Taking The Horse To Water

Some Issues In Workplace Mediation

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The most important insight to date is that there is no predictable pattern that successful mediation must follow.

Laurence Susskind[1]

Mediation is increasingly recognized as an important element in an effective dispute management system. Many organizations corporations training in-house mediators who are then available to provide mediation to fellow employees who are involved in disputes.[2] Training internal mediators increases the level of dispute management and resolution skills in an organization. Mediation training for managers and employees helps them better to deal with the minor conflicts that occur in the workplace. Accordingly, whilst most workplace disputes may be resolved through informal interventions of fellow staff members or managers, others can be satisfactorily conciliated or mediated by a fellow-staff-member mediator.[3]

There are limitations however. There will always be disputes which an in-house mediator may not be able to resolve - but which could have been successfully mediated had an external mediator been appointed in the first instance. Moreover, there may be employee resistance to the idea of an in-house mediator, resulting in reluctance to using a mediation option as often as might otherwise have been the case. And this would therefore defeat the original purpose of investing in mediation as a workplace dispute resolution process.

Accordingly, for a mediation process to be accepted in a workplace milieu, the opportunity to utilize external mediation services should also be available. And the more serious and mission-critical the dispute, and the greater the likelihood that the in-house mediator may lack the requisite skill and indeed, just as importantly, the time to devote the necessary attention to the case in hand, the more important the access to an external resource must be.

It is the very complexity of the workplace and of workplace relationships, and the disputes that arise therefrom, that render the development of effective mediation strategies so difficult – particularly, assessing the appropriateness of mediation itself, the model or models best suited to workplace mediation, and the task of getting disputing parties to actually participate in the process.

This paper examines the appropriateness of mediation as a workplace dispute resolution process. It considers particularly the feasibility and practicality of in-house mediation processes, sponsored by management and driven by an employee trained in dispute resolution and mediation, and particular problems these face in a workplace milieu. It also examines how these may be mitigated by the use of an external professional mediator.

Part One: Conflict through the Workplace Prism

Up Close And Personal

Conflicts within organizations are basically to do with relationships, between individuals or between groups of individuals. Conflict is pervasive and inevitable fact of social interaction, and is part of the routine of everyday life in organizations. Disputes are embedded in the interactions between members as they go about their daily round of activities.[4]

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[1] Susskind L, <u>Multi-Party Public Policy Mediation: A Separate Breed</u>, American Bar Association, http://www.abanet.org/dispute/magazine/f97suss.html

[2] Tim Hicks, <u>When And Why To Use An External Mediator</u>, @ Mediate.com (http//www.mediate.com)

[3] Refer Kolb. D & Bartunek. JM (Eds.) F, <u>Hidden Conflict In Organization</u>s, Sage Publications 1992, on hidden conflict in organizations, and its containment of conflict by informal means. See also, my paper *Containing Conflict – Going To Work And Not To War*, UTS November 1998

[4] Kolb. D & Bartunek. Op.cit at 2. They may appear to continue in a harmonious and positive working and social relationship, whilst deep down, there is an itch that cannot be scratched. Conflict may appear to have been resolved but whilst parties may have buried the hatchet, they remember where they buried it. Differences might be publicly aired, but most occur out of sight and in forms other than official negotiation and grievance processing.

The organization is comprised of people who come to it with established values, beliefs, personalities and desires. Influenced by the organization, they influence it. Conflicts tend to be coloured therefore by the behavioural characteristics of the individuals within it - how they view the organization's objectives and goals; how they view their own role within the organization; how they contribute to the decision-making processes within the organization. Influencing each of these are various interpersonal and motivational factors, objective and subjective.

Often, the trigger relates to management policy. Some perceived or actual contradiction or injustice, some slight or rebuff, some open or subtle put-down, disappointment, rejection, or frustration. Often, it relates to relationships with colleagues, some disagreement over work or responsibilities, some breakdown in cooperation and collaboration, some failure to deliver or to provide. Often it is a combination of the two, where lines of responsibility and accountability are blurred or non-existent. And in many instances, the conflict may have been imported from outside the workplace. Some dysfunctional personality, some upset or trauma in the private life that spills over in the workplace in a welter of frustration and turmoil. In many cases, it is a question of the chicken and the egg. Tensions erupt and are exacerbated as they follow line of organizational fault lines, and expose organizational weaknesses.[1]

In the workplace, where people coexist in close proximity, and often under stressful circumstances (be it through work pressures or interpersonal contretemps) people butt up to each other. Colleagues may conflict with each other, over work content, over their interdependency, over attitudes to work and workplace, over each others' style, behaviour, and mannerisms, even. There is also an amorphous 'undeclared conflict' between dissatisfied and nervous employees and the organization itself, as manifested by lethargy, working to rule, and a lack of commitment and care given to work. This is the hot house where grievances real and apparent, discontent latent and evident, and harassment perceived and actual, are nurtured and bloom.

And because for many, work has got a personal and social significance far beyond being just a job, workplace conflict may be more intense and difficult to resolve - or may facilitate resolution through a commitment to the maintenance of the employment relationship. This is a relationship in which people are brought together without freedom of choice, being forced to relate to and cooperate with one another regardless of personal likes and dislikes.[2] But people do not have to love each other to get on at work. Shared interests and values are not essential to a working relationship. People do not have to surrender their values or point of view. But they must learn to deal with differences.

Much of the emphasis in dispute resolution in the workplace is on such interpersonal conflicts – style, roles, communications, and power imbalances. And this is reflected in workplace mediations. McDonald notes that the majority of workplace mediations focus on improving the relationship between the disputants – and moving from the past to the future, enabling a continuing working relationship. *By effecting change in relationships, disputes can shift to a more empowered problem-solving style that can be translated back into the workplace.* Other mediations focus on settling the dispute at hand by, for example, the parties agreeing not to work together, and working on an amicable separation.[3]

The Promise of Mediation

In most writing on Alternative Dispute Resolution (hereafter referred to as ADR) there us an underlying thesis that most conflict arises out differences between individuals and groups – differences of opinion, world-view, perceptions, directions, access to finite resources, or whatever. That this is caused by (and thence exacerbates) communication breakdown (including non-communication and miscommunication) concerning positions interests and needs. And thus contributes an inability to negotiate these in an objective manner.

Recognizing the need to assist parties in dispute to achieve resolution or reconciliation, and providing processes, procedures, and personnel to facilitate this, ADR is claimed to improve the parties' ability to negotiate with each other, improve their relationship with each other, and to improve their ability to deal with disputes or differences in the future.[4] The claim is made for ADR in general, and classic mediation in

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[1] Crawley. J Constructive Conflict Management, Nicholas Bealey Publishing, London 1992, and Toparov. B, The Complete Idiot's Guide To Getting Along With Difficult People, Alpha Books 1997. These provide relevant and entertaining vignettes and scenarios with respect to dealing with conflicting interests and personalities.
[2] Tillet. G. Resolving Conflict – A Practical Approach, OUP 1997 at 24
[3] McDonald D & Vagias A, *Mediation and Interpersonal Conflict – Effecting Behavioural Change in the Workplace* in Fisher, T (Ed.) Proceedings of 4th National Mediation Conference Melbourne, April 1998 La Trobe University
[4] Astor.H and Chinkin.C, Dispute Resolution in Australia, Butterworths 1992 at 47.

particular, that that the parties maintain control of the dispute and its outcome whilst the mediator controls the process.[1]

David Augsberger writes that a competent mediator can assist parties in many ways - in breaking open the conflict, untangling the issues, the behaviour going on between the parties, the conflict that enmeshes them, separating people (and their attitudes and actions) from the problems (the conflict situations): supportive of people as they clarify their own views and values whilst being confrontational with the conflict situation itself - hard on the issues soft on the people.[2]

And Boulle: *Mediation is a system of practical decision making. It sometimes resolves disputes, it sometimes contains them, it sometimes defines them more clearly, but it always provided the opportunity for making decisions, even if only the decision to submit the dispute to a court, the boss, an international tribunal, or some other authoritative decision-maker.* [3]

It is about making choices, about taking control. But it is also about being realistic – realistic choices, realistic decisions. And the mediator's role, in Boulle's view, is to enable the parties to limit their options to those that are realistic and feasible, and to make *practical decisions* in the light of them.[4]

Mediation can be used to settle disputes, to define problems or disputes, to manage conflict, and to prevent conflict.[5]

Then there are the transformative aspects of mediation – mediation as a source of self-awareness, empowerment, forgiveness, and reconciliation,[6] as an educative and therapeutic, transformative process that enables empowerment and responsibility, and hence benefits the parties regardless of the outcome.[7] It is important that the mediator has an understanding of conflict in order to assume a role as mentor and exemplar, coach and encourager, and as modeler of effective communication and problem-solving skills.[8] This enables the mediator to inform and educate parties about normal patterns of conflict and ways of responding to it.[9] It is empowering for the parties to have the conflict normalized buy being educated about its nature and its resolution. It allows for the expressions of emotions associated with conflict, particularly anger, betrayal and lack of acknowledgement – subject to the parties adhering to mediation guidelines.

