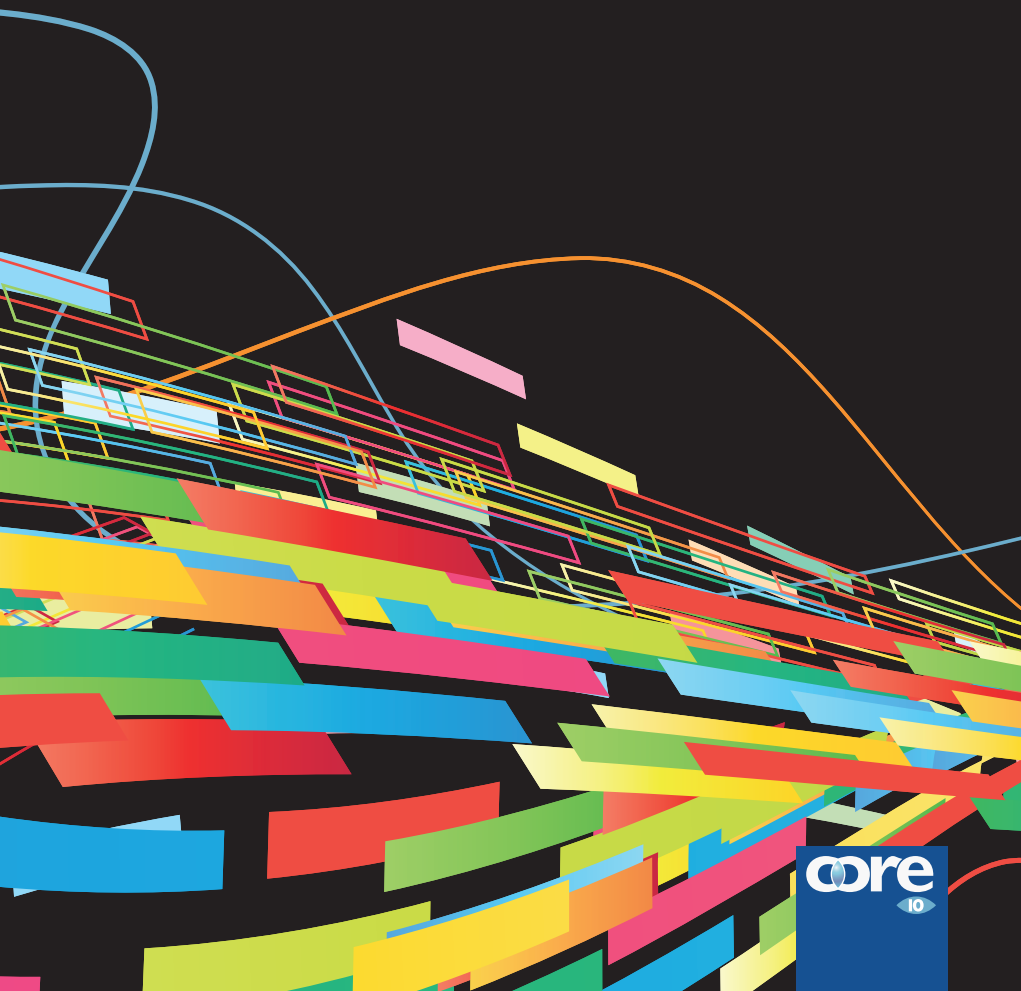
THINKING DIFFERENTLY

Making a Difference Using Mediation

A Collection of Contributions, edited by David Lee



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Dedication

This book is dedicated to all who are committed to finding constructive and cooperative ways to deal with difficult situations and, in particular, to my great friend and mentor Michael Westcott. His unstinting and self-denying service as secretary to the multi-lateral Edinburgh Conversations in the 1980s helped pave the way for new thinking in the nuclear age. He was truly a mediator.

Acknowledgements

I would like to express my sincere thanks to all of the contributors to this book. They have made it what it is: a unique contribution to the literature in this important field. The book is considerably enhanced by contributions from William Ury, Ken Cloke, Jim Mather and Michael Leathes. But each individual piece adds value in its own special way.

I would also like to acknowledge the extraordinary commitment to the editing and compilation of the chapters by my very good friend, David Lee, of David Lee Media, formerly assistant editor of *The Scotsman* newspaper, who has been a tremendous support and guide throughout. David even undertook our training course in order to experience what we are all talking about! His canny oversight has achieved the convergence of so many different ideas and themes in one unified whole. That has been captured visually by Simon Shaw's engaging cover design and brought to publication by the indefatigable Bruce Ryan, without whose thoughtful layout and internal design work completion would not have been possible!

Finally, I express my deep gratitude to my family and all who have supported the Core project over the past ten years. It has truly been a collaborative effort.

John Sturrock

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These groupings are not mutually exclusive. Many of the chapters overlap – or converge. With the exception of Messrs Cloke, Leathes, Mather and Ury, all contributors have participated in Core's mediation skills training course during the past ten years.

Foreword

William Ury

William Ury is one of the world's most respected authorities on conflict resolution and co-founder of Harvard's Program on Negotiation. He is the author of *The Third Side*, and *The Power of a Positive No* and co-author (with Roger Fisher) of the best-selling *Getting to Yes*.

I greatly enjoyed my visit to Scotland in June 2009. I was pleased to meet so many leaders from different sectors of Scottish life and was impressed by the commitment to make a difference in the world. It seems to me that Scotland is well-placed to play a significant role, even to lead the way, as a Third Side society at a time when we face a very uncertain future.

Perhaps the core challenge facing humanity is to learn to live together and resolve conflicts at a time when our capacities for destruction have never been greater. One of the keys is to organise our decision-making processes in a fast-moving world so that we can deal effectively with our differences. To do that, we need to learn to negotiate even more effectively than we do now. I believe that there is a negotiation revolution taking place. Negotiation is fast becoming the pre-eminent form of reaching decisions in the world; it is crucial that we become more creative, acknowledging the paradox that the best way to be competitive in the world is to be co-operative. This is not easy and compels us to seek to understand the other's point of view, to bring to the surface underlying differences in interest, and to look for mutually satisfactory solutions.

Opportunities arise with the global technological revolution – we need to match that with the requisite 'human software'. In a knowledge-based society, sharing resources increases value in a way which was not possible with limited physical resources. We need to realise that 'winning' in the old way no longer prevails: in the legal system, and in politics, we need to look for ways to achieve mutual gains, being mindful of the wider context in which every conflict takes place. We need to be able to 'go to the balcony' and ask ourselves if a particular course of action will truly serve our broader interests.

Increasingly, we can use the wider community as the Third Side, just as our ancestors did, to influence protagonists in disputes to consider the wider social context. We can even include in this process those views that might be perceived as extreme and seek to influence them through honest dialogue. This is where the role of mediators is so important, providing a process and structure within which difficult conversations can take place.

I commend the work which Core has undertaken over these past ten years in helping to bring mediation to the fore in Scotland. The challenge now for Scotland as a country is to use its place in the world to increase our understanding of what mediators and other Third Siders can do to influence the way in which the important decisions which face us all are addressed.

I wish Core and Scotland much success in your vital work as Third Siders!

Introduction

Jim Mather

Jim Mather is the Minister for Enterprise, Energy and Tourism and Member of the Scottish Parliament for Argyll and Bute.

I am genuinely delighted to have been asked to provide an introduction for this book, particularly since I have long been convinced, not only of the benefits of mediation and other collaborative forms of dispute resolution, but also of the possibilities they offer to society in general and economic effectiveness in particular.

It is now clear to me that any country with thriving economic activity, or aspirations to grow its economy, ought to have efficient, affordable and just systems for dispute resolution.

By that, I mean it is imperative that methods are available to allow us to handle conflict in a mature and optimal way that is more likely to produce better solutions and better outcomes and less likely to fracture relationships and damage future potential.

It is equally clear to me that these methods must reflect modern practices and embed useful lessons to be learned from other parts of the world.

In doing that, we need to consider what would give Scotland a competitive edge in a modern and progressive local and wider international marketplace. The Business Experts Law Forum, set up by my colleague Kenny MacAskill, was convinced that making mediation and other forms of alternative dispute resolution really successful in Scotland would be one part of giving Scotland a competitive advantage in attracting enterprise. This idea sits well with the Scottish Government's strategic aims in relation to sustainable economic growth and creating the best possible environment for business to prosper and grow.

Parties in dispute around the world are increasingly turning to non-court, collaborative forms of dispute resolution – and mediation is, of course, one of the main forms. While generally quicker to use to reach a settlement, mediation also has the potential to deliver more satisfactory and creative solutions to disputes than those available through the courts.

I am now convinced that the use of mediation therefore offers significant opportunities for parties to reach acceptable settlements to disputes, potentially at less cost to the public purse, and usually with less distress and inconvenience to the parties involved.

In addition, mediation offers society and business a different way of doing things, which reflects values of co-operation and collaboration, rather than winning and losing, and which sustains long-term positive and productive interaction among people in families, communities and businesses.

In this climate of financial restraint, and in an effort to encourage different ways of doing things, the Scottish Government is seeking to encourage public bodies to consider the use of efficient and cost-effective non-court dispute resolution. The Scottish Government

is also considering the provision of alternative dispute resolution in new Bills before Parliament to avoid automatic referral to, for example, the Sheriff Court.

Mediation is currently being used in a number of areas, such as education, planning, construction and procurement, but there are other possibilities which need to be explored by mediation practitioners as well as by government. Embedding mediation and all other types of alternative dispute resolution into the handling of conflict resolution in Scotland is important to Scotland's economic future.

There is a long way to go, but then mediation has come a long way in the last ten years. Collaboration between all interested parties is the key to future success and I look forward to seeing what the next ten years will bring for all those interested in resolving disputes in a collaborative manner.

Setting the Scene

John Sturrock

John Sturrock is founder and chief executive of Core, Queen's Counsel, formerly an advocate by profession, a mediator and coach by vocation, and an innovator and entrepreneur by inclination.

Whatever you do will be insignificant, but it is very important that you do it.
Mahatma Gandhi

My journey to mediation

This celebration of ten years of mediation starts, for me, a bit further back in time. In 1986, after nine months of 'devilling' to the now Lords Eassie and Clarke, I was admitted to the Faculty of Advocates. Prior to that, I had completed my law degree at Edinburgh University, taken a year out as Senior President of the Students' Association there and was, I believe, the last law apprentice in Scotland, following the introduction of the new traineeship in 1981. I had also spent a year in the United States undertaking a Masters Degree in international law at the University of Pennsylvania. That American connection became important in subsequent years

I was fortunate in that my career at the Bar was both interesting and busy. I had the opportunity to act as junior counsel to many of the leading 'silks', now judges. However, I was restless and, in 1993, travelled around the globe with my expenses paid by the Faculty on a four-week investigation into how advocacy was being taught, especially in the US and Australia. One thing led to another and, by April 1994, I was installed as the Scottish Bar's first Director of Training and Education. A whole new chapter opened up for me.

My involvement in developing advocacy training over the next eight years led me to explore the whole area of adult skills training and also to the study of negotiation at Harvard and then mediation with CEDR (Centre for Effective Dispute Resolution). By 2000, I was convinced that, in the new century, the combination of enhanced professional skills and co-operative problem-solving using mediation represented a future of which I wanted to be a part. The idea of Core was conceived and developed – initially as Core Consulting and Mediation, then as Core Solutions Group, and now, increasingly, simply as Core...

We set up Core at a time when there was very little, if any, commercial mediation in Scotland. Our first formal mediation was in the summer of 2001 and we held our first training event on 22 January that year, in the august premises of the Royal Society of Edinburgh.

While the rest is, as they say, history, this book is an excellent way to record the significant journey we have all been on over these past ten years. I am deeply touched that the contributors have given time to craft their chapters. Each brings a unique perspective to mediation, its use and potential. We are all indebted to them. What they show is that mediation offers something of value in many situations and walks of life. It brings a new dimension to difficult problems and troublesome issues and disputes, with the potential to change perspectives and transform ways of thinking.

Why mediation?

In the late 1990s, having undertaken my own training and learned a little about how mediators actually worked, I had a sense that mediation would work better for me as a way of earning a living – and, much more important to me, of making a difference. It ticked boxes which the adversarial world, much though I had thrived in it, never could. It offered the opportunity to build on the areas of effective communication and enhanced business, professional and personal relationships which had become central in my understanding of skills training. It enabled people to rebuild and renew relationships – or at least part as amicably as possible.

Mediation took me into the fascinating world of skilled negotiation, in particular the Harvard school inaugurated by the seminal *Getting to Yes* (whose co-author, William Ury, honoured us by his presence as Core's guest in Edinburgh in 2009 – and who honours us with a foreword to this book). It helped me to see that businesses and individuals could resolve difficult problems in very short periods of time, with all the savings in money, anxiety, opportunity cost and reputation which that could achieve.

Above all, it represents an enlightened way of doing things at a time when we really need it – locally, nationally and internationally. Focusing on interests rather than positions, separating people from the problem, accepting that there are at least two sides to most (if not all) stories, understanding the reality of difference and diversity – and finding ways to work creatively with these: these trip off the tongue in our courses but are fundamental to the future of our common humanity.

My experience of mediation

I have had the privilege of working as mediator in more than 200 different disputes, difficulties and differences in places as far and wide as Aberdeen, Ayr, Chester, Dublin, Geneva, London and Malawi – and many points in between. The topics have ranged from hill-farming to human resources, from the armed forces to Olympic sport, from patent rights to multi-party insolvency, from banking to higher education, from iconic engineering projects to home extensions, from individual grievances to organisational disruption, from governance and government to families and communities – and so many more.

Mediation has taken me to involvement in issues of worldwide importance, such as climate change, in my role as independent facilitator of the 2020 Climate Change Delivery Group here in Scotland, another real privilege. It has permitted me to be part of the most intimate conversations in families which are struggling to come to terms with deep-seated issues spanning generations. I have seen and heard what it feels like to be under-valued at work, to lose your investment in a major joint venture, to learn that an insurance company cannot compensate you – and what it feels like to be the employer, joint venture partner or insurer in these situations.

Each engagement has revealed the multi-faceted nature of human and business relationships and the awkwardness of communicating what it is really all about. Each has touched on individuals' senses of dignity and integrity and many on the complexities of modern commercial dealing. And in most, though not all, cases, change has occurred and a resolution, or a solution, an outcome or even sometimes reconciliation, has been achieved.

The potential of mediation

As I experience mediation more, I am coming to think that it represents more than simply helping people to negotiate. Of course, it does that: even where no outcome is apparently achieved, in the hands of a skilled mediator parties should have a better appreciation of several things. These would include what the issues are, what is concerning others, what risks exist in courses of action which they might take, what options are available for moving forward and, thus, what choices are open to them. But there is, I suggest, more.

A skilled third party, who has no stake in the outcome or the issues, and who is trained to help those involved to gain an understanding of what matters and to explore possibilities which may be difficult for them to discuss face to face in classic negotiation, should help people to identify possibilities (or, to use the jargon, to 'add value') which would not necessarily become apparent otherwise.

This has various elements located in game theory, economics, risk analysis, human behaviour, psychology and the engagement of emotion with which I am only now becoming more familiar – and more comfortable. The next step in mediation, for many of us, will be to identify, assess and articulate better what we mean by all of this. We are, I believe, still in the foothills. What we do there is important and increasingly valuable. But what might come as we move upwards has great potential to help us to cope with the serious issues which we all face at this stage in the human journey.

Even if one takes mediation at its narrowest, as dispute resolution in the conventional sense, there is much potential for growth. Core has delivered a growing number of mediations over the ten-year period of its existence. We have welcomed increasing numbers on to our mediation and conflict-management training courses. We have undertaken numerous in-house projects over the years and engaged with so many others at conferences and events. Many of those who train or attend events are actual or future leaders in their industry, field or profession. The potential that lies with these people to take forward mediation as a process for managing and resolving disputes is very great indeed. Many of them are contributors to this book.

