

Seven Keys to Unlock Mediation's Golden Age

A work by 40 authors around the world



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Seven Keys to Unlock Mediation's Golden Age

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Editorial Note:

Mediate.com has published a series of peer reviewed articles under the collective title [*Seven Keys to Unlock Mediation's Golden Age*](#). The objective of the *Seven Keys* is to encourage discussion among all stakeholders on navigating mediation's best future. Here is the [Table of Contents](#). For social media, please use: #7KeysMediate.

The seven keys are: Leadership, Data, Education, Profession, Technology, Government and Usage. Each key has between two and four articles, each no more than 1,111 words in length, contributed by some 40 leading authors around the world.

Below, **Professors Nadja Alexander and Lela P. Love introduce the series with “Imagine.”**

The *Seven Keys* articles portray a variety of images and understandings of mediation. All recognize mediation's extraordinary versatility. Some focus on resolving disputes; some on deal making; some on managing interpersonal disputes in families, communities, schools and the workplace with more of a relational focus; others are about peace-making between groups and nations and public policy decision-making. Some of these articles apply to all sectors of mediation practice while others focus on particular fields with a view to inspiring new adaptations and approaches in other areas. Each key is a jigsaw piece. Connected together, they form a vibrant, exciting vision of how the field can dramatically improve and prosper.

The 40 women and men from the mediation sphere around the world who have contributed to this work reflect many different backgrounds, experiences and cultures. We owe our gratitude to each contributor for succinctly sharing their proposals for how mediation can achieve its Golden Age. Each article has been peer reviewed by other contributors. We are also grateful to the extraordinary thought leaders who prepared the *Introduction* and *Conclusion* for their strong encouragement, deep perception and clear vision.

We pay tribute to all the contributors for agreeing that this work may be freely republished, either as individual articles or as a complete book, under the terms of the Creative Commons License below. As Seneca said over 2,000 years ago: the best ideas are common property.

Mediate.com is convening the field's stakeholders to figure out collaboratively how to grow mediation over the next decade. See: [Mediation 20/20: Navigating Mediation's Best Future](#) to be held September 30-October 2, 2020.

[Seven Keys to Unlock Mediation's Golden Age - The Introduction](#)

[Nadja Alexander, Lela Love](#)

Imagine

by **Nadja Alexander and Lela P. Love**

*“In order to change an existing imagined order,
we must first believe in an alternative imagined order”*

Yuval Noah Harari Sapiens
A Brief History of Humankind (Ch. 6)

This work is not about best practice. It is about **next** practice.

Imagine corporate, political and community leaders empowering others with their mediative style and collaborative stance.

Imagine governments embracing mediation principles to frame their approach to domestic and international problem-solving and dealing making.

Imagine mediation being a necessary step before any form of civil litigation and arbitration — worldwide.

Imagine mediation being a cross-disciplinary, core education component at kindergartens, schools, universities and professional bodies, and mediating being perceived as a widely respected independent profession.

Imagine mediating with an earpiece that translates not what parties are saying but what they are actually feeling.

Imagine being stuck in a negotiation and with the click of a button being able to get practical and evidence-based information about how to get yourself out of deadlock.

Imagine epistemological worlds of dispute resolution, deal making, peacemaking, international relations, brain science and psychology deepening their capacities by engaging with one another on a scientific basis, rather than self-isolating or colliding.

Imagine adequate funding for and acceptance of collaboration as an approach to human problem solving.

[Interview with Nadja Alexander and Lela Love](#)

All these imaginings and more are contained in the pages that follow – a collection of over 20 eclectic yet compellingly succinct and coherent essays, carefully curated to offer us Seven Keys to Unlock Mediation’s Golden Age.

Currently mediation finds itself in a fragmented age. Diverse disciplines make a claim to mediation; they include business, psychology, counselling, management, human resources, social sciences, political science and law, among others. As with all disciplines, they have their own theories, systems, literature, models, jargon, processes and practices and many mediation scholars remain within their own academic silos, resulting in a fragmentation of the field. More than that, the way mediation is practised draws boundaries around specific areas of practice, for example, family, commercial, investor-state, environmental, and peace mediation. Co-option of mediation into the legal or court space also ultimately leads to fragmentation, and to debates about what mediation is and isn’t and who can call themselves a mediator and who can’t. Fragmentation diminishes the value and power of mediation. It confuses users and inhibits cross-disciplinary collaboration and innovation. In an age of fragmentation, this work offers a path for integration and growth. Seven Keys to Unlock Mediation’s Golden Age introduces new innovation into mediation by seeking to develop understandings of the field that connect people, professions and perspectives. It pulls together disparate fragments from diverse mediation worlds and shapes them in new and holistic ways. In Seven Keys, the value of the whole is greater than the sum of its parts as it maps out a future not just for mediation but also for humanity.

Enjoy this work which comes to us thanks to the collaboration of some 40 leading voices from around the world. It can be read from cover to cover or by dipping in and out of its vast yet compact contents. Seven Keys is optimistic, grounded and most timely.

In the words of Irish poet and philosopher, John O’ Donohue, “Our trust in the future has lost its innocence. We know now that anything can happen from one minute to the next. Politics, religion, economics, and the institutions of family and community all have become abruptly unsure.” The 2020 Coronavirus pandemic reveals what huge challenges lie around each corner calling for our imagination and world-wide collaboration.

The worlds of mediation, peace-making, coaching and empathetic listening have an opportunity to offer leadership to navigate these uncharted waters. If ever there was a moment in time when the multi-disciplinary talents of mediation professionals and the needs of the world meet, it is now. What we do - or don’t do - now, matters. Imagine how you will use these keys to unlock the potential of mediation.

1st Key-Leadership: Establish Strong, Collaborative, Mediative Leadership

Kenneth Cloke, Joan Goldsmith, Rosemary Howell, Alan Limbury, Valeri Primo-Lack

Leadership is a skill. It is not inborn, dependent on money, power, or titles. It is something everyone does at multiple points throughout their lives, whether they consider themselves leaders or not. We all have led someone somewhere, sometime, and can do it again - consciously, collaboratively, and effectively. Some skills, behaviours, and traits can be directed or mandated by others. But others cannot be mandated and must be led, demonstrated, facilitated, encouraged, supported, mediated, mentored, or coached(1).

When, in about 500 BC, Cleisthenes moved the Athenians toward a collaborative form of self-government, *everyone* was invited to participate in leadership as well as “followership.” The numerous democracies that developed around the world thrived on diversity, requiring leaders who bring diverse ideas, talents, perspectives, cultures, values, and constituencies that together formed an integrated, dynamic, collaborative whole. Leaders stood *with*, not over, above, or against, those who *choose* to follow.

Interview with Rosemary Howell and Alan Limbury

There are three distinctive leadership styles(2):

- *Autocratic*: hierarchical, controlling, competitive leaders who take responsibility and make decisions for others;
- *Anarchic*: bureaucratic, detached leaders who administer but abdicate responsibility and let others take the blame; and
- *Democratic*: collaborative leaders who inspire, encourage, empower, facilitate, critique, support and share responsibility and are there to serve. Given that it aligns interests, we can refer to it as “*mediative leadership*.”

The reality or prospect of intense competition can result in autocratic or anarchic leadership styles. As we look to what the next decade may hold for mediation, the field has an opportunity to come together and very visibly practice mediative leadership.

Mediators are natural leaders. Leaders are natural mediators

Unlike other forms of leadership, mediative leadership is exercised not only at the “top”, but at the “bottom” and throughout. Like mediation, it seeks to balance power and challenges the very *existence* of “top” and “bottom”. It gives everyone the ability to become a collaborative leader, sharing the responsibility to pursue a joint mission in the common interest. Mediative

leaders inspire collaboration, stimulate synergistic connections, support honest interactions, build trusting relationships, and encourage self-management, diversity and integration across boundaries. They connect people through problem-solving, dialogue, and collaboration, so they can intelligently co-create solutions. They synthesize diverse approaches, theories, orientations, and discoveries; spark innovation, and create synergies that strengthen consensus and inspire collaboration.

Mediative leadership requires leaders who can listen, empower others, generate trust, build relationships, and negotiate collaboratively (including with competitors). They are *ubiquitous* leaders, who can prevent and resolve conflicts, lead, follow, and build consensus. By the nature of what they do, leadership comes naturally to mediators. The field of mediation requires visibly concerted leadership that can inspire and orchestrate the co-development of the profession globally.

Mediative leadership competencies

Warren Bennis' book co-written with Joan, *Learning to Lead*(3), identifies five primary competencies of leadership. Joan and Ken have added a sixth (#6):

1. *Mastering the Context*: Understanding the big picture.
2. *Knowing Ourselves*: Understanding our limits and skills.
3. *Creating Visions and Communicating Meaningfully*: Having an inspiring vision.
4. *Empowering Others through Empathy, Integrity and Constancy*: Building trust.
5. *Realizing Intentions through Action*: Turning visions into practical solutions.
6. *Preventing and Resolving Conflicts through Collaboration*: Preventing adversarial conflicts through skill and capacity building, using mediation.

[Interview with Ken Cloke](#)

The global dispute resolution field is ripe for mediative leadership

The mediation field has always been fragmented internationally. It requires conscious effort, and some structure, to lead collaboratively and implement strategic plans capable of driving widespread systemic change in a concerted manner. If the main players make that conscious effort to come together and demonstrate mediative leadership, leverage their collective experience and the benefits of technology, they will be able to generate a common agenda that seeks beneficial results for all stakeholders. Ways to do so could include the following:

1. *Learn from differences and build cross-regionally*

The Global Pound Conference Series 2016-17 (GPC) generated important new data showing regional variations. For example, the latest GPC series North America Report(4) reveals significant differences within the USA and with Canada. If such differences are observed within this region, it is fair to assume that there are even greater ones internationally. Can the mediation

community step back to consider how mediation can be practiced more pluralistically and holistically, in a party-centric manner? Can different communities more systematically share and learn from one-another, across regions?

1. ***Educate and train mediation as a core skill for all professions***

Many universities are often reluctant to provide vocational skills as opposed to academic learning. Teaming up with professional bodies can make it possible to promote the principles and practice of amicable conflict resolution as a core component of any degree. Business and law school curricula could both teach how to diagnose disputes, their tendency to escalate, interest-based negotiation, and when to bring in mediators. Students would be able to demonstrate skills in mediative leadership and how to facilitate negotiations and handle disputes. Professions that are regularly involved in disputes, such as law, project management, accounting and psychology, could make a comprehensive understanding of mediation a requirement for admission to practice.

1. ***Promote dialogue and connect all stakeholders***

It is necessary to promote dialogue between all stakeholders to identify ways of supporting the uptake of mediation in the future in a concerted manner, aligning interests. If all stakeholders work together to collaborate in developing compelling, consistent messages to disputants, such as how to use mediation to prevent conflicts from escalating and prevent positional approaches from becoming stuck, the market will grow and everyone, mediators and disputants alike, will benefit.

1. ***Energetically develop all six leadership competencies as one mediation community***

The world's leading mediation institutions and their members could meet regularly to discuss the six competencies identified above. This could begin with a global conversation, convened by a neutral, non-services-providing organization, supported by service providers and professional bodies. Together they could focus on crafting a shared vision for the global development of mediation by 2030.

Who can do this?

Mediative leadership requires sharing power. If all stakeholders become owners, and not merely renters of the field's future, mediation will become more widespread.

Who will design, build, own, and sustain these leadership skills and unlock mediation's Golden Age? *We will, together.*

[Interview with Joan Goldsmith](#)

ENDNOTES

[1] Examples of such skills, behaviors and traits associated with leadership that cannot be mandated are captured by the following words: Trust, Love, Caring, Dedication, Creativity, Self-management, Curiosity, Honesty, Insight, Courage, Synergy, Empathy, Integrity, Compassion, Consensus, Understanding, Craftsmanship, Wisdom, Values, Passion, Perseverance, Forgiveness, Initiative, Unity, Flow, Trustworthiness, Collaboration, Follow-through.

[2] For more on this see: *The End of Management and the Rise of Organizational Democracy* by Kenneth Cloke and Joan Goldsmith (Jossey-Bass 2002)

[3] *Learning to Lead: a Workbook on Becoming a Leader* by Warren Bennis & Joan Goldsmith (Basic Books/Perseus, 2010)

[4] The GPC Series was organized by the International Mediation Institute (IMI). While it was not focused on mediation particularly, but all forms of dispute resolution, it provided insights into how mediation varies from country to country. For more information about the GPC Series, click [here](#). For the North American Report referred to and a summary of the differences encountered, click [here](#).

VIDEO

1st Key-Leadership: The Youth Shall Lead Us

[Aloysius Goh](#), [Sean Lim](#), [Samantha Lek](#), [Megan Tay](#)

Develop a Generation of Peacemakers through Peer Mediation Programs

Many peer mediation programmes (PMPs) set out to teach youth conflict management. Yet, having offered one such PMP annually since 2010, we have found that we have learnt as much, if not more, from them.

Humbling as it may be for adults to admit, the sages who can unlock the Golden Age of mediation may actually be the youth.

What is “Peer Mediation”?

“Peer Mediation” describes the process in which a young person facilitates the communication between two or more peers who are in a dispute and leads them to an amicable solution.

Relevance of Peer Mediation

Thanks to technology, youth wield phenomenal influence over each other. If you were born in the last century, it can be hard to imagine life as a young person today where you are constantly able to befriend others and become victims of hate speech and fake news. Cloaked as online personalities, hate and frustration can be vented with little fear of the consequences. It is also not unusual for comments to be “liked” and “shared” within minutes by thousands around the globe. In this world, which is by design separate from that of previous generations, conflicts regularly arise and spiral quickly out of control. The youth often find themselves in situations where simple apologies no longer suffice to resolve the original conflict. Prompt conflict de-escalation by friends makes a difference. This is why many schools have introduced PMPs.

Mediation and Leadership in Schools

School-based PMPs go beyond conflict management education.

The [Peacemakers Conference](#) is one such PMP. Framed as a leadership bootcamp where youth learn key skills like exercising self-control, resilience to negativity, and responsibility for their community, the Conference is in substance a mediation workshop-cum-friendly competition held over 3 days. Led by international mediation professionals and undergraduate students, Peacemakers has trained more than 850 Southeast Asian youth in mediation and has drawn the support of the International Mediation Institute, the Asian Mediation Association and the Singapore Ministry of Law.

Evidence of Peacemaker’s success comes most from the appreciation notes the organisation receives from the Conference alumni. One teacher shared how a Peacemaker graduate prevented a fight between his classmates and not only averted suspension for them but fostered a strong

class spirit. Another student confided that she convinced her quarrelling parents to seek professional mediation assistance and saved the family from breaking up.

Indeed, PMPs make the greatest impact for youth from challenging backgrounds. With a richly textured emotional vocabulary, their demonstrations of empathy often bear an authenticity that moves the observer. Their transformation during the Conference from misunderstood delinquent to creative problem-solver proves that leaders and mediators can be nurtured.

When the youth are taught to ask “why” and not just “what happened”, they learn to look beyond angry accusations. Instead of seeking to attribute fault, they learn to suspend judgment, be attentive to the context, and consider the emotions of others. With a new appreciation of the purpose of communication, they guide their friends to exercise self-control, reflect on deeper motivations, and create innovative ways to solve the problem.

PMPs compel the youth to acknowledge that while conflict may be inevitable, violence is not. When someone disagrees with them, it need not be because their comment was wrong or foolish, but because the person did not understand fully. Learning that “there is no failure, only feedback”, they become resilient to criticism and conscious that naysayers often seek to conceal their own inadequacies by pointing out the splinter in the other’s eye.

On a social justice level, the youth discover that resolving conflict amicably is something all of us can and should do. They gain confidence to resolve their own conflicts through communication. They see that the power to resolve conflicts lies in their hands and take ownership of the peace and well-being of others within their community.

[Interview with Aloysius Goh, Sean Lim, Samantha Lek and Megan Tay](#)

Recommendations

Although there are many PMPs in educational institutions worldwide, the majority of schools have yet to devise and introduce one. One way to improve the situation is for existing PMP providers to share tools for “training trainers” and materials that will inspire and enable teachers to draw on local and international experience. For those interested in running a PMP, three suggestions from Peacemakers’ organisers are:

Institutional Support and Educator Role-Modelling

Unsurprisingly, PMPs which made the greatest impact were fronted by staff invested in promoting the use of mediation in school. By reducing reliance on authoritarian forms of rule-enforcement-based problem solving, peer mediation represents a paradigm shift in the teacher-student dynamic. Teachers must trust in the students’ ability to lead the resolution of their conflicts. As mediating can be psychologically stressful, peer mediators should know of available mentoring support. This can be trained school staff or professional mediator volunteers

who help triage the conflicts appropriate for peer mediation and determine which should be escalated for administrative intervention.

Relevance

Role plays which mirror the youth's experiences and struggles will help them better appreciate the relevance of peer mediation. Rather than lectures abbreviated by anecdotes, the right pedagogical mindset is practice abbreviated by lectures. The youth generally love a good challenge and have a lifegiving ability to laugh at themselves. However, many also struggle with adolescence and may feel awkward when searching for the correct intervention. With a blend of humour and gravitas, the practices will provide the youth with the self-confidence and competency to be leaders and peacemakers.

Keep Things Simple

An effective PMP keeps things simple and focused. One of Peacemakers' greatest challenges has been to include all the well-intentioned advice from stakeholders into a limited time frame. Schools are busy places and sustaining the youth's interest can feel impossible. While encouraging the young peacemakers to be ambitious, a PMP is most effective when it focuses on the small steps to de-escalate and resolve conflicts. One tool that can help peer mediators beyond the workshop is a behavioural guide printed on a wallet-size card. An example of a Peacemaker Code reads:

- Don't be a mere spectator to fights
 - Listen actively
 - Suggest constructive solutions
 - Acknowledge others' emotions
 - Take a breath before reacting
 - Don't pass on fake news/rumours
 - Be responsible for your community
 - Communicate empathy.

Conclusion

The following lyrics sum up our thoughts succinctly:

“I believe the children are our future
Teach them well and let them lead the way”

Let us raise a generation who will serve as agents of peace, and truly bring about the Golden Age of peace we mediators hope for.

1st Key-Leadership: Adopt The Edinburgh Declaration John Sturrock

Back in May 2018, I had the privilege to host and chair a really uplifting and wonderfully diverse conference in my home city, Edinburgh, Scotland, under the auspices of the International Academy of Mediators (IAM) .

Around 100 mediators from over 20 countries attended and shared deep discussions about how we as mediators can look outward and work towards a “new enlightenment” in the tradition of the great Scottish Enlightenment of the 18th and early 19th centuries which made Edinburgh, for a time, the “Athens of the North” and led to leadership in economics, philosophy and physics by such as Adam Smith, David Hume and James Clerk Maxwell. Literature and architecture thrived through Robert Burns, Sir Walter Scott and James Playfair and such Scottish inventions as the telephone, the bicycle, television, penicillin, the refrigerator, among many others, played a part in the modernisation of the world. At the conference we learned about Adam Smith’s lesser known work (after The Wealth of Nations) entitled The Theory of Moral Sentiments in which he spoke of the importance of finding common ground and “the pleasure of mutual sympathy”.

Interview with Tim Hicks and John Sturrock

We were inspired by such writing and aspiration. At the conclusion of that conference, in a ceremony in the Scottish Parliament building following superb addresses emphasising the value of principled and interest-based negotiation delivered by world-renowned negotiation expert William Ury (who also signed the Declaration) and Scotland’s First Minister, Nicola Sturgeon, almost 100 mediators signed a Declaration setting out what we believe in and commit to.