But more often than not, mediation is about practical and pragmatic decision making over work-conditions, money, interpersonal issues and personality differences that people require in order to get on with their lives. People do not go to workplace mediation for counseling, therapy and personal transformation. They have a problem, a dispute, a conflict – and they want it resolved, ideally yesterday.[10]

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[1] id. at 49 and 102 . Mediation is a process-based system. Certain core procedures are indispensable regardless of the particular circumstances of the mediation. A recognized process assists the parties to make decisions – it does not make the decisions for them. Refer: Boulle L(2), Mediation – Skills and Techniques, Butterworths, 2001 at 8

[2] Augsberger DW, Conflict Mediation Across Cultures ,WJK 1992, Chapter 7

[3] Boulle (2) op.cit. at 8. A fresh slant on Folberg and Taylor's well-used definition: *…the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process that emphasizes the participant's own responsibility for making decisions that affect their lives. It is therefor a self-empowering process.* UTS Centre for Dispute Resolution: Mediation Course Manual, 1995 at 28

[4] id. At 22 . He summarizes the mediator's main functions as (a) creating favourable conditions for the parties; (b) assisting the parties to communicate; (c) facilitating the parties' communications; and (d) encouraging settlement.

[5] id. at 4, and at 13-14, the four mediator functions (1) Creating favourable conditions for the parties; (2) Assisting the parties to communicate; (3) facilitating the parties' negotiations; and (4) encouraging settlement.

[6] id. At 8

[7] McDonald D & Vagias A, op.cit.

[8] op.cit. and Boulle (1), Mediation – Principles, Processes, and Practice, op cit. at 45-56. The mediator thus steps out of role to act as a coach, trainer and educator in the assisting assist the parties to learn and develop the principles and techniques of constructive problem solving): the passing on of skills (listening, assertiveness, issue identification, problem-solving skills, style awareness and flexibility).

[9] Boulle (2) op cit. at 10 Helping people to preempt and/or resolve their own conflicts; helping people learn DR techniques; assist communication and understanding the nature of conflict

[10] The playwright David Williamson provides an illuminating insight:
 It is necessary to understand the critical distinction between a dispute and a conflict. A dispute is a situation in which the facts are in dispute and an examination of the facts can sort out the dispute. A conflict is a situation in which people feel negative emotions about each other. A dispute doesn't necessarily involve conflict, and a conflict can occur when there is no dispute…The mediation process works best where there's a dispute. Participants are encouraged to look at the facts rationally without letting their emotions become amplified or engaged. However, in a situation where people hate each other, the facts of the dispute are not their prime concern. Disputes arise from the smallest of pretexts as a result of the underlying conflict, and if one dispute is solved, another will be found to replace it. Where there is a conflict, disputes are only the symptoms, not the cause, and mediation won't be effective. A Justice That Heals, Sydney Morning Herald Spectrum, 27-28 Oct.2001

But the difficulties of direct, face-to-face, unmediated, negotiations are many. Given the difficulty of reconciling and overcoming the objective and subjective issues that arise, the idea of bringing a third party to mediate is an attractive one. Third party interventions can contribute to problem-solving by making sure that disputants attack the problem rather than each other, and by keeping the focus on interests rather than on positions.[1] If the parties have unrealistic assessments of their situation should the negotiations fail, a neutral evaluation of the walk-away alternatives may be indicated.[2]

Appendix One summarizes the promise that mediation offers in conflict resolution. Drawing upon David Augsberger and Lawrence Susskind,[3] its primary focus is upon difficulties facing cross-cultural mediation and the skills required. But it is equally applicable across a broad range of conflict scenarios.

Power & Interests

Boulle has noted that disputes can be dealt with on three levels. There is the power level, essentially a contest of strength in which victory generally goes to the strongest. There is the rights level, wherein parties in conflict can present their dispute to an authoritative institution or individual to make a decision as to which party is in the right. And lastly, the interests level wherein parties in conflict, either on their own or with varying degrees of assistance, negotiate their way to an agreed settlement. He notes that where a dispute resolution focuses on interests, there is more likely to be a greater satisfaction with outcomes, less strain on relationships, and a lower likelihood of the dispute recurring.[4]

Dispute resolution focussing on interests endeavours to resolve the conflict of needs. This is the essence of Principled Negotiation: separate the people from the problem; focus on interest, not positions; generate a variety of possibilities before deciding what to do; and insist that the result be based on some objective standard.[5]

In an organizational context, however, this may not be practicable for a variety of reasons. In day-to-day interactions, interpersonal relations are conducted on a power-level, relating to authority and status/position within the corporate structures, and a rights level: position and function as defined by job specifications and performance criteria.

There is a limit to how far management will go in encouraging dispute resolution at the interests level where this may interfere with and conflict with management perception of company policy and objectives, and management perception of appropriate behaviour and performance. There are certain lines that cannot be crossed, particularly management's perception of the corporate interest, and also of the power and authority structure behind it.[6]

Individual managers may attempt to resolve disputes through various Dispute Resolution mechanisms, including third party facilitation, conciliation, counseling and arbitration. These range from assisting parties to reach consensual agreement to more authoritarian outcomes, which include ultimatums and official warning letters. The use of such mechanisms often depends upon individual managers' initiative whilst their effectiveness depends on the style and experience of the managers involved. It is only as good as the manager who drives it, and moreover, only as good as the willingness of the parties, the employees, to use the mechanism on offer and their attitude to the manager and to management in general. Many a good initiative falls by the wayside owing to a lack of will on the part of management and staff, on a failure to follow through, and to follow up and implement solutions generated.

Whilst managers endeavour to effect conciliation or counseling, their judgement can to a degree be coloured by such issues as neutrality and power. There is a tendency for the well-intentioned manager to resort to his or her formal authority to resolve an impasse. Also, there is a temptation to get caught up in the issues of the dispute. This may occur in an organizational sense, insofar as the manager is, like the employee, a member of the same organization, and indeed, may be in the same department of that organization. Or in an

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[1] Fisher, R. Kopelman, E. & Kupfer Schneider, A. Beyond Machiavelli: Tools for Coping with Conflict, Penguin Books 1994 at 123

[2] id. at 125

[3] Susskind, op.cit.

[4] Boulle (1) at 65-66.

[5] Fisher R. & Uri W Getting to Yes, Arrow Books 1997, Chapter Two, from 18. This flows through to the philosophy behind assisted DR mechanisms such as mediation: that the very nature of consensual problem solving may ameliorate conflicts of emotions and values en route.

[6] If management gave too free a rein to the philosophy and processes of ADR, these could create obstacles to the organization's effective operation.

emotional sense insofar as the manager's value system may come into play and with it prejudices and preferences that colour his or her perception of the facts of the case. The manager may take sides or play favourites, or merely be perceived as doing so. Impatience and frustration on the part of a manager attempting to reconcile two or more employees, or a particularly recalcitrant employee, may result in an authoritarian solution that fails to resolve the matter. The needs of the conflicting party or parties will nor be met; they may feel that decisions are being made without their consultation or consent.[1] Appendix Two, *The Ballad of Jack & Jill*, shows this in stark relief.

Mediation as an ADR process endeavours to addresses issues such as these by giving dispute resolution focus, form and procedure whilst addressing above all else, the interests and needs of the disputants. But, many circumstances in an organizational context may not be conducive to interest-based resolutions. The relative effectiveness of such solutions hinges on two major issues: power and neutrality. Indeed the very acceptance, legitimacy and credibility of any alternative dispute resolution regime depends upon how an organization comes to terms with these.

Part Two: Mediation in the Workplace

Mediation is, in a perfect world, value-free, and available to all (within the limits of realistic expectations, financial means, and practical access, of course). These are the accepted *rules of engagement*: the mediator is independent; the mediator does not impose solutions on the parties; their participation is voluntary and egalitarian; they *own* the procedure; the settlement, if achieved, is consensual; and, proceedings are confidential.

But all this assumes a level playing field and a neutral third party.