Making a difference

Some are frustrated in Scotland by what they perceive as the relative lack of speed at which mediation is being adopted here compared to other countries and by an apparent lack of legislative and judicial support for mediation. But mediation is not unique in that sense and maybe this gives us an opportunity to approach things differently? Much is happening already. What this book celebrates is that many people, from diverse backgrounds and standpoints, have done just this: grasped the idea of mediation and run with it. They have sought – and seek – to make a difference. What possibilities that brings for us in Scotland – and much more broadly!

It is clear, as the breadth of this book reveals, that to view this just in a "Scottish" context is very parochial. As our great friend from California (and contributor of one of this book's most challenging chapters), Ken Cloke, reminds us, mediation knows no boundaries. Mediation is truly without borders of any sort!

Economic Development, Public Sector and Governance

Charlie Woods
Richard Scothorne
Stewart Carruth
Joe Rafferty
Eleanor Emberson

Charlie Woods is a mediator and coach with Core Solutions. He is a freelance consultant in economic development and strategy and former strategy director and chief economist with Scottish Enterprise.

Conflict is endemic to human existence. The winners are those who can see the warning signs early, deal upfront with the issues and do so in a manner that the parties affected consider to be fair.

From Family Wars, *Gordon & Nicholson*

Who I am

Since 2007 I have been pursuing what is fashionably termed a portfolio career. As well as being an associate of Core Solutions, I am a freelance strategy/economic development consultant (with clients mainly in the UK but some further afield), a visiting professor at the European Policies Research Centre of the University of Strathclyde and a non-executive director of Space Unlimited (a social enterprise that helps connect the insights of young people with the problems of business) and Planning Aid for Scotland. Before 2007 I spent over a quarter of a century in Scottish Enterprise and the Scottish Development Agency in a wide variety of jobs. My last role there was as strategy director and chief economist, having previously been chief executive of Scotland Europa.

Why I got involved in mediation

The simple answer to this question is because my wife told someone that she thought I would be a good mediator and he then suggested I speak to John Sturrock. I am indebted to her for this insight!

Following on from my discussion with John, I took part in Core's mediation skills course in spring 2007. It was during the course that I realised that much of what I had been doing throughout my career involved mediation. After the course I had a structure and framework to hang it on and some practical tips and ideas for doing it more effectively.

My experience of mediation

Since completing the course. I have assisted and led in a number of mediations. I am also on the panel of mediators at the Edinburgh Sheriff Court where I have led and assisted a number of cases. I have been involved in around 30 mediations in total, mainly commercial cases in a wide variety of sectors.

I have been part of the Core team which prepared a 'Users Guide to Mediation in Planning' for the Scottish Government and is leading a series of pilot planning mediations for the Government and I have worked with John in trying to bring the mediative process to a wider policy agenda.

I have also used the learning from mediation in both facilitation and wider consultancy assignments. I have discovered that a process of building rapport, generating understanding, exploring and evaluating options, leading to negotiation, decision, implementation and evaluation has great relevance in many contexts.

Some lessons learned along the way

Mediation is a rich learning experience – this section highlights some of my lessons from experience.

Preparation is critical – this includes key questions to help focus minds, getting the room architecture right, understanding what 'full authority' actually means. Humanising the process is also vital. An informal breakfast at the start of the mediation can help build rapport and understanding of what makes someone tick – for example, that they have just become a dad. The point of connection can be unexpected – a particular breed of dog in one case.

One of the great values of the process is in helping parties assess risk, no matter how unpalatable. Tools like 'decision trees' can demonstrate how relatively small changes in assumptions can make significant changes in possible outcomes (and how close parties are to each other). It is a fine balance to judge the appropriate pace when moving from exploration and options generation to evaluation, risk assessment and negotiation.

Never underestimate the power of the process itself to help the parties to come to a settlement – the darkest hour is always before dawn. When a mediation does reach a conclusion, it is really important to finish with a face to face meeting. Even if agreement hasn't been reached, the parties might remember some point of real rapport generated at the start of the day. You always have to expect the unexpected.

Reaching agreement can be exhilarating for the mediator, but it can often be more a feeling of relief or resignation for the parties. Even when the dispute is primarily about money and business risk, any settlement has got to feel right and parties might need some time and help to get to this point.

How much more could mediation help achieve?

Conflict costs UK business over £30 billion a year, takes up over 20 per cent of leadership time and results in the loss of 370 million working days. High though these costs are, they are only part of the story. Conflict also takes its toll via poorer service, reduced productivity, damaged reputations, staff demotivation and lost opportunities.

It is estimated that over £1·4bn a year is saved by business in the UK as a result of using mediation, at a cost of around £15 million. In the public sector, the Ministry of Justice reports that in 2008/09, the Government saved more than £90 million alongside wider non-financial benefits through using mediation. While widespread benefits are already occurring through the use of mediation, given the scale of the costs there is scope to achieve much more.

Mediation exemplifies the Heineken effect, in reaching parts that more formal dispute resolution processes rarely reach (as well as generally being faster and cheaper). If parties to a dispute find a mutually acceptable 'win-win' solution, it is much more likely to allow their relationship to continue and develop. This can be particularly important for two companies or public sector bodies relying on each other in a supply chain where both would benefit from continuing to do business. In some cases, mediation will be genuinely transformational to a relationship as well as addressing immediate transactional disputes.

The quote at the beginning of this chapter highlights the importance of nipping conflict in the bud before it becomes too destructive and costly. This will become ever more important in all sectors as organisations struggle to reprioritise within

tightening budgets and businesses can ill afford to be distracted in an increasingly competitive world.

Mediation has application beyond conflict resolution. Collaboration between firms and organisations is likely to become ever more prevalent in the public and private sectors. Mediators can play a valuable role in improving the success rate of joint ventures by using their experience of why things go wrong to identify more effective alliances and avoid unnecessary conflict.

A lot of time and money goes into legal, financial and technical due diligence, yet in many cases if more attention was paid to human due diligence, stronger foundations for new ventures could be laid. In some cases, this human due diligence may lead to a decision not to proceed, but better this happens before something starts than after the investment has been made and reputations laid on the line.

We are likely to face increasing pressure on resources in the years ahead. This could range from the strain on pubic finances, already being felt as we struggle to cope with the fall-out from the credit crunch, to the impact on natural resources resulting from unsustainable development and the impact of climate change. This increased pressure will demand more effective and efficient ways of managing conflict and much better ways of working collaboratively to make the most of resources. By helping us focus on our shared interests and breaking down positional barriers, mediation offers a way of achieving this.

Land is a vital resource. Land use planning is aimed at ensuring that the widest possible public interest is promoted in any development. Mediation can play a key role in helping improve the outcomes and increase the efficiency of the planning system. It can be used to help build understanding, solve problems and narrow divergent private interests before democratically elected politicians take decisions concerning the wider public interest. It has the potential to play a role in all stages of the system. It could have particular relevance to the pre-application stage of developments (given greater emphasis in recent planning reforms in Scotland).

Mediation also has a role to play in helping improve the performance of the economy as a whole. The essence of better economic performance is increased productivity (greater output relative to inputs). In helping achieve better outcomes, more quickly and at lower cost, mediation can help boost productivity. This has been recognised by the World Bank in their promotion of mediation as part of the development of a vibrant commercial sector.

Adding value

Any country that builds a reputation as a place where disputes are minimised and resolved quickly, creatively and cheaply is also going to be a more attractive place to do business, and a better place to invest in. The skills used to manage conflict and build collaboration at home can also become a source of export income in their own right when deployed elsewhere.

Mediation offers significant potential to manage conflict, strengthen organisations, improve collaboration, increase productivity, manage the allocation of resources, build valuable relationships, improve business performance, generate exports and attract investment. One of the real challenges for mediators in the next ten years is to help potential clients understand the value of mediation, both in conflict management and as a wider tool of leadership and management in all sectors.

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.
T.S.Eliot, Little Gidding

My journey to mediation

I never planned to become a facilitator. In fact, when I was first thinking about my career, I'm pretty sure such people didn't exist. My first jobs in local government took me from dealing with planning applications in Gloucester to strategic planning in Aberdeen at the start of the oil boom – exhilarating for a young graduate with recommendations being implemented swiftly, the landscape changing daily and the benefits of a planned approach obvious. Most important, I saw a region grasping an opportunity and creating an entirely new future for itself which has brought huge benefits to this day.

I then moved into policy planning and economic development in the lowlands at a time of rising unemployment. I still remember the headline when Leyland Trucks closed its plant in West Lothian – 'Bathgate to Close' – and that's what it felt like, coming on top of the closure of the last mine, a local electronics plant and a number of other significant local employers.

We put together a response, led effectively by the then Scottish Office and supported by an imaginative district council. A new motorway junction and a reopened railway transformed the geography of West Lothian, an energetic business support agency increased start-up rates, and a new focus on West Lothian as the place for inward investment to Scotland all helped to create one of the highest economic growth rates in the UK. All the time, though I didn't realise it, I was seeing how groups worked and how relationships mattered more than structures.

Then I moved to a new company set up by British Shipbuilders and with a chief executive from the private sector. I reported every Friday afternoon how many redundant workers from the Clyde shipyards we had helped get a new job that week. I was helping employers think differently, supporting people and listening to their stories – men who had left school at 15 and become whatever their dad's yard had needed that day. Thirty years on, what I heard was: 'I'm not really a caulker burner, I fancy doing something I enjoy.' It felt a real privilege to be part of it. But a deep-seated lack of trust between workforce and management meant that, although entirely new in our focus and commitment, we were assumed to be more of the same. The unions thought I must be a carpet-bagger from London and discouraged the men from seeking our help – so I also remember clandestine meetings in dark Partick bars, and run-ins with burly officials who needed persuading that I wasn't the enemy. For me, one of the most

Richard Scothorne is a founding director of Rocket Science UK Ltd, a consultancy which works with public, private and third sector clients in the area of work, welfare and economic development.

important parts of this for me was working at the front line – and finding my faith in people reinforced and refreshed.

From facilitation to mediation

When I set up in consultancy, I started drawing on all this – listening hard, asking questions, challenging, helping people imagine different futures and how they could create them. There were tougher, bigger assignments: dysfunctional management teams, United Nations workshops in Oslo and New York, clients asking me back to sort out tricky people and problems. I had become a facilitator – and sometimes (I know now) a mediator.

But I found myself tiptoeing away from some difficult situations, not having the means or confidence to deal with them. So I went on a Core training programme, which felt like coming home – stretching, confirming, providing me with new tools and processes, gaining confidence in the power of silence, giving more space to people, experiencing the electric atmosphere of conflict and feeling more comfortable with it.

What I have learned about mediation

I still remember a lecture from my university days. It was delivered by one of the most original people in the department, a man who made leaps of imagination and created careers for others who filled the gaps he left behind him. He was telling us about a universal ratio – present in willow branches, bifurcating rivers and glacial outwash plains. He had been walking with a friend who would point from time to time, saying, 'There it is again.'

Mediation has been like that for me. In most of my work, I have been guided by four simple principles: the power of the process, the need for trust, the significance of individuals gaining power over their lives, and helping people gain a sense of their future. There they were again. There is fascinating evidence that underpins the significance of these four principles. When GPs explore options with their patients, and patients start making choices, they get better quicker. When children design the school curriculum, performance soars. Children do better at exams when they have a sense of what their future might look like.

The process might mean that there are times when clients feel they are not getting anywhere. But faith in the process allows us to encourage clients through these longeurs to a much better place. Critically, our belief in the process gives us a contagious confidence.

The potential for mediation

What does all this mean for mediation? Change is becoming endemic. The very speed of this change – and the way that it throws expected futures into doubt – creates stress and conflict. It is easy for energy to be thrown inwards at colleagues and employers rather than outwards at issues and solutions.

Lots of securities and other assumptions are being challenged. Private companies are taking over large swathes of public services (larger indeed than most know or can imagine). The third sector is being lauded, but is finding it hard to appreciate the need to rationalise on a grand scale – and deal with long-standing competitors as allies. Some power is being devolved, but at a time when limited resources can make this seem meaningless. Money is tight, and increased competition for it can lead to conflict. And the only way to deliver more or better is to work in very different ways which can feel uncomfortable and threatening.

So the scene is set: a large public sector facing unprecedented cuts (partly because of unprecedented increases) – and no sign of a respite; a private sector growing slowly out of recession and seeing significant opportunities in the delivery of publicly-funded services; an economy which is probably on a long slow haul out of a deep recession with cross-currents of news and views which raise and then dash hopes and then raise them again; rising unemployment and – at least as debilitating – the risk of it being felt by many more. This is a fertile landscape for stress, uncertainty, loss, anger, hopelessness and conflict. This will find expression in personal relationships, working relationships, relationships between organisations and partners and between contractors and sub-contractors.

A landscape like this needs as many people as possible who can spot the scope for conflict and do something about it, people who can deal confidently and constructively with differences when they arise, people who – because of their perception and skills – ensure they don't succumb themselves. As numbers grow, cultures will change, with a focus on ensuring clear understanding of different perspectives, listening before designing and acting – and working together in new ways in terms of how services are designed, delivered, reviewed, refined and prioritised.

The chances are that growing tax revenues will reduce the pressure for cuts; that it will become clearer what can and can't be done in terms of acceptable consequences; and, as the electoral cycle proceeds, that the temptation to invest more will grow. But the landscape will change – it will be a speckled ground of different kinds of organisations in different kinds of contractual relationships, some firmly in the public sector, some in the third sector, some profit-making. Careers will much more often travel back and forth between these sectors which themselves will grow less distinctive in their cultures and delivery. *How* we design and deliver services will change out of all recognition.

This will lead to new kinds of roles and new kinds of relationships. It will bring new creativity and commitment, and, while in itself it may not increase the scope for misunderstanding and problems, it will change the nature of conflicts and how they can arise.

I'm sure that in this landscape the value of mediation skills will continue to increase. They will become part of the toolkit of the effective manager – and probably a conventional part of management training. Some employers will start requiring these skills – or helping their managers gain them.

As a recent Core graduate, I am still a beginner in the world of mediation. But already it has allowed me to stretch my range in the field of facilitation, dealing with issues I would have avoided, helping organisations tackle problems and relationships that are constraining their performance. But it has also reinforced my faith in the basics and helped me use them in new ways: process, trust, empowerment and horizon. They provide a powerful guide to the development of policy and practice. And, more than ever, I can enjoy watching their transformative chemistry.

Stewart Carruth is director of corporate governance at Aberdeen City Council, helping to shape and influence service delivery, including finance, legal and democratic services, human resources, ICT and corporate and community planning.

Do the difficult things while they are easy and do the great things while they are small. A journey of a thousand miles must begin with a single step.
Lao Tzu

My journey to mediation

It was a very personal event which led me into mediation. As a senior manager in an organisation, I was always aware of dealing with conflict within the workplace. Traditionally this conflict arises between a manager and staff member, where more often than not, the staff member has cause for concern about the behaviour of the manager.

I experienced the opposite. It was deeply difficult to deal with, so much so that I went to employee counselling, which in itself was a difficult and very private decision. As a senior manager, there is an expectation that you get on with it, and that dealing with inappropriate behaviour is part of the job. For many this is the case and as such it is rarely reported.

At the time, I reflected on the pattern of events which led to my decision to go to employee counselling and I wondered if I could have done anything about it, closed it down earlier. I recognised immediately that the situation was not unique and that the adversarial nature of my experience was being played out in a whole manner of ways at individual, organisational and societal level. I recognised that there must be a different way of doing things and committed myself to mediation.

I undertook Core's mediation course in 2009 and found it to be one of the most challenging and enjoyable courses that I had attended. What I found interesting was the diversity of the participants who covered a wide range of professions and disciplines. I was fortunate to build up a relationship with Core and continued the mediation dialogue after the course, which helped me shape my thinking on how mediation could be applied. Assisting in mediation cases also helped me understand the vagaries of human behaviour and to expect, in many cases, the unexpected.

I have moved on in my career. I am now a director in a large city local authority, responsible for delivering a range of complex services, managing more than 700 staff and a corporate budget of over £500 million.

The skills I learned during the Core course and subsequently applied, albeit to a limited extent, in live cases have added a new dimension to my own style of management. It is often commented on by others that they can see me applying various tools from the mediation toolkit. However, the greatest benefit was my realisation of the potential power of using mediation in non-traditional ways.

