Shifting the Focus from Mediating the Problem to Mediating the Moment – Moving Beyond 'Getting to Yes' and 'The Promise of Mediation'

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Overview

This paper represents the current state of our thinking with respect to the fundamental question for practising mediators; *"What do we mediators do in the session and why do we do it?*

Our thinking has been evolving over the last 25 years and continues to evolve. It has in part been informed by the thoughts and writings of many theorists from diverse professional fields that we feel speak to us as mediation practitioners and trainers.

The focus of this paper will be on us as mediators and the theories that underpin our professional practice rather than on the broader question of "What is mediation and how can we help parties resolve their problem?" We will shift the focus from the parties and their "problem" on to us as mediators.

This will mean exploring theory that goes beyond traditional mediation theory which has mainly focused on the parties, the problem and the negotiation. This has been driven and informed by seminal texts such as *'Getting to Yes'*(Fisher, Ury and Patton 1981) and *'The Promise of Mediation'* (Baruch Bush and Folger, 1994). These authors challenged and disrupted the prevailing adversarial positional negotiating culture and marked important historical milestones in the evolution of the modern Western mediation movement.

While there has been much written on the parties there is a notable absence of theory underpinning how we as mediators practise our art. This absence has led to the conclusion by many authors and theorists that mediation is a field rather than a legitimate stand-alone profession.

We will set our focus on theories that underpin and support the skills required to practice as a professional mediator. At the heart of these skills is the mediator's ability to manage the dynamics of conflicting parties especially when working with them in a joint session.

The skills required for this interaction are often referred to as fluid or soft skills. The theories that underpinned these skills and why they work have been developed over

an extended period of time and are drawn from a diverse range of professions and theories. They include professions such as organisational psychology, psychotherapy, psychology, advanced mathematics, physics, anthropology, the law and theories such as complexity theory, the Nash equilibrium, obliquity theory, game theory and concepts such as being totally present in the moment, intuition, the challenge of being an irritant, the use of time and space (Temporality), the 'Third', the 'Field' and Meditation/Mindfulness.

The way mediators think and how they behave in each moment of a mediation are interconnected at many levels. This connection is the core of mediators thinking and practice.

Differentiating between Knowledge and Thinking

It is our ability to think that makes us a mediator, lawyer or social scientist not our acquired knowledge of the subject or field. Although knowledge acquisition is an important first step for the novice professional it does not make a practitioner.

This is because the intellect holds information and theories which exist only in the past through a process of reflection on what we have learnt with our rational mind. This residue of thought does not exist in the present.

Therefore the professional encounter has to be real and fresh and unique to each moment. In essence mediation, the law and the social sciences have to be continually created afresh by the practitioner and remain fresh during each moment of the professional encounter. How you are moment to moment is the driver of that engagement.

The technical knowledge of a particular profession or field is static intellectual information isolated from the here and now of the personal experience. Therefore one has to continually overcome that knowledge so as to be able to engage in the here and now of the moment. Thomas Ogden refers to this process within the context of psychoanalytic psychotherapy. He states:

> *"... Analytic learning is biphasic. First, we learn analytic procedures, for example, how to conceive of, create and maintain the analytic frame; how to talk with the patient about what we sense to be the leading edge of the patient's anxiety in transference; how to make analytic use of our reverie experience and other manifestations of the countertransference. Then, we try to learn how to overcome what we have learned in order to be free to create psychoanalysis anew with each patient. These 'phases' are in one sense sequential in that we have to know something before we can forget/overcome it. But, in another sense, particularly after we have completed formal analytic training, we are continually in the process of learning to overcome what we have learned"*(Ogden 1994).

Not only do we have to overcome all that we know we also have to try and detach from the clutter of complex patterns of thoughts that fill up our minds. This clutter is made up of the memories of past similar experiences, the desire for an outcome overlaid with the need to try and understand what is happening and why. While these mental processes help us deal with day-to-day life they can, in the heat of the here and now of the mediation session, distract us from experiencing what is really going on in front of us.

Wilfred Bion (1967) warns against developing an attachment to our memories, desires and the need to understand as they can inhibit the practitioner being attentive and totally present in the here and now of the moment.

There are many differences between mediation and therapy. However both professions need to fully engage with parties in the here and now of their respective professional settings.

Zero Thinking

What mental state must the mediator possess and model for the parties so that everyone, including the mediator, can learn from the moment to moment experience of the session?