Definitional terms such as 'neutral' and 'impartial', "voluntary" and "consensual", and, indeed, "confidential" are difficult to pin down at the best of times. But in an organizational context, such concepts become severely compromised by actuality and perception, ad particularly so with respect to arguments for use of an in-house mediator on one hand, and an out-sourced mediator on the other.

Accordingly, we endeavour to reality check such pivotal assumptions of mediations as viewed through a workplace prism.

The Paradox of Partiality - The Question of Neutrality

Does the mediator see him/herself as a player or as a facilitator? Is the mediator's power employed in support of the process to influence the content and outcome? Strong directive intervention by a mediator is likely to be effective at producing settlements. The mediator's world-view and understanding of the issues begins to influence that of the parties, and the mediator's solutions become part of the process.

Doubt has indeed been cast on whether mediators are indeed actually neutral. As Mayer points out, a mediator had power by virtue of the fact that the parties agree to be in mediation and have chosen a particular mediator. He/she has power also by virtue of the process, especially its impartiality and confidentiality, the mediator's ability to articulate the issues which concern the parties, and power derived from expertise in substantive areas.[2]

The sole presence of a third party in the mediation room creates an impression of that party's involvement in the substantive issues of the case. And who knows what motives the mediator has for achieving a solution, any solution. Professional self-esteem? Success rate? Another resolution reached (regardless of the quality, fairness, or durability of that outcome)?

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[1] Such ad hoc mechanisms, whilst not so global in their application, nevertheless require a commitment on the part of management to make them work, a willingness to establish guidelines and procedures, to provide resources and facilities, and also to train managers to operate the processes. They also demand willingness on the part of employees to use the dispute resolution processes as a means of resolving interpersonal conflict and disagreements between themselves and the organization itself. The regime would thus acquire legitimacy and credibility in the eyes of all stakeholders, management and employees alike.

[2] Astor & Chinkin, op cit. at 104. The mediator's interventions may be subtle and not apparent to the parties; the nature of the influence exerted may be invisible, and it is highly likely to be variable. But it may be there nonetheless. The mediator may have a favoured or disfavoured outcome, may exert pressure towards the former, may create more opportunities to talk through the favoured option, make evaluative remarks more in support of it. By ignoring some interventions by the parties and choosing to pursue others, clients are steered in directions chosen by the mediator.

Indeed, this goes to the heart of any discussion of the qualities demanded of effective mediators – that of whether or not a mediator can indeed be completely impartial given that his or her own background, opinions, political bias, or professional motivation, will colour mediator behaviour. Can the mediator really check his or her baggage in at the door?

An internal mediator may not realistically be completely neutral or impartial - certainly not in the eyes of the disputing parties. Only in large corporations could it be feasibly to specifically employ an internal dispute resolver-cum-mediator with role and status sufficiently distant from those of the disputing parties. In most circumstances, there are lines of organizational relationship between the internal mediator and the parties.

An in-house mediator or facilitator, or arbitrator or conciliator for that matter, is a member of the organization, part of its structure, along in its chain of responsibility and authority. He or she may be a member of the management team, and if not actually presiding over a process involving people under his or her own span of control, will no doubt know the parties and be know to them. And may indeed have prior knowledge of, possibly involvement with, the issues involved, albeit indirectly and non-committal. Moreover, it is likely disputing employees would behave quite differently in the presence of an internal mediator than they would with an external mediator. Likewise, the internal mediator would behave differently to an external mediator insofar as he or she is dealing with fellow employees

This, then, is a long way from perfect partiality. It may be preferable for a mediator to possess an outsider's perspective, one unprejudiced by the facts of the case and unconnected to its outcome: involved in the management of the process and not the issues and the outcome.

Whether the third party may indeed by impartial in the matter to be resolved, perceptions may be otherwise. Moreover, there will be the underlying concern on the part of the parties for a fair and balanced hearing, and for confidentiality. The assurance that "this will go no further than these walls" is no assurance, particularly when trust and credibility may already be at low levels.

The mediators' neutrality may therefore be an ideal rather than a reality. Perceptions are important. There may be an expectation on the part of the disputants that the 'neutral' will be directive because he or she is appointed by, employed by, and perhaps part of management. Because of this, parties may not always feel that they are in control of their dispute.

Primus Inter Pares - The Question of Power & Empowerment

The importance of power differentials is proportionate to the status and position of the respective parties within the organizational structure. The more equal the parties in status and standing, the more balanced are their power differentials. The greater the gap between them, particularly the manager/supervisor and subordinate gap, the more intrusive are factors such as fear, insecurity, ambition and aspiration.[1] In the workplace it is axiom that whilst all parties are equal, some are inevitably more equal than others.

Party control may be compromised by power imbalance between the parties. If there is such an imbalance, and it is not dealt with in the process, 'party control' becomes another way of describing exploitation of the weak by the strong.[2] Persons with limited access to information and unable to articulate effectively their interests, concerns, needs and rights, might feel quite unable to resist pressures to attend a mediation, and once there, be unable to assert their needs in relation to the other party in the dispute. A danger of consensuality and a neutral role for the third party is that the outcome of the process will simply reflect the power relationship between the parties themselves.[3]

If the mediator does not provide affirmative support for the weaker party in mediation, the imbalance of power will almost certainly be reflected in the agreement. But the stronger party may perceive such support as bias on the part of the mediator and may not therefore wish to participate further in the process.[4] Where a mediator acts to address a power imbalance, his or her neutrality is compromised

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[1] Manifested, for example, in intimidation, concern, reluctance to participate, fear of pressure, and bias.
[2] id. at 74, quoting S. Roberts:…retention of control over the outcomes by the parties themselves does not necessarily remove the coercive element which is seen as an objection to third party decision making. Where this control lies with the disputants themselves, that may enable one party to enforce a solution which would not have been tolerated by an even-handed outsider.
[3] id., at 105 .In the absence of an authoritative and powerful third party, and at 95, quoting S. Murray,
The disputing party who is s stronger and has more resources and more effective powers of persuasion will tend to do better. The weaker party argues for the best that he or she thinks she can get, not what he or she thinks is most fair.
[4] id., at 107-108 with reference to the difficulties of redressing the imbalance without being perceived as compromising neutrality (per Davis and Salem)

Then there is the matter of power. Not just the power imbalances between the parties, who which may or may not sit at different levels of the organizational structure, but also of the third party.

Power, like neutrality, is a concept driven as much by perception as reality. In an organization, it originates from many sources. From position and status within the hierarchy; from the legitimacy that formal status imparts; from the power holders position in formal and informal networks; from the strategic support he or she receives from others further up the ladder; from the authority endowed by the various rules and regulations that govern procedures and behaviour in all organizations; from force of personality, gender, size and physical presence, gender. And in the organization, the power to help or hurt others: if not exactly the power to hire and fire, then the power of opinions and evaluations which may or may not effect the parties' promotion prospects or their prospects of retaining their position.

Emotional issues derive from all this. Negative attitudes towards the company and towards the intervener who is perceived as its representative in this particular instance; reluctance to speak out for fear of the sanctions that may or may not be applied (remember, perception is just a powerful as reality in a conflict situation).[1] Nervousness, tension, stress, and those ineffective dispute resolution strategies discussed above: denial, appeasement, or surrender in the face of a perceived stronger party.

Consider power and authority from the point of view of the intervener too, particularly pertinent with respect to in-house mediation by in-house mediators.[2]

Consider two scenarios. Firstly, where the company-designated third party ranks above the disputants in the organizational hierarchy. He brings to the process all that his rank and expertise endows. He is in effect able to direct the parties towards a solution and if they prove recalcitrant, exert influence in a variety of ways to ensure an outcome. Secondly, where the company-designated third party is assigned to assist the resolution of a dispute between disputants who are senior to him in the organizational hierarchy and who may have potential or actual influence over his or her future prospects.

Case Notes: Position & Positioning

The company-designated third party, the Contact Officer with respect to Grievance Handling Procedures, was assigned to assist the resolution of a dispute between disputants who are senior to him in the organizational hierarchy and who may have potential or actual influence over his or her future prospects.

Two senior managers were engaged in a serious dispute that threatened their work, their private lives, and the company itself through the possibility of vicarious liability. The rank of both parties was such that apart from the Contact Officer who, under the supervision of the company's legal advocate, acted as liaison and information gatherer, all other senior executives, including the Managing Director, were instructed not to intervene in any form whatsoever.

The Contact Officer organized a formal mediation with an accredited external mediator (a retired judge). The mediation was held off-site, with the parties' respective legal representatives present. A mediation agreement was reached, and this resulted in both parties resuming their positions and continuing (with certain conditions laid down) their working relationship.