No such document is ever perfect and there were a few reservations about some of the expressions used. But, overall, the Declaration received emphatic support at the conference. Here is what we subscribed to on Saturday 12 May 2018:

We believe that it is in the interests of our world as a whole and our own communities in particular that difficult issues are discussed with civility and dignity.

We believe that it is very important to find common ground and shared interests whenever possible and to enable and encourage people to work out difficult issues constructively and cooperatively.

We believe that finding common ground and shared interests requires meaningful and serious dialogue which requires significant commitment from all concerned.

We believe that understanding underlying values and addressing fundamental needs is usually necessary to generate long-term sustainable outcomes.

We believe that restoring decision-making and autonomy wherever possible to the people who are most affected in difficult situations lies at the heart of good problem-solving.

We believe that mediators have a unique role to play in helping to promote the principles we have set out above.

We believe that it is a privilege to act as mediators in a wide range of difficult situations in our countries, communities and the world as a whole.

We are committed to offering our services to help those in difficult situations in our countries and communities, and in the world as a whole, to deal with and resolve these for themselves in a constructive and cooperative way.

We are committed to doing all we can to maintain our independence and impartiality in those situations in which we are invited to act as mediators and to build trust in our work as mediators.

We acknowledge and accept that preserving our independence and impartiality in such situations may mean that any outcome reached may not accord with views or wishes we may hold as individuals.

We acknowledge that applying these ideas is a long-term, subtle and complex process which we need to approach with humility and that a range of outcomes is possible in the many different contexts and places in which we work.

We are committed to maintaining and raising professional standards through training, continuing development and sharing of best practice.

We recognise that it is important to exemplify the values that we seek to encourage and, in our work as mediators, we undertake to do our best, and to encourage others to do their best, to:

- *show respect and courtesy towards all those who are engaged in difficult conversations, whatever views they hold;*
- *enable others to express emotion where that may be necessary as part of any difficult conversation;*
- *acknowledge that there are many differing, deeply held and valid points of view;*
- *listen carefully to all points of view and seek fully to understand what concerns and motivates those with differing views;*
- *use language carefully and avoid personal or other remarks which might cause unnecessary offence;*
- *look for common ground whenever possible.*

The **Edinburgh Declaration** was a seminal and inspirational expression of belief and commitment. It explains why we mediate - something that is rarely publicly expressed. As we all focus on the future in what has become an even more uncertain and turbulent world, let us affirm what we believe in and what we commit to. Now is the time for mediation to put its best foot

forward in a world which desperately needs to find new and better ways of approaching conflict and difference.

The **Edinburgh Declaration** is for all of us to make the best of. It is not exclusive to the IAM or any one body. It helps to frame the contribution we mediators can make. It helps us to be better understood and appreciated. I encourage all readers to adopt The Edinburgh Declaration and use and promote it in your own work in whatever field that may be. Among many suggestions made for its use are articles in journals, blogs, advertisements, adoption and endorsement by mediation and other organisations, translation into other languages, and inclusion on websites and in mediation agreements.

The message travels far when we speak collectively in this way. Now is the time.

2nd Key-Data: Bring Objective Science to Mediation

Ava Abramowitz, Kenneth Webb

In 2017, after four years of investigation and detailed review of 47 empirical studies, the American Bar Association Dispute Resolution Section's Task Force report, "*Research on Mediator Techniques*," was released.[3] Its findings were perplexing:

"The Task Force's review of the studies found that none of the categories of mediator actions has clear, uniform effects across the studies—that is, none consistently has negative effects, positive effects, or no effects - on any of the three sets of mediation outcomes." The outcome categories are: "(1) settlement and related outcomes, (2) disputants' perceptions and relationships, and (3) attorneys' perceptions."

Yet, we know mediation works.[4] Cases are being settled. Professors are teaching mediation skills. Courts are certifying people to mediate, and disputants and their lawyers are relying on them - all with an accepted shroud of confidentiality. How long can all this sanctioned activity continue without scientific proof supporting it?

We Can do More

Yes, there are obstacles.[5] All, however, are solvable, and strides are being taken to do just that. New survey instruments are forthcoming.[6] Increased academic studies, often using student - or actor - disputants and real mediators, are trying to gain insights into the *black box* of mediation - its mysterious internal functions that are largely hidden from users,[7] and poorly understood by mediators. But the fact remains, as important as this activity may be, until we directly observe a large enough number of mediations, we will continue to wonder what mediators actually do to help settle disputes. Simply put, nothing can substitute for direct observation of real-life mediations by trained researchers yielding scientifically tested, evidence-based reasons for that reliance.

Fortunately, we already have a variety of methods to give us insight into mediation. We have a range of qualitative methods such as surveys and interviews to improve our understanding, but the use of direct observation methods is fairly rare. For those methods we need to look outside the field of mediation to the research of other disciplines to find new, workable, tested research tools. There we will find a tested scientific method - Behavior Analysis (BA) - that can be used to observe, quantify, and correlate mediation participants' communication behaviors with both forward movement and impasse. With BA's methodology, we can link anonymized data from demographic and perception studies with BA's own anonymized data to identify exactly those techniques that correlate with "yes".[8]

INTERVIEW

Behavior Analysis

Created in the 1970s, BA, through direct observation, has been successfully applied to analyzing a range of interactive skills. While no single research methodology can provide definitive insights into such a complicated activity as mediation, applying BA to it seems a good first step. Mediation is, after all, a form of facilitated negotiation and persuasion, and that is where BA has made its most visible contribution—Negotiation and Persuasion.[\[9\]](#)

What BA does is discover those communication behaviors that correlate with, if not cause, success. Each behavior is closely defined, so there is no overlap with another behavior. Further, each behavior is *objectively* defined, defusing the need to guess speaker intent. The language speaks for itself and is coded accordingly.

How does BA do that? BA breaks down communication into its atoms – the individual behaviors people typically use. An idea is put on the table. People usually agree or disagree. Someone is confused. They either seek information or give information. Such behaviors, once identified, are the atoms of communication that can be used singularly, in combinations, or in sequences to achieve results.

An example: For any group[\[10\]](#) to reach a decision, someone has to *Initiate*—that is, put a proposal on the table; everyone has to share enough information to *Clarify* the proposal so all are talking about the same thing; and the group has to *React*. These three key behaviors can be broken down into smaller behaviors, as long as each behavior can be separately and clearly delineated from all other behaviors. Moreover, each behavior must be unquestionably objective, so a high enough degree of inter-rater reliability can be achieved. This allows hypotheses to be tested by anyone certified to observe, results to be replicable, and evidence-based education and training to be created, delivered, and evaluated for efficacy and impact.

The concept of BA is familiar to mediators. Mediators, like negotiators, are taught that *active listening* is key to conveying empathy; that, when they *Seek Information*, they should then *Test Understanding* and later *Summarize* so the speaker feels heard. This cluster of communication behaviors is taught as the Empathy Loop. Wouldn't it be wonderful if research uncovered other clusters?

Through BA, scholars and skills trainers could test hypotheses and fine-tune mediator training and performance. Here's one hypothesis: Different behaviors are used in caucus than are used in joint session. Moreover, different behaviors are *more effective* in caucus than in joint session. Whatever is discovered, mediators could then learn how to use each milieu strategically, not merely by habit or default.

With research methods such as BA, the mediation profession can finally have objective, quantitative, replicable, science-based insights backing it. We would have a profession-wide meta-language so that Mediator A in Country B could share *Initiating* strategies with Mediator C in Country D, and both would know they are discussing the same phenomenon. Even better, we could correlate communication behaviors with outcomes from forward movement, settlement,

and impasse to discover which behaviors are helpful, when, and where, and which ones are not. We could even link participant perceptions with behaviors and discover which ones induce a higher sense of procedural justice, trust, and neutrality.

And we could do more. We could explore communication behaviors stage by stage from preparation through settlement. We could study nuance and style. Do some negotiators succeed by *Proposing*, *Giving Information*, and *Disagreeing*? Do others succeed by *Building on the Proposals of Another*, *Seeking Information*, and *Supporting*? Are there still other effective style models? Do they differ by economic sector, type of dispute, experience of the parties, by culture, or merely by mediator proclivity?

The Challenge

BA is no magic bullet. Qualitative analysis will invariably be necessary. Best if two differently skilled researchers pair up. Mediation is that complex. Whatever the methodology, it will be difficult to identify behaviors that *cause* outcome. For a while, correlations will have to suffice, but is using research challenges as a reason to maintain “*the black box*” an acceptable option? With big-data analytics teasing insights and order from noisy data, it needn’t be.

It’s time to bring objective science to mediation.

ENDNOTES

1st and 2nd endnotes available below.

[3] The Task Force Report is available [here](#).

[4] Is it that we know or that we believe mediation works? Is settlement attributable more to the mediator or to the disputants’ desire to settle? A study linking participant expectations pre-mediation with participants’ communication behaviors during mediation as well as their post-mediation perceptions might help us answer that question.

[5] These obstacles are among the most daunting:

- We have no standard definition of success for either the mediator or the resolution of the dispute. (But see Ava J. Abramowitz, *Toward a Definition of Success in Mediation*, *American Bar Association, Section on Dispute Resolution*, *Dispute Resolution Magazine*, Volume 24, Number 4, Summer 2018.)
- There are no professionally agreed-upon definitions and metrics that enable comparisons.
- Nearly all research to date has been qualitative with each researcher developing their own methodology and terms. Comparability cannot result.
- Getting access to live mediations is more than difficult. The process is confidential—and people like it that way.
- Mediation is contextual. Are the skills demanded of a family mediator the same as those used by a construction mediator? Unlikely.

- Finally, mediation is messy, and any resulting data, qualitative or quantitative, will be noisy. Correlating input and outcome will be hard, finding causations harder still.

[6] The National Center for State Courts with the assistance of the ABA Section on Dispute Resolution (SDR) is working on “Data Elements for Courts to Collect Regarding ADR,” which will help put the demographics and use of mediation in perspective. Resolution Systems Institute, again with the help of the SDR, has issued “*Model Mediation Surveys: A Guide to Courts*,” which will provide insight into how people feel about the process and its outcomes. And this is just in America. Academics and researchers around the world are working together to discover what mediators and parties can do to make mediation more effective.

[7] The word "users" is intentionally selected to include not only the lawyers and their clients (often referred to as “the parties,”) but also experts, family members, corporate employees, and other attendees who the mediator and the parties feel would aid in resolving the dispute.

[8] “Exactly” probably requires tandem observations by both a qualitative and a quantitative analyst.

[9] See, for example, Neil Rackham, Peter Honey, & Michael J Colbert, *Developing Interactive Skills* (1971), Neil Rackham and John Carlisle, *The Effective Negotiator — Part I: The Behaviour of Successful Negotiators*, 2 J. EUR. INDUS. TRAINING 6, 6-11 (1978), and Neil Rackham, *SPIN Selling* (1st ed. 1988).

[10] A mediation, by definition, involves a group—mediator(s), two or more disputants, usually two or more lawyers, and often an expert or more. If an implementable settlement is to be reached, each participant has a role to play in its development. *Getting to Yes* spells out the most used process. Behavior Analysis details the communication behaviors, the communication atoms, each participant uses and correlates the chosen behaviors with impasse or movement or whatever else the researcher wants to explore.

[2nd Key-Data: Run the Global Pound Conference \(GPC\) Series Every 5-7 Years](#) [Emma-May Litchfield, Danielle Hutchinson](#)

The Global Pound Conference (GPC) Series 2016–17 was an ambitious project involving a series of 28 events held in 22 countries across the globe. Led by the International Mediation Institute (IMI), chaired by a user and supported financially by many outstanding sponsors[3], and chaired by a user (i.e. party), its purpose was to collect actionable data[4] and stimulate conversation on shaping the future of commercial dispute resolution and improving access to justice.

The GPC was attended by 4,000 stakeholders who, with the aid of a dedicated voting app, were invited to express their views on issues at the forefront of dispute resolution. The use of cloud-based technology meant that many trends and patterns emerged in real time, prompting rigorous discussion among the delegates and experts in attendance. In adopting an approach that enabled both instant and longer-term results, the GPC generated data using methods not previously considered[5], in ways not previously possible, and at an unprecedented scale.

As insights and priorities continue to emerge[6] from the data, its unique value becomes increasingly apparent. For example, based on the findings from the GPC, we are now able to identify distinct party profiles. These can be used by lawyers and other practitioners to better understand parties, including what they will need to increase the likelihood of reaching a resolution. The next step is to commit to regular GPCs to enable ongoing data collection to help improve all forms of dispute resolution, including mediation.

[Interview with Emma-May Litchfield and Danielle Hutchinson](#)

Party Led

Stakeholders from across dispute resolution were represented at each event: Parties (disputants/users such as companies, other organizations, business owners, in-house counsel); advisors (lawyers, finance experts); non-adjudicative providers (mediators, facilitators); adjudicative providers (judges, arbitrators); and influencers (scholars, skills trainers, policy makers, government officials, Chambers of Commerce). The commercial parties that attended gave the GPC a vital party-centric approach. In the spirit of promoting ongoing research and conversation, the data is publicly available[7].

The Value of Holding Periodic GPC Series Events

A global perspective: The GPC Series 2016-17 was a global endeavour. As the events were held in 22 countries, it provided global perspectives. It was also global in the sense that it included participation from a variety of stakeholders across the dispute resolution spectrum, thus allowing

mediation to be viewed through a much wider lens. This enabled us to see mediation's impact both as a stand-alone process, and when used with other processes. In facilitating global input, we can compare data locally, regionally and globally across jurisdictions, and therefore learn from each other.[\[8\]](#)

Monitoring progress: By conducting GPC events regularly over an extended period, it becomes possible to monitor and share progress against targets and priorities and ascertain trends. For example, the recent GPC North America Report[\[9\]](#) identified several top priorities:

- Including ADR as a mandatory part of law school curricula and continuing legal education for lawyers and judges, and suggested inclusion in business school curricula[\[10\]](#);
- Increasing diversity of ADR providers/practitioners;
- Developing principles of proportionate discovery to reduce delays, costs and complexity and increase opportunities for early resolution;
- Conducting a systematic review of arbitration - specifically complexity, timeliness, costs and access to justice;
- Developing a strategic plan to manage the growing influence of mediation; and
- Shifting the focus to a party-centric approach to dispute resolution by prioritising the identification of parties' needs, wants and expectations, and then matching these to the dispute resolution processes most likely to achieve parties' desired outcomes. This contrasts with practices that focus on helping parties shoehorn their desired outcomes to fit processes offered by the practitioner/provider or specified by contract.

In collectively identifying this list of priorities for shaping the future of dispute resolution based on clear data, North America is now better-equipped to evaluate the impact of setting such priorities, measuring progress towards these goals, identifying the facilitating and inhibiting factors, and assessing the extent to which such priorities continue to be relevant. It also means the mediation community can take a more informed and strategic approach to promoting mediation within the context of the priorities identified as important for meeting the needs of parties.

Change over time: By adopting a systematic data collection process through repeat GPCs, the global dispute resolution field can identify changing attitudes and the impact of major turning points. For example, one of the themes to emerge from the GPC Series 2016-17 was parties' reluctance to adopt mediation because of concerns about lack of enforceability of mediation settlement agreements. With the advent of the Singapore Convention on Mediation[\[11\]](#), we can monitor the ongoing impact of this international mediation enforcement mechanism on the needs, wants and expectations of parties involved in commercial dispute resolution. We have the unique potential to discover whether the impact is felt equally across jurisdictions or if local enforcement issues remain a major stumbling block. Crucially, such reflections and any subsequent response will not be anecdotal, but evidence based.[\[12\]](#)

In terms of change over time, it may also be that we need to revisit the way that we conceptualise the key players in commercial dispute resolution. In future GPCs, additional stakeholders such as those with a role in helping parties build strong agreements and therefore prevent disputes, could

be included. This may see business managers and other ‘negotiators’ take their own distinct place alongside the existing stakeholders as vital players in the commercial dispute resolution landscape. Exploring these opportunities by gathering data on what stakeholders think and desire on this subject in future GPCs is an exciting prospect.

Multi-modal data collection: Using multiple modes of data collection allowed the GPC Series 2016-17 to satisfy dual needs. Firstly, allowing quantitative data to be available to delegates in real time prompted robust conversation during each event. Secondly, conducting focus groups provided a source of rich qualitative data that could be analysed over time.

Multiple-choice questions enable participants to respond to matters identified as important by the researchers. Focus group questions, however, give participants scope to express their ideas about issues that they, themselves, deem important. Adopting this dual modality allows for checks and balances that ensure the research designers do not inadvertently confine responses to their areas of interest. There is wisdom in continuing to adopt this approach when conducting future GPC events. This is particularly important given the calls for a more objective [\[13\]](#) or evidence-based approach to the search for what really works.

The GPC Series 2016-17 was a huge success. It generated invaluable data.

Let’s do it again.

ENDNOTES

1st and 2nd endnotes are the author bios below.

[\[3\]](#) For a list of Sponsors and other supporters, [click here](#)

[\[4\]](#) The data was supplemented by online voting that incorporated information from people unable to attend a live event.

[\[5\]](#) The need to consider a range of methodologies, some of which may be new to mediation, and prioritize evidence-based practice is discussed in “*Bring Objective Science to Mediation*” by Ava J. Abramowitz & Kenneth E. Webb. For more information on the cross-disciplinary approach to data collection and analysis by the GPC Series, see the GPC North America Report [here](#).

[\[6\]](#) For a list of all reports generated using the GPC data, [click here](#)

[\[7\]](#) For the overall data from the multiple choice questions asked, [click here](#). For a summary report explaining global data trends and regional differences, [click here](#). These documents are on the website of the International Mediation Institute, which initiated the GPC Series and can be found [here](#) and [here](#).

[\[8\]](#) This idea is discussed further in “*Establish strong, collaborative, mediative leadership*” by Kenneth Cloke, Joan Goldsmith, Rosemary Howell and Alan Limbury (compiled by Valeri Primo).

[9] For the GPC North America Report, click [here](#). The GPC North America Report was funded by the AAA-ICDR Foundation.

[10] This idea is discussed further in “*Teach mediation as a core subject aligned to real world needs*” by Barney Jordaan and Deborah Masucci.

[11] For a full review of the Singapore Convention, see: *The Singapore Convention on Mediation: A Commentary* by Nadja Alexander and Shouyu Chong, Wolters Kluwer 2019. See also “*Sign, ratify and implement the Singapore Convention on Mediation*” by George Lim.

[12] The methodology adopted by the GPC has also been used extensively in the development of professional standards. With the advent of the Singapore Mediation Convention, and specifically Articles 5.1(e) and (f) which reference specific standards of mediator practice, it may be useful to consider other contexts within which the GPC methodology may make a contribution within the field of mediation e.g. in “Act to ensure mediation is respected as a true professional practice” by Pierrick Le Goff.

[13] This idea is discussed in “*Bring Objective Science to Mediation*” by Ava J. Abramowitz & Kenneth E. Webb.