Bion talks about cultivating a state of mind that is openly receptive to the unknown. He refers to it as a state of reverie and describes it as a form of mental void, a formless infinite and 'the perfect blank'. He also calls it 'zero thinking' (Bion 1970). It is a space in which the practitioner is unmoved by his or her own memories and desires and has an overall attentiveness to the present moment.

These concepts appear in Buddhist and Taoist's doctrines. Zen calls it 'don't know mind' or 'no mind' (*wu-shin*). Bion's concept of attention is comparable to mindfulness, a core practice in Buddhist meditation.

Freud wrote only five papers on technique. The following is his suggestion on the preferred state of mind of physicians who wish to practise analysis:

> *"It consists simply in not directing one's notice to anything in particular and in maintaining the same 'evenly-suspended attention' (as I have called it) in the face of all that one hears. In this way we spare ourselves a strain on our attention which could not in any case be kept up for several hours daily, and we avoid a danger which is inseparable from the exercise of deliberate attention. For as soon as one deliberately concentrates his attention to a certain degree, he begins to select from the material before him; one point will be fixed in his mind with particular clearness and some other will be correspondingly discarded, and in the making of this*

> *selection he will be following his expectations or inclinations. This however, is precisely what must not be done. In making the selection; if he follows his expectations he is in danger of never finding anything but what he already knows; and if he follows his inclinations he will certainly falsify what he may perceive. It must not be forgotten that the things one hears are for the most part things whose meaning is only recognised later on"* (Freud, 1912, p. 432).

Freud suggests that we only learn or evolve through experiencing an experience. This applies for the therapist as well as for the clients. He suggests that it is only after experiencing something that we can recognise its meaning. The common denominator between Bion's view and the Buddhist view of mental development is that in both thought systems mental growth is synonymous with learning from experience (Pelled 2007).

A number of modern writers have expressed these concepts using different terms. The concept of 'mindfulness' also refers to paying attention to the moment:

> *"It is a way of paying attention moment to moment with equanimity and without attachment to whatever passes through the conventional senses and the mind. A person in this state of present moment, non-judgemental awareness can yet enjoy a degree of freedom from them which can lead to a better performance in negotiation or mediation or any activity"* (Riskin 2009).

Another term used is 'suspension':

> *"In practice, suspension requires patience and a willingness not to impose pre-established frameworks or mental models on what we are seeing.*
> *If we simply observe without forming conclusions as to what our observations mean and allow ourselves to sit with all the seemingly unrelated bits and pieces of information we see, fresh ways to understand a situation can eventually emerge".*
> (Senge, Scharmer, Jaworski and Flowers 2005)

Mediating the Moment.

> *"Both the past and the future are transformed through the present moment, and there is no present moment without a conscious human being" (*Reshad Field 1979)

Mediation is conducted solely in the present moment. The challenge for the mediator and the parties is to remain present as each moment unfolds rather than intellectually jump ahead in time to what might be a possible solution.

Thomas Moore emphasises the importance of tolerating moments. He notes that there is a tendency for people to try to resolve tension as soon as possible. He

suggests that this is such a natural reaction that it may seem strange to suggest that parties willingly remain in their discomfort. He states that we are conditioned to want quick solutions. He points out that there are benefits from being patient with contradictions and paradoxes. One benefit is the possibility of finding more profound and lasting solutions to life's problems. He states:

> *"A rush to find solutions can lead to something being quickly put together. If we can tolerate moments of chaos and confusion then something truly new can come to light. There may be new tensions and unfamiliar ambiguities to deal with, but having won a fresh vantage point through the courageous endurance of tension, we may be better equipped to understand the process, realising that illusions and follies have their own roles to play in the mysterious alchemy of the soulful life".*
> *(*Moore 1994).

Daniel B Wile refers to solving the moment rather than the problem. He maintains that what distinguishes Collaborative Couple Therapy from other approaches to couple therapy is that it focuses on the moment rather than the problem. He states that collaborative couple therapy is based on the concept that when issues arise in the relationship between the parties each one suffers loss of voice. Also as a couple they lose their connection. When these issues arise in couples therapy the therapist also has a problem in that the therapist loses connection or empathy with the parties.

Wile maintains that the therapeutic task is to solve the moment rather than solve the problem. He states that by focusing on the moment it allows parties individually and collectively and the therapist to recover from these losses. He states:

> *"Solving the moment is a collaborative couple therapy way to solve the couple's problem, since it creates the collaborative spirit that enables couples to arrive at whatever practical solutions might be possible"* (Wile 2011).

