July 2024
Issue 8

Mediation Matters!

The quarterly newsletter of the
University of Strathclyde Mediation Clinic

Inside this issue

Editor: Patrick Scott **Assistant Editor: Adrienne Watson**

University of Strathclyde Glasgow

Editorial

Patrick Scott

Welcome to the summer issue of ***Mediation Matters!***, if the current weather can be so described. We have some interesting content for our readers, including all the presentations from the Clinic's conference in March. But before we look at any of that, we would like to congratulate Dr Charlie Irvine on the completion of his PhD. We are sure that he is pleased to have completed his thesis, of which we hope that he will tell us about in more detail, through an interview with our assistant editor, Adrienne Watson.

As promised in the previous newsletter, we include all the presentations from the Clinic conference in March. Professor Deborah Thompson Eisenberg was our keynote speaker, and she gave an excellent presentation entitled ***Learning through Practice: Mediation Clinics and Mediator Education***. Deborah makes some interesting observations that I had not considered, such as mediation being more difficult than litigating.

There were also six workshops at the conference, all of which are included in this issue. Oyinkro Olobio and Eunice Olatunji provide an interesting account of their experiences as recent graduates of the MSc/LLM in Mediation and Conflict Resolution course, whilst Charlie Irvine and Pauline McKay set out the history of the Strathclyde Mediation Clinic. Stuart Kelly deals with lawyers in the mediation room and Bryan Clark focuses on online mediation. Toby Guerin and Robyn Weinstein discuss the establishment of a mediation clinic, and Silence Chihuri discusses diversity in mediation.

Samson McKinley, in his article ***Everyday Mediation,*** provides some useful insights into the thoughts of a mediator. He makes some interesting observations about impartiality. I wonder whether, if a mediator is partial to both sides, that makes him or her impartial? That may help to build up trust with the parties, but it would be important for them to appreciate the neutrality of the mediator.

In his workshop on ***Diversity in Mediation***, Silence talks about "diverse mediators" being better equipped to engage with parties from their own backgrounds, whilst Samson discusses a similar situation in Afghanistan, where it was important for mediators to build rapport with the parties and establish a connection with them, to the extent of being "partial".

In ***An Ethical Dilemma (Part 2)***, I provide some feedback from a recent workshop on ethical issues with illegal agreements and try to offer some guidelines on how mediators should approach such matters. Adrienne Watson, our assistant editor, interviews Frank Eijkman on his dissertation entitled ***What can we learn about mediators and mediation from the content data analysis of mediator reflection forms?***. This is an interesting interview with some useful insights into reflective practice.

We have the usual contributions, ***From the Chair***, ***Clinic News*** and ***Rosie's Roundup***. In my ***Patrick's Ponderings***, I discuss some issues relating to the awarding of judicial expenses in Simple Procedure matters, and ***Aunt Minerva*** provides her advice to Worried, from Kinlochsporran in her Agony Column.

I hope that you enjoy the content and, until next issue, happy mediating.

Patrick Scott
Editor

From the Director ……

Charlie Irvine

Despite the rubbish weather my summer began on a cheerful note, as I finally graduated with my PhD. Although it took a while (don't ask) and sometimes seemed unfinishable, I'm glad I did it – even if I hadn't done it, this study needed to be done. To generalise a bit, original UK mediation research is relatively rare, original Scottish mediation research rarer still, and original Scottish mediation research that talks to self-represented parties is like hen's teeth. The last was Margaret Ross and Douglas Bain's evaluation of small claims mediation in 2009.[1]

Now that I can look back on the journey with a bit of distance, I see how richly I benefitted. In no particular order it gave me:

- *a reason to immerse myself in the volumes of critical writing about mediation;*
- *the chance to speak to mediation's consumers about what it was like for them;*
- *a glimpse of ordinary people's thinking when the courts ask them to devise solutions to their disputes;*
- *finally, a research-based response to Professor Genn's infamous rhetoric about mediation not being about just settlement.*

For those who want to read more and have a bit of time on their hands, here's the thesis, entitled *Does mediation deliver justice? The perspective of unrepresented parties*. For now, I'll share a couple of headlines that seem relevant to the work of the Mediation Clinic and anyone else who deals with cases referred by the courts.

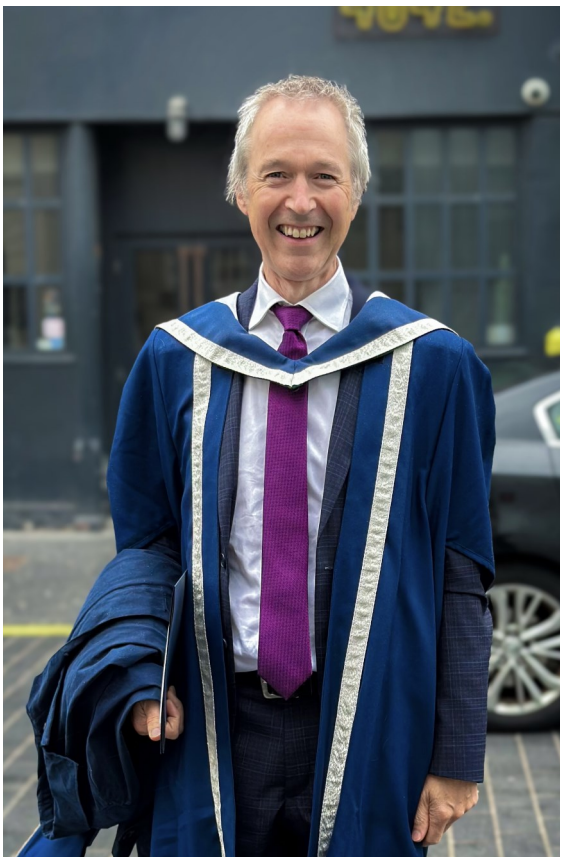
1. Mediation is held to a higher standard than the courts

In one key respect mediation is expected to perform better than the courts: enforcement. Here's a quote from the thesis:

> *...participants drew no distinction between getting a settlement and getting paid. If they didn't get paid mediation was not successful, whereas it is possible to litigate, succeed, and receive nothing.*

It's one of litigation's dirty little secrets that a great deal of good money is thrown after bad. A court decree doesn't guarantee payment, and in around a third of cases more action is needed, often at considerable expense. In 2019-20, for example, over 44,000 forms of diligence were used for non-Council Tax cases. Diligence is a rather obscure term once characterised in the public imagination by warrant sales, and now featuring orders like 'attachment' (of the debtor's own property), 'arrestment' (of what's owed to them by someone else, like wages) and 'inhibition' (preventing someone from selling houses or land).[2] Each step costs money, including fees to sheriff officers and, usually, solicitors. Ross and Bain's research found around 65% of those with court decrees had actually recovered what they were awarded.

In contrast, when we talk about a successful mediation, we mean one where the settlement has been fulfilled. A number of participants in my study spoke positively about getting paid – one even had the money in her account before she left the mediation. Another included payment among her reasons for saying she received justice: *"They said they would send a cheque and they did."*



2. Procedural justice works differently in mediation

Anyone who has studied with me will recall various ramblings about procedural justice: the idea that people care as deeply about the way decisions are made (the process) as the result (the outcome). Research has focused on people's treatment at the hands of the decision maker; dignified and even-handed treatment along with the opportunity to put their case seems to be the recipe for a procedurally fair process.

But what happens when the parties *are* the decision makers? For one thing, the way the mediator treats them, while still important, comes in for less scrutiny because the mediator is not making the decision. More important is the other party; a decision can only be made with their agreement. This means that as well as being decision *makers*, mediation parties are decision *recipients*.

This appears to have escaped our attention. In our enthusiasm to support party decision making we have overlooked the pain and dismay people feel when their adversary has a say in the outcome. Here's another quote from the thesis*:*

> *Mediation participants are hybrid decision makers and decision recipients, with little choice but to take their counterpart's perspective into account. As decision makers they must consider the other party's views or risk no decision being made at all; as decision recipients the other party's choices will inevitably influence the outcome.*

This may explain why so few of my participants gave an unreserved "yes" when asked if they got justice, even though most of them settled on terms they had agreed to. Quite a number appeared in two minds, saying things like "yes and no" or "9 out of 10 in justice." One claimant offered this snapshot of her thinking:

> *I was just like – a bit of me thought, that's fine, I'm getting £900. And then another bit of me thought, hmm, she should have had to pay the full lot.*

To conclude, this research has underlined how seriously we should take our clients. The courts have delegated to them the complex task of devising an outcome to legal disputes. They take it seriously and think carefully. They have to weigh up a wide range of considerations: risk, convenience, aspiration, combatting injustice and the hassle of returning to court. And, even if they're not 100% happy, they really like getting the whole thing behind them. And they especially like getting paid!

Charlie Irvine[3]
Director, Mediation Clinic

[1] Ross, M. and Bain, D. (2010) *Report on evaluation of in court mediation schemes in Glasgow and Aberdeen Sheriff Courts.* Scottish Government Social Research, Edinburgh.

[2] https://brodies.com/insights/litigation/they-do-things-differently-in-scotland-attachment/

[3] ***Dr 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 has recently been awarded his Doctorate for his PhD research into mediation participants and their reasons for settling.***

The University of Strathclyde's Fourth Mediation Clinic Conference

Learning through Practice: Mediation Clinics and Mediator Education

On the 21st of March, the Mediation Clinic held its fourth Conference, which was online.

Speakers and participants joined us from across the world, including the United States, Poland, India and Nigeria.

We were delighted to welcome Professor Deborah Thompson Eisenberg as our Keynote Speaker. Professor Eisenberg's talk was entitled ***Mediation Clinics and Clinical Legal Education*** and provided an insight into the value of mediation clinics in teaching the skills of active listening, powerful questions, empathy, and adaptability, and the positive difference that this can make in the world.

We were also very pleased that the conference included six thought-provoking workshops which were presented by Professor Bryan Clark, Professor Toby Guerin, Professor Robyn Weinstein, Silence Chihuri and members of the Strathclyde Mediation Clinic (Oyinkro Olobio, Eunice Olatunji, Charlie Irvine, Pauline McKay and Stuart Kelly).

Recordings from the conference are available on our YouTube channel.

The Keynote address and each of the workshops are presented on the following pages:

Mediation Clinics and Clinical Legal Education

By Professor Deborah Thompson Eisenberg[1]

Deborah Thompson Eisenberg

It is wonderful to be with all of you this morning to speak about Mediation Clinics and Clinical Legal Education - two topics near and dear to my heart.

I am a professor of law and Vice-Dean at the University of Maryland Francis King Carey School of Law in Baltimore, Maryland. Our law school has a long and proud tradition of both clinical legal education and dispute resolution, consistently ranking among the top clinical and ADR programs among U.S. law schools and is the fourth oldest. We are celebrating our 200th anniversary and our clinical law program recently celebrated its 50th.

We have approximately twenty legal clinics in which students are certified as student attorneys under court rules, similar to rules in most US states, that allow them to practice as an attorney under the supervision of a professor/supervising attorney. At our law school, all students in our day division must complete a clinic in which they represent disadvantaged and marginalized communities as a condition of graduation. We call this our Cardin Requirement, named after Maryland's U.S. Senator Ben Cardin. When Senator Cardin was in our state legislature, he led an effort to fund clinics at our school to expand access to justice.

Within our clinical program, we have a Mediation Clinic. This was one of the first law school mediation clinics in the U.S., started by my predecessor, Professor Roger Wolf, thirty years ago. The Mediation Clinic forms an anchor for our Center for Dispute Resolution, founded twenty years ago. My colleague Toby Guerin will be telling you more about the structure of our Mediation Clinic later today.

I came to teach at Maryland Carey School of Law after fifteen years as a civil litigator. When I began teaching in 2007, I taught litigation-based courses, including civil procedure, a workers' rights clinic, and employment discrimination. Mediation and ADR were part of my practice, but I played the role of the litigator advocating for my clients' rights. What I learned over time in my litigation practice, however, was that even if my client won, so much was lost in the litigation process. Especially in employment discrimination cases, the litigation process itself was draining – emotionally, psychologically, and financially – and did not always make my clients feel 'whole' at the end, even when they won. Although I must say that winning always felt better than losing.

My transformation from litigator to mediator was a gradual process. Mediating, I learned, is more difficult than litigating in many ways. In litigation, there is a clear roadmap to the process: the rules of evidence, the rules of procedure, the case facts developed through careful discovery, and the case law analyzed in well-written briefs. You represent one client and zealously advocate for that one client. And there is a clear end point. The case either settles, as most civil litigation does, or a judge or jury will decide the case.

Mediation is so much messier and more difficult. In mediation, party self-determination means that two conflicting parties must agree to the outcome. The informality of mediation means that the conversation can be emotionally raw, and that power imbalances and relational dynamics can enter the room and affect the outcome. Training mediators to facilitate dialogue between two or more conflicting parties – who are likely angry with each other and not eager to talk across the table – with all these other factors at play, is no easy feat.

What I would like to discuss with you today is where mediation clinics fit within the broader structure of clinical legal education. I know some of you do not teach in law school settings, but I hope my exploration will be instructive not only for the education of future lawyers, but also for future leaders and members of our society more generally.

An awkward fit?