[2nd Key-Data: Develop a Negotiation Index](#)

[Michael McIlwrath](#)

Folklore was the class at university that fundamentally altered how I view the world. It was taught by a certain Professor Alan Dundes^[2] who was internationally known – and notorious – for a number of his essays and books about various human traditions. For those in the USA in those years, perhaps the most controversial of his academic work (which also earned him a number of death threats) was a homoerotic interpretation of American football.^[3]

Prof. Dundes introduced his students to different systems for classifying and analyzing human traditions. Among these was the Aarne-Thompson Tale-Type index^[4]. This index, “*catalogues some 2,500 basic plots from which, for countless generations, European and Near Eastern storytellers have built their tales.*”^[5] The index classifies tales according to the elements they contain, and numbers them for reference with the “AT - number” designation. The AT tale types apply to much more than so-called “*folktales.*” For those who grew up in Western culture, they classify every story you have been told, every film you have seen, every theatrical play you have attended (including all of Shakespeare), and even many urban legends.

[Interview with Mike McIlwrath](#)

Negotiation needs an AT Tale Type Index, and so does Mediation

As an in-house litigation counsel for more than 20 years, I have been involved in countless negotiations (and mediations) around the world. We often struggle to find the right strategy to fit a negotiation and are befuddled by negotiations that fizzle or lead nowhere despite clear advantages (that we perceive) to the other party. When we try to stretch beyond the familiar, it feels like reinventing the wheel. I may not have been in this situation before, but certainly others have. I have looked for a negotiation resource similar to the AT Tale Type Index. To date, I have found nothing close.

Without such an “*index*” of data capturing all the different things that occur in negotiation, mediators are handicapped when they try to apply their theories. They lack the reference points other than their own experiences in assisting parties. We all learn on the job, but we also learn much from others.

An index of how people actually negotiated, and what they believe works and what does not, is easily something that could be created with the right level of collaboration among practitioners and academics. Such an index should not adopt or have a preference for any particular negotiation theory or style. With Prof. Dundes, for example, one did not have to accept his Freudian psychoanalysis, and I mostly did not, to appreciate his message that all human traditions can be captured as data, and that data can be collected and organized so as to be easily accessible as a reference for those interested in the field. In fact, he enlisted his students in the task of assembling data, requiring each of us to collect, identify, and analyze 40 items of

folklore. Our collective contributions (about 500,000) are today catalogued and archived in the Folklore Archives at UC Berkeley. But Prof. Dundes believed that collecting data was just the foundation of the real endeavor. As he said in one speech, *“the presentation of data, no matter how thorough, is useless without the development and application of theory to that data. It is not enough to simply collect, one must do something with what one has collected.”*

Certainly, the negotiation field is so vast and varied that an index, catalogue, or canon (call it what you will) could be both rich and useful. Like folklore, negotiation is a human tradition generally passed from one negotiator to another. And negotiation techniques vary as much among practitioners as the situations that negotiators face. Without any universally accessible reference of negotiation techniques and situations that classifies empirical evidence that may be more effective in given situations, negotiators tend to adopt techniques drawn from their early training, what they once found to have been effective, or their own personal styles.

Who would benefit?

Mediators and negotiators would be primary beneficiaries of such an index. The mediation field is awash with often contradictory theories on how to best use different negotiation techniques. Yet it is impossible to assess them with reference to available data (where it is available), to add to the data (as with the A-T Index) or compare different techniques and negotiation situations.

With an organized classification of negotiation techniques and situations, parties and mediators could more easily make use of approaches with which they lack familiarity or comfort, but that may be more effective for their situation. Both mediators and parties could more confidently navigate the mediation process. And it could also spur the negotiation field to develop and test new techniques.

How would a negotiation index work, and what would it include?

Like any good reference, a negotiation index would need to be organic so it could grow over time. It would be able to add new links to available literature or authoritative commentary as it became available, information on whether there is consensus on certain techniques, or minority views inconsistent with current consensus but not necessarily wrong or ineffective.

For example, suppose a party is reluctant to make an opening offer, but has been encouraged by a mediator to do so anyway. The index could have a section devoted to opening offers, with multiple subsections, such as making the first offer, counter-offers, seeking additional information before making an offer, amounts of opening offers, and concessions following an opening offer. Under each sub-heading would be information about different approaches, a possible consensus opinion, and reference materials.

For parties - like me - who often struggle to get the other side to agree to mediation, this index might also include a section on proposing methods of reaching agreement, with references on timing and characteristics of the parties, and relevant cultural distinctions.

A Negotiation Index would help negotiation and mediation to be regarded as serious professional disciplines. Other professions rely on such reference tools. Medicine, for example, has a vast range of well-documented reference tools for diagnosis and treatment available at the touch of a keyboard.

Making it happen

Creating a Negotiation Index - whether as a hard-copy catalogue, an online wiki, a downloadable app, or whatever form could be most suitable - will require collaboration among negotiation and mediation scholars and other thought leaders, their publishers, researchers, skills trainers, and dispute resolution institutions. Just as Prof. Dundes enlisted his own students to create a catalogue, business and law school students around the world could provide a powerful contribution to an effort co-ordinated internationally by a group of scholars. It would take a little time, but with a collective will, such an exciting project could improve the quality of the work that negotiators and mediators do every single day.

ENDNOTES

[1] is author bio, below.

[2] For more on Professor Dundes, [click here](#).

[3] *Into the Endzone for a Touchdown: A Psychoanalytic Consideration of American Football* (1978).

[4] Since then it has been updated and is now called the *Aarne-Thompson-Utter Tale Type Index*.

[5] Id.

3rd Key - Education: Teach Mediation as a Core Subject Aligned to Real World Needs Barney Jordaan, Deborah Masucci

Mediation is rarely taught as a core subject in business schools, law schools and other professional curricula, despite the fact that an increasing number of jurisdictions now provide for some form of court sponsored mediation. A number of global companies include courses in negotiation and mediation in their professional development offering, but the courses are not always effective in addressing real life situations.

The case for, and benefits of, including negotiation and mediation as core modules in law courses rather than a mere elective has already been made elsewhere (e.g., Riskin 1984; Lewis 2016). Results from the GPC Series 2016-17 for North America published on the International Mediation Institute's website^[3] further confirm that education in law and business schools in these disciplines has become a major demand for users of dispute resolution services throughout North America.

Reciprocal skills

However, a proper understanding of mediation requires not only *knowledge* of mediation (education) but also some actual *experience* as mediator or mediation advocate in real cases. With typically large student numbers, one can probably only expect the former to be offered in the standard curriculum, although many U.S. law schools offer clinical programs where students can practise mediator skills. These programs often collaborate with the courts or community dispute resolution programs.

Yet teaching mediation skills to students before they have a decent understanding of negotiation puts the cart before the horse. A compulsory course in negotiation for law students should be standard in legal training: most of a legal practitioner's or corporate advisor's professional time is spent negotiating. Yet few law schools outside the U.S. seem to provide for it. We believe that mediation should not be offered as a course on "alternative" dispute resolution but incorporated into the broader framework of legal practice, alongside arbitration and adjudication, with equivalent status.

As Riskin (1984) states: "*Law schools should not graduate a mature mediator*". Providing more in-depth knowledge and hands-on experience of mediation needs to be reserved for masters or postgraduate levels. Given factors such as lack of time in the law curriculum, large student numbers, budget constraints and availability of experienced faculty, there is little option but to do so. Such programs must also focus on additional skills such as counselling, process selection, effective preparation skills, cultural dynamics, mediation advocacy, mixed-mode dispute resolution, emotional intelligence and neuroscience.

Interview with Barney Jordaan and Deborah Masucci

Mediation knowledge and skills for non-lawyers

What about business schools? Many already offer negotiation either as an elective or as a core subject in their degree programs, including the MBA. Some include mediation as part of the curriculum, some make a cursory reference to it while others don't cover it at all. Yet business schools are perfectly placed to inform participants in both their degree and executive programs about the benefits of mediation from a business perspective. The results of the GPC Series 2016-17[4] demonstrate quite clearly the size of the attitudinal gap between corporate managers and corporate counsel (the demand side) on the one hand, and their legal advisors on the other, regarding dispute resolution needs and expectations. While, for example, clients rated efficiency of dispute resolution processes as their primary concern, their external lawyers tended to provide advice based on their own training and experience which, by and large, did not include knowledge or experience of mediation.

Business schools can contribute to increasing knowledge of mediation in different ways, beginning by including negotiation as a core competency in their degree programs and including a module on what one might call '*mediation literacy*' in negotiation courses, not least because of the emerging importance of facilitated negotiation.

Business schools can also offer postgraduate diploma-type programs that include as core modules dispute avoidance and management, negotiation and mediation. At one business school, where one of the authors taught for many years, such a program was offered with the mediation component being taught by an external, accredited mediation training agency that provided participants not only with an academic qualification but also accreditation as mediator in the local jurisdiction with an option to also qualify in a particular foreign jurisdiction subject to certain conditions. Models for this type of program can also be found in North American Law Schools that offer certificate programs for dispute resolution.

Business schools are also ideal hubs for bringing together members of the legal and business worlds to discuss mutual interests and concerns regarding the resolution of business-related disputes, particularly in a globalised and fast-changing operating environment. This can include the promotion of Planned Early Dispute Resolution[5] (PEDR); setting up round tables[6] and workshops - involving faculty, legal and dispute resolution practitioners, in-house counsel and senior managers – around themes such as "*Legal Means Business*".

Internal and corporate education

But what happens when the student enters the work force, or an executive program participant gets back to the workplace? Do they have scope for practising and honing their newly acquired negotiation and/or mediation skills set? What about employees who didn't have the opportunity to attend negotiation and mediation courses? Currently the focus of negotiation courses offered by global companies is mostly on sales and procurement negotiations and not dispute management and resolution. Offering access to courses focused on dispute avoidance and management as part of their employees' professional development could bring significant added value to a company, especially if those courses are customised to the organisation's needs and

not merely generic, off-the-shelf products. Courses can be delivered using on-line technology, a more efficient delivery system for global organizations.

Adding value

Negotiation and mediation training can build on one another to impart skills that address real life problems in organisations with potential spin-off benefits beyond the organisation. It can also enable those who have received training to begin applying their skills in their personal lives, their communities and society at large. In 2019, almost 200 CEOs signed a Business Roundtable statement^[7] defining five purposes of business. One of them is “*Investing in our employees. This ... includes supporting them through training and education that help develop new skills for a rapidly changing world...*”. Need we say more?

ENDNOTES

Endnotes 1 and 2, author bios, are listed below.

[3] GPC Series [aggregated results](#)

[4] Please [click here](#).

[5] For a description of PEDR, [click here](#).

[6] See for example, the RTMKM in Germany – [click here](#).

[7] For the full Statement, [click here](#).

References:

Lewis, L. L. (2016) “*Law Student Mediators Wear a Triple Crown: Skilled, Sellable, & Successful*” available [here](#).

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3rd Key-Education: Ensure the Future Through Mentoring and Practice Programs for New Mediators Angela Herberholz, Emma Ewart Keir

Mediation is an ever-evolving field, making the journey for mediators a never-ending learning process. Practising mediators with advanced knowledge, skills and experience need to support the next generations of mediators to ensure a positive and vibrant future of mediation.

The Problem

Each year, people of all ages undergo mediation training in different countries and for different reasons. Most complete the course riding a wave of excitement and enthusiasm, anxious to practice their skills. But there are very few structured career paths or development programs that students can opt into when mediation training ends. It is difficult for newly-trained mediators to step on the first rungs of the mediation ladder.

Consequently, newly-trained mediators often struggle to find opportunities to advance themselves in the field without connections. Many feel intimidated, reluctant, to approach experienced mediators for guidance. When the Young Mediators' Initiative (YMI)[\[3\]](#) surveyed members, 87% confirmed the need for mentoring programs incorporated in mediation training. Just 35% had been fortunate enough to gain any field experience whatsoever. Some practising mediators are members of service providers that offer formal post-training schemes, but these situations are rare.

It is so notoriously difficult for new mediators to gain field experience that Bill Marsh, one of the world's most experienced international mediators has observed: "*Opportunities are slim, and only the most committed will ever stand a chance. You need to be willing to take risks, travel, experiment and not get paid*"[\[4\]](#).

While new mediators are usually aware of this problem and are willing to invest personal resources, it still seems to be very difficult to enter the profession. There are few internships and scholarships, and those that do exist[\[5\]](#) are over-subscribed.

This very often results in the next generation of mediators being unable to practice what they have learned, and talented professionals drift to other fields.

Interview with Angela Herberholz

Addressing the Problem

To ensure a vibrant future for mediation, mentoring schemes are needed. Each program could attract a pool of highly qualified and experienced mediators willing to act pro bono as mentors. Each program could be online, connecting mentors with mentees so that mentors can provide guidance to mentees and help them generate field opportunities. And the programs could be led by a dedicated group of professionals. All mediation provider institutions could establish such a program or subscribe to existing mentoring programs such as the YMI, publish it on their websites and promote it to their online communities. While expert participation in these programs should remain voluntary, mediation providers could strongly and publicly (online and offline) encourage their members to engage actively, either as mentors, or as experience generators, and preferably as both. Where a mediation service provider does not offer such a mentoring program, their panel mediators might challenge them, and take steps to create one, becoming the first mentors.

Empowerment Through Experience Generation

Field experience is vital to develop the successful skill sets mediators need. Mentorships facilitate access to field experience. A mentee can support the mediator at all stages of the mediation process, from preparation, through administering and note taking, to shadowing the mediator and following up. Many mediators who enable inexperienced mediators to accompany them report that “shadows” are genuinely valuable to them in many ways^[6]. While parties need to be asked if they agree to having a “trainee” or “assistant” present during their mediation, mentees must comply with the same rules and confidentiality obligations as the mediator. YMI members adopt the IMI Code of Professional Conduct^[7]. Consistent feedback from mediators supporting the YMI and offering shadowing opportunities to YMI members indicates that when requests were made to parties or their advisers to bring along a YMI member, few objections were recorded.

Guidance

Not all mediators make suitable mentors, but every mediator has what it takes to become one. Mentoring closely resembles mediator skills, such as the ability to listen actively without judgement; to perceive solutions and opportunities; to provide insight and counsel; and empathy, respect, flexibility and patience. Mediators are encouraged to apply their existing skills, networks and time to empower, inspire and guide new mediators whenever they can towards a successful mediation career.

Mentoring can occur in many forms and it is not bound by national borders. There are many newly trained mediators in parts of the world where mediation is not yet used sufficiently to enable them to gain experience. Experienced mediators can make a huge difference and help develop mediation in those countries by connecting with a mentee online. With technologies such as video conferencing, bridging countries and cultures, mentorships can have a cross-cultural dimension, valuable to the experienced mediator mentor as well as their mentee.

Lead The Way!

Ten years ago, the International Mediation Institute established the YMI and a mentorship scheme to develop new mediators. A structured and well-organized online framework allows YMI members to connect with experienced mediators and ultimately gain field experience. Unfortunately, mentee demand quickly outgrew the supply of willing, experienced mentors. This scarcity of mentors remains the core challenge that needs to be addressed.

In order to increase the pool of experienced mediators, YMI teamed up with organizations either already running their own mentorship scheme or eager to develop one. Rather than each organization working independently, a collaborative effort was launched. The Worldwide Mediation Mentoring Program^[8] is currently being developed jointly by the YMI, the International Academy of Mediators (IAM), the Institut Français de Certification des Médiateurs (IFCM), the Instituto de Certificação e Formação de Mediadores Lusofonos (ICFML), and the Singapore International Mediation Institute (SIMI), with the support of the International Centre for ADR of the International Chamber of Commerce (ICC).

Collaborative leadership can ensure global access to New Mediator programs and allow the next generation to emerge, develop and progress^[9].

Mediation trainers can actively support their alumni and offer field experience as part of their programs.

Mentoring schemes can share best practice examples and allow other organizations to learn from them.

Above all, experienced mediators can step forward as mentors and help lead the future development of quality mediation based on experience as well as training.

3rd Key-Education: Include Learning in Psychology & Brain Science to Enhance Mediator Practice

Tim Hicks, John Sturrock

Mediating entails working with people in relationship. And given the nature of relationships, this means verbal and non-verbal communication, the stories people have about their world, what people believe, understand, think, know, what they think they know, and what they think is real and true. Mediators engage with people's thoughts, feelings, understandings, perceptions and conceptions, as well as their attributions and projections, biases and prejudices. They work with issues of power, control and survival, with fear and aggression. Fundamentally, mediators work with people's psychologies and identities, their worldviews and self-views - everything that makes up what it is to be a human being. A tall order!

The need to keep abreast of new learning in human cognition and behavior

The conflict resolution field has sought theoretical understandings of the causes, sources, and types of conflicts in order to develop more effective practice interventions. What leads to conflicts and tends to make some conflicts difficult to resolve? Mediation is necessarily interdisciplinary as it seeks insights from the varied areas of study that shed light on human behavior, from psychology to ethology. The more we can understand how and why people function, the more mediators can help them navigate the challenges of their relationships.

Therefore, as conflict resolution practice continues to develop and mature, keeping abreast of advances in the various disciplines that shed light on human behavior will be critical. Best practice will be informed by broader and deeper familiarity with the expanding knowledge base related to human behavior and experience. The challenge is driven by the constantly expanding nature of human inquiry. There are implications for the design of basic, intermediate, and advanced mediator training programs, and for mediators' continuing education requirements. Within the academic context, what would a complete dispute resolution curriculum look like at the undergraduate, Masters, and Doctoral levels? What key understandings would we include from, to name a few, psychology, decision sciences, rhetoric, political science, economics, anthropology, and, increasingly importantly, from neuroscience?

Neuroscience

Neuroscience, in particular, is becoming increasingly relevant. All of the disciplines we learn from are, and will be, increasingly informed by the developing insights from the science of the brain and extended nervous system. All of the dynamics of communication, perception,

cognition, and identity that mediators manage in conflict resolution are grounded in the workings of the brain. The rapidly emerging fields of neuroscience and behavioural psychology offer: (a) understanding of conflict and conflict resolution behaviors; (b) an understanding of why there is considerable resistance to mediation's use around the world; and (c) the opportunity to expand what mediators do in order to enhance mediation's productive use.

Brain science and dispute resolution

We are learning more about the underlying drivers of human conduct that lead people under pressure to adopt an adversarial or binary approach to problem-solving. The exponential growth in recent years in our knowledge of the working of the human brain gives us much to work with. The reptilian brain, with its adrenalin-driven, protective flight, fight, or freeze response designed to protect us from physical threat, is still active today when we perceive social and psychological risks.

Within the process of mediation, cognitive biases abound, whether confirming party preconceptions, reactively devaluing others' contributions in negotiations, attributing ill will to others' conduct, promoting over optimism in lawyers' analyses (and at the same time, paradoxically, encouraging risk aversion at certain times) or causing parties to fall for the fallacy of sunk costs - and so on. However irrational it may seem from an objective viewpoint, these can lead us to the binary, right/wrong, yes/no thinking which of course is characteristic of the litigation process and adversarial relations generally.

The characteristics of brain function can also help us understand why mediation is sometimes feared or resisted by those seeking the resolution of a conflict, whether in the justice system or in other contexts. To what extent are the expectations of mediation (for example, listening to, acknowledging, and legitimizing the other party's experience, shifting one's understanding of the situation, moving away from positional bargaining, etc.) perceived as threats to identity? Does the language used by mediation evangelists deter those with standing in the conventional system from adapting to or adopting mediation?

There are characteristics of basic neural function that can disincline parties from assuming responsibility for outcomes and participating in collaborative problem-solving. Being able to blame another for the problem (or its solution, if imposed) can feel easier and safer. As an obvious example, the balance between adherence to prior learning and openness to new understandings (the neural stability/plasticity balance) is skewed towards the former in the conditions of threat and uncertainty that are characteristic of conflict, inclining parties to resist considering new ways of seeing the conflict and their erstwhile adversary.