Intuition - The Difference between Conscious and Unconscious Thinking
Having created an unfolding experience of the moment how then does the mediator or therapist respond to what unfolds?

Ogden (2015) suggests that the practitioner must rely on a whole different form of perceiving and thinking than our day-to-day conscious thinking. He differentiates between conscious and unconscious thinking. Conscious thinking is required to get us through our everyday physical lives. It is task oriented with planning and goals. It is drawn from our conscious senses and relates to what is supposed to have happened and what has not yet happened. Bion (1967) refers to them as our memories and desires.

Ogden suggests our intellect is formed through conscious physical sensation and is quite separate from our unconscious.

> *"The unconscious is not a role of physical sensation. Physical sensation resides in the domain of conscious experience." (Ogden 2015)*

If we apply conscious thinking to the unfolding experience of the mediation or therapeutic session it can distract us from being present in the moment. Ogden states that the form of thinking, which Bion calls intuition, has its roots in the unconscious mind.

> *"For Bion (1962) unconscious thinking involves the viewing of experience from multiple perspectives simultaneously, thus generating a rich internal dialogue not possible in waking, conscious thinking." (Ogden 2015)*

Ogden suggests that rather than understanding or analysing the nature of what is happening in the particular moment of the session a practitioner's task is to intuit that unconscious reality of the moment by becoming at one with it. Becoming one with the parties is the entry point to experiencing the unconscious experience. It is the precondition to intuitive thought. Paradoxically it is not a goal that can be consciously sought.

> *"The therapist does not seek reverie any more than he seeks intuition. Reverie and intuition come if they come at all without effort unbidden." (Ogden 2015)*

For mediators the challenge is to be able to sit with the uncomfortable tension of the moment without an irritable reaching after fact or reason. This state is called Negative Capability (Rollins). It can be hard for the mediator to maintain a state of reverie (the capacity to make sense of what is going on in unconscious processes) when the parties continue to be in high conflict with no resolution in sight. However, it is precisely at this time that the parties look to the mediator for guidance. It is at this point the mediator can draw on intuition as a way of moving beyond the uncertainties, mysteries and doubts of the moment.

One of the effects of attaining a state of reverie is that it gives the practitioner time and space to step back from the immediacy of the unfolding interaction to allow the multiple perspectives that are occurring to come together. This can generate a rich internal dialogue (intuition) not only for the mediator but also the parties. Bion suggests that Negative Capability is not an immediate mental discipline, rather a way of life (Rooney 2007).

Unconscious thinking is an antidote to the addiction to intellectualising problems instead of developing the ability to sit with them, totally present in the moment.

Endless intellectualising drawn from the conscious mind paradoxically leads to a blockage and barrier to the absolute alterity (the state of being other or different) of the world that lies beyond our knowledge and control (Ogden 2015). It is the world beyond our knowledge and control that contains the path to the, as yet, unrealised truth.

Intuition connects us on many levels with the universe that surrounds us not only with respect to what is happening now but also what is about to happen.

Intuition and its Challenge to the Rational Mind

We use the word intuition in its traditional meaning, defined, in part, as; *"the immediate apprehension of the mind without reason"* (Oxford 1964). A number of authors have given the word intuition a meaning opposite to its traditional meaning. Daniel Kahhneman in his book "*Thinking, Fast and Slow"* uses a definition by Herbert Simon who states that intuition is nothing more than the recognition of stored memory. Kahhneman defines 'systems one' thinking as - experiencing a reaction to an event which produces a premonition. He refers to this as intuition. He also refers to intuitive knowledge which he states operates automatically and quickly with little or no effort and no sense of voluntary control (Kahhneman 2011). Very much like a reflex action.

Kahhneman and Simon are prepared to adopt only the first half of the traditional definition in that they accept that the intuitive awareness is an immediate apprehension of the mind. However they have distorted the traditional meaning by, in effect, deleting the words 'without reason' and replacing it 'with reason'. Their examples of stored memory, intuitive knowledge, and common beliefs are all sourced from what has built up in our rational mind over the years. Even unconscious behavioural reflexes emanate from within us. It is as if they cannot accept that we have access to an awareness that exists in a place that is outside of and quite separate from ourselves.

Alain Lempereur (2003) in a paper titled "*Identifying Some Obstacles from Intuition to a Successful Mediation Process"* associated intuition with common beliefs and behavioural reflexes. However in his revised paper (2011) he has deleted the word intuition from the title and replaced it in the introduction with the word instinct.

