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Mediation Enabling "A Stronger Scotland"

Graham Boyack

I recently reviewed how mediation could support "A Stronger Scotland" the Scottish Government's programme for 2015-16. This article highlights the range of areas where mediation, and the skills of mediation, can make an impact.

In the first paragraph of the First Minister's foreword the aim of ensuring that all children flourish, regardless of background, is an area supported by our work on promoting Peer Mediation in schools. This work is an effective way of giving young people listening and conversation skills and is also an important tool used to tackle bullying and harassment.

Strong Sustainable economy

A key part of being able to deliver a strong economy is having a positive workplace culture that supports innovation and productivity. Such workplaces are typically those where disputes are resolved in a positive manner and difference is embraced as part of the creative process. **The recent CIPD report "Getting Under the Skin of Workplace Conflict" showed** both the potential for mediation to be better used and also the corrosive effect of ineffective dispute resolution.

Mediation Enabling "A Stronger Scotland" Cont'd

To support this, the Network promotes mediation and the use of mediation in the workplace and would be delighted to feed into plans such as the Scottish Enterprise Workplace Innovation service and to work to support the Innovation Challenge Fund. We would also see this work as supporting the Scottish Business Pledge and the Fair work Convention.

Protecting and Reforming Public Services

Education

As highlighted above, work to reduce the attainment gap can be supported by the development of peer mediation across schools, which helps to realise pupil potential through personal growth and a positive school culture.

Justice

Whilst much of the focus in the programme is **on criminal justice, the statement "Problems and disputes turn into crime and disorder"** focusses on the need to resolve those problems and disputes at an early stage. Mediating such problems and disputes can play an essential part in maintaining the community cohesion and in mending relationships.

The Succession Bill highlights an area where resolution of disputes can be made easier with a mediative/collaborative approach.

Children and families review around UN child centred approach is also an area where mediation has a role to play and the Network is able to bring a range of interested groups together to support this work.

Health and Social care

One of the key areas where mediation and the skills of mediation can make a difference is in helping to promote a positive workforce culture where collaboration and merging of different cultures is happening across health and social care. The Network is aware of work in Germany where care home staff are trained in mediation skills in order to better manage the relationships in care homes between patients and relatives and have access to mediators should this be required. This has a positive impact on the atmosphere in **homes and people's ability to resolve disputes amicably**. Such an approach would make a positive difference in Scotland and has possible wider uses given the variety of agencies involved in the wider health and social care sector.

Strengthening Our Communities

A key part of strengthening our communities is based around work on housing and planning and in both these areas we believe mediation can play a role in enabling communities and improving relationships. Community empowerment will need to be supported by communities being able to resolve the disputes that will arise in a way which enables relationships to be maintained. The skills of mediation have a role to play in this and in the way in which communities seek to listen to their residents.

In housing the growth in private tenancies requires a better way of resolving the disputes rather than landlords feeling the best way is simply to let the tenancy run to its end and have the tenants move on. There are often solutions that would help resolve those disputes but at present there is very little support for landlords and tenants to do this

Mediation Enabling "A Stronger Scotland" Cont'd

and what does exist is patchy. The work of the home owner housing panel shows that mediation has a role in supporting the resolution of disputes and there could similarly be merit in using mediation in resolving some private tenancy disputes.

On land reform mediation has a role to play in helping to bring together what seems on the face of it to be conflicting interests to find solutions. The Network is also aware of its role supporting organisations such as community trusts where if disputes arise it may threaten the whole existence of the organisation.

Working Across Government

The Network continues to work on a number of areas such as court and tribunal reform, consumer work and on digital justice which

have particular Scottish needs and opportunities. We have also been aware of significant work where using the skills of mediation in the work of government itself has produced considerable benefits in both Denmark and the Netherlands.