Including brain science in mediator training and practice

The more effectively mediators understand and are able to use the growing knowledge of how we think, perceive, and experience, the more likely it is that even the most seemingly intractable conflicts can be assisted by mediation. In our own practices as mediators, we have found that by making explicit reference to some of the insights from neuroscience in context and with appropriate language and relevant examples, parties are able to absorb the learning that arises

and turn that learning into practical use in the course of negotiations, often achieving remarkable results.

Looking to the future, it is difficult to imagine that mediation and other collaborative approaches to resolving differences and bridging divides will maximize their effectiveness without understanding and incorporating the evolving knowledge of the fundamental roots of human behavior and understanding of brain function. Yet in practice, and in our training and education, interdisciplinary insights have tended to be only marginal.

Collaborative problem-solving in the face of differences and disagreements will more likely become more society's norm if this field or practice we call conflict resolution expands its scope to incorporate more actively, intentionally, and thoroughly into the education and training of mediators the scientific understandings of human behavior and psychology. Our premise is that greater understanding will lead to more effective practice and innovation.

[VIDEO]

3rd Key-Education: Train Mediators to be Culture-wise, not Culture-blind

Joanna Kalowski

Perplexed by the slow uptake of mediation in many places, is it time to wonder whether the mediation field has taken sufficient account of the centrality of culture? Do we typically train and promote a Western, one-size-fits-all mediation model? Should we educate ourselves to be more culture-wise and flexible? And if we did, would that increase the uptake of mediation around the world?

In Shakespeare's *The Merchant of Venice*, Shylock says:

*If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die?*²

This plea for our underlying humanity is striking; but the ways human societies react to the same behaviour can be very different and one key factor is culture, as the Covid-19 pandemic has revealed.

In more collectivist cultures, the lockdown was promoted and, for the most part, tolerated as being for the common good. In more individualist societies, that rhetoric was often less evident, and when social distancing was mandated or recommended, more individuals protested their loss of autonomy and civil rights. Social distancing was taken for granted as desirable and possible in certain countries; in other places, alternative measures had to be found because remaining distant from others was culturally unrealistic. The cultural fissures between what was workable and what was not were exposed for all to see.

Mediation as a cultural phenomenon

Although mediation has its roots in Confucian philosophy, modern mediation is essentially based upon Western values and practices. In embracing mediation as an ideal tool for the resolution of disputes of all kinds, it is entirely possible that modern mediators, usually drawn from the ranks of the educated, privileged and socially advantaged, have found it challenging to adapt the very models they use.

In his book *We Must Talk Because We Can*³, David W. Plant warned: "*We have to start by defining the process as part of the problem*". When it comes to resolving disputes, not only between cultures, but also within them, we have not succeeded in applying that wisdom. The reasons are not difficult to locate.

We have not sufficiently scrutinised models of mediation; we have not rigorously subjected them to a cultural critique; we have not questioned whether they were designed to suit the societies in which they originated but less applicable in others.

Instead, we have simply assumed that mediation is culture-blind and has universal application. The field has hardly stopped to wonder if, indeed, it may not be so. In our enthusiastic embrace of mediation, have we failed to seek and listen to feedback from users?

Participants in a Hong Kong construction mediation workshop once greeted the idea of mediator neutrality or impartiality with derision. However well the mediators behaved, they said, the very fact that they were largely from the same social group as developers, would render them partial or biased in the eyes of injured workers. So, class raises its head, along with culture and, as other authors have notably asserted⁴, gender.

How can mediators overcome such unspoken perceptions? How should they behave? *What should they do differently?*

It is precisely these questions that were addressed by the IMI criteria for accreditation as an intercultural mediator⁵. Designed to ensure mediators working across cultures have the requisite knowledge, skills, sensitivities and approaches, the criteria are offered as a basis for the development of cross- and inter-cultural mediator training programs. It is worth noting that the criteria do not recommend any particular mediation model, and still less so, that one model is more cross- or inter-culturally viable. That is left to the value judgement in the country in which the training is offered, and it is implicit in the criteria that those models may vary widely. The question for mediation service providers and for mediators active in different cultures is *do our models differ, and have cultural factors been taken into account in their design and implementation?*

VIDEO

Removing mediation's cultural blindfold

There are now two live issues squarely before mediators and providers if mediation is to achieve all it can in the decade ahead:

1. whether the models of mediation are a good fit with the cultures in which they are deployed; and
2. whether the behaviours of mediators are well adapted to the cultural setting and parties' expectations.

We are fond of saying that cultural and legal norms differ, so a third issue is:

1. what are we doing to take account of those differences?

To promote mediation and their training programs, many organisations have imported prominent mediator-trainers from other countries. Has this had the unintended effect of spreading the notion that this is the best/correct/ideal model and approach, the one that will make a trainee a successful mediator?

In imposing Western mediation models and, for instance, certain notions of how best to demonstrate neutrality and impartiality, how and when to intervene, what communication techniques to use and why, whether to caucus or not, the very acceptance of mediation may have unwittingly been hampered. Most mediators have met parties who have emerged from a mediation in which they nominally settled but who vow they will never mediate again. Mediators can be quick to dismiss their responses with the typical Western summation: "*They got a deal, didn't they?*"

When asked why they are not satisfied, parties often point to practices and processes they felt were at best inappropriate, at worst offensive. If we are serious about the promotion of mediation, there will be a need to collect such responses regularly and analyse them in the light of culture.

If, for instance, resolving a dispute is as much about rebuilding or sustaining relationships as getting a deal, then the way the deal is done can matter as much as the outcome. The journey can be as important as the destination. The relationship between process and outcome is worth studying in the decade ahead and may well reveal previously unanticipated sources of success and satisfaction.

From the standpoint of the mediator's own culture, "*they got a deal*" means things are fine. Unless mediators seek and take account of feedback, they may never know that they unwittingly jeopardised relationships between parties by encouraging open discussion of issues which, in a given cultural setting, was unwise to broach.

Are mediators culture-blind, or are the processes we use? Or both? To ensure mediation gains traction worldwide, we have to stop implicitly dictating that certain models are the Holy Grail and accept that in, as well as between, different cultures, mediation will look, feel and need to be practised differently.

Above all, mediators need to be trained how to mediate flexibly, sensitively and in ways that are culture-wise.

ENDNOTES

(Author bio is below)

2 William Shakespeare, *The Merchant of Venice*, Act III, Sc I

3 David W. Plant: *We must talk because we can*, 2008

4 cf Alicia Kuin: *Actively Support UN Resolution 1325 on Women, Peace and Security*

5 <https://www.imimediation.org/wp-content/uploads/2018/04/imi-intercultural-criteria-and-cfa-final-draft-modified-.pdf>

4th Key-Professionalism: Act to Ensure Mediation is Respected as a True Professional Practice

Pierrick Le Gof

The new decade started well for mediation. In its Report entitled *The Year Ahead: Developments in Global Litigation and Arbitration in 2020*, Baker McKenzie ranked the increased use of mediation #3 of the ten big themes set to emerge in 2020, taking the view that “*mediation is gaining traction around the world*”[2]. This follows a year 2019 that was already flamboyant in the history of mediation with the signature of the Singapore Convention on Mediation[3] and numerous events at national level. An important one in France, for example, was the release of a special report on mediation by the *Club des Juristes*, one of the most influential legal think tanks in Europe[4].

These developments are obviously positive, but mediating is still generally viewed as an activity rather than a profession. Mediation is not a stand-alone field of study at university level and mediation practitioners come from diverse professional backgrounds. The fact that mediation is open to persons with a large variety of skills (psychology, sociology, commercial, legal, etc.) should offer a tremendous competitive advantage, yet this rich patchwork of expertise may represent a challenge in professional harmonization. Additionally, numerous mediators rely more on the expertise gained over the span of their career in other fields of practice to assert their credentials in mediation, than on a dedicated and formalized mediation professional path. It appears therefore that further continuous improvement initiatives are needed to ensure that mediating is widely respected as a true professional practice in its own right.

Mediation training and education

Among these initiatives, the development and recognition of mediation as a stand-alone curriculum at universities is critical. The creation over the years of dedicated Masters’ degrees in international arbitration around the world at renowned law schools, backed-up by prestigious arbitration competitions, represents scientific and doctrinal strength that can only boost the visibility of arbitration as a professional practice. It would be welcome to see a similar global proliferation of academic programs in the mediation field, whether at Bachelor or Master level. Since mediating is not exclusively a legal field, the expansion of these programs can be conceived not only at law schools but at any other relevant faculty, thereby potentially multiplying the academic opportunities. As to competitions, we can only commend the existing initiatives towards organizing mediation advocacy competitions, such as the ICC Mediation Competition, the IBA-VIAC Mediation and Negotiation Competition and the mediation competition of the Singapore International Mediation Institute. More such mediation competitions are emerging and these events are important because they build a professional community of mediators and advisers skilled at representing clients in mediation.

Demonstrating high mediator practice standards

Beyond training, the work towards universally accepted and recognized certification standards must continue. This means that certification methods and requirements must be sufficiently rigorous to ensure a minimum consistency in professional skills at national and international levels. At the same time, certification processes need to consider the different steps in a mediation career, differentiating between the certification of highly experienced mediators and those who are at an earlier phase in their career while having nevertheless gathered the relevant knowledge. This is a key mission of the International Mediation Institute[5] (IMI). By driving transparency and standards into mediation practice, including the certification of mediation training programs, IMI promotes harmonized rules of accreditation for mediators. This is vital to achieve uniform and universally accepted mediation standards and recognition of mediation as a free-standing profession.

[Interview with Pierrick Le Goff](#)

Mediator codes of professional conduct

Another important evolution to establish mediating as a true professional practice is the inculcation of robust codes of professional ethics for mediators. This is essential because any profession wishing to gain recognition and respect must have a robust code of good conduct in place. In the context of the Singapore Convention on Mediation, this is fundamental, since article 5.1 (e) provides that a competent authority can refuse the enforcement of a settlement arising from mediation if: “*There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement*”. Article 5.1 (f) adds another similar ground for refusing enforcement if there are “*justifiable doubts as to the mediator’s impartiality or independence*”. The identification and knowledge of these applicable standards, as well as the definitions of “impartiality” and “independence”, will therefore become more relevant than ever. The IMI Code of Professional Conduct is useful guidance in this respect[6], as is the European Code of Conduct for Mediators[7], in order to establish standards of independence and impartiality for mediators. Provisions dealing with mediation in the codes of conduct of other professions can also help. For example, the report on mediation of the *Club des Juristes* mentioned earlier recommends the need to amend the rules of the legal profession to make it compulsory for attorneys, as a matter of sound deontology, to inform their clients on mediation.

Disciplinary processes

Finally, comprehensive codes of professional ethics for mediators have another critical value: they set the groundwork for disciplinary processes. This will require the highest focus if we are to establish mediating as a truly recognized professional practice. Codes of good conduct have limited value if their implementation is not monitored and enforced. This is not easy, since disciplinary processes require fairness and consistency to be credible and well accepted[8]. In addition, there will be a need to determine whether these processes should be best handled

through some form of national or international regulatory body, or be tied to the certification process and managed directly by certification institutions. It is therefore another area of mediation where international harmonization will be needed.

Capitalizing on progress

Substantial conceptual progress has been made over the years to establish mediation as a credible, efficient, alternative to litigation and arbitration. Most recently, the Covid-19 pandemic has brought severe disruption and triggered new challenges for mediation. It has forced the mediators' community to increase use of digitalization and online mediation tools. The traditional flexibility of mediation and its distance from traditional dispute resolution should facilitate this inevitable evolution.

If we are collectively able to establish mediating as a true profession, perceived as such by disputants and advisers worldwide, we will pave the way to an unprecedented phase in mediation's development. This requires strong, collaborative leadership by the field's most prominent service providers, skills trainers and dispute resolution practitioners worldwide, supported by the active engagement of academic and professional institutions, leading law firms and litigation funders, corporate and other users and Governments.

The international infrastructure is in place. All the mediation field needs now is to harness its exceptional skills, drive and dedication to achieve this vital goal.

ENDNOTES

Author bio below

[2] See: "[The Year Ahead: Development in Global Litigation and Arbitration in 2020](#)", Baker McKenzie, 7 January 2020.

[3] [United Nations Convention on International Settlement Agreements Resulting from Mediation](#), signed in Singapore on 7 August 2019.

[4] "[Médiation et Entreprise](#)", Report of the Club des Juristes, 11 March 2019.

[5] <https://www.imimmediation.org/>

[6] For the IMI Code of Professional Conduct, [click here](#).

[7] For the European Code of Conduct for Mediators, [click here](#).

[8] The IMI has a detailed disciplinary process that can serve as a guide or, in the case of IMI Certified Mediators, can be activated directly. To access the process, [click here](#).

[4th Key-Professionalism: Modernize the Culture Driving Legal Practice](#) [John Brand](#)

Much has been done to encourage parties to prefer negotiation over litigation and arbitration. However, change has been slow in most countries. We need to step back and consider how progress can be accelerated[1].

Mediators teach us ‘*to go slow to go fast*’[2] and ‘*to analyse the problem before jumping to solutions*’. In our enthusiasm to promote consensual outcomes, are we trying to go too quickly, too soon? It may benefit us to reconsider the issues, then seek creative solutions. We need to explore why many parties hesitate to negotiate, preferring (and risking) the adversarial route.

Why has change been disappointing?

Most disputes are resolved consensually without lawyers. Even when lawyers are involved, most are resolved amicably, (though often at a late stage after most costs have been incurred)[3]. The few that do not achieve an agreed outcome are harder to resolve, and default to a Court or Tribunal decision. Interest-based negotiation and mediation in these tougher situations are only widely practised in relatively few places.

The reasons seem cultural. We have traditionally preferred power, war, strikes, boycotts, threats and intimidation to resolve conflict. The self-perceived *strongest* party seeks to win. This translates to the rights-based approach inherent in litigation and arbitration. Only when the risk of not succeeding surfaces do parties consider a consensual process. Even then, they can struggle to abandon adversarial and positional instincts. As psychologist Abraham Maslow observed, *it is tempting, if your only tool is a hammer, to treat every problem as if it were a nail*.

We all find conflict challenging. We often do not appreciate that we can achieve outcomes through negotiation that are less risky, faster and less costly than litigation.[4] Even when we privately know this, we may lack the knowledge, skills and experience to get to a negotiation or mediation table.

We may have underestimated how deeply ingrained our conflict resolution culture is, or how much needs to be done and how long it will take to change. While “push” initiatives like court-related mediation, case management systems and process steps to encourage mediation all make a significant difference, and have contributed to a growth in mediation, we must also address the underlying causes. That means addressing cultural change in legal practice.

[Interview with John Brand](#)

Cultural change in legal practice

Lawyers and Judges are primary gatekeepers to the use of court-related mediation. Yet one of the most important conclusions from the data harvested from the approximately 4,000 voting delegates around the world during the Global Pound Conference Series 2016-17 was:

All stakeholder groups identify Advisors (predominately private practice lawyers) as the primary obstacle to change in commercial dispute resolution practice. The lawyers showed the self-awareness to also identify themselves as the group most resistant to change[\[5\]](#).

Judges were also identified as an obstacle to change. It is a cultural issue. Many lawyers and Judges are so accustomed to tried and true adversarial processes that a rights-based solution appears to them the only option. Of course, not all cases can be resolved consensually - for example when legal or constitutional precedents need to be established or a rights-based outcome is preferred by a weaker party against a stronger one unwilling to negotiate. But a better appreciation of the merits of consensual outcomes over adjudicated ones should be systematically inculcated into legal and judicial training.

With training, Judges may better appreciate that early negotiation and mediation can reduce their case load, giving them more time for cases that must be litigated and directing limited Court resources to cases that provide fair and faster justice to the weak and powerless.

The situation with lawyers is different. Clients, typically, defer to their lawyers. The word “client” derives from the Latin noun “cliens”, meaning “dependent”. Dependency is a power. Most lawyers would admit to having an ethical duty to use this power responsibly, regardless of whether that duty is enshrined in their professional code. Responsible professional behaviour includes recommending to clients alternatives to litigation, such as negotiation and mediation, whenever appropriate. It should not be necessary for civil procedure rules to apply a big stick, such as adverse cost awards, to prevent abuse of this power. Advanced training in modern negotiation theory and practice would help lawyers perceive how best to help their clients achieve quicker, more valuable outcomes.

Lawyers would also benefit from the knowledge and skills to represent clients in negotiation and mediation. Apart from advising parties on whether and when to mediate, there are fees to be earned in drafting and negotiating agreements to mediate, helping parties to prepare for mediation, representing them in mediation, drafting and negotiating settlement agreements and becoming mediators themselves. This requires a different kind of training. It also requires a different attitude, namely that the reputation of a lawyer fundamentally depends on achieving what clients need, resolving cases early, saving costs and managing risk. The resulting enhanced reputation will generate more clients, repeat business and greater professional prosperity.

With mediation training for Judges and lawyers, dispute resolution practice will morph from gladiatorial towards problem solving. This will open the market for reducing clients’ risks and costs by negotiating and mediating. There are also financial advantages for lawyers to a quicker turnover of cases and outcome-based fee arrangements[\[6\]](#).

Other professionals and business managers will also benefit from similar training to understand the potential cost savings in early interest-based dispute resolution and to insist their lawyers achieve early outcomes. Parties will benefit from learning about the underlying causes of conflict and finding creative solutions through negotiation. This should start in the home and at pre-school, and throughout primary and secondary education. Changing conflict culture should be a

central part of every school's life skills curriculum, encouraged by parents, teachers and peer mediator 'fuss busters'.

Cultural change

To realise the cultural change, we must improve the way society addresses dispute resolution. The legal professions and their educators need to adopt a new, comprehensive, multi-faceted approach. Recognising that there is more to lawyering than technical legal knowledge and advocacy skills is now essential. Clients want cost-efficient outcomes, not lengthy process. There is a growing client perception that litigation and arbitration are not only tedious and expensive, but also risky. Successful lawyers in the modern world are those that attract clients not only because they are excellent lawyers, but in particular because they can reduce risk, save cost and can deliver faster results through negotiation and mediation. This requires new legal cultures, skills and attitudes.

The client perception of dispute resolution lawyers is not positive, as the Global Pound Conference data indicated, and lawyers themselves are acutely aware of this. It is time to change, and to grow and prosper with that change.

ENDNOTES

Endnote 1 author bio is below

[2] As expressed by Professor Thomas J. Stipanowich, Director of the Straus Institute for Dispute Resolution at Pepperdine University: "...*the mounting global hubbub surrounding mediation, and highly varied perceptions regarding the nature and value of mediation, underscore the need for thoughtful conversation and deliberate reflection on present trends and tendencies. The failure to periodically step back and take stock of where we are and where we are going increases the likelihood of behavioural "drift" – that is, action that becomes increasingly reflexive as opposed to deliberate.*" See Stipanowich "*The International Evolution of Mediation: A call for dialogue and deliberation*" Kluwer Arbitration Blog, June 2, 2016.

[3] See Roger Fisher and William Ury "*Getting Past No: Negotiating with difficult people*" (1992)

[4] There are many statistics supporting this. For examples, click [here](#), [here](#), [here](#) and [here](#)

[5] For a recent high profile example of where parties can reach negotiated or mediated outcomes that are of more value to both than the best that they could achieve in a litigated outcome, [click here](#).

