

**“CURRENT MEDIATION THEORY AND PRACTISE EMPHASISE PRACTICAL PROBLEM SOLVING AND SETTLEMENT OVER OTHER GOALS OF SOCIAL JUSTICE, PROMOTIONAL EQUALITY OR TRANSFORMATION OF THE INDIVIDUAL.”**

Before reviewing Mediation it behooves us to review how the current systems of dispute resolution satisfy the needs of the individuals in their goals, including Social Justice, Promotional Equality or Transformation of the Individuals.

#### The Courts/Arbitration/Negotiation and Maslow’s Hierarchy of Needs

“Conflict is a fact of life. .... what really matters is how we deal with it. Do we go to law - or to war – to resolve our differences with others? Or do we find means that are quicker and cheaper and less corrosive of our merits, relationships and resources? Modern society simply generates too much conflict, and too much complexity for all of it to be resolved through the Courts. As a legal friend said recently, “the Courts have become a place for the warehousing of disputes”” *Andrew Floyer Ackland introduction to “A Sudden Outbreak of Common Sense” 1990.*

Going to Court has almost become synonymous with an overt act of aggression leaving matters in the hands of third party unconnected with the dispute. This third party has overriding powers to mandate for the disputants. The parties futures are determined by a judge who generally has no

knowledge of their unique situation other than the papers which may have been read pre-trial and based on what is given in evidence in the case itself. This latter point may also be directly related to the quality of advocates retained by the parties themselves. Thus the theory that the more money an individual has the better their chances in court! Many people or organisations cannot afford to litigate their case, both from a financial point of view and from a time perspective.

In civil cases the usual remedy is monetary. The courts are rarely empowered to give a decision directing one party to acknowledge their moral culpability and accept the damage to the feelings of the other person as caused by them. In Defamation Actions an apology can be directed to be published along with monetary award.

### Time Perspective

Some cases will take years to get to hearing. (eg. The current time in the Eastern Circuit, Kildare County, for a Civil or Family Matter is at least two years from Issue of Proceedings to Hearing date). In addition to the cost, anxiety and stress therefore the immediate needs of individuals to a dispute cannot, it is respectfully submitted be met. The maxim "Justice delayed is Justice denied" then applies.

### Family Law

Even in Family Law where emotions are intrinsically involved. The Court within the Irish Legal System is not enabled per se to enquire to a great extent to take conduct in to account. The Irish system of Separation/Divorce is one of a “No Fault Basis”. Whereas the Courts will take in to account the actions of parties in relation to access, domestic violence and custody it will not necessarily be adverted to in Separation/divorce. Mc Mahon J, currently sitting in the High Court has directed that conduct will only be taken in to consideration where it is of such a gross and obviously detrimental nature that to ignore it would be unjust.

(It should be noted the there is Statutory recognition of Mediation both in the Civil Liability Act 2004, Judicial Separation and Family Law Act 1989, Divorce Act 1996 and also in the New High Court Rules. The Bill currently in draft stage also deals with Mediation and Alternative Dispute Resolution. However though these are matters where the Courts can refer the parties but not where the Court/Judge is directly involved.)

### Arbitration/Negotiation

Arbitration is notably less formal than the Court system but yet still has taken control away from the parties and into the hands of an independent “expert”. The grounds of appeal to the Courts are quite limited. Negotiation while not of itself suggesting an adversarial process, does have inherent difficulties. Usually there is no “referee” who will assist the parties. Negotiation is also usually dealt with from the power base of the individuals in the dispute. It is

positional, generally not recognising the beliefs, feelings or internal reasoning of the parties involved.

In Maslow's hierarchy of needs then it is submitted the current adversarial system, arbitration and negotiation system lie somewhere at the lower level. They deal with the most basic requirements of the parties in relation to physiological needs and needs for security. Because of the Courts absolute directive nature it is not empowered to move in to the other areas of Love and belonging, Esteem, Experiential purpose and Self Actualisation.



