to the year ahead and plan what we would like to happen. Your Board has been reflecting on where we are now and considering what we want the future to look like for the Mediation Clinic. To that end, we have had Strategy Days in September and December, when we discussed and debated how best to take the Mediation Clinic forwards, strengthening its position within the justice system.

Having met last year we conducted a SWOT and PESTLE analysis which gave us a robust breakdown of the challenges and opportunities that we face. We plan to share a proposal document with the Clinic members for their consideration and feedback. This will be at our Conference on the 18th of March, so we encourage you to sign up for the Conference and we hope to see you there.

Andrew Boyd[2], **Alastair Sharp**[3]
Co-Chairs

[2] ***Andrew Boyd completed the MSc in Mediation and Conflict Resolution at the University of Strathclyde in 2013. Andrew currently works for the Scottish Centre for Conflict Resolution as their Mediation and Conflict Resolution Advisor. Andrew is also on the mediation panel of the Scottish Legal Complaints Commission and is a consultant mediator with Common Ground Mediation. Andrew has been volunteering with Strathclyde Mediation Clinic since its inception.***

[3] ***Alastair Sharp is a former English Judge and has been a fully accredited CEDR Mediator since 2002. He completed the LLM in Mediation and Conflict Management at the University of Strathclyde in 2015. He is a Member of Scottish Mediation and the Founder and Principal of ASMediation, which is based in the North-East of Scotland, with his practice extending throughout the country and with a base in London at Lamb Chambers in the Temple.***

Clinic News

As we now return to work after the festivities (now a distant memory), things are busy at the Clinic for our student assistant, Elise Marshall, and me. The first three months of the year are always hectic for us, as parties tend to cancel mediation sessions in the run up to Christmas, whether that be due to illness, holidays or not wanting to engage at such a busy time. This makes the following months slightly busier, which means more opportunities for our lead and assistant mediators! We are also looking forward to our normal CPD and Peer Support Sessions which will run over the coming months.

As well as being busy with our normal referrals, we are also finalising the arrangements for the 3rd Mediation Clinic Conference, ***Working within the courts: the role of mediation and mediation clinics in civil justice systems***, which takes place in person and online on **Saturday 18 March 2023**. It promises to be an exciting, varied day with workshops from Sheriffs, current students, alumni and academics in the field. The keynote from **Tony Allen** ***Mediation in the Shadow of the Law. Shadow or sunlight?*** is not to be missed. The full programme can be accessed **here** and tickets can be purchased from the **University Shop**. We will also be looking for Clinic volunteers to assist on the day (in person and online) so please look out for email communications as we would welcome any help. Thank you to our Conference Committee in getting this off the ground: Patrick, Marc, Adrienne, Gordon, Leon, Craig, Frances, Frank and Charlie.

The Clinic is excited to launch a new Mediation Clinic Network which aims to provide encouragement, support and learning for Mediation Clinics. Our vision is to create a space where we can come together to share best practice, collaborate and promote the work of Mediation Clinics across universities and third sector organisations. If you already lead a Clinic or are thinking of setting up a Clinic, please do **contact us**. The Network would be member driven and open to Mediation Clinics globally. We envisage this being delivered by one-off events, workshops, and meetings to share experiences, bringing benefits to all.

No matter the time of year, if you are a student on the LLM/ MSc/PG Mediation course at Strathclyde and have yet to test the water with participating in a mediation through the Clinic, please do get in touch if you are interested. Students can participate as an assistant mediator. Assistants can have as little or as much input into a mediation session as they are comfortable with (our lead mediators are incredibly supportive). I would be happy to talk you through the process if this is new to you and put your mind at ease when you are ready.

At present we aren't accepting external applications for the Clinic but, if you are interested, please **email** us and we can put you on our waiting list. Further details of how you can support the clinic can be found **here**.

I'd like to ask that all mediators continue to sign up via the Doodle links with regard to your availability for mediations with the Clinic. Please note we always double check your availability before any cases are assigned. Please look out for the sign-up links in your email.

Finally, we are currently piloting using our SharePoint site for our case files. This would mean that all our case files would be securely held in one place eliminating the need to email documents to each other. We will keep you updated on any changes that may transpire.

Elise and I look forward to working with you all again during the coming year and please do get in touch if there is anything that we can help with in the meantime.

All the best.

Pauline McKay[1]
Co-ordinator, Mediation Clinic

[1] ***Pauline McKay completed the PG Certificate in Mediation and Conflict Resolution course at the University of Strathclyde in 2020. She is currently an Accredited Mediator with Scottish Mediation, the Clinic Co-ordinator of Strathclyde Mediation Clinic and volunteers as a lead mediator with the Clinic and Lothian and Borders Mediation Service.***

Patrick's Ponderings by Patrick Scott[1]

The Agreement to Mediate

It has come to my attention that there is some confusion and misunderstanding about what the Agreement to Mediate is, and of its importance to the parties, the mediators and the Clinic. We now have a pilot with lead mediators being assigned to specific courts, with each of them being responsible for the preparation of the Agreement and for ensuring that it is signed by the parties.

A question which arises is who are the parties to the Agreement? In my view, they are the entities involved in the dispute, whether individual or corporate. It is also perhaps useful to acknowledge the difference between 'parties' and 'participants', when considering the wording of the Agreement to Mediate. Do we want the parties or the participants at the mediation to be bound by the confidentiality clause? My view is the latter.

I have had two queries from solicitors about them being referred to as the parties to the Agreement, instead of the actual party, represented by them. I re-drafted the Agreements and sent them to the solicitors for signature.

What is an Agreement to Mediate?

It is a written contract, valid and enforceable in law and binding on all those who sign it.

Who should sign the Agreement?

It is my view that at least everyone who is going to attend the mediation should sign the Agreement, in order words 'the participants'. However, if a solicitor is representing a client, it is important that the solicitor signs the Agreement in a representative capacity. Let us consider the following example.

Jane Marple sues Brilliant Bathrooms Limited for compensation for their poor workmanship. Brilliant Bathrooms is represented by Edward Golightly, a well-known local solicitor. The Agreement to Mediate is prepared as follows:

> **Jane Marple…….Party**
> and
> **Edward Golightly…….Party**

What is wrong with this Agreement?

Edward Golightly is not a party. He is representing a party, the respondent. If he signs the Agreement as above, Brilliant Bathrooms is not a party to the Agreement and is not bound by the terms of the Agreement.

How should the Agreement reflect the involvement of the solicitor?

The heading could read something like this:

> **Jane Marple…….Party**
> and
> **Brilliant Bathrooms Limited, represented by Edward Golightly…….Party**

What if the director of Brilliant Bathrooms is also going to attend the mediation?

In such an event, the respondent could be reflected as "**Brilliant Bathrooms Limited, represented by Joe Soap and Edward Golightly**" and both of these representatives should sign the Agreement.

What is the importance of reflecting the parties correctly?

Consider the following. The Agreement reflects Edward as the respondent. Joe is unhappy with the outcome and starts making disparaging comments about Jane on social media, disclosing some of the content from the

mediation. Jane goes to her lawyer and wants to sue Joe for defamation and for breaching the Agreement to Mediate, in particular the confidentiality clause. Joe disputes that he is a party to the Agreement and points out that nowhere in the Agreement is either his name or that of Brilliant Bathrooms mentioned. There may be some fancy legal footwork that can be done to try and persuade a court that Edward actually signed the Agreement in a representative capacity, but it would be a lot easier if the parties were cited correctly.

How should a person be cited if they are accompanying a party but not representing them?

If Jane Marple is accompanied by her friend, Hercule Poirot, as moral support, the citation can read "**Jane Marple, accompanied by Hercule Poirot**".

What if a party has a trading name but it is not a company or separate legal entity?