The confidentiality of the process and its outcome was acceptable to both parties. But there was a paradoxical outcome with respect to how the dispute and its resolution were perceived by employees generally. The mediation had achieved its outcome of resolving the dispute between the two parties. But the workforce in general, unaware of the full facts of both dispute and resolution, were unsatisfied that justice had been done. It appeared to many just like one more worker back down, one more management cover-up.

Yet, how do you communicate the effectiveness of a process without breaching the privacy and confidentiality of the process? If you cannot broadcast its successes – or its failures - how do you let the people know that the system is in place, that it is working, that it is effective, and that it is fair?

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[1] Everything is related: social values and mores, innate deference to authority figures, reluctance to rock the boat and risk one's job in a poor corporate and economic climate. Job security. Promotion prospects. Significant others must be considered: spouses, families, and the bank! The stigma of joblessness; the spectre of unemployment.
[2] See Boulle (2) op. cit. at 181-182 on the sources of mediator power. Power is relative. It is not always what it seems. A manager may have the status but not the impact. He or she may neither possess nor deserve the respect of subordinates. That manager may therefore overcompensate and over use 'status', or formal position and the authority that goes with it, coming down heavy with 'the rules' if he or she cannot obtain compliance by other, less repressive, means. Power and authority are two different things entirely. So the power bestowed on the third party by the company on one hand and the process on the other may be relative. And because it is relative, its use will not be entirely consistent and even-handed. See Appendix 1

And so, in many ways, the in-house mediator has to struggle for integrity and legitimacy in an environment replete with power differentials, and indeed, may be part of the problem and not of the solution. Again, therefore, it may be preferable for a mediator to possess an outsider's disengagement from the organization's power structure, unconnected to its hierarchy and politics, and untouched by the issues and interests that drive them.

But whatever the choice, be it an in-house or external mediator, the mediator's integrity, and that of the process, will always depend on creating and maintaining a delicate balance between interventionist and non-interventionist, and between parties' right to self-determination and the mediators function of encouraging them to make decisions and reach agreements. It is relative too. Whether an intervention is one of influence, pressure or coercion will depend on the attitudes and circumstances of the parties, the personal disposition of a party, their educational status and emotional stability, how they may react to the various forms of encouraging settlement.[1] Boulle sums it up succinctly:

This all suggests the need for a delicate balance between assertion and oppression, between persistence and pressure, between patient and endurance.[2]

You Can Take a Horse to Water - The Question of Consent and Compulsion

The voluntary nature of the ADR process is often emphasized. But if voluntary, how do you get employees to take up the option? And once started, how do you keep them involved if they do not perceive that their needs are being satisfied? Will there not therefore be pressure on disputing parties to participate in the company-sanctioned process, and thereafter, pressure on them to reach a settlement?

This pressure may be exerted by the so-called impartial third party, or by the company. And if there is a degree of perceived compulsion, doubt may be cast on the alleged flexibility of ADR. The parties may not believe that they retain a great deal of control over their dispute resolution process. They may in fact take what they are given including the identity of the third party.[3] Hence, quite apart from third party neutrality, there are limits to voluntary nature of the process, the flexibility, and even consensuality and party control, the hall-marks of ADR.

Ideal conditions for workplace mediation include the willingness of parties to participate in the process, to maintain confidentiality, to interact in a rational manner; and to have direct, open and honest communication. And time: mediators need to work against the pressure of *fixing the problem and fixing it quickly* in order to shorten the process.[4]

But first, you must get the disputing parties to the table. What if one side does not want to face the other? What if one side does not recognize and acknowledge that there is a problem to be solved, a conflict to be resolved? What can an intervener do to in these circumstances to advise the parties, to encourage them to participate in a dispute resolution process, to prepare them for such participation, seek other means of resolving the conflict.

There are many reasons why people may be reluctant to engage in workplace ADR. There may be a feeling that it is not wise to *rock the boat*. Some may believe that going to mediation might not be a good career move.[5]

The mediator or conciliator must engage reluctant parties, either independently or together, in a reality-checking exercise that obliges them to consider the alternatives, and indeed the consequences of not engaging in some form of reconciliation. If this fails, and the parties cannot be brought together, then perhaps other measures must suffice. Shuttle 'negotiations' perhaps, or each side taking positions and modifying behaviours that are calculated to ease the mutual tensions and stabilize if not mend the

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[1] id. at 193-194

[2] id. at 194

[3] Astor goes through these issues with respect to litigation and court-based or court-related ADR schemes. op.cit. at 49

[4] McDonald & Viargas, op.cit. In addition, participants are asked to commit to certain rules of engagement: To try to respect each other's views and perceptions: to try to actively listen: to take turns, and to minimize disruption; to abstain from judging, blaming, labeling and attacking: to handle as best they can their emotions, and those of the other party (tears, anger, sadness, loss, and the like).

[5] Many people will put up with a lot rather than expose themselves to the public gaze, to possible humiliation, reprisal, and rejection. For, after all, the human being yearns for acceptance, approval, belonging to the group or community at large. There is too, the material imperative. The pay packet, the prospects of advancement (and a bigger pay packet), team spirit, peer group approbation, a sense of personal and professional commitment and achievement. Or on the downside, avoiding negative sanctions of admonition, peer group disapprobation, the threat of disciplinary action or the sack.

relationship without actually confronting reach other. Management measures can also be taken, for example, to separate the parties in the workplace, or to set up reporting structures that circumvent the need for close, perhaps supervisory, contact between them.[1]

One should always be cautious respect to shuttle mediation or indeed any facilitation or conciliation process that tackles the problem by dealing with the parties individually and apart – and particularly the dangers of *Shuttle by Default.* There should always be a specific reason for shuttle mediation – never should be for its own sake! Legal or safety reasons, for example; one party may feel intimidated or afraid; high emotions may be exacerbated; there may be gross imbalance of bargaining power that the third party cannot mitigate.[1] The mediator becomes the sole messenger for offers and counter-offers, the sole conveyor of information on the attitudes and behaviour of the parties. The mediator can thus impose his/her own perspective/slant/spin on the issues, the information passed back and forth, and the outcome. The confidentiality principle may be compromised, as may be the concepts of partiality and the use (and abuse) of mediator power.[2]

It can be argued that such mediation is not true mediation. The parties do not work collaboratively together on the problem. They do not learn how to negotiate with each other. They do not have the opportunity to improve their relationship for the future.[3]

Case Notes: But You Cannot Make Him Drink

A conflict erupted in a workplace between two members of a small and close-knit workforce. The matter was one of interpersonal differences culminating in an incident of apparent inappropriate behaviour that resulted in harsh words, tears, and withdrawals with licking of wounds on all sides.

Management asked a third party to assist in diffusing and resolving the conflict. Both parties were willing to participate in this as yet undefined process. Hence the third party encountered no difficulty in approaching both parties and arranging to meet with each of hem separately at another, neutral venue, out of office hours, Both were happy to download their files with respect to their relationship with each other and with other colleagues in the relaxed and confidential meetings that ensued, enabling the third party to acknowledge their concerns, assist them in interpreting and defining the roots and fruits of the conflict. He was also able to ascertain what each expected to gain from the process and to suggest ways and means of going about it.

One party, the alleged 'offending' party was very keen on a face-to-face conciliatory reconciliation process. A feeling of guilt, of responsibility for the dispute? A worldview that embrace New Age touchy-feely approaches to 'making up' – itself quite at odds with the alleged inappropriate behaviour that gave rise to the conflict in the first instance. The 'offended' party would have nothing to do with such a process – did not want to confront the other party in this or any other forum – albeit it quite resigned to actually sharing the same workplace the very next day. Whilst quite reassured by the opportunity to be able to download her files to the third party 'conciliator', she was quite adamant that the only solution was an administrative solution, i.e. management must support her, and that support should include some form of disciplinary action against the other party.

The degree of compulsion to go to mediation, or consensual participation, is proportionate to the degree of the intensity of the conflict, and also the degree of urgency and seriousness as interpreted by management. Indeed, management interest in a solution and active interest in the outcome is commensurate to the degree to which management perceives the conflict as impacting upon the organization – on employee relations, the conduct of business, exposure to vicarious liability, and also, to the actual or potential effect of the dispute upon outsiders such as customers, trade unions, and statutory authorities.