I'll start by telling you about one of the first times I ever attended the American Association of Law Schools annual Clinical Law Conference. This was in the wake of the police killing of an unarmed eighteen-year-old young black man named Michael Brown in Ferguson, Missouri. Social justice is a strong undercurrent in clinical legal education. During the plenary session of the conference, we were asked to split into groups, and go and stand by the sign around the room that best described our type of clinic, so each clinic group could then discuss how we could make a difference in reforming police practices. I looked around at the signs and did not know where to go. There was no sign for mediation clinics or ADR. Should I go to the civil litigation

group? What about policy advocacy, community development, criminal defense? I stood there, trying to determine where mediation clinics fit within the clinical law community and feeling excluded, especially during conversations about social justice advocacy.

On the one hand, ADR, broadly speaking, fits within all these substantive areas. After all, mediation clinics and ADR focus on the *process* by which legal disputes and conflicts are resolved.

We teach our students that *procedural justice* is just as important as the substantive law. Dispute resolution processes are involved in all substantive legal areas. In the U.S., fewer than 1% of civil cases, and fewer than 2% of criminal cases, ever reach a trial.[2] Negotiation, plea bargaining, and mediation are well integrated into civil and criminal practice and are the way the vast majority of cases are resolved.

But, unlike other legal clinics, we train students to be *neutrals*, not the lawyer fighting for justice in court or negotiating a settlement. There are some mediation clinics in which students represent clients in ADR processes, but most mediation clinics teach students to be neutral – to appreciate the perspectives of multiple parties at the same time, without taking sides and without judging. In the context of social justice movements, neutrality is viewed with great suspicion. Consider these quotes:

Desmond Tutu: "If you are neutral in situations of injustice, you have chosen the side of the oppressor."[3]

Elie Wiesel: "We must always take sides. Neutrality helps the oppressor, never the victim."[4]

Some attribute to the poet Dante: "The hottest places in Hell are reserved for those who, in a period of moral crisis, maintain their neutrality."[5]

Whoa. That is very heavy. We certainly don't want to be aligned with "the oppressor."

So, let's examine what we really do in mediation clinics, and how the theory and skills we teach play a crucial role not only in educating future lawyers and leaders and improving the legal profession, but also in transforming complex social issues and promoting social justice more broadly.

History of U.S. clinical legal education

I'll start with some background about clinical legal education in the United States.

As many of you likely know, American legal education is founded on the case method of instruction, developed under the leadership of Dean Langdell at Harvard Law School in 1870. In this model, students study the law by reading appellate cases. By engaging in Socratic dialogue about the application of the law to the facts of the case, they analyze the underlying legal reasoning and glean legal principles and rules – this is the process we often call "thinking like a lawyer."[6]

In the 1930s, legal realists such as Jerome Frank, who became a federal judge on the U.S. Court of Appeals for the Second Circuit, criticized the case method for failing to account for the ***human factors*** that affect the law and the administration of justice. Consider this quote from Judge Frank's 1933 article *Why Not a Clinical Lawyer-School?*:

> *Students trained under the Langdell system are like future horticulturists confining their studies to cut flowers, like architects who study pictures of buildings and nothing else. They resemble prospective dog breeders who never see anything but stuffed dogs. And it is beginning to be suspected that there is some correlation between that kind of stuffed-dog study and the over-production of stuffed shirts in the legal profession.*[7]

Jerome Frank and other realists urged law schools to establish "legal clinics" to teach students not only to "think like a lawyer," but "act like a lawyer." Judge Frank believed that law schools should teach "the human side of the administration of justice."[8] He urged law schools to teach students to be sensitive to the place of the lawyer in society, to understand the uncertainty of facts, and the inherent biases baked into litigation, and to develop the skills of negotiation, draftsmanship, and case planning, as well as opportunities to reflect on professional ethics and engage in law reform activities.[9]

Frank's article became an early blueprint for many clinical law programs. In the 1960s and 1970s, clinics grew at many law schools, kickstarted by funding from various foundations. The civil rights and anti-poverty movements of these decades strongly influenced the development of the clinics, and many civil rights and legal aid lawyers taught clinical courses.

But the critiques of legal education continued. The American Bar Association's MacCrate Report in 1992, and later the Carnegie Report in 2007, emphasized the need for law schools to educate law students beyond the adversarial, litigation-based model and beyond the traditional doctrinal classroom and case method.[10]

The MacCrate Report identified ten fundamental lawyering skills and four fundamental values – most of which are a repackaging of the various skills and values that Judge Frank had advocated decades earlier, including: problem solving; legal analysis and reasoning; legal research; factual investigation; communication; counseling; negotiation; litigation and alternative dispute resolution; organization and management of legal work; and recognizing and resolving ethical dilemmas. The four fundamental values emphasized in the MacCrate Report were: providing competent representation; striving to promote justice, fairness, and morality; striving to improve the profession; and professional self-development.

Today, clinical education is offered at most U.S. law schools, with a growing number of schools, like Maryland Law, requiring clinic for graduation. Clinical offerings have diversified to include many practice areas: criminal defense; immigration law; civil rights; environmental law; community development; intellectual property; small business; public health; policy advocacy; ADR clinics; and more.

Fast forward to 2024, and the fundamental lawyering skills and values identified in the MacCrate Report are now required by the American Bar Association for law school accreditation. Many of these skills, including negotiation and ADR, will be tested on the "NextGen Bar Exam" – the licensing examination for U.S. lawyers – beginning in July 2026.

What do mediation clinics teach?

With this background, let's come back to our central question: where do mediation clinics fit within clinical legal education? Judge Frank emphasized training in negotiation, as well as psychology and the human and emotional aspects of the law. But he likely did not have in mind training law students to be the neutral mediators, as ADR itself was not yet as prominent in legal practice.

But I think Judge Frank, if alive today, would consider the skills taught in mediation clinics as core competencies not only for future lawyers, but also for leaders in our society. Mediation clinics share the same fundamental values that I described for clinical law programs more generally. But the skills we teach are different.

Active Listening

The first skill that mediators must learn is one that seems in short supply these days – listening, or more specifically, active listening. This means not just hearing the words while someone else is talking and thinking of how to counter with a response, but listening to understand the feelings, values, and perspectives of the speaker; and then doing the same with the other party in the matter. That ability to navigate two conflicting perspectives in an informally structured, unscripted conversation, without judging, is so much harder than it looks.

I recall sitting in the mediator's chair for the first time in small claims court. I had litigated for fifteen years and argued in state and federal court, both trial and appellate courts. And I had won cases against big corporations. But mediating in the small claims court was one of the most difficult things I had ever done. There were no strict court procedural rules or crisply written briefs applying the facts to the law. It was chaotic. Both parties came at each other and the mediators with raw and real emotion, and both believed they were right. In that first mediation, I believe I sat there like a deer in the headlights, unsure what to say or do. Thankfully, I was with a more experienced co-mediator who facilitated the conversation quite skillfully.

Active listening comes more naturally to me now. I try to put that into practice in my administrative role every day. My professor colleagues will often come to me and say things like "I had a very difficult conversation, and I channeled you!" Many ADR professors may hear similar sentiments from their colleagues. I think what they mean is that they *listened* to try to understand the perspective and interests of the other person *before* immediately reacting, defending, or telling the other person all the reasons they are wrong (which law professors are very skilled at doing).

And here is where mediation training is so very important today, when our society is so highly conflictual and polarized. Active listening values curiosity – it helps the speaker feel valued and heard and builds trust. Active listening is an important skill not only for mediators, but for lawyers when they are interviewing clients or trying to figure out what is important to the opposing side as they negotiate potential outcomes. Active listening is important for leaders who want to foster inclusion and equity on their teams and work collaboratively to address tough problems.

Related to active listening, mediators understand the difference between dialogue and debate. Tools such as active listening facilitate dialogue, and dialogue is the foundation of participatory democracy and social progress. While sometimes we may need competitive, adversarial litigation or protest to protect and advance the rights of the most vulnerable, dialogue can lead to progress and innovation – dialogue is the process through which we can

identify the underlying interests and values of competing stakeholders, build understanding, and explore potential options for resolution.[11]

I should note that not all dialogue results in a resolution. This has been explored by Carrie Menkel-Meadow, Katherine Kruse, and others as the "deliberative democracy" function of ADR. That is, there is value and power in the conflict itself – in the ability to have dialogue that may not result in "harmony" but may contribute to collective learning and the clarification of perspectives and community norms.[12]

Powerful questions

A second skill we teach in mediation clinics is the construction of powerful questions that facilitate conversations and expand information. Lawyers learn how to conduct direct and cross examination to identify and challenge key facts in the case. In mediation clinics, we go beyond these types of questions. Mediators learn how to craft curious 'what' and 'how' questions to promote deeper conversations and understanding between individuals in conflict.

Powerful questions help to clarify the root causes of the conflict, surface the interests underlying positional arguments that need to be addressed, and identify the key topics that need to be discussed. Such questions often invite self-reflection and lower defensiveness, stimulate creative brainstorming, and generate innovative solutions.

Experienced mediators at this conference can give many examples of such powerful questions. These are questions such as:

- *What is most important to you?*
- *How is that important to you?*
- *What would it take to move forward?*
- *What needs to change?*
- *How will that make a difference for you?*

Sometimes the powerful questions are those that concern something that is not about the legal issues in the case, but something that the parties keep raising. For example, I was mediating a small claims case, and my student mediators were observing as part of their apprentice process, which required two observations before they could co-mediate. The legal dispute involved a property claim – a replevin action[13] for return of a car. The parties, I came to learn, had once been in a relationship that ended poorly. And they had several pending lawsuits involving each other.

One party had a little girl who had grown quite attached to the other person. Throughout the mediation, I asked questions relating to the car and various incidents that happened between them, but I kept hearing the little girl's name come up – I'll call her Amber, but that wasn't her name. Amber had nothing to do with the underlying legal cases but seemed to be at the heart of the broader conflict. When I had tried many different strategies to overcome an impasse and I was unsure what to do next, I asked something like: "I keep hearing about Amber; would you like to talk about her?" And I waited in silence. It was a breakthrough moment. Both, who had been stoic and angry up to that point, started to cry as they talked about the impact of the end of their relationship on Amber. They worked out a plan for Amber to visit and talked about the deeper issues involving their relationship and how it ended. After that powerful question, they quickly resolved the legal case. When the parties left the room, my student observers applauded and said: "Now we understand the power of mediation. Everything you have been teaching us makes sense now!"

Empathy

The skills of active listening and powerful questions cultivate a third skill, empathy. This is not necessarily a specific mediator intervention, but one of the byproducts resulting from active listening, powerful questions, and dialogue. The *Oxford English Dictionary* definition of empathy is "the ability to understand and appreciate another person's feelings, experience, etc."[14] We often call this standing in the shoes of another. Others refer to this as "emotional intelligence." Through the mediation process, the mediator asks questions to uncover and highlight the perspectives of opposing parties, cultivating empathy.

Empathy can help lawyers build trust and understand their own clients' perspective, as well as their adversary's perspective. As Professor Jim Stark has written, "mediation clinic students come to understand that to many people caught up in a legal conflict, the psychological, relationship and spiritual aspects of the conflict can be experienced as equally important as, or perhaps even more important than, the legal or distributional aspects."[15] This "human side" of addressing conflicts is something that Judge Jerome Frank discussed back in the 1930s.

Adaptability

A fourth skill we teach mediators is adaptability, which can be described as being comfortable with the unpredictability and sometimes emotionally chaotic nature of conversations between people who are in conflict. Mediators must learn to stay patient and calm during tough conversations and adapt to the needs of the parties. This is

a crucial skill for anyone in a leadership position, including lawyers. For a mediator, the heated emotional exchanges contain valuable clues about what is important to the parties. Whereas lawyers and judges may clamp down on emotional outbursts, mediators mine them to identify the parties' needs, values, and interests – in other words, what is most important to each side. Mediators do not become too invested in any particular outcome. They trust that the parties closest to the conflict have ideas about how to work it out. And in complex multi-stakeholder conflicts, skilled mediators can help to facilitate a process to identify the key interests of all and explore creative options for moving forward.

Mediation and social justice

I've talked about the valuable skills that we teach our students in mediation clinics. But I haven't answered the question posed at the beginning: can mediation clinics promote social justice and change the world? My answer is the same as it is for any other type of legal clinic: perhaps, in some cases, or even many cases, they can. I have witnessed many mediations that have been life-changing for the parties involved. I have been in mediations that left me feeling more hopeful for the future of humanity – mediations where the parties not only settled the legal case, but shared heartfelt apologies, hugged across the table, or laughed together. I've participated in mediations that led to changes in policies and practices that benefited communities beyond the litigants in the case.

But I also have been in other mediations where the conversation did not lead to a resolution, and that is fine. Mediation is an option, but it is not the only option and may not be the best option for all parties and all conflicts. As I used to tell my mediation clinic students, the worst thing that will happen if the parties do not settle is that a very smart judge down the hall is going to decide the case for them.