Let us assume that Joe Soap traded under the name of Brilliant Bathrooms, but it was not a registered company. The citation could then read "**Joe Soap, trading as Brilliant Bathrooms"** or just **"Joe Soap**".

Most of the time, the Agreement to Mediate will not be relevant post-mediation, but there can be that rare occasion when one of the parties, the mediator or the Clinic will want to rely on the Agreement, and it is important that the Agreement reflects the names of the parties correctly and that it is signed by all those attending the mediation.

[1] ***Patrick Scott completed the LLM in Mediation and Conflict Resolution course at the University of Strathclyde in 2018 and was awarded an LLM in Mediation and Conflict Resolution with Distinction. He is currently an Accredited Mediator with Scottish Mediation, serves on the panel of mediators of the Scottish Legal Complaints Commission and volunteers as a lead mediator with Strathclyde Mediation Clinic.***

Steps to an Ontology of Mediation

Ben Cramer[1]

What am I saying in this article?

I hope this essay goes some way to revealing shared reality (between author and reader) and opens up new perspectives and possibilities for practice. First, I explore a distinction between the positions of curiosity and wonder, and how they might shape the mediation process; then I link that to the notion of mediation as a form of serious play. Next, I present the idea that what's most real in relation to mediation is what we come up against, what creates friction or resistance; and I explore three layers of reality that show up in the course of disputes: the objects around which disputes happen, the reasons around which I imagine impasse occurs, and the events which seem to me to give rise to settlement. I conclude by proposing that the reality of mediation is co-constituted by the quality of attention and engagement of the participants, and commend a position of experimentation.

Curiosity and Wonder

We can make a useful distinction between *curiosity* and *wonder*, following cognitive scientist John Vervaeke, that goes something like this: *curiosity* is actively focused on finding out something particular, whilst *wonder* is wide open to receiving what's emerging. We are in the realm of curiosity when we're engaged in an investigation, operating from within a template of making sense of events, building a system of understanding which has a more or less close fit to the world we're in. In this view, curiosity is clearly goal driven, where the purpose is to 'get', or 'grasp', some aspect of what's happened, or what's happening. We are in the realm of wonder when we're engaged in inquiry, open to receiving what's happening without needing to fit what we're sensing into pre-established categories and templates. In this view, wonder does not have a fixed goal or purpose, except that of being with what is emerging. The satisfaction of curiosity comes from acquisition of particular knowledge, whereas in wonder, satisfaction is endlessly deferred, making way for something more like the surprise or beauty of encountering the world as it's unfolding. Another helpful way of pointing to the distinction I'm trying to reveal is that curiosity is like *reasoned investigation*, and wonder is like *blind vision*[2] – suspending our habitual patterns and categories of comprehension.

For some reason, my current learning seems to favour the following perspective: that one limitation of privileging curiosity, reasoned investigation and building systems of understanding, is that we risk staying in the world as we already know it or assume it to be. One limitation of privileging wonder is that we must bear (and ask others to bear) the discomfort, and joy, of being in a world that is only barely graspable. I was lucky over the festive break to spend some time with my sister's 7-month-old baby who seemed to spend half the day in a powerful forcefield of wonder, and the other half sound asleep.

How do I see this as being relevant to the practice of mediation? I'm experimenting with seeing my approach to mediation as having two basic components: being relentlessly settlement-oriented; and aspiring to remain radically hospitable (open and responsive) to whatever is alive. The latter, for me, means staying in touch with the 'blind vision' of wonder, following the process and being willing to defer comprehension.

I'm making an argument, of sorts, for approaching mediation with a sensibility of wonder, but as I do so, I'm becoming aware of a distance or asymmetry of investment this could widen between mediators and their clients. I often hear parties coming into mediation say something like "I'm open to seeing what happens", but I also frequently observe parties holding focused needs, wishes and goals which seem to demand a pointed attention to very specific and grave issues, which can't necessarily be addressed in mediation. One claimant recently told me,

> *"I feel at times as if it has broke me... I've been so worried that I can't sleep... I feel that I've*

been ripped off. . . it's a nightmare . . . 'they' (I feel bad about saying 'they'), that company, have tried to wear me down".

It's this sense of asymmetry that stops me short of writing something like 'mediation works best when it is a form of collaborative joyful discovery'. So instead, I'm envisioning mediation as a form of *serious play*.

Serious Play

What do I mean by serious play? The 'serious' part respects what's at stake for parties coming into Clinic mediations – and I don't presume to know what those stakes are. The material and symbolic stakes often seem to me (I admit) rather low - £100, an acknowledgement of hurt or respect by an individual or organisation with whom there is no ongoing relationship; a 50mm displacement of a kitchen surface; a single bad review. Sometimes the stakes seem more obviously significant to me: £4000; a comfortable and beautiful living space; ownership of a pet; the terms of an ongoing family and business relationship. The 'play' part recognises that respectfully addressing significant events can be done with lightness and experimentation, without dismissing the gravity of the situation. By attending to the playfulness of mediation, I'm also meaning to imply that an effective mediation space cannot be one which each individual approaches in a simply purpose-driven way. In some meaningful way, the essence of playfulness entails an absence of purpose, or rather suspension and shifting of purposes and goals. Isn't it the case that impasse in mediation often occurs when some apparently important aim or objective is adhered to in a way that fixes and limits someone's attention and thinking? And that developmental leaps occur when purpose is released or transfigured, revealing possibilities for settlement and/or continued negotiation? I'm proposing that effective mediation is *not* simply the aggregation or alignment of pre-established individual purposes. I see parties engaging in facilitated negotiation as serious play, as an experiment, even a moral experiment – entering a kind of relational and narrative forge, where social relationships, norms and boundaries, and ways of interacting are trialled, dropped, invented or reinforced. By referring to the playfulness of mediation, I'm intending to highlight the novelty (or more properly, originality) of the unique quality of the social encounter that any particular 'mediation' becomes for its participants.

One article I've seen on serious play[3] notes that it has both purpose-driven and autotelic (intrinsically purposeful) aspects. This is useful because it emphasises the way that mediation, as serious play, is inherently purposeful. Relaxing our hold on extrinsic goals makes space for change, experimentation, learning and collective practical wisdom.

What's most real in mediation?

This is the first article I've written on mediation for an audience, so I'm probably making the mistake of trying to say something too general and fundamental. Perhaps paradoxically, my intention is to pay attention through a lens of 'what's real', rather than to make any enduring claims or descriptions. I feel intimidated writing in a newsletter called '*Mediation Matters!*', because when an innocuous looking question like 'what matters?' unfolds, we quickly enter a field of metaphysical depth and complexity. Examining the question of what matters, one thing that happens to me is that I find a perspective in which ontology (what's there when we're in relationship to what's real) and axiology (what we value) are entwined.

By one view, I suppose, we can know we're in contact with the really real because it pushes back, creating resistance or friction. Think sonar: a bat navigates reality from the echoes received – an image I'll return to later. It's from this perspective that I want to propose that we might generatively examine three layers of what makes a difference in disputes referred to the Clinic: what initiates disputes; what gives rise to impasse; and what makes settlement possible. (There is also a shadow side to this which is likely to receive less attention from mediation practitioners much of the time: what prevents conflict from occurring; what makes impasse impossible; what interrupts settlement agreements from being implemented).