The power of mediation in public services

It is often said that skilled negotiation lies at the heart of mediation and I believe that to be true. However, the backbone of mediation is the process, which is both robust and flexible. This is demonstrated regularly through the application of mediation to different types of cases.

It struck me immediately that the robustness and flexibility of the mediation approach to seeking resolution in a non-adversarial way, where the power to resolve lies not with the mediator but with the parties, could be applied in a different way. The key to my thinking is timing.

Mediation often occurs once a dispute has arisen and at a relatively late stage in the process. However, I believe that there is an opportunity to apply it differently, early and upfront in the delivery of public services.

Over the last decade, there has been an increasing expectation of the public sector and the services that it delivers. The funding of these services has historically been driven by year-on-year growth in public sector budgets. At the same time, there has been a move towards greater collaborative working, often though not exclusively through community planning partnerships, which were set up to enable public sector, business and voluntary organisations to work better together and to focus on outcomes.

It is now clear that the level of funding which has been historically available to public sector organisations is unsustainable. There is an unprecedented challenge for all organisations delivering public services to work more closely together and to utilise the total public service budget in a more productive and outcome-based way. This will mean a reassessment of the relationship between public and voluntary organisations and groups and individuals who have historically expected and received a wide range of services.

Often these relationships are characterised by structures, processes and behaviours which hinder rather than support the delivery of better outcomes.

The role of the mediator

The mediator, as the third party, is in an ideal position to facilitate discussion between local authorities, other public sector organisations, the voluntary sector and individuals in community planning. The tools and techniques of mediation – rapport building, exploration, confidentiality, seeking authority, negotiation, options appraisal and decision-making – all support multiple parties as they take decisions on investing limited funds on projects in the community.

The key point is that mediation is utilised early in the community planning process to shape decisions, rather than later in the process after decisions have been taken and funding distributed.

I believe that the time for applying this approach is now. Local authorities in particular have traditionally distributed grants to a wide range of projects in the community. The level of available grants is and will continue to be significantly reduced, and community projects will have to find other ways to fund projects or obtain support in kind.

Moreover, there is a shift away from simply giving grants to organisations to a commission-based approach to community projects linked to a service level agreement and some indication of a social return on investment. Inevitably, this means that there will be more competition for limited funds. In my view, we require a new approach to redistribute this funding, and this is where the mediation toolkit can play its part.

I can see a number of advantages to using the approach. There will be a greater chance of collaboration, vested interests will be explored and opened out, relationships will be strengthened, which will be important in the long term, and negotiated decisions based on outcomes will be encapsulated in agreements. All this should lead to greater benefits.

Challenges to overcome

To apply mediation to the public services setting seems sensible. The framework is, to a certain extent, in place and there are now key drivers for doing public business differently. Instinctively, there is probably an inclination to collaborate rather than compete.

For the approach which I have outlined to work, there requires to be a far greater understanding of mediation and an openness to try out new ways of working. Ultimately, it will depend on leaders from a range of backgrounds, with a diverse range of skills, building communities of interests or practice to take forward the mediation toolkit and apply it in unlikely and different circumstances. In many cases, it will require people to take the risk of a new approach and to be forgiving if it does not work in the first instance. The good news is that the approach does not require any change in legislation, only the mobilisation of like-minded people willing to work collaboratively to deliver benefits for their community.

In summary, my journey to mediation has been exciting and illuminating. It started from a very personal event and led me to realising possibilities at a time when there are opportunities to be creative and innovative in how we work together. There is a diaspora of enthusiasts, many of whom are Core alumni, who must connect with each other to give it a go and build the evidence that is required to persuade and influence others to understand that mediation used in non-traditional ways can deliver public services more effectively.

Success is not final, failure is not fatal: it is the courage to continue that counts.
Sir Winston Churchill

Joe Rafferty is learning & development manager for the Scottish Children's Reporter Administration. He was an all-round trainer who has morphed by inches into the definition of a change agent.

Mediation: greater than the wisdom of Solomon?

I'm not sure the biblical monarch was as wise as some people would have us believe. True, it was a neat bit of judicial manipulation which drove a distressed mother to declare that her child should be given to another, rather than be sliced in half, but I am not sure that Solomon really got to the heart of the matter.

The story goes that two mothers made representations to Solomon to resolve a dispute. One of them had rolled over her baby in her sleep and accidentally killed it. Both mothers claimed the surviving baby to be hers. Solomon ruled that the baby should be halved with a sword and divided between the two parties. The true mother was judged to be the one who at this point was willing to give up her baby to the lying woman, rather than see her child suffer.

I have always thought this a very clever story but a somewhat risky judgement. Is it possible that the lying mother decided the child should be saved rather than have another innocent death on her conscience? Is it possible that the true mother knew something terrible about the other mother and thought her child would be better off dead than brought up by that evil woman?

Whatever the rights and wrongs, at this stage in my career I am convinced that mediation would have been a much wiser route to a resolution.

Who I am

I am an organisational development person working for the Scottish Children's Reporter Administration. The reason why I say that I am an organisational development person, rather than my job title – learning & development manager – is that it gives a better flavour of what I do and why mediation is such a critical element.

Organisational development is all about people and behaviour. Ultimately, it is about maximising people's performance and ensuring that their efforts are deployed in the most productive way for the organisation. Disagreements are inevitable and therefore a crucial element of organisational development is finding ways to resolve disputes, feuds, power games and, in some cases, all-out warfare.

I have always worked in the public sector – local authority, university and non-departmental public body – where dispute resolution is documented within grievance and disciplinary procedures, and the principles of fairness and due process are well observed.

But it doesn't work.

What have I learned?

Conventional methods of dispute resolution are wholly unsuited to a closed system like an organisation, especially a small one. In the big wide world, at the end of proceedings, you can walk away, win or lose.

In a small organisation you have to stay and find a way to work with the other party, regardless of the outcome. For example, if you bring a grievance against a manager and your grievance is upheld, your manager is likely to be instructed to change their practice. Then you have to continue to work with them! This state of affairs can seriously damage teams, having a significant impact on morale and productivity. In the final analysis, conventional methods of dispute resolution can actually end up cementing the very types of behaviours and problems which they are supposed to be there to sort out, with an entrenched resumption of hostilities.

Mediation not only provides a less confrontational method of resolving issues, but is also a genuine learning experience for all concerned. The mediation process helps us to gain a mutual understanding of our respective viewpoints and motivations. This can often lead to a complete resolution, but even if not, can allow both parties to find a way to work together. At the very least, it causes no additional damage.

Thinking back to our earlier example of Solomon and the maternal dispute, you have to wonder what kind of relationship the two mothers were able to maintain after the ruling. With one of them labelled a liar and possibly a child abductor, you can't see them being the best of friends. And we never get to hear the back story. Did the lying mother fear she would be accused as a killer? Is this why she did it? In which case, with skilled mediation, the true mother may well come to have a degree of sympathy for the other mother, laying blame and anger to rest, and therefore providing a more hopeful future for all concerned.

It seems to me then that Solomon should have gone for a mediated outcome. Such a process would have been much more likely to arrive at the truth and, consequently, a less risky judgement.

Mediation and teambuilding

When line managers have staff who report directly to them at loggerheads, they often struggle to know what to do about it. (At least that has been my frequent experience.) Grasping for a solution, they are apt to commission some teambuilding training as a way of persuading the warring parties to bury the hatchet. This is usually unsuccessful since teambuilding training is usually not designed to resolve actual disputes – it is more at the level of breaking down barriers and getting to know each other better.

What makes matters worse is that the line manager often fails to mention the real nature of the problem to the teambuilding facilitator. This unfortunate individual is then left scratching their head at the occasional awkward silences and apparent lack of enthusiasm for any activity which is remotely 'teamy'.

Recognising the frequency of such an occurrence, I decided to offer a different service when managers asked for teambuilding training. It was properly designed to help resolve team issues, particularly in its use of creative problem-solving techniques. As part of this effort, I recognised that often the problem centred on two feuding individuals and, looking around for a tool to help with this kind of issue, mediation

appeared to be the most obvious solution. Not only is a conventional mediation useful in this situation, but the skills picked up as part of practising mediation also prove applicable and invaluable in many group situations.

And so it grows

The obvious success of mediation in one area in my organisation had led to cross-fertilisation and stretch into others. We now see mediation as a general approach and this has led to applications in partnership working, dealing with complaints, an alternative to dealing with grievances and disciplinary issues and a method of developing shared practice – to name just a few real examples.

It is rare these days that a grievance is heard in the conventional manner in our organisation without mediation being attempted first. Sometimes it cannot work because individuals refuse to engage. But where mediation takes the place of an adversarial process, we can confidently report that the outcome has been much more satisfactory for the individuals and for the organisation.

So what's next?

What's next is soft skills for line managers, including taking a mediation approach to resolving disputes within teams.

Pressure on resources means that now, more than ever, we need managers to manage and not refer issues on to some kind of support service. Such services are an expensive add-on, so we need to equip managers to be able to handle the trickle of people-related issues – the types of issues they have always found particularly challenging in the past.

This approach requires us to train and coach our managers in a variety of soft skills, with mediation as a key element. Core's mediation training promotes this discipline as a skill for life and I think that is the simple truth of it. Once you gain experience and skills in mediation, you find yourself much more able to handle people-related problems. We see this as the key to getting the best out of our managers and developing a very high-functioning organisation.

So, in summary, Solomon was clever, no doubt about it. But maybe William Ury has moved things on a bit.

Eleanor Emberson is chief executive of the Scottish Court Service.

Do not wait for leaders; do it alone, person to person.

Mother Teresa

Who I am

Unfortunate conversation-killer at parties: 'I have been a civil servant for 17 years and, before that, I was a mathematician.' If people don't back away with a fixed grin, I do sometimes explain that by one of those rather strange career paths through the civil service, I started out as a government statistician in London but now find myself back home leading the Scottish Court Service. Fortunately, courts are a much more promising subject for entertaining stories.

I am not a lawyer, although I do work closely with a lot of lawyers. My role as chief executive is to ensure that the Court Service provides all the staff, buildings, systems and support required by the judiciary in the Supreme, Sheriff and Justice of the Peace Courts throughout Scotland. Along the way I worked for several years in HM Treasury on public expenditure, returned to Scotland to work on the devolution finance settlement and then spent several more years working on school education policy. It might not make for great small talk, but it has been a fascinating journey.

Why I got involved in mediation

Anyone involved with courts finds out very quickly that there are many ways of resolving disputes that do not fit the traditional court stereotype. Some of these involve courts working in ways that focus on problem-solving; some of them involve avoiding court altogether. The more I heard about mediation, the more interested I became. Mediation appeared to be important for the future of the justice system but I was interested in its potential to be applied in other ways to the work of government.

The most satisfying points in my varied career in public service have been ones where long-standing conflicts have been resolved and there has been a deeper understanding of what is truly important. There is an old civil service joke that the saying 'I'm from the Treasury and I'm here to help' ranks alongside 'the cheque is in the post' as one of the great lies of our time. However, the best times I had in the Treasury were when we were working with the finance teams of other government departments to establish trust and understanding and to make the very complex public spending processes work more smoothly. The best times I had working on school education policy were during the National Debate on Education, where children, parents, teachers and others came together in groups to share ideas and talk about what was truly important to them. This theme carries on and draws me strongly towards learning how to create more of these opportunities.

My experience of mediation

I have barely taken baby steps in mediation. I completed Core's certificate in 2010 and my experience of formal mediation is limited to the assistant mediator role, but I have been able to use the techniques, if not the full process, within my day job. Anyone in a management role will find it helpful to have ways of encouraging others to explore problems fully and to look at other perspectives, which is often the hardest thing for people to do. I enjoy working with teams where we are all very different characters. There is real strength in diversity as long as we can manage it and can turn any conflicts in our attitudes and approaches into improvements in the outcomes.

What I have learned about mediation

One of the most striking things about studying mediation has been seeing how things I had learned in a variety of different ways can fit together. I have been involved in negotiations, conflicts and the struggle to find solutions to the problems which government throws up. I have done my fair share of leadership development and training focusing on interpersonal skills. A lot of the techniques were not quite new, but if I had a basic toolkit before, I feel as though now all those tools have been sharpened and I am much more confident in how to use them.

I have also become more aware of how others are using those techniques. There were always people who seemed to be able to calm down any tense situation and to create an atmosphere where people focused on finding shared solutions. I understand a bit better now how they did that and I have a framework which helps me see what they are doing while it is going on. I also now have some skills to help me do something similar – although, the single biggest thing I have learned about mediation is how much more I have to learn.

The potential for growth of mediation

I could write about the obvious potential for mediation to resolve disputes that might otherwise be settled at greater trouble and expense through the courts, and in some cases settled less satisfactorily. Others who are active in commercial and family mediations will have better-informed views on this but I really do see the potential there. I also see potential, though, in using a mediative approach in the wider work of government.

A lot of this is about resources or, put crudely, money. There are spending reviews where difficult decisions must be taken about which services should be funded from general taxation, which should charge fees to cover some or all of their costs and which are not to be provided by government at all. There is prioritisation to be done within services on how limited staff time and money should be spent, There are also difficult decisions about whether a service commissioned by government should be provided directly by public sector bodies or whether some or all of it should be done by the voluntary or private sectors.

It is easy to see how conflicts arise in every aspect of the allocation of resources and although we have ministers and Parliament to take the final decisions, how much better to approach the conflicts creatively. It does not always have to be a zero-sum game where people can only win at the expense of others losing out. The most successful public bodies, which give the very best value to Scotland, already realise this and there are so many good examples around where bodies have looked beyond the traditional boundaries. More public bodies are starting to share their

'back office' services to save money but the biggest benefits – either financial or in terms of quality improvement – come from joint effort around the frontline delivery of services.

I have seen, for instance, excellent joint work between a local authority and a health board, who recognised that investing in services that keep older people safe and supported in their own homes was a win-win. People supported in their own homes have a greater quality of life and stay healthier for longer, and providing services in this way saves substantial amounts of money that would otherwise have been spent keeping those individuals in hospital or residential care. To make this work, the health board and local authority have had to pool their resources in new ways and get away from fighting about individual budgets. There are similar things happening all over the country but it is far from easy.

I think there is real potential for techniques from mediation to be used to help public bodies resolve conflicts and find those win-win solutions. There are many questions about how that is best done but I chose the quotation at the start of this piece to reflect my personal view that the problems cannot just be tackled by the people in the most senior positions in the public sector. I would encourage anyone at any level who sees conflicts holding public services back to learn more about negotiation and mediation and to put what they learn into practice. We can all make a real difference.

Health, Education, Planning and Environment

Morag Prowse
Rob Hendry
Jamie Whittle
Abigaile Bromfield

Morag Prowse is Dean of the Faculty of Health, Life and Social Sciences and Professor at Edinburgh Napier University and a non-executive director of NHS Lothian Health Board.

The first step in the acquisition of wisdom is silence, the second listening, the third memory, the fourth practice, the fifth teaching others.
Solomon Ibn Gabirol

What does mediation mean to me?

I was Scottish-born, but lived and worked outside Scotland for more than 30 years in the United States, England and Wales. A passion for education and new opportunities created a portfolio career that took me from a clinical nursing background and senior management posts in the NHS to an academic career and then a Professorial role as Dean. I never lost my early commitment towards healthcare – and engage in this world still as a non-executive director with a health board.

I completed my higher education as a mature student while managing work and home as many do – graduating from the University of Wales College of Medicine at Bachelor, Master and PhD levels in science and health-related disciplines. The author Terry Pratchett wrote recently how he was lucky to have a job *out of the cold*. Like him, I know my life as an academic is a relatively privileged one, but one that brings with it responsibilities.

I have been fortunate enough to travel the world and this has helped to retain my sense of perspective as a global citizen and remind me of the value of public service, gratitude and humility as personal qualities and values. I have seen how the slums of Calcutta in the monsoon season add a particular meaning to the concept of 'meeting healthcare needs'.