Nevertheless, as applied in various social contexts, mediation has been shown to make a meaningful difference. For example, a study of small claims mediation by the Maryland Judiciary comparing the attitudes of those who had gone through an ADR process (mediation or settlement conference) to those who had gone to a hearing before the judge without ADR found that, in the short-term, ADR participants were more likely to report that:

- *"They could express themselves, their thoughts, and their concerns;*
- *All of the underlying issues came out;*
- *The issues were resolved;*
- *The issues were completely resolved rather than partially resolved;*

They acknowledged responsibility during the process."[16]

And these findings held true regardless of whether the parties settled in the ADR session. ADR cases were also less likely than those that received a judicial verdict to return to court over the long term for a follow up "enforcement action." The predicted probability of returning for future court intervention was 45% for the cases that received a verdict, but 21% if the parties settled in ADR.[17]

Outside of courts, mediation has been applied in important ways in communities to promote social justice and prevent violence. For example, mediation is an integral part of the United States' most important civil rights law – the Civil Rights Act of 1964, which prohibits discrimination based on race, sex, religion, in employment, education, and other contexts. You may have heard of Title VI, Title VII or Title IX, but have you heard of Title X, which established the Community Relations Service (CRS) as part of the U.S. Department of Justice?[18]

President Lyndon Johnson advocated for an agency that would work on the ground with communities for non-violent implementation of civil rights laws, to ease racial tensions in the South. In President Johnson's blunt language, he wanted an agency that could work with communities "to help the medicine go down."[19] President Johnson wanted a cadre of mediators to do the hard work of building understanding, changing hearts and minds, and promoting peace, outside of court processes.

CRS works with communities behind the scenes to promote non-violence and address systemic issues that lead to violence. Through facilitated dialogue and mediation, they work to improve community-police relations, help schools resolve racial conflicts, and address hate crimes and bias incidents. If you want to learn more, check out the videos on the CRS website,[20] or read *America's Peacemakers* by Bertram Levine and Grande Lum, which describes the agency's history and incredible work since its founding.[21] The CRS is a shining example of how mediators promote social justice in the background to complement other civil rights litigation and enforcement work of the U.S. Department of Justice.

Another example of mediation making a meaningful difference on the ground is Baltimore's Safe Streets, a gun violence reduction program based on "a public health

approach that uses trusted messengers in the community to interrupt" and mediate thousands of disputes each year that may evolve into violence.[22] Safe Streets serves the residents of ten target areas across Baltimore City, totaling 2.6 square miles. "Past evaluations of the program ... have found that Safe Streets sites are associated with decreases in fatal and nonfatal shootings, both in the sites' target areas and the area immediately surrounding the sites."[23] In March 2024, the Penn-North neighborhood, which had been plagued by gun violence and was the epicenter of the Baltimore uprising after the death of Freddie Gray, celebrated more than a year without a homicide.[24]

I'd be remiss if I did not tell you about the broader work of our own Center for Dispute Resolution at the University of Maryland Carey School of Law, which we call C-DRUM for short.[25] In addition to teaching mediation and ADR to law students, C-DRUM teaches the same skills to school-aged peer mediators in Baltimore City Public Schools. Our law student mediators work with middle and high school mediators. We also provide restorative practices and peer mediation training to educators, to promote inclusive and positive learning environments.

Our other initiatives include the Erin Levitas Project for the Prevention of Sexual Assault, which uses a restorative dialogue framework with middle school students to prevent the attitudes and stereotypes that can lead to sexual harm.

We have a partnership with the Maryland Judiciary, the Public Policy Conflict Resolution Program, that trains top leaders in our State in consensus-building processes, to support a better-functioning democracy. We recently received a grant to train first-line public servants in effective communication and conflict de-escalation, as they are often on the front lines of angry constituents and intense conflicts at school boards, local government, boards of elections, etc. We also advance mediation in our own university workplace, through a Workplace Mediation Service.

Through these initiatives, as well as our teaching, scholarship, and professional training, C-DRUM advances conflict resolution processes to transform relationships, systems, and the world.

Conclusion

In the final analysis, the value of mediation clinics, and the difference we make in the world, resides in the skills that they teach. The skills of active listening, powerful questions, empathy, and adaptability can help those that we train make a positive difference in their own spheres.

And in the end, that is the force multiplier about which I care the most.

Those who are trained in mediation have the capacity to navigate complex conflicts, facilitate difficult conversations between stakeholders who have divergent interests, and be empathetic, patient, and adaptable in the face of conflicts, large and small. These are the future lawyers, policymakers, and leaders who can apply these skills in their workplaces, in the legal profession, in government, and in communities to help us build a more just, equitable, and peaceful world – one conflict, one mediation, one dialogue, one conversation at a time.

So, I express heartfelt gratitude and respect for all of you at this conference who are educating mediators in a variety of settings – you are equipping the future leaders and problem solvers of our world with the skills that will help generate empathy and understanding, promote justice, and tackle the world's conflicts.

[1] ***Deborah Thompson Eisenberg is Vice-Dean and Piper & Marbury Professor of Law at the University of Maryland Francis King Carey School of Law, where she directs the Dispute Resolution Program and writes and teaches in the areas of procedure, dispute resolution, and employment law.***

[2] Thea Johnson, *Plea Bargain Task Force Report*, A.B.A. CRIM. JUST. SECTION 6-7, 36 n.2 (2023).

[3] *Desmond Tutu 1931-*, OXFORD ESSENTIAL QUOTATIONS (Susan Ratcliffe ed., 5th ed. 2017), https://www.oxfordreference.com/view/10.1093/acref/9780191843730.001.0001/q-oro-ed5-00016497.

[4] *Elie Wiesel: Acceptance Speech*, NOBEL PRIZE, https://www.nobelprize.org/prizes/peace/1986/wiesel/acceptance-speech/ (last visited May 15, 2024).

[5] Scott Horton, *Dante – The Curse on Those Who Do Nothing in the Face of Evil*, HARPER'S MAG. (Oct. 17, 2010), https://harpers.org/2010/10/dante-the-curse-on-those-who-do-nothing-in-the-face-of-evil/; *John F. Kennedy's Favorite Quotations: Dante's Inferno*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, https://www.jfklibrary.org/learn/about-jfk/life-of-john-f-kennedy/fast-facts-john-f-kennedy/john-f-kennedys-favorite-quotations-dantes-inferno (last visited May 15, 2024).

[6] For a summary of the history of U.S. legal education and clinical legal education, see Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551 (2018).

[7] Frank, *supra* note 6, at 912.

[8] *Id.* at 918.

[9] *Id.*

[10] *See* LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (known as the "MacCrate Report"); WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (known as the "Carnegie Report").

[11] *See* DAVID BOHM, DONALD FACTOR & PETER GARRETT, DIALOGUE—A PROPOSAL (1991), https://www.humiliationstudies.org/documents/BohmDialogue.pdf (describing the purpose of meaningful dialogue is to expose the incoherence in our thought and generate "collective learning"); 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: THE CRITIQUE OF FUNCTIONALIST REASON (Thomas McCarthy trans., 1987).

[12] *See* Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice,* 5 NEV. L.J. 389, 395-96 (2005) (questioning whether "harmony" is the goal of ADR theory and practice and noting that "in a pluralistic society, the features of fluidity and openness to continued challenge may be just as important as quelling of disputes."); Carrie Menkel-Meadow, *The Lawyer's Role (s) in Deliberative Democracy*, 5 NEV. L.J. 347, 348 (2004/2005) (exploring the "articulation of a process-oriented model of democratic deliberation and discourse").

[13] Replevin is a legal action to recover personal property that is wrongfully taken or held by someone else.

[14] *Empathy*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/empathy_n?tab=factsheet#5524311 (last visited May 20, 2024).

[15] James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 502 (1996).

[16] Lorig Charkoudian, Deborah Thompson Eisenberg & Jamie Walter, *What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court*, 35 CONFLICT RESOL. Q. 7, 38 (2017).

[17] *Id.* at --36.

[18] 42 U.S.C. § 2000g.

[19] BERTRAM LEVINE & GRANDE LUM, AMERICA'S PEACEMAKERS 8 (2020) (ebook).

[20] *About CRS*, COMMUNITY RELATIONS SERV.: U.S. DEP'T OF JUST., https://www.justice.gov/crs/about (last visited May 17, 2024).

[21] LEVINE & LUM, *supra* note 18.

[22] *Mayor's Office of Neighborhood Safety & Engagement: Safe Streets*, CITY OF BALT., https://monse.baltimorecity.gov/safe-streets-0 (last visited May 17, 2024); CURE VIOLENCE GLOBAL, https://cvg.org/ (last visited May 17, 2024).

[23] *Mayor's Office of Neighborhood Safety & Engagement: Safe Streets*, CITY OF BALT., https://monse.baltimorecity.gov/safe-streets-0 (last visited May 17, 2024); CRIME & JUSTICE POL'Y LAB, UNIV. OF PENNSYLVANIA, ANALYZING THE IMPACT OF BALTIMORE'S GROUP VIOLENCE REDUCTION STRATEGY IN THE WESTERN DISTRICT (2024), https://crimejusticelab.org/publication/analyzing-the-impact-of-baltimores-group-violence-reduction-strategy-in-the-western-district/; DANIEL W. WEBSTER, CARLA G. TILCHIN, & MITCHELL L. DOUCETTE, ESTIMATING THE EFFECTS OF SAFE STREETS BALTIMORE ON GUN VIOLENCE 2007-2022 (2023), https://publichealth.jhu.edu/sites/default/files/2023-10/estimating-the-effects-of-safe-streets-baltimore-on-gun-violence-july-2023.pdf.

[24] Penelope Blackwell, *Safe Streets Area Goes More Than a Year with No Homicides, Officials Say,* BALT. BANNER (Mar. 6, 2024), https://www.thebaltimorebanner.com/community/criminal-justice/safe-streets-penn-north-JLZH6TGFJFAYHCIIMMTT4J4OD4/.

[25] *Dispute Resolution Program*, UNIV. OF MD. FRANCIS KING CAREY SCH. OF. L., https://www.law.umaryland.edu/academics/programs--centers/dispute-resolution-program/.

Experience of the Strathclyde Mediation Clinic as Recent Graduates

By Oyinkro Olobio and Eunice Olatunji[1]

Oyinkro Olobio

Eunice Olatunji

The curriculum of the MSc in Mediation and Conflict Resolution exposes students to the theory of mediation and serves as the launch pad to very enriching experiences through the Mediation Clinic. Modules like the *Theory and Principles of Mediation*, *Mediation Practice*, *Employment Mediation*, *Negotiation* and *Conflict Resolution and the State* provide students with the necessary knowledge that enables them to mediate with a good foundation. The modules provided useful practice sessions, with intensive weekends, enabling the students to practice their skills. Students were further encouraged to liaise with the Mediation Clinic to arrange observation sessions with practising lead mediators, to enable them to increase their practical experiences of the theoretical knowledge they acquired in the classroom.

We joined the Board of the Mediation Clinic as student members during the 2022/2023 cycle and that provided us with in-depth knowledge of the workings of the Clinic and helped us take advantage of the opportunities provided. This helped us to appreciate the role of the Mediation Clinic in educating mediators through 'learning by practice'.

The Mediation Clinic provides a valuable service to Scottish society, by providing mediation services to over half of the nearly forty Sheriff Courts in Scotland. With funding from the Scottish Government, the Mediation Clinic coordinates its members to manage mediation referrals from the participating Sheriff Courts and has secured a significant number of settlements since its inception, thereby increasing access to justice and reducing the pressure on the judiciary.

The Mediation Clinic provides students with the opportunity to co-mediate with lead mediators, helping them to appreciate the various styles and approaches of different mediators in achieving settlements. We soon realised the importance of style and creativity in managing a mediation process and the need to engage parties based on their particular dispositions. Participating as assistant mediators, we soon understood the workings of the Mediation Clinic as its staff, or the lead mediator, engaging the parties in intake calls and arranging signature of the Agreements to Mediate form before the actual mediation takes place. In some instances, we also observed that the lead mediators hold pre-mediation meetings with the parties before the actual mediation. All these formed part of our experiential learning through the Mediation Clinic.

When the mediation takes place, we then begin to see how parties are guided to focus on interests and not positions, how to separate the parties from the problem and how to guide them to develop solution options to their dispute and decide on a mutually beneficial resolution. For Oyinkro, the initial experiences of mediations brought about no settlements and made him doubt his future as a mediator. He soon realized that, although achieving settlement required good mediation, a resolution was primarily the decision of the parties and not the mediators. He persisted, however, and was a joint winner of the inaugural Ailie Barclay Award for the student mediator who had done the most mediations between 2022 and September 2023.

After a successful mediation session, is the need to assist the parties in drafting a settlement agreement, which is then signed by the lead mediator after the contents are confirmed by the parties. A mediation session that does not settle is either adjourned for a later date or referred back to the Sheriff Court for a hearing. After the mediation, the mediators prepare a reflection of the process, enabling them to consider what was successful and what was not, and to record what they learnt from the mediation. This part of the process provided us with immense learning opportunities.

The Mediation Clinic as an agent of mediator education also provided us with numerous peer review sessions, as well as coffee sessions where mediators engaged with each other to share experiences, challenges and learnings. These served as valuable opportunities for us to learn from. The Mediation Clinic also provides other learning and networking opportunities, such as when Eunice represented the Mediation Clinic at the the Fair Justice System for Scotland (FJSS) Roadmap session on the diversification of the Scottish Justice sector, and the Scottish Legal Awards, where the clinic won the community contribution award.

The annual Mediation Clinic Conference is one every budding and experienced mediator associated with the Clinic looks forward to. It is usually a gathering of mediators from different walks of life and provides immense learning and networking opportunities. We have been fortunate to participate in two conferences, which have increased our knowledge of mediation and conflict resolution, as well as built our confidence as mediators.