Supporting The Third Sector

The Network has just launched a mediation scheme for the third sector providing free and low cost mediation to support organisations resolve their disputes. The scheme provides vital support to organisations where unresolved conflict can have a very damaging impact.



better conversations
better outcomes

Flagship Mediation Course Dates 2016

Spring School:*

Using Mediation Skills as a Professional
25 - 27 April 2016

Residential Summer School:*

Using Mediation Skills as a Leader
28 - 31 August 2016

Module 2:

Building Mediator Competence
Spring: 26 - 27 May 2016
Autumn: 27 - 28 October 2016

Module 3:

Assessment
Spring: 2 - 3 June 2016
Autumn: 3 - 4 November 2016

* Note that the Spring School and the Summer School are available as free standing three day courses. They are also a prerequisite for attending Modules 2 and 3.



The University of Strathclyde Law School's Postgraduate programme in Mediation and Conflict Resolution, now entering its sixth year, provides a thorough, practical and exciting introduction to this developing area. Still the only course of its kind in the UK, the programme is rigorous and multi-disciplinary, exposing students to a wide range of approaches as well as being taught by experts from across the UK.

The course combines theoretical and practical elements and has been accredited by the Scottish Mediation Network. Participants will enhance their confidence in dealing with interpersonal and organisational conflict while developing their communication and problem-solving skills. As well as core classes on mediation theory and practice, there are classes on employment mediation, mediation law and policy, arbitration, transitional justice the key business skill of negotiation. Students may also elect classes from the whole range of postgraduate programmes such as Human Rights, Construction Law and International Economic Law.

Students can gain practical experience by volunteering with our [Mediation Clinic](#), which provides a weekly small claims service at Glasgow Sheriff Court. Student mediators work alongside experienced practitioners to develop their mediation skills in a real-world setting.

Start Date: September each year

Mode of Study: Full-Time or Part-Time

Course will be taught by a combination of evening lectures and intensive weekend sessions to maximise flexibility.

Application and further information can be obtained from:

<http://www.strath.ac.uk/humanities/courses/law/courses/mediation/>

Contact:

Pauline McKay (Administrator) E: pauline.mckay@strath.ac.uk

Charlie Irvine (Course Leader) E: charlie.irvine@strath.ac.uk

T: 0141 548 5998



Keep Mediation and Arbitration Separate?

John Sturrock QC

My wife and I recently spent a very convivial evening at the beautiful home in Sydney of leading Australian mediator Alan Limbury and his wife, Dr. Rosemary Howell, who coaches a team from the University of New South Wales in the annual ICC mediation competition.

One topic which stimulated some forthright conversation was the use of hybrids whereby a mediator takes on the role of arbitrator if the matter does not resolve by mediation. In particular, we discussed the transition from mediator to arbitrator with the consent of the **parties. It's a topic on which I recently addressed a group in Dublin too and, contrary to my regular pontification about the value of ambiguity and the need to avoid binary thinking, the more I think about it, I find myself adopting an increasingly dogmatic view.**

So, here's the dogma, dressed up as provocation. Mediators should not get involved in hybrids if that means the mediator taking on any sort of adjudicative role in the matter, even if parties request it and the rules allow it. To do so compromises mediation as a hugely valuable process, and the overall risks associated with doing so outweigh any short term benefit in an individual case.

For similar reasons, I am concerned when I see mediators and arbitrators associating in the same professional body. I am concerned by a trend which seems to align the two dispute resolution methods more closely. Mediation and arbitration are so fundamentally different that, as I see it, this in-mixing carries very significant risks for both. However, I write as a mediator and it would be presumptuous to express my views from any other perspective.

