Kluwer Mediation Blog

Is Mediation Really Like Fruit? – Does The Conflict Have To Be Ripe?

Rosemary Howell (University of New South Wales) · Tuesday, July 31st, 2018

(This post is being republished because of technical problems when it was first published).

Studying and teaching with Professor Frank E.A. Sander at Harvard in the late 80's was life changing. The energy and vision he showed – going right back to his presentation at the 1976 Pound Conference – persuaded me that fundamental changes to the culture of conflict were possible and in progress.

I returned a convert.

It took a while to realise that many in the legal profession saw it very differently.

I am not sure why lawyers resisted the conversion – perhaps it was because they feared ADR would become the 'Alarming Drop in Revenue' that had been predicted or maybe their linear, logical approach made it easier to reframe mediation as a tool to settle legal disputes rather than a tool to resolve conflict.

As mediation moved more into mainstream, we started to see a growing body of work considering the point at which conflicts should be referred to mediation.

References were drawn to I. William Zartman's work on ripeness and The Hurting Stalemate which drew on a significant body of research exploring international conflict resolution. Many scholarly articles followed, taking up the idea of ripeness and seemingly embedding it as an absolute.

In Australia, judges found the idea appealing. The Chief Justice of Victoria (as she then was) in a keynote address to the profession in 2009 reflected:

'*Judicial experience tells us that in litigation it is a bit like picking fruit. We need to pick the "mediation peach" when it is ready – too early it will be hard to penetrate the fruit; too late it is over-ripe. The judicial art is to time the "sweet moment"*.'

Numbers of other judges have added their views. A good example comes from the judge hearing a billion-dollar commercial family dispute who noted:

'*So far as mediation is concerned, sooner or later – as with most commercial and family disputes – it may well be desirable that these proceedings be referred for mediation. But in my view, they are not ripe for that yet. Further disclosure will have to take place before the proceedings can be referred for mediation*'.

There have been challenges to the work of Zartman and his successors, including in this blog. However, judges and many lawyers, who are the wholesalers of disputes, appear to have been persuaded that ripeness is some kind of standard and that the likelihood of a dispute being ripe for mediation increases as pursuit of legal proceedings advances.

Much as I enjoy a good skirmish, I would like to take the discussion and investment of our energy from the front of the conflict to the place where we can actually make the most difference.

Let's go back to the beginning. Using the fruit analogy, let us reflect on the place where the tree is first planted – the fertile ground yet to receive the seed of conflict.

The Civil Litigation Research Project (CLRP) in the early 1980's, with the imprimatur of the US Justice Department, produced remarkable data. It investigated the apparent explosion of disputes in the civil justice system.

The results were surprising.

Apparently, while many events have the potential to become legal disputes, few reach that potential. The outcome of this project validated earlier research which had analysed the stages of a dispute to produce the visual below (with my additions in red).

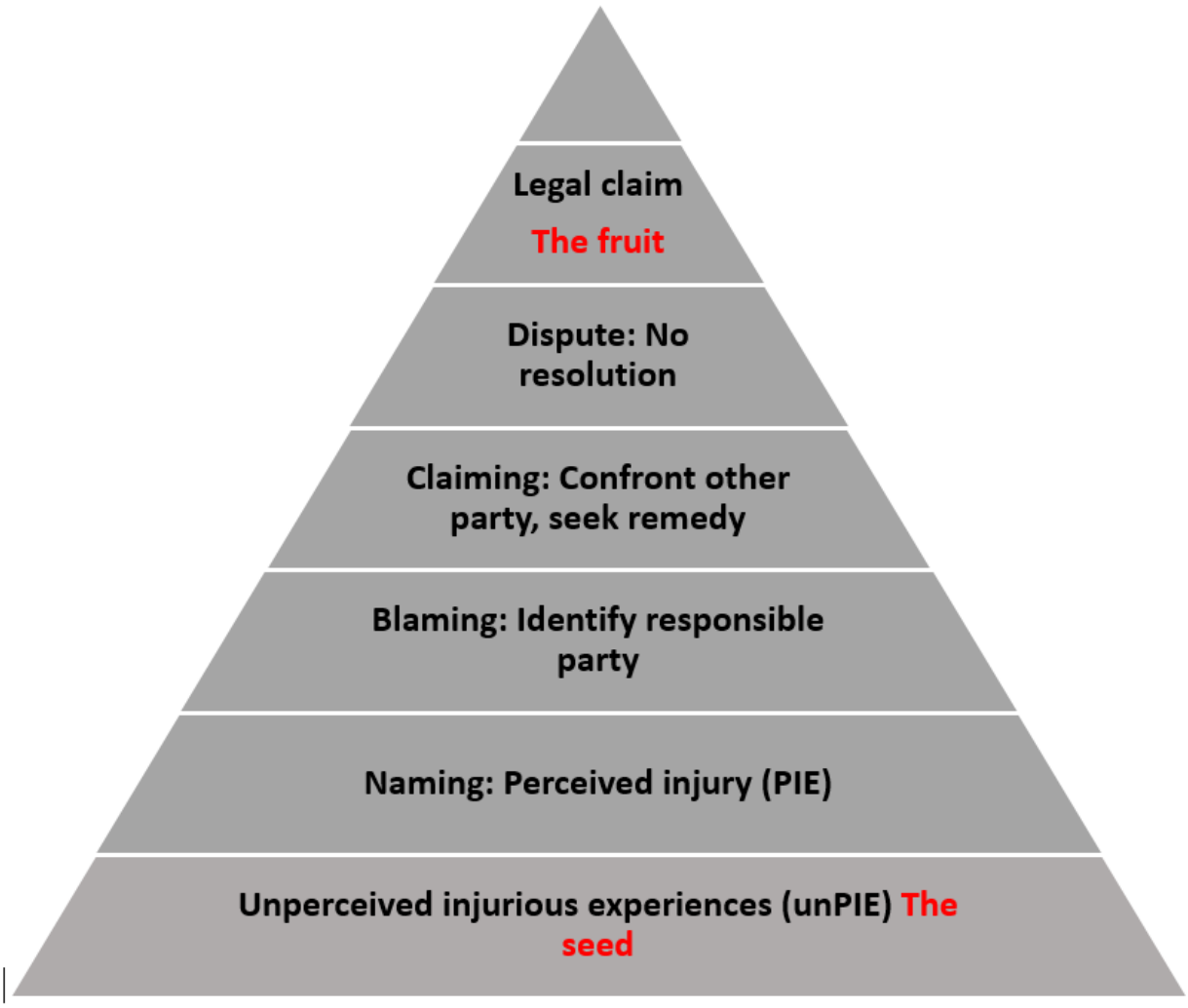

Figure 1 Adapted from Miller and Sarat, 1980.

The chart demonstrates that, even before a dispute begins to form, there are opportunities for early intervention – and, as the conflict begins to emerge and develop more energy and power, opportunities continue to arise before it transforms into a legal claim.

This represents the strongest possible message to lawyers and the mediation community about where we, and the community we serve, will achieve the greatest return on our conflict resolution efforts.

By recognising the CLRP finding that disputes are not 'found objects that arrive fully formed' we can pay far more attention to the role we can play at the bottom of the pyramid.

It is time to move our focus from waiting for the legal dispute to ripen to seizing the opportunity we have for constructive intervention at every stage on the pyramid.

To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please subscribe here.

To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please subscribe here.

This entry was posted on Tuesday, July 31st, 2018 at 2:40 pm and is filed under ADR, Conflict, Developing the Field, Dispute Resolution, Mediation Practice, mediation process, Understanding mediation
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.