Studying Mediation and Conflict Resolution at the University of Strathclyde and the synergy the programme has with the Mediation Clinic offers more than just a theoretical knowledge of mediation. Alongside academic learning, students gain practical skills essential for real-world applications. This holistic approach not only leads to earning a degree but also creates opportunities to fulfill the criteria for registration with Scottish Mediation, the regulatory body for mediators in Scotland.

[1] ***Coming from varying experiences in Nigeria, Eunice Olatunji and Oyinkro Olobio joined the 2022 stream of the MSc in Mediation and Conflict Resolution programme in September 2022.***
Eunice had experience of mediation having trained as a lawyer and worked with the Lagos State Multi Door Court House, the first in West Africa, for about seven years before her quest for more knowledge and global reach led her to enroll for the programme at the University of Strathclyde.
Oyinkro had managed stakeholders at different stages of his career, working lastly with one of the global oil and gas giants in Nigeria before joining the 2022 programme at the University of Strathclyde. His experience basically involved negotiating between his organisation and the external stakeholders. His desire to take the experience one notch higher led him to seek more experiential knowledge through the programme at the University of Strathclyde.

History of the Strathclyde Mediation Clinic

By Charlie Irvine[1] and Pauline McKay[2]

Charlie Irvine

Pauline McKay

The University of Strathclyde Mediation Clinic (the Clinic) was inspired by watching the success of American students in mediation competitions and a desire amongst our own LLM/MSc Mediation and Conflict Resolution students for more practical experience beyond role-plays. Acknowledging the educational value of real-world practice, the Clinic was established with the support of the Law School and wider university. It aims to serve a variety of stakeholders including mediators, disputants, courts, businesses, communities and the wider economy.

Initially launched alongside our well-established Law Clinic, the Clinic initially faced challenges securing cases. However, a pivotal meeting with a supportive Sheriff provided opportunities to mediate small claims in local courts from 2014. Scotland introduced new Simple Procedure Rules in 2017, requiring Sheriffs to encourage the use of alternative dispute resolution throughout a case. This led to an immediate increase in the use of mediation in a number of local courts, giving our students valuable hands-on experience in the court process and mediation practice.

The onset of the pandemic necessitated a speedy transition to online mediation using platforms like Zoom and the telephone service WhyPay?. Despite these challenges this too led to growth, as remote mediation enabled us to serve courts across a much bigger area. One Sheriff Principal approached us in late 2020 explaining that if the Clinic helped resolve more cases without an evidential hearing, it would free up court time to help tackle the backlog in criminal trials. We were happy to work with her on this and still operate in all courts across that Sheriffdom.

Online and telephone mediation sessions now have a firm place in our mediation practice. We still offer in-person mediation but demand has not returned to pre-pandemic levels. When surveyed, the great majority of parties say they preferred remote mediation, finding it more convenient and less stressful than face-to-face. Referrals from the courts continue to increase each year, underscoring the clinic's essential role in the justice system. From January 2022, this led to significant grant funding from the Scottish Government, enabling us to provide a modest payment to lead mediators and appoint a full time Clinic Co-ordinator. An additional grant in 2023 supports our Service Delivery Administrator and enables the Clinic to provide a mediation service for the majority of courts in Scotland.

Practical considerations

Practical considerations for setting up a mediation clinic include:

- **Aligning mission and objectives with the host institution**
  It has been critical to the Clinic's success that the Law School and wider university are supportive. Strathclyde describes itself as the place of useful learning, so the Clinic's emphasis on learning through practice resonates well throughout the institution. The Principal includes the Clinic as an example of the university's value of being people-oriented.
- **Securing financial support**
  Before the Clinic received grant funding from the Scottish Government it was already being supported internally via workload allocations for the Director and administrator, a dedicated Clinic room and regular meetings with the Head of the Law School. This means the Scottish Government sees its involvement as a partnership with the University of Strathclyde, strengthening the case for continuing support.
- **Defining case types**
  From its inception the Clinic has attempted to produce useful statistics so that its work can be compared to other services. We are now part of a group hosted by Scottish Mediation to harmonise the figures across providers, which will help underline the value of our work to the Scottish Government and the courts.
- **Ensuring quality assurance for mediators**
  The Clinic's roots in higher education have led to an emphasis on reflective practice and critical thinking about our work. We provide regular peer support sessions and CPD events, while our mediators are required to write a reflection after every case and to maintain membership of the Scottish Mediation

Register. The Clinic has initiated another short-term working group to develop an agreed set of standards for court mediators in Scotland.

- **Addressing technological needs**
  The development of remote mediation and growth in referrals have increased the need for a simple, user-friendly platform for cases alongside an effective database and online resources for practitioners. Mediators need to be trained and familiar with the technology they'll be using with clients.
- **Managing infrastructure and staff**
  Growth brings the usual challenges for any organisation as the circle of people involved gets larger. This has been exacerbated by the move to remote mediation, reducing opportunities to chat after court or have a coffee with one's co-mediator following a tricky case. The Clinic has initiated coffee mornings (online and in-person) and we'll shortly be holding our first away day.

Support for mediators involves ongoing training, peer support sessions, feedback mechanisms, and access to resources via online portals. The Clinic's achievements include recognition at the Scottish Legal Awards and inclusion in the Scottish Government's Vision for Justice (three year delivery plan).

Looking ahead, the clinic aims to sustain its relationship with the Scottish Government while continuing to expand mediation services across Scotland. Additionally, it seeks to engage with international counterparts through initiatives like the International Mediation Clinic Network and, of course, our quarterly newsletter *Mediation Matters!*.

Overall, the Clinic serves as a vital link between education and real-world mediation practice, contributing to the efficient and peaceful resolution of disputes while fostering professional development among students and mediation practitioners. Through its dedication to practical experience, quality assurance and ongoing support, the Clinic's mission is to promote mediation as a key part of the justice system working in partnership with the courts.

[1] ***Dr 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 has recently been awarded his Doctorate for his PhD research into mediation participants and their reasons for settling.***

[2] ***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, Lothian and Borders Mediation Service and other Community organisations.***

Lawyers in the Mediation Room

By Stuart Kelly[1]

Stuart Kelly

From Shakespeare to contemporary cinema, lawyers are commonly portrayed through a narrative of courtrooms, trials and contest. Aristotle reflected on the lawyer's particular skill in forensic oratory and the importance of rhetoric in court; Riskin, writing in the 1980s, linked lawyers' "philosophical map" to a "litigation paradigm".

The appropriateness or otherwise of lawyers in the mediation process is well covered in academic literature. Menkle-Meadow, in particular, has given considerable attention in her own work to the perceived difficulties that lawyers have in shifting their mind-set from litigation to mediation. She has argued that "adversarialism pervades the underlying conception of the lawyer's role" and that it thus drives their professional and ethical framework.

Such perspective has also been addressed directly in the UK. Mason has argued that English lawyers are "steeped… in the adversarial perspective"; Nicolson and Webb similarly suggest that adversarialism casts a "long shadow" over professional conduct and ethics. Even closer to home, Clark reflects that the "culture" of adversarialism is embedded into Scottish legal education.

At the recent Mediation Clinic Conference, I explored these issues in the context of lawyers' involvement in mediation. My suggestion was, and remains, that the more mediation becomes mainstream within Scottish civil justice, lawyers will play an increasing role in it – either by choice, or by being instructed to do so by the court. This move towards increased lawyer involvement in mediation carries consequences.

For example, if we accept that lawyers find it difficult to shift their mind-set from litigation to mediation, the dynamics in the mediation room will likely change. There will be a need for mediators to consider how to balance the need for parties to have legal representation alongside the need to maintain a dynamic that encourages interaction and discussion. This may require a mediator to be more assertive, either pre-mediation or during the mediation, about their own expectations of the conduct of the mediation.

Lawyers may also, and perhaps consider they must, use mediation like they might do any other legal or quasi-legal forum in asserting legal authority in positioning their client's case. This will require mediators, who are often not legally qualified, to be confident in their own abilities to navigate such arguments, even if not ultimately required to offer opinion on them.

Such consequences from increased lawyers' involvement cause some concern amongst mediators, particularly those who are not legally qualified. Yet such concerns are not solely limited to mediation. In my presentation at the Conference, I gave the example of the Children's Hearings System (CHS) in Scotland. Established in the early 1970s, the CHS was designed to deal with children reported (whether due to their own conduct or neglect) in an informal and non-legalistic setting. CHS panel members are not required to be legally qualified, and most of them are not. The purpose of hearings is to try and give voice to the child and to let them have some agency in decisions being made about them.

The relative informality of the CHS belied the reality that a panel's decisions will have legal consequences for the child and for their family. In the 2000s there were a number of legal cases that therefore established the right of different participants to legal representation, and the ability to access legal aid, including for the child. This has since led to a marked increase in the participation of lawyers in hearings.

The increased participation of lawyers in the CHS has led to accusations of increasing adversarialism and a difficulty in (re)establishing informality. In a recent study by Porter et al (researchers from CELCIS at the University of Strathclyde), panel members reflected on the changed dynamics in panels when lawyers are present. Their research also suggested that other professional participants in hearings – most commonly social workers – found the presence of lawyers to be intimidating.

All of this may sound alarming. For my own part, however, I think that lessons can be learned from the CHS and the increased role of lawyers in that forum.

Firstly, I suggest that it is important for the mediator to remember that it is their job to structure and direct the mediation. Lawyers being in the room does not change that. Mediators may need to develop some robustness in ensuring that the mediation process avoids descending into a form of tribunal.

Secondly, the CHS, in association with the Scottish Legal Aid Board, has developed a Code of Conduct for lawyers taking part in panels. This sets out that "when conducting proceedings before a children's hearing, a solicitor, whilst fulfilling their professional duties to their client, shall respect the ethos of the children's hearing system and acknowledge that decisions should be based on sound reasons, with the best interests of the child being paramount." The suggestion is that this Code is having some impact. If nothing else, it sets expectations. Mediators can learn from this in setting their own expectations of how a mediation is to proceed and may wish to use a similar approach to the Code directed to lawyers.

Lastly, and I accept as a qualified solicitor (albeit non-practising) I may be biased here, I think that much of the criticism of lawyers in the mediation process has a tendency to be overplayed. Mulcahy and Wolski conducted some interesting research in London which concluded that, whilst lawyers are trained in the adversarial culture, and whilst they are familiar with court and legal argument, they are sophisticated enough to respond to the situational sensitivities of the mediation setting. Just because a lawyer is present, and active in the mediation, does not mean that adversarialism follows.

So, for mediators I repeat the conclusions I offered at the Conference. I accept that the increased participation of lawyers may be a source of some concern. As seen in the CHS, and likely in mediations too, there may be some difficulties along the way in ensuring the ethos of the process is maintained. I do not accept, however, that these challenges are insurmountable. I suggest that as mediators we need to be robust in our pre-mediation and mediation strategy, be clear about our expectations from lawyers (particularly on what conduct we will not accept) and have the confidence to set the tone throughout.

[1] ***Stuart Kelly is the Deputy Head of Strathclyde Law School and a Teaching Fellow. He is a triple graduate of the Law School - LLB (Hons) (First Class), LLM (Distinction) and Diploma in Legal Practice. As a qualified solicitor, he previously worked in private practice for two of Scotland's largest firms, and as inhouse counsel for two of the UK's largest companies.***

Online Mediation: Practice and education

By Professor Bryan Clark[1]

Bryan Clark

Introduction

Drawing on a conference paper I gave at the Strathclyde Mediation Clinic conference in March, this short article reports on the findings of a recent research project I conducted into international commercial mediators' views on, and experiences of, online mediation, and also offers some thoughts on online mediation education from my experiences of leading the online LLM in Mediation and International Commercial Dispute Resolution programme at Newcastle University Law School.

Background to online mediation project

Over recent years, online mediation (that is mediating over Zoom or some other similar application) has grown in popularity. While developments can be traced back over at least two decades, online mediation was propelled into the spotlight by Covid related lockdowns rendering in-person interaction impossible in many environments. It has become clear that in more recent years, as lockdowns have lifted, online mediation has remained popular in many settings. The 2023 CEDR biannual audit speaks to this growth estimating that 64% of civil mediations were taking place online. Academic literature in the field also sees significant discussion of the benefits and drawbacks of online mediation. On the one side, the process has been lauded for its efficiency gains and associated 'green' benefits, as well as scope for immediacy and flexibility. On the other hand, critics have bemoaned online mediation's inability to capture the nuances of in-person interaction and pointed to difficulties around such areas as adequate technology, as well as confidentiality and security concerns.

Against this backdrop, my research (conducted with Professor Tania Sourdin) sought to gauge the experiences of high level, international commercial mediators on the issue of online mediation (amongst other matters). We conducted 19 interviews over Zoom between 2021 and 2022 with mediators drawn from a range of jurisdictions including Scotland, England, Ireland, France, Switzerland, Sweden, Australia, New Zealand and Hong Kong. Our mediators were an experienced bunch ranging from 11 to 34 years of experience in the field. Some 14 were male and 17 had a legal background.