Arbitration, like litigation, is an adjudicative process. It involves the presentation of argu-

ment and evidence designed to persuade a third party to evaluate and make a decision. It is of course generally a private process, governed to a greater extent than litigation **by the parties' preferences. Mediation is also private and the parties have considerable control over it. But further key attributes of mediation are, or should be, that:**

The parties retain the ultimate decision-making function and responsibility for determining the outcome

The mediator's role is to assist the parties to exercise this responsibility autonomously The parties may elect to withdraw at any time, for any reason

There is an (almost) infinite flexibility in the use of the process

Solutions can be found by exploring all aspects of relationships: personal, commercial, past, future, and all manner of issues and options may be discussed A critical role of the mediator is to help parties assess risk and different possibilities, including alternatives to reaching an agreement on the presenting issues

Such an outcome (no formal agreement) is a valid result of engaging in mediation

The mediator will never know everything and his or her knowledge of facts, arguments and risks is necessarily limited by the nature of the process.

In the mediator's assisting role, he or she may ask challenging questions and ponder with parties a range of possible solutions, outcomes, alternatives or "settlements". It is not however the role of the mediator to pronounce a decision. Such is beyond his or her competence or capability by nature of the role and the process.

On this analysis, and in passing only, **"evaluative" mediation seems to be an oxymoron, if that means the parties expect and**



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rely on the mediator to express a view which is designed to provide them with an outcome. Any views the mediator expresses can only be provocative and provisional. Anything else assumes to the role a responsibility and the making of judgments which, I suggest, cannot validly be assumed or made.

There is a further, fundamental, factor which appears to militate against a mediator assuming a formal adjudicative role of any sort. As studies of the brain tell us, we are all victims of our unconscious minds. Perhaps to our horror, something like 90% of our thinking is unconscious. This has wide reaching implications but, for mediators, this means that the parties, and us, are affected by what we understand the process to be or what it may become. Therefore, any possibility that the mediator may express a determinative view is bound, whether we like it or not, to influence how we and the parties approach our conversations and relationships.

The value of mediation should be the pushing of boundaries in a way that is only possible because the mediator is wholly disinterested in the outcome and unencumbered by any prospect of reaching a view. In such a setting, the parties are free to explore things in a way which is quite unique. Inevitably, it seems, that would be different if the roles are – or might become – different.

It may go further. The possibility of some form of adjudication may in fact diminish the prospect of a mediated outcome being achieved by the parties exercising self-determination. We are who we are and, after a long hard day, it may suit both the parties and the mediator for the latter to express a view. We are creatures of habit. Self-determination is extraordinarily hard work. It engages the neo-cortex structure in the brain and consumes far more energy than intuitive problem-solving. Resisting the urge to offer a view as mediator can be difficult, especially if one can see a way through and one has the credibility and authority to carry it off. But, and I say this sincerely as well as provocatively, **the danger is that it's a cop-out.**

We have all experienced those days when all seems lost. When, despite best efforts, no solution can be found. This is the hard case when it would be easy to bow to the adjudicative way out. But, have we also not all seen cases where, because there is no alternative, the parties have nevertheless reached agreement in such circumstances? With the guidance of really excellent mediators, it is arguable that nearly all impasses can be overcome. That is true mediation in action. If not, after all the hard work, a pause may be preferable to a third party decision.

This may all seem rather purist. "Get real", I hear you say. "We need to be more pragmatic". I have no objection to people engaging in activity that has mixed components, but just don't do it within a process where one individual is expected to play both roles and to inter-mingle the two radically different approaches. Mediation has huge potential as we move from hierarchical, top-down decision making to flatter, more participatory models generally. Our collective future probably depends on the success of these innovations. As an example, mediation can (and already does) expand into many areas of human activity. But it is still not well understood by the wider public, including policy makers. It is still too often confused with arbitration. One of the reasons for mediation's relative lack of use may indeed be that misperception. I argue that we compound the problem if, within our emerging profession, we add to the confusion by mixing up the two roles.

Wouldn't it be ironic if, while trying to meet the needs we perceive (and indeed are told) that clients have, we mediators in fact damage what is very special about what we do? The baby could still go out with the bath-water....

SACRO Open Day—Aberdeen

Aberdeen Community Mediation Service **recently took part in Sacro's open day** at their offices on Crown Street, Aberdeen.

Around 60 partners and elected members came along on the day.