In 2010, I glimpsed the day-to-day social and political injustices remaining in post-apartheid South Africa. That society has much to thank its outstanding and inspirational leaders (Nelson Mandela and Desmond Tutu) for, but much work remains to be done, as in many other countries, to resolve conflict.

At various times in my portfolio career, I have learned many ways of thinking and acting – often associated with a particular role. I learned to be an educator, team player, counsellor, negotiator, leader, manager, analyst and decision-maker. I trained in Western Medical Acupuncture and undertook MBA studies in creative leadership. So what brought me to mediation in 2008?

Mediation and its relevance to health and education

During my NHS career, I experienced conflict ranging from employment issues to patient complaints and concerns about the quality of care – including instances where the healthcare system had let patients or their families down.

My own experiences support the view that families often want simply to understand how harm came to their loved ones and how the systems will ensure this does not happen again. Medical negligence cases can sometimes take years to reach a

resolution and grieving relatives can feel that organisations and legal processes lack common humanity – despite the best intentions of all concerned. Could mediation and alternative dispute resolution offer a better way as an adjunct to legal and organisational processes?

In my career and various roles in higher education, the kinds of organisational employer/employee disputes and individual grievances I was involved with had sometimes been unresolved for years. The very procedures designed to assist people out of conflict sometimes made it worse.

An illustration of this is where an individual claims bullying and harassment. Quite correctly, an investigation takes place – but if the case is not upheld, the individual who has been investigated can launch a counter-claim. And so it goes on, with many productive working hours lost, resources wasted and stress for all involved.

At one point in my higher education career, I decided there must be better ways to resolve this kind of conflict. I had heard about mediation and was very impressed by my first experience with professional mediators. They came quietly and confidentially into a workplace context and issues that appeared irresolvable over some years were settled.

What current issues in health or education could be explored from a mediation or alternative dispute resolution perspective?

The Westminster Comprehensive Spending Review and Browne Review of Higher Education have lifted the fees cap and introduced free market principles to the higher education sector in England.

In this context, the urgency of seeking a 'Scottish solution' to the anticipated reductions in public funding that could adversely affect Scottish universities (without a politically acceptable alternative form of raising revenue such as student fees) has never been greater. With multiple stakeholders – students, parents, universities, funding bodies and the tax-paying public – all having interests and positions here, could a mediated dialogue be one way forward?

In UK healthcare contexts, similar dilemmas are already debated in the media on a daily basis. What can the NHS fund? Who decides about priorities? Who pays?

For example, more and more expensive drugs and interventions that can benefit individuals are available to the NHS. However, in a resource-restrained context, this benefit to the few might be at the expense of interventions that can benefit populations. Multiple stakeholders here are the public, health professionals, health boards and trusts and the public bodies that make decisions on resource allocations and prescribing and treatment protocols.

Although current government administrations are protecting health spend overall, there will have to be increasingly hard choices made about how resources are used in a health service free for all at the point of delivery and based on clinical need. Could mediation assist in exploring the multiple perspectives in this kind of context?

My experience with mediation

I was so impressed with seeing how mediation could assist even apparently intractable conflicts that I decided I would learn more about this method and signed up for the Core course – but pressures of work meant cancelling and rebooking twice. It was

clearly meant to be as I persisted and duly completed what has proved one of the most significant experiences of professional development to date for me.

What did I learn?

I think my most important lesson was to put aside all that I thought I already knew and immerse myself in this apparently simple process of acting as a neutral person and adopting what William Ury and others describe as a 'Third Side' position.

At its simplest level, mediators assist people in conflict to understand better their own and the other parties' perspectives. They also help people explore a range of options that might, or might not, reach a mutually agreed resolution. Yet every stage of the process – the conflict, problem-solving, options appraisal, risks, benefits and any solutions – remains firmly with the individual parties.

The mediation process starts with acknowledging where people are and helping them see where they might choose to move to. I came to understand that mediation and conflict resolution were fundamental life skills that could be taught to individuals from various backgrounds and beliefs.

While this sounds straightforward, I would draw a parallel with *Strictly Come Dancing*. Learning a method is one thing; flow and finesse is quite another. I was fortunate enough to learn from the very best at Core and continue to seek opportunities to develop my skills and understanding.

The potential of mediation

I started to have conversations with other mediators that led me to think that if people with these skills (many of whom are already in positions of influence in their own fields) formed a powerful coalition, they could make a difference to the lives of individuals, countries, governments and nations.

An old African proverb says: 'When spider webs unite, they can halt even a lion.' There are many examples in the world where this is already happening and Scotland could use such a coalition now as fiscal constraints are translated into difficult choices for governments, organisations and individuals.

Conflict is an inevitable result of social interactions among people holding diverging views about resources and ways of life. Conflict might indeed be necessary for making progress and dealing with injustice and problems in the world.

I learned in mediation training (in authentic role play exercises) that the goal of mediation is not to end or eliminate conflict but to transform the way it is expressed from destructive forms such as violence, abuse and intolerance into constructive forms such as debate, dialogue, negotiation and democracy.

As a number of influential authors note, the Third Side is not a new idea. In some form, it exists in every culture. It is one of the most ancient human processes for dealing with deep differences – and has been described as the common heritage of humanity.

The problem with communication is the illusion that it has occurred.
George Bernard Shaw

Rob Hendry is head of medical services (Edinburgh) at the Medical Protection Society, and was previously a GP and a medico-legal adviser.

Introduction

My career has followed a rather unplanned course, and certainly not one I could possibly have envisaged when I entered medical school in 1975. Two recurring themes for me have been an interest in what happens when things go wrong, and a sense that interesting things seem to happen when different disciplines come together.

Getting involved in mediation

Following a variety of hospital and GP jobs, I found myself drawn to the legal aspects of medicine and was lucky enough to enrol in the inaugural Masters course in Law and Ethics in Medicine in Glasgow University in 1989. The class of nine doctors and nine lawyers provided a fascinating insight into the different paradigms in which the two professions operate, and how differently they approach the problem of what to do when something goes wrong in medical care.

During the first year of the course, the two groups spent considerable amounts of time clashing. 'Why can't they see the obvious flaw in their position?' was a frequent remark. Two groups of intelligent people could argue and talk for hours without really understanding what the other was meaning. And then the group seemed to undergo a communal epiphany. We realised there can be different ways of looking at the same issue – neither right nor wrong, neither better than the other, just different.

From this grew mutual respect and tolerance, as well as a sense of uncertainty. For some people, it was difficult to learn that their world view is not always correct.

I then moved from clinical practice into the emerging specialty of legal medicine and worked for a number of years as an adviser to the Medical and Dental Defence Union of Scotland. This involved the management of medical negligence claims and a wide range of disciplinary and regulatory work. The shortcomings of traditional litigation have been widely explored elsewhere and I don't intend to labour the point, but given the length of time many medical negligence claims take to settle and how relatively few end up in court, it is perhaps surprising not more cases come to formal mediation.

Because of the potential for improvement in the way we handled cases, I took an interest in mediation. After hearing John Sturrock speak on the subject, I signed up for Core's mediation training. As well as being great fun, the course provided me with skills and an underpinning philosophy that have served me well in some interesting and unexpected ways.

Having found the interface of medicine and law fascinating, I complicated things further by undertaking an MBA at Strathclyde University Graduate Business School. I was particularly drawn to the study of how organisations build and implement strategy. Why do seemingly logical plans that managers come up with so often fail when the company tries to implement them? Again, the conflict that arises when people have different views of the way the world worked was central. These tensions, often described by managers as 'push-back', are disputes arising from dysfunctional communication. Literature on change management stresses the need for good communication, but often pays little heed to how to manage the conflict that can flow from it. Managers often have the illusion that communication has taken place and are surprised when staff react angrily to 'perfectly reasonable' proposals.

These different approaches to the need to manage conflict started to converge around what William Ury called the 'Third Side'. My present job with the Medical Protection Society has recently seen me restructuring the way the company delivers services in New Zealand. This exercise required bringing doctors, lawyers and managers from two different cultures together. Suffice to say, I spent much of my time in mediation mode.

Experience of mediation

I have been involved in a number of formal commercial mediations designed to resolve claims without going to court. For many, this has proved a valuable way of avoiding the uncertain outcome of a court judgement. Yet the uptake of mediation in medical negligence cases has remained lower than might be hoped, perhaps because the current system has evolved in a way that makes all parties focus almost entirely on money. One could speculate how this might be changed, but I will focus instead on the experiences I have had of mediation in the health sector.

Whether in a hospital department or a general medical practice, one is dealing with people who usually have to work together in the future; ongoing relationships are very important. In addition, staff have often cost the public purse a great deal to train and have skills that are not easily replaced. Simply sacking a difficult doctor and replacing him or her with someone who 'fits in' better is rarely an option. Most importantly, however, is the fact that medical care nowadays is delivered by teams, and if these teams are dysfunctional, patient care suffers and we are all potentially put at risk.

Sadly, dealing with 'difficult doctors' is often managed badly and arcane disciplinary processes are relied on to deal with staff in dispute with colleagues and managers. Some of the most satisfactory mediations have seen doctors and their colleagues explore differences and concerns in ways that help each of the parties understand where the other side is coming from. In these mediations, there is often the 'illusion that communication has taken place'. The parties have often been interpreting the messages the others have been giving out in different ways and drawing misleading conclusions from what they think the others have said.

Many of the disputes I have witnessed appear to have been unnecessary. At the very least, they could have been defused earlier if those involved had better dispute-management skills and if managerial systems took into account that people don't always behave logically and that disputes are a normal and healthy part of organisational life.

What I have learned

I was drawn to mediation as a potentially better way of resolving disputes between patient and doctor when things went wrong. Litigation was often slow, expensive and frequently unsatisfactory for all parties. This remains true and we have a long way to go in being able to manage adverse outcomes in the best possible way.

However, if more difficult and often less well-defined disputes that pervade the health service could be reduced, there would be enormous benefit to all parties. Many NHS employees who fall into dispute with the system are motivated by a desire to do the best for patients and feel frustrated when constraints are placed on them. Ironically, those who have to manage scarce resources also believe they are doing the right thing for patients and struggle to cope with staff they believe are acting 'selfishly'.

Potential for growth

There is no shortage of disputes in healthcare. In a complex environment that deals with emotive issues, tensions frequently arise. Management of professionals is notoriously challenging. A great deal of resource is consumed dealing with competing interests.

If there is to be a lasting culture-change in the way disputes are managed in the healthcare sector, there is a need to influence the profession at various stages, but most importantly, to influence those who are entering it. Despite recent changes in the undergraduate curriculum, most medical graduates achieve success from individual effort and many find it difficult working in teams and have difficulty communicating. I have seen a number of very bright junior doctors get into difficulties in their early careers because they fail to handle conflict with colleagues.

The need to encourage doctors, nurses and others at the start of their careers to think about the skills needed to resolve conflict in their working lives provides fertile ground for those with an interest in mediation. Some interactive training sessions should be encouraged in medical and nursing schools. If one was being even more radical, these groups should also include trainee medical managers. In a world of finite resources, there will inevitably be tension between those who manage the health service and those providing patient care. Joint exploration of the principles involved in mediation might be one step to bridging the schism between doctors and managers. If ever there was evidence needed of the illusion of communication having taken place, one would need to look no further than a meeting of consultant staff and health board managers!

There has recently been a call for a duty of candour to be imposed on organisations providing healthcare. The driving forces for this are laudable, but unless there is adequate training in how to deal with the inevitable conflicts that will arise, it is likely that the hoped-for improvements in patient-doctor relations might be illusory. It is up to all of us with an interest in mediation to encourage medical educators to provide mediation training for their staff.

The National Health Service is Scotland's largest employer and is probably home to more disputes than any other organisation in the country. What a challenge to all of us interested in mediation.

Jamie Whittle is a partner at R & R Urquhart LLP in Inverness, advising clients on a range of environmental and planning matters as well as dispute resolution. He is a part-time lecturer in environmental law at the University of Edinburgh School of Law for postgraduate students.

Calm the muddy water, it becomes clear. Move the inert, it comes to life.
Lao Tzu

First encounters

My first encounter with mediation was in the high mountain country of Ladakh in northern India. It was a law school summer break when I probably should have been gaining experience in a Scottish firm to enhance my prospects of securing a traineeship. Instead I was living with a Ladakhi family at around 14,000 feet, helping on their farm and learning the ways of sustainability practised by an indigenous culture.

Tibetan Buddhism was the principal religion in this part of Ladakh and the culture centred around its principles. One of these was that direct confrontation with others should be avoided whenever possible. Society had developed a simple yet ingenious method of containing and resolving disputes when they arose, known as a spontaneous intermediary. Whenever two individuals became caught in a dispute, they would pull in the nearest bystander (who could even be a child) and summarise the situation. The third party would make a decision, which the parties would accept.

I accept that purists might label this arbitration, but the lesson to me was a quick, free, available means of settling disputes and preserving community integrity. The concept of mediation was something that struck a chord during law school: a philosophy of collaboration and lateral thinking, with an absence of cumbersome procedure and veneers of law, a clinical yet gentle way of reaching the source of a problem and finding a navigable way out.

Enrolling on Core's mediation training course in 2005 was very much a life-changing experience. It was my first proper chance to immerse myself in mediation theory and practice – the art of open questioning, active listening, containing a dispute, creating options and objective criteria and asking 'What is this really about?' Little did I know on that first morning of the course that the girl sitting directly to my right would become my wife a few years later. Never underestimate the power of mediation!

A Guide to Mediation in Planning

Some ten years after that trip to the Himalayas, I found myself researching the roots of mediation as part of a project with John Sturrock and Charlie Woods of Core. We were engaged by the Scottish Government to write *A Guide to the Use of Mediation in the Planning System in Scotland*. Although considered by many to be a modern concept, mediation has had a place in Asian and African cultures for centuries. It is one of the old ways of the planet now rediscovered.

Its role in the planning system is to provide a mechanism for either helping parties to build consensus at the earlier stages, or

as a means of resolving differences when a dispute arises. The planning system in the UK has established methods – such as hearings and public inquiries – where parties have the chance to put forward their positions, although a committee or reporter will make the final decision. Although conditions can be applied to any planning permission to regulate development, hearings and inquiries in my experience invariably produce winners and losers.

Fisher and Ury suggest three criteria as being characteristics of a successful agreement – that it be wise, efficient and that the parties are left in better relationship that when the negotiation began. Yet I know of no hearing or public inquiry where the parties have been left in an improved relationship. Like litigation, these processes have the capacity to push people apart rather than bring them together. The significance is that the planning system comprises a trinity of applicant/developer, government and community. Each is a stakeholder, and each has an interest. Conducted properly, a mediation can enhance the understanding and working relationships between these entities. Furthermore, and as estimated by the UK Government in 2002, the use of mediation in the planning system could release more than £3 billion of investment into the economy more than 40 weeks earlier than if other routes to dispute resolution were used.

The Beauly-Denny public inquiry

Looking back at some of the planning disputes I have been involved in so far as a lawyer, and where the parties have ended up in a public inquiry, I often wonder how different the outcome would have been had the matter been referred to mediation. Take the Beauly-Denny power line inquiry, the longest public inquiry since Scottish devolution.

The main hearing process lasted more than four years, beginning with the application in late 2005 and ending with Scottish ministers' determination in early 2010. In between, there was a strategic inquiry session in early 2007, four local sessions, wayleave hearings, compulsory purchase hearings and ancillary planning applications which together spanned well over a year and took place in various locations along the route of the line. The reporters spent a year writing up their report before Scottish ministers considered the findings for a further year.

In the end, the applicants promoting the transmission line were granted the consent they required, albeit subject to many conditions. From a commercial viewpoint, the lengthy hearing process will certainly have delayed the project, complicated the various ramping-up periods and incurred colossal professional fees. In terms of communities along the line seeking to mitigate the impacts on the environment, landscape, health and tourism, my sense is that many feel disenfranchised as a result of a process that was prohibitively expensive for third parties (generally) to engage with any parity. The tenor of the process was undoubtedly adversarial and lacked any space for applicants and objectors to discuss the design in any meaningful way.