Objects in Dispute

Beginning with the first of these, I found the question of *what generates disputes* to be beyond the scope of this article, so instead I looked back over some recent Clinic cases to get a sense of the objects around which disputes arise. I wanted to offer a kind of recognition of the everyday stuff of conflict that happens in relationship to the significant objects and minute particulars of our lives. I couldn't think of a better way to present this than as a list of mediation matters (taken from anonymised reflective notes):

> *The springs in a sofa; A timeshare; Parking tickets; A windscreen wiper motor; A credit rating; An unpaid invoice; Electrical work; Damage to property; Water services; A leather suite; A bed, microwave, box of items and washing machine; Missing money; A door supervisor badge; End caps and sash cords; A 1997 Jaguar in immaculate condition; Wiring to fit two heaters and outside lights; A large laminate floor; Delayed payment charges; A fence over a dividing line; A garden; Unwatermarked photographs; An incorrect company number; A wound up Limited company; Cleaned, unblocked and painted gutters and pipes; Withheld fabric; A hummer being repaired; A forthcoming proposal; Rental income; An emergency tax code; A mismatch of colours; A dysfunctioning boiler; Not a specific type of insulation; Two couches; Work; Dampness; A lost gold bracelet; Voice inflections; An unoperational lift; A knee injury; Unrepresentative photos; Discolouring and fading carpets; The wrong type of bricks; The absence of devices to connect to a TV; A work base; A reputation; A bathroom; A substandard oil; Architectural visualisations; A difference of opinion; Missing linen.*

Notice how each of the objects in this list can evoke (in memory or imagination) worlds foreclosed, and ensuing paths of conflict.

Reasons for Impasse

Where do things get stuck? In the Clinic mediations that are referred from Simple Procedure, the notion of impasse is super clear: anything that finally interrupts the pathway from referral, through to the mediation session, to a settlement agreement and the fulfilment of its terms, can be described as an impasse. Mediation fails if it is interrupted before the fulfilment of a settlement agreement. But, as we explored above, mediation is not only about this apparently linear procedure towards a clear outcome – there is always more than this going on.

You'll notice from the list below, that when I was examining 'failed' cases and trying to identify the obstacle to settlement, I started out assuming that the obstacle was some kind of lack, deficiency or problem; but that over time, I began to look from a perspective that considered that the obstacle to settlement might have been a virtue. My method here has no deep analysis or insight, I simply read through my anonymised reflections for some cases that terminated before resolving and projected onto them a reason for stalling:

> *Lack of information; Desire for external determination; Speaking too much; Unacknowledged grievances; Denying any fault; Not receiving advice about the risk of negative outcome; Lack of trust; Not wanting to negotiate; Being trapped in a defensive narrative; Lack of mediator's patience and endurance; Lack of information about the value of an item; Internal disagreement; Not having full authority to settle; Not owing anything; Being unreachable; Filibustering; Representative unable to contact respondent; Being unwilling to pay legal expenses; Refusing to take down an unfavourable review; Not accepting responsibility; Being uncompromising; Desire for fairness; Caring for or serving stakeholders; Frugality; Holding someone accountable; Steadfastness; Dignity; A matter of principle; Reason; Fate;*

Foolishness; Respect for institutional convention; Being accountable; Aggression; Need for justification; Maintaining boundaries; Being strong willed; Teaching a lesson; Business ethics; Confidence in legal position; Innocence; Scepticism; Standing up for someone; Wanting to win; Knowing what's reasonable.

What can I/we do with this? I've generated this cloud of entities that I see associated with impasse to begin to discover some of the events and processes that I see meaningfully affect the course of facilitated negotiation. And to evoke a response in the reader; and invoke learning in myself and others. The way I see it, if I see these processes at play in mediation, it is because I can also recognise them in my own life and conflicts. What are some of the problems or limitations I can see in this list? I certainly don't intend it to be comprehensive or generalisable, and I haven't considered categories or a structure for organisation. Clearly, in any situation, impasse and it's 'causes' are multi-layered, multi-factorial and multi-dimensional. Is it ever constructive to *locate* impasse in one or other person?; in the relationship?; in the process or context? It seems to me that how we locate impasse, as practitioners, will impact what we do and say. This brings me back to the positions of curiosity and wonder. When it's obvious that the sticking point is, for example, a matter of principle, a curious stance might say "Which principle? What does that mean? Why is that important? How will it be enacted? What would that mean for you? What difference will that make?"; a stance of wonder might say "Ah! I hear you! What next?"

Reaching Settlement

Why do disputes settle? In this final layer, and list, I present the events which I've speculated as 'turning points'; those which seem to me to have been most influential in the resolution of some recent Clinic cases. In order for my argument about reality as 'what we come up against' to remain consistent, I need to point out the following: that this is a list of obstacles to continued dispute! What interrupts the path of conflict:

Having settlement as a goal; Making an offer; Deciding not to fight; Just wanting it over; Realising the Sheriff will award expenses; Considering the other's losses; Imagining a fair offer; Listening to your daughter; Being heard; Evaluating court outcomes; Returning to joint session at impasse; Direct communication; Party control over the process; Reaching a time boundary; Listening to your wife; Considering others; Holding areas of agreement in mind; Receiving an apology; Articulated expectations are met; Being respected; Space for anxiety to settle; Being willing to hear a proposal; Being able to externalise the dispute; Naming being hurt; Being able to see the perspective of the other; Mediators defusing a threat to withdraw and negotiating more time; Interrupting monologue; Highlighting miscommunications; Developing rapport in pre-mediation; Affirmative and supportive presence; Clear structure and process; Mediators getting out of the way; Psychological safety; A prior strong relationship; Confidence in the legally binding nature of a settlement agreement; Encouragement to plan together; Listening to your sister; Considering the impact of the court process.

Carrying Forward

Remember the bat? From one view, the bat is a subject in an objective world, which it probes with sound in order to ascertain what's really out there. From another, the bat's world is *made of sound*. There's a German saying "Wie man in den Wald hineinruft, so schallt es heraus" which might mean something like "The way one calls into the forest, so it echoes out"[4]. Isn't it the case that when we probe with curiosity, we will find a world which fits the contours of our questioning? Receiving with wonder, we're attuning to a 'world' in which there is *more*, an excess beyond what is useful, wanted or satisfying.

Recent empirical work in cognitive science is failing to show, according to Vervaeke, a hypothesised link whereby awe would facilitate cognitive flexibility. And

their hunch is that *reverence* will be found to mediate this link. In this, there is shared reality with adrienne maree brown, who presents mediation as the sacred work of 'Holding Change', as a means by which "the spirit moves towards justice"[5]. In her short book on the way of emergent strategy facilitation and mediation, a contributor[6] writes "...my job is not to get in the way...". In the logic of my argument here, this raises a fascinating, if somewhat metaphysical, question: if what's real is what gets in the way, when is it the mediator's role to get real; and when to give up their substantial reality in service of the process?

Notes and References

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[2] With thanks to Olga Diamanti for this conceptual pairing.

[3] Wendelin Küpers. 2017. Inter-play(ing) – embodied and relational possibilities of "serious play" at work. Journal of Organisational Change Management, 30, 7, pp.993-1014.

[4] I prefer "The foresting calls us through our echoing" or "Our foresting echoes the calling into us" or "The forest calls your echoing into it, as you listen". Or, "Your calling echoes from the listening of the forest, or "I call out and the forest calls back".

[5] adrienne maree brown, Holding Change: The Way of Emergent Strategy Facilitation and Mediation. AK Press. Edinburgh. 2021.

[6] Inca A. Mohamed, in the chapter "Be Open to Experimenting".

Learnings of a New(ish) Mediator

Alan Jeffrey[1]

As I approach the one-year anniversary of my first mediation, a hostile standoff between a furious mother and a newly homeless teenager, it feels appropriate to reflect on the things I have learned. Like mediation itself, my thoughts and feelings about the practice can be messy, constantly shifting and are routinely updated as my experience grows.

Yet, here are some of the challenges, thoughts, questions, and topics which have stuck with me as I begin the journey to becoming an experienced mediator…in no particular order. The following list is not exhaustive, nor do I commit to standing by these statements next year, or this afternoon.

Boring cases. Interesting people

I don't think it casts me in the best light…but I don't really care about people's kitchen worktops, complaints against travel companies, or unpaid parking fines. Most of the conflicts I have encountered in simple procedure cases are often dull to me…at least on paper.

