

Text of Lecture to the Membership of the Chartered Institute of Arbitrators - Quarterly Lecture

8 October 2007

Esteemed colleagues and friends,

Thank you for the invitation to speak today. I am honoured that so many have made time to come and listen today. My paper is entitled The Journey to a Credible Profession: time for mediators to come of age.

The title itself is a big subject and I cannot hope to do it full justice today. I hope that my research and observations will be a substantive point of reference that invites you all to consider and reflect on the subject.

The invitation is to bring mindfulness to this process which is already underway and which is, I believe, very important for a number of reasons. Some of those reasons are related to our own interests as professional mediators and some are to do with society in general.

Mindfulness is the practice of observing and noticing without judgement. It is a core practice for mediators and I will come back to it later on.

My plan is to

1. review where we might be now
2. describe the crossroads that I see; a crossroads that presents us with an inherent conflict and which is an interesting place to be for professional conflict resolvers.
3. propose a number of options and choices for your consideration.

First of all I would like to start with a story about a child called Mediation.

Mediation was adopted and he was much wanted. His parents naturally dreamed that he would grow up to make a difference, be successful and happy and make lots of money. And they worried that his brightness would have to survive the rigors of the 'real world' and they knew they would protect him on that journey. They also worried quietly that they did not know his heritage and that he would always be an unknown quantity.

At two years old this child was showing real promise. He was very advanced for his age: chatting and full of curiosity, pulling at the hem of its mother's skirt saying 'notice me, notice me, I'm different!' People were charmed but they didn't pay too much attention.

At primary school, he outperformed all the other children. Occasionally the teachers made encouraging noises but most of the time they worried that this child was trying to be too different. "Mediation is doing very well but he needs to be more focused." "Mediation needs to

concentrate more and follow the class.” “He gets there in the end and frequently surprises us but we are concerned...”

Put another way, the establishment was getting rather perplexed by the fact that Mediation simply didn’t do what was expected but was performing quite brilliantly. And his generally happy and energetic demeanor was quite frankly irritating.

At 12 Mediation was quite precocious and very independent. His parents worried endlessly about bad influences and bad behaviour. They knew they would lose their influence one day but they were not quite prepared for it to be now. They hoped and prayed it was just a phase.

Sure enough Mediation came home with bad habits and some very distorted thinking. For example, he found all sorts of things interesting which had no basis in fact. He was also very adaptive; you could see him transform his way of being to suit whatever he was doing and whomever he was with. Sometimes he appeared quite inconsistent. It was hard to get a handle on his personality and some found that difficult to deal with. His older brother was so much more stable and predictable although rather less engaging and certainly less happy.

At 16 Mediation wanted to do psychology, philosophy, anthropology and physiology at A Level. Good Grief! What was he going to do with all those soft subjects? There were big arguments at home! “What about medicine, law or if you must engineering?” “Get something solid behind you. You can do all that other stuff later on.” Mediation compromised. He did English instead of anthropology.

At 18 Mediation was very keen to take a course at a middle ranking university. His grades would have secured him a place at Oxford or Cambridge. His parents were horrified that he should turn down a place at Oxford. Mediation’s elder brother was doing Law at UCL. A brilliant student and destined for great things.

And here we have the crossroads. And the conflict.

This is where I think we are in defining our profession. The crossroads is about - should it look like the established professions or should it be something new. Until now we have been borrowing from established professions and principally the legal profession. There have been benefits and disadvantages to that phenomenon. Until now I don’t think it has mattered but I think it will matter more for the future as we come to understand better what it is that makes mediation work and what makes mediators proficient.

To explore further I need to spend a little time talking about what makes a profession. Classically there are three professions: Law, medicine and divinity. Mind, body and spirit. Justice, health and belief (read hope).

There are milestones that denote when an occupation becomes a profession and there are characteristics that define a profession.

1. a full-time occupation,
2. with a dedicated training school
3. a university discipline
4. a local association
5. a national association
6. a code or codes of professional ethics and disciplinary procedures for those who infringe them
7. licensing laws.

I will then choose a couple to explore further because I see the debate around them as being pertinent to what we might need to pay attention to and perhaps avenues that can be pursued in order to take things forward.