Is it mere pipe-dreaming to imagine what might have happened instead had mediation formed part of the process? My view is that stakeholding communities, landowners, businesses and NGOs would have been engaged at an early stage in a proper consultation process. Information gathered would have shaped the ultimate design of the scheme. Greater understanding of the concerns of the local population would have been gleaned by the applicants.

I suspect, having felt that their concerns had been listened to, far fewer people than the 18,000 or so who lodged objections would have done so. Those who might have objected would have had an opportunity to scrutinise design and mitigation with the applicants in a constructive, principled manner, drawn comfort from clear parameters of fair compensation, and gained a greater sense of acceptance and even connection with the project. Pipe-dreaming perhaps, and it is easy to point out the rigidity and inevitability of our planning system. Yet something inside tells me we could have handled this example and many others in Scotland far more swiftly and creatively, and with greater dignity and democracy.

Mediation and the environment

Planning, broadly, is about optimal land use, taking into consideration economic, social and environmental factors. Meaningful engagement between developer and community can result in a dialectic delivering appropriate buildings and developments sympathetic to their surrounding built, cultural and natural environments. Critical to this process, I believe, is a capacity to understand these environments, a skill and process that cannot be learned overnight but which takes time from living in one place. Listening to the land (as pioneering conservationists such as Aldo Leopold and Sigurd Olson used to encourage) means gaining a sense of the rhythms and intricacies of a place. 'A thing is right' declared Leopold, 'when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise.'

Environmental issues, such as climate change, loss of biodiversity and pollution, are now recognised at the highest levels as posing an unprecedented scale of threats to humanity and the wider planet. As a species, humans stand very much at a crossroads where these issues can be addressed in creative, collaborative, durable ways. Denial and apathy are no longer options. The issues are complex, the interests multiple and varied, and reaching consensus and clarity on the appropriate courses of action highly challenging. One need only analyse the round of negotiations at the UN Framework Convention on Climate Change in Copenhagen in 2009 to gain a sense of the multiplicity of positions.

Looking ahead, while the application of mediation in planning and environmental disputes is in its infancy in Scotland, its use is well-recorded in countries such as Australia, the USA and New Zealand. Scotland, with its world-class natural heritage, would benefit from a greater use of mediation in planning and environmental issues to find the optimal design and scale for developments that befit land and communities. Beyond our shores – as environmental issues demand an internationally collective approach – I believe the mediation process and its skills have an invaluable role in helping humanity to mitigate environmental degradation, fostering the restoration of depleted ecosystems and re-connecting communities with the land.

Change will not come if we wait for some other person or some other time. We are the ones we've been waiting for. We are the change that we seek.
Barack Obama

Abigaile Bromfield is a regional co-ordinator at the Advisory Team for Large Applications (ATLAS). She is a chartered town planner with experience in the public and private sectors.

The field of planning has the potential to be fraught with discord and dispute. Planning matters can raise emotions if beliefs, property or financial security are challenged, whether the matter is a multi-million investment in a new town centre development opposed by a local heritage group or the dismay of a neighbour about a garage extension. In England, disputes are largely resolved through costly appeals, and decisions made by the inspector must be accepted by all parties. This is surely the precise environment for mediation to make a genuine difference to people's lives, not to mention their bank balances!

Why I got involved in mediation

In my current role in the Advisory Team for Large Applications (ATLAS), I have witnessed many conflicts, often with a great deal at stake. While my team was initially set up by central government to provide technical planning advice to help unblock problems with the delivery of major housing developments that were contributing to the housing crisis, we soon concluded that a common theme to successful projects was non-technical – working collaboratively, good communication and building trust between partners.

From the outset of ATLAS, my team leader brought a belief that collaborative working would deliver the development of better quality places. I believed that if this was combined with clear project management frameworks, it would create a more sustainable relationship for parties to resolve any issues that would inevitably arise over long, complicated projects. When the team was created, we had a certain degree of freedom to experiment with approaches. This has been tested and improved by new team members to form the basis of our current mediation approach as part of our service.

The ATLAS approach to mediation

Last year, I was asked to represent ATLAS as part of a steering group researching the use of mediation in planning in England led by the Planning Inspectorate and the National Planning Forum. Part of the research involved exploring our team's use of mediation and we were challenged about whether we could be truly independent and act as mediator. I took the opportunity to develop my thoughts on this by enrolling on a Core mediation course. I was able to learn and reflect upon our practice by understanding more about mediation theory, and developing my own skills.

I believe the approach adopted by our team is analogous to 'evaluative mediation' which involves applying our expertise and experience to assess situations and help stakeholders reach conclusions rather than being purely facilitative. Our technical

knowledge has on many occasions acted as a counterweight against political positions that were preventing agreement. Throughout the research, colleagues and I have debated at length the meaning of mediation. I think what matters is not whether our practice conforms to a certain label, but our skill to maximise opportunities by helping find common objectives and shared solutions to resolve differences and enabling key decision-makers to achieve desired outcomes. Furthermore, regular independent evaluation of our work has provided evidence that both the public and private sectors recognise our role as a mediator.

Independence is an important criterion for a mediator. As our engagement approach is provided over a longer period, to maintain our impartiality we focus on the client as the development project; this does not mean that delivery of the development is a foregone conclusion as a successful outcome might be no development or something quite different from original proposals. Our working practice is based on our knowledge that to achieve successful outcomes for development projects, four main elements are critical: a strong project vision (ambition); collaboration; robust project management; and a spatial plan. Where potential conflict exists, we always try to encourage collaborative working by creating confidence and awareness about planning issues.

Lessons in mediation

I have learned from my work that a common issue or barrier to the use of mediation in planning is the culture of procedures, in both local planning authorities and the private sector. Historically, the planning system has been inherently confrontational. Conflict appears more likely when planning applicants take an adversarial approach, set against a defensive and reactive culture in a local planning authority. Perhaps an inevitable contextual factor, which has exacerbated conflicts, is the economic downturn, leading to a greater divergence between the developers' perceived financial return and the policy aspirations.

Inevitably, some level of conflict occurs in most of our projects due to their complexity and the duration of the planning process. Quite often the concept of the development has been in existence for many years and some of the key infrastructure associated with it has been in policy planners' back drawers for years without being debated properly with the local community or landowners. This leads to entrenched positions. I have learned to support clients in untangling the threads, putting them and key stakeholders back on track to achieve their ambitions and enable the achievement of better quality outcomes. This can require a range of mediation techniques to help reach resolution. Mistakes have been made but these have helped shape a more successful approach to deal with conflict in planning. Our greatest successes have resulted in the transformation of people and organisations to work in partnership to deliver strategies for future places in a more coherently-managed framework.

My experience of mediation

My first experience of trying mediation techniques was in the first year at ATLAS where I tested a deliberate approach to deal with conflict resolution. The project was an 'urban extension' project (approximately 2500 homes). The site crossed the administrative boundaries of two districts and one county council and there were two leading housebuilders involved. An appeal had been lodged against the non-determination of the planning application when we were asked to become engaged. My role was to help unlock the impasse which revolved around several technical matters.

There were tensions not only between the applicant and local authorities, but also between the three councils because a clear decision-making structure did not exist, and there was no leadership and unclear ambitions for the proposed development.

It was obvious at the first joint meeting that relationships were frayed and personal attacks occurred. I saw the tensions from the developer side showing, knowing their own jobs were in jeopardy. At times, the passion was immense and power struggles quite prevalent. It was necessary to emphasise my independent role to obtain confidential financial information and options from both sides (in separate rooms for some of the process) in order to start unlocking the impasse and exploring both parties' objectives. This was demanding as there were many technical experts around the table already. I had to use knowledge of good practice gained elsewhere on similar projects in order to get them to examine their problems from different perspectives. I started to see how there was a role for mediation in planning to resolve entrenched technical issues. An independent party was needed to reveal the drivers and motivations of stakeholders to progress the project. I also learned that there was a need for more than one mediator in future complex schemes – and that it was not a quick process.

Although the initial mediation work was completed in a few intense sessions over the space of a few weeks, this led on to wider support provided over a longer period to help build more effective joint working practices and a better decision-making framework to help avoid repeated conflict. A legal agreement was eventually completed and planning permission achieved, but more importantly communications were improved for later stages in the planning process. However, this experience did highlight the need for mediation support earlier in the planning process to influence the initial stages of developing shared ambitions and objectives for a place which would help stakeholders avoid conflict later on.

The potential for growth of mediation in planning

Planning is in a state of flux with new politics, new ideas, no clarity of framework and an emphasis on local working. The introduction of 'localism' brings with it potential for new interested parties with different mindsets and knowledge to become more involved in the planning process in a different way from the past. It also brings opportunities for the use of mediation techniques, but I can see the need for increasing awareness of its role and benefits within the planning process and indeed some guidance if it is to be more widely used.

From my work, I recognise there are obvious direct benefits to mediation including achieving an agreed planning permission, avoiding an appeal, as well as fundamentally improving the quality of outcomes for future places we might live in.

Customer, Employment and Family Relations

Gavin Davis
Sandra Gordon
Carol Fox
David Morgan
Eilidh Wiseman
Alison Edmondson

Gavin Davis is a lawyer who manages the dispute resolution team at Standard Life and has been with the company for five years.

What we've got here is failure to communicate, some men you just can't reach. So you get what we had here last week, which is the way he wants it…well he gets it. I don't like it any more than you men.

The Captain, Cool Hand Luke

Why I got involved in mediation

I grew up in Belfast in the shadow of Stormont and have lived through the transition from burning barricades in the streets to having watched Paisley and McGuiness share power with a slightly disconcerting familiarity that left one wondering why it had taken us 30 years to get to this stage if it was this easy after all.

Northern Ireland was a place where the extent of the vocabulary extended to 'no' and 'never'. Communication across the divide was non-existent and politicians built their reputations on intransigence and a refusal to communicate with their political opponents. We were a nation obsessed with the past and apparently completely unable to move on. It seemed that we were unable to contemplate a peace process because that would equate to a 'surrender process'. This mindset may seem familiar to many mediators.

Even as a teenager in Belfast I was, however, aware of certain organisations (the Corrymeela community being a shining example) who refused to accept the status quo. These organisations recognised that peace was achievable and that mediation between the communities in Northern Ireland was a method of achieving it.

I watched along with others the arrival of Senator George Mitchell who used mediation to broker what became the Good Friday Agreement. No-one believed that the Good Friday Agreement could hold but finally, through the engagement of the parties (not all, I accept) in the process and its confidential nature which allowed communication to occur that could never have been possible before, peace arrived. George Mitchell said: 'I believe there's no such thing as a conflict that can't be ended. They're created and sustained by human beings. They can be ended by human beings. No matter how ancient the conflict, no matter how hateful, no matter how hurtful, peace can prevail.'

This sentiment certainly resonates with me as mediation is ultimately about *people*. If Northern Ireland could do it, I knew that the mediation process could work. I was going to be a mediator someday. While I haven't as yet brokered peace in the Middle East, I am a mediator and I believe it works as a process. However, it wasn't until training as a mediator and becoming involved in mediation in my work life that I realised how practical, commercial and wide-ranging in application this process really is.

My experience of mediation

I have been actively involved now in mediation for three years, having trained with Core in 2007. I have honed my skills through involvement in the Edinburgh Sheriff Court Mediation scheme, an abbreviated form of mediation which aims to resolve low value disputes in two hours or less. It certainly means you have to get to the nub of the dispute as quickly as possible. The fact that they are low value claims does not mean that they are simple and often the parties are arguing over points of principle. I often think that principles are the most expensive element of dispute resolution.

I have also had the privilege of assisting Core in several mediations and have learned an enormous amount watching these skilled mediators at work. As a legal adviser, I have represented Standard Life in several mediations and even been mediated by Core!

What I have learned about mediation

Communication necessarily entails that the person with whom you are communicating understands your message. Fundamentally I have learned that the majority of disputes have been caused by, or augmented by a failure to adequately communicate. Mediation, and a good mediator, gives the parties that opportunity to communicate.

It obviously shouldn't be the case, but often is, that the first time you understand what is really in dispute is on the day of the mediation. Many times as a mediator I have seen in the eyes of a party the dawning realisation of what the other party has actually been trying to say all along despite the dispute having been in existence for many years.

As lawyers representing our clients, we rightly argue for everything our client is entitled to. When it comes to the mediation and the parties take control, they begin talking about what they want and need from the day – and the superfluous often slips away with some gentle, or not so gentle, prodding in the right direction by the mediator.

Mediation gives a voice, it can be a cathartic process, it levels up the power balance. Often when dealing with large organisations, individuals can feel disenfranchised and feel they are not being heard. Mediation gives these individuals the opportunity to negotiate directly with the organisation with which they are in dispute. It is often a cathartic process releasing the pressure that this lack of ability to communicate, either perceived or real, has engendered.

My organisation's use of mediation

I hope that Standard Life and I can be friends again.

This phrase was contained in a letter which I received following a successfully concluded mediation in which Standard Life was involved several years ago. The relationship with the policy-holder had completely broken down, we were involved in a County Court litigation and costs were mounting. So we tried mediation…

We were able to settle that dispute and the long and short of it is that mediation reconciled our customer with us. I think it is highly unlikely that this particular customer would have ever invested with Standard Life again had it not been for the mediation. Not only was the dispute settled, the relationship with the customer was restored. Therefore, it would follow that mediation is a commercial imperative. In a competitive financial services industry, customer loyalty is paramount and if

mediation can aid customer retention, it should be considered as an opportunity to resolve disputes with our customers in such a way as to ensure that they remain as customers, or at least allow them to do so.

I have found that mediation works as a process for Standard Life. Customers are the central focus of everything we do. We spend a lot of time and money on the best methods to communicate with customers. That is not just potential customers but existing ones, including those we are in dispute with. We have found through research that if we can handle the resolution of a dispute in the appropriate manner, these clients can become our greatest advocates and most loyal customers. We do this by engaging properly with those who complain by attempting to communicate with them to resolve the dispute. We believe that treating customers fairly should be at the heart of the dispute resolution process. Too many financial institutions seem to forget this.

Mediation is a natural by-product of this attitude. Mediation is a method of engaging with our customers with whom we are in dispute which avoids the adversarial nature of the courts. I have found that neither Standard Life nor their customers can benefit from the court process; Standard Life is not in the game of trying to beat our customers in court. We want to resolve the dispute and mediation enables that.

The potential for growth of mediation

I consider mediation to be a tool which now sits firmly in the arsenal of any dispute resolution lawyer. Clients are becoming more familiar with the process and are now expecting it to be used.

The FSA has been looking carefully at how financial services organisations handle disputes to ensure that customers are treated fairly in the process. For this reason, any financial services organisation which doesn't know and use mediation should be asking itself if it really understands its obligation to treat customers fairly.

The Financial Services Ombudsman in Ireland already has a mediation scheme and it is disappointing that the Financial Ombudsman Service in the UK has not taken the opportunity to embrace mediation. The vast majority of customer complaints in the financial services sector do not appear in court but instead use the (free for the customer) FOS. The ombudsman service is looking for ways to expand its remit and provide a better service to all parties involved in the process: if the service was to embrace mediation, that would really be a step forward in its work and would aid the financial services industry.

Don't do anything fancy, just do the obvious well.

Source unknown

Sandra Gordon heads up the Royal Bank of Scotland's executive response team, dealing with a wide range of complaints from shareholders, customers and others.

Who am I?

I left school at 16 in 1975 and have only ever worked with RBS. I learned all about banking in the flagship branch in St Andrews Square and to have worked in such a beautiful building was a real bonus. At that time, I was fortunate enough to be surrounded by some real characters and can honestly say that I really enjoyed learning from my colleagues. A former manager was often fond of saying, 'Don't do anything fancy, just do the obvious well.'

I can't remember exactly whose mantra this was but seem to recall it was either Bill Shankly or Sir Matt Busby – both great men. Anyway, this particular saying has been a great reminder to me throughout my years working in the Bank to always try to do the right thing and in the most common sense way. Nowadays, you're more likely to hear me say 'Don't panic Captain Mainwaring' – banking can be a stressful environment, particularly when you deal with complaints, which I do and I love every minute of it – well, usually!