(Image from Google Web. No author noted)

It is from these origins that the modern alternative dispute resolution movement has grown.

## Mediation

The need for parties to retain input and control of their life situation has dictated the rise of access to such resolution. Mediation has become possibly the fore runner where people themselves maintain control of the outcome.

Mediation has become synonymous with non aggressive, non confrontational resolution of conflict.

Mediation itself is recognised by people as allowing them to remain in charge of their own destiny. The parties themselves control the outcome. However, formal recognition is a relatively recent phenomenon. “...Mediation as a formal process has only recently become common place outside of labour and international disputes. (*Jennifer V. Beer with Eileen Stief- Mediation Handbook 1997*)”.

The practise of mediation has grown “to encompass all areas of life, interpersonal, family, communal, educational, occupational, medical, commercial, urban, regional, national, ethnic, international, and environmental” (*Christopher W. Moore The Mediation Process 2003 – Challenges for Growth and Development of Mediation, page 466*)

Mediation as a practice “cuts across the lives of the traditional established disciplines” (*Robert Benjamin the Physics of Mediation; Reflection of Scientific Theory and Professional Mediation Practice*). Many different professional schools of thought “all came to the realisation that the traditional practise

models of their separate disciplines were inadequate effectively to understand, accommodate, or resolve conflict.” (*ibid*).

In Ireland over the past 10 to 20 years mediation is practised within the workplace, in the community, restorative justice, family, commercial areas. There is a draft Bill currently arising from the Law Reform Commission’s consideration on alternative dispute resolution so the reality at present is that the manner of practice of mediation is giving rise to a theoretical and statutory basis in Ireland.

#### Practise of Mediation/theory.

##### Early Generic models.

Seen against the cut and thrust of adversarial direct and cross examination of the Court based system, these models, in themselves were quite revolutionary.

They allowed people speak from a personal and emotional point of view, was revolutionary. The parties disputing were given full voice and each was assured the freedom to communicate what was happening for them around the “dispute”. The “telling” of the story for the client allowed the client to express the interests and concerns as opposed to the position they held within the “dispute”.

Joint sessions with the parties were employed in these models over the caucus. This seems to be on the premises that mutual understanding can arise when people are free to express themselves openly in a safe environment. This in turn facilitates an alternative understanding of the other disputant, their interests, needs, desires, mutual re- recognition follows with the result of the different agreed solution as to what might have been in a rights base resolution. Relationships could be rebuilt and the future between the parties be assessed and reassured.

The result therefore it is hoped is one where both parties have reached mutual understanding, perhaps a greater degree of mutual awareness have come to mutual solution.

#### Multi party problem solving.

Multi party problem solving mediation deals with the concept of facilitate public debate on issues. It brings the essence of mediation issue problem solving . It facilitates basic generic mediation on a larger scale. It is a problem solving driven mediation. It requires, just as a two party mediation dispute, a willingness on the part of the stakeholders to attend and participate. There must be a mediator acceptable to the parties. There must be a process of further mediation itself and there must be the potential to get a resolution which takes into account all stakeholders.

#### Settlement Driven Mediation.

In the commercial world be it small shop or large company, it has been hugely understood that going to Court could take a considerable amount of time, expense, energy and tension. In addition labour disputes of themselves would not readily sit into the Court process. They would be too cumbersome, too protracted. Conciliation and Arbitrations have been used for many years in industrial and labour relations. Therefore they were a natural progression for mediation. Their suitability effectiveness for mediation has been clear to the professionals engaged in employment disputes, namely the Unions and employer Organisations.

In commercial disputes in an ongoing relationship it is important to the parties and also where there is a huge risk element of going to Court. Mediation provides a real answer to the needs of the parties concerned. The matter is not taken out of their hands into an adversarial arena. They control the result.

The focus in on desire is on obtaining a result. However, the result that is being sought is on that is in the interests of all parties. Emotional expression is not encouraged but can it be said therefore that focusing on the problem solving and settlement is detrimental or negative? Simple comparison with the established systems of dispute resolution shows that the new methods move people up the scale in Maslow's hierarchy of needs. Can it be said that such a form of mediation does not promote social justice, equality or transformation of the individual?