A profession is traditionally

- ⌚ Skill based on theoretical knowledge: Professionals are assumed to have extensive theoretical knowledge and to possess skills based on that knowledge that they are able to apply in practice.
- ⌚ Mediators borrow and adapt. Very few study mediation in-depth.
- ⌚ Professional association: Professions usually have professional bodies organized by their members, which are intended to enhance the status of their members and have carefully controlled entrance requirements. We do have local mediation groups - mostly for fellowship. A couple of national groups and much discussion about what might be a 'home for mediators'. Perhaps most people don't know what they want until they see it. A majority do not want to exclude people, nor do they want it to be elitist. I also feel that there is a real or perceived conflict of interests if a membership body is also a service provider unless of course the people who allocate the work are not perceived to be competitors for the work.
- ⌚ Extensive period of education: The most prestigious professions usually require at least three years at university and frequently periods of study after university.

We borrow from our previous careers. I will shortly come to education and training in more detail.

- ⌚ Testing of competence: Before being admitted to membership of a professional body, there is usually a requirement to pass prescribed examinations that are based on mainly theoretical knowledge.

Mediation skills are only partly based on theoretical knowledge. The main art and skill come from interpersonal skills, understanding people, experience and wisdom. We do not have examinations for wisdom or intuition - yet!

- ⌚ Institutional training: In addition to examinations, there is usually a requirement for a long period of institutionalized training where aspiring professionals acquire specified practical experience in some sort of trainee role before being recognized as a full member of a professional body. Continuous upgrading of skills through professional development is also mandatory these days.

We do have systems of assistantships and for the most part the appointment of mediators is governed by management of some experience before being launched solo. On the point of CPD - again we borrow. You can get CPD points for your mediation practice by completing CPD not strictly related to mediation. There is a lack of advanced skills training mostly because advanced skills training is voluntary. Without demand there is no need to supply.

- ⌚ Licensed practitioners: Professions seek to establish a register or membership so that only those individuals so licensed are recognized as bona fide.

I think this is pretty self-regulating since most mediators want to be part of a recognized body to give their practice legitimacy. Although, it is true that anyone can put a sign up and say they are a mediator.

- ⌚ Work autonomy: Professionals tend to retain control over their work, even when they are employed outside the profession in commercial or public organizations. They have also gained control over their own theoretical knowledge. Mediators have achieved this relatively quickly. It is frequently expressed in the writing of articles for professional journals and speaking events. Mediators are very respectful of people who spend time expanding theoretical knowledge and they are enthusiastic to learn more.

- ⌚ Code of professional conduct or ethics: Professional bodies usually have codes of conduct or ethics for their members and associated disciplinary procedures for those who infringe the rules.

We have very suitable codes of conduct and professional ethics all aligned in terms of tone and content. What we don't have is a way of dealing with those who break the code except for a very powerful tool of the grapevine! In a way I think this works well and is

preferable to introducing a hammer to crack a nut. The main issue is that 'complaints' are made for all kinds of reasons not least a lack of understanding on the part of the parties and poor management of their expectations by their advisors which in the wrong system, could destroy the reputation of a very good mediator quite easily.

- ⌚ Self-regulation: Professional bodies tend to insist that they should be self-regulating and independent from government. Professions tend to be policed and regulated by senior, respected practitioners and the most highly qualified members of the profession.

Self-regulation is preferred from the point of view of understanding what really goes on in a mediation and because some of the skills cannot be managed by rules and regulations.

- ⌚ Exclusion, monopoly and legal recognition: Professions tend to exclude those who have not met their requirements and joined the appropriate professional body. They seek to bar entry for the unqualified and to sanction or expel incompetent members.
- ⌚ Professions have an element of public service and altruism: The earning of fees for services rendered can be defended because they are provided in the public interest, e.g. the work of doctors contributes to public health.

Mediation makes a very important contribution to society. At its best it encourages people to take responsibility for their actions and to understand the consequences of the choices they make.

- ⌚ High status and rewards: The most successful professions achieve high status, public prestige and rewards for their members. Some of the factors included in this list contribute to such success.
- ⌚ Offer reassurance: Professionals are able to offer reassurance to their clients that although there appear to be problems, everything is normal or being dealt with properly, and this reassurance may be offered rather than solutions to particular problems and only accepted because of their professional status.

This is a particularly characteristic that mediators share with the classical professions.
Trust me I'm a mediator! You are in a safe pair of hands.

- ⌚ Ritual: Church ritual, and the Court procedure are obviously ritualistic.

Rituals are a very important part of human culture. The mediation process is also a kind of ritual.

- ⌚ Inaccessible body of knowledge: In some professions, the body of knowledge is relatively inaccessible to the uninitiated. Medicine and law are typically not school subjects and have separate faculties and even separate libraries at universities.

I did notice when I was at Harvard this year that the humanities library was open until 5pm and the law library until 11pm which begs the question: is the pressure on law students greater than the preciousness of the ancient texts or is it the other way around?

