

Applying Cynefin Complexity Theory to Mediation. Challenging the Retired Judge Command and Control Mediation Model

Overview

This paper looks at how complexity theory can help guide mediators, ADR professionals and lawyers to constructively engage with the fast emerging collaborative economy. An economy built on the creative tension between risk-taking and innovation. Balancing this tension and establishing a culture of trust is essential for maintaining the increasingly short time at the top in the 21st century economy.

This risk taking culture challenges the relevance of the traditional adversarial solution focused approach by the legal profession and the judiciary. It has special implications for the retired judge/ senior counsel command and control mediation model.

The Cynefin approach to complexity theory

Cynefin is a Welsh word that means we are influenced by multiple factors in our environment that we can never fully understand. It is a good way to describe the complex world we are experiencing in this early part of the 21st century.

The digital age is now a practical day-to-day reality for everyone. The illusion that the world is ordered and therefore can be easily reordered is challenged by the complexity of modern living. Conflict and disputes are also becoming far more complex. Today's leaders in politics, industry and dispute resolution will have to manage this complexity in a way that allows the emergence of new ways of coexisting and innovative practices.

The Cynefin framework (Snowden and Boone 2007) is a practice-based management system that seeks to modulate this complexity rather than trying to constrain it. It is an insightful way of thinking that has direct application to conflict resolution and peace building practices.

It is an experiential mode of management which requires leaders to step back and allow patterns to emerge. It is through this emergence that opportunities arise for innovation and creativity. It is a process that opens the door for luck and serendipity. The focus is on managing the present and seeking out its evolutionary potential.

It requires leaders to have a deeper understanding of the broader context in which they operate and the ability to not shy away from complexity and paradox. Because it is an evolutionary process it gives managers the time and space to assimilate complex concepts. The approach is to probe first then sense and respond. It is managing for emergence rather than outcome.

Guiding Principles

Understanding complexity theory is an essential tool for lawyers and ADR professionals in adapting their core skills to fit the modern fluid and complex commercial, social and political environment.

Complexity theory is built on three guiding principles.

The first is that in a complex environment outcomes cannot be predicted. This is because each aspect of a complex environment is interconnected and so all parts constantly co-constrain each other. They co-evolve by constantly modifying behaviours in random, never in the same way twice. This constant change means it is impossible to forecast or predict what will happen.

As a result our understanding of why things happen the way they did can only be done in retrospect. Because no two contexts are the same in a complex environment the concept of joining the dots in advance is an illusion. Best practice is, by definition, past practice and hindsight does not lead to foresight after a shift in context (Snowden and Boone 2007, p 3).

The second principle is that in a complex environment there is no one way or right way of doing things. There is no universal solution. In fact choosing a single hypothesis limits the evolutionary potential inherent in the myriad alternative approaches. A multi-hypothesis approach leads to emergent practices and breakthrough innovations.

The third principle is that in a complex system you cannot go back or forward in time. We co-evolve so once patterns have formed we have to work from that point. Therefore we have to understand and manage from the present and nudge forward. This is the opposite approach to designing a desired end state and then working backwards to close the gap.

Using Brexit as an example the UK cannot reverse engineer back to 1973 and start again nor can it arbitrarily select a desired future state and try to close the gap. It can only nudge forward from the present. The same applies to Donald Trump's "*Make America Great Again*"

The Process of Implementation

There is a three-step process in dealing with complex situations.

The first is to create a boundary within the system that irritates emergent behaviour into life. Managers can then observe that behaviour and amplify things that work and dampen things that do not.

Two examples from practice are the contractual requirements built into Project Alliances that preclude parties suing each other for negligence or fault and that all

decisions are required to be unanimous with no abstentions (Rooney 2011). These boundaries irritate emergent behaviour amongst the contracting parties.

Other examples of boundaries include setting time limits, requiring outcomes where all parties either win together or lose together and mandating a no blame fully open book culture.

The second step involves creating a number of early 'safe to fail' trials or experiments that run independently in parallel. This stimulates lateral thinking and multiple perspectives. The aim is to avoid premature convergence or group thinking by keeping multiple possibilities open. It also recognises the value of 'obliquity' which is the practice of achieving objectives indirectly (Kay 2010).

The third step involves creating real time feedback systems so managers have the tools to monitor and manage in the present. This can involve the use of digital technology and apps to provide real-time feedback loops using narrative stories as a way of conveying raw data. These source stories help counter the cognitive distortion that occurs with interpretations and reinterpretations by consultants.

Allowing for Mavericks, Dissent and Disruption

One of the Cynefin mottoes is early detection and fast recovery. The aim is to trigger mistakes early through multiple safe to fail trials. Embracing risk and possible failure is an essential element of experiential understanding. It challenges groupthink by encouraging, minority views, mavericks and dissent. In other words diversity.

It is the opposite approach to the command and control model which seeks fail safe predictable outcomes. This is based on the cult of the alpha leader and is often driven by the desire to make the complex simple and ordered. This tends to focus on facts rather than allowing patterns to emerge. This leads to a structured rules approach which constrains the freedom of movement and diversity within organisations. It leads to organisational groupthink.

The over emphasis on efficiency and outcomes drives out variation. This is because diversity includes things that are not currently efficient. Allowing a place for mistakes, inefficiency, conflict and disruption to occur allows new learning which can be the springboard for innovation. They create a tension in the system which allows for evolutionary breakthroughs. If managers do not allow this type of internal disruption to occur then their competitors will disrupt externally.