Irene Reid, Service Team Leader said afterwards **“It was a really successful event and let people see where it all happens – having so many different services under the one roof it was an opportunity to allow partners to see what we do.”**



Five-Day Mediation Skills Course **3,4,10,11+18 March 2016, Glasgow**



Designed for people who will be using mediation skills in their work, this course is accredited by the Scottish Credit and Qualifications Framework together with the Scottish Community Mediation Network. The course provides information on key concepts in mediation and the opportunity to discuss and practice basic skills in a safe, relaxed atmosphere. It covers the whole mediation process from first contact with the service to closing a case. The mediator's role is explained and practised using typical scenarios for first visits to explore mediation as an option, preparing clients for joint meetings and handling difficult behaviour at a meeting. The course is assessed based on activities from day three onwards culminating in a full role-play of a mediation meeting on day five.

To book a place or for more information please contact: Robert Lambden at Scottish Community Mediation Centre: Tel 0131 624 5400 or e-mail infoscmc@sacro.org.uk Course Fee is £600 per participant



Limited places still available

Thursday

Workshops

Keynotes

Paul Wheelhouse—Minister for Community Safety and Civil Justice. The minister has an overview of how mediation may be used across the wider civil justice system.

Professor Liz Stokoe—University of Loughborough. Liz has undertaken significant research on communication in and around mediation.

Professor Tamara Relis—London School of Economics. Tamara looks at justice mediation.

Effective Networking Skills, led by Colin McKeand

Mediator Practice: Personal Style and Implicit Theories, led by Roy Poyntz

Can Danger be Averted, led by Sonia Bruce and Rosanne Cubitt

Reflective Methods for Getting at What Mediators Actually do, led by Kenneth Kressel

What's Love (And Hate) Got To Do With It: Mediating With Young People and Families, led by Abbey Krause, Paul Burns and Carolyn Hirst

Mediation in the Digital Age, Led by Ewan Malcolm

Restorative Practice in Schools, led by Ian McDonough and Irene Reid

Keynotes

Professor Kenneth Kressel—Rutgers University. **Kenneth's background in psychology** has allowed him to research into what is happening in a mediation.

Professor Ellen Waldman—Thomas Jefferson School of Law. Ellen has written extensively on ethics in mediation.

Kenneth Hogg—Director for Local Government and Communities Scottish Government. Kenneth will give a perspective on mediation and government.

The Power of Mediation to Bring Organisational Values to Life and Affect Organisational Changes, led by Katherine Graham and Janis Brown

The Impact of the Strathclyde University Mediation Clinic, led by Andrew Agapiou, Ailie Barclay, Elaine Maclennan and Carol Thomson

Empowering Carers Through Mediative Skills, led by **Fiona O'Donnell, Aileen Riddell** and Linda Paterson

Dealing With High Conflict People, led by Hugh Donald

What's Wrong With Mediation: Vocal Critics and Critical Voices, led by Charlie Irvine
Culture, Conflict Styles and Mediation, led by Julius Erolin

Friday

Workshops

For further details about the conference and how to book a place please click [here](#) or email events@qmu.ac.uk .

Programme

Thursday 3 Dec

- 8.45 - 9.15 Opening/registration
- 9.15 - 10.30 **Opening plenary and keynote address; Paul Wheelhouse MSP, Prof. Tamara Relis, Prof. Petra Vend QMU and Robin Burley SMN**
- 10.30-11.00 *Refreshment break*
- 11.00-12.30 Workshops Mediator practice, Networking Skills, Managing the Power in the Room, Papers on Peer Mediation and Child Custody
- 12.30-13.30 *Lunch*
- 13.30-14.45 **Keynote address; Prof. ElizabethStokoe**
- 14.45-15.15 *Refreshment break*
- 15.15-16.45 Workshops/papers Reflective Methods, Mediating with Young People and Families, Mediation in the Digital Age, Restorative practice in Schools
- 16.45-17.00 **Plenary round up, reflections, future focus**
- 17.00 Drinks reception