But…people are interesting. The reason that someone is behind on their energy bills or why they parked their car in that particular spot is rarely simple, and often fascinating. There is always a unique narrative, a fascinating story that demands to be told, and mediation as a format can allow for the telling.

I am a people person, not a problem person. Understanding motivations, empathising with people's situations, acknowledging their struggles, and helping them communicate that to others can make the most banal problem truly interesting.

5 hours for 5 years

I shuffled like a zombie away from the computer screen, dehydrated, tired and doubting. Doubting my skill level as a mediator. How did I let that mediation go on for FIVE HOURS! Should I have ended it after three?! Four hours?! Could I have said one magical sentence that would have miraculously resolved their conflict in ninety minutes? Who knows, but I was certain someone better at this than me could have got this wrapped up quicker and more confidently.

I wallowed in imposter syndrome for a few days before the chant of 'five hours' gave way to the thought of 'five years'. That conflict had raged on for five years. Years of anxiety, stress and frustration. Five hours to resolve this conflict, feels more reasonable in this context. In fact, five hours to resolve a five year long conflict sounds more than reasonable and honours the desires of both parties who communicated to us that they wanted to get this resolved today.

I haven't quite processed why the lengthy duration of this mediation upset me so much in the moment, but the act of reviewing the mediation less through my ego and more in the context of the wider conflict seems like a smart one.

Sustainability is key

My ego thoroughly enjoys the fact that all simple procedure mediations thus far have reached agreement. I must be pretty amazing at this mediation thing, right?

Perhaps I should be more concerned about the sustainability of such agreements. Several times I have received emails after the fact suggesting that one or more parties has not stuck to the agreement and the conflict remains ongoing.

Is this human nature, bound to happen in a certain percentage of cases, no matter how agreement is reached? Or was the agreement doomed to failure by the way it was agreed? Did I, in my need to 'win' at the game of mediation, push for an agreement that I knew would be unsustainable? Not consciously. But the pride I take in a 'successful' settlement may subconsciously highlight this to be true.

What I know is I have no desire to create settlement for the sake of a positive outcome in the moment, sacrificing sustainability. Sustainability is key and perhaps communicating this to the parties more clearly may destroy my 'winning streak' but ensure that any agreements that are reached have a better chance of being met.

Shuttle mediation - a necessary evil?

I don't like it. I don't like shuttle mediations. I don't like private sessions. Zoom breakout rooms are ideological nightmare fuel, threatening my carefully constructed mediation identity.

I like conversations. I want people to have conversations and find agreement through dialogue. I want to empower people to sit in a room and discuss real problems like real adults.

I've heard all the arguments for shuttle and private sessions. They all make perfect sense. I know others are (mostly) right and I am wrong. In fact, I use it myself…and I feel like I'm cheating and taking the easy way out.

No one I've spoken to agrees with me.

But…I just don't like it. So there!

I'm having a tantrum now. I'll get over it.

Too much to say

I could go on…I wanted to write about the usefulness of ritual in mediation, something I take from my previous career in the theatre. I wanted to write about the honour of being let into other people's lives. The difficulties and endless rewards of co-mediation. I wanted to write about the impact that those not in the room may have on the mediation, the spouse that may not be in attendance but has strong opinions on the outcome, or the employers/employees who don't get a say but will be impacted by the decisions that are made. And I REALLY wanted to write about whether mediation gets in the way of justice…Yet I've made you read enough of my rambling and thank you for indulging me.

I plan to re-read this next year, and update with the learnings that year two has brought. I may chuckle at the naivety of my writing here, or perhaps be struggling with the same thoughts. Yet, if I've learned anything on this nascent journey, it is that mediation encourages reflection, learning from our mistakes and experimenting with different styles and techniques. And after a year of successes, failures and mistakes, I am no less fascinated about the opportunities created by the world of mediation.

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Reflections on Neutrality and Impartiality by a Novice Mediator

Tom Scade[1]

I have just completed the LLM in Mediation and Conflict Resolution, and I have progressed to become a lead mediator in the Clinic. However, I feel like a novice who, despite this training and significant life experience, is still attempting to navigate the practical application of the knowledge and develop my own mediation style. This is difficult, particularly in developing an understanding of how the rules-based deontological ethical values of mediation affecting neutrality and impartiality, and allowing informed consent and self-determination, mesh together in practice.

The first difficulty is in understanding the debate surrounding what impartiality and neutrality actually mean. They are nebulous concepts open to individual interpretation.[2] Are they the same? Some argue that they are the same concept, as impartiality is a synonym of neutrality, and they share other synonyms. There are 13 synonyms of neutrality including justice, even-handedness and equality.[3] Are they different? Some argue that neutrality has two parts, impartiality, and remaining equidistant and able to interact with each party, which conflict with each other.[4] Some such as Astor argue neutrality contains four meanings – not intervening in the content and outcome of the dispute, not having personal or financial connections to the parties, not being influenced by outside bodies, such as government, and also not being biased towards either party and treating them equally.[5] Some such as Moore argue neutrality and impartiality are different in meaning.[6] I believe it is reasonable to avoid this semantic debate and regard them as meaning the same as suggested by De Girolamo and Astor[7] with a meaning of avoidance of bias or favouritism and having no prior conflicting interest with the parties, or self-interest in the outcome.

Another difficulty for the novice is that a significant number of respected mediators, such as Astor, Mayer and Font-Guzman, Field and Crowe, Winslade and Monk, and Mulcahy, believe that it is impossible for mediators to behave neutrally or impartially.[8] Izumi asserts, from her experience and evidence from cognitive research, that human cognitive function, accumulated life experience, and social factors such as race, gender and ethnicity lead to inevitable implicit bias, making neutrality and impartiality impossible.[9] Even to ask mediators to look on neutrality and impartiality as aspirational ideals is said to be asking mediators to strive for the unattainable.[10]

The other difficulty, apart from understanding what neutrality and impartiality mean and whether they are achievable, is that most Western mediators operate according to deontological (rules based) ethical codes.[11] These require neutral and impartial behaviour at the same time as asking mediators to support parties to ensure informed consensual entry into mediation and allow a self-determined outcome.[12] Mediators rapidly come across the difficulties in navigating such rules when faced with the practicalities of power imbalances in mediation caused by differentials in educational attainment, intelligence, financial hardship, lack of access to legal advice, sexual power differences, racial power differences, and understanding of mediation process. These deontological rules have been severely critiqued as being unhelpful, rigid, impractical and of constraining mediator ethical development.[13]

Astor has highlighted these practical problems for mediators as follows[14]:

> *"But whatever form power takes, dealing with power while maintaining neutrality places mediators in a double bind. Dealing with power relationships in order to ensure that mediation is fair, and being neutral, conflict with each other.*
>
> *But once we challenge the idea of neutrality and recognize the positioning of the mediator, mediators have an obligation to deal with power."*

The evidence of these difficulties is reinforced by the empirical research which has provided many examples showing that this paradox is solved by the mediator preferencing self-determination and party empowerment over neutrality and acting in a non-neutral manipulative manner to support a weaker party. A striking example of this is the study by Mulcahy on community mediators in London.[15] There is also significant evidence that mediators practise 'selective facilitation', by manipulating and moving parties towards the mediator's preferred outcome.[16] This behaviour leads to angst in the mediator as they are possibly breaching their stated code of conduct.