Applying the Cynefin principles to Mediation

There are five models of thinking in the Cynefin framework. Simple/ordered, complicated/ ordered, complex, chaotic and the 'I am not sure which model I am in' thinking. The two main variations are the two versions of ordered and complex.

ADR theorists and academics point to at least five models of mediation. They are facilitative, evaluative, settlement, transformative and narrative.

However from a practice perspective there are only two models. The model that involves the parties working together in a joint session and the model that does not (caucused or shuttle mediation).

The application of complexity theory to mediation starts with the principle that any interaction between human beings (and markets) falls within the complexity quadrant. This is because we are communal in our culture and we co-evolve within groups and through our relationships. We are by our very nature complex.

From a mathematical perspective there are far more relationship connections in the joint session approach. In a simple mediation with one mediator, two parties and their lawyers there are 20 connections there and back between each of the participants, 48 pathways in which messages can be carried to and from the mediator and 120 pathways in total including through the mediator. However in caucused mediation there are no connections between the parties, four connections there and back between the lawyers and the mediator and therefore four pathways to and from the mediator.

The caucused mediation approach sits firmly in the ordered quadrant. It seeks to fashion order by hypothesising an end state solution and then applying pressure on the parties to close the gap. It is often conducted by alpha mediators (retired judges and senior lawyers) using a command and control approach.

A problem arises for managers and mediators when they apply ordered thinking to complex situations. Caucused mediation can be effective in simple ordered disputes but counter-productive in complex ones. Unfortunately it is often used as a one size fits all approach. This ignores the fact that apparently simple factual conflicts can disguise far deeper complex issues. It can inhibit emerging solutions, diversity, variety, innovation and the positive and creative aspects of disruption and conflict.

The Joint Session Model verses the Caucused Model

The value of the joint session approach in mediation is that it allows a fresh interaction between the parties in real time. It is a way of moving the focus away from the past and the future and on to the immediacy of the present. This is in harmony with complexity theory and the Cynefin approach of understanding and

managing from the present rather than drawing from the past or hypothesising a future goal and trying to close the gap.

The joint session mediator has no option but to mediate the moment to moment interaction between the decision-makers. This draws the mediator away from mediating the problem to mediating the moment (Rooney and Ross 2012).

One of the core principles of the Cynefin approach is the concept of disintermediation. Its aim is to eliminate all secondary interpretations that occur when intermediaries analyse raw data before presenting it to the decision maker in summary form. It is by decision-makers having direct access to raw data presented in the form of multiple individual narratives that allows them to detect emergent patterns first-hand.

Caucusing, by its very nature, is an informational game that involves the ritual use of deception by the parties, their lawyers and by the mediator in some form or other. "*Consensual deception is the essence of caucus mediation.*" (Cooley 2003). Arm's length game playing further alienates the parties who are the eventual decision makers. It leads to secondary interpretations by the lawyers and the mediators through relaying messages. This can result in a premature convergence of thinking and moving too quickly to a conclusion. It lacks the humanity present in the act of human interaction.

The power of the joint session approach is that the parties, the mediator and the lawyers can all observe first-hand the real-time interaction between the participants. The parties' opening statements are a description of their interests and positions in narrative form. Although this does not eliminate game playing per se the parties can give it an immediate and direct visual and auditory context. It removes the element of secondary interpretation inherent in the caucused mediation approach.

The Cynefin approach of paralleling early 'safe to fail' experiments is replicated in the facilitative approach through face-to-face option generation, brainstorming and the many other mediation techniques such as 'what if' and 'parking issues'. It can generate multiple perspectives which can be tested in real time by continuous back and forth movement between joint session and private caucus over the course of the session. Maintaining this dynamic interaction allows diversity of thinking, creating novel and unexpected outcomes.

The Importance of Developing Fluid Management and Mediation Skills

The Cynefin approach challenges the command and control style of management particularly in a complex environment. It requires leaders who can manage the flow of networks between people in a way that allows for a safe space for minority views, diverging opinions, conflict and internal disruption. It requires a higher state of alertness and the ability to provide a real-time response to emerging

patterns and behaviours. This is the best pathway to creating strategic surprises and opportunities.

As with mediators working in the joint session model the Cynefin approach requires the development of fluid (soft) skills. These include the ability to remain totally present in the moment by maintaining an evenly suspended attention (Freud), acting without memory, desire and the need to understand everything that is happening (Bion), the use of time and space (Temporality, 'The Third', 'The Field') and intuition that goes beyond just pattern recognition (Rooney and Ross 2012).

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ENDNOTES

Cooley, J. W. (2003) *Defining the Ethical Limits of Acceptable Deception in Mediation*
4 Pepp. Disp. Resol. L.J. 263 2003-2004

Kay, J. (2011) *Obliquity: Why our goals are best achieved indirectly* Penguin Publishing Group

Rooney, G. (2009) *Project Alliancing- Applying Advanced Conflict Management Systems to Complex Infrastructure Projects*. Available at SSRN:
<http://ssrn.com/abstract=1809267>

Rooney, G. and Ross, M. (2012) *Shifting the Focus from Mediating the Problem to Mediating the Moment - Using Intuition as a Guide* available
at:<http://ssrn.com/abstract=2140220> Spanish Translation: Revista de Mediación 2014, vol. 7, No. 1, pp. 36-46

Snowden, D. J. and Boone, E. (2007) *A Leader's Framework for Decision Making* Harvard Business Review, November 2007 See also :
<https://www.youtube.com/watch?v=s8SayvnfQi0>

Greg Rooney has been a practising mediator for 24 years. He retired from legal practice in 1996 to practice full-time as a mediator. Greg specialises in mediating

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