Experiences of mediators with online mediation

Although most had no experience of virtual mediation pre-pandemic, at the time of the study all were mediating online. Generally, our mediators were more positive about online mediation than they had expected to be. Indeed, some who held strong initial reservations had become devotees of the online process. While the majority were surprised by how effective online communications over Zoom and similar platforms are, many still cited an overall preference for in-person mediation on the basis of the richer human interaction possible in the in-person setting. Some pointed to online mediation being easier in the context of caucusing, with its more structured question and answer format rather than the more free-flowing dialogue prevalent in joint-sessions. Whether the prevalence of online mediation leads to more caucus-based approaches remains to be seen. Increasing lawyer domination may already be leading us down this path.

Pros and cons of online mediation

Almost all mediators pointed to the significant potential for savings in terms of costs and time, and the attendant 'green' benefits. As one might expect, these savings may be particularly notable in the realm of international commercial mediation characterised by long distance flights and hotel stays aplenty. Some mediators also alluded to their moral responsibility to cut emissions through their signing of the mediators' Green Pledge. Additional benefits cited included the issue of immediacy in terms of being able to organise online mediation swiftly, and also greater ease in procuring high level decision makers online. Some mediators felt this may have improved settlement rates online. Enhanced pre-mediation activity with parties (not just a quick call with the lawyers!) was also noted as a benefit of online mediation and some mediators discussed their development of hybrid approaches with pre- and post- mediation activities conducted online and the main event occurring in person. In terms of downsides, the more limited ability to read the room and influence parties online was noted by most mediators as a concern. Some others also discussed the lack of spontaneity online and the limited ability to replicate the 'water cooler' moments in session breaks where decision-makers might spark up a conversation and rapport leading to a breakthrough. Very few mediators discussed any problems with confidentiality, security or technological problems which may blight online mediation in other environments. Equally, few mentioned any ethical

concerns arising from online mediation despite this issue being raised in the literature.

Future of online mediation

The majority of our mediators conceived of a future in which they would continue to offer online mediation alongside its in-person relative. A minority, however, were only offering online mediation now. Only one, scathing about their experiences in online mediation, said that they were hoping only to engage in-person mediation in the future. There were mixed views as to how the mediation market would develop in the future. Some mediators noted a demand from lawyers and clients to return to in-person mediation while others reported strong demand for retaining online mediation. Cultural variations were seen here. For example, one mediator recounted the desire for English lawyers and clients to move back to in-person settings while online mediation remained more in demand in the USA. It was also noted by one mediator that East Asian cultural practices showed a preference for a return to in-person mediation. In summary, while the future of online mediation does seem secure, it will be interesting to monitor developments and gauge the extent to which in-person mediation reasserts its dominance in the international commercial field, as well as other dispute settings. The competing interests of mediators, lawyers and clients may point to developments in different directions.

Some thoughts on online teaching

The final part of my paper reflects on some of my experiences teaching mediation online, primarily through my role as course leader of the LLM in Mediation and International Commercial Mediation programme taught online at Newcastle University. One of the mediators in our study criticised mediators that had been trained online as being unable to operate effectively in person. Online mediation training has, however, developed significantly since the pandemic. Bodies such as the International Mediation Institute (IMI) and Civil Mediation Council have allowed would-be mediators to be trained primarily online and be accredited. At Newcastle, our LLM is taught completely online. Within the LLM – a one-year full time or two-year part time academic programme – is a set of activities leading to accreditation by the IMI as a mediator. Our teaching methods entail a combination of asynchronous, interactive, video-based materials with live online research seminars and skills practice sessions. We offer classes in conflict resolution, mediation and negotiation theory, mediation law, online dispute resolution and technology and practical mediation skills. The focus of the programme is very much upon blending theoretical learning, practical skills development and inculcating critical legal and policy knowledge in the students. The main assessment (for mediation practice) encompasses two online roleplays externally assessed by an IMI examiner. Students must also conduct an in-person mediation and write a reflective log on the differences between online and in-person mediation.

Overall, I think that online teaching, in common with online practice, works very well for mediation. I have learnt that live online sessions are essential for building community within the student cohort even if non-synchronous learning is very valuable for flexibility. The online mediation training we conduct is replicating much mediation practice occurring now, but students do identify key differences with the in-person species of the process and recognise that the practice in the two modes is quite different. Zoom teaching works very well in small groups for academic seminars as well as skills training. Online discussion boards which students are required to complete regularly, stimulate debate and allow us as a team to monitor student engagement. The online environment allows students more easily to practice their mediation and negotiation skills with other students (from different courses) in the Law School, as well as those from other universities across different jurisdictions. Online student mediation and negotiation competitions, which have proliferated in recent years, are another excellent learning tool. There is no doubt that our students have forged a real sense of community with each other and the course team (despite most of us having never met in person!) even if there remain issues with identifying with the wider university as a remote student.

In summary, online mediation both in terms of practice and education is here to stay. Both present challenges for existing paradigms of practice and are leading to innovations. And there is much to learn from comparing online and in-person activities across practice and teaching. We watch this space with interest!

[1] ***Bryan Clark is a Professor of Law and Civil Justice at Newcastle University. Bryan joined the Law School in April 2019 as a Professor having previously spent 15 years at the University of Strathclyde in Glasgow where he was Head of School from 2013-2016. Prior to that he was a lecturer at Heriot Watt University in Edinburgh, a researcher at the Robert Gordon University in Aberdeen and has also worked in Further Education.***

How to Establish and Maintain a Mediation Clinic in a Law School

By Professors Toby Guerin and Robyn Weinstein[1]

Toby Guerin

Robyn Weinstein

Through a survey launched during the fall of 2023, we gathered data from thirty-six U.S.-based law school mediation clinics, thirty-four of which are still in operation. The survey was inspired by Professor James Stark's 1996 article and directory of law school mediation clinics. Three decades later, we sought to revisit Professor Stark's work and collect data on mediation clinic case types, clinical supervision and training, and court and community partnerships. Survey respondents also provided information about student enrollment, number of credits awarded, and the duration of the clinic. A second survey was conducted in January 2024 to obtain more detailed information about each mediation clinic's curriculum, assessment methods, and assignment models.

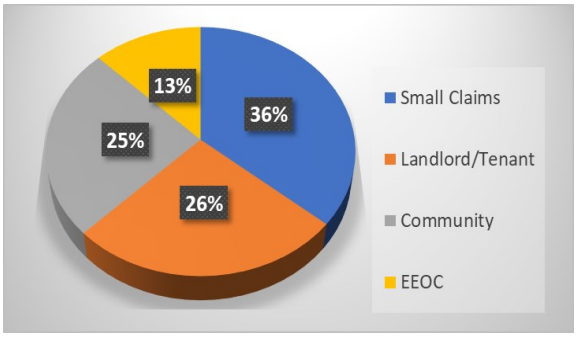
During the presentation, we described our own clinical programs which share some similarities, but are also distinct. Maryland Carey Law offers students a one-semester (four month) mediation clinic, where eight students mediate disputes under the supervision of one full-time faculty member and one part-time staff attorney. Students receive mediation training through a credit-based mediation seminar offered in the semester prior to the clinic. In contrast, Cardozo's mediation clinic engages sixteen students in a two semester (eight month) program through which they receive state court approved mediation training and participate in an apprenticeship program with a local community dispute resolution centre. Cardozo's clinic has four part-time adjunct professors serving as mediation mentors, and one full-time clinical director. In both programs, students participate in a weekly seminar emphasizing mediation theory and skills, and complete various assignments designed to enhance their knowledge, self-reflection and skills in mediation practice. Students in each clinic mediate online and in-person through a variety of court-annexed mediation programs.

When establishing a mediation clinic, we identified several 'decision points' including, choices regarding case types, student supervision and training, and the role of the students in the mediation process. We also suggest that clinic directors should assess the demand and need for a mediation clinic within their communities and align the clinic's purpose to support the institution's broader mission. Institutional support can impact the funding and staffing necessary to establish an effective mediation program.

Case type

Case type selection is a design choice that impacts many other considerations such as the training provided to students, pre-requisites or substantive legal knowledge, timing of case referral and processing, and frequency of mediation opportunities.

Through the survey, we found, that in the United States, the most common referral source for mediation clinics is small claims matters (36%). These cases usually involve monetary disputes that are capped at $5,000 - $10,000 USD depending upon the jurisdiction. Twenty-six percent of clinics handle disputes involving landlord/tenant claims, twenty-five percent mediate community disputes, and thirteen percent receive employment discrimination matters referred from a U.S. federal agency, called the Equal Employment Opportunity Commission. A smaller number of U.S. clinical programs offer mediation services for other matters such as divorce, special education, inmate civil rights, international abduction cases, elder mediation, and in matters involving protective orders or harassment. Many clinics report mediating a variety of case types, while a smaller number of clinics specialize in one subject matter or referral source.



Clinicians must ensure a reliable source of mediation opportunities prior to enrolling students. Many U.S. mediation clinics work with partner organizations such as community dispute resolution centres, courts, or government agencies. The volume and timing of referrals contributes to decisions about the number of students, timing of the clinic, and number of credits. Community and

court partners often have training, assessment, and supervision requirements which may influence mediation clinic design.

Supervision and training

Our survey showed that most mediation clinics offer students between 20-30 hours of dedicated mediation training, with more than half providing the training as an intensive program immediately before the clinical program begins. Another cohort of programs integrate mediation training as part of a semester-long seminar course, and yet another, smaller group provide training through a separate credit-based course.

Training Method	# of Respondents
Intensive right before clinic	23
As part of clinic	17
Separate credit-based course	13
Other	3
Separate non-credit course	0

The case type and referral partners also inform choices around supervision of students. In some instances, a supervisor with substantive legal knowledge may be necessary, in other formats the students partner with a supervisor from the community-based mediation provider. Depending on the number of students participating in a clinic, supervision can be time-intensive, and many clinics reported the need for additional supervisors beyond the clinical director.

At Cardozo Law students participate in a formal apprenticeship program offered by the New York Peace Institute (NYPI), where students observe three cases, co-mediate five cases, and then complete a final mock mediation under the supervision of a NYPI staff member who assesses their skills using a formal rubric. At Maryland Carey Law, the clinic and community partners have an arrangement whereby faculty and supervisors complete the required training and apprenticeship process and are then approved to supervise the clinic students in those settings.

Role of students

In response to the survey, most clinics indicate that their students serve as co-mediators, solo-mediators, or observers. We use a tiered process in our clinics where students first observe trained mediators, then co-mediate with faculty or supervisors, and eventually co-mediate with their peers. In addition to serving in the role of mediator, students in mediation clinics engage in other tasks associated with the practice of law and mediation such as case management, case intake, mediation scheduling, and filing and submitting case documents.

Curriculum and assessment

In our January 2024 survey, we also collected learning objectives from fourteen clinical directors. All the clinical programs included an overview of both mediation skill and theory, ethics, and self-reflection and critique. Eleven of the respondents include diversity, equity and inclusion in their curriculum, and nine of the respondents include conflict theory and conflict management, and elements of professional identity. Other reported curriculum topics are access to justice, alternatives to mediation, and online dispute resolution.

We also discussed how clinical programs assess their participants. Five clinics indicated that they evaluate students on a pass-fail system while nine indicated use of a letter grade rubric. Survey respondents also reported a variety of assignments required by clinical programs , including student presentations, reflective journals, and recorded mediations. A smaller number of clinics require a final exam, a written self-assessment, written research paper or participation in a mediation competition.

The presentation emphasized that establishing and maintaining a mediation clinic requires balancing many design and pedagogical factors. Clinic directors should align the course with the institution's mission, while also meeting the needs of the mediation partners. Other factors, including case type, supervision and training, learning objectives and the role of the students, shape the development and implementation of mediation clinics. We plan to further examine the survey data, record our findings in a law review article and create an updated directory of clinical mediation programs.

[1] ***Professors Toby Treem Guerin (University of Maryland Francis King Carey School of Law) and Robyn Weinstein (Benjamin N. Cardozo School of Law) direct mediation clinics at their respective U.S. law schools and are members of the American Association of Law Schools Clinical Law ADR Section.***

Diversity in Mediation

By Silence Chihuri[1]

Silence Chihuri

My presentation at the last Mediation Clinic Conference was titled *Diversity in Mediation*, a subject that aligns very much with our work at Fair Justice System for Scotland (FJSS) Group, which is promoting diversity and inclusion in the Scottish justice system and society. In this article, I will attempt to summarise the key points from my presentation. I hope that anyone who missed it, and all others who come across this, will gain new perspectives.

Mediation is a highly successful (92% according to CEDR statistics) and in-demand practice for conflict resolution. This is because of some benefits mediation offers such as privacy and flexibility during settlement, cost-effectiveness, reduced stress, and overall, better outcomes for all parties involved. However, for mediation to have these outcomes for **everyone**, the profession needs to be diverse enough to accommodate the needs of the diversity of people represented in society.

British society is changing before our eyes and only through representation will fairness, especially in the justice system, be enhanced. Regardless of age, gender, race or other social groups people belong to, they deserve to have access to mediators who they find trustworthy, empathetic and reliable enough to bring their conflict situations to just conclusions. Here are some UK mediation statistics derived from CEDR.