Hence, a common-or-garden interpersonal dispute that does not clearly affect the parties' work performance or productivity, and does not have a negative influence on their colleagues and workplace generally – is more suited to low-level interventions on management's part – interventions that are less pressured in time and urgency - and consensual participation by the employees. For example, they chose to participate in the process to improve their working relationships and their working environment – their own personal 'comfort',

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[1] The dispute resolver must always be prepared to *go with the flow* when defining and diagnosing a dispute prior to intervention. He or she must be able to think on one's feet in assessing what is requred, and selecting a *fit* from a variety of models: facilitation, conciliation, simple advise and guidance, mentor, enabler, teachers, agony aunt, fire-brigade, or mediator.

[2] Boulle (2) ibid at 104 and 198. In addition, there is potential for error and omission when conveying parties messages to each other, whilst parties ma be sensitive to the amount of time the mediator spends with each side. Some other drawbacks of parties not facing each other: communication is liable to distortion; their focus is more on substantive rather than emotional content; it is easier to engage in positional bargaining, threats, bluster, and other negotiation tricks; there may be attempts to persuade the mediator instead of each other; unconsciously using the mediator as their agent to advocate their case to the other side.

[3] id. at 199

satisfaction, and well-being. Or conversely, they may elect not to enter into a dispute resolution process, preferring to let the conflict fester or abate.[1]

But if the conflict does indeed impact upon the workplace, affecting the parties' performance and productivity, and threatens to infect others. If it looks like spreading into the wider organization and its business generally, with the potential for over-spill into legal and industrial relations jurisdictions. Then management pressure to initiate a dispute resolution process increase, requiring a swift and also formal process that endeavors to resolve the conflict, and covers the company's back insofar as it must demonstrate that it has procedures in place to resolve such conflicts, and has used these procedures.[2]

And with it, sanctions of non-cooperation: *You must resolve your dispute or else…*

Naturally, mediation ordered by management must address the issues of voluntary participation, and the parties' ownership of the process, confidentiality, and power imbalances, in addition to the inevitable implications for mediator neutrality and power.

There are problems therefore with in-house, management ordered mediation or conciliation processes insofar as the degree of compulsion that may be involved. One or both parties may be unwilling participants, and hence their commitment to the process and its outcome may at best be reluctant, and at worst, hostile. There may be a tendency to just go through the motions for the sake of peace and quiet, or to avoid admonition or even disciplinary proceedings on the part of management.

The Management Shadow - The Question of External Influence

It is accepted that in any mediation environment, the power and/or influence of absent parties can impact upon issues and outcome, and must therefore be taken into account. And in workplace mediation, this is particularly pertinent. There are the parties' colleagues to be considered, and also supervisors and line managers. Most particularly, senior management may have a keen interest in the proceedings and may demand input in the shaping of any resolution, settlement or formal agreement that emerges from the mediation.

Absent parties cannot be ignored. They may have considerable influence over one or other party, and whilst not being required to ratify an agreement, can still nevertheless stymie it by reticence, intransigence, or obstructiveness. It is critical therefore that the mediator ascertain from parties the existence of stakeholders whose approval is, formally or informally, a required factor for success. Or of any others who will be insist on knowing how the matter is settled – and who may, indeed, want input.[3]

Associated with this is another imperative of mediation – the parties' power to settle, The power to actually decide and agree on an outcome, to sign-off on a mediation agreement, is a fluid thing that advances and retreats depending on the progress and outcome as perceived by one or other of the parties. It may be conditional, limited, concealed, invented, a cynical *going along with* process.[4] One or both parties may tolerate a mediation effort, but go through the motions, only. They may participate but, in the end, they retain the right to make the final decisions and even veto the outcome.[5] And more subjective influences may be at play. A party may be concerned how fellow employees will react to any compromise he/she may reach.[6] Fear of criticism, ridicule, or otherwise may undermine commitment to a mediated outcome.

In the workplace, an in-house mediator who is cogniscent of the channels of reporting and communication, and perhaps in daily contact with different levels of management, will know precisely who the stakeholders are. Or at least will know how to go about identifying them. The mediator can anticipate absent party influence and take it into account. Make contact with them, involve them, and consult with them. Advise as to how parties to consult with them. Ask how parties will counter anticipated criticism, or potential sabotage of an agreement. In short, the mediator must identify interests, priorities, options and choices of the absent parties.

And the most critical, most powerful absent party is Management.

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[1] Refer to Kolb & Bartunek, and Tillett, op.cit.
[2] Thence avoiding vicarious liability under miscellaneous State and Commonwealth legislation.
[3] Boulle (1) op.cit. at 237, 271
[4] e.g. *Because I have been ordered to;* or:*because it is expected of me:* or *I had no choice*

[5] See Susskind, op.cit. A promise by an elected official or a manager to "live with the results of an informal consensus building process" could be criticized as a "dereliction of duty" or as "delegating away" statutory or management responsibility

[6] Boulle (2), op cit. at 236

In our discussion of neutrality, power and compulsion, we have considered the reality of management involvement in the workplace mediation process. The shadow of management influence is cast over most dispute resolution processes in an organizational context. If management is aware of the process, and takes an active interest in its outcome, whether as an interested observer, as an active advocate of a solution, or as an active participant in the process, then the influence of management is felt.

Case Notes: Who's The Boss?

One party – the alleged offender, at that -was a very good friend of the CEO. The company advocate had a long-standing business relationship with the company and close para-social contacts with many senior executives, including both the alleged offender and the CEO. The CEO although theoretically out of the loop, was nevertheless exerting pressure on the advocate to ensure certain outcomes, including the distance the company was prepared to go in securing a settlement of the case. and, implicitly, a commitment to strike down any solution that was contradictory to existing company management reporting hierarchies.

At the point of an agreement being reached, the intervention of the advocate – by telephone to the parties, and the contact officer – deprived the parties of their freedom and authority to settle on anything that went too far against the CEO's wishes. Although an agreement was indeed signed, and the parties departed reasonably satisfied with the outcome, it was nevertheless not totally supported by the CEO - who indirectly, including through the advocate, proceeded to undermine the agreement by attempting to alter certain of the administrative arrangement set in place to enable the parties to return to their responsibilities. In his role as neutral go-between, the Contact Officer was compelled to intervene and advise both the CEO and the advocate to back off and let the agreement stand.

And the length of the shadow cast is proportionate not only to the impact upon the spill effect of the dispute, as discussed above, But also, to the power and status of one or both of the parties. Again, therefore, the degree of management involvement and even intrusion is contingent upon and commensurate with the perception of its importance to workplace relations (including the maintenance of smooth employee relations, discipline, and good order), to the wider business, and to potential external risks.

And the reach of the shadow invites a most intriguing question that goes right to the heart of what mediation is all about: collaborative, consensual dispute resolution, and the parties' ownership thereof: If management sets the rules and potentially makes the decision, does not management and not the parties own the solution?[1]

All Over The Block - The Question of Confidentiality

This most critical element of the mediation process can never be totally guaranteed if the mediator is a fellow employee. He or she may be trusted never to divulge the details of a conciliation or mediation to others. But information is power – and even if not used, it can be perceived as threatening insofar as all concerned will always be aware of such knowledge and its potential implications if it "got out". The dual relationship between the parties and the in-house mediator compromises the mediation process whilst shared confidences may influence future working relationships.[2]

Case Notes: A Secret All Over The Block

Whilst the Contact officer and the Advocate were punctilious about maintaining the confidentiality of the proceedings, and impressed this upon the parties, 'leakage' occurred from day one. Indeed, no sooner had the alleged offence been committed than gossiping and confiding, and lobbying, taking sides commenced. Whist assuring management that confidentiality was being maintained, the parties themselves were actively disseminating the perceived facts of the case to all who were willing to hear about them. In a small country town, the story (or stories, more like) were a *secret all over the block*, and the talk of the town in shops, the RSL, the Golf Club…Management was compelled to issue a directive to all managers advising them that public discussion the matter was off-limits on pain of disciplinary action. All this did was to push the talk underground – where it remained during the mediation process – and where it remains to this day.

The environment of in-house Dispute Resolution may itself be intimidating. The proximity to the workplace may mean that the attention of the parties may not be wholly on the process but may be distracted by thoughts of things to do, calls to make, and so forth. The fact that a mediation takes place in-house means that tongues start wagging, that closed door signify momentous things afoot. Confidentiality may be

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[1] Paraphrasing the idea that in litigation, the judge makes the decision and the legal system owns the solution.
[2] Refer to page 6 with respect to partiality.

breached and the rumour mills fed. A mere perception of a breach or potential breach of confidentiality will prejudice the process.

Outsourcing – The Question of Distance

The foregoing pages have considered the factors that compromise the integrity of mediation by in-house mediators. There are other more mundane but nonetheless cogent reasons for foregoing the in-house option.

