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Balancing the mediation conversation

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Moving beyond conventional standards

Balancing the mediation conversation

Kevin Hearn

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Introduction

Now that Approval Standards and Practice Standards are being adopted across Australia as part of the National Mediation Accreditation System, there is a risk of blurring the goals of compliance and quality.

It is conceivable that a mini-industry will be generated around compliance issues, perhaps including 'advanced' standards and 'specialist' standards, all in the name of ensuring high quality mediator practice. In such a scenario, the voices of innovation and fresh ideas may struggle to be heard, resulting in the conversation informing the practice of mediation becoming seriously unbalanced.

However, that part of the conversation which currently focuses on innovation and fresh ideas is itself somewhat unbalanced in that there is a focus on measurable elements of mediation practice and a reluctance to spend time exploring those things sometimes experienced in high quality practice but said to be 'unmeasurable'.

Quality mediator practice

Recently Sourdin stressed the need for a commitment to regular evaluation of mediator practice and measurement of quality improvements.[1] She outlined strategies for improving the quality of practice, including mentoring, surveying disputants about services, quality forums, self-assessment and external assessment.

These are probably all too rare in the lives of many busy mediators, partly because there are costs in terms of both time and money. However, there would seem to be another reason, apart from these costs, which makes the establishment of what Sourdin calls a quality mediation culture problematic: namely, the silence that seems to surround what Tillet calls 'the un-describable and unmeasurable elements of mediation',[2] even though such things seem to be part of what is termed 'quality' in mediation practice.

When mediator practice is evaluated, there is usually agreement among evaluators in identifying examples that are superior to others. However, in such examples, mediators sometimes demonstrate competencies that are not easily described or measured.

Marshall suggests such competencies are probably not able to developed through training, however effective the training.[3] Schön points out that, usually, high quality practitioners are not said to have simply more professional knowledge but rather, more 'wisdom' or 'talent' or 'intuition' or 'artistry'.[4] He continues:

> Unfortunately, such terms as these serve not to open up enquiry but to close it off. They are used as junk categories, attaching names to phenomena that elude conventional strategies of explanation.[5]

It was 1987 when Schön made those comments. Over the 20 or so years since then there has been emerging what Fisher calls a 'new mediation vocabulary';[6] terms that appear to represent attempts to identify strategies for developing the capacity to engage, in a practical way, with those 'elusive' phenomena.

For example, there is now a body of literature on 'mindfulness', something defined as 'the capacity to notice without judging, and with equanimity'.[7] Such terms appear

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seasons greetings

On behalf of all of us at ***ADR Bulletin*** and Bond University Dispute Resolution Centre, we would like to wish you a joyous festive season and a happy, safe and prosperous New Year 2010!

occasionally in the literature of mediation, but there seems to be a reluctance to speculate on possible linkages to the quality of mediation practice.

The continuing use of terms such as 'mindfulness' or 'presence' seems to represent, in part, a rethinking of the nature of conflict. Conflict is being understood increasingly as contagious. Marshall writes of mediators referring to,

> feelings of antagonism between the parties being 'contagious', so that when someone is being stubborn and belligerent, I find it very hard because I want to behave belligerently. That will trigger something in me.[8]

Linking to this understanding is the notion of 'residual conflict'.[9]

The assumption is that no one has completely resolved all the past conflict in their life, some of which, according to Groff, may reach back to the birthing process.[10] So for every mediator there will always be 'sticky conflict residues'[11] to which elements of the conflict manifesting itself in the interactions of the disputants may adhere. This may generate a degree of stress within the mediator, especially if he or she has been witnessing what Bryson describes as 'wrenching, incompatible tensions'[12] in these interactions.

The conventional strategies for dealing with any distressing after-effects from a mediation session are:

(1) debriefing with a colleague; and

(2) professional supervision with someone outside one's workplace.

Such strategies may be described as *reactive*. The new mediation vocabulary seems to represent, in part, an acknowledgement that there is a need for mediators to have a commitment to *proactive* strategies as well.

Such strategies may be understood as ways of reducing the 'stickiness' of one's 'conflict residues' and thereby becoming decreasingly vulnerable to the exposing of conflict which is part and parcel of mediation practice.