The dominance of neutrality in Western Mediation is unusual compared to mediation in other cultures where mediators can be related or closer to one party than the other[17] and is a twentieth century Western phenomenon.[18] Despite this, Kressel has noted that some modern mediators do perform successfully whilst not being neutral.[19]

Why is neutrality so dominant in Western Mediation? Some observers feel that this emanates from the dominance of judicial neutrality in Western democratic judicial systems, and that it is being used by mediators in the nascent profession of Western Mediation as a way of gaining validity and acceptance of this new format,[20] a tendency perhaps increased by the significant co-option of mediation by the legal profession.[21] Others suggest that there is a link to the contemporaneously developing Rogerian person-centred counselling where the mediator must remain detached from those counselled.[22]

Astor, a critic of neutrality, has suggested that attempts to reduce the power of neutrality, which she suggests is necessary, may be faced with significant resistance as it is 'embedded' in the psyche of the nascent profession.[23] This is exemplified by the inclusion of both a requirement to behave neutrally or impartially while ensuring party self-determination and support of both parties equally, in almost all Western Mediation Codes of Practice internationally and in the UK.[24] None of these codes advise on the research evidence, such as that of Mulcahy, showing significant variation in mediator behaviour, with mediators often feeling they have to 'step outside' a neutral stance to support parties in situations of power imbalance, nor do they advise how to cope with power imbalances.[25]

These difficulties of conformity with the ethical guidelines alter mediators' behaviour. As Charlie Irvine has noted, mediators' rhetoric and ethical guidelines often do not match what they do in practice.[26] One might challenge the honesty of mediators because of this behaviour but there is research evidence that neither the mediators nor the parties are aware of them behaving in a manipulative non-neutral way during mediations,[27] and in addition Charkoudian et al demonstrated that mediators find difficulty in accurately defining their behaviour and style of practice.[28]

To overcome these difficulties of neutrality caused by the conflict between neutrality and self-determination in current codes because of rigid deontological Kantian interpretations of the ethical values, some mediators such as Waldman,[29] Shapira,[30] Field and Crowe,[31] Honoroff and Opotow,[32] and MacFarlane[33] have advocated that mediators should use a 'contextual' form of ethical decision making in which it is accepted that the ethical values in the paradigm of mediation ethics are not regarded as absolute and inviolable but varying in importance depending on the context within the mediation.

Field and Crowe have suggested that the time has come to accept that a different approach to mediation should be taken using this more contextually based ethical decision-making model supported by reflective practice and placing self-determination or party empowerment, and not neutrality, as the dominant value, and ensuring that informed consent, rather than neutrality, is the main means of allowing self-determination. They would not completely remove the aspiration to neutrality from a basic ethical

framework but acknowledge that it is almost impossible to achieve, and definitely not to be regarded as an absolute inviolable value. They call this a guided method.[34]

Others such as Waldman and Ojelabi advocate that social justice requires mediators to act as 'fairness cheerleaders' and a 'safety net' for parties who may be about to make 'unconscionable' agreements, which suggests that mediators should be aiming for fair substantive outcomes.[35] Some, such as Mayer and Font-Guzman, go further and accuse mediators of using neutrality as a form of avoidance behaviour and a way of avoiding dealing with significant problems in mediations, and thus maintaining the status quo, a process which can harm weaker parties. They therefore encourage an activist role.[36] There is an acceptance by many that mediators have potential power in mediations by controlling the process and agenda, shaping the discussion, and thus perhaps influencing the substantive outcome.[37] Many such as Field and Crowe, and Mayer and Font-Guzman feel that the adoption of a rigid neutral stance is to deny this power or is a failure to use it.[38] These observations reflect the feeling by some mediators such as Douglas that they have a duty of care or fiduciary duty to both parties requiring the consideration of substantive outcomes.[39]

This plethora of conflicting information is all very confusing for a novice, but is important, in conjunction with reflective practice, and peer support in developing our style.

Personally, this has influenced my attitude to neutrality and impartiality, and I have been significantly influenced by the concept of contextual ethical decision making, and a realisation of the critical importance of informed consent in promoting self-determination, and I find myself thinking internally during mediations less about whether I am behaving neutrally and more about whether what I might be saying, doing, or suggesting, is empowering the parties and enhancing both parties' ability to reach an informed decision. I have also witnessed the power and influence of mediators in mediations, and I do not have a problem accepting this power. On this basis, I feel comfortable assisting a weaker party and stepping outside 'equal' behaviour to both parties provided it assists parties in reaching a self-determined decision, a behaviour probably influenced by my background in medicine with its ethical concept of duty of care.

I am also avoiding using the terms of neutrality and impartiality in my introductions, but struggle in utilising other language to describe my approach as many of the terms I might consider using are synonyms of neutrality or impartiality e.g. even-handed, equal, fair, just.[40]

My closing comments may be controversial, but to combat this language difficulty, I wonder if, in acceptance of the emerging information on the problems of neutrality and impartiality in mediation, and to be honest to myself, and allow true informed consent for the parties, I should be considering reshaping and expanding my opening statements to something like this:

> *The code of ethics I am governed by demands that I behave neutrally and impartially. However, my training in mediation has shown me that true neutrality and impartiality is difficult, if not impossible, to achieve. To cope with this dilemma, I strive to be self-aware, and thus aware of potential bias in my thinking and behaviour, by using a combination of co-mediation, reflective practice, and peer support to discuss difficult issues. I will therefore not advise you what to do but I will do my utmost to assist both of you in your discussions in this mediation and ensure, by assisting each party individually as required, by providing information and discussion of options, that you will be in a position to make your own fully informed decisions together on the outcome of this mediation, and that the outcome is one which can be acceptable and fair to both of you*.

Notes and References

[1] ***Tom Scade completed the LLM in Mediation and Conflict Resolution course at the University of Strathclyde in September 2022 and was awarded an LLM in Mediation and Conflict Resolution with Distinction. He is currently an Accredited Mediator with Scottish Mediation and volunteers as a lead mediator with Strathclyde Mediation Clinic, carrying out mainly Simple Procedure related mediations.***

[2] Hilary Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) 16 Social & legal studies 221 222-223

[3] Astor (n 1) 223; Merriam Webster Thesaurus, 'Definition and Synonyms of Neutrality' (*Merriam-Webster Thesaurus,* 2021) <https://www.merriam-webster.com/thesaurus/neutrality> accessed 22/09/2021

[4] Janet Rifkin, Jonathan Millen and Sara Cobb, 'Toward a New Discourse for Mediation: A Critique of Neutrality' (1991) 9 Mediation Quarterly 151 152-153

[5] Astor (n 1) 223

[6] Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (New York, NY: John Wiley & Sons, Incorporated 2014) 21

[7] Debbie De Girolamo, 'The Mediation Process: Challenges to Neutrality and the Delivery of Procedural Justice' (2019) 39 Oxford J Legal Stud 834; Astor (n 1) 222--223

[8] Astor (n 1) 236 ; Bernard Mayer, 'Core Values of Dispute Resolution: Is Neutrality Necessary?' (2012) 95 Marquette Law Review 805 812; Bernard Mayer and Jacqueline N Font-Guzman, *The Neutrality Trap* (John Wiley and Sons 2022) 30 and 42; Rachael Field and Jonathan Crowe, *Mediation Ethics: From Theory to Practice* (Cheltenham, Gloucestershire: Edward Elgar Publishing 2020) Ch 5 and 6; John Winslade and Gerald Monk, *Narrative Mediation : A New Approach to Conflict Resolution* (1st ed.. edn, San Francisco : Jossey-Bass 2000) 32-37; Linda Mulcahy, 'The Possibilities and Desirability of Mediator Neutrality - Towards an Ethic of Partiality?' (2001) 10 Social & legal studies 505 506

[9] Carol Izumi, 'Implicit Bias and the Illusion of Mediator Neutrality' (2010) 34 Washington University Journal of Law and Policy 71 153

[10] Astor (n 1) 228

[11] Gregg B. Walker, 'Training mediators: Teaching about ethical concerns and obligations' (1988) 1988 Mediation Quarterly 33 34