One justification for training internal mediators is cost related - the argument that in-house mediators would be less expensive than external ones. Yet the cost of the in-house mediator's time may not be much less than the fee charged by an outsider, particularly if one considers the opportunity costs of bringing in an in-house resource from, say, another department, division or geographic location within the company.[1]

The matter of the in-house mediator's skills and experience are also valid. It would be beyond both the needs and the resources of the average organization to be able to employ a full-time, qualified mediator. The designated employee would inevitably have a full-on day time job, so to speak, and would most probably *do* grievance procedures, mediation or whatever, by desire or default by virtue of skill, training, or intrinsic interest.

Moreover, the in-house mediator, with perhaps less training and experience, may not have the skills to effectively mediate more serious disputes, nor the time to devote the necessary attention to the case. The downside is that a conflict that could have been satisfactorily resolved with the involvement of a more experienced mediator may not be successfully mediated by the in-house mediator; and as a result, employees my have less confidence in the mediation process particularly, and the organization's dispute resolution regime generally, and will not seek these options as readily as they otherwise might.

The alternative to such in-house dispute resolution is therefore the establishment of a mechanism external to the organization. This would overcome perceptions of neutrality and power to a degree, and allay fears and suspicions. in mediation theory, a neutral mediator is said to bring many things to the process by virtue of his or her actual and perceived impartiality. The parties are said to be certain of a fair hearing and can expect to air their feelings, their grievances, their needs and interests in an atmosphere of confidentiality and empathy.

The very definition and process of external mediation, whereby the mediator assists the parties in working together to reach an agreement that they can live with, assists the problem solving process. The probability that the mediation will take place outside the company's premises, removing the parties from the environment that housed the conflict, also serves to create an atmosphere conducive to collaborative problem solving.

However, if a regular external service–provider is used, there will come a time when the neutrality will be compromised by the ongoing fiduciary arrangement between the provider and the organization, not to mention interpersonal relations between this and management. Even with the best of intentions, the ongoing relationship between organization members and external counsel can impact upon the perception and the reality of arms-length interaction. Familiarity breeds complacency and perhaps laxity – laziness even with respect to protocols of impartiality and even confidentiality.

An alternative is to select outsiders on an ad hoc basis. But this could become costly and time-ineffective and therefore unacceptable as a use of company resources. And would management want to run off to outsiders in the event of intra-company disputes? Management wishes to be in control of its own house, so to speak. It does not wish to derogate responsibility for what are essentially human-relations matters to outsiders. Common outsourcing decisions, such as for Information technology and payroll are made on economic and technical grounds. The day-to-day management of the organization is another matter entirely.

Conclusions : A Flawed Process is Better than None At All

What can be done to mitigate the obvious shortcomings and difficulties, impracticalities, indeed, of workplace mediation? Or at the very least, to counterbalance the inevitable, predictable pressures exerted by the workplace environment. Can we at least limit the pressures of partiality, inequality, dis-empowerment, compulsion, confidentiality, and the pressures of external influences?

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[1] Tim Hicks, op cit.

Maybe only going off-site in terms of mediator and venue is the answer - particularly in terms of the enforcement of the outcome. But in the workplace, in the corporate environment, this may not be practicable, desirable, possible, or necessary.

The in-house process may a feasible and economically viable one. But there are many problems to overcome, particularly those relating to neutrality and power, and ensuing therefrom, the perception that the process is just another arm of management, and as such, a tool for controlling and manipulating the workforce, simply to create the impression of participation and consensual procedures. Such perceptions hinder the development of legitimacy and credibility for dispute resolution processes. Likewise, they work against the adequate understanding, acceptance and commitment to these processes on the part of the stakeholders.

Yet, ought not a workplace ADR regime with mediation as one of its options be permitted to take root without the full satisfaction of these concerns? Is it really necessary to concentrate so much on the notion of neutrality? Perhaps mediators are never neutral. Perhaps mediators should not be neutral.

What of the necessity of redressing power imbalances? If this is achieved, it is often fleeting, temporary - illusory even, if the status quo ante merely re-asserts itself once the mediation is over and the parties have departed from the mediation environment. The parties are empowered during the process, but return to the real world with their powerlessness, and are in most cases requred to return to a workplace culture or system that has not changed. A dis-empowered party may suffer further disadvantage or discrimination after what they have disclosed during mediation (hence, there are hidden dangers in mediation). Why the need to redress power imbalances that cannot in reality be redressed? Perhaps these should be merely acknowledged and taken into account in the process.[1]

Similarly, in the pressure-cooker milieu of the workplace, with its countervailing pressures of management demands and employee needs, and there seemingly irreconcilable interests, there may be no way around the issues of compulsion and management influence. And in any large collective of individuals, constantly interacting with each other on a day-to-day basis, perfect confidentiality would be illusory.

Finally, people within an organization may not therefore be ready for workplace mediation. They may want to be directed, to have their conflict arbitrated and adjudicated. They will have to be brought gradually to an acceptance and understanding of Dispute Resolution processes a gradual, educational process. And these compulsory, as a company policy may not work immediately, therefore. In fact, it may be counter-productive, at least until the questions surrounding the issues considered in this paper resolved.[2]

These questions probably never be answered fully, even with the best intentions in the world. But as conflict can be damaging to an organization, preventing it from achieving its objectives, one would probably have to settle for a flawed dispute resolution process on the grounds that a flawed process is preferable to no process at all. Also, in many cases, it might just work.

The pitfalls are many and various, and the outcomes uncertain. All third party interventions in conflicts are about change and changing – asking people to change how they think and feel about each other, about resolving what has happened, and about moving onto what will happen. Ideally, there will be a degree of closure, an intention to put the past behind, to let go, to move forward. In reality, however, this may not be a realistic expectation, particularly when people are asked to abandon, forgive, and forget. Often a conflict is never fully resolved to the satisfaction of all parties, and whilst people may be prepared to bury the hatchet under immediate circumstances and pressures, there are some among them who will always remember where it is buried.

But, even if ostensibly unsuccessful, even if outcomes are inconclusive, a mediation process may actually achieve goals of bringing people together to resolve their differences, of improving communications, and of increasing their awareness of their own and others' needs and interests.

As Boulle points out, the mediation movement regards constructive conflict management not only as a means to an end of settlement, but as an end in itself.[3] The literature on mediation suggests that the system should be evaluated not only in terms of the final outcome. Even where the dispute is not fully resolved, mediation might provide other benefits. Parties discover each other's concerns and interests. They vent

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[1] There is nevertheless the educative nature of the mediation process. The demonstration of equality and empowerment of the weaker party may have a downstream effect influence upon both parties. including the educative function discussed above. Boulle (1) op.cit. at 45-46

[2] It may even give rise to the corporate equivalent of vexatious litigation as employees, invited to participate in the new process, pursue all manner of complaint through the formal grievance process.

[3] id..at 45

emotions in a positive environment, with a consequent lowering of hostility and antagonism. They define the dispute more clearly, prioritizing issues in dispute, generating a range of optional 'solutions', and agreeing on procedures or methods to resolve substantive issues. They are forced to confront the conflict and not abdicate responsibility of settlement decisions. The mediation provides a model for constructive problem solving for use in subsequent disputes.[1]

The paper opened with Laurence Susskind:

> *The most important insight to date is that there is no predictable pattern that successful mediation must follow.*[2]

But one thing is certain: a mediator's lot is not an easy one.