Instinct is a response to external conditions triggered from within us. There is a rational basis supporting this reaction such as the attraction to the opposite sex for procreation and the fear of heights. Intuition is a product of something derived from somewhere beyond our reason with no rational basis to support it. I suspect that Kahhneman and Simon are really referring to the word 'instinct' as well as conditioned responses such as racial prejudices when they use the word 'intuition'.

The rational mind likes to name and define complex concepts as a way avoiding the uncomfortable uncertainties that cannot be rationally explained. It derives great satisfaction in dividing concepts into numerical lists. A very Cartesian approach of separating the mind from the body, 'I think therefore I am'.

So Kahhneman's division of the complex issue of how we think into two basic rational thinking alternatives is deeply satisfying. It illuminates them into a form that our rational mind can comfortably accept. However, this illumination can blind us to a deeper meaning.

Bion refers to how illuminating things can paradoxically create a form of blindness. He refers to the translation of a letter from Sigmund Freud to Lou Andreas Salome;

> *" The analyst must cast a beam of intense darkness into the interior of the patients association so that some object that has hitherto been obscured in the light can now glow in that darkness"* (Grotstein 1997)

The deeper meaning that Kahhneman misses is that there is something else beyond his systems one and two thinking that comes from fully experiencing the present moment without interference from the rational states of memory, desire and the need to understand. This state of thinking gives us access to a rich internal dialogue that comes to us out of the unconscious unbidden. It is called intuition.

Professional intuition is found in a wide range of disciplines and is one of the hallmarks of expert practice, especially in fields where professionals need to engage with fast-moving, uncertain and often messy situations. Rather than representing unreliable, vague feelings, intuition underpins and informs expertise, enabling experts to notice and respond to both patterns and anomalies occurring in their work (Wilson 2011).

Intuition also allows experts to expand beyond the capabilities of their rational mind through their ability to compress and elongate time sufficient to allow thoughts and impressions to instantly gestate into a holistic picture of the unfolding moment. This results in a momentary glimpse of the infinite.

Daniel Kahneman in 2017 has now said that he was wrong about bias' . That he was himself biased when he set those out in "*Thinking, Fast and Slow"*. He now states that humans are too noisy and that should be replaced by artificial intelligence robots see Remarks from Daniel Kahneman

The Third - Becoming at One with the Unfolding Moment

It is sometimes suggested that empathy is the connecting bridge between a practitioner and the parties (Wile 2011). Empathy is defined (Oxford 1964) as the

power of projecting one's personality into and so fully comprehending the object of contemplation.

Ogden (2015) suggests the connecting bridge is not through the practitioner projecting his or her personality but through the practitioner becoming less definitively oneself in order to create a space in which the practitioner and party may enter into a shared state of intuiting and being at one with the unfolding reality. It's not about the acquisition of greater knowledge about what is happening. Rather it is experiencing oneself in the context of being with another person and becoming one with them in the unfolding moment.

Ogden (1994) takes the concept of becoming one with the unconscious reality further by suggesting that when this technique works it effectively creates a third mind which exists separately from the practitioner and the party. This third mind, which he calls the analytic third, is something that the practitioner and the party contribute to and from which each accrues an individual meaning.

> *" Both give themselves over to the third, while at the same time retaining the individual identities, now changed by the experience of living in the third" Ogden (2014)*

Ogden suggests that the combination of the two minds (or in a mediation context, the three minds of the parties and the mediator, into a third mind (or fourth) is more than the sum of the individual parts.

> *"The analytic third is a metaphor for the creation of a mind that has an existence of its own and is capable of thinking in ways that neither contributor to the creation of the third subject is capable of generating on his own" Ogden (2014)*

In psychoanalytic terms this entity has also been called 'Intersubjectivity' (Ogden 1994). It can also be understood as the space between the parties or the field which exists whenever the parties and therapist are present together. The Third or the Field is jointly created in the conscious and unconscious relationship between the participants. It mostly dissipates when they cease being together in that setting. It fully exists in the shared moment.

In practical terms it means that the mediator's own positive and negative thoughts about the parties or the prospects of success of the mediation directly contribute to and affects 'The Third' at both a conscious and unconscious level. This challenges the traditional concept of mediator neutrality (Rooney 2015).

The presence of this 'third 'is often expressed in religious and spiritual connotations with terms such as the Christian concept of 'The Holy Spirit', the Taoist concept of Dao 道, the ten thousand things and becoming one with the Tao.