While there needs to be, in the ongoing conversation informing the practice of mediation, adequate time devoted to issues of quality, there also needs to be a commitment, on the part of individual mediators, to draw back regularly from this conversation, to engage in nurturing what Boulle calls 'the soul of the mediator';[13] to engage in what Masterson refers to as 'the search for the real self'.[14] Without this, the conversation focusing on quality may lack a significant degree of vitality and openness.

Proactive strategies or 'inner work'

Proactive strategies will be referred to as 'inner work', a term used by Carl Jung in an interview when he was asked if he thought that people's failure to manage or resolve conflict would lead eventually to the human species destroying itself. Jung replied: 'Not if enough people do their inner work'.[15]

This section does not attempt to explain Jung's interpretation of the term. Inner work just seems more user-friendly (three syllables as compared to six) and useful also in the sense that it seems to emphasise the need for effort to be ongoing as individual mediators seek to reduce the vulnerability of their inner world or psyche to elements of conflict to which they are regularly exposed.

The reduction of such vulnerability may enable the creation of space from which certain competencies emerge; those interventions which could be identified as 'quality' work but which are out of the mediator's mouth before he or she has done any sorting of alternatives or rehearsing of appropriate language.

Two examples of inner work will be outlined:

- First, the Enneagram, which involves a blending of Eastern and Western thinking dating back possibly 2000 years or more.[16]
- The second example is best left unnamed for it involves appreciating an 'otherworld' beyond words and concepts, and draws its inspiration from Wittgenstein's advice: 'Don't think, just look'.[17]

Enneagram

Not a great deal seems to have been known about the Enneagram until the 1980s. One theory to explain this is that it was strictly an oral tradition handed down by word-of-mouth. Some authorities still maintain it is best transmitted orally.[18] However, since the 1980s books have been published, explaining what it is and how to work with it. Perhaps the four central assumptions of the Enneagram are:

1. As individuals, we have some awareness of our various talents and potential but we, unknowingly, routinely undermine or sabotage this potential.

2. Nine patterns or types of such behaviour can be identified; these are called simply Type One, Type Two, Type Three and so on, to Type Nine.

3. Each individual operates according to one such instinctive pattern of emotional self-harming, which may, at times, also constitute a threat to the emotional wellbeing of others.

4. It is possible for individuals to recognise their Type and then begin a process whereby managing their conflict, generated by disturbance of their 'sticky conflict residues', becomes increasingly effective.

A key point regarding this example of inner work is that it is primarily a self-directed process. It is not a case of being diagnosed by some 'expert' as being a particular Type. Until one experiences the 'shock of recognition'[19] of one's Type, little of value will be achieved.

A common criticism is that the Enneagram is simply another typology, like the Myers-Briggs Type Indicator. However recognising one's Type is just the beginning. The inner work then continues with strategies to lessen the undermining or sabotaging of one's potential which is a feature of the behaviour of each Type.

A comment by Riso may be useful:

> The proof of the Enneagram's accuracy lies not so much in empirical validation as in its ability to describe people in a way that deepens their understanding of themselves and others. In the last analysis, either the descriptions of the Types … have 'the ring of truth' or they do not; either the Enneagram makes sense in your own experience or it does not.[20]

'Don't think, just look'

The second example of inner work is suitably introduced by a comment from Ludwig Wittgenstein, one of the twentieth century's leading philosophers.

> Sometimes, in doing philosophy, one just wants to utter an inarticulate sound. But that does not stop someone writing a thesis on whatever sound one makes'.[21]
>
> Of central importance to his later work is the notion of a way of knowing that is safe from language.[22]

It is perhaps a way of knowing that Les Murray is referring to in the following poem.

> Everything except language
> knows the meaning of existence.
> Trees, rivers, planets, time
> know nothing else. They express it
> moment by moment as the universe.
>
> Even this fool of a body
> lives it in part, and would
> have full dignity within it
> but for the ignorant freedom
> of my talking mind.[23]

Murray seems to be suggesting that 'my talking mind' is not as smart as it thinks it is; that it is largely ignorant of the freedom of an 'otherworld'[24] beyond words and concepts.

The second example of inner work is largely about experiencing the freedom of this otherworld. Variations of Wittgenstein's advice quoted earlier — don't think, just look — could be useful in beginning this work:

> don't think, just listen
> don't think, just touch (and be touched)
> don't think, just taste
> don't think, just breathe
> just, stretch, just walk, just dance
> and so on.