I worked in branch banking for 20 years and learned my trade and my 'love' of customer interaction, good and bad. Staying within St Andrews Square, I went on to work for one of the Bank's directors, supporting branches in Edinburgh and the Lothians in all things service-related, from queuing to courtesy. It was in this role that I got a real desire to deal with complaints. I would help our branch staff to deal with them and loved the fact that I was speaking with customers and helping to put things right.

Between 1992 and 1996, I worked in Manchester for the Bank. I was still involved in service activities, but had a new set of northern words to learn and new accents to understand as I visited the 60-odd branches in the Manchester area. To this day, I still say 'bobbins' when something is rubbish, and 'ta-ra' when saying goodbye. In 1994, I managed a branch in Lancashire, before returning to Edinburgh in 1996 to be part of the Bank's Customer Relations Unit. Since that time I have worked exclusively in a complaints environment, as a case manager dealing with complaints every day. One memorable moment was being able to talk a customer down from the roof of a branch from where he had threatened to jump.

Later, I dealt with complaints that had been referred to the Financial Ombudsman Service, where the order of the day was to mediate an outcome for disputes where deadlock had been reached. I'd always admired the way the ombudsman had the ability to identify underlying issues (the bits that weren't said but clearly existed) and I learned a lot about fairness in the circumstances of each dispute that I dealt with. Currently, I head

up the Bank's executive response team – dealing with a wide range of complaints from shareholders, customers, activists and opinion formers.

There's never been a better time to use and share my mediation skills. I'm starting to sound like a broken record as I remind others constantly to 'separate the person from the problem'!

Why I got involved in mediation

I guess I could say that this happened by accident. About seven years ago, I was dealing with a particularly difficult complaint which on the face of it couldn't be resolved. The Bank opted for a mediation approach and I was fortunate enough to become involved.

At that time, I considered myself to be a decent complaint handler, although I wasn't sure what else could be done to resolve this particular issue amicably. I was blown away by the whole mediation process and the behaviours and techniques used to bring about a win-win situation. It made me challenge how I dealt with complaints and opened up a whole new way that was both fair and non-judgemental. This particular mediation lasted from 9am to midnight and I can remember feeling totally energised at the end of what was a very satisfying day for both parties.

I remember the customer offering to give me a hug and take me for a drink. How different that felt in comparison to the vast array of emotions and anger that had been evident in previous weeks. Following my first 'mediation', I made myself a promise that I would change the way that I dealt with complaints and that I would spread the word among my colleagues.

My experience of mediation

I absolutely love it and although I can't be an independent mediator as such, the behaviours and techniques used are well and truly in my complaint-handling toolbox.

I've used and shared what I've learned with my colleagues and encouraged them to think differently. My experience up to now has been enlightening, I'm always amazed that I can ask difficult questions and make progress in the most complex of issues. I prepare more and wing it less. I explore options and am unafraid of asking 'what if that can't happen?' I've learned not to assume or judge and have become a better listener. And I take time to summarise and take stock of situations. Weirdly, I'm comfortable with silences and don't feel the same pressure to fill them!

The importance of asking the right questions really helps to clarify and understand. I've had a recent experience where failure to acknowledge or address race-related remarks threatened a reasoned and fair outcome. Mediation behaviours and using the right questions really helped the conversation to move on in an acceptable way. I acknowledge feelings and anger rather than 'use' them to decide an outcome. I've learned that sometimes wanting to fix things doesn't always work and for the right reasons. Best of all, it's a two-way process where customers feel involved and part of the outcome.

What I have learned about mediation

For me, it has to be not thinking that I know the answer before I speak to or write to a customer – or even listening to a colleague. Yes, of course I want to get it right, but I start with a clean slate and try my very best not to jump to conclusions, drive my

own agenda or come up with an automatic solution that I think will sort the problem – because sometimes it just doesn't.

The importance of accepting what you hear, whether you agree with it or not, is another matter – but acknowledging something rather than challenging it usually is a good place to start. What's not being said is significant. I'm always surprised about the little nuggets of information customers give us and how we sometimes fail to see the importance of them, choosing instead to provide the answers we're familiar with. Preparation is everything; I try to prepare a few open questions before any customer conversations. The beauty of it all is that using mediation behaviours and techniques means that interactions are a two-way experience and it's not about a one-sided view or outcome. It helps to make a connection, which is much more rewarding that driving your own agenda.

My organisation's use of mediation

An introduction to mediation skills is part of my team's induction. It's not quite business as usual yet, and it isn't always the first choice when entering into dialogue with customers. That said, there is clear evidence that we're getting better at participating in difficult conversations, and are really starting to explore potential options. It's a bit like opening the first door only to find other doors that need unlocking and, rather than refusing to continue through the doors, we're unlocking them as we go. As a result, we get the bigger picture. We're visiting more customers across the country to have the difficult conversations face to face.

With the support of Core, I've been able to organise and deliver in-house training so that colleagues build up their skills and understanding of mediation.

The potential growth of mediation knows no bounds and it must become 'business as usual' and second nature when working in a difficult environment where conflict, anger, confusion, frustration and a range of emotions are on display. In complaints, this is usually the norm. It's tried and tested and it's rare not to get an outcome, whether that's an agreement – or an agreement to disagree! The behaviours stretch way beyond complaint-handling and can be vital in dealing with the everyday personal disputes that we are often faced with.

Carol Fox
is a specialist discrimination lawyer dedicated to representing claimants. She leads the team of Fox Cross Solicitors Limited in their new Edinburgh office.

The battle for the individual rights of women is one of long standing and none of us should countenance anything which undermines it.
Eleanor Roosevelt

Why I got involved in mediation

My first acquaintance with mediation was in the early 1980s, in the context of family law and domestic violence, during my earlier career as a social worker. I freely admit I did not approach mediation with anything like an open mind. I nursed a hostility and suspicion of those who failed to recognise what I saw as a dangerous power imbalance between the genders, lack of any political context and the undermining of hard-fought feminist rights at the same time as we were trying to protect funding for refuges for women and children. Even as a social worker, I dismissed mediators as ill-informed do-gooders competing for scarce public funding, to be viewed with grave suspicion.

At that time, I read wide-ranging critiques of mediation, which dismissed it as a scheme for diminishing the rights of the underprivileged in our society, whereby individuals were allegedly disempowered and forced to acquiesce in their own oppression. This closed my mind and blocked any possibility of me looking honestly and realistically at the needs of those around me. The polemic of academics who never dealt with the anguish, violence, distress, sadness and disappointment of human lives won the day. Meanwhile, I remained angry and campaigning and certainly achieved a lot for victims of domestic violence by helping to open two refuges and an advice centre.

Looking back, I often wonder whether it was always in the best interests of women and children in such difficult circumstances to be met by a committed and righteously angry young social worker. Perhaps all they wanted was some understanding and a cup of tea. For campaigning advocates on the left and feminist sisters alike, opposition can become a comfortable place not to be challenged by the vagaries of human emotion nor new ways of thinking. God forbid.

Fast forward nearly 30 years. How do I come to be contributing a chapter to this book on mediation? Now a lawyer, I sincerely hope I am no less of a feminist. I am still committed to being angry, with a passion for equality, the underdog and the underprivileged coursing through my veins. But with greater maturity, personal and political battles survived, I am older and wiser – and so much better informed.

As I approach my 50th birthday, I am proud to say unreservedly that people are much more important to me now than any polemic. I am a better lawyer than I ever was a social worker. My focus is solely upon clients who need and deserve a professional advocate whose job is to be fully informed about all the options

available and to enable these to be clearly and carefully explained, so that above all the claimant can then make truly informed choices. From my initial misgivings some 30 years ago, I now see mediation as empowerment in action and I know what I am talking about.

My experience of mediation

My re-acquaintance with mediation was, ironically, at the suggestion of an enlightened, better informed respondent lawyer in a disability discrimination case. The claimant was in a very fragile emotional position and mediation was suggested as an alternative to going to tribunal. I first wanted to find out more about the process itself and was offered an informal meeting between the lawyers and the mediator to discuss any concerns. This was my very first visit to Core.

Following this discussion, it was agreed the employer would meet the cost – and if the mediation failed, the claimant had the full right to proceed to tribunal and both lawyers would be fully involved in the process. Having protected the claimant's rights, I explained he had nothing to lose by giving mediation a try. I was also concerned about how he would cope with the hearing process itself in his present state of mind. He agreed and the case was resolved after one very long day of mediation.

Since that first successful case, I always suggested mediation as a possibility in a discrimination claim, allowing the client to make the ultimate choice, rather than me proscribing procedures in advance. I gained valuable insights into the process and was able to successfully mediate difficult cases involving sexual harassment, pregnancy discrimination and disability discrimination which allowed each individual to have their voices heard in a way which would not have been possible at a tribunal.

Mediation is not an easy option. Stripped bare of bundles of documents and tribunal procedures, it demonstrates a respect for each individual and puts his or her experience at the centre of the process. Furthermore, his or her wishes are fundamental to reaching a positive outcome. Crucially for me, the decision-making powers are not given away to an unsympathetic or ill-informed tribunal.

The yearly employment tribunal statistics record a profoundly disappointing and worryingly low success rate for claimant discrimination cases. In my view, this suggests the present tribunal system often fails to serve the interests of justice and too often fails claimants. While any error might be rectified on appeal, what happens to the individual claimant in the meantime as the case proceeds over many years perhaps before the Employment Tribunal, Employment Appeal Tribunal, Inner House of the Court of Session, Supreme Court or even the European Court?

What happens to that person? Do they live happily ever after? Do they ever get another job? Do they put the experience behind them and breathe a sigh of relief? No. The reality is many people are broken not by the initial injustice or discrimination but the frustrating and demoralising attempt to seek redress. Mediation is a principled alternative for principled people.

What I have learned about mediation

Following the successful individual mediation cases, I decided to undertake training with Core to understand the process better and to be a more effective lawyer using mediation. The course was challenging; afterwards, I was allowed the opportunity to assist in a mediation. This was also challenging. I was impressed by the calm,

respectful, professional approach of the mediators. I was overwhelmed and surprised perhaps, that quiet people can also be strong and determined, and come from a position of integrity and honesty without thumping the table once. I was astonished that entrenched, long-standing grievances could be shifted within one or two days of mediation and that all could leave with a sense of achievement.

I have much more to learn about mediation but I know enough about the limitations of our justice system, and employment tribunals in particular. These limitations need to be addressed collectively. This burden should not be placed upon the shoulders of individual claimants who have already suffered discrimination and then have to navigate their way through difficult tribunal procedures.

My organisation's use of mediation

Fox Cross Solicitors Limited was established as a niche claimant employment and equality law firm in January 2010. We hope to work in innovative ways as we move beyond the present specialism of equal pay into wider discrimination and employment matters. We only act for claimants and we hope to offer mediation as a core option for all clients who seek early redress for their sense of injustice.

The potential for growth of mediation

While a natural optimist I am profoundly weary and dismayed by the frustrating process of guiding thousands of claimants through the slow, bureaucratic, procedural maze of the employment tribunal system in Scotland. After more than five years of mass equal pay litigation, the present system has failed to deliver one substantial legal judgment in favour of the low-paid women I represent. If only mediation could be considered in these equal pay cases. If only I did not witness the daily shock and disappointment of women denied equal pay for 40 years who have been failed by their employer, their trade union and the justice system. Having struggled on, sometimes in multiple part-time, low-paid jobs, these women deserve so much more. Perhaps mediation could be an answer.

Imagine a circumstance where employees are informed of their rights and afforded speedy access to justice and mediation if these rights are breached. That was the original intention behind setting up industrial tribunals. There have been attempts to reform the tribunal system since then but all have floundered as the starting point was either cost saving or a need to reduce the number of cases going to tribunal.

Employment law for claimants offers a huge new area for mediation. Perhaps the greatest challenge is to overcome the innate resistance of people like me and at the same time make mediation affordable for claimants and low paid workers. That is a perhaps a key challenge for Core in the next decade. But it is also a responsibility we all share as we look at every available option to allow real access to justice for Scottish workers and employees.

Whatever your life's work is, do it well. A man should do his job so well that the living, the dead and the unborn child could do it no better.
Martin Luther King, Jr.

David Morgan is a partner and head of dispute resolution at law firm Burness LLP, and an accredited expert in employment law.

What type of lawyer do you want to be?

I asked myself this question, I think sub-consciously, at an early stage of my career. I was drawn to employment law as a student at Glasgow University as I could relate to the real issues which I saw played out in the case reports and journals which we critiqued with the analytical eye of academia. The black letter of the law quite quickly seemed dwarfed by the 'real' issues which struck me as being much more important, either to solve a problem or resolve a dispute.

I have always felt that the person you choose to be in your personal dealings with people should inform the approach you adopt in your professional life. I started my career in another of the large commercial law firms in Glasgow. I chose to specialise in employment law and I have followed this exclusive path throughout my career. My focus was initially in the contentious area, representing clients' interests in the employment tribunal.

Employment disputes introduced me from an early stage to the concept of negotiation and conciliation. A conciliator from ACAS is assigned to work with parties in every employment tribunal claim to try to reach a settlement. Now, this is far from mediation as I now know it, but it did allow me to shape my style of negotiation.

As a junior lawyer, I handled a particularly complex employment tribunal claim, acting for a construction company. Such was the culture of the industry that a decision was taken to dismiss with immediate effect a senior manager whom the clients believed was threatening to set up in competition. I warned the client that there was a real risk of a finding of unfair dismissal. Their instruction was to fight fire with fire and launch an ordinary action for breach of contract and removal of confidential information. A 'streetfighting' approach was to be adopted.

While the court action certainly had an impact on the employee, my instinct was that this was an opportunity to bring the parties together to try to resolve the disputes in their entirety. I suggested a meeting with ACAS for lawyers to come together to discuss the claims and how they might be resolved. With hindsight, this meeting was the first appearance of what I would soon come to reach for much more readily in my toolkit as an employment lawyer, as I learned more about mediation.

Why mediation?

I now head up the dispute resolution department at Burness LLP. I joined the firm in 2002 as a partner at the age of 29 and took on the management role around 18 months later. I remember that the first piece of formal correspondence I received in my capacity

as head of dispute resolution was a letter from John Sturrock at Core. I had heard of John and his reputation at the Bar. His approach impressed me – he had followed the progression of Burness and in particular the re-branding of our litigation section as 'dispute resolution', which was viewed as forward-thinking at the time. However, he observed that he had not come across us on the mediation circuit at the time and we arranged to talk about what we might do in the firm.

The first initiative that I was to introduce to the department was training in mediation skills and representation at mediation for all of the dispute resolution lawyers (litigation and employment) within my firm. There was a natural fit with our approach to dispute resolution and, in workplace disputes in particular, it was immediately apparent how mediation would lend itself to resolving these matters. All through my career I had heard clients using language such as 'it's a point of principle' and 'I would rather pay your legal fees than pay him to settle this case'. In those days, commercial clients and even ACAS would scoff at the suggestion that a party should ever apologise to a claimant employee. The best that a claimant could hope for was an agreed employment reference.

My experience of mediation

I developed my training and mediation skills by accrediting with Core on their flagship course in 2008. My business case for doing so was to develop my skills and expertise in representing the interests of client employers at mediations. The focus of my practice as an employment lawyer has always been on the employer's side. I can now genuinely think of few cases in my portfolio in which I would not suggest mediation as an alternative to the more adversarial tribunal process.

I have had an opportunity to shadow John Sturrock as assistant mediator and I have now handled numerous mediations, representing the employer. Perhaps the most powerful experience was the resolution of a difficult disability discrimination claim in which the claimant suffered from anxiety and depression.

The mediation took place at my firm's Edinburgh office and John Sturrock acted as mediator. It was evident from an early stage of the day that the parties would be able to talk with each other again after several months had passed since they last met. A tactical display of pastries in the morning over coffee brought the parties immediately together.