The Field

The ancient Hindu religious text, The Bhagavad Gita gives some guidance through the concept referred to as "The Field". The Field is drawn from Chapter 13 of The Bhagavad Gita.

Krishna's advice to Ajuna is to transcend the field of duality of black and white, left and right, democrat and republican, good guys and bad guys, I am right and you are wrong and so on. This duality is an illusion because each is a composite of the same element only in a different arrangement. The boundary between them is an arbitrary line dividing into two what is really just one continuous field. The advice is to be you and bring yourself from the field of multiplicity to that of eternal Unity. He exhorts the immense value of non-dualistic vision.

Duality, in a mediation context, can be seen as the opposing positions taken by the parties. Mediators in essence challenge these illusions by looking beyond the positions to the common interests. The common interests mirror the non-dualistic vision promoted by the Gita. This is 'The Field' within which the mediator operates.

It is estimated that The Bhagavad Gita was written between 5,000 and 6,000 years ago and is still today a vital source of guidance to Hindu's. In chapter 2 it refers to the qualities of being free from the attachments of fear and desires which are similar to Bion's (1967) detachment from memory and desire.

The author Christopher Isherwood (1944) refers to the principal theme of the Gita about the nature of action. He states:

> *In general, people almost always act with attachment: that is to say with fear and desire. Desire for a certain result, and fear that this result will not be obtained. Attached action binds us to the world of appearance to the continual doing of more action. We live in a delirium of doing and the consequences of our past actions conditions the actions we are about to perform…….. But there is another way of performing action; and this is without fear and without desire. The Christians call it 'Holy Indifference' and the Hindus 'Nonattachment'.*

The Gita proposes a three-step process:

a. Firstly we must thoroughly learn and practice our profession whether it is as a mediator, warrior or sportsperson. The expertise literature (Wilson) suggests that it takes at least 10 years to become an expert although some people will never get there even after 20 years of practice. An expert is partly defined as someone who is still learning and who is able to remain fresh and open to the new even after many years of practice. People who claim they have nothing more to learn from experiences have ceased being experts.

b. The second step is to find your true self. This means paradoxically overcoming all your learning as a professional so as to be free and totally present in the moment. You have to also overcome any attachment you have to your memories, desires and fears as well as any narcissistic tendencies drawn from your social status and any attachment to the need to help, rescue, educate, moralise, judge or punish people who are in need or who have transgressed. This is a lifelong task.

c. The third step is to go beyond the illusionary dualities that divide us such as Catholics and Protestants, Sunni and Shiite, Jews and Gentiles, liberals and conservatives and so on. This can prove a challenge for people who are firmly attached to fundamentalist beliefs. It requires the ability to be able to loosen our addiction to the 'us and them' mentality and to look for the unity inherent in our shared human existence. Thomas Moore (1994) touches on this search when he states that the ways of the soul are filled with paradox.

Time is the Mediator's Friend

The one thing that is common to all mediations is time. Time is the currency in which mediator's trade. The more time the mediator can spend with the parties the more opportunities there are for relationships to rebuild and options to emerge.

One of the problems with traditional hard positional negotiating techniques is the speed with which they take place. They either resolve the matter relatively quickly or bring the negotiation to an abrupt end. In direct negotiations between lawyers and parties there is often nowhere to go when both sides move quickly to their bottom lines. Where a mediator is introduced into the process the challenge for them is to manipulate the parties into deferring the headlong rush into offer and counter offer. Time is the mediator's friend in such situations.

Time creates space for fresh connections between the parties even if it is only for the period they spend together negotiating. The longer the mediator can spend with the parties the more opportunities these are for 'The Third' and 'The Field' referred to above to be engaged.

The power and effect of time on the parties in a negotiation process can be seen in comments of M. J. Slattery Q.C. (as he then was) when noting the connection between participation and human reactions in his review of his first experience acting as a lawyer for a party in mediation:

> *"The fatal step in mediation is to say yes to the idea in the first place. Mere participation in the process works insidiously over time to suspend, then overcome, much of the detachment of lawyers and the cynicism of their clients. Once hours, days or even months have been spent mediating in a structured environment, human*

reactions attempt to give all this activity some purpose. The motivation to settle then appears" (M. J. Slattery Q.C 1993).

An example of expanding time is the use of the pre-mediation meeting. It allows the mediator to build a connection with the parties and their lawyers before entering into the formal mediation session. The mediator can contract with the parties to allow time for exploring the issues before entering into the rounds of offers and counter offers. It also allows the mediator to build a personal connection and rapport with each of the parties and their lawyers. These individual connections can be used to ease the parties and their lawyers into accepting the value of participating in a joint session.