This example of inner work is not about monitoring what is going on. It is primarily about experiencing the emotion of intense satisfaction from a way of knowing that is safe from a language of explanation. It is primarily a DIY process in order to lessen what could be called the learned helplessness of our species, the 'symbolic species',[25] when seeking to engage in experiences without language or other symbols.

Inner work and mediation

Inner work, such as the two examples outlined, may enable the mediator:

- to model a presence that is conducive to conflict resolution;
- to be less vulnerable to the disputants' 'contagious' conflict;
- to be less distracted by the 'complexity' of the substantive issues.

Conclusion

The quality of mediation practice depends partly on a commitment to compliance issues so that, among other things, there are consequences for mediators failing to demonstrate an appropriate standard of practice.

What is also required is a commitment to innovation and fresh ideas and to the ongoing evaluation and measurement of the quality of the practice of individual mediators.

In addition, quality may be enhanced by ongoing inner work carried out by mediators, primarily as a DIY process. Such inner work may enable a mediator to engage effectively with what are called 'elusive' phenomena of mediation practice and demonstrate competencies that are probably not able to be developed through conventional training programs. ●

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Endnotes

1. Sourdin T 'From accreditation to quality practice — next steps?' (2009) 11(1) ADR 6–11.
2. Tillet G *Submissions in response to Who Says You're a Mediator?* NADRAC, 2004 p 101.
3. Marshall P 'Political and social/emotional competencies of mediator practice and professional development' (2009) 10(8) ADR 153–160.
4. Schön D*Educating the Reflective Practitioner* Jossey-Bass, San Francisco 1987 p 13.
5. Above note 4 p 13.
6. Fisher T 'Who's minding the mediator? Mindfulness in mediation' (2009) 5(10) ADR 166–171.
7. Above note 6 p 167.
8. Above note 3 p 155.
9. Sofield L and Juliano C *Collaboration* Ave Maria Press, Notre Dame, IN 2000 p 133.
10. Groff S cited in Tarnas R *The Passion of the Western Mind* Pimlico, London 1996 pp 425–428.
11. Keashly L and Nowell B 'Conflict, conflict resolution and bullying' in Einarsen S, Hoel H, Zapf D and Cooper C (eds) *Bullying and Emotional Abuse in the Workplace* Taylor and Francis, London 2003 p 348.
12. Boulle L 'The personal and the political in ADR: Interview with David Bryson' (2004) 6(10) ADR 190.
13. Boulle L above note 12 p 191.
14. Masterson J *The Search for the Real Self* The Free Press, New York 1988.
15. Johnson R *Owning Your Own Shadow* Harper, San Francisco 1991 p 113.
16. Riso R and Hudson R *Personality Types* Houghton Mifflin, Boston, 1996 pp 11–26.
17. Wittgenstein L cited in Rohr R *Simplicity* Crossroads, New York 1991 p 89.
18. Palmer H *The Enneagram* Harper, San Francisco 1988 p l4.
19. Above note 16 p 25.
20. Above note 16 p 25.
21. Wittgenstein L cited in Lash S(ed) *Post-Structuralist and Post-Modernist Sociology* Edward Elgar, Aldershot 1991 p 234.
22. Monk R *Ludwig Wittgenstein: the Duty of Genius* Vintage, London 1990 p 536.
23. Murray L *Learning Human: Selected poems of Les Murray* Duffy and Snellgrove, Sydney 2003 p 199.
24. Murray L *The People's Otherworld* Angus and Roberson, London 1983.
25. Deacon T *The Symbolic Species* Norton, New York 1997.

ADR RECENT DEVELOPMENTS

The Resolve to Resolve

The Federal Attorney-General has launched the NADRAC report *The Resolve to Resolve — Embracing ADR to improve Access to Justice in the Federal Jurisdiction* (September 2009). The report can be downloaded from the NADRAC website at <www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~NADRAC+The+Resolve+to+Resolve+Report_web.PDF/$file/NADRAC+The+Resolve+to+Resolve+Report_web.PDF>, or by going to the 'Publications' page and following the links to 2009 reports.

The Attorney-General's speech from the launch can be accessed at: <www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_FourthQuarter_4November2009 LaunchoftheNationalAlternativeDisputeResolutionAdvisoryCouncil(NADRAC)-ReportonAlternativeDisputeResolutionintheCivilJusticeSystem>.