Much of the day was spent looking at ways in which the parties might work together again with a view to resolving the tribunal claim and when the ink was dry on the settlement agreements at around 8pm, John gave me the nod to wheel in a birthday cake for the claimant. Only John could have spotted in his pre-mediation preparation that the mediation meeting had in fact been fixed on the same date as the claimant's birthday! He had flown to Edinburgh from his home in Norwich for the mediation and was genuinely touched by this gesture.

The potential for mediation

I think we have seen a shift in the last couple of years towards commercial clients being much more ready to embrace mediation. The greatest challenge in workplace disputes is often that the value of the claim is such that it can be resolved through more traditional channels such as negotiation or ACAS conciliation in any event. There is also the advent of judicial mediation which is now being offered by the Employment Tribunal Service in certain cases. My training in mediation makes me

somewhat sceptical about the possible contradiction in terms of a judge switching roles from decision-maker to mediator. However, the process has been successful in several cases that I have handled, as the essential components are there.

Another challenge for mediation in workplace disputes is explaining the process to legal opponents who do not 'get it'. The same can often be said for the unrepresented claimant, although the flip side is that mediation can, in my experience, offer the greatest value in claims involving emotion and principle for a party litigant who wants his 'day in court'.

Experience has shown that, having had the opportunity to vent their feelings in mediation, very often the issues for the claimant then distil down quite discretely to financial settlement or other components such as outplacement counselling and agreed statements. I no longer have any hesitation in advising a corporate client to apologise. The power of saying sorry (or a multitude of variations on that theme!) should never be underestimated. Mediation provides a safe environment to say sorry; it is no longer the hardest word.

In the early days of my use of mediation, some of my partners reflected that it was not in the firm's interests to resolve a client's dispute when our fees have traditionally been incurred by following the litigation process sequentially through to a court hearing. However, in my experience, getting a client a positive result at mediation is much more positive and genuinely cements the long-term relationship between lawyer and client. We have all seen the immediate rush of a success in court or tribunal quickly diluted when the legal fees are rendered after a lengthy hearing.

And what happened in the case with the construction company, you might ask? That did resolve itself to the client's satisfaction and I was subsequently to hear from a colleague what I took as being one of the best compliments I could have received from, of all people, my opponent.

Following the lawyer-to-lawyer meeting, my opponent (who was a general practitioner in a small high street firm) was said to have described me as 'nothing like he would have expected from a lawyer in a large city firm'. I knew exactly what he meant then. But I now realise (from my studies of Ury in *Getting to Yes*) what was going on. My natural approach is to take the people out of the problem and work rigorously to resolve the dispute, while being respectful of the people involved. That is the type of lawyer that I want to be.

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We can't solve problems by using the same kind of thinking we used when we created them.

Albert Einstein

The sceptical convert

During 2004, John Sturrock and Pamela Lyall encouraged me to take part in mediation training. Here is my first confession; I could see no benefit in mediation.

For the majority of my career, I have advised employers. My naïve view was that when an employee brought a claim against my client, their sole interest and aim was compensation. My client was either interested in resisting the claim or settling for as little as they could get away with. There was no ongoing relationship to save.

However, after giving it thought, I agreed to undertake the training. I attended the five-day Core mediation course in November 2004. Not all practitioners attending were litigators; there were property lawyers, corporate lawyers, and I remember that there was also a GP and an NHS manager among our number. The course was hard work. There was a lot of interactive learning including the dreaded roleplays. I found it exhausting.

I like new shoes

I am going to make a second confession: the five days of mediation training were life-changing. As zealous as that sounds, I am being sincere. The training had such a profound effect on me. It was the first time I had really stepped into the other side's shoes. I felt that it was a voyage of discovery. I know that others on the course felt that too. I suddenly became aware that table-thumping would not always get the right result for my client. To have my long-held adversarial views turned on their head was revolutionary.

I gained a maturity from my mediation training which I might otherwise not have achieved. I became self-aware in a new way. The training taught me how to deal with disputes in my profession but it also made me think about the way I act in my personal life. I am no longer as hesitant to consider someone else's view and I am quick to recognise steps to remedy my mistakes.

It is this sense of self-discovery that has left such a lasting impression on me. The mediation training has benefited my approach to my children, my business, my colleagues and my clients – I definitely got plenty of bang for my buck! I returned for Core's advance mediation course two years later.

Solicitors and the Third Side

As part of my conversion to mediation, I read some of the literature recommended by Core including *The Third Side* by

William Ury. The premise of the book is that there are actually three sides to every dispute: one party's view, the other party's view and the reasonable person's view.

Or, in the words of Messrs Barlow and Williams, 'There are three versions of this story; mine, yours and then the truth.' (*Shame*, 2010) I take that 'Third Side' approach with me.

As a solicitor, I have limited scope to act as a mediator. More often than not, I am an adviser to a client who is party to the mediation. However, informal mediation is a more common occurrence.

As an example, shortly after my training, I had a client with a member of staff returning from maternity leave who the client felt would be better to leave their business because alternative arrangements had been made in her absence.

Instead of looking at the issue with a view to a financial settlement, the client and I tried to think creatively to try to reach a possible solution. My client achieved the outcome they wanted but avoided a costly settlement or tribunal dispute. The employee also got a result that suited her; there was no bad blood, strongly-worded letters or sleepless nights.

I do not think the solution would have been arrived at without the training I had undertaken. I found myself slipping into the employee's shoes without actually taking the conscious decision to do so; it just happened. This is why I have such a profoundly positive view of mediation. It has changed my whole outlook.

No-noise negotiations

My experience of mediation has coloured my approach to negotiations. I have found that I now take a principled view rather than a positional view. I think it is very clear when the solicitor on the opposite side has had some sort of mediation training. There is no adversarial 'noise' around the negotiating process. It is refreshing when a solicitor acting for an employee comes to the negotiating table knowing what it is like to wear the shoes of my client. I have little doubt that those solicitors know that I have already tried on their client's shoes too.

The morning after

The primary benefit of formal mediation is that the parties become so focused on the middle ground that a solution can be found to what seemed an intractable problem only the day before.

My team and I have been involved in two mediations which demonstrate this. The first was a judicial mediation where one day of mediation avoided four days of tribunal appearance time and the possibility of our client losing an uncapped discrimination claim.

The second mediation that springs to mind is particularly unique because the mediator was also one of our clients! Again, this mediation was settled in one day, avoiding the time spent at tribunal arguing over the merits of each side's case.

Our knowledge of the mediation process allows us to demystify the process for our clients in the time leading up to the mediation. On the day of the mediation, we have to keep things on track. It boils down to this: we ask our client, how will you feel tomorrow morning if this is resolved and how will you feel tomorrow morning if this is not resolved? You would be surprised the effect that has on their focus.

Spreading the good word

At Dundas & Wilson, I oversee our mediation group. This is drawn from across the firm; we have lawyers from construction, litigation and employment. We have presented at the CIPD Conference in 2009 and have undertaken joint seminars with Core, Scottish Prison Service and ACAS. We want to pass on the word about mediation to others.

We undertook a survey on mediation after our CIPD Conference. The stats were encouraging: a quarter of HR managers were planning to introduce mediation to their workplace.

Our clients that have used mediation have been astounded by the results. They are amazed that a satisfactory result can be reached for both parties in such a short space of time when minds are focused on achieving an outcome. These outcomes are often not win-win, but they are a compromise that one can live with and the other can deliver. Once our clients are converted, they never look back.

In a societal context, we are not always honest about how we feel. Social norms and anxieties about security and other issues often prevent people from speaking their mind. In the workplace, this lack of communication can create conflict. What is apparent from the mediation process is the instant change in attitude that will occur after the employee has had a chance to outline their feelings to the employer and for the employer to explain their feelings in response. It is cathartic.

Don't look back in anger

I think there is little doubt that the economic climate will increase workplace conflict. Numerous developments in the law will also lead to tension in the employment relationship.

I would like to see a greater move towards mediation. It saves cost, time, and improves the well-being of those in the workplace. My head tells me that conflict is more likely than collaboration in the coming years but I hope that mediation will continue to grow.

Looking back to just six years ago, litigation was highly contentious. Thankfully, things have moved forward since then.

One of the best things about mediation for the lawyers involved is that there are no bundles of papers, statements or witnesses. Mediation requires none of the litigator's paraphernalia; just listening and thinking. The art of adversarial practice is left at the door and hopefully the attitudes that go with it. Instead, innovative thinking is required from the lawyer.

Perhaps that will be the mark of a great employment lawyer in the future – to win the argument for the Third Side.

The aim of argument, or of discussion, should not be victory, but progress.
Joseph Joubert

Alison Edmondson is a solicitor at Turcan Connell, specialising in family law.

Background

Many contributors to this book are pioneers who have advanced the mediation cause in their various fields. I began my professional career as a family law solicitor in a time of mediation momentum, when the frontiers were moving firmly forwards. As such, I identify more readily with a sense of inheritance: I see myself as a beneficiary of the mediation pioneers. That heritage is both a blessing and a challenge to those of us who join the endeavour.

My journey into mediation

One of the professional experiences which has profoundly affected my practice was a Court of Session divorce case regarding financial provision for both spouses, the dissolution of a family business and care arrangements for two young children. Negotiations finally settled at a joint consultation. (The instructed advocates conducted a shuttle negotiation on the parties' behalf.) The settlement fell squarely in the middle of the spectrum of fairness. All advisers worked effectively, even the most complex of issues was unravelled, contentious court hearings were avoided and both parties could live with the outcome.

However, the negotiation left both parties intensely dissatisfied. The difficulty was not one of outcome, of substantive justice: the difficulty lay with the process. These clients had seen the best of what the court system had to offer them and even at its best, that system was inadequate to serve their needs. The depth of my client's unhappiness struck me profoundly and that, more than anything else, propelled me into the world of mediation.

My experience of mediation

Within weeks of that joint consultation, I undertook mediation training with Core. I had a clear idea of what I hoped to achieve. As it turned out, I had significantly underestimated the personal and professional impact that the experience would have on me.

Even prior to then, like most family lawyers, for many of my clients I relied on Scotland's long-established family mediation services (now part of Relationships Scotland) to intervene at an early stage in a potential conflict, usually in disputes relating to children. It is testament to the overwhelming success of the work of family mediators that the majority of the families whom I guide to family mediation services do not subsequently need my professional involvement in the arrangements for their children.

I embarked on my training with the aim of applying mediation skills to quasi-mediations. Family lawyers frequently find themselves acting in a role which has more in common with the typical description of a mediator than with the caricatured description of a litigator.

For instance, the skills I acquired revolutionised my approach to dealing with litigants in person (an increasing feature of family law). Influenced by my mediation coaches, I have permission, confidence and skills to approach unrepresented parties more humanly and more effectively (for them and my clients).

Likewise, the practice of a family lawyer frequently includes joint meetings with both clients and solicitors present. Such four-way meetings are a cornerstone of collaborative family law, a form of practice with a commitment, on the part of clients and lawyers, to tackle difficult conversations with respect and to avoid litigation. Put briefly, in executing my primary duty as a family lawyer to act in my client's best interests, I find myself increasingly using and building on the skill-set of my mediation training.

One of the unexpected effects of my Core training was to challenge me to consider mediation as a viable option well beyond the circumstances in which referral had become habit. Proponents of mediation know that even in apparently intractable disputes, mediation is capable of being the corner at which clients' experience of their conflict turns. It takes some considerable trust to rely on the process in the most entrenched child-related disputes. Having now taken that step, I know the practice can live up to the theory. In more than one instance, two parents – deeply entrenched in conflict – have described themselves as 'we' for the first time in years during a mediation session.

Equally, it is well-understood that mediation can deliver a robust approach to issues of financial complexity. However, it was only in the context of the course that it became forcefully apparent to me that a divorcing couple with their own business might benefit more from a commercial approach to conflict resolution than from the traditional family lawyer's practice. Another benefit then of mediation training was finding fresh ways of thinking about conflict.

Lessons from mediation for lawyers

The perspective, skills and principles of mediation speak directly into my work as a family lawyer. Understanding the explicit values of mediation practice has helped me to discover the implicit values underlying the 'traditional' lawyer's approach.

There are undoubtedly situations in which the levels of hostility or untrustworthiness are such that substantive justice is the highest goal which we family lawyers can realistically achieve for our clients. In such situations, robust negotiation and use of the litigation system do serve our clients well, particularly the most vulnerable of them.

However, traditional legal training promotes a default mode for conflict resolution targeted at acute levels of hostility and extreme levels of untrustworthiness. We family lawyers then behave as though we believe that this presentation is typical of all of our clients. We may even unconsciously encourage them to adopt this approach or to assume that it is the approach of the other party.

Likewise, our traditional mode for conflict resolution aims to ensure that our clients do not speak for themselves. We reveal a value judgement that our clients are incapable of resolving their own disputes and imply that we know better than they do how their lives should be lived.

In fact, it is my experience that most family lawyers have a sincere respect for the dignity and ability with which the vast majority of our clients approach one of

the most difficult conflicts of their lives. My mediation training drew me into a community in which I find myself exposed to the writing and practice of mediation. This has informed, inspired and supported me to make my own values explicit and to put them into practice.

My organisation's use of mediation

At Turcan Connell, I am privileged to belong to an organisation which holds as one of its underlying values a genuine open-mindedness to all forms of dispute resolution. Collectively, we have used mediation successfully to deal with disputes in the distribution of family estates, in employment matters, in land and property disputes and, obviously, in family law disputes.

The field of mediation is undoubtedly maturing, and mediation's capability to deal with complex financial disputes and extremely polarised emotional situations is well-established. Speaking particularly from my own experience, the key to use of mediation by a family lawyer is an open-minded, and possibly innovative, consideration of its suitability in all our cases.

Mediation's future in family law

Looking to the future of both family law and mediation, I return again to the metaphor of inheritance. The practice of mediation and the practice of family lawyering in Scotland in recent decades have at least been travelling in the same direction and at best have been nourishing one another. The work of Core, of family mediation services and CALM (Comprehensive Accredited Lawyer Mediators) in family practice certainly suggest that the latter is true.

The mediation community has been enriched and energised by the work of family mediators of all disciplines who have often been responsible for breaking new ground politically as well as quietly mediating with many people. From the practical, legal perspective, almost all family lawyers in Scotland are committed to using contact with other practitioners, whether in person, by correspondence, or by telephone, as constructively as possible and with a view to resolving rather than inflaming issues between parties. Likewise, we have a commitment to handle contact with clients (both our own and any opponent) with professionalism and sensitivity. The two disciplines have much to offer to one another.

I personally have benefited from the wealth of experience that Core has developed over the past decade. We who are beneficiaries are faced with the challenge of stewarding that inheritance well. For all that has gone before, the relative youth and variety of the present incarnations of mediation in family practice give it plenty of scope for growth.

I return to where I began, with the case that first propelled me into the mediation community. That, I think, illustrates perfectly the need and the scope for growth of mediation practice in the field of family law. The only barrier to mediating a dispute so financially complex and emotionally charged was that it did not occur to the practitioners involved that the dispute was capable of being mediated. I look forward to a day when it is the instinctive perspective of practitioners to see mediation as a preferred option to help our clients resolve the full range of family conflicts.

Human Rights, Sport, Church and Leadership

Shelagh McCall
Paul Buxton
John Chalmers
Hugh Donald

Shelagh McCall works as a Commissioner with the Scottish Human Rights Commission, as an advocate and as a part-time sheriff.

Better to light a candle than to curse the darkness.

Chinese proverb

Who I am

I am an instinctive avoider of conflict. Conflict unsettles me. It confuses. It lets loose emotions I would rather remain securely tethered – whether the conflict is mine or someone else's. For someone who has spent a large part of her career practising in the courts (and the criminal courts at that), this might be an unexpected admission. Even before I began my legal career at the start of the 90s, it seemed to me that one of the least effective ways to deal with conflict was through combat, whether acted out in the courtroom or on the battlefield. From the start, I challenged myself to find a way to participate in an adversarial litigation system while maintaining respect for the dignity and integrity of those whom I came across and for myself. I've not always succeeded!

Why mediation?

Some sort of conflict lies behind every court action, including criminal prosecution. In our adversarial justice system, conflict is also the means by which we seek to resolve that original problem. It can hardly be surprising that, at the end of a case, it is extremely rare for people to feel happy about the experience and the outcome, even if they 'win'.