With respect quite the contrary is proposed. If parties to a commercial dispute have an awareness which leads them to choose an interest based course for dispute resolution as opposed to a rights arena for dispute resolution this of itself effects an increased level of social justice, promotion of equality and transformation of the parties themselves. There is mutual recognition of interests needs, desires even if this interest is self motivated from a financial point of view. It still recognises the possible negative consequences of an adversarial resolution. There is therefore recognition that the dispute is not simply a “what’s right and what’s wrong” but an understanding that somewhere within the jigsaw of the dispute lies the solution which will give possible expression to mutual interests.

#### Cognitive, systemic school.

Whereas the generic mediation process has as its stages the opening, storytelling, framing the issues, problem solving and agreement the cognitive school has as its stages a minimum opening, data gathering, mutual problem definition, problem solving and outcomes. The greatest difference being instead of storytelling, data gathering and instead of framing the issues, there is mutual problem definition. This school concentrates on looking at what the parties perceived to have happened from a factual point of view. Mediation here concentrates on data taken from the clients to generate with the purpose of generating a new way to mutually tackle the problem arriving a result.

The concentration in this scenario is to deconstruct the apparently rigid factual interpretations of the events and put them into a context where the parties can re-evaluate the position that they have adopted. In this re-evaluation they effectively give themselves permission to review their perceptions' of the dispute and the other party.

Unlike in the settlement driven module this system has a subliminal message of promotion of equality/social justice in that rather than just settlement as the aim it also has the idea that recognition of the other parties position in relation to the dispute may generate a greater understanding of the other party. It does promote an attempt at a basic emotional understanding of the other party. However it does not get involved in these emotions. Reviewing the settlement driven models and the cognitive systemic school it can be seen that settlement driven is at its basic level a manner of achieving resolution by the parties themselves. The cognitive system also brings into play the possibility of each disputant walking in the feet of the other party" without attempting to understand them.

Can it be said that such a form of mediation does not promote social justice, equality or transformation of the individual? Surely not! It accepts greater self-determination by the parties. It accepts the possibility of mutual respect. It accepts the possibility of appreciation of others?

Transformative Mediation/Victim-Offender Mediation.

*“Relationships in this world are the result of how the world is seen”*

*( A Course in Miracles chapter 19 Sub section IV paragraph A i12).*

Transformation mediation moves further into the “unknown” in that the conversational interaction between the parties themselves sets the pattern and pathway of the process itself. In the dialogue between the parties not only is a recognition of the other parties factual position encouraged, as in the cognitive system, but the mediator encourages expressions of feelings and emotions. The mediator ensures that all parties are allowed to express facts, feelings, emotions. (See the “purple” house conversations. Mediator Robert Baruch Bush). The mediator effectively creates an environment within which all aspects of the disputed story are allowed be heard. The expectation and thrust/trust of the mediator is that the dispute will form the starting point from which the disputants will realise a mutual understanding, mutual recognition and acceptance by way of their ultimate agreement.

#### A shared meaning and a possible new resolution.

Insight mediation is based on a facilitative approach to the situation rather than the problem. In settlement driven mediation and incognitive mediation the aim is to achieve a settlement acceptable to the parties.

Insight mediation is non linear in its purpose. It allows the parties an opportunity to create a situation whereby rather than being attached to the problem they are able to stand back from it. In standing back from it they look

to what is beneath their respective interests. They look to what is happening behind the issues themselves. In understanding this they come to an insight as to what a possible solution is. They seek to gain an understanding of the reasoning why each party has their individual perception. How this perception has created their current situation. How they can move on with the mutual shift in their emotional understanding of the other. Insight is gained by thinking what has happened before to how a person is now and the consequences of that.