Overlaying of the New Experience over the Old

Relationships are at the heart of our human existence. We build up relationships with people to whom we are connected whether it is for social or commercial reasons. These relationships develop unique communication and negotiating patterns which tend to disintegrate when conflicts and disputes remain unresolved.

It is the creation of the fresh experience that is at the heart of the mediation process. The mediation offers the chance for the parties to experience new experiences that overlay and eventually replace the historical ones. In effect rebooting the relationship between the parties.

Many lawyers find it emotionally and culturally difficult working with their clients in the joint session and actively seek to avoid it partly by selecting mediators who work solely using shuttle negotiation. There are also significant levels of anxiety and depression within the legal profession which adds to this aversion. However as lawyers become more experienced working with facilitative mediators they realise the benefits of overlaying older emotions /experiences with new ones is the more creative and empowering path to compromise.

This overlaying effect of the new mediation experience over historical events can be seen in the mediation of apologies for victims of sexual abuse both within religious institutions and the military. The power and effect of the victim of the abuse spending time with the current representative of the religious body or the current military service chiefs helps overlay a new experience over the experience of being sexually or physically abused many years before. The internalised effect of the historical abuse is brought into the present moment with the apology and the payment of reparation.

With the help of skilled counsellors this new experience can help start the process of reintegrating that part of the victim's psyche that was shattered by the original sexual abuse. (Ross and Rooney 2007, Rooney 2011)

This overlaying effect can be seen in Ogden's (2015) reference to T S Eliot's (1919) comment that the past is always part of the present, "*a 'present' he* (T S Eliot) *calls the 'present moment of the past'*."

> *"The entirety of the past is alive in the present moment of the analytic experience. From this perspective, the analyst sacrifices nothing eschewing memory. "The past is never dead. It is not even past" (Faulkner 1950, act 1, scene 3)."* (Ogden 2015)

Comparing the Facilitative Mediation Process to the Command and Control Caucused Mediation Process

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 involve any meaningful contact between the parties (caucused or shuttle mediation).

The caucused or shuttle mediation approach is often conducted by alpha mediators (retired judges and senior lawyers) using a command and control approach. They seek to fashion order by hypothesising an end state solution and then applying pressure on the parties to close the gap. This results in a focus on facts and positions rather than allowing patterns to emerge.

The joint session facilitative approach is an experiential mode of mediating which requires the mediator to step back and allow patterns to emerge. It seeks to embrace the complexity of human interaction rather than trying to reorder it. It requires the ability to not shy away from complexity and paradox.

Working in the joint session allows the mediator and the parties to understand the broader context in which they operate. Because it is an evolutionary process it gives parties the time and space to assimilate complex concepts. The approach is to probe first then sense and respond. It is mediating for emergence rather than outcome. The focus is on mediating the present and seeking out its evolutionary potential.

It is therefore important to be aware of some of the theoretical underpinnings of working with the parties in a joint session. These include theories drawn from other disciplines:

Mediating the Moment – The Use of Time and Space

The joint session provides an opportunity for a mediator to work simultaneously on the substantive issues and the underlying relationship issues. Private sessions (or

caucusing) with each party are still part of the mix but are used as a specific intervention in support of the joint session.

When dealing with relationships time is not measured in hours but in moments. It is the moment to moment experience of the session that is at the core of mediation practice. Whether the parties meet face-to-face in a joint session is dependent on a number of circumstances that need to be assessed through a thorough pre-mediation assessment process. This assessment is based on the 'do no harm' principle similar to that of the medical profession.

Most disputes are resolved by a simple negotiation of the substantive issues. However entrenched disputes contain at least some form of relationship breakdown. The path to resolution has to involve some aspect of the relationship plane beyond that of simply negotiating the substantive issues. This poses greater challenges but it does open the door for a real connection and a fresh relationship building experience for the mediator and the parties.

There is a temptation for mediators, the parties and especially their lawyers to avoid joint sessions for fear that rekindling emotions (experiences) might hinder the search for a solution. The request by the mediator to work jointly and collaboratively face-to-face with reluctant parties and their lawyers places the mediator in the role of an irritant. One of the definitions of the word irritate is to stimulate something into action, or excite or produce an uneasy sensation in a bodily organ (Oxford 1964). In the facilitative mediation context the mediator is trying to irritate or stimulate the communication and negotiating patterns back into life as a precursor to the substantive negotiations.