In terms of age:

- *Mediators are significantly older than professionals in other fields.*
- *77.5% of commercial mediators are over the age of 50.*
- *42.4% are over the age of 60.*
- *56% of those mediators in training are under the age of 50.*
- *Only 22.5% of practising mediators are under 50.*

When it comes to gender:

- *Just 33.6% of commercial mediators are women, and the average commercial mediation panel has 28.7% women.*

And when it comes to racial and cultural diversity:

- *96% of commercial mediators are white, compared with 86% of the general population. The proportions of Asian and Black commercial mediators are significantly below the general UK population.*

Importance of diversity in mediation

1. **Dispels certain myths**
   Diversity in mediation challenges myths and misconceptions about the profession. For instance, some communities may view mediation as biased, not suitable for certain cultures or serious conflicts. But diverse mediators who actively and successfully engage with different communities can demonstrate that mediation is impartial, effective and adaptable to a wide range of settings, cultures and disputes.

2. **Mainstreams the use of mediation**
   When people see mediators from their own backgrounds, they are more likely to trust and consider mediation as a viable option. This increased acceptance and use of mediation can lead to its full integration into mainstream conflict resolution practices. This is very important because as mediation becomes more common, the burden on judicial systems reduces.

3. **Gives options to those who cannot afford legal fees**
   Mediation is cheaper than litigation, therefore it is a more accessible option for people facing financial constraints. By promoting diversity within the mediation profession, people of all social groups can find mediators who understand their specific circumstances and financial constraints. This ensures that everyone has the opportunity to resolve disputes fairly.

4. **Breaks social barriers**
   Mediators from diverse backgrounds can help to break down social barriers as they bridge gaps, facilitate dialogue and foster understanding among various groups. This connection across social divides can lead to more meaningful and lasting resolutions as everyone feels genuinely understood and respected. Furthermore, it enhances a harmonious society where differences are addressed constructively rather than divisively.

5. **Enhances society's perception of mediation as an alternative to litigation**
   When mediation reflects the diversity of society, it improves the overall perception of the practice as an

inclusive and effective alternative to litigation. Diverse mediators bring credibility and relatability to the process, showing that mediation can handle a wide range of issues and is suitable for all individuals, regardless of their background.

How to promote diversity in mediation

1. **Widening access**
   Mediation is still very exclusive. There is need to mainstream mediation by promoting mediator role models from less represented groups – younger people, females and people from the Black, Asian and minority ethnic community, to attract new mediators to the profession.
2. **Intercultural business communication**
   Training providers should review their promotional materials to ensure their language, visuals and other marketing elements encourage a diversity of entrants. Staff who speak to prospective applicants should be trained to help all applicants to understand how they can overcome barriers to becoming a mediator.
3. **Empowerment through education**
   Training providers should consider giving financial support to aspiring mediators from underrepresented backgrounds to encourage them to undertake the course.

I ended my presentation with a quote from Sir Geoff Palmer OBE, Professor Emeritus and Chairman of the FJSS Board: "Diverse societies require diverse leadership."

For more information about FJSS Group and our work, check out our website www.fjssgroup.org, call 0131 285 1013 or email info@fjssgroup.

[1] ***Silence Chihuri is the Founder and CEO of Fair Justice System for Scotland (FJSS) Group.***

Everyday Mediation

By Samson McKinley[1]

Samson McKinley

In the spring of 2020, I was deployed to Kabul, Afghanistan with the US Army. I was an intelligence analyst; I monitored drone feeds, updated maps, and made targeting recommendations. But I was also a mediator, of sorts. On the 29th February 2020, the US and Taliban signed *The Agreement for Bringing Peace to Afghanistan*[2] , also called the Doha Agreement. The US agreed to withdraw its forces from the country in return for the Taliban pledging to no longer harbour international terrorist organizations like Al-Qaeda. The US also agreed to reduce its support to the Islamic Republic of Afghanistan, the government it helped establish in 2004. For years the Afghan Army had depended on US air support, and without it their forces were vulnerable to Taliban attacks.

I worked side by side with Afghan soldiers. They were furious after the Doha Agreement, and most of our daily meetings turned into heated verbal exchanges about the wavering commitment of the US to their government. Every day between the signing of the Doha Agreement, and the last departure of US troops on the 30th August 2021, we as American soldiers mediated between our local partners and the distant decision-makers in Washington. We were far from the impartial ideal espoused by formal mediation guidelines. In fact, we were partial to both sides. We were committed to carrying out our orders, but we also felt deeply indebted to the Afghans with whom we had lived, worked, and fought. How were we able to 'mediate' given these divided loyalties?

I finished my Army contract last year and started a course on peacebuilding and mediation at the University of St Andrews. During my studies I was introduced to Séverine Autesserre's 2014 book *Peaceland.*[3] To summarize, Autesserre travelled the world for several years visiting major peacebuilding hubs, including UN missions, NGO field offices, and diplomatic embassies. During her visits she noticed a disturbing trend – peacebuilding efforts frequently failed, not because of their strategies or terms of settlement but rather because of the everyday actions of international peacebuilders. UN, NGO, and diplomatic personnel were repeatedly condescending, disrespectful, and exclusionary towards the locals they worked with. As a result, locals were less likely to share information, so the international organizations' situational awareness and ability to effect informed change collapsed.

Upon reading this, I immediately connected Autesserre's "everyday peacebuilder" with my own experience. Admittedly, my personal impact on broader Afghan peacebuilding was slim. But I saw on a daily basis how the same personal habits of Americans as 'everyday mediators' had ripple effects on political relations in the country. Just as Autesserre observed, the best 'mediators' in our headquarters were *partial.* We truly cared about the war's outcome. We listened to, and more importantly implemented, the Afghans' suggestions. And in turn, we were listened to when we tried to de-escalate tensions or broker agreements. However, the partiality advocated by Autesserre for "everyday peacebuilders" is a far cry from the detached impartiality taught in mediation training.

Most research on mediation concerns the 'formal' practice. In peacebuilding this takes the form of "track-one" diplomacy between government leaders, such as the meetings between US and Taliban officials in Doha. In civil mediation it means court-ordered sessions and official guidelines like the Clinic's Practice Standards. There is nothing wrong with this focus – these things are important. But most of us are also 'everyday mediators', navigating tense relationships with friends, co-workers, or even parents. The central difference between formal and informal mediation seems to be impartiality. Successful formal mediators are impartial, while successful 'everyday mediators' are partial. Are these two spheres really that separate; are there not things that formal mediation institutions can learn from the 'everyday'?

While working as a conflict mediator during the Nicaraguan Civil War in the 1980s, John Paul Lederach[4] observed a difference between "outsider-neutral" and "insider-partial" mediation. Peace practitioners who came from the communities they mediated between, or who had become deeply invested in them as proposed by Autesserre, achieved the best results. Why is the "insider-partial" so effective? In *Mediating Conflict in Latin*

America, Lederach and Paul Wehr argue that "insider-partial" mediation helps build trust, a phenomenon called *confianza* in Latin American countries. In contrast to impartial outsiders, the insider's "accessibility to the conflictants is rooted not in distance from the conflict or objectivity…but rather in **connectedness** and trusted relationships with the conflict parties."[5] Crucially, Wehr and Lederach's insight is not limited to the 'everyday' – they apply the lessons I learned in Afghanistan and that Autesserre observed on a micro-scale to *formal* mediation practice.

I am not proposing the abandonment of impartiality for the Strathclyde Mediation Clinic. The messy, informal environments analyzed in this article are inherently different to professional, legal mediation. Trust isn't a rare commodity for us at the Clinic; it doesn't depend on partiality. That being said, I think we can learn from the 'everyday' example. As an American living in St Andrews, I am perhaps closer on paper to the "outsider-neutral" end of things when it comes to the Glasgow-area disputes I have co-mediated for. My everyday habits and narratives about the place I live, and commitment to it, surely affect the mindset I carry into mediation, the same way they did in Afghanistan. We must remain impartial, of course, but perhaps in the post-Covid era it's worth thinking about how we can be a little more connected. Who knows, maybe some *confianza* will come out of it.

[1] ***Samson McKinley is pursuing an MLitt in Peacebuilding and Mediation from the University of St Andrews. He received accredited mediation training as part of the MLitt program and currently volunteers as a co-mediator with the Strathclyde Clinic.***

[2] *Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America, 2020.*

[3] *Autesserre, Severin. Peaceland: Conflict Resolution and the Everyday Politics of International Intervention. Cambridge: Cambridge University Press, 2014.*

[4] *Wehr, Paul and Lederach, John Paul. "Mediating Conflict in Latin America." Journal of Peace Research 28, no. 1 (1991): 85-98.*

[5] *Ibid, 87.*

An Ethical Dilemma! (Part 2)

By Patrick Scott[1]

Patrick Scott

After writing *An Ethical Dilemma* in the January issue of *Mediation Matters!*, two things happened. I received an email from a mediation group in South Africa, suggesting that it would be useful to have mediators' guidelines for grey areas, such as where the dispute being mediated involves some form of unlawful activity by one or both of the parties. The second was that I presented a workshop on this issue and asked for feedback from the attendees.

The first thing that struck me from the feedback was that there were many different views on the approach to be followed. Some mediators felt that, if the activity giving rise to the dispute is unlawful, the mediator should not proceed with the mediation. Another attendee questioned whether the consequences of the withdrawal should be considered. Others felt that the parties should not be deprived of the opportunity to mediate, depending on the particular circumstances. An interesting comment was that we should be careful not to apply our own morality to the situation. And the legality of the settlement agreement would be a factor to consider. Perhaps these different views emphasise the need to try to formulate some guidelines in this regard.

My personal view is that I would be loath to deprive parties of the option of mediation where they both want to mediate, unless a code of ethics precluded me from proceeding. I would not want to rely on my own ethical standards to decide whether or not I assist the parties. Let us assume that the mediator has an aversion to illegal drug dealing, having lost a family member to addiction, and the dispute which is referred to mediation involves a drug deal. Should the mediator refuse to assist the parties based on personal views and standards? I think not.

If that premise is correct, we need to develop a code of ethics dealing with when to mediate in circumstances of illegal activity, and when not. I am of the view that a mediator can proceed with a mediation that is tainted by illegal activity in the following circumstances:

1. The unlawful activity is known to the authorities (or the mediator makes it clear that he or she will report it to the authorities). In these circumstances, it would obviously be problematic for the mediator if the parties tried to use the non-disclosure of the unlawful activity to persuade the other party to settle.
2. The one party would be unjustifiably enriched at the expense of the other if the matter was not resolved.
3. The settlement agreement involves no unlawful activity.
4. The parties are made aware that, if the settlement agreement is not complied with, it may not be enforced by the court.
5. The settlement agreement is fair to both parties.[2]

...I would be loath to deprive parties of the option of mediation where they both want to mediate, unless a code of ethics precluded me from proceeding. I would not want to rely on my own ethical standards to decide whether or not I assist the parties.

What should a mediator do if it becomes apparent during the mediation that the above-mentioned standards have not, or will not, be met? The Mediation Clinic's Agreement to Mediate contains a provision that any party, including the mediator, may withdraw from the mediation at any time. If it transpires at some point in the mediation that there is a whiff of illegality, the mediator should first try to see whether that obstacle can be overcome. If, for example, it transpires that the unlawful activity is not known to the authorities, the mediator should advise the parties that he/she is duty bound to report the matter. This is one of the exceptions to the confidentiality clause. If that is accepted, and the parties are prepared to continue, there would be no reason why the mediation should not proceed.

If the parties were to negotiate a settlement that involved unlawful or illegal activity, the mediator would be duty bound to advise them that that is not something that he/she could be party to. For example, if the parties were to

agree that the claimant will provide further funding for an illegal drug deal to enable the respondent to earn sufficient money to repay both that loan and the previous loan, the mediation would have to be brought to an end.

Even with specific guidelines, there may be many areas that are grey, and the mediator may be in doubt as to what to do. I suggest that the first thing to do is to try and get some guidance from your governing or professional body, even if it means adjourning the mediation. If that is not possible, and you are in serious doubt as to the ethics of the situation, err on the side of caution and stop the mediation.

Mediators can face some challenging situations from time to time, and we must always ensure that we are on top of our game!

[1] ***Patrick Scott completed the LLM in Mediation and Conflict Resolution course at Strathclyde University 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 SLCC Panel of Mediators and volunteers as a lead mediator with Strathclyde Mediation Clinic. He also serves on the Board of Trustees of Scottish Mediation.***

[2] These are my own personal views and not necessarily the views of any other person or body, including the University of Strathclyde Mediation Clinic.

Research conversations….

Frank Eijkman[1] discusses his LLM dissertation with Adrienne Watson[2]

Frank Eijkman

Adrienne Watson

What can we learn about mediators and mediation from the content data analysis of mediator reflection forms?

Key findings:

- *Self-reflection is a valuable tool for mediators and its value is increased when a mediator reflects with others.*
- *The self-reflection forms provide a rich data source which could be used for further research and learning to the benefit of all mediators*
- *From the analysis of 27 Strathclyde Mediation Clinic self-reflection forms, we can see that mediators frequently identify pre–mediation as an important part of the success of the mediation, on the whole mediators are happy using online mediation and, finally, private sessions were identified as an effective tool for mediators.*

This series of interviews looks at some of the research our students and established academics have undertaken. We will be discussing the lessons that have been learnt, the impacts of the research and recommendations for those who are yet to undertake their dissertations.

This month, Frank Eijkman is interviewed by Adrienne Watson. Frank completed his LLM dissertation, *What can we learn about mediators and mediation from the content data analysis of mediator reflection forms?*, in 2021.

What brought you to the Mediation and Conflict Resolution Master's course at Strathclyde?