[6] Global Pound Conference Series: Global Data Trends and Regional Differences page 15, available [here](#).

[7] See Julie MacFarlane "*The New Lawyer: How settlement is transforming the practice of law*" (2008).

4th Key-Professionalism: Encourage Mediation and Arbitration Integration

Mark Appel, Wolf von Klumberg

There are few givens in dispute resolution, but here are some:

1. The preferred result in any dispute is a negotiated settlement.
2. A skilled mediator between disputing parties adds real value to settlement talks.
3. Nothing energises dispute negotiation like a deadline - such as a firm hearing date.
4. Mediation and arbitration can work perfectly as an integrated dispute resolution process.

Dismantling Silos

A common disputant refrain is: *“don’t talk to me about process, talk to me about solutions”*. When Wolf was counsel at Northrop Grumman, its ADR Policy required finding expeditious, cost effective means of resolving disputes. As he explained it at the time: *“We knew that maintaining control over the outcome was preferable to asking an adjudicator to make a determination. Through experience we learned that mediated settlements were virtually always better than uncertain awards and helped maintain relationships and eased enforcement. Yet, we also recognised in our Policy that arbitration was sometimes the unavoidable means of dispute resolution and that a stepped approach blending mediation with arbitration was needed.”* In contrast, during Mark’s time at the American Arbitration Association, he recalls a Construction Industry executive self-identifying, perhaps only half in jest, as *“a victim”* at a meeting of arbitration industry professionals.

Many dispute resolution professionals, particularly those who have been around for many years, persist in seeing the arbitration and mediation processes as mutually exclusive. The challenge is therefore, how best to bring about an appreciation for the integrated use of mediation and arbitration, whether sequenced, concurrent or otherwise as best fits the circumstances of the case.

Integration Imperative One - Informed Users

Progressive users have put in place written ADR Policies that clearly reflect best dispute resolution practice. Doing so helps to ensure that all employees understand what is to be negotiated into agreements, but also what the pathways are to finding a resolution once a dispute arises. The outcome for these organisations is more predictable, cost efficient and satisfactory outcomes than for those that simply leave their disputes to the lawyers and risk confinement in the silo. Predictably it is those progressive organisations that have been at the forefront of pushing private dispute resolution to be more efficient, more user and solution focused. More efforts of that sort by the user constituency are necessary to bring about much needed change in

rules and attitudes, particularly of the legal profession, to enable mediation and arbitration each to be better together. Supply follows demand. If users insist on contract clauses and policies that enable the flexible use of arbitration and mediation, service providers will step up to meet the challenge.

[Interview with Mark Appel and Wolf von Kumberg](#)

Integration Imperative Two - Institutional Leadership

In our legal training we learned that rules of procedure, not unlike legislation, reflect societal norms and expectations. Certainly, this has been the case with procedural rules for arbitration and litigation. But sometimes institutions need to lead, not just follow. Like the slow-moving policy makers challenged in the bestselling book “*Nudge*”, arbitration and ADR Institutions need to adapt their procedural rules so that disputants are encouraged to do things to help themselves. Like talk to each other or, better yet, agree to engage the services of a mediator. Too often, dispute resolution provider organisations perpetuate arbitration and mediation silos, encouraging a choice of one or the other. Better that those same organisations’ rules and practices create seamless access to an arbitrator or mediator as necessary and appropriate during the dispute resolution process. In a few institutions’ rules you will now find incarnations of duality, such as the ability to attempt med/arb/med, or at least to permit mediation and arbitration to run simultaneously. There is also an increasing awareness in some common law jurisdictions that parties who give their express consent to engage in a med/arb/med process, should be permitted to do so (Ontario, Canada is one such jurisdiction).

Integration Imperative Three – Dispute Resolvers

It is particularly unfortunate that most arbitrators and mediators themselves are not leading the charge for effective integration of arbitration and mediation processes. At the very least, efforts should be made in the training provided to both groups that provide them with the basic knowledge of each other’s process and how it functions. Fortunately, some neutrals are looking at dispute resolution holistically and taking a “*guided choice*” mixed mode approach^[3]. This requires them to understand that the objective of every dispute is to find an outcome with the greatest cost/benefit to the parties. They may propose dispute avoidance mechanisms, such as dispute boards, dispute management processes such as structured negotiation or mediation and, finally, adjudication, arbitration or litigation. Each dispute is approached on a “*horses for courses*” basis, utilising appropriate dispute resolvers as necessary for an effective outcome.

Integration Imperative Four – The Justice System

In many countries, it has been the Civil Justice system and the Judiciary that have led the way in changing legal cultures and breaking down established norms, to bring a holistic approach to the resolution of disputes, with a court trial as the final forum, if required. We have already seen the steps being taken in Ontario. England & Wales as well have been at the forefront in reforming

the judicial system to recognise a mixed mode approach, where, following the Civil Justice Report in November 2018, a Judicial ADR Liaison Committee was formed. Wolf is a member of that Committee and it is intended to provide a dedicated forum for the discussion and exchange of information about the role of ADR in providing access to justice and more effective means of resolving disputes. This can lead to more effective implementation of mixed mode dispute resolution. Leading arbitration and ADR provider institutions could take a similar approach.

Investor State Dispute Settlement (ISDS)

Both mediation and traditional arbitration have an important role in ISDS. Mediation allows investors and States to resolve their disputes in a consensual manner. Mediation's advantages include speed, cost, retaining control over the outcome and preserving relationships and also allowing States and investors to create solutions which address both economic and political realities. Crucially, Foreign Direct Investment is key to the economies of many States, and a stable investment environment requires effective and timely dispute resolution. A policy of combining mediation with arbitration will enhance the achievement of investment goals for both investors and States.

The Yin and Yang of Dispute Resolution

So much is being done already to break down the barriers and silos hindering the use of ADR in more effective ways. Much can, however, be done to build on this and to make mixed mode attitudes, expertise and methodology universal.

Integration is the future.

ENDNOTES

Endnotes 1 and 2, author bios, are below.

[3] See, for example: Thomas J. Stipanowich and Véronique Fraser article in the Fordham Law Journal (2017) on the International Task Force on Mixed Mode Dispute Resolution: *Exploring the interplay between mediation, evaluation and arbitration in commercial cases*. To access, [click here](#). For information on the Mixed Mode Task Force of the IMI, [click here](#). For an overview of Guided Choice by Paul M. Lurie, click [here](#).

4th Key-Professionalism: Create a Universal Code of Disclosure

Ana Gonçalves, Francois Bogacz, Daniel Rainey

Universal mediation standards have been a controversial issue ever since the rise of mediation as a dispute resolution process. There are several apparent reasons, perhaps chief among them the extreme diversity of mediation applications and approaches across the world. Regardless of the reasons for avoiding the establishment of universal mediation standards, there is an achievable goal toward which all stakeholders in the mediation ecosystem could work: a Code of Disclosure that would frame the multitude of mediation modes in a way that is understandable to parties. Such a Code could be the first step towards the eventual adoption of a uniform, global Code of Professional Conduct for mediators.

Roots of Uncertainty

Mediation practice varies greatly on the basis of nationality, legal setting, culture, and mediator preference. Parties considering mediation for the first time reasonably may feel uncertain about what to expect, depending on the situation and on the mediator[4].

Many States[5] and professional organizations have established mediation “standards” and model rules, but none is universally accepted with respect to the mediator’s conduct and the practice of mediation generally. The standards of practice that do exist approach the issue of practice from a general perspective: e.g., mediators are told to honor party “*self-determination*,” but rarely is there a definition-in-practice that tells one how to do so, and that easily leads to variance in how self-determination is perceived and implemented.

Like self-determination, objectivity, fairness and justice are all concepts commonly found in the codes of conduct and rules of practice. While commonly found, not only do they differ in detail, they can also be interpreted radically differently, depending on applicable cultural and legal norms.

In an attempt to introduce a degree of clarity, assurance, harmony and public respect to professional mediation globally, the International Mediation Institute[6] (IMI), a non-service-providing charitable body, published the 2008 IMI Code of Professional Conduct[7]. This was compiled by IMI’s Independent Standards Commission drawing upon the 2002 recommendations of the CPR-Georgetown Commission on Ethics and Standards in ADR[8] and on other codes and standards of dispute resolution bodies around the world[9]. The IMI Code is backed up by the IMI Professional Conduct Assessment Process[10] that enables anyone with a complaint about the conduct of a mediator practicing under the IMI Code to have their complaint independently assessed. However, the IMI Code and complaint process applies only to IMI Certified Mediators and however popular it may be, it cannot be considered universally applicable.

Given these potential issues, the question we raise is whether there is a way to create a substitute for a uniform Code of Conduct, something that would bring more certainty to parties about the

process and approaches used by the mediator, and at the same time strengthen the platform for enforceability of cross-border mediation settlement agreements, created under the Singapore Convention on Mediation[11].

[Interview with Jeremy Lack, Ana Goncalves, Daniel Rainey, and Francois Bogacz](#)

A Universal Code of Disclosure

A Code of Disclosure is a simple, powerful concept. It would provide that a mediator must first establish a set of principles to explain how he or she will conduct mediation. The framework of the disclosure statement would be uniform, regardless of the subject matter of the dispute and wherever and however the mediation will take place. Although the Code would have a uniform list of principles for disclosure, the mediator's declared conduct could vary greatly underneath each principle, and it would do so with the knowledge and approval of the parties. In addition to any declaration of adherence to a specific State or professional code of conduct or model rules, the principles may include elements such as independence, neutrality, impartiality, confidentiality, envisaged mediation process steps, the mediation style to be adopted, the mediator's role, any conflicts of interest, the applicable complaint process and the mediator's qualifications.

Taking the 'Mediation Process' principle as an example, the Code of Disclosure would not require that the mediator use a specific process but would require that the mediator explain to the parties the process s/he proposes to use and to secure the parties' approval. This broad 'process' principle could be broken down into topics such as 'pre-mediation', 'Mediation', 'post-mediation'. The Qualifications topic, for example, might require the mediator to disclose if s/he is credentialed by a dispute resolution institution(s), and if so which.

Creating a Code of Disclosure is achievable within a reasonable time frame. Compared to a uniform Code of Professional Conduct for mediation, creation of a flexible and adaptable Code of Disclosure would only require discussing and agreeing on the broad principles for what a mediator needs to disclose in advance to the parties[12].

Making it happen

The creation of the Code of Disclosure could be initiated by convening an *ad hoc* international working group of respected stakeholders in the dispute resolution field. The working group could be co-chaired by users of dispute resolution services and moderated by several leading mediation scholars. All deliberations could be conducted in an online forum that anyone interested could observe, with a draft Code of Disclosure offered for public comment. The development process would involve consulting existing codes of professional conduct and studies on ethics in negotiation and mediation and would involve consultation with mediation-related institutions across all subject areas. The working group would then publish a recommendation for adoption by service providers and mediators on an open, online register that could be endorsed by

governments, NGOs and professional bodies. Once widely adopted, the Code of Disclosure could be formally incorporated into national and international norms.

The creation of a Code of Disclosure would bring many benefits to mediation and its stakeholders. It would:

- Support and guarantee parties' self-determination, which is today as close to being a universally accepted principle in the mediation field globally as currently exists;
- Build confidence in the profession's trustworthiness by showing the emergence of a uniform practice;
- Provide greater transparency and certainty to parties on how their cases will be handled;
- Provide a framework for clarifying to all stakeholders for what mediators can be held accountable;
- Codify what must be disclosed by the mediator to parties and counsel as an integral part of the mediation agreement at the beginning of each mediation;
- Allow mediators and parties to continue benefiting from what is one of the most important hallmarks of mediation: flexibility. The Code would not impose behavior on the mediator, but would impose the duty to explain and get party agreement about what is going to be done and how;
- Provide to a judge a set of agreed 'case-specific standards' against which he or she will be able to measure 'serious breaches';
- Provide a platform for a future conversation between professionals about a uniform 'Code of Conduct'.

ENDNOTES

Author bios are listed below.

[4] See for example: M. Schonewille & J. Lack, '*Mediation in the European Union and Abroad: 60 States Divided by a Common Word?*,' in M. Schonewille and F. Schonewille (Eds.), *The Variegated Landscape of Mediation. A Comparative Study of Mediation Regulation and Practices in Europe and the World*, The Hague, Eleven International Publishing, 2014.

[5] See, for example, The United Nations Convention on International Settlement Agreements resulting from mediation. The rules state that: *The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate ...*". Further guidance from the UN rules states that: *The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.*

[6] WWW.IMImediation.org

[7] For the IMI Code of Professional Conduct, click [here](#)

[8] For the CPR-Georgetown Commission, click [here](#)

[9] These included:

Code of Conduct for Mediators of the UIA Forum of Mediation Centres (2003)

European Code of Conduct for Mediators of the European Commission (2004)

Model Standards of Conduct for Mediators (2005) adopted by AAA, ABA and ACR

Ethical Guidelines for Mediators of the Law Council of Australia (2006)

JAMS Mediators Ethical Guidelines

The Guidelines for the appointment of mediator of the Chartered Institute of Arbitrators

Swiss Rules of Commercial Mediation

[10] For the IMI Professional Conduct Assessment Process click [here](#)

[11] The Singapore Convention provides a uniform international framework to enforce mediated agreements of cross-border disputes. Under Article 5, a judicial authority may refuse to enforce a mediated settlement agreement only in specific circumstances, one of which (e) is evidence that there was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement. This question is explored more fully by the authors in their article: *Beyond the Singapore Convention: The Importance of Creating a Code of Disclosure to Make International Commercial Mediation Mainstream*, International Journal of Online Dispute Resolution 2019.

[12] To view charts comparing a Code of Disclosure with a Code of Professional Conduct, please click [\[here\]](#).

5th Key-Technology: Take Advantage of ODR's Full Potential

Jeremy Lack, Ana Gonçalves, Daniel Rainey

Online Dispute Resolution (“ODR”) is now universal, especially since the Coronavirus pandemic began. What was rejected as a mere theoretical concept by many experienced mediators a few weeks ago has now been completely integrated into their own practices. But what we mean by ODR is somewhat fluid. Due to its origins in e-commerce, ODR used to be considered as a total system, hijacking face-to-face mediation and moving everything online. In fact, ODR had crept into mediation practice even before then. Now it is poised to reach its full potential.

ODR Was Already Happening Slowly and Subconsciously

Mediation is an exercise in communication. Information and Communication Technology (ICT) has been incorporated into mediators’ practices to ease communications: phone, e-mails, and more recently, videoconferencing. Some mediators already shared files or folders electronically by e-mail or used a shared online folder. Few mediators today arrive at a mediation to meet the parties or their advisors for the first time. They have usually communicated with them beforehand, at least by phone or e-mail, and to have received electronic documents that can be annotated and read or searched digitally. While there may be generational or cultural preferences that influence the uptake or extent to which ICT may be employed, using everyday electronic applications was not usually thought about as “ODR”, or as a means for conducting a mediation, but as ancillary communication tools. This is all changing.

Interview with Jeremy Lack, Ana Gonçalves, Daniel Rainey, and Francois Bogacz

New ODR Platforms Exist, But Existing Consumer Applications are a First Step

While some organisations are developing bespoke ODR platforms to manage and conduct mediations from start to finish[4], many are focusing on specific types of disputes or addressing certain cultural preferences or mediation styles, which may not appeal to all mediators, parties or their advisors. It is not necessary, however, to adopt any of these platforms to fully practice ODR.

General video conferencing systems already provide huge improvements that enable all mediators to take advantage of ODR. The easiest is to start using consumer applications that are already widely available to the general public and incorporate them fully into mediation practices. There are many to choose from[5]. Most allow information and data sharing behind confidentiality firewalls, where participants can see one-another in real time and chat offline. Simple websites such as www.doodle.com allow disputants and mediators to schedule conference and other calls more effectively across time zones and involve more participants. Most make it possible to take notes and facilitate discussions online, using mind maps to replace

flipcharts. ZOOM is particularly popular, as it allows mediators to caucus online with the parties, as well as take anonymous polls. While this platform has recently raised many questions about its confidentiality, its security has greatly improved, and it is possible to add passwords and limit access through waiting rooms and pre-registrations. KUDOWAY, another online platform, also allows for multilingual videoconferencing by providing different language channels to allow simultaneous interpretation. Using such platforms significantly decreases the costs of travel and allows for effective preparation, and to track progress differently.

Greater Use of Video Conferencing

As the security of online videoconferencing improves across all platforms, we need to think about how to use these platforms better, and different ways in which ODR can ease interaction with participants in preparatory or “pre-caucus” meetings. Seeing people online beforehand, in the comfort of their own office or home surroundings, facilitates greeting them in person at a later stage. Online conferencing allows everyone to gain a first impression of the other participants involved, and to break the ice.

For particularly tense situations, ODR can also defuse the potential challenges of a first face-to-face meeting. Learning together how to use an ODR system allows the parties to enter into the process differently. It can be a transformative process in itself, triggering “in-group” pro-social behaviour or emotions, as people often offer to help one-another (even if they themselves are using the technology for the first-time). Dealing with the novelty of videoconferencing in mediations can help put people (and their counsel) collectively at ease, sharing one-another’s vulnerabilities. These shared learning experiences can generate productive social bonds.

ODR is also useful in other ways: it changes the notion of seating plans, ensures you have the participants’ attention, and can also be used creatively to do joint exercises or ask polls that stimulate collective thinking. It can also help when having to manage multiple participants (up to 100-500 participants with basic versions of ZOOM) and put them into breakout groups for discussion. Some of these systems also include Artificial Intelligence that can help collect or analyse data to help generate zones of possible agreement (ZOPAs).

While no ODR system claims to be better in all respects than physical meetings, technical or connectivity issues can still occur, and some mediators feel they are deprived of the benefits of working face-to-face, ODR can sometimes better address the parties’ procedural needs or alternatives. It can save significant time and money, especially for long-distance disputes, small organizations and private individuals. While in-person meetings may be better, ODR is clearly better than no mediation at all.

The Courts were already beginning to think along these lines before COVID-19. Statistics from a recent ODR program in Franklin County, Ohio (USA) show that 91% of participants in that program would recommend ODR. If given the choice between ODR or going to court, 94% would prefer ODR.[\[6\]](#) This willingness to embrace ODR is being seen in courts and in arbitral tribunals across all continents.[\[7\]](#)

Training

Training on the use of ODR and different commercially available ICT systems are available. There are videos and useful postings on how to prepare for ODR sessions.^[8] It is in the best interests of mediators to learn more about the impact of ODR and to assess how well prepared they are to use it skilfully and to its full extent. Formal ODR trainings, linked to mediation certification programs, are beginning to emerge.^[9] The International Mediation Institute (IMI) is preparing to provide certifications for accredited online mediators.^[10] The Access to Justice Commission in the State of Virginia (USA) is also designing ODR training as part of its Continuing Mediation Education (CME) program.

The Only Constant is the Accelerating Pace of Change

The marketplace is fluid and constantly developing, along with the expectations of disputants, tribunals and other stakeholders. Parties will expect mediators to be familiar with many ODR applications already on the market, and those yet to arrive. Mediators will increasingly need to incorporate them into their daily practices.

The future of mediation significantly depends on mediators' capacity to keep up with, and leverage, relevant ICT technologies. Now and after the Coronavirus pandemic will be over.

ENDNOTES

1,2, and 3: Author bios are below.

^[4] For a comprehensive list generated by the National Center for Technology and Dispute Resolution, [click here](#).