- ⌚ Indeterminacy of knowledge: Professional knowledge contains elements that escape being mastered and communicated in the form of rules and can only be acquired through experience.

This is a very important characteristic in relation to the mediation profession because mastery acquired through experience is a key feature of excellent mediation practice.

- ⌚ Mobility: The skill knowledge and authority of professionals belongs to the professionals as individuals, not the organizations for which they work. Professionals are therefore relatively mobile as they can move to other employers and take their talents with them. Standardization of professional training and procedures enhances this mobility.

Well ,we don't quite have that yet. The International Mediation Institute is proposing an international passport for mediators which aims to reconcile the training and experience of mediators into international standards.

You will have noticed that not all the milestones are in place as far as mediation is concerned. For example, it is only full-time occupation for a very small number of practitioners (I).

Yes, there are dedicated training schools (II) but of varying quality.

The question of disciplinary procedures is not in place.

The first is the issue of full-time profession.

The second is the professional knowledge that escapes being mastered and communicated in the form of rules which influences my third area of interest - education and training.

What does that mean? What should be included?

Full-time profession:

At the moment mediation is a full-time profession for very few. The obvious reason is that the market isn't developed enough to support bigger numbers. The big question on everyone's lips is why hasn't the market grown?

The second reason is that it is currently perceived as a profession for people who already have experience. Partly due to the perception that you need to be experienced and at least as old as the parties!

Most people see it as a second or third career. In some quarters it is viewed as a soft option or a kind of retirement package. One lawyer told me recently that in his firm doing a mediation was viewed as having a day off.

And a third possible reason is that the way the practice of mediation has increasingly adopted an evaluative slant. This creates the perception that only those already credited with training and experience in judging and related skills can do it and that it is only required when a judgment is necessary i.e. when the parties (and perhaps their legal advisors) have reached a crossroads and they have neither the skills nor the experience to know what to do next.

This last point is I think really important not because I want to say anything about evaluative or non-evaluative styles but because I think it is a self-limiting belief as far as market development is concerned. As long as mediation is seen by professional advisors as a process of last resort, either for themselves or their parties then the market will remain constrained and will only grow very slowly and in spite of itself. And if the market grows very slowly then there is no real invitation for new people to join.

Mediation is negotiation, very sophisticated negotiation and the skills required are not those taught at school, university or law school. They may be natural and instinctive to a few but even the naturally gifted need to study how to use them appropriately, effectively and consciously. Until there is a real hope of entry into the profession, universities will not offer the kind of degree programmes that will start to support the profession and people will continue to borrow. Without the substance of learning and knowledge the profession will lack an essential pillar.

It is that body of knowledge which frames the whole process.

There are some post graduate courses but generally mediation is still not established as an area for undergraduate study.

The classical professions (law and medicine) are both notable as requiring not just study to enter, but extensive study and accreditation above and beyond simply getting a university degree.

In 2003 Trinity College Dublin advertised for a professor to run a Higher Diploma in Mediation Studies and an MA in Mediation and Conflict Resolution. These were based in the Faculty of Human Sciences side by side with Economics, Education, Library and Information Studies, Philosophy, Politics, Psychology, Sociology and Social Policy and Social Work.

The course was suspended for the 2007 intake and is undergoing review.

Canterbury Christchurch offers mediation as substantial part of their LLB.

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Bradford University offers Peace Studies and Conflict Resolution as distinct undergraduate degrees.

I am sure there are others but none quite hit the mark. The Dublin course was an optimistic start and one hopes that 'review' is not a metaphor for cancelled. However, a Higher Diploma or courses which do not count towards a degree are not attractive enough.

Serious academic study has been important to professions. To be learned, informed and holder of a body of knowledge not widely available is part of the elitism and mystique associated with differentiating from tradesmen. You may have some thoughts on elitism but in truth, for universities to provide such opportunities for study there must be some place for the graduates to go and practice; a place that they aspire to (and their parents do!) Most universities provide data on how many students found employment within a short time after graduating. This is part of competition and it is part of the conflict/crossroads we are at now. The main difficulty is that without a substantial body of work to study, challenge and expand this particular hurdle is wide and long. With degree courses lasting three years, the lead time for change is also long and slow.

And what would that body of work look like? What would an undergraduate study?

Here I would like to refer to my own research in which I identified the skills, attributes and behaviors of effective mediators.

The skills and attributes that people really appreciate are,

Intelligence

Patience

Persistence

Optimism

Confidence

Managing the process

Instinct and intuition

Communication skills

Building rapport

Some expert knowledge.