We close with David Augsberger:

> *Mediation is not only the ability to define and clarify, to separate and discern, to link and reconcile opposites; it is also the capacity to absorb tension, to suffer misunderstanding, to accept rejection, and to bear the pain of other's estrangement.*[3]

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[1] ibid. Furthermore, the post-mediation milieu is important in any workplace mediation or ADR. Once an agreement has been finalized (or not, as the case may be), and a transformative process has occurred)(or not, again as the case may be), the participants are in most cases requred to return to a workplace culture or system that has not changed. What can be done by the management or the in-house ADR personnel to provide post-mediation support in the short term and beyond to enhance the likelihood of sustained behavioural change and the development of DR skills? Can there be skill development and training in communication skills, effective listening, conflict resolution and the like?
[2] Susskind L, op.cit.
[3] David Augsberger op cit. at 91

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Appendix One: The Promise of Mediation

A third party may be necessary

- because parties are bogged down by tradition, training and complacency in the argument mode of thinking.
- The parties may not be able to carry out certain thinking operations because these would not be consistent with their positions in the conflict. – anger and frustration can cloud good judgement
- they may fail to focus on the issues by adopting adversarial positions
- disputes may have become internalized and personalized
- if the parties have unrealistic assessments and expectations of their situation with respect to positions and outcomes, and, should the negotiations fail, a neutral evaluation of the walk-away alternatives may be indicated
- the parties may be bogged down by positions– by issues, personalities, and history - rather than impelled by interests

The 3rd Party

- third party interventions can contribute to problem-solving by making sure that disputants attack the problem rather than each other, and by keeping the focus on interests rather than on positions
- may offer information or introduce an intervention in the dispute to break a negative cycle – or to turn it to positive ends
- can seek to achieve a balance in the power situation of the parties. Any power differential will undermine trust and inhibit dialogue…symmetry in situational power: attempt to guarantee equity, favour the least articulate
- help achieve a balance in the reciprocal confrontations between the parties – so the at apparently premature actions by either will not be misinterpreted
- listen and communicate, and be non-judgmental in both
- facilitate communication to enable clear deciphering and interpreting of each other's messages
- assess the degree of openness in the dialogue and introduce processes to free the interaction…
- maintain an optimum level of tension in the negotiations
- be neutral on content and outcome and be hard on process and soft on content
- be hard on the problem and soft on the people

Mediation

- offers an external agent with alternative and additional information, experience, and expertise, who can provide resources and motivation
- offers a neutral who can facilitate, educate, and guide the parties through a structured resolution process
- can provide alternatives beyond those which the parties themselves can generate
- keeps in focus the visible prejudices, values, stereotypes, fears and needs of both parties and their communities in a way either is able to do for him/herself
- invites and often ensures full participation and full communication between the parties
- can equalize power differentials and provide maximum opportunities for both parties
- gives freedom for both parties to express and explain their sides of the dispute without limits on the style or content
- decreases confusion, cultural misunderstandings, and individual limitations to make the proceedings intelligible to all
- aims to reduce largely psychological obstacles that prevent hostile parties coming together for constructive negotiation

Mediation allows disputants and their supporters to

- talk to each other in a verbal style that is natural, comfortable, and mutually intelligible to all parties
- ventilate anger and frustration in a free and appropriately open and therapeutic fashion
- receive an increased sense of power and personal worth
- gain access to a readily available, quick and inexpensive forum
- equalize or re-align status and interpersonal power struggles by promoting an egalitarian ethic
- re-establish and realign the persons, place, and sense of belonging in the relevant social group
- learn about other parties' cultures and perhaps learn to understand and to tolerate them
- learn to work together side-by-side in joint effort and joint problem- solving
- get their rights recognized as legitimate by the very fact of being 'on the table' and often, the public record
- develop problem solving skills in general and dispute resolution skills in particular

The mediator	The mediator must be able to
• remains outside the conflict itself, refusing to slip in to the role of judge, adviser or advocate on content or policy issues • acts as a cultural bridge between the conflicting parties, reframing value-laden concepts in a non-judgmental, non-provocative manner • if competent, can assist parties in breaking open the conflict, untangling the issues, the behaviour going on between the parties, the conflict that enmeshes them, separating people (and their attitudes and actions) from the problems (the conflict situations • is supportive of people as they clarify their own views and values whilst being confrontational with the conflict situation itself i.e. hard on the issues soft on the people! • maintains caring neutrality – the commitment not to a particular outcome but to end the suffering of both parties • seeks to progressively sharpen his/her basic skills of empathy, active listening, sensitivity to the needs of the parties, sense of timing, verbal and nonverbal communications skills, capacity to maintain neutrality while remaining in contact, and ability to understand the stages of negotiation and conflict resolution	• identify who are the stakeholders, and endeavour to include them in the mediation • determine the preferred process, e.g. formal or informal; face to face or shuttle, and establish the right conditions, paying due deference to cultural norms and protocols • see and perceive with a measure of creativity and objectivity, including being aware of nuances of speech and body language (active listening and perceiving) • be non-judgmental and avoid provocative, value-laden language • define and clarify, to separate and discern • link and focus the parties and reconcile opposites • contribute creative skills e.g. offer • a probe (question, observation, proverb, quotation) • a provocation (reversal, exaggeration, paradox, contradiction) • a picture (metaphor, story, case, image) • a principle (basic assumption that the parties hold in common, goal they now share, value they have both affirmed) • pirate and promote ideas • review issues and concepts, provide an overview enabling parties to broaden their perspectives • develop a sixth sense for timing
Difficulties facing Cross-cultural Mediation • defining the role of the mediator –how the mediator is viewed by the parties – as a neutral? An equal? A judge? a participant? a party, even? (in some cultures, a mediator can indeed be part of the dispute, his/her reputation or face dependent on the outcome). • there are almost always great many parties, and not all of them are obvious • it may be hard to know exactly who the stakeholders are and who can speak for them. • bringing these groups together to resolve differences is a laborious task • ground rules have to be negotiated anew in each such situation • participants are likely to have diametrically opposed views of what will happen if negotiations fail • mediation may have to be handled by teams of mediators – too much work, too many parties • things that can go wrong when attempts are made to bring made parties together to tackle a complex issue • the impatience of many convening authorities • mediators may bring **their** cultural and other baggage to the table • it may be necessary "to go slow to go fast." - unless all the pre-negotiation logistics are handled with great care (to give the overall effort the necessary credibility and legitimacy in the eyes of the stakeholders), the entire process is likely to falter before it is completed • one or more parties may resist a consensus building effort • the parties may be confused about what the	**Skills required for cross-cultural mediation** • mediators need to know something about the substantive milieu in which they are working and be aware f the cultural assumptions of the parties • mediators must be aware of the temporal realities of the milieu. In some contexts, time is not an issue • mediators must be extremely sensitive to the larger context of their work • attempted intervention or mediation by one external to the culture inevitably misses cues, scrambles data, and confuses primary and secondary issues at best. • a mediator unfamiliar with the culture may utilize tactics least likely to facilitate an opening of communication that will clarify differences and enable conciliation • mediators must be highly eclectic in their approach to problem solving. • a passive mediation style in a situation that requires a high level of mediator activism may result in failure • But an activist mediation style can overwhelm or put off a group of participants who expect the mediator to play a low-key role. • mediators must match their approach to the demands of the situation • mediators must be attuned to the contracts and continuities across cultures. • mediators must give equal attention both person and problem, to relationships and goals and to private interests as well as public positions

process entails • a key party may not accept the basic premise that mediation is voluntary, and remains so right up until the final agreement is signed • mediation is very dependent on the environment, the pressure to resolve the dispute, the motivation of the parties, and the resources available • perceptions relating to neutrality and power are problematical for all mediations • there may be a perception that the process may be just an exercise in middle class or first-world patronization or manipulation • these difficulties hinder the development of legitimacy and credibility for dispute resolution processes, and work against the adequate understanding, acceptance and commitment to these processes on the part of the stakeholders • the process must be consistent with the parties' orientation to, and understanding of dispute resolution	
Is mediation the answer • both parties must be self-motivated to enter into give and take negotiation • parties may not be ready for mediation, may not want it, and may have to be brought gradually to the idea by a gradual, educational process • parties may want to be directed, to have their conflict arbitrated and adjudicated • what of the necessity of redressing power imbalances? If this is achieved, it is often fleeting, temporary, illusory even, if the status quo ante merely re-asserts itself once the mediation is over and the parties have departed from the mediation environment • parties are empowered during the process, but return to the real world with their powerlessness. Why the need to redress power imbalances that cannot in reality be redressed? Perhaps these should be merely acknowledged and taken into account in the process	**Even if mediation fails, there are still gains** • even where the dispute is not fully resolved, mediation might provide other benefits. For example: • parties discover each others concerns and interests • venting of emotions in a positive environmental the consequent lowering of hostility and antagonism • defining the dispute more clearly • prioritizing the issues in dispute • generating a range of optional 'solutions'; agreeing on procedures or methods to resolve substantive issues • forcing the parties to confront the conflict and not abdicate responsibility of settlement decisions • providing a model for constructive problem-solving for use in subsequent disputes • the demonstration of empowerment and equality of a weaker party can have a downstream, heuristic influence on both parties as they take away with them the experiences and lessons of the process
Sources include: Augsberger DW <u>Conflict Mediation Across Cultures</u> *Multi-Party Public Policy Mediation: A Separate Breed*, Lawrence Susskind. American Bar Association Boulle L, <u>Mediation –Principles, Process, Practice</u>, Butterworths1996	

Appendix Two: The Ballad of Jack and Jill
A Case Study in the Resolution of Interpersonal Conflict

Round One

Jack and Jill are middle mangers in a large organization.