#### Humanistic Dialogue.

“If the field of mediation becomes driven by the desire to reach settlements in the quickest way possible, at the expense of understanding and addressing the emotional and relational context of the conflict, it may evolve into little more than another impersonal, mechanical and routine social service.” *Mark Umbreit A Humanistic Mediation; A Transformative Journey of Peacemaking- March 14<sup>th</sup> 1997.*

This is based upon the premises that little healing of emotional wounds will occur without opening of the heart through dialogue. However to facilitate this the mediator must go beyond the facts of the case. The mediator is seeking to uncover the emotions beneath the words. Communication therefore is moving to a deeper “the techniques of listening skills (however can also get in the way of genuine dialogue).....” Mark Umbreit (ibid).

The Mediator in moving from techniques which elicit facts creating an environment for emotional release must be careful as the mediator must remain present to the client rather than merely reflecting on the clients words. Otherwise the mediator will fall foul of the idea as propounded by Robert McCloskey *"I know that you believe you understand what you think I said but I am not sure you realise that what you heard is not what I meant"*.

Just because disputants in a mediation trust a Mediator with facts it does not necessarily mean that they will trust a Mediator with emotions. Emotions are much more deeply personal. Their attachment much more at a deeper level to the clients and therefore affect the client at a much deeper level. In essence they are much more personal than the notional facts surrounding a situation. The Mediator themselves must build up a trust of confidentiality with the party showing that not only is the Mediator seen to building a safe comfortable space for the parties but they must actually achieve this. Just as most people can detect an insincere sales person so too will the clients detect a Mediator who is applying techniques as opposed to actually co-creating the safe comfortable space where direct communication actually takes place. Before a client gives the mediator emotional trust they will inherently want to be aware that the Mediator understands the subliminal emotional message of the clients verbal and non verbal communication. Thus, although it would seem that the style of mediation is not directive the Mediator steps into the role of a facilitator promoting, through silence and non verbal communication the mutual recognition of common humanity between the parties. This form of co transformative growth between the parties has been practiced by many

indigenous people. This includes native Hawaiians, native Mari people, native Americans, first nation people in Canada. In these situations the parties Moving from facts to emotions, and then to what is beyond the emotions. The parties are speaking to the “connectedness” (*Diane Laur Reschu 1993*).

This form of transformative mediation brings a greater clarity to the parties. They escape from the destructive/discursive chatter that may notionally be the dispute to an area of calm beyond the dispute from whence arises the end of the conflict. Although resolution of the core issues may not occur an acceptance of the situation may arise. In this acceptance the parties may find the freedom to move forward that simply was not there before.

This area includes the victim offender mediation. It was principally used where there is feelings of “being wronged” whether by way of one individual in part of a group or one or more individuals in society. It does not speak of necessarily getting to an agreement in relation to a dispute to allow parties move on. It speaks more to the spirit to forgiveness to allow both form an emotion position.

### Victim Offender Mediation

Ostensibly, to the logical mind, there may not be a purpose in such communications. Under the morals of society the offender may have been

tried, found guilty and punished. Accordingly to logic therefore the victim should feel satisfied with the outcome. However this is patently not so. The need for such mediation may arise where either the victim or offender may feel themselves frozen in time where they cannot get beyond the experience of the moment or period to time within which the incident occurred. Being unable to do so they are not free within themselves to move forward in their lives. They may have entered a state of existence rather than living. Transformative mediation has the potential to restore an energy to their lives as a result of which they are re empowered. They can choose to move and to re-engage with their surroundings.

In Narrative Mediation as propounded by John Winslade and Gerald Monk the mediator takes the basis of communication between the parties as found in their "stories". It effectively treats each party's story as their unique language. Although the parties may speak a common language whether English, French, Italian etc., they do not necessarily understand the communication of the other persons story. Each person has been conditioned socially and culturally by their story. Thus in the recanting of the story lies the opportunity for mutual recognition, understanding and growth. This because the new of communication of the old story the parties effectively deconstruct this story and introduce an alternative story that both parties identify with and prefer. Within the new story lies a shared meaning and a possible new relationship.