^[5] **Chats:** [WhatsApp](#), [Slack](#), [Google Hangouts](#);

Mindmaps: [Mindmeister](#), [XMind](#); [Lucidchart](#);

Scheduling: [Doodle](#); Calendly;

Web and Video Conferencing: [Zoom](#), [Cisco Webex](#), [GoToMeeting](#), [Google Meet](#), [Signal](#) (which is extra secure), [Skype](#), [Kudoway](#);

Document Sharing: [Dropbox](#), [Google Docs](#), [OwnCloud](#)

^[6] For more, [click here](#).

^[7] For an example, [click here](#).

^[8] For a particularly useful article on preparing for an ODR process, see Manon Schonewille's checklist [here](#).

^[9] Such training or certification entities as Instituto de Certificação de Mediadores Lusófonos (ICFML) in Brazil, Holistic Solutions, Inc. in the USA and Toolkit Company in the Netherlands

are offering new ODR programs for practitioners. For more information, click [here](#) or [here](#). Other organizations, such as [ADR ODR](#) and the [Swiss Chamber of Commercial Mediation](#) are beginning to propose new online training programs for ODR as well.

[10] The interest in ODR training increased so significantly that IMI issued a special statement on “*Clarifications over online training during the pandemic*” see [here](#).

5th Key-Technology: Embrace and Integrate Relevant New Technologies **Francois Bogacz, Jeremy Lack**

Much ink has been spilled on the future of mediation, and how robots may someday take over from humans. However, mediation is not an empirical science that can be reduced to algorithms. It is a social process that requires an understanding of human behaviour, psychology, social and brain sciences, emotions, group heuristics, etc. Mediation is thus likely to remain a process that involves humans for the foreseeable future, and technology is unlikely to completely replace mediators in the next 10 years. Nevertheless, mediators can do a better job of using technology, and understanding what products, algorithms and systems are available. They need to be aware of new technologies, and how they can help improve the profession in the coming decade.

Artificial Intelligence (“AI”) Is Changing the Game

“AI” is the ability of a machine to think and learn on its own, without being encoded with commands.[3] Relevant methods such as natural language processing, reinforcement learning, and deep learning, are evolving at exponential rates and AI is already impacting mediators. Commercial disputes often involve terabytes of information that need to be analysed and processed quickly. Machines are far more effective than humans at triaging and aggregating such information. This is why new “legal tech” products are increasingly used in litigation and arbitration. Some AI applications are already being developed to generate tentative findings of fact and of law, and the respective strengths and weaknesses of disputants’ positions. Mediators can leverage AI to assess the likely merits of the case, help the parties to understand possible Zones of Possible Agreement, prepare analyses of BATNAs/WATNAs[4], and generate discussions on benchmarks if the matter doesn’t settle.

In addition to substantive analysis, there are vast amounts of publicly-available information about most people, including their psychometric profiles, often without their knowledge. AI software such as CRYSTAL[5] claims to be able to analyse personalities and predict the likely behaviours of people in conflict situations or negotiations with greater than 80% accuracy. It uses data published on social media accounts (e.g., LinkedIn, Salesforce, Hubspot or Google mail) to assess individuals and how they may work within a group.[6] It may be only a matter of time before parties or new AI algorithms start using such systems to assess neutrals or assess participants. While this may be viewed as shocking or dangerously manipulative, it can also be viewed as an opportunity for greater self-reflection, to monitor potential biases and systemic “group think”, in the hope of being more mindful and optimizing communications. The use of such AI functionalities is likely to increase as mediators, disputants and their advisors discover their existence and functionalities.

Interview with Jeremy Lack, Ana Gonçalves, Daniel Rainey, and Francois Bogacz

Case Triage

Data generated by the Global Pound Conference series is also being used to develop software that uses a Triage Resourcing Modality Matrix (TRAMM) to pair disputants with the most appropriate dispute resolution process that matches their familiarity and experience with ADR.^[7] TRAMM can also be used to predict what style of mediation may be most appropriate in certain cases, and whether to use co-mediation. This software can distinguish between disputes having a 50% chance of settling using mediation from those having a 90% chance of doing so. It may also be used to design mixed processes, combining evaluative or adjudicative processes with mediation. It may be developed and improved to optimize case diagnostics and process design. They can be especially valuable where disputants have varying experience or cultural approaches to mediation.

New Brain-Machine Interfaces Are Coming

Virtual and augmented reality (AR/VR) also need to be considered. Research is being conducted using virtual agents, including the voice or image of a real person or an avatar, which may be used to assess the conscious and/or unconscious needs of the parties.^[8] Our communication handsets will soon be able to provide us with multilingual simultaneous translations^[9] and AR/VR information that can be used to diagnose disputants' emotions, analyse facial expressions, track body language, monitor voice features and interpret vocabulary.^[10] Is the person nervous, upset, angry, sad? New applications may soon provide disputants, advisors and neutrals with greater information in real time about what participants may be thinking, the likely success of different interventions at different stages, and probable reactions of participants to different techniques. This could be via pop-up windows appearing on videoconferencing screens, or in fully 3-D immersive environments, involving holograms and all of our senses, including tactile feedback or even olfactory stimulation.^[11] This may sound futuristic, but such technologies are not far away.

The Future is Now

Whether we welcome them or not, new technologies are poised to have an enormous impact on the future of mediation. While many are still in their infancy, they can advance quickly, having the capacity to significantly impact how mediators, disputants and advisors prepare for mediations, intervene, communicate, and influence settlements. They can reduce barriers to mediation's uptake, and improve difficulties with costs, travel, deadlines, complex relationships, emotionally-charged situations, or understanding participants' underlying concerns, needs and interests. While they raise serious ethical issues (e.g., whether and how to use them or obtain consent), the challenge is to understand their potential, and to channel them to meet the disputants' needs and help them reach better outcomes. This may also include determining when they should **not** be used or relied upon, and understanding how different mediator styles or preferences may impact their clients.

Turning a blind eye is not an option. Mediators who ignore new technologies are likely to be overtaken by those who don't. They may no longer meet best practices. A new generation is already emerging that is willing to adopt these new tools and technologies, as is being done in other domains. New technologies can improve mediation and inspire its greater use. It is up to

each mediator to decide whether, how or when to use them. This requires learning about them first and keeping an open mind.

ENDNOTES

Author bios 1 and 2 are below.

[3] For more on AI, [click here](#).

[4] BATNA and WATNA are acronyms for “Best Alternative to a Negotiated Agreement” and “Worst Alternative to a Negotiated Agreement”. For more information on these concepts, click [here](#).

[5] For more on Crystal, [click here](#).

[6] For more, [click here](#).

[7] For more on Triage, [click here](#).

[8] See: [Jonathan Gratch](#). For a video example of how this has recently been done to recreate Salvador Dali, [click here](#).

[9] For more, [click here](#).

[10] See iMotions as an example of a complete platform able to process many signals in real time by clicking [here](#) and [here](#).

[11] For example, the smell of freshly-baked cookies or naturally soothing scents may trigger dopamine release or oxytocin, or help reduce cortisol levels. For more, [click here](#).

6th Key-Government: Make Mediation a Prerequisite to Civil Litigation

Manon Schonewille, Constantin-Adi Gavrilă, Leonardo d'Urso,

Buckminster's Law derives from the futurist and inventor, R. Buckminster Fuller,^[4] who dedicated his life to "*making the world work*". His principle:

"You never change things by fighting against the existing reality.

To change something, build a new model that makes the old model obsolete."

Litigation is costly in terms of money, risk, energy, stress and time. Some judicial systems encourage mediation, for example through training, professional obligations on lawyers, and cost sanctions for failure to mediate in good faith. Some work, most do not. Owing to strong process resistance in many jurisdictions, mediation remains a "*less frequently used alternative*^[5]" to litigation. We have not yet succeeded in establishing a properly balanced relationship between mediation and litigation. If this were achieved, mediation would be attempted much more often^[6].

Officials of UNICEF, one of the largest UN agencies, recently publicly announced that mediation should be the natural first step to resolve disputes. However, the reality is that opportunities to mediate are effectively denied to millions of litigants. We need to find *a new model that renders the old one obsolete*.

This is that *new model*:

1. Adopt a "twin-track" public policy^[7]: Access to mediation + competent mediators

This involves integrating mediation into judicial systems by removing barriers to access while simultaneously balancing demand and supply simply and pragmatically:

Stimulate demand by requiring all civil litigation to be preceded by a formal step in which a professional mediator will help litigants to understand and, if they choose, to access mediation. There would be no compulsion to proceed to a mediation. Adapting to jurisdictional needs and circumstances, this step can range from an informational, consultative, regulatory or introductory meeting, to a full first mediation session with an easy opt-out.

and

Build the supply side by taking steps to ensure high-quality mediation services through professional standards, including minimum requirements for training and accreditation of mediators, of lawyers in representing clients^[8], and of judges in referring cases.

[Interview with Leonardo d'Urso and Constantin-Adi Gavrilă](#)

VIDEO

1. Take a step-by-step approach, piloting and monitoring progress and results

Creating the demand can be achieved in stages. There are substantial advantages to be gained by introducing the mediation step for certain types of cases and extending it as and when the supply of a quality-assured mediation infrastructure increases.

A formal right to understand and access mediation sounds obvious, simple and low cost – and it is all those things. Yet, curiously, only very few jurisdictions extend such a systematic procedural right to litigants. In countries where that happens, such as Italy and Turkey, a high percentage of newly-informed litigants opt to try mediation. The number of mediations vastly increases, user satisfaction and settlement rates are high, and the number of lawsuits correspondingly nosedives.^[9] This results in substantial savings to judicial budgets.

Adapting the mediation information step to the individual needs and circumstances of different justice systems is vital. The mediation process step may initially be more suited to certain categories of cases than to others. This allows experience and data to be gathered and analyzed and to involve stakeholders before extending the scheme.

1. Insist professional mediators implement the model

One model does not fit all needs. But there are two common success factors.

First, all litigants, and their legal representatives, are required to meet together, whether physically or using online mediation tools, with the professional mediator and make an informed decision.

And second, regardless of whether the mediation step is merely an information meeting about mediation, or leads seamlessly to a first mediation session, that meeting needs to be led by a professional mediator. Mediation and its implications for a specific case is something parties to a dispute need to fully understand before they are likely to appreciate and accept its value. Only an experienced mediator can effectively demonstrate and communicate that understanding and answer in-depth questions. Experience has shown that where mediation information sessions are conducted by case managers, administrators and others who are not experienced mediators or not acting in a mediation setting, the prospects of parties opting to mediate can be greatly reduced^[10].

1. Ensure adequate public investment

The prospective savings to judicial budgets achieved by resolving many cases at a preliminary stage are so large that the modest costs of the first mediation step can be viewed as an investment

generating a substantial return. Those modest costs can be further reduced by a schedule of litigant contributions based on ability to pay, or fixed low fees, or both. In countries where judicial systems are under such great strain that even the initial investment is untenable, alternatives could be developed, for example mediator pro bono schemes and INGO grants. Online mediation can also be very helpful in this respect.

It should be possible to convince Ministries and Departments of Justice that the cost of providing Court services far exceeds that of a first mediation step and that, given the high statistical probability of the parties resolving their dispute, the mediation sessions would substantially reduce the judicial budget. Some relevant comparative statistics is available. It is known, for example, that: mediation saves time and cost to litigants[11], as well as administrative and Court costs[12], and that mediation increases litigant satisfaction rates[13]. Yet in many jurisdictions around the world, mediation is currently used to resolve less than 1% of cases before the Courts[14].

Applying Buckminster's Law does not imply any compulsion or pressure on litigants to mediate. Mandatory mediation is an oxymoron and is not applicable under the Buckminster's Law model, whose only requirement is to give litigants, via an automatic pre-litigation process step, the opportunity to understand mediation and to make an informed choice by attending a first, accessible, and easy to organize session with a professional mediator.

Conclusion

Litigants have a right to access mediation if they wish. That right needs to be granted to them by a required process step that educates them about mediation so that they understand how and why it works and what value it can deliver for them. Allowing litigants to proceed to Court without extending them that right is inexcusable. It would also reduce judicial budgets, increase the efficiency of the Court system for those cases that are unsuitable for mediation, and lead to speedier, more satisfying justice for all.

Applying Buckminster's Law to the world's litigation systems leads to a new legal model that adds value, works well, improves efficiency, saves costs, reduces risks and makes sense.

ENDNOTES

Author bios are below.

[4] For more on Buckminster Fuller, [click here](#).

[5] See, for example, ZAM/ACB *Onderzoek naar kansen en belemmeringen voor zakelijke mediation onder advocaten, bedrijven en rechters in Nederland*. ZAM/ACB Study of opportunities and impediments in commercial mediation in the Netherlands. Utrecht University december 2018. Marc Simon Thomas, Marina de Kort-de Wolde, Eva Schutte, Manon Schonewille. For an English summary, [click here](#). and Ior Italy's required initial mediation session: see: Bridging the gap between mandatory and voluntary mediation. Leonardo d'Urso. Alternatives VOL. 36 NO. 4 APRIL 2018 and PricewaterhouseCoopers and the European

University Viadrina Frankfurt/Oder, *Commercial Dispute Resolution: A Comparative Study of Resolution Procedures in Germany*, 2005.

[6] The absence of evidence of such a balanced relationship was a core finding of a Briefing to the European Parliament's Committee on Legal Affairs (JURI) in November 2018. For the full Briefing, click [here](#).

[7] For a detailed summary of the twin-track approach, please [click here](#).

[8] i.e. mediation advocacy training

[9] See for example Italy's required initial mediation session: *Bridging the gap between mandatory and voluntary mediation*. Leonardo d'Urso. *Alternatives* VOL. 36 NO. 4 APRIL 2018.

[10] In the Netherlands, all courts have implemented a referral system to mediation and have a mediation officer who provides information and helps parties arrange a mediation if they wish so. This officer also keeps a list of official court mediators. In spite of this, the number of court-referred mediations is limited. Based on the 2018 Annual Report of the Council of the Judiciary in total 3.686 cases were referred by judges to mediation (although not all actually took place because several parties opted out). The majority were family law matters (1.911) and criminal cases (1.472), meaning that only 303 of the more than 1.5 million court cases were referred to mediation for all other dispute categories combined.

[11] See for example: *The Cost of Non-ADR: Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation*, June 2010. ADR Center [accessible here](#).

and J.T. McLaughlin, based on: Alexander, N. (2009), *International Comparative Mediation: Legal Perspectives* 337.

[12] See, for example: Timothy K. Kuhner, *Court-Connected Mediation Compared: The Cases of Argentina and the United States*; *ILSA Journal of Int & Comparative Law* [Vol. 11:519], p. 519-553. Machteld Pel, *Referral to Mediation* (2008)

[13] See for example: *The Cost of Non ADR: Surveying and Showing the Actual Costs of Intra-Community Commercial Litigation*, June 2010. ADR Center and ZAM/ACB survey.

[14] [Click here](#) for the 2014 study: *Rebooting the Mediation Directive*.

[6th Key-Government: Sign, Ratify, and Implement the Singapore Convention on Mediation](#) [George Lim](#)

The UN Convention on International Settlement Agreements Resulting from Mediation was signed by 46 nations, including China, India and the United States on August 7, 2019. Within six months, a further six nations had signed. The Convention will improve the enforceability of international commercial settlement agreements reached through mediation, rather than, as now, treating such settlement agreements as ordinary contracts, exposed to jurisdictional and other vagaries of enforcing contracts across borders.

But the Convention has a value far beyond enforcement. This is the mediation field's version of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Not only was the New York Convention the catalyst for the huge uptake of arbitration around the world, but it crucially stimulated worldwide respect for arbitration as an alternative to litigation. This motivated an increase in global trade and investment and created a new world legal order.

The Singapore Convention on Mediation can have a similar influence on the international appetite for mediation. Indeed "*the primary goal of the Convention is to promote the use of mediation for the resolution of cross-border commercial disputes as mediation [which] is seen as not only a faster, less expensive form of dispute resolution but also as more likely to preserve commercial relationships*".^[2] It will emphasize the extraordinary value of mediation and underscore its credibility. The Convention is arguably the most significant happening in dispute resolution since the 1976 Pound Conference, progenitor of modern mediation. The Convention provides that it comes into force six months after the first three nations have ratified it. Those nations were Singapore, Fiji and Qatar, and the Convention's entry into force date is established as September 12, 2020. Saudi Arabia has since ratified, and it now needs to be signed and ratified by all nations, and to come into full operation internationally as quickly as possible.

[Interview with George Lim](#)

Background to the Singapore Convention on Mediation

There have been previous attempts to secure international enforcement of mediated settlement agreements. For example, the 2008 EU Mediation Directive^[3] addressed enforcement of mediated settlement agreements but required parties to deliberately opt into enforcement in other jurisdictions. Article 6.1 of the Directive reads: *Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable* (emphasis added). While it is inspiring that the EU tried to address enforcement of cross-border mediated settlements 12

years ago, an opt-in approach is likely to result in less, rather than more, opportunity for enforcement.

An international Convention on the enforcement of mediated settlement agreements was initially proposed by the United States in June 2014 in the context of the United Nations Commission on International Trade Law (UNCITRAL). The mission was assigned to UNCITRAL's Working Group II. To reinforce the proposal, an international survey was conducted on the use and perception of commercial mediation in international legal and business communities led by Professor Stacie I. Strong at the University of Missouri. Analysis of the results^[4] of the 221 responses indicated that participants were strongly in favour of a convention on both the enforcement of agreements to mediate or conciliate international commercial disputes, and the enforcement of settlement agreements arising out of international commercial mediation and conciliation. There was a similar vote in support of a mediation enforcement Convention during the Global Pound Conference Series 2016-17^[5].

Working Group II began work in 2015. I was fortunate to be part of Singapore's team to UNCITRAL's Working Group II on Conciliation, which met between 2015-2018. The Working Group was chaired by Ms Natalie Morris-Sharma from the Singapore Ministry of Law. The Singapore team comprised officers from the Ministry and myself representing the private sector.

It was not an easy Working Group, considering there were representatives from 50 countries, with different legal systems and cultures. Naturally, each country had its own social, economic and political interests. It was thus with a great sense of achievement that we managed, in February 2018, to prepare the draft text for a Convention on the enforceability of international commercial mediated settlements, and a Model Law to the same effect.

In June 2018, 26 countries spoke in support of Singapore hosting the signing ceremony for the Convention. And on 20 December 2018, the UN General Assembly passed a Resolution to adopt it. The signing ceremony was unprecedented because 46 countries agreed to promote the cause of mediation. The countries that signed represented more than half of the world's population. Many more countries have expressed their interest to sign, and the objective now is to secure more signatories and more ratifications.

The need for all nations to ratify the Singapore Convention on Mediation

Nations ratifying the Convention are required to enforce international commercial settlement agreements arrived at through mediation in accordance with their national rules of procedure and the conditions set out in the Convention. The Singapore Convention on Mediation provides for automatic enforcement of international mediated settlement agreements in countries ratifying it, unless the parties opt out. Other provisions of the Convention^[6] will not be recited here owing to space limitations. They are comprehensively explained with clear examples in *The Singapore Convention on Mediation: A Commentary* by Nadja Alexander and Shouyu Chong^[7].

If nations believe in mediation as a means to resolve disputes efficiently and effectively, there seems to be every incentive for them to sign and ratify the Singapore Convention immediately. Over 160 nations are signatories to the New York Arbitration Convention; global trade and

investment will be boosted if all those nations now offer the same enforceability mechanism to international mediated settlement agreements.