The company can be described as hierarchical and mechanistic in relation to status and lines of authority and communication, although there has been a degree of delayering and a flattening of the hierarchical pyramid in recent years. This has come about primarily as a response to changes in the environment in which the company operates and the impact of Information Technology (which it has embraced enthusiastically and productively). Jack reports to Jill who reports to the Director.

Jack runs a department of five people. Jack and Jill are similar personality types: are ambitious, arrogant, and have poor people skills. Neither is very good as listening, and both are impetuous when it comes to decisions and actions derived therefrom.

Although Jack's role and responsibilities, including reporting channels, were made clear to him on appointment, He wants total control over his department and would like to report directly to the Director. He aspires to perks and conditions that other managers have but perceives that these are denied to him because of his apparent junior status. Self-esteem is important to him: how he sees himself in the organization, how others see him, how he would like others to see him. He wants ultimately to have Jill's job.

Jill believes that Jack has his eyes on her job and that he will do all he can to undermine her and take it. She suspects him of white-anting her and of criticizing her to others. She counters by playing the same game, making decisions on his behalf without consulting him, interfering with the day-to-day management of his department, and on occasions actually taking the clerks' part in their disputes with Jack. For to be frank, Jack's way of relating with his staff could be improved. He plays favourites, he criticizes individuals publicly, he issues directives in a dictatorial manner, and threatens disciplinary proceedings of his instructions are not carried out to the letter and to his satisfaction. He does not communicate his wishes clearly, and has a habit of making decisions on the run and changing his mind shortly thereafter. This causes confusion and ill feeling. Naturally, Jack suspects Jill of white-anting **him** and of interfering in areas that are his responsibility alone.

The causes of conflict are many, therefore. A case of job definition and turf protection, of ambition and self-esteem, of conflicting personalities and worldviews. In the first instance, mistakes were certainly made. Roles were not spelt out definitively to either party. Territories, responsibilities, and autonomies were ill defined. Initial differences of style and opinion escalated and slights and perceptions of slights, including for example Jack going over Jill's head to appeal to director, and Jill going around Jack to deal with his staff. The conflict careered out of control by the sheer weight of the stress and animosity thrown into it.

There was considerable sparring over several months, with each appealing to the Director for support against the other. The Director repeatedly requested that they settle their differences in a responsible manner. Matters came to a head with each independently asking him to resolve the matter. Jill demanded that he back up her authority. Jack asked to report directly to the Director and demanded that he instruct Jill to keep out of his department's business. In these 'appeal sessions' there was much grandstanding, self-aggrandizement, self-advertising, deception, distortion of the facts, burning martyr, offended pride, and brinkmanship.

Several attempts at conciliation were inconclusive. The conflict simmered and occasionally came to the boil. The Director came to the dispute with the intention of being even-handed, of appealing for calm, and endeavouring to smooth ruffled feathers. He attempted to give each a fair hearing and listen to both their concerns, and pour oil on troubled waters. He appealed to their sense of professionalism and their pursuit of the common good. He checked out the facts behind the allegations each had made about the other. A busy man at the best of times, he was patient and, so he believed, fair and understanding.

In the end, the Director lost patience. Caught up in the issues, he was unable to maintain his hitherto neutral stance. He summoned them both and demanded that they cooperate with each other. Taking the moral high ground, and coming down heavy with the full authority of his position, he issued what were in effect warning letters. These spelt out clearly what their roles were, what they were to do and not to do, how they would behave in each others company, and how they would behave in respect of their staff and in front of their staff. In short, he separated the warring parties!

In reality, he came down on Jack's side. Jill, he believed, had failed as a manager. He reckoned that her interpersonal skills were poor and that she has got almost everyone in the company offside with her manner. Jack's were not much better. He resolved that they would both attend a course on interpersonal skills (not together of course). Neither got what they wanted. On staff issues, Jack was to report directly to the Director and the Human Relations Manager. The Director intended to keep a tight leash on Jack's discretion and independence, demanding regular reporting and full communication. On operational matters, i.e. Issues relating to the output of his department, he was to report directly to Jill. Both were to keep the Director fully informed on substantive issues affecting the department and its work.

The situation whilst currently calm on the surface, was in reality unresolved. Bad blood existed still, particularly in the case of Jill who felt that in such turf wars, management should have supported her against her subordinate. What will others think? There is also the matter of hurt pride and self-esteem; a perceived slap in
the face after other achievements have been acknowledged and rewarded. She figured her days with the company were numbered, that promotion prospects had been severely diminished, and that the bond of trust and respect that hitherto existed between her and the director had been stretched to breaking point. Motivation was decreased; working back, once taken for granted was now the exception rather than the rule. Things were quiet in Jack's department. He was been instructed not to crow too loudly as is his normal demeanour. He pulled his head in and appeared to be behaving himself.

This was, in reality, a lose/lose outcome which satisfied no one, including the Director. He now admits that he would sooner let Jill go. Get rid of the person and hence the problem.

At the time, management surmised whether a consensual process such as mediation would have worked in this situation and produced a better result: seeing the dispute from the other side, working through options for resolution, the cooperative approach rather than the hitherto adversarial approach. But who would be the mediator? Should the mediator be an external agent, or was it possible to have a credible and legitimate in-house mediator role? It comes down the those basic issues so central to the Mediation process: neutrality, confidentiality, and power (the latter an issue which could effect both the mediator and the disputing parties insofar as all have a place within the organization structure and therefore different ranks/status and authority within the organization). The perceptions relating to these factors go right to the heart of the outcome of such in-house dispute resolution. How much is the agreement (if there is indeed an agreement) reached by cooperation and consensus, how far do the parties own the dispute and the process, and how credible and legitimate and hence how effective and durable is the outcome

Round Two

As with many unresolved disputes, the conflict between Jack and Jill did not take long to resurface. Arguments over polices, procedures, opinions and jurisdictions once more rose to the surface, accompanied by interpersonal invective and tantrums. On this occasion, however, the Director played Pontius Pilate. He passed the matter over to the company's dispute resolution "Contact Officer" with the instruction to all parties that they were to endeavour to resolve their differences in a co-operative forum.

This they duly did. A meeting was arranged in which the pair aired their differences in the presence of the Contact Officer who took on the role of neutral mediator, facilitator and arbitrator as the circumstances demanded. The parties agreed to a code of conduct between themselves, and work commenced upon drawing up procedures and job specifications that would redress the omissions that had given rise to the conflict in the first place. Regular meetings were to be held to monitor progress and to ensure that channels of communication were kept open.

The Contact Officer was drawn of necessity into the loop to ensure that these steps were in fact taken. In effect, he became the de facto manager of their department. In reality, he ranked above the disputants in the organizational hierarchy. He was able to bring to the process all that his rank and expertise endowed. He was in effect able to direct the parties towards a solution and if they prove recalcitrant, exert influence in a variety of ways to ensure an outcome.

This very soon proved to be the case. The parties were from the outset reluctant participants in this "peacemaking" process. Their mutual resentment and distrust was difficult to overcome, and an air of dishonesty and pantomime hung over the proceedings. Any semblance of co-operation was a charade, the Contact Officer finding it very hard to believe ether party's version of events. Moreover, as a senior executive of the company, the Contact Officer was coming to is own conclusion that the administrative drift that had set in as a result of the dispute would have potentially damaging implications for the company itself. What had commenced as the result of management shortcomings and interpersonal rancour, was beginning t have more global implications with respect to the integrity and continuity of administrative

procedures.

Furthermore, the dispute was having its effect on other members of the organization. People were drawing their own conclusions as to the causes of the conflict, and the rights and wrongs of the case. Other managers were offering their own opinions and their own solutions, whilst subordinates were bemused and confused bystanders in a struggle for authority and control that left themselves bereft of adequate supervision and guidance. As the dispute wore on, and as gossip and innuendo threatened to undermine the dispute resolution process, pressure was building up for an administrative solution.

The Contact Officer voiced his concerns to the Director and was instructed to draw up recommendations for an administrative solution. He was advised furthermore that any such recommendations could be the subject of legal action in the future. After much research and consultation, he drew up a detailed plan for the restructuring of the department and provided the Director with three options.

The restructuring that followed resulted in Jack's retrenchment and a radical change in the management structure of the department.

Two years down the track, Jill is no longer with the company. She to was part of the collateral damage of another company restructure. Although, there were wider issues involved in the retrenchment decision, he case was not helped by the still reverberating strains of *The Ballad of Jack & Jill.*