[12] Scottish Mediation, 'Code of Practice for Mediation In Scotland' 2016) <https://www.scottishmediation.org.uk/wp-content/uploads/2016/03/Code-of-Practice-for-Mediation-in-Scotland.pdf> accessed 19/10/2021

[13] Julie Macfarlane, 'Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model' (2002) 40 Osgoode Hall Law Journal (1960) 49 55-56; Brad Honoroff and Susan Opotow, 'Mediation Ethics: A Grounded Approach' (2007) 23 Negotiation Journal 155 155

[14] Astor (n 1) 236

[15] Mulcahy (n 7) 516

[16] David Greatbatch and Robert Dingwall, 'Selective Facilitation: Some Preliminary Observations on a Strategy Used by Divorce Mediators' (1990) 28 Family Court Review 53 63

[17] Derek Roebuck, 'The Myth of Modern Mediation' (2007) 73 Arbitration: the Journal of the Chartered Institute of Arbitrators 105 112

[18] Roebuck (n 3) 111

[19] K. Kressel and D. G. Pruitt, 'The mediation of social conflict' (1985) 41 Journal of social issues 190

[20] Astor (n 1) 221-222; Astor (n 1) 210

[21] Bryan Clark, *Lawyers and Mediation* (1. Aufl.2012 edn, Berlin, Heidelberg: Springer-Verlag 2011) 71 and Ch 3

[22] Carl R. Rogers, *On Becoming a Person : A Therapist's View of Psychotherapy* (Boston : Houghton Mifflin 1995); Roger Seaman, *Explorative Mediation at Work: The Importance of Dialogue for Mediation Practice / [internet resource]* (1st edition 2016.. edn, London : Palgrave Macmillan 2016) 168

[23] Astor (n 1) 236

[24] Omer Shapira, *A Theory of Mediators' Ethics* (1 edn, Cambridge University Press 2016) 91, 207; Scottish Mediation, Code of Practice (n 11)

[25] Mulcahy (n 7) 516

[26] Charlie Irvine, 'Mediation and social norms : a response to Dame Hazel Genn' (2009) Family Law 3-4

[27] Debbie De Girolamo, 'The Mediation Process: Challenges to Neutrality and the Delivery of Procedural Justice' (2019) 39 Oxford Journal of Legal Studies 834 846-847

[28] Lorig Charkoudian and others, 'Mediation by Any Other Name Would Smell as Sweet-or Would It? The Struggle to Define Mediation and Its Various Approaches' (2009) 26 Conflict Resolution Quarterly 293 308-311

[29] Ellen Waldman (ed), *Mediation Ethics : Cases and Commentaries* (1st ed.. edn, San Francisco, CA : Jossey-Bass 2011) 6-9 and 15-16

[30] Shapira (n 23) 229

[31] Field and Crowe (n 7) 212-224

[32] Honoroff and Opotow (n 12) 166-170

[33] Macfarlane, 'Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model' 56

[34] Field and Crowe (n 7) Ch 9 180-181

[35] Ellen Waldman and Lola Akin Ojelabi, 'Mediators and Substantive Justice: a View From Rawls' Original Position' (2016) 30 Ohio State Journal on Dispute Resolution 391 429

[36] Mayer and Font-Guzman (n 7) 30 and 40

[37] Arghavan Gerami, 'Bridging the theory-and-practice gap: Mediator power in practice' (2009) 26 Conflict Resolution Quarterly 433 439-446

[38] Field and Crowe (n 7) 112; Mayer and Font-Guzman (n 7) 34

[39] Susan Douglas, 'Ethics in Mediation : Centralising Relationships of Trust' (2017) 35 Law in Context (Bundoora, Vic) 44 57-59

[40] Merriam Webster Thesaurus, 'Definition and Synonyms of Impartial' 2021) <https://www.merriam-webster.com/dictionary/impartial#synonym-discussion> accessed 22/09/2021; Thesaurus, 'Definition and Synonyms of Neutrality' (n 2)

Mediation in Spain

Aitana Rius Fabregat[1]

Mediation in Spain is voluntary and is based on the free choice of the parties. The mediator's role is to actively assist in the process of resolving a conflict between the parties. Any resolution achieved by the parties, and set out in a settlement agreement, may be considered an enforceable title, if the parties so wish, through its elevation to a public deed before a notary. As in mediation in Scotland, the parties are treated equally by the mediator, who is an impartial third party. Mediation in Spain is also confidential, with the mediators and the parties being precluded from being obliged to provide information and documentation acquired during a mediation, in a judicial proceeding or arbitration.

In order to be a mediator, you need to have a university degree or advanced specific vocational training, as well as specific mediation training by duly accredited institutions, which will be valid in any part of the national territory. The wonderful thing about mediation is that it is universal. If you move from one country to another, you may have to register with a different professional body, but the principles and process remain the same. However, with law, every country has different laws and regulations, and different standards of qualification.

Although mediation has been in existence from before formal court processes were introduced into our society, it is still not fully understood and is under-utilised. In Spain, mediation is seen as a lesser process. The community look down upon people who mediate and place far greater emphasis on the legal route. The General Council of the Judiciary adopts a similar approach. This discourages referral to mediation. In my view, the older generation of people in Spain are averse to mediation, being somewhat stubborn and set in their ways, and they prefer the courts to resolve their disputes, believing that they are in the right and that the courts will find in their favour.

In some other countries, the community see mediation in a more positive light and regard people who resort to mediation as doing the right thing.

However, Spain is not the only country that lacks mediation culture. A change of mindset is needed for mediation to evolve. Society sees courts as the solution and it will be up to public institutions to address this issue, as they are the ones who have the power to change that, with the first step being to establish a homogeneous, unifying and adequate legislative framework to professionalise and guarantee quality in the practice of mediation. Implementing it as a university degree/masters in conflict management and resolution. There is mediation legislation in Spain, but it is less than adequate in my view, and is not widely known. At the University of Valencia, there is a post-graduate course in mediation, but it is all theory and no practice, and does not enjoy much support.

In Scotland, although there is still some way to go, parties in conflict are more likely to mediate because they want to resolve the dispute, rather than to tick a box. There is something about the spirit with which you enter in a mediation that is important.

Feelings and emotions play a huge part in the process of resolving a conflict. The mediator helps to redirect the emotional states of each party and build a safe environment, improving communication between the parties. Mediation allows the parties in conflict to take control of the situation. In the traditional process of litigation, the rules are rigid and not adaptable to your situation. Access to justice is limited and has its barriers. The lay person plays a more passive role and needs to hire a lawyer who essentially has the access to court. In mediation everyone has easy access, and it is more affordable, sometimes even free of charge.

The formal process is known for taking years to resolve a dispute which can be frustrating for the parties and expensive. I observed a mediation in the Mediation Clinic which reached a settlement in just an hour. Of course, not every mediation will take an hour, but I was so impressed about that. This is one of the great benefits of mediation.

Mediation allows for the future relationship between the parties to be addressed. Instead of becoming involved in an acrimonious situation, with a win-lose frame of mind, the parties are able to discuss their differences with a view to achieving an amicable resolution. Parties are able to address their feelings and emotions during the mediation process, which helps to resolve the problem in a more amicable way and enables the parties to get to the root of it. Some matters that are referred to the Mediation Clinic by the Simple Procedure Court, just require a mediator to assist the parties in addressing the emotion behind the dispute. I believe in giving the parties the opportunity to talk about their issues and to let them decide on how they resolve them. People need to learn how to communicate when something goes wrong so they get the chance to do things better the next time.

The Mediation and Conflict Resolution course at the University of Strathclyde has given me faith in society and made me want to start a career as a mediator. I don't believe that mediation is appropriate in every case, as there are some matters that need to be handled by the courts. However, I see mediation as the future and as the beginning of a change in society for the better.

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“Sorry, Mediator! Can you speak my language?”