After completing my Law degree at the University of Exeter, I knew I didn't want to become a solicitor or a barrister as I didn't like the binary 'win or lose' mindset. The degree had included an amazing ADR module, led by Professor Tia Matt. I was blown away by ADR, so I knew I wanted to work in this field.

When the Covid pandemic hit, I found myself with time to think about what I wanted to do, so I started looking up various Master's programmes. When I stumbled across the Strathclyde course, I was sold!

What drew you to the Mediation Clinic?

The Clinic was one of the main reasons I applied for the course. I am a big kinesthetic learner, so I value learning by doing. For something like mediation and conflict resolution, where we learn the skills through role plays, we need to start using those skills in the field as soon as possible.

The Clinic experience provides a 'safety rail' when we are beginning, especially for those who aren't very confident, as we know that the lead mediators can easily take over if needed.

What roles have you undertaken with the Clinic?

I got involved in the Clinic as soon as possible after completing the *Mediation in Practice* module. I did a couple of cases as an assistant mediator and was on the Board for a year. Then, unfortunately, I couldn't balance it with my work commitments, so I had to step back from the Clinic. However, I try to keep an eye on what's happening, and I read *Mediation Matters!* when it comes out.

How did you decide on your dissertation research area?

The work with the Clinic fed into one of the main ideas behind my dissertation. After one of my first mediations, we filled out the self-reflection form and I'd recently read an article about how the lack of research data made it harder to demonstrate the effectiveness of mediation. As I was filling out the form, I suddenly thought that everyone was completing the forms and Charlie Irvine, the Director of the Clinic, was looking at them, but nothing happened with them after that. There is a lot of data in the forms, and I was curious to see whether the data revealed anything and what we could do with that data.

How would you summarise your dissertation's aims?

I had three broad aims. The first relates to the Clinic's self-reflection form, I wanted to look at the use of the forms as a tool for further learning for mediators. The second aim was to look at whether the self-reflection forms could be a mechanism for gathering information on what mediators believe is working, and comparing that to the literature. The third aim was to look at around 30 reflection forms and perform a qualitative data analysis of what the mediators say is, and is not, working.

What were your main findings?

I did a lot of literature searching in areas such as adult learning theory and, more specifically, the literature around reflection forms in mediation. Michael Lang's work is at the forefront of this area and the main takeaway was that it's very good to be reflective, but if you just do it alone you can get caught in retrospection and your own cognitive biases. Reflecting with others helps us to learn much more from our mediation experiences.

Donald Schön's book[3], *The Reflective Practitioner*, was also interesting. He discusses the ideas of reflecting 'in action' which occurs in the moment when you are aware of something new and use your previous experiences to 'improvise' in the moment. Reflecting 'on action' takes place later, where you look back as what worked, what didn't work and what you would do differently next time. This can create a cycle where both types of reflection build on each other to improve our practice.

The key findings from the reflection forms concerned:

- *The move to online mediation during the early stages of the Covid pandemic*
  This was mostly seen as a positive development apart from some technical difficulties and the need to teach the parties to use Zoom. Some mediators were concerned that it was harder to read the parties' body language, than in face-to-face mediations.
- *The use and timing of private caucuses*
  This is not widely covered in the literature. The mediators generally found that caucuses were beneficial following a joint session and this was much easier to do online.
- *The importance of pre-mediation meetings*
  Many mediators felt these were essential to setting the tone of the mediation, identifying problems, building rapport and helping the mediator prepare for the mediation.

Did you develop any new skills during the dissertation?

Analysing qualitative data was a new skill for me. I researched data analysis methods and decided that, because the data set was quite small, I should analyse it manually rather than using specialist software. Initially, I used deductive thematic analysis (I drew up a list of themes in advance which I tagged in the forms), then I undertook inductive thematic analysis where I added tags for themes the mediators raised which I hadn't anticipated.

What aspects of your dissertation were particularly challenging?

Getting the dissertation completed in time was the biggest challenge. I wasn't able to start working on the reflection forms until we had the permission of both mediators in every case, I hadn't scheduled this extra time into my planning.

Analysing the reflection forms was challenging as people reflect in very different ways. Some mediators simply gave yes or no answers, while others wrote pages of self-reflection, which made coding the data more complex. The variety of terms which mediators use for the same thing added to the complexity, for example, 'private session', 'private meeting', 'caucus' and 'breakout room' all refer to the same aspect. As I was analysing the data manually, I had to take extra care not to make mistakes, which was very time-consuming.

Once I started working at the Centre for Effective Dispute Resolution (CEDR), balancing work with completing the dissertation became more difficult.

Which aspects of your dissertation are you most proud of?

After finishing the dissertation, I felt like I wouldn't ever want to read it again. It's been interesting to read it again two years later and I'm quite proud of it. I thought the idea of looking at the reflection forms as a mechanism for data analysis was quite original. It was difficult, but I'm really glad I did it.

Have you practised as a mediator since completing the Master's course?

I started a six-month internship with CEDR while I was finishing the LLM, which became a permanent position.

My job is predominantly with the CEDR Foundation, which is the outreach and thought-leadership branch of the organisation. We work with young people (aged 16-25) to

develop their conflict resolution skills through a programme called *Skills for Life* which teaches skills such as active listening, handling emotions, conflict styles and influencing with integrity. I also work on a range of events, including the National Student Negotiation Competition and London International Disputes Week. The work is always varied, which is what makes it exciting.

I don't get to mediate as much as I would like, but I sometimes act as an assistant mediator to some bigger commercial cases, or as a conciliator on our conciliation schemes. Our funeral homes scheme can be particularly emotionally challenging as the cases usually involve a family who is dealing with something going seriously wrong with the funeral of a relative—these are disputes that money can't really resolve.

Was your dissertation helpful in shaping your mediation practice?

Yes, definitely, in terms of learning from my reflections. After a mediation, I always do some self-reflection and then I try to speak to someone else about it. We have many highly experienced mediators at CEDR, so I often ask them what they would have done in a particular situation, such as a difficult ethical issue, or discuss ways I could have handled something differently.

The research really instilled the value of self-reflection within a group, this can help you to grow in your practice. The Clinic's Peer Support sessions are a very good way of helping mediators to discuss and learn from issues they've encountered.

With the benefit of hindsight, would you change anything about your dissertation?

I'm sure everyone says the same, but I would begin working on the dissertation much earlier than I did, as it took so much longer than I expected. There is a lot to do and to think about before being able to start writing the dissertation, so I wish I had planned a bit better.

What do you wish you had known before you embarked on your dissertation?

I wish I had realised how much work would be involved in the dissertation. My supervisor, Charlie Irvine, was very helpful, and he advised me a few times that I should narrow it down. However, I was fixed on needing to write 15,000 words and I didn't think I would have enough to write about if I reduced the scope.

Is there anything you would like to say to students who will be working on their dissertations this summer?

Start your preparations early and don't allow your focus to be spread too widely. If you try to cover too wide an area, you will have a lot more work to do and will find it difficult to compress the dissertation into 15,000 words.

You also need to be prepared for your preconceived ideas to be challenged once you start the research, and be open to the fact that it might not turn out the way you think it will.

I would also point anyone who is interested in self-reflective practice to Michael Lang's work, I think there is no-one better in this area at the moment. I would particularly recommend his book, *The Guide to Reflective Practice in Conflict Resolution,*[4] and there are many helpful resources on his website (www.thereflectivepractitioner.com). The research shows that self-reflective practice is a fantastic tool for learning, so don't miss out on that opportunity.

[1] ***Frank Eijkman completed the LLM in Mediation and Conflict Resolution at the University of Strathclyde in 2021 and became a CEDR Accredited Mediator in November 2022. He is currently the Foundation Co-ordinator and a Conciliator at CEDR.***

[2] ***Adrienne Watson trained as an Accredited Mediator in 2016. She completed the MSc in Mediation and Conflict Resolution at the University of Strathclyde in 2023. Adrienne is a lead mediator with Strathclyde Mediation Clinic and is Assistant Editor of the* Mediation Matters! *newsletter.***

[3] Schön, D.A., 1987. *Educating the reflective practitioner*. Jossey-Bass, San Francisco.

[4] Lang, M.D., 2019. *The guide to reflective practice in conflict resolution*. Rowman & Littlefield.

From the Chair .....

Alastair Sharp

On behalf of your Board, may we wish you slightly better weather for the remainder of the summer than we have so far enjoyed, and a new and exciting political landscape in which to enjoy it. We hope that the Scottish Ministers who have so far been quietly enthusiastic about the continuing development of Mediation, albeit with their customary thoroughness, are not deterred from continuing down this road despite the vagaries of the electoral system. We can tell you that the Board themselves are invigorated by a recent working lunch/social event (at our own expense we hasten to add) at The House for an Art Lover which is a delightful and original location for those who may not have visited.

We are maintaining our relationship with the various Sheriffdoms around the country. Charlie Irvine has given an online seminar to around 15 Sheriffs on what mediation is about and a narrative on the Clinic. This was well received, and it is hoped that such events will become a regular part of the training of Sheriffs. A number of follow-up communications ensued with individual Sheriffs, and it is anticipated that this will continue. Furthermore, Pauline and Rosie have been visiting courts and, together with Leon Watson, have had a particularly productive meeting with the Sheriff Clerk at Kirkaldy. It is of note that Paisley Court recommenced in-person attendance by mediators in late April with considerable success.

In all, the message is that all is well, and we are moving forward with some interesting new and existing initiatives locally and further afield. We are already making preliminary plans for next year's Conference with the results of a questionnaire as to its format indicating a modest preference for it being online i.e. 50% of a 50-response survey as against 30% wishing it in person. We are also working on a plan for a mediation information video for Scottish courts and consumers. This was inspired by four short videos commissioned by the Maryland Judiciary. Early days yet on this but potential thespians watch this spot.

We hope you enjoy this issue of *Mediation Matters!* with our continuing heartfelt thanks to our indefatigable editor, Patrick, and assistant editor, Adrienne, and all its contributors.

Alastair Sharp[1]
Co-Chair

[1] ***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

Pauline McKay

I hope that everyone is managing some sort of a break over the next few months. We tend to forget that time away is hugely beneficial for everyone.

Just a short round up on what has been happening. Charlie and I enjoyed a trip to Dundee in June to visit the innovative new Justice Hub located next to the waterfront. It is designed to enhance the delivery of justice across Tayside, Central and Fife by providing trauma-informed evidence by commission suite and live link evidence facilities, supporting the most vulnerable witnesses in providing their best evidence to the Court. The Justice Hub will serve both the High Court and Sheriff Courts across Tayside, Central and Fife, while supporting the delivery of civil justice. There appeared to be a lack of mediation facilities, but it was great to meet colleagues supporting Simple Procedure who will be based there one day per week.

We were out and about again in Edinburgh visiting the Scottish Government at St Andrew's House. This was a fruitful meeting in which we met with the new Access to Justice team leader and colleagues. The Scottish Government now has our first quarter statistics. It has been a busy quarter with 99 referrals between April and June.

I recently visited Paisley Sheriff Court as one of the in-court mediators for the Simple Procedure court. We were fortunate to get a case from the Sheriff who was appreciative of our efforts despite the case not being able to settle. The parties did well, under time pressure and mediating in a witness room only adds to our need for flexibility when mediating. A mediator presence will continue at court as resources allow and we may look to expand this to other courts in due course.

This month, I was involved in shadowing Charlie training PhD students on Conflict Resolution Skills. Theory mixed with some practical exercises appealed to the students who gave lots of positive feedback. Hopefully, we can build on this and roll it out across the University.

We also had a much-needed meet-up at the House for An Art Lover at the end of June. Coffee and a bite to eat was the order of the day and it was great to see people in person – some meeting others for the first time. We forgot to take photos but will remember for next time.

In the coming months, we will be welcoming new students to the LLM/MSc Mediation and Conflict Resolution programme. There are options to study Full-Time, Part-Time and to undertake the PG Certificate or Diploma, if preferred. There is still time to apply before mid-September. It's a fantastic course with lots of theory and practice and students can take advantage of gaining hands on experience through the Mediation Clinic.

Wishing everyone a great summer wherever you are!

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, Lothian and Borders Mediation Service and other community organisations.***

Rosie's Roundup

by Rosie McBrine[1]

Rosie McBrine

I am now re-reading the spring edition of *Mediation Matters!* and everyone is looking forward to the warm weather, it seems. At the start of July, we are still where we were three months ago and waiting for the sun to make an appearance! We have been very busy here at the Clinic and cases have been streaming in. This is great news for us as we continue to spread the word of mediation.

We are pleased that the Clinic is (again) a finalist in the Scottish Legal Awards. The celebration dinner takes place on Thursday, 19th September at the Doubletree by Hilton, Glasgow Central. We are grateful for those who contributed to our submission, and to all those who continue to support the Clinic throughout the year. We are very much looking forward to this event, and I'm sure that you can expect to find pictures of the evening in the next edition of *Mediation Matters!*.

In April, we held our Mock Mediation. A big thanks to Elise and Alan for mediating this, and to (plumber) Leon and (hairdresser) Alison for their great acting skills. It was great to see a number of Sheriffs, court staff, mediators, lawyers, and students attend this event. We hope to host another Mock Mediation next year, as the feedback was well received, with participants keen to attend another. We are also keeping our eye out for other mock mediations. We would love to see these!