Can it be said that such forms of mediation do not promote social justice, equality or transformation of the individual?

Mediation dangerously.

“Mistake not truce for peace nor compromise for the escape from conflict. To be released from conflict means that it is over.” ( *A Course in Miracles* chapter 23 Sub section III paragraph 6).

Ken Cloake has espoused the notion of the going beyond the process steps to allow the mediators look at their own existence. In doing so the mediator effectively can act as a poultice to allow a conflict be drawn out from darkness and into the light where it simply dissipates. Once held to the light it no longer exists. The danger in this mediation is that the Mediator is in effect attempting to facilitate a spiritual transformation of the clients. If the mediator per se is not spiritually aware then the possibility of resolution diminishes rapidly. It is very difficult to teach French when you cant speak it!!

“At issue in most mediations are not only money, power, position, and legal rights, but respect, honest and empathetic communication, trusting collaborative relationships, responsibility, forgiveness, and closure. While knowledge of law, finance, psychology, negotiation, and organizational development are useful in resolving the first set of issues, an understanding of the spiritual dynamics of conflict is essential for resolving the second.”

Chapter 10 Mediating Dangerously, Kenneth Cloke.



Where then does this development of the Transformative Mediation appear in the hierarchy of Maslow's Needs? It is submitted the clients have opportunity for:-

1. Acceptance of greater self determination.
2. Mutual respect and appreciation of others on a factual basis.
3. Mutual acceptance and recognition of the parties individual need for esteem.
4. Possible opportunity for realisation of inner potential and Self Actualisation.

Is this therefore not an example of mediation satisfying the needs of the individuals in their goals, including Social Justice, Promotional Equality or Transformation of the Individuals?

Conclusion

An adaptation of Maslow's Hierarchy of needs to a notional hierarchy of the nature of the various forms of mediation might be seen as follows:-

....?.....?....

Mediating .....dangerously

Transformative .....mediation

Narrative .....mediation

Generic ..... models.....of .....mediation

Cognitive ..... systemic ..... school

Settlement ..... driven..... Mediation

## Conclusion.

In this situation the physiological and security needs correspond with the settlement driven mediation and cognitive systemic school respectively. The family needs together with a certain element of esteem needs correspond with the generic models of mediation and narrative mediation. The esteem needs and experiential needs overlap between the narrative mediation and the transformative mediation. The need for self actualisation and experiential needs correspond with mediating dangerously.

Whereas there are some who would suggest that current mediation theory and practice do emphasise practical problems and settlement over other goals, social justice promotional quality or transformation of the individual it is respectfully submitted that this is not so. Every form of mediation carried out with expertise and sincere application, whether it is settlement driven or has as its consequences self actualisation, social justice, promotion of equality and transformation of the individual. A primrose in full bloom can be as perfect a flower as a rose. However it is rare to see a cultured rose in a hedge row and a wild primrose in a cultured garden. Each has a different expression of nature but each perfection in its own right. What is important in mediation however, as is implicit in the notion of mediating dangerously, is that the mediators grow in their own awareness. Within this growth lies potential growth for their clients to the mediation.

*BIBLIOGRAPHY*

*Andrew Floyer Ackland introduction to "A Sudden Outbreak of Common Sense" 1990.*

*Jennifer V. Beer with Eileen Stief- Mediation Handbook 1997.*

*Robert Benjamin the Physics of Mediation; Reflection of Scientific Theory and Professional Mediation Practice(Article Mediation Quarterly Vol. 8 1990)*

*Christopher W. Moore The Mediation Process 2003 – Challenges for Growth and Development of Mediation, page 466*

*A Course in Miracles (second edition published 1992 by Foundation for Inner Peace)*

*Mark Umbreit A Humanistic Mediation; A Transformative Journey of Peacemaking-March 14<sup>th</sup> 1997.*

*Mediating Dangerously, Kenneth Cloke2001*

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**3<sup>rd</sup> November 2010**