Jonathan Rodrigues[1]

“Mediation is an assisted negotiation, facilitated by a third neutral party, held in a secure, confidential…” I went on blabbing, until I noticed a blank expression on the face of the party, who was an HR Manager at a reputable company.

I stopped in my tracks and checked in with him, saying, “You seem a little lost, would you like me to repeat myself?”

He shook his head in disagreement and said, “Why should my organisation send two employees to mediation? Tell me…!”

I began again, “As I was saying, its voluntary nature, coupled with the practice of neutrality by the mediator allows parties in dispute…”, but was stopped again in my presentation.

He said, “Are you at a conference or giving a lecture in class? Can you please speak my language? Just simply tell me why…”

What a horror show, I thought. I was embarrassed that I wasn’t able to connect with this party, who was exploring mediation for the first time. Luckily for me, this was only a fictional role-play at a workplace mediation training session, hosted by The TCM Group, as part of my induction into the world of workplace mediation in London. Though it was simply a training simulation, it did make me introspect into the language that I use as a mediator.

It is often taken for granted that everything that we say as mediators will be kindly accepted by the parties in dispute who wish to mediate – but, what about those who refuse to carry on with mediation after an opening session? Could it be that they are unable to relate to the mediator’s language that we expect them to grasp? We are trained to speak about the key principles – voluntariness, neutrality, confidentiality, self-determination – as essential selling points while attempting to confirm participation of the parties in mediation. However, might it be possible that there are other things important to them, besides this? Below are some key words parties might be wanting to hear whilst we pitch mediation to them… could we think of some more?

> “Mediation helps *parties who do not see eye-to-eye to share their perspectives* with each other, no matter how contradictory they may seem.”
>
> “There will be *no one else listening to this conversation in the mediation room,* except us, and as the mediator, I will ensure civility and physical safety throughout.”
>
> “*A resolution may be reached within hours* of beginning the conversation, and I will be there to help you draft that agreement, and you can sign it only after reading it.”
>
> “As your mediator, I am *available to coach and guide you (and the other side) on how to collaboratively communicate your interests and needs* without upsetting the other side.”

As part of the same simulation, where I was still on this phone call with the HR Manager, attempting to get a buy-in for mediation, I was asked another question – “This dispute has layers of tensions dating back to the pre-Covid times, and you expect to get this sorted in a day’s session? How are you so sure of this speed mediation round?” Once again, a reasonable question and a valid concern from the user lens. I must confess that my instinctive response to this query then was not quite accurate, and a better answer only became clearer after many rounds of roleplaying and understanding the process design. This once again reminded me that users may not have complete faith in the process of mediation, and that we may need to go beyond the routine description of the structure of the sessions.

In my opinion, institutions offering third-party funded mediation sessions – something common to both Strathclyde Mediation Clinic (University / Government Grant) and The Mediation Company at The TCM Group (Organisation / Company that the parties in conflict are affiliated with) – would require to have the following

essentials in their framework to encourage parties to make the best of their day's efforts, in addressing and resolving conflict.

Structure

For starters, it would be crucial to have a clear structure of the number of sessions designed for a day's mediation, with defined guidelines on the scope and limitation of conversations in each session, along with a specified time limit per session. A strong process design allows for a focussed conversation, avoids distractions, and invites parties to engage a progressive and collaborative approach to the conflict, from start to finish. Parties also feel comfortable and prepared to engage and distribute their energies and efforts during the course of the day.

Skills

There is no room for hiding in a pre-designed mediation session, where the parties may not really offer the mediator any warning signs before tipping over the boiling point. Therefore, mediators would be expected to be sharp and demonstrate communication and problem-solving skills. Due to time constraints, it is also crucial for the mediator to be able to strategically summarise all the information at the table, whilst simultaneously reflecting the priorities and respecting the emotions.

Standards

High standards are expected to be practiced across the board, and this can be ensured by training all mediators to follow the same mediation process design and subscribe to the code of ethics in their practice. Regular contact with trained mediators, either through follow-up refresher training or reflective practice groups or networking events, can serve well to maintain quality control and reiterate best practices. As part of the mediation process itself, it is good practice to encourage parties in conflict to offer feedback to the mediator and institution.

Servicing

Post-mediation follow-up and check-in is also an important aspect of preserving trust and maintaining contact with the disputing parties. Through this effort, the mediators and institutional service providers (private or non-profit) also extend their empathetic approach beyond the mediation session. I would dare say that is, ultimately, a professional responsibility to ensure the satisfaction of process and outcome, beyond the confines of the mediation room. Obviously, it is also a smart way to keep in touch with happy clients, who may be inclined to refer others in conflict to mediation.

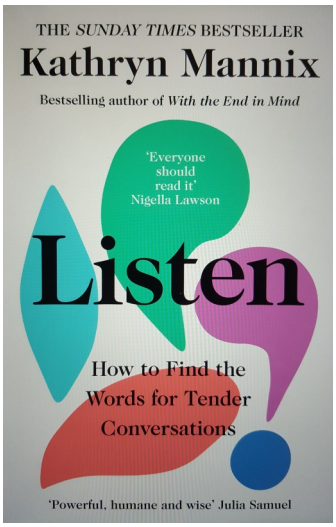
Although the value of mediation is quite commonly understood and fairly acknowledged among the legal and HR professionals, other users who constitute an important stakeholder of the collaborative process may not possess similar levels of awareness and exposure. It is our responsibility as mediators to take the message to them in a language that is practical and something to which they can relate.

[1] ***Jonathan Rodrigues completed the LLM in Mediation and Conflict Resolution course at the University of Strathclyde in 2020. He currently works at The TCM Group in London, as the Co-ordinator of the People and Culture Association, as well as volunteering for Strathclyde Mediation Clinic.***

Book Review

Listen: How to Find the Words for Tender Conversations by Kathryn Mannix[1]

Review by Gordon McKinley[2]



This week I sat and listened to parents telling their story of loss of confidence and trust in their child's school. They felt let down both by the system that was supposed to support them as well as their own sense of challenge as they seek to get the best for their child with complex additional support needs. I was struck once again by the value of storytelling and the power of listening to each other in the difficult and challenging spaces where conversations need to take place if things are ever going to get better. Having recently read Kathryn Mannix's book entitled "*Listen: How to Find the Words for Tender Conversations"*, I was reminded of the importance of creating a safe space for real conversations to take place. When I started to consider how I might review this book, my thoughts went to those many individuals we spend time with in the mediation room as we seek to help them find a way through their dispute.

As mediators, we are trained to be good at listening and asking impartial and well-balanced open-ended questions. However, no matter our personal and professional experience, we can learn so much from others who have similar roles in other walks of life. Although context is important, it isn't everything. As I have reflected on this book, I have been struck by the many parallels between what the author is seeking to promote and our own approach whether in the Clinic or elsewhere. Even a brief look at the chapter headings could give you the impression that you are reading the programme outline for mediator training.

Based on her experience in medicine as a palliative care consultant, the author talks about the reasons we may have for avoiding certain topics with our family and friends. She describes the approaches we can take to make those conversations easier, and she doesn't avoid the potholes in the road that we will encounter when we do. While the author's background means that end of life stories feature strongly in the book, it is by no means exclusively about palliative care. She uses scenarios from a broad range of situations including adoption, sexuality, the death of a child in early pregnancy and what it means to grow old. In each case she uses these stories to make important points about how we communicate with each other.