I was pleased to recently complete the SACRO Mediation course. This has added to my knowledge of the role which allows me to better serve the needs of our clients. I have been using this knowledge in both intake calls and by starting to assist in mediations. Special thanks to Ben and Carol, who allowed me to assist in their mediations, and answered all the questions I had following the mediation. Your guidance is much appreciated! After dealing with a couple of emotional clients during intake, I also completed the British Red Cross Distressed Caller training. This gave me an insight into de-escalation techniques, being empathetic on the phone, and confidence in myself when dealing with cases where emotions run high. There has been lots to think about, and so much more to learn.

In addition to these external courses, I have also enjoyed the recent CPD events held by Stuart Kelly on *Consumer Rights*, Patrick Scott on *Unlawful and Immoral Agreements,* and Margaret Downie on *Simple Procedure – Uncapped Expenses*. If you missed these, you can find them on our YouTube channel (along with all Conference Content and the Mock Mediation!).

On a note less relevant to the Clinic, I was pleased to attend the Law School Legal History Trip. The tour was resurrected for the Law School's 60th anniversary. We toured Glasgow learning about high-profile legal cases, including the George Square Bin Lorry Disaster, the Tolbooth Riot, and the Glasgow Subway. Each story was followed by a quick stop nearby for a refreshment, then a short walk to the next location. It was an enjoyable day with good weather. We are looking forward to the Law School's 60th Anniversary Ball in October.

We really enjoyed meeting some of the Clinic members at our recent social, and I am looking forward to the forthcoming coffee mornings, and, hopefully, an end of summer catch-up in Glasgow.

Rosie McBrine[1]
Service Delivery Administrator

[1] ***Rosie McBrine started as Service Delivery Administrator with the University of Strathclyde Mediation Clinic in November 2023. She graduated in Social Policy and Education at the University of Strathclyde in July 2023, whilst also working part-time for Aviagen UK Ltd as a Marketing Assistant alongside her studies.***

Patrick's Ponderings by Patrick Scott[1]

The Quirks of Judicial Expenses

Patrick Scott

My ponder for this quarter is on the awarding of judicial expenses (in some jurisdictions these are called costs or costs of suit) in the simple procedure court in Scotland. The simple procedure court is a small claims court and has jurisdiction to hear claims of up to £5,000. Legal representation is permitted but, I would venture to say, not encouraged. The reason that I say this is that the amount of expenses that can be awarded to the successful party are capped at various levels, depending on the amount of the claim. This usually excludes the cost of raising the action (a fee of £110) and the sheriff officers' fees for serving the process (between £50 and £100), which are normally added on to the award.

In summary, the cap is as follows:

- *For claims under £300, no expenses are awarded.*
- *For claims between £300 and £1,500, the cap is £150.*
- *Between £1,500 and £3,000, the cap is 10% of the claim.*
- *Claims over £3,000 have no cap on expenses.*

The amount upon which the cap is determined is the amount of the claim if the claim is dismissed, or the amount actually awarded if the claimant succeeds in an amount less than that being claimed.

That all sounds very simple, which one would expect from a simple procedure court. However, there are some difficult situations to navigate when dealing with expenses. In mediations, this is an issue that arises from time to time. Parties settle the claim and then get stuck on the issue of the expenses. As a facilitative mediator, what can we do to assist? We can refer the parties to the cap on expenses as that is contained in a schedule to the rules of the court. We should point out that expenses may be awarded above the cap in certain circumstances, being:

- *the respondent has not stated a defence*
- *the respondent does not proceed with his/her defence*
- *the respondent has not acted in good faith in defending the claim*
- *the Sheriff finds that either the claimant's or the respondent's conduct in the case has been unreasonable*

However, some unusual situations can arise which make the issue of expenses less clear. Let us assume that the claimant sues two respondents in the same action, and claims £1,200 from the one and £3,400 from the other. The claimant employs the services of a solicitor. The first respondent wants to settle the claim, but the expenses become an issue. How much would the Sheriff award against the first respondent if the claim was successful?

The are several options. The Sheriff could regard the claim as being for an amount of £4,600, and award uncapped expenses. But that would seem a bit harsh on the first respondent. What if the Sheriff capped the expenses at £150 as against the first respondent? Would that unfairly benefit the second respondent, against whom uncapped expenses could be awarded? Should the Sheriff only award the claimant £75 against the first respondent? My view would be to regard the claims as two separate claims and determine the cap on that basis, namely £150 for the first respondent. The cost of raising the action and sheriff officers' fees must still be factored in. Here I believe one must look at the actual cost to the claimant. If the Sheriff were to award £110 against each respondent, the claimant would be unfairly benefitted. He or she would have only paid one fee to raise the action, so should only be able to recover that amount, in other words £55 from each respondent. The sheriff officers' fees are slightly different as they would probably be incurred separately in respect of each respondent unless service on both respondents took place at the same address. If not, the claimant would probably be entitled to the cost of the service on each respondent from that respondent, and these amounts could differ from each other.

Applying the same reasoning to the award of expenses against the second respondent, those would be uncapped but the cost of raising the action would be £55, otherwise the claimant would be over-compensated.

Another scenario that may arise is that a claimant claims £3,700. The matter is referred to mediation and the respondent makes an open tender to pay £3,000, admitting his liability for that amount but placing the remainder of the claim in dispute. This part of the claim does not settle and the matter proceeds to court. If one or both of the parties are represented, what should the cap on expenses be. My view is that, with the open tender, the

respondent has essentially reduced the claim to £700, and that amount should be used to determine the cap, namely £150.

Yet another scenario is that a claimant seeks legal advice prior to instituting the action and pays a lawyer £500 for advice and assistance in preparing the court papers. However, the claimant sues in person and without legal representation. The claim is for £800, and the claimant adds on £500 for judicial expenses, claiming a total of £1,300. How should the Sheriff approach the claim? Expenses cannot be awarded by the court as the claimant is unrepresented. If he or she was represented, those expenses would be capped at £150. It would seem unfair to award £500 expenses to the claimant as part of the claim when, if there was representation, a cap would apply. If I was the Sheriff, I would not allow that part of the claim.

Consider the following example. The claimant sues the respondent for £500. The respondent lives in the south of England and the court is in Glasgow. To travel to Glasgow for the hearing, the respondent would incur travel and accommodation expenses of £400. If the defence of the claim succeeds, would the respondent be entitled to reimbursement of his or her travel expenses? I am advised that travel expenses are never awarded. The best that the respondent could hope for would be that the Sheriff permits the hearing to take place online. I am not sure what criteria are considered in this regard and, at best, all a mediator could do would be to inform the parties that an online hearing may be possible, but that it would be up to the Sheriff to decide.

A final point to consider. One that I have encountered. A factor sues on a factoring agreement, claiming an amount of £1,200. The services of a lawyer are enlisted. The claim succeeds. In terms of the cap on expenses, the claimant can only be awarded £150 for expenses. However, the factoring agreement contains a clause to the effect that, if the respondent is in default of his or her payments, the claimant may sue to recover such fees and the respondent will be liable for all expenses relating to the claim. Does this override the cap as determined by the rules. My view is that it would not. The simple procedure court is designed to deal with small claims and parties are encouraged, by the cap on expenses, to act in person. It would defeat the object of the legislation if parties were at liberty to contract out of compliance with the rules of court. Whether or not that is the case, will be for the courts to determine.

[1] ***Patrick Scott completed the LLM in Mediation and Conflict Resolution course at Strathclyde University 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 SLCC Panel of Mediators and volunteers as a lead mediator with Strathclyde Mediation Clinic. He is also on the Board of Trustees of Scottish Mediation.***

Aunt Minerva's Agony Column

By her earthly intermediary Alastair Sharp

Minerva is the Roman Goddess of Wisdom and Just Causes. She has agreed to share her wisdom with members of the Clinic and answer queries as to unusual or interesting cases.

This is her response to a another query from 'Worried' of Kinlochsporran.

The names and some of the facts have been changed for confidentiality purposes.

Dear Aunt Minerva

Hello it's me again. Worried from Kinlochsporran. A bit of an unusual situation this time. All to do with the election. We used to be Liberals for many years but a while ago a group of supporters from another political party persuaded us that we would get free beer if we voted for them. The regulars in the snug of the Droughty Laird held them to their promise and have been voting for them ever since. The free beer lasted a few rounds, but as Angus the Laird's Junior Keeper said, a promise is a promise, and we'll have our free beer yet. Whether or not it was the free beer, Jim McHaggis was elected, and he regularly maintained a substantial majority over his nearest rival, Alastair Ogg.

This year there was a growing swell of support for Alastair, and many felt he was in with a chance. Now in the snug of the Droughty Laird a wee bit of gambling went on. Jimmy the Ferret as he was known used to take bets on various local activities such as who made the highest price at the local market for sheep or coos or whether the Minister's pregnant wife would have twins, so blooming was she whilst expecting. The sums were not large, and Jimmy paid up or kept his gains with no ill feelings either side. He had once claimed to be the official agent of a Glasgow bookie "if anyone asked" but no one ever did.

On this occasion and after a few malts and chasers, and after having disposed of a freshly culled deer to some sassenachs touring the route 500 in a luxury van with built-in barbeque for a decent number of notes, Angus asked Jimmy what odds he would give that Alastair would win the seat. Angus guffawed and said, "nae chance in hell" and gave him 10 to one. Angus pulled out his wad and peeled off £200 and said "y'ere on man". Jimmy grabbed it and exclaimed "bloody eejit" and ordered drinks all round.

In the ensuing election, Jim McHaggis lost to Alastair, who was duly elected. When Angus entered the snug to collect his winnings of £2,000, Jimmy refused to pay claiming it wasn't a valid bet[1] and in any event "he didnae have that kind of money" and that both of them were drunk at the time so it wasn't a proper wager. Angus consulted his cousin who was a paralegal in Glasgow and issued process in the Kinlochsporran Sheriff Court and the Sheriff has paused the case for mediation.

Please can you help with my questions

Worried, From Kinlochsporran

Worried's Questions

a) I must confess that I have taken to frequenting the snug in the Droughty Laird with my new boyfriend, the Laird's Head Keeper. We don't form part of Angus and Jimmy's group but may say hi to them and have a chat on occasion. Does this preclude me from acting as mediator? They both want me to carry on and keep buying me drinks!

b) My parents were both missionaries and brought me up not to drink or to gamble (I drink tonic water in the snug) and I still believe that both habits are sinful and the work of the devil. Do my beliefs preclude me from acting as mediator?

c) The Sheriff is known to like a flutter and it is rumoured has a share in a horse. If the case has to go before him, do I request that he recuse himself or could it be an advantage?

d) I have had preliminary meetings with each of the parties. Angus says he is prepared to settle the case if Jimmy agrees to go double or quits on the next election. Should I agree to put this forward to Jimmy or is it compounding further calumny?

e) I am a member of the Free Church of Scotland (the Wee Frees). Should I inform my Minister of my involvement in the mediation?

Aunt Minerva's Answers

a) Provided you have made it clear that you are only accepting the drinks as a social response and in no way in relation to the case, I wouldn't worry about it. If one of them starts lacing a tonic with vodka, then that's a no no. Upon reflection, I think it best if you refuse their generosity and rely upon the Head Keeper's sporran to keep you refreshed

b) No, you can keep your beliefs separate from the case. Unless of course you find the whole concept of a case involving gambling and drink abhorrent and cannot face discussing the issues. But remember that conscientious objectors in the wars acted as stretcher bearers and doctors, and judges deal with matters that may conflict with their beliefs.

c) Let it be! How would you raise it in any event. As you say, it might even be to everyone's advantage for a Judge to understand the principles of betting and the language.

d) Hmm! A slightly tricky one. The advantage of mediation is that solutions can be reached outside the box, and this may be an example. The advantage of this solution is that it would postpone the matter until the next elections, but the practical problem is that if Angus won, it is highly unlikely Jimmy would have the £4,000 required to pay. I suspect that Angus is putting this forward as a way of postponing the conflict, perhaps to ensure harmony in the snug. I don't think you should reject it out of hand. However, I would suggest you tell Angus that it would be best for him to make this offer himself in the snug one evening. It may well be that by the time of the next election it will have been forgotten.

e) I do not know the rules of your church. Unless you are under an obligation to report matters relating to your professional life to your minister, I can see no need to inform him. However, only you with the knowledge of the rules of your order can make the final decision.

Good Luck, Worried. I hope that I have helped.

Aunt Minerva

[1] *Older readers may have a vague recollection of gambling debts being unenforceable in Scotland's courts. Indeed that used to be the case, on the grounds that they were sponsiones ludicrae. This was changed, however, by the Gambling Act 2005. Now, as long as there is no other illegality, there is nothing to prevent the courts from enforcing a wager - see https://licensinglaws.wordpress.com/2014/02/10/gambling-debts-enforceability-and-voiding-bets/* (Ed.)

If readers have any other questions, please direct them to:

Aunt Minerva's Agony Column, Mediation Matters!

To subscribe to ***Mediation Matters!***
please email mediationclinic@strath.ac.uk

The Mediation Clinic is supported by the Scottish Government and the University of Strathclyde

Mediation Clinic
University of Strathclyde Law School
Level 3, Lord Hope Building
141 St James Road
Glasgow G4 0LS
Email: mediationclinic@strath.ac.uk