The advantage of the joint session is that it allows the parties to re-engage through experiencing new experiences. Bion (1967) suggests that we need to experience something before we can develop a knowing. Experience, he says, precedes thought. Because the experience is permeated with uncertainty it can trigger a need to understand what is going on. The urge to quickly clear up that uncertainty can impede the connection to the unfolding experience. Bion exhorts a quality of the mind that is openly receptive to the unknown.

We can get distracted away from the 'unfolding experience' by turning our gaze towards solutions and possible answers. Mediators can frame their thinking process around the belief or assumption that there is an existing truth or solution that can be sought out and discovered much like trying to find something you have just lost. Mediators can assume that there is a solution already in existence such as an amount of money that only has to be revealed to the parties for resolution to occur.

Bion (1970) challenges this form of thinking and asserts that there is no existing truth to be revealed but rather a moving toward a yet unrealised truth. There is a subtle but important difference between these two modes of thinking. This is because the experience comes first followed by the associated thought. If we reverse that order and direct our thoughts towards seeking out an answer before the experience then that mental approach will impede or reverse understanding as it unfolds in each moment.

An example of allowing our thoughts to precede the experience is the formulation of a pre-mediation hypothesis (Rooney 2008). This is an example of a mental attitude based on a presumption that there is an existing answer or truth which the mediator only has to uncover. The problem with this mental attitude is that the moment we fix our focus on our hypothesis we automatically start a selection process accepting some points and discarding others. As Freud states this is precisely what must not be done. He advocates maintaining an evenly suspended attention, not fixing on any one point. As stated, if we start following our expectations (hypothesis) we are in danger of never finding out anything but what we already know.

The practitioner must still prepare for the session including undertaking research and reading the brief or case notes. However there must be a conscious resistance to forming any conclusions. The aim is to move the mental focus away from seeking 'the truth' or 'the right answer' and onto allowing the unknown to unfold.

The joint session creates the opportunity to press the restart button on the parties negotiation and communication relationship which is the prerequisite for the movement from entrenched positions to the parties giving the final 'yes'.

Complexity Theory and the Cynefin Framework
Mediation and conflict can be looked at from a complexity perspective.

All human, economic and social interactions are complex and interwoven while continually on the move. Nothing is static. When the interactions are working well there is a low energy cost flow.

Conflict as it builds up starts to restrict the interactions until it breaks down completely. At which point it becomes a high energy cost (disruption, anger, adversarial expensive lawyers, stagnation etc.)

The human interaction approach to mediation (humanistic mediation) is based on reconnecting or re energising the interactions either to move forward or to move in a different direction. It gets the flow going again.

The problem with the more directive dispute resolving approach to mediation,

especially by lawyers, is that it traps the parties in that high energy cost stagnation. The blockage is extended rather than released. Interaction between the parties is seen as a hindrance not an opportunity.

I am suggesting that we start looking at conflict not as a static issue to be solved but as a temporary blockage in the flow of our interactive lives. It is about reactivating that low energy flow to allow something unexpected to emerge.

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.

Complexity theory is built on three guiding principles (Rooney, September 2016).

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.

The Cynefin framework is a practice-based management system that seeks to modulate this complexity rather than trying to constrain it. It is an experiential mode of management which requires leaders and mediators 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.

The Cynefin approach challenges the command and control style of management particularly in a complex environment. It also challenges the command and control mediation model used by many retired judges and senior counsel especially those who do not allow any meaningful contact between the parties.

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 mediator has no option but to mediate the moment to moment interaction between the decision-makers. Maintaining this dynamic interaction allows diversity of thinking, creating novel and unexpected outcomes.
This draws the mediator away from mediating the problem to a process of managing for the emergence of strategic surprises and opportunities.

It requires a higher state of alertness on the part of the mediator and the ability to provide a real-time response to emerging patterns and behaviours. This approach to dealing with complexity is built on the ability for mediators and managers to develop fluid (soft) skills.

The Obligation to Repay Gifts

The anthropologist Marcel Mauss has investigated the power of gift giving in a number of societies. He suggests that the power inherent in gift giving is universal. It invokes the principle of reciprocity (Coggiola 2008) whereby the gift received has to be repaid.

He suggests that in theory gifts are voluntary disinterested and spontaneous but in fact they are given and repaid under obligation and out of self-interest. He asks what force is there in the thing given which compels the recipient to make a return?