I found this a very easy book to read, and I was particularly struck by the weight that words can have in our engagement with others. We often talk about 'difficult' and 'challenging' conversations. However, Mannix prefers to describe these as 'tender'. I am not sure that this is a word that I feel particularly comfortable with. However, it does remind us of the importance of the impact of a single word on what happens next! Her view is that this is a much more positive term as we do our best to minimise the risk of causing further pain or distress. She talks from her experience in

I would certainly commend Kathryn Mannix' book to any mediator wishing to continue to develop their skills.

medical school where students are taught how to gently undertake a physical examination with great care, watching the patient's expression for cues and signs of distress. However, she then goes on to suggest that having a conversation with a patient is usually not taught as well, describing her personal early career experience of being punched when a patient reacted violently to the bad news she was being told. Whilst the simple rules of how to break bad news may provide the foundation for a positive conversation, they tend not to allow for the nuances of the situation nor the needs of those involved.

I want to return to the theme of storytelling as I am reminded of the narrative approach to mediation where telling our story is a significant aspect of the process. The author uses stories as a key component throughout her book. As she does so, it helps us to understand ourselves, and others, better. For example, a man in end-of-life care needed to rediscover his dignity in washing and shaving himself before he felt ready to die. In another chapter the author talks about her widowed uncle, who set a place at the dinner table for his wife, long after she had died. She notes that this was not through denial but because it made perfect sense to him. Like the parents I mentioned earlier, these stories provide us with an incredibly powerful platform for our own professional reflection, learning and growth.

I particularly liked the way in which Mannix asks us to consider that a conversation might be less like a set of instructions to follow, and more like a dance. "*The conversation, like a dance, requires participants to join in and take turns.*" One person may lead, she says, but never forces, while the other follows but is never pressured. Conversations, like dances, need practice, and she recommends that after every second question we stop to make sure we have got the steps right. I think that is good advice. In each of the twists and turns of a mediation the tiniest step can lead to a change of direction, an opening up or a closing down of something. It can lead to resolution or back towards entrenchment and impasse. We certainly need to be watchful for each of the dance steps that parties take.

I would certainly commend Kathryn Mannix' book to any mediator wishing to continue to develop their skills. As I left the mediation room the other day, a quote from this book popped into my head. "*We limp to wisdom over the hot coals of our mistakes. Bind your feet, now, and keep walking*". Those parents had not resolved all their issues with their child's school. No magic wand had been waved to 'fix' everything and no formal agreement had been reached. They did, however, have the chance to talk, feel listened to and have the opportunity to think about how their story might be different. Sometimes that is enough, and we keep on learning how to hold space for others as we limp on. Perhaps they will be able to lead the steps of the dance as they seek to support their child in the coming days and months.

This book is available on Amazon, in hard cover, paperback and on Kindle.

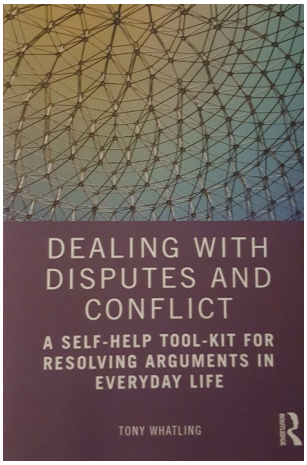
[1] *Dr Kathryn Mannix works with people who have incurable illnesses. She is a pioneer of palliative medicine, having worked as a palliative care consultant in hospices, hospitals and patients' own homes. She is also passionate about public education. After qualifying as a Cognitive Behaviour Therapist in 1993, she started the UK's first CBT clinic for palliative care patients. She has also written "With the End in Mind".*

[2] ***Gordon McKinley completed the MSc in Mediation and Conflict Resolution course at the University of Strathclyde in 2019. He currently works independently in leadership development, executive coaching and as a mediator focussing primarily on the workplace and with families of children with additional support needs, as well as volunteering for Strathclyde Mediation Clinic.***

Book Review

Dealing with Disputes and Conflict: A Self-help Tool-kit for Resolving Arguments in Everyday Life by Tony Whatling[1]

Review by Patrick Scott[2]



Described by the author as a "self-help tool-kit for resolving arguments in everyday life", the book certainly achieves that goal but is also a useful reference for experienced and novice mediators alike. Written in an accessible format, it contains many tips and suggestions on how to get the best results from a mediation, and how to deal with difficult and challenging parties.

Tony Whatling starts by exploring some common definitions and principles of mediation, identifying the potential challenge to the lay mediator as being "an impartial third person", a concept many experienced mediators struggle with in a different context.

Some interesting points are made - sometimes skilful and experienced mediators neglect summarising as a tool for fear of failing to summarise correctly. He also explains the importance of "active listening" and describes in some detail how this can be achieved. "It is not enough for the mediator to be listening and understanding, the speaker must know and feel this to be so, and the periodic summary conveys this cogently". The same can be said of impartiality – it is not sufficient for the mediator to be impartial, but he or she must also be perceived by the parties as being impartial. The importance of eye contact, the use of open and closed questions and positional bargaining versus needs-led negotiations are also covered in an easily accessible manner.

The book covers "additional strategic interventions beyond core toolbox skills", covering aspects such as normalising, mutualising, reframing, concatenation and the Jujitsu approach, some of which were alien concepts to me. There are interesting and useful observations, such as unless people in fixed positions experience doubts about their positions, they will not be psychologically or emotionally "fit enough" to negotiate a settlement, which provide useful advice to lay, novice and experienced mediators alike. Another interesting observation is that the strategies mentioned by the author "are designed to engender a gradual and progressive sense of uncertainty", making it easier for the mediator to help the parties towards a resolution.

"What are the known attributes of effective mediators?", poses the author, pointing out that "very little has been written about the qualities of the mediator". He then sets out a list of these qualities, including a sense of appropriate humour, physical endurance and the hide of a rhinoceros.

There is a good balance between mediation theory and practical advice, with a number of examples of the author's vast experiences to emphasise the points that he postulates. This not only assists the reader in

"It is not enough for the mediator to be listening and understanding, the speaker must know and feel this to be so"…. it is not sufficient for the mediator to be impartial, but he or she must also be perceived by the parties as being impartial.

understanding the principles, but adds an interesting dimension, making the book a "lighter" read than the usual academic work or educational guide. These examples make it easier for particularly lay mediators to obtain more insight into what they need to do to guide parties to a resolution.

Another useful topic, not often covered in mediation literature, is "the power of apology and reconciliation". After setting out the key elements of an apology, Tony explains how the mediator approaches this sensitive issue, describing apology and forgiveness as "highly personal and idiosyncratic processes, emotionally and psychologically" and that they "should never be coercive or imposed by practitioners".

Another aspect of mediation not often covered in works on mediation is the importance of ensuring safe practice. The author deals with co-mediation, covering both the benefits (such as providing reassurance to a novice mediator) and some difficulties (such as complications in who takes the lead and turn-taking). The use of humour is also covered, and the advice is to use humour carefully, respectfully and sensitively.

Finally, there is some useful advice on how to manage a mediation, with the timing of interventions by the mediator, time-out breaks for the parties and laying the ground rules for an effective mediation. Tony also offers some tips on how to avoid potential legal consequences and provides some important cautionary warnings to bear in mind, in ensuring that the parties are satisfied that the mediation is safe and that they want to proceed.

This book is available on Amazon and from the publishers, Routledge, in paperback, hardcover and on Kindle and would be a good inclusion in any mediator's library.

[1] *Tony Whatling has over 30 years' experience as a family mediator, consultant and trainer, with a professional practice background in Social Work in Child Care, Adult Mental Health, Family Therapy, Area Team Management and Social Work Education. His first book,* ***Mediation Skills and Strategies: A Practical Guide*** *was published in 2012 and his second,* ***Mediation and Dispute Resolution, in 2021.***

[2] ***Patrick Scott completed the LLM in Mediation and Conflict Resolution course at the University of Strathclyde in 2018 and was awarded an LLM in Mediation and Conflict Resolution with Distinction. He is currently an Accredited Mediator with Scottish Mediation, serves on the panel of mediators of the Scottish Legal Complaints Commission and volunteers as a lead mediator with Strathclyde Mediation Clinic.***

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