

Mediation And The Principle Of Emergence

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Charlie Irvine in his recent Kluwer blog (Mediation Values: Still Searching) suggested it is our values that determine what we do or say in a mediation rather than any techniques we learn as mediators. Charlie gives a mediation example where the husband wanted to claim his full pension as part of the division of assets. Charlie was accused of taking sides when he suggested that the law might suggest a different result. The wife said she understood Charlie's point but would accept this apparent unfair outcome.

I had a similar situation. The wife said the husband had worked hard all the marriage and should have all the superannuation. She had not wanted to consult a lawyer. In joint session I asked the husband, who had consulted a lawyer, what his legal advice was re super. He sheepishly set out the law. The wife went silent and I called a private session. She asked for an adjournment to get legal advice.

Both Charlie and I were aware that our respective wives were agreeing to something less than they would legally be entitled. My response was to mediate that particular moment in joint session and allow something to emerge out of the interaction. It moved the focus from the fairness issue to the information and value disconnect between the parties. It forced the husband and wife to interact. This imbalance would otherwise have carried on through the whole mediation.

The Principle of Emergence

Mediation is built on the complex interaction between the parties. That interaction leads to something new being created which becomes greater than the sum of the parts. Scientists call this process 'emergence'.

The American physicist Murray Gell-Mann made the following point "You don't need something more to get something more. That's what emergence means."

Everything in the dispute is there in the person of each party - all we have to do is allow it to emerge. We just have to get ourselves, as mediators, out of its way. Of course, we have our own values, particularly not wanting to let the wife miss out on her entitlement as well as the desire to get a fair settlement for the parties. But we don't need to add these personal values to get something more for the wife. It is their journey not ours.

The introduction, by mediators, of legal information and in many cases with retired judges, legal advice and opinions, are examples of the use of mediator expertise to help craft a solution. The underlying value is the concept of fairness and justice although, I would argue, there is a deeper subconscious value at play. The desire for the mediator to successfully get a deal done and to be seen as a successful mediator.

I suggest that the desire to get a settlement is the biggest influence on mediator behaviour. I suspect most mediators don't see this as a 'value' but a natural consequence of their contractual engagement. But it is our attitude to that ultimate goal of wanting a successful outcome that has the most impact on mediator behaviour.

I would argue that it is the prime value driving the solution focused advisory approach to mediation, particularly by lawyers, as evidenced by their preference to be called 'dispute resolvers' rather than the more oblique (John Kay - Obliquity Theory) term of 'mediators'. It can be seen in the practice of mediators using their expertise to hypothesise a solution and then work to close the gap using the caucus or shuttle mediation model to corral the parties towards a compromise.

Stepping back and allowing issues to emerge can bring unexpected outcomes. I have encountered many examples where the wife has been prepared to forego some financial entitlement to keep the husband involved with bringing up the children. The fear of being left alone to raise children and the loss of the children's connection with the father has often, in the mind of the wife, outweighed the fairness consideration.

Allowing this to emerge in the joint session provides an opportunity for both parties to properly consider its implications for their long-term role as parents particularly as to whether it is sustainable over time.

If my intervention with respect to the wife's legal entitlements did not work, then I would still hold the space for something else to emerge. In the end I would not have hesitated in holding a private session with the wife and telling her that I'm not prepared to go ahead with the mediation unless she got legal advice on this issue. Once she had received proper legal advice I would then have proceeded. It then becomes the wife's decision as to how she balances the values of family life versus fairness.

This is a boundary issue not a value issue. I set the boundaries within which I as a mediator operate. I would normally mediate with lawyers for each party, with the lawyers either being present or being available in a supporting role.

Tacit Values

Coming back to Charlie's point on how values influence mediator behaviour, I would make the point that we do not know our values until we are face-to-face with an ethical dilemma that tests them. It is only after experiencing that experience that we can assess what it disclosed about our values. We can join the dots in retrospect but not in advance. We cannot predict how we will behave in any situation.

This has similarities to how we acquire knowledge. We do not know what we know until we are faced with a situation where we need to apply it. It's called tacit knowledge. This comes from the work of Michael Polanyi. It can be defined as skills, ideas and experiences that people have but that are not codified and may not necessarily be easily expressed. As Polanyi puts it, we know far more than we can say. I am therefore suggesting that in addition to tacit knowledge we also have tacit values.

The reason why this is important is that we can never really understand ourselves and the hidden influences that impact on our values. The Welsh have a word for it - Cynefin (kuh-NEV-in). It has no English equivalent. The closest translation is 'the place of our multiple belongings'. It refers to the fact that we are influenced by multiple things which we may not be aware of including our family history, our DNA, our geography, our faith and our conscious and unconscious social interactions that have built up in us over time.

If we can never hope to understand our values, then it is best that we isolate them from the moment to moment interaction between the parties.

This leads to the ultimate mediator challenge of holding a non-judgemental awareness while actively interacting with the parties. It requires us to detach from our memories, desires and the need to understand what is happening (Wilfred Bion) in order to allow the moment and all its potential to unfold. It's what makes us a 'Mediator' rather than a 'Dispute Resolver'.