Friday 4 Dec

- 8.45-9.15 Opening/registration
- 9.15-10.15 **Keynote address; Prof. Kenneth Kressel**
- 10.15 *Refreshment break*
- 10.45-12.15 Workshops/papers Organisational Values and Change, Strathclyde Mediation Clinic, Papers on Current Mediation Research
- 12.15-13.15 *Lunch*
- 13.15-14.45 Workshops Empowering Carers, High Conflict People, What's Wrong With Mediation, Culture Conflict Styles and Mediation.
- 14.45 *Refreshment break*
- 3.15pm **Keynote address; Kenneth Hogg and Prof. Ellen Waldman**
- 4.45pm **Round up, reflections, future focus**
- 5.00pm Close of conference

Mediation and Network News

SMN AGM

The Network AGM was held in September and appointed two new members.

Andrew Agapiou a Senior Lecturer from the University of Strathclyde joins the Board of Trustees as does Catriona Tulloch who works in Community Planning in Aberdeenshire Council.

The meeting received the Annual Report from the Board of Trustees which described a very positive year for the Network with significant progress being made in a number of areas.

The meeting heard an excellent address from Laura Jacks a mediator and former Texas judge.

SMN CPD Dates 2016

The Network are delighted to announce that our CPD dates for the coming year will be as follows.

Spring CPD
Edinburgh 15th March
Glasgow 24th march
Aberdeen March

Autumn CPD
Edinburgh 4th October
Glasgow 5th October
Aberdeen 13th October

The topics for 2016 are currently being considered, a huge thanks top those who attended Online Mediation CPDs. We are likely to produce guidance notes for mediators to help their practice in this area.



THE MEDIATION PARTNERSHIP



SMR Accredited Mediator Training Course

First Course in Scotland to be accredited by the Scottish Mediation Register

Dates: Thurs 11th & Fri 12th, Thurs 25th & Fri 26th Feb 2016 + Optional Assessment

This intensive four day course is suitable for mediators, lawyers, managers, HR personnel and anyone with an interest in gaining or enhancing mediation skills. It will provide delegates with a clear theoretical and practical training course, in line with the Scottish Mediation Network (SMN) *Guidance on Mediator Competency*.

“Best training event I have ever been to. Excellent guidance. Great fun.” Delegate from the University of Aberdeen

“Previous training felt like learning the highway code and having a 'go' in a simulator, whereas with Linda and Aileen it was like getting to drive the car with two very able and encouraging instructors on board to make it a safe and enjoyable experience.” Lili Hunter, Lili Hunter Consulting Ltd

To book a place, or find out more information, contact Aileen Riddell on 07950 395276 or e-mail enquiries@mediationpartnership.co.uk www.mediationpartnership.co.uk

Workplace Employment Initiative Group

November 2015

Dear SMN colleague

At our last meeting we were delighted to welcome an excellent contribution from David Bleiman who presented a workplace mediation roleplay that certainly got us talking. The comments from the group highlighted the differences of expectation, and the possibilities of a different outcome had mediation been considered before any type of hearing.

The next meeting of the SMN WEIG will take place on Thursday 21 January 2016. All meetings are kindly hosted at the SMN offices at 18 York Place Edinburgh. As usual, the main meeting will run 2-4pm, and count as part of our CPD. The CPD-extra one-hour session will run from 12.45pm.

This time we will be hearing from Matthew Vickers, Deputy Chief Exec of Ombudsman Services. Matthew is a former Trustee of the SMN, and was previously CEO of the Scottish Legal Complaints Commission. His session will address the role of mediation in relation to complaints processes.

The CPD-extra session is to be confirmed.

As usual, all members of SMN are welcome to attend but please let me or the office know if you will be joining the meetings, as tea/coffee will only be ordered for those who have confirmed!

Looking forward to meeting up,
Slainte

Linn

Linn Phipps, Chair, SMN WEIG, 07917 564440