Even though the gift appears to be given generously it is in fact a form of pretence and social deception. In Maori culture the spiritual power of the giver remains embedded in the gift. When the gift is received the person receiving it acquires this power. Through it the giver has a hold over the recipient. The only way to expunge

that power and to neutralise it is by reciprocating. This is the motivating force behind the obligatory circulation of wealth, tribute and gifts in Samoa and New Zealand (Mauss 1990).

The pressure to reciprocate when receiving a gift has important implications for mediators and the parties. Often an impasse can be broken by a simple gift given by one party to the other. It can be as small as an acknowledgement or the willingness to make a concession, even if it is only small. It automatically invokes the principle of reciprocity, putting pressure on the other party to respond. This can mark the beginning of a movement towards resolution.

One of the powers and advantages of working in the moment rather than focusing solely on the problem is that it allows more opportunity for gifts to be exchanged. A gift, no matter how small, can re-invigorate a relationship that has atrophied. Gifts are often used to great effect in hostage negotiations as a technique to pressure the hostage taker into reciprocating.

Deferring Persuasion and Problem-Solving

Anatol Rapoport (1960) in his book *Games, Fights and Debates* examines how to increase the likelihood that people will choose cooperation over self-interest in a debate or conflict. His answer is to reduce the threats so that people can feel safe to cooperate and give up their self interests.

He suggests that in order to make conflicts safe parties firstly need to postpone persuasion and problem-solving until each person can state the other person's position (interests and concerns in mediation speak) to that person's satisfaction. The aim is to create attunement and increase cooperation. John Gottman refers to Rapoport's principles and suggests that the ultimate goal of attunement is to reduce the threat for participants and avoid what he calls flooding so that non-defensiveness, understanding and empathy can occur.

Gottman defines flooding as an emotional and physical reaction by a person under pressure who becomes overwhelmed by negative affect. It usually consists of a complex mixture of emotions such as grief and anger. When a person becomes flooded they would rather be anywhere on the planet than where they are. Gottman maintains that the more a person becomes flooded the more their ability to take on new information decreases. He suggests that flooding erodes the level of trust and parties start to act out of their own self-interest. A flooded person loses the ability to listen to the other. When flooding is triggered it causes the heartbeat to rise above 95 bpm and takes at least 20 minutes to recover. The study found men are quicker to flood and de-flood than women.

Gottman suggests there are three parts to flooding:

> *"The first part is the shock of feeling attacked, blamed and abandoned. The second part is awareness that we can't calm down. The third part is emotional shutdown. When we are flooded we become like a city under siege. Conflict then starts becoming an absorbing state. …… It suggests that when people are flooded they cannot listen even though they might wish to. …. and can't be very creative"*(Gottman 2011, p 209)

Gottman states that attunement during conflict needs to be reciprocal. Therefore he suggests that each party takes turns as speaker and listener. The listener is required to attune, take notes and be able to repeat the speaker's position (interests and concerns) to the speaker's satisfaction. This requires not only summarising what the speaker has said but also validating the speaker's feelings and needs. He suggests that making this work requires postponing persuasion and problem-solving so that defensiveness is reduced (Gottman 2011).

This approach of creating reciprocal attunement mirrors the standard facilitative mediation model in which the mediator takes a statement from each party and reads it back in a way that not only summarises what each has said but acknowledges and validates each party's feelings and needs. Gottman notes that in practice it is often difficult for parties to stop expressing negative affect and blame. The facilitative model of mediation attempts to counter this problem by the mediator capturing each party's words and reading them back in a way that converts the complaint into a positive need. The object is to create what Gottman calls attunement between the parties.

Conclusion

Mediators make choices on how they allocate their time with the parties. One choice is to focus totally on the parties' problem by chipping away at their positions until sufficient concessions are granted by each side to achieve resolution. Engaging in hard-nosed adversarial negotiations (positional bargaining) can have the appearance of negotiating from a base of power and strength. Yet, paradoxically, it is a soft option compared to the challenges and dynamics of working with the parties on their interests and concerns in the here and now of the moment.

The choice of working with the parties in the moment brings with it personal challenges for the experienced mediator but at the same time, potentially, great rewards. It does require a level of expertise. This expertise relates more to the mediator's ability to think in a way which is detached from his or her own issues and to be totally present with the parties. It involves becoming comfortable with and accepting the uncertainty of the moment. It is not something that is to be practised just before a professional encounter. It is something to be practised throughout a lifetime (Symington 1996).

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