The Singapore Convention on Mediation represents the dawn of a new era in dispute resolution on a global scale. We can all persuade our Governments to sign, ratify and implement the Convention.

ENDNOTES

Author bio below

[2] Timothy Schnabel, leader of the US delegation to the UNCITRAL Working Group II meetings that curated the Singapore Convention on Mediation. See: *The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements*, Pepperdine Dispute Resolution Law Journal Vol 19.1 2019

[3] For the text of the EU Mediation Directive 2008, [click here](#).

[4] For more on the Survey, [click here](#).

[5] To see the GPC voting results, click [here](#).

[6] For the full text of the Singapore Mediation Convention, [click here](#).

[7] For the publisher's link to the book, [click here](#).

[6th Key-Government: Actively Support UN Resolution 1325 on Women, Peace, & Security](#) [Alicia Kuin](#)

Resolution 1325 marks the first time that the UNSC affirmed the critical role of women in conflict resolution and peace building. It calls on governments to adopt a gender perspective when implementing peace agreements and stresses the importance of women as full participants in mediation processes.^[2]

Governments have a responsibility to ensure mediation^[3] becomes an *inclusive* - and therefore effective - process for resolving conflicts, making mediation better understood and more widely used, at all levels of societies and economies. There is one especially impactful, global and inclusive way to discharge that responsibility: devise and execute a National Action Plan to implement United Nations Security Council Resolution 1325 on Women, Peace and Security.

The link between women's meaningful involvement and the long-term sustainability of peace agreements has been established. When women are signatories, agreements have been shown not only to be more durable, they also contain a greater number of gender and political reform provisions that are implemented at a higher rate.^[4] Yet many governments still lack the political will to support women in mediation and peacebuilding at regional, national and international levels.

Since Resolution 1325, twenty years and eight subsequent Resolutions have passed. Yet between 1992 and 2018, women made up three percent of mediators and thirteen percent of negotiators in all major peace processes.^[5] These statistics are indicative of an international and systemic issue.

National Action Plans

The implementation of Resolution 1325 rests on member states, who are encouraged to develop a National Action Plan (NAP) to determine country specific priorities and government commitments. Out of the UN's 192 member states, 81 have adopted NAP's.^[6] Governments need to not only act on developing NAP's but be accountable for following through on their reassessment and full implementation.

Implementing NAP's demands governments to meaningfully engage diverse voices from women-driven civil society, non-profit and grassroots organizations, dispute resolution providers and professional bodies, and peacebuilders. Meaningful engagement informs stakeholders how NAP's can best serve their country-specific contexts and conflicts. Effective NAP's engage a diversity of women's groups to inform decision making by taking a bottom-up approach to supporting the women, peace and security agenda.

In addition to developing, reassessing and implementing NAP's, governments can also support their country representatives to the women's mediation network in their region.

[Interview with Alicia Kuin](#)

Global Alliance of Women Mediator Networks

On September 26, 2019, the Global Alliance of Regional Women Mediator Networks met at the United Nations in New York for their inaugural meeting. The Alliance is made up of the four regional networks – FemWise Africa, Nordic Women Mediators, Women Mediators across the Commonwealth and Mediterranean Women Mediators (an Arab Women’s Network is in development). The networks are united by a collaborative effort to enhance and strengthen the meaningful participation of women in peace processes.

At a supra-national level, these networks connect women mediators and peacebuilders, combine their resources, elevate their recognition, and support their peacebuilding efforts. The members of these networks are experienced community, national and international mediators and peacebuilders who work across silos as opposed to in them. Members are the original advocates and champions of Resolution 1325, collaborators of NAP’s within their own and other countries, and are highly skilled and notable practitioners.

Governments, organizations and individual support for the networks and their members via political statements, media recognition, financial backing and stakeholder engagement, validate the importance of having women as lead mediators in peace processes and having parties present at the tables that represent women’s voices and a gender inclusive perspectives on peace agreements.

The Ripple Effect

Women play a vital role in both conflict and peacebuilding. They are conflict actors, wives, mothers, front-line workers and business owners. They are connected to conflict drivers through their understanding of community relationships, structures and power dynamics. This means their perspectives are fundamental to resolution processes and post-conflict recovery, trauma support and ongoing community mediation efforts.

The ripple effect of a purposeful political and structural shift towards gender inclusivity will create a social norm transformation in support of women at all levels in society. This will not only result as women being more often selected as lead mediators for national and international conflicts, but also as community, business, human rights and workplace mediators.

Social acceptance for diversity within the field will ultimately lend itself to each specific field of practice and go beyond gender by achieving an inter-sectional and inter-generational lens.

Greater adoption, implementation and support of the Women, Peace and Security agenda will have a positive impact on peacebuilding worldwide. Peace processes will be more inclusive; agreements will be more sustainable; a higher rate of more holistic agreement provisions will be

realized, and local mediation efforts and post-conflict recovery will be strengthened as a result of genuine gender equity.

As we approach the 20th anniversary of Resolution 1325, governments and civil society, as well as all practicing mediators (men, women and people living beyond the binary), must ensure mediation becomes a truly inclusive field of practice. This needs to be achieved by breathing new energy into the design and implementation of NAP's and active support for the Global Alliance of Women Mediator Networks, whose members are engaged at all levels of society and cross-pollinating fields of practice.

After all, unlocking mediation's golden age means unlocking gender-inclusive mediation.

ENDNOTES

Author bio at end of article.

[2] To access *UN Security Council Resolution 1325 on women and peace and security*, S/RES/1325, October 2000, [click here](#).

[3] Mediation and peacebuilding are used synonymously in this paper to acknowledge that resolving conflicts globally includes the work of third party neutrals as well as negotiation advisors, conflict interveners, front line activists, organizers, peace researchers, and the many other forms of pursuing peace.

[4] Krause, J. Krause, W & Bränfors, P., *Women's Participation in Peace Negotiations and the Durability of Peace, International Interactions*, August 2018. For more information, [click here](#).

[5] To access *UN Women Facts and figures: Peace and security. October 2019*, [click here](#).

[6] To access *Peace Women: Women's International League for Peace and Freedom. National Action Plans for the Implementation of UNSCR 1325 on Women, Peace and Security*, [click here](#).

6th Key-Government: Help Governments Lead Mediation into the Mainstream

Christian Radu Chereji

Governments play a vital role in the advent of a Golden Age of mediation in three critical areas: generating robust data; mobilizing public and professional engagement; and, most visibly of all, inspiring uptake and demonstrating that they “walk the talk”. All of these can be achieved with the active support of mediation’s stakeholders.

Mediation implementation mainly happens at national level. Until now, the role of Governments has been focused on deciding that an alternative to court action is necessary, that mediation can be a solution, and then legislating to introduce mediation within their civil justice systems. Later, attention has been given to how that legislation is integrated into the larger corpus of national laws and especially court procedures. Mediation legislation has developed gradually over the last three decades, in some places more successfully than in others. But there remain many other things that Governments, uniquely, can do to propel mediation into the mainstream of dispute resolution.

Generating Robust Data

As the Masters degree students enrolled in my *Comparative ADR Systems* class discovered immediately, there are severe data deficits in mediation. It is not yet possible to gather reliable figures on the numbers of mediators and mediated cases in the most countries. There is currently a lack of systematic data gathering at the national level (with very few exceptions, Italy being one example) regarding not only mediation cases per annum, but the number of trained and accredited mediators; the types of cases resolved through mediation; the success rates of mediation; the types of cases most likely to be referred to and solved using mediation; the average costs of mediation compared to the average costs of litigation; the extent of user satisfaction with mediation and mediators; and other basic indicators. Without such data it is very difficult to assess, with any reliable degree of accuracy, how deep or how far mediation has penetrated societies and economies, and what the consequences may be.

Governments have the capacity, in collaboration with courts and dispute resolution service providers^[2], to establish systematic and comprehensive data gathering methodologies concerning all aspects related to mediation. Without such information, expertly and objectively analyzed policy making in mediation, and dispute resolution more widely, remains, at best, an educated guess.

Interview with Christian Radu Chereji

Mobilizing Public and Professional Engagement

In many countries, mediation development has been driven by certain tangible objectives, such as the need for a more collaborative and non-confrontational method of dispute resolution, the importance of reducing court backlogs and savings to civil justice budgets. These are all important and worthy objectives, but there has been less concern paid to how mediation impacts upon the interests of different stakeholders. Introducing mediation represents change; and not all stakeholders are happy with such change, particularly many practicing lawyers and sometimes judges. A balanced, moderate approach is needed, and all stakeholders can be engaged in the development of mediation public policy. The political facet of public policy design cannot be ignored. Accordingly, policymakers need help to use the information and data gathered by monitoring and assessing mediation progress to mobilize the widest support among all potential stakeholders and the public at large. It is important to attract the strongest possible support. Potential disputants, for example, are rarely consulted sufficiently; if they were engaged more systematically, the pace of change may accelerate, and their advisers may start to become less resistant to change.

Leading By Example

One of the great virtues of Government is the ability to lead by example. If Governments want to encourage and inspire the use mediation in a significant manner, they can use it themselves. The standard contracts entered into by Government agencies could routinely include multi-step dispute resolution clauses as a sensible strategy for avoiding and resolving conflicts. This would be a highly visible act of leadership. Yet curiously, in many parts of the world, parties contracting with Government agencies often report being presented with single-step dispute resolution clauses (litigation or arbitration) without a prior mediation step, and even difficulties getting Government agencies and public authorities to consider using mediation.

Stakeholders could signal to Governments that it would be welcomed if Government agencies and public authorities adopt a pledge to mediate wherever appropriate and include a mediation step in the dispute resolution clauses in any contract they sign, any program they fund, and any project they run. Such a pledge, coupled with a mediation step clause, will send a strong signal about how seriously Governments view mediation. The impact would be fourfold: first, it would get parties to mediation, giving them a better understanding of the process and building trust; second, it would give Government officials and public servants a better understanding of mediation and how to use it to their benefit; third, it would help avoid litigation and arbitration, with all the consequential costs, risks and delays; and finally, it would develop a progressive market for mediation for the wider benefit of society and the economy. Overall, it would build momentum behind mediation and stimulate greater use.

Providing Leadership Support

Mediation institutions, skills trainers, scholars and other stakeholders providing assistance to Governments in developing mediation will be adding an important value to societies and economies. But caution is required regarding the transfer of mediation best practice models from one country to another. When learning from others' experiences, public policy designers and their consultants will want to adapt to local cultural and legal contexts before adopting models proven to work well elsewhere.

Mary Parker Follett (1868-1933), one of the world's earliest organizational theorists, is credited with introducing the philosophy of "win-win". She also characterized leadership as *the art of getting things done through others*. Stakeholders in mediation can offer their collaborative expertise to help Governments build data for policy making, to generate wide support for amicable dispute resolution practices, and to be seen to inspire through their visible behavior. Governments can improve their societies, reduce their civil justice budgets, and benefit from mediating, rather than litigating and arbitrating, their disputes. The expertise already exists in the mediation field to help Governments devise new resolution strategies.

As Mary Parker Follett also taught: *Conflict is best resolved not through compromise, but through invention.*

7th Key-Usage: Invest to Generate Instinctive User Recognition and Demand

Felicity Steadman

Mediation is not well established everywhere. In some countries, however, mediation is not a foreign concept nor is it necessarily viewed as a threat to lawyers. The law sometimes positively encourages parties contemplating litigation to consider mediation, and their representatives are obliged to a greater or lesser extent to explain mediation to them.

In those countries in which mediation is not well known it may be confused with arbitration and even with meditation. The law may not encourage mediation, and lawyers may feel threatened by it, regarding 'ADR' more as the cause of an '*Alarming Drop in Revenue*' than as a process that might assist their clients to achieve more effective and earlier outcomes.

So how can an appreciation of the value of mediation be developed in the marketplace? The answer is a collaborative multi-stakeholder marketing effort.

Mediators

Let's begin with mediators. If they, and the institutions to which they are affiliated, stand in the marketing side-lines, focusing more on promoting themselves than the practice of mediation, the market is unlikely to grow optimally. Mediators know how to distinguish positions from interests, fears and concerns. So, they are well able to identify and address the interests of other stakeholders – Government, Judiciary, lawyers and, above all, users - both private individuals and organisations.

To secure referrals, mediators certainly need to market themselves and generally do so well. But when marketing themselves, mediators also need to market mediation, conveying an appreciation and understanding to users of why and how mediation can serve their interests. This means articulating a core value proposition for the use of mediation to meet the interests of everyone involved in managing disputes. That value proposition will inevitably vary according to the constituency.

Government and Judiciary

Generally, Governments are under pressure to provide access to justice for their citizens. Often standing in the way are obstacles, such as the length of time it can take to get to court and the costs involved in litigation and arbitration. Mediation offers a way to overcome such obstacles at much lower cost. Government agencies are also users and may be able to help fund marketing efforts if they can be persuaded that this will considerably lower the cost to the public purse of providing justice.

Interview with Felicity Steadman

Lawyers

Lawyers' interests range from a genuine desire to serve clients well to making money in the process. Their clients often simply want to resolve their differences quickly, privately and at as little cost as possible. In resolving disputes, lawyers often act as their clients' gatekeepers, advising whether, when and how to achieve desired outcomes. Mediation can help lawyers service their clients' needs in a way that reduces client costs and risks. Building such a reputation attracts more clients and makes business sense. Quote users in this regard. Users listen to other users.

Users

The Global Pound Conference Series (GPC)[2] held in 2016-17 went a long way to identify what users of dispute resolution processes want when they seek to manage their disputes. The GPC data demonstrates a strong desire by users to resolve disputes early wherever possible and to retain control by negotiating outcomes themselves.[3] Users want to be better informed of the options for achieving these goals – in other words, users are generally willing marketing targets. Find out how disputes are resolved in other jurisdictions and use case studies and examples of success to bolster your proposition. Users are persuaded by evidence that other users have applied mediation with success. The voice of the user travels far and wide. Most important of all, market mediation as a *negotiation* process. This resonates with users' natural bias, as they negotiate daily. This helps “de-lawyerize” and de-mystify mediation, making it easier to understand and value.

Service providers

The mediator provider market in most countries is notoriously competitive. If mediation service providers could collaborate to agree a plan to coordinate approaches to stakeholders to deliver educational programmes, share experiences and generate feedback, they would quite quickly start to market mediation effectively. As President John F Kennedy said: “*A rising tide lifts all boats*”.

If that collaborative plan could be co-branded and featured in professional websites presenting the value of mediation awareness events, it would openly demonstrate that mediators do as they teach. The work of the UK's Civil Mediation Council (CMC)[4] illustrates how many stakeholders have convened ‘*to inspire all sectors of society to use mediation when managing and resolving disputes*’ and to represent the industry.

A successful marketing effort and the facts to substantiate it need to be communicated to stakeholders. There are many ways to do this at micro and macro levels. For example, by:

- Talking to potential customers about how mediation can benefit them and their future;
- Offering an initial awareness programme free of charge as an investment in the field;
- Pitching mediation as a negotiation form, aided by a neutral *facilitator*;

- Explaining why the dynamic of a facilitator improves the quality of negotiation;
- Training party representatives in mediation advocacy skills;
- Establishing a mediation programme as part of a continuing legal education or continuous professional development program package (for lawyers, finance managers and others with professional compliance obligations);
- Offering to prepare a role play of a facilitated/mediated negotiation as a focal point;
- Conducting a programme together with third parties (a mediator plus one of the user's law firms or a user from another organization, or all three);
- Encouraging in-house and external advisers to attend;
- Including deal facilitation elements, thereby encouraging business managers to participate;
- Inviting visible Government and judicial involvement.

To be credible ambassadors of mediation these initiatives must be led by professionals who have had training and experience of mediation, who speak with authority and who provide practical answers to questions and challenges put to them by sceptics.

Mediators and mediator provider organisations are often overzealous about mediation and are consequently at risk of losing sight of just how entrepreneurial and marketing-orientated they need to be in relation to the mediation market. Once a true market for mediation begins to develop, the services of mediators and mediator provider organisations are more likely to be used.

ENDNOTES

Author bio below.

[2] For more information on the GPC, click [here](#).

[3] <https://www.imimediation.org/research/gpc/series-data-and-reports/>

[4] <https://civilmediation.org/>

7th Key-Usage: Expand the Value of Mediation Into Deal-Making

Veronique Fraser, Joan Stearns Johnsen

Mediation takes many forms and has many facets. It is a malleable process that parties and neutrals adapt to different areas of practice, cultures, and practitioner demands. This flexibility derives from the broad range of skills that neutrals draw upon.

Mediation is Negotiation

Negotiation is a primary skill of any mediator since mediation is a facilitated negotiation and the mediator the process specialist. At a minimum, mediators must understand and be fully competent in all aspects of negotiation. This includes an understanding of negotiation theory such as asking the right questions, framing statements, separating people from problems, identifying and addressing underlying interests, generating creative options for mutual gain, and applying objective criteria, ATNAs and ZOPAs as well as managing conflicting negotiation styles.

Today's skilled mediator ideally has a much fuller tool chest, encompassing a much broader set of interpersonal, psychological, and communication skills. As research and scholarship in the human sciences has been adapted to mediation, the value of the mediator has increased. This broader toolkit and the wisdom to use it appropriately, equips the modern mediator for all challenges. The modern skilled mediator is capable of so much more than settling disputes.

The mediator's value now includes highly attuned and elevated communication skills including empathic and active listening as well as non-verbal understanding and behavioral fluency. It also includes an understanding of neuroscience and behavioral economics as well as cultural competency, preparation management, process design and subject matter expertise. In short, the mediator's skill set continues to expand and as it does so, the value of the mediator similarly grows.

This wide range of interpersonal and communication skills enables the mediator to identify sources of potential opportunity and conflict even when they are not fully understood by the parties. The mediator uses their deeper understanding to interact earlier and help parties fashion more creative solutions.

Mediation's Value Beyond the Resolution of Conflicts

The power of mediation skills can be valuable well beyond traditional mediation. For example, a mediator can be used to manage process and help parties reach agreement in complex and challenging negotiations such as those between multiple parties of different cultures, countries, languages and expectations in complex joint ventures.

Mediators can add steverage value in anticipation of friction or disagreement between businesses, whether competitors or customers or even colleagues. They can surface and listen to underlying interests to identify sources of agreement and disagreement. As mediation matures and our appreciation of its value grows, we can think more broadly about its application.

So why should experienced negotiators call upon a mediator to assist them with deal making? What value can a mediator bring to proficient negotiators? The answer lies in the unique value of a skilled mediator that transcends that of any negotiator. There is a difference between closing a deal and building a long-lasting partnership. Often negotiators concentrate on the mechanics of securing the best deal today. They often focus less on sustaining business interests. Deals are more tangible and static, but circumstances change and what seemed fair at the conclusion of the deal might no longer be perceived so by everyone over time. This leads to conflicts, court battles, increased transaction costs and loss of value.

[Interview with Veronique Fraser and Joan Stearns Johnsen](#)

Trust, Transparency, & Compatibility

Researchers have studied successful performance-based collaborative business relationships. They found that they had in common a bedrock of trust, transparency and compatibility[3]. Instead of negotiating a deal, parties to collaborative relationships negotiate the basis of the business relationship. It requires expanding the focus beyond individual and common interests to the interests of the relationship as its own entity. Using a mediator can be particularly valuable as mediators can steer the conversation to the best interests of the relationship and help the parties establish a relationship of trust and transparency. In that sense, the mediator is, as Professor Jeswald Salacuse has suggested, a kind of *Counsel to the Deal*[4].