If I was designing a degree course for mediators it would have to include

- ∅ **science**
- ∅ **art**
- ∅ **philosophy**
- ∅ **spirituality**

The science would include Positive Psychology, physiology and negotiation. This is a relatively new discipline which has arisen out of the observation that traditional psychology only dealt with the abnormal. Law deals with the abnormal. Medicine deals with the abnormal. Mediation can be the positive psychology equivalent of law. A positive psychologist would say: 'Let's do what works and what makes people feel successful, in charge, in flow.'

At the beginning of this session there was a piece of music playing. The piece is entirely spontaneous. It is improvised from beginning to end. Keith Jarrett may have practiced scales and arpeggios, rhythms and fingering for years but he had never practiced that piece of music before. He was 'in flow'. Flow is a notion designed by Mihaly Csikszentmihalyi one of the most important figures in positive psychology. If you haven't read his book - Flow: The psychology of optimal experience - I strongly recommend the book to you and its counterpart - Finding Flow.

One key point in his work is the autotelic personality. An autotelic activity is one we do for its own sake because to experience it is the main goal. An autotelic personality perceives both the challenges in a given situation and their skills to be high. Mediators often report conditions that correlate to being in flow.

The mediation profession has an opportunity to define itself. It can be the little brother of the legal profession with all the family baggage, or it can be independent which does not exclude legal knowledge but does not depend upon it for its identity.

The entrants would be profiled to establish their strengths and preferred styles and allocated programmes that stretched them, personally. They would need to have a predisposition in certain key areas which supported the possibility of becoming proficient. There is enough evidence from research already undertaken to provide the kind of process that would enable this. The Myers Briggs Type Indicator has a huge database. It has its shortcomings but it does provide a very good indicator of preferences. With the right assessment, students would be pushed to become proficient in some skill in a very short timeframe. This could be learning to play a musical instrument in say 3 months, learn a subject they had never done before. There would be a balance of intellectual challenge and skills.

There are local associations and they are generally for fellowship. We don't have a national association - well not in the traditional sense which would include some kind of influence on fees and conditions.

There are hopeful signs: An interesting description appears on the web site of Princeton University. I love this description. I particularly like the “a more Zen-like approach.”

There is one big point missing from this description though and that is an appreciation of the value mediation can bring to the **world of business** in helping companies deal with change, innovation, collaboration, resource management, team building, reputation, brand, profit and sustainability.

Career: Mediator

A Day in the Life

Being a professional mediator is all about conflict resolution, and so the job demands a person with excellent reasoning, problem-solving, and peacemaking abilities. When two parties have a dispute and wish to avoid the legal intricacies of litigation, they may call in a mediator to facilitate an equitable solution. While many are suspicious of lawyers and attorneys, mediators are more often attributed with qualities of wisdom, trustworthiness, and neutrality. Unlike lawyers and judges, who evaluate, assess, and decide for others, mediators help participating parties evaluate, assess, and decide for themselves. Parties wishing to avoid the delays, high costs, publicity, and ill will brought on by litigation look to mediators as a more peaceful, inexpensive, and expedient alternative. The mediator's job is to listen, sort through differences between the two parties involved in a dispute, and find common ground upon which to ascertain a solution. A good mediator is honest, neutral, and encouraging; listens well; and has excellent communication skills. Helping two parties arrive at a mutually agreeable solution also takes a fair amount of creativity. Mediation is considered a form of Alternative Dispute Resolution (ADR). Although ADR sounds like a terrible syndrome, it's in fact a more Zen-like approach to conflict resolution, with mediators as the master practitioners. Corporations, government agencies, community organizations, schools, neighborhoods, and even families will turn to mediators when they seek mutually acceptable answers to their problems. Examples of conflicts they work to resolve include labor/management issues, health care disputes, environmental/public policy issues, and international conflicts.

Paying Your Dues

The educational background of a professional mediator varies widely. A fair number in the field hold law degrees, while others may not even hold a bachelor's degree. Most important is an education in mediation, whether taken as part of an undergraduate degree or as individual training courses. University degrees in public policy, law, and related fields also provide helpful backgrounds. While few states require licenses or certification to practice mediation, most

individuals in the profession have completed training and pledged to abide by certain ethical standards.

Associated Careers

Lawyers, religious leaders, social workers, counselors, and educators are often called on to mediate. Judges and magistrates also play the role of mediator. Strong mediators have many possible professions open to them, including diplomats and politicians.

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Her main focus is on using mediation in increasingly creative ways for the benefit of business, organisations and their most valuable resource - their people.