Building trust requires talking about trust. It can be challenging for a party to a negotiation to address the issue of trust without putting the other on the defensive. The mediator is ideally positioned to broach the subject of trust. For example, a mediator can ask each party to assess their own trustworthiness and their perception of the other's trustworthiness. By helping them confront and discuss their doubts and fears about trustworthiness and the actions that can foster or impede it, the mediator can help the parties arrive at a common understanding of trustworthiness and its implications in the deal.

Transparency fosters trust and vice-versa. Highly collaborative relationships demand a degree of transparency that transcends the information that is typically shared in business relationships. An experienced mediator can educate the parties about the importance of sharing information and guide them in deciding why, what and how information could be shared. Mediators can also help parties frame and disclose more personal information such as concerns, motivations, needs and goals, which lead to more efficient problem-solving and better decision-making.

Compatibility also contributes to highly collaborative relationships. Compatibility refers to organizational cultural fit. Mediators can help the parties explore compatibility by asking about their values, commitments to corporate social responsibility, reputation, risk tolerance, flexibility, views, innovation, etc. Poor compatibility can impede success. Just the act of discussing differences with a mediator can foster greater mutual understanding and help remove blockages.

Going Further

Skilled mediators can help deal making parties anticipate and avoid conflict and lay the foundational principles that will allow them to work successfully together in a dynamic environment characterized by constant risks, changes and uncharted opportunities, and sustain a mutually competitive advantage long after the deal is signed. Users need to better appreciate the value that mediators can add to deal making. Mediators need to market their value beyond dispute resolution.

ENDNOTES

Author bios are below.

[3] See: *Getting To We: Negotiating Agreements for Highly Collaborative Relationships* (2013) by Nyden, Vitasek and Frydlinger

[4] See: *The Global Negotiator: Making, Managing and Mending Deals Around the World in the Twenty-First Century* (2003) by Jeswald W. Salacuse.

7th Key-Usage: Forge a User-driven Vision for Mediation; Then Fund It

by [Michael Leathes](#)

From 1984 until 2004, around 900 grants totaling some US\$160 million funded more than 300 mediation initiatives. The benefactor was the William and Flora Hewlett Foundation, a private philanthropic institution with current assets of about US\$10 billion[2].

The financial support came at a critical time, eight years after the 1976 Pound Conference, three years after Fisher & Ury's Getting To Yes, and just months after Harvard Law School established the Program on Negotiation as a special research project that was part-funded by Hewlett Foundation grants. Mediation needed that thoughtful financial springboard. Without Hewlett's field-building strategy, its focus on investing in the development of theory and its operational grants over those formative years, mediation might not be where it is today.

The field has been unable to secure comparable long term, large scale, funding since 2004. Mediation providers worked hard to capitalize on the investment and kept on developing. Yet in many countries and many fields (e.g. investor-state) mediation is barely used. The helicopter view suggests the growth curve has flattened. Twenty years on, mediation is at another critical moment. The curve needs to flip up again, or risk levelling off permanently.

Hewlett's funding was a smart strategic investment, not a series of blank check donations. It was based upon a clear vision, namely that mediation could be built into a distinct academic and practice field, enabling disputes of all kinds to be managed more effectively, ultimately leading to more stable societies and stronger economies. Hewlett's funding undoubtedly helped mediation get established and prove itself.

Today, though, mediation needs to go further. It needs to articulate a new, mature, vision. One that unlocks its Golden Age. The leading influencers, namely mediation institutions, mediators, users, scholars, skills trainers, professional bodies and Government agencies, nationally and internationally, can craft that vision, express their belief in it, commit to it, then embark on its implementation.

It is perfectly feasible for service providers to partner while simultaneously competing. Getting partnering right requires common goals, clear principles and shared energy. Leadership and partnership will drive the future of mediation.

The new vision can be inspirational, achievable and measurable – emphasising mediation as the universally natural, preferred, instinctive way for users both to avoid and resolve conflicts and to make deals in all areas - social, economic and political.

There are investors who fund goals that are both inspiring and realistic, where the fundamental objective is to gain wide public value and benefit. Investors who think that way are goal and results driven. They also seek convincing answers to basic questions, such as:

- Do those who lead truly believe the vision and mission? What is their strategy over time? Is it transparent, specific, realistic and credible?
- Are those who lead genuinely committed? Will they act as joint trustees for the long-term advancement of the global mediation field?
- Do those who lead have a track record of delivering funded goals?
- Will those who lead have personal and organizational “skin in the game” in terms of their time commitments, contributing toward funding, or in any other ways?
- Is there a transparent, credible operating plan with detailed financials? Would investment funds be managed responsibly within a defined structure and adequate financial controls? Would funds be exempt from taxes? How credible are the priorities and phasing of the funds? Are the goals and commitments time-bound? How will achievements be objectively measured and reported?
- What will be the payback both for others as well as those who lead, exactly who will benefit, and how will value be assessed?
- Will additional investment be sought, and if so, from whom?
- Are there any relevant conflicts of interest?
- What mechanisms are in place for resolving disagreements?

The mediation field is not short of the extraordinary talent to address these issues. But viewed from a user perspective, it seems only rarely to advocate the field directly to potential users, the Global Pound Conference Series 2016-17 being a welcome exception. For example, TED.com, founded in 1984, groups its 3,000 plus talks into some 450 subject categories viewed 1.5 million times a day. Mediation is not yet a TED.com subject category.

With collective will and energy, the field can mobilize a new vision from the 22 preceding contributions to the Seven Keys, explaining why mediation can be far greater than the sum of its parts for everyone, including users. This requires *mediative leadership*, demonstrating qualities that lie at the heart and soul of mediation: maximizing the value of relationships; partnering among stakeholders; and achieving the outcomes that will benefit all.

Those who lead can together forge the vision into a compelling user-driven plan. A plan with a credible set of outcomes that delivers many times more value for societies and economies than the investment level required. A plan that also has the capacity to improve the prospects of geopolitical agreements. A plan that can greatly improve and grow mediation globally. A plan that truly can convince major funders to invest in mediation’s Golden Age.

ENDNOTES

[1] This article follows discussions Michael Leathes has had with a past donor of mediation projects, and a number of users of mediation services. The article also reflects his own experience raising funding in the mediation field.

Michael is a former in-house counsel and in that capacity was a frequent user of mediation services. After retiring in 2007, Michael helped establish the International Mediation Institute (IMI) as a charitable institution, served in a pro bono capacity as the first Executive Director of the IMI, and participated in funding negotiations for the mission of the IMI with benefactors

including the GE Foundation, Shell International, several major dispute resolution institutions and a number of other donors. He stepped down from the IMI Board in 2015. Michael is the author of *Negotiation: Things corporate counsel need to know but were not taught* (Wolters Kluwer, 2017).

[2] David Kovick wrote a detailed and informative paper in 2005 entitled *The Hewlett Foundation's Conflict Resolution Program: Twenty Years of Field-Building* which can be read [here](#).

The Seven Keys Conclusion: Many Paths, One Way

by [Joanna Kalowski](#)

The decade to 2030 presents humanity with unimagined challenges, each of which will require ingenuity and a capacity to embrace innovation. It threatens to be a much more dangerous and fractious world. The likelihood of conflict and conflicting ideologies makes effective resolution of disputes and the negotiation of sustainable deals crucially important.

If the shared goal is to take mediation forward as the process of choice in the post-Covid world, we may need to shift the focus of communication to the end – the outcome of negotiations and the prevention of disputes - and away from the means - mediation. Such a shift requires research that demonstrates when and why mediation is the process of choice. Opening the field to research into comparative techniques such as coaching could yield useful information as well as expand mediators' own repertoires.

The authors of the Seven Keys believe data matters, and that to date, we have relied largely on anecdote.

Research might also reveal that mediation is not as widely understood among users as previously believed. The need to commission, publish and publicise research, not just settlement rates, is essential information for users in the many places and sectors where mediation is still languishing.

If access to justice in the public mind means access to courts and tribunals, how to get across the message that only a very few disputes ever get to court, and the rest are negotiated and settled between the disputants themselves? That mediation can achieve such negotiations more amicably and more sustainably? That mediation is not second-rate justice? That mediators are professionals open to scrutiny and new learning? Having committed, for instance, to a Code of Disclosure in each jurisdiction, mediators will be judged accordingly, and users will be able to hold mediators accountable.

If courts in many countries have used mediation primarily as a case management tool, users may have little appreciation of its value in its own right.

Unless we undertake research, share our findings across the field and implement what we discover, users will remain unable to distinguish mediation from litigation or from meditation.

Internationally, models and approaches may differ but the message must be fundamentally the same, and as a field, we must hold each other to account.

VIDEO

The Seven Keys chart a course towards achieving a new vigour, and constitute a series of recommendations, identifying the need for:

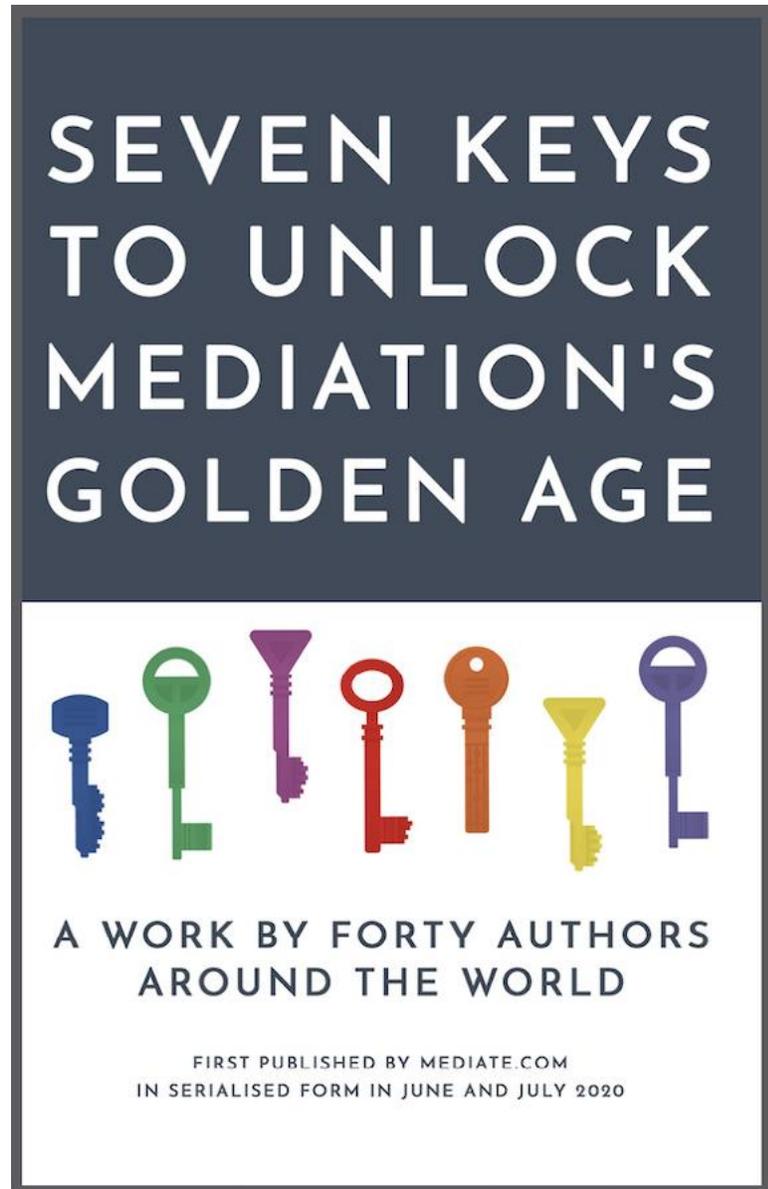
- a new leadership style in the global field, adaptive and 'mediative';
- intentional collaboration among provider organisations internationally;
- education of the next generation of resolvers;
- collection and analysis of field research and experiential data;
- commitment to a unifying set of universal principles such as the Edinburgh Declaration;
- adoption of a Code of Disclosure;
- commitment to an interdisciplinary approach that creates an independent profession;
- continuing education in information communication technology (ICT) and Artificial Intelligence (AI);
- redesign of academic curricula in negotiation and dispute resolution;
- education of 'gatekeepers' - judges, in-house counsel;
- influencing national governments to ratify international instruments that promote mediation;
- more nuanced and targeted marketing and promotion to diverse audiences;
- an emphasis on the language of negotiation over mediation since the former is within users' experience;
- shifting the focus of mediation away from conflict resolution, since the need for a third party does not necessarily arise out of conflict;
- emphasise the value a third party neutral can add to negotiation and deal making;
- encourage courts and tribunals to promote mediation as a first step in the settlement of legal disputes, with access to mediation professionals rather than court staff, so that first time users gain a lasting impression of its value.

A renewed collaboration is urgently required of mediators and providers across the world if mediation is to achieve all it can in the new decade. Taken together, the Keys clearly set out how and why this is feasible and what is at stake.

If the field can demonstrate its usefulness to users, it can attract and inspire philanthropists and other benefactors once again to provide the capital that unlocks the future.

The Seven Keys confront the field with a stark choice: either to pull up the ladder of success, however qualified it has been, and leave the next generation to rebuild all over again; or commit to leaving a lasting legacy by charting a strategic future now.

If you would like to download the complimentary e-book of the Seven Keys to Unlock Mediation's Golden Age, you can download it here: [<http://toolkitcompany.com/resource-center/page/83/7-keys-to-unlock-mediations-golden-age/7-keys-consolidated-e-book>]



The Seven Keys Epilogue: Unlocking Mediation's Golden Age by Mobilizing *Mediatively*

Manon Schonewille¹ & Michael Leathes²

1. synchronicity : noun

The simultaneous occurrence of several ideas or events that appear causally unrelated, yet when experienced together result in something exceptional.

The jigsaw of 23 pieces by 40 authors in 16 countries, all part of the over-arching theme *Seven Keys to Unlock Mediation's Golden Age* (#7KeysMediate), aims to mobilize an energetic dialogue among the conflict resolution field's stakeholders on new approaches and attitudes to take mediation to higher, deeper and wider levels.

The Seven Keys sets out to inspire the field's practitioners, service providers, educators and trainers, aided by scholars and users, to provide a collaborative, *mediative* leadership where they simultaneously lead *and* serve. A leadership characterized by a commitment to empower all stakeholders to become joint *owners*, not just renters, of mediation's future.

Mediatively?

The opening contribution³ to the Seven Keys characterizes *mediative leadership* as:

... giv[ing] everyone the ability to become a collaborative leader, sharing the responsibility to pursue a joint mission in the common interest. ...The field of mediation requires visibly concerted leadership that can inspire and orchestrate the co-development of the profession globally.

The Seven Keys invites stakeholders to *imagine a new, collaborative vision for the mediation field* based on mediative leadership to create a whole greater than the sum of its parts. *Not best practice, but next practice.*

A new alliance

Having interacted closely with all Seven Keys' authors to explore the essence of their propositions and the trends they perceive, we were struck by a strong sense of synchronicity. The propositions, and the thinking and attitudes underpinning them, do more than inter-connect. In

¹ Manon Schonewille is a mediator, skills trainer and author. Her books include *Toolkit Mediation* (2018), *Toolkit Generating Outcomes* (2009) and *The Variegated Landscape of Mediation: A comparative study of mediation regulation and practices in Europe and around the world* (2014). Manon conducted interviews with the Seven Keys authors.

² Michael Leathes is a former in-house counsel and user of mediation services. He is the author of *Negotiation: Things corporate counsel need to know but were not asked* (2017). Michael curated the Seven Keys work.

³ *Establish strong, collaborative, mediative leadership* by Ken Cloke, Joan Goldsmith, Rosemary Howell and Alan Limbury <https://www.mediate.com/Mediation2020/article.cfm?zfn=keys-mediative-leadership.cfm>.

combination they reach a metaphysical plane, a new realisation, that potentially opens the way to a radical vision of mediation's future, and its role in dispute resolution and beyond. A vision that hopefully all stakeholders can believe in, support and deliver.

Several authors noted that mediators are natural leaders. *Mediative leadership* is an instinctive, but often latent, phenomenon in this field; latent because, at this still relatively early stage in the field's development, mediation is understandably focused on its vast range of processes, techniques and skills - the very things that render it flexible and adaptable to situations, customs and cultures. However, mediation is also a mindset, a way of thinking, of acting and behaving. Some authors noted that mediation's very diversity makes it exceptionally complex, fragmented and competitive. All of which can inhibit the field from practicing *mediative leadership* in the ways needed to shape its collective future.

Next practice

To overcome this natural inhibition, the field needs to strive for purposeful and deliberate practice⁴ aimed at the common good of the field in order to chart the future collaboratively. Part of this next practice could be a network of facilitators whose role would be to harvest opinions about the field's future, enable them to be openly expressed, discussed and understood, and encourage a consensus to emerge on the field's future for the benefit of all. The resulting consensus could form the basis of a substantial funding program to materialize the next steps for next practice.

The facilitation network

The network could comprise highly respected, expert, trusted, neutral figures in the negotiation field from around the world. Mediation's leaders – whom we might define as *those having the capacity to inspire action* - would engage with their local/national facilitators in order to plan the future of the field together. The facilitators would start by helping the leaders to establish an agreed process and framework aimed at identifying a shared vision and mission for the longer-term future of mediation that would be widely acceptable to practitioners and service providers. It would form the basis of a credible and fundable plan and an inter-connected strategic alliance.

Owing to the diversity of mediation practice, facilitators may encourage discussions on different visions, missions, plans and funding methods for different practice areas and markets. Diversity needs not imply divergence; cross-pollination opportunities will lie at the heart of the facilitators' role. The network of facilitators around the world would inter-relate, sharing proposals and insights to configure synchronized plans for the field.

To function effectively, the facilitators would be individuals with the standing and skills to encourage contributions and help the field to negotiate a consensus on its future. They may potentially convene under the auspices of a neutral host organization. Some or all may be volunteers. They would have the individual and collective ability to process and distil a wide

⁴ See: *Peak: How all of us can achieve extraordinary things* by Anders Ericsson & Robert Pool (2016).

variety of opinions in a collaborative, *mediative* manner. They may be scholars, educators, trainers and users of mediation services. Each would be skilled in mediating, but, to maintain their neutrality, not currently be practicing as mediators or affiliated to a major mediation service provider. They would represent diverse countries, cultures and professional backgrounds.

The end result would be a strategic plan, or a number of inter-connected plans, that would map out the many projects that need to be implemented, how, by whom, at what cost, in which time frame and with what payback. It would be fundable on a large scale.

Forward vision

In *Thinking, Fast & Slow*, Daniel Kahneman comments: *we can be blind to the obvious, and we are also blind to our blindness.*

Mediators' skills include helping parties become *unblinded*. Appreciating the power and success of neutral facilitation to help them envisage the field's future together ought to be perceived by mediators as natural, even "obvious". Mediators habitually steer parties to collaborate and forge options for mutual gain, so why not apply the same for the mediation field itself? The field knows that neutral facilitation mechanisms such as Dispute Resolution Boards really do work. Provided the facilitators are genuinely perceived as neutral and expert, they would be respected and trusted in this role.

Hopefully, mediation's leading stakeholders will see the opportunity and find the best way to apply the principles they practice to the common good by effectively "*mediating mediation*", expanding the field and benefitting all, including themselves. We believe they will, because they can.

The jigsaw will synchronize. Mediation will mobilize.