It seems pretty obvious to me that the systems or tools we deploy to resolve our conflicts have the capacity to hurt or heal, to perpetuate or resolve the conflict, to afford us our dignity or to strip it away.

In a human rights context, it is often the most marginalised and disempowered members of our community who find themselves subject to abuse, or otherwise unable to realise their rights. We ask a lot of those vulnerable members of society when we require them to resort to the law to remedy harm that is being done to them. In reality, we ask too much. And what of those rights – economic, social, cultural – which can't currently be enforced through the courts? What is the best way for us to move forward as a society to improve everyone's living experience?

Mediation has the potential to address entrenched power imbalances and bring people round the table on an equal footing. It allows for a safe context in which to explore the true issues. It can facilitate dialogue and provide the opportunity for creative problem-solving. From a human rights perspective, that's the attraction of it. It enables those whose rights are affected to meet in a potentially constructive and collaborative forum with those whose responsibility it is to uphold those rights. It has the potential to provide a means by which common interests can be identified and used to advance the realisation of individual rights.

My experience of mediation

I began by undertaking basic mediation skills training. I would recommend it for lawyers – there is great liberation in asking open questions precisely because you don't know the answer! Later, I travelled to the United States to participate in a week-long course with Kenneth Cloke in advanced mediation. Or, as Ken would call it, 'dangerous mediation'. Why dangerous? Because he was encouraging mediators to move from the safe haven of neutral facilitation to being 'omni-partial' – in other words actively being on everyone's side at the same time, engaging from and with the heart, caring about all of it.

I don't practise as a mediator. The opportunity has not arisen nor, to be fair, have I sought it out. What has interested me most is systems design – how can we use what we know about mediation to develop ways of working or processes that are capable of taking into account and reconciling diverse interests at the same time as respecting fundamental rights?

My organisation's use of mediation

At the Scottish Human Rights Commission, we have been looking at how and why mediation and other participatory approaches work to help us design our own process for multi-party dialogue. We call it a Human Rights InterAction. It is a practical application of a human rights based approach – one which enables rights holders to understand what rights they have and to participate meaningfully in discussion about matters which impact those rights; and which at the same time helps duty bearers to recognise their obligations, to be better able to fulfil those obligations bearing in mind peoples' differing needs, and to be held to account on whether they do.

The Human Rights InterAction can be a form of mediated non-judicial dispute resolution and a model for consensus-building, round-table dialogue. The InterAction is designed to ensure human rights are inherent in the process as well as the outcome.

The potential for growth

We face challenging times in Scotland in 2010 and beyond, with increasing pressure on fewer public resources. It is in such times that the human rights of the most marginalised in our society can come under threat. With a view to bringing about greater realisation and protection of human rights across Scotland, the Commission is mapping the ability or inability of all people across Scotland to realise the full range of rights – civil and political, economic, social and cultural. It's the first time this has been carried out in a comprehensive way. By identifying the gaps, we can see what needs to be done. Once that information is available, we hope to bring together individuals and groups with policy- and decision-makers to work together to devise a national human rights action plan to set about filling those gaps.

Two of the main challenges for using a mediation-based model to address gaps in human rights protection are the apparent conflict of rights versus interests, and the tension between confidentiality and accountability.

There can often seem to be a clash between rights and interests. The rights of the individual may appear to be at odds with the interests of the duty bearer (and others). But where fundamental rights are at stake, there is a baseline below which any agreement cannot fall, no matter what parties think they are prepared to do

to resolve an immediate issue. So the question is whether a mediation model is capable of reconciling the situation where rights appear to demand one outcome, and interests (including budgetary considerations, the needs of other individuals, the practicalities of service delivery) appear to demand another.

While rights-holders and duty-bearers may come at these decisions from very different perspectives, I wonder if, when we get to the heart of it, we will find that there is, in fact, a shared interest – that of fairness. Working from fairness, a human rights based approach is a process by which, and a goal through which, everyone's rights are capable of being respected and each of us is afforded our dignity. The shared interest in fairness allows us to be 'omni-partial' and seek solutions that agree priorities that progressively improve everyone's situation.

The second main challenge is confidentiality versus accountability. Mediators will tell you that part of the reason mediation works is because of the confidentiality of the process. It allows parties to say and do things that might otherwise be too prejudicial to contemplate. By allowing that freedom, some remarkable solutions can be found. What's the role of confidentiality when there needs to be accountability for fulfilling fundamental rights?

While a human rights based approach necessarily entails transparency in order to be able to hold duty-bearers to account, what needs to be monitored is the agreement and its implementation. The process by which that agreement is reached can remain confidential. I recognise there might nonetheless be fear in taking part in the process, even if confidential. It might seem easier not to have to engage with the challenges presented by the marginalised and the vulnerable, simpler to have a 'one size fits all' approach to service delivery. It might be hard to find ways to reconcile competing priorities for scarce public funding. There might well be fear in being seen to engage in the process but ultimately being unable to reach agreement.

But the potential to be recognised as having gone about things in a way that affords everyone the respect and dignity they deserve, to receive the same in return, to have shown themselves willing to try to reach better outcomes from a human rights point of view, should prove a great incentive for duty bearers to agree to participate as openly as possible.

There is potential through a mediated process to arrive at agreements that enable greater realisation of a wider range of human rights across Scotland. Even where agreement cannot be reached on specific matters, the act of collaboration between individuals and policy-makers to devise and implement a national human rights action plan will empower affected individuals to find their voice and seek to influence decision-making. It will enable those responsible for delivery of services to increase their ability to recognise the human rights issues at stake and take them into account.

Agreement or not, the outcome should be greater respect for human rights. In mediation terms, a win-win situation.

When it is obvious that the goals cannot be reached, don't adjust the goals, adjust the actions.

Confucius

Paul Buxton is performance advisor for UK Sport, the government's high performance sport agency. His role is to review, actively support, challenge and be a critical friend to six Olympic and Paralympic sports to London 2012 and beyond.

My journey

At the age of 15, I entered the little-known sport of triathlon for the first time, and despite very few opportunities to compete, it caught my imagination, and I set about a schedule of training that would provide the shape of my daily routine for the next 13 years. Through triathlon, I developed an interest in training science which led me to a degree programme studying sports sciences at Brunel University and eventually into coaching.

In 1998, I was lucky enough to secure a role working for British Triathlon, the sport's governing body, responsible for identifying and developing talented athletes capable of success in Olympic competition. I left British Triathlon in 2004 to take on a broader role managing public investment in sports governing bodies, first at Sport England, and then joining UK Sport in my current role in 2006.

Mediation in sport

The environment in which high performance Olympic and Paralympic sport operates is constantly changing. International competition standards continue to progress, as more and more countries create effective systems for the identification, development and fielding of outstanding talent.

The pressure that this puts on athletes, coaches, administrators and support staff is hard to describe. The need for our athletes to be working harder and smarter than the competition has led us to adopt the phrase 'no compromise', in an effort to explain how we must all work if we want to win.

I describe this environment in order to highlight just how easy it is for situations of apparently insurmountable conflict to occur. Conflicts between athlete and coach, between parent and governing body, between and within sports organisations, regularly surface. Disputes can be over athlete selection, differences in beliefs over training and competition strategy, and as a result of conflicting home country, British and personal interests.

In 1997, the Sports Dispute Resolution Panel (now known as Sports Resolutions UK) was established to help sport address these conflicts without recourse to legal action. Despite mediations being conducted on average once a month, and almost always to a successful conclusion, I was not exposed to mediation until 2008.

My first experience of mediation

In late 2007 I asked a colleague if they knew anyone who would be able to chair, or 'strongly chair' as I described it, a very difficult meeting. That colleague passed me a contact number for John Sturrock and suggested I discuss the situation with him.

John was able to explain how mediation could serve us, and with very little debate, we had a date in the diary and some groundwork had been done with both parties. The mediation was a success, and while it had challenged us all, it was clearly not just a 'strong chair' I needed in that situation.

Could we have achieved the same outcome without mediation? I am confident that the answer is no, and while both parties had criticised the pace of progress at points during the day, on reflection they recognised why giving the early stages of mediation enough time became so important later in the day.

One participant acknowledged that the conversations that had taken place would not have been possible had both parties been left to tackle this without a mediator. Relationships had been strengthened, the air was clear and a written agreement, which both parties were able to enact, was in place. The changes to governance that were agreed as a result of this mediation remain in place and are serving the sport well.

This situation was far from unique. Applying mediation, as a formal process, as a way of working, and as a set of skills, had obvious relevance to my work. I persuaded UK Sport to support my formal training as a mediator, and have found this of huge value. While I have not yet mediated in a formal sense, I have recently used mediation skills to help resolve a dispute over home country and GB interests,, and I regularly call on mediation principles to help me handle my daily work.

What I have learned of mediation

My first steps in mediation brought out the sceptic in me. Was this not another way to describe how to reach a compromise? If so, then mediation would undermine one of the fundamental principals in high performance sport, to accept 'no compromises'.

I now understand that in situations of impasse, the biggest compromise is to remain in unresolved conflict. A commitment from all those involved to find a resolution has to be the first step. To do nothing is unacceptable if the outcome of this affects performance, and in so many cases in sport, it does just that.

I also realised that the answers were often to be found in the conversations between those involved. These conversations could only take place with the support of a mediator. And I learned the value in those answers coming from the participants during these difficult conversations, to ensure the solutions were enacted with success in mind.

I have also learned the value of having an independent person involved in a dispute, someone who is able to maintain their neutrality, and focus on the mediation process, and not the outcome. There is a parallel in this to how coaches and athletes will focus their attentions on each element of the athletic performance rather than the medal outcome.

Of course, the outcome is important in both fields, but as a driver of the athlete or of the mediator it does not serve us well. In both cases, a focus on excellence in the process keeps our mind on the one thing we can control, and if we do it to the best of our ability we should feel satisfaction in having achieved the highest level of performance available to us.

The potential for growth of mediation

I would suggest that there is no greater sporting event than the Olympic and Paralympic games, and my life is currently absorbed by the pressure of ensuring athletes in the Olympic and Paralympic programme are able to realise their aspirations when the Games come to London in summer 2012. The London Olympic Games will be an exceptional event for us all, but probably puts our high performance system under more strain and greater scrutiny than we have ever known.

I have no doubt that mediation has an important part to play in helping us through this period, by reducing the time and energy wasted on unresolved conflicts. In pursuit of increased use of mediation, we now have 148 policies across governing bodies of sport that specifically identify routes to alternative dispute resolution, including mediation. I am confident this number will rise as Olympic and Paralympic selection policies look for an escape route where disagreements over selection occur.

Perhaps as important for me is the opportunity to embed the basic principles of mediation into our work, to ensure we do not give disputes the chance to take our attention away from key athletes and their coaches during the final stages of preparation.

The ability of leaders within sport to tackle difficult conversations, to provide the opportunity for athletes and staff to share concerns or discuss differences, will be critical. I look at the skills of mediation as vital in this respect, and would identify them as one of the pillars of good leadership in the context of high performance sport.

I am finishing this chapter as I fly to Italy to speak at a conference of Italian national sports federations, alongside colleagues from Canada and Australia. The interest in international collaboration over strategies for performance is interesting, with most countries remaining open to share information, aside from some detail around training and equipment.

The Olympic family appears to recognise that national interests need to be balanced with an interest in the growth of the Olympic movement as a whole, by collaborating in this way. I believe that mediation can offer us a route to build on this collaboration both at home and abroad, and ensure we do not let differences and conflict become a barrier to sharing the knowledge and ideas that could make the difference between fourth place and an Olympic medal.

John Chalmers has been a minister of the Church of Scotland for 31 years. He served in parishes in Renton, Dunbartonshire and Palmerston Place, Edinburgh, before becoming the Church's senior pastoral adviser. He is now the principal clerk to the General Assembly.

Some people say that forgiveness is for wimps. Well, I say then that they must never have tried it.

Marietta Jaeger

A real story

James had entered the ministry of the Church with such enthusiasm. His motives and his hopes were high when he was welcomed into his first congregation – this was the pinnacle of his vocation. Two years into this new adventure, his doctor signed him off with a stress-related condition. He felt lonely and isolated and for the first time in his life, he had been prescribed medication for depression. James called me to talk about leaving the ministry. He couldn't believe that in such a short space of time, the bottom had dropped out of his world, God felt miles away and his faith had been shaken to the core.

How did all of this happen so quickly? Well, those who asked James to be their minister had told him the congregation was ready for change. They said they were ready to support him in a programme that would make the life of their congregation more relevant. His plans for contemporary worship and developing the church hall as a drop-in centre were discussed in full and he thought he had a mandate to make it happen – but he hadn't reckoned on the Adams family. They were a dynasty with roots in the Church that went back four generations. Mr Adams' father donated the money which was used to rebuild the pipe organ 20 years ago and did not appreciate the sound of the new clavinova and the accompanying guitar. When the new programme for working with young people meant Mr Adams' wife was asked to take a back seat, the war began.

When Mr Adams made an official complaint at the Kirk Session meeting, James thought he could explain the logic behind his plans and believed others would support him. But his supporters were afraid of Mr Adams and not one of them had the courage to speak against him. Mr Adams was also influential in the town and had rallied a supporting group which had agreed to withdraw financial support for the Church until the Adams' family received an apology and James' plans were undone. It was shortly after this that James became ill.

The spiritual layer beneath the symptoms

At the time, my job was that of supporting and advising ministers who found themselves in such situations, but I had seldom encountered anything so difficult. It was interesting to observe so many of the classic signs of high-level conflict:

- *Fear*: even the very presence of the main protagonists sitting in their regular pew on a Sunday morning gave rise to stomach-churning anxiety.

- *Anger*: not anger of the righteous or justifiable kind. Instead, these were primal feelings of wanting to hurt and harm the other, not exactly what you would expect of a minister in the Church.
- *Paralysis*: such conflict had permeated every part of the life of the individuals and congregation involved that it had stopped the real work of the Church in its tracks.
- *Depression*: this kind of conflict wears away at the inner life and not for the first time I was convinced we were dealing with a deep spiritual malaise.

There are many other symptoms and consequences of being involved in such seemingly intractable disputes, but none of them are the way to a life which is at peace with itself, with others or with God. The sad fact of nearly all high-level human conflict is that those closest to the people in dispute are often the ones who suffer the most. The stress involved wreaks havoc on relationships; children and loved ones get the rough end of our tongue when they don't deserve it. Such conflict, and the damage it does to individuals, has deep spiritual implications.

A spiritual response

The Church, like every other institution, is going through a period of significant upheaval which brings with it conflict that has to be managed. Like every other organisation, it has to cope with personality clashes and power struggles which need to be handled carefully. In a report to the General Assembly in 2008, the Church acknowledged its own schismatic history and theological diversity were a seed-bed for acrimony and division. However, it also pledged to rediscover those essential tools of conflict transformation – confession, repentance, forgiveness and acceptance. Ironically, these tools – which are written about in every manual of mediation and conflict transformation – are of the very essence of the Church itself.

The Church is not borrowing principles from the world of management or commerce or politics. The faith of the centuries gave us these gifts; the Church simply has to learn to live by its own beliefs.

For many years, I had been exercising what had been intuitive ways of helping to mediate such conflicts. However Core introduced me to a process which gave my intuition a structure. The structure of the process gave me the permission to take risks and to go, we might say, where angels feared to tread! I have lost count of how often, since adopting a more formal approach to mediation, I have said to myself, 'trust the process', and the process so often leads to transformation.

James is still a minister and it was a very special moment to be with him and the Adams family when they broke through to a resolution. It was a kind of 'miracle' – a spiritual journey that changed all their lives for ever and for good. They understood one another better, they appreciated one another's place in the Church and the difference in their relationship transformed the life of the congregation.

The personal journey of the mediator

It is always a privilege to be part of a process which transforms the way people relate to one another and, of course, these experiences touch the mediator in the deepest places too. To be a mediator, therefore, is to be on a personal journey of growth and discovery. If that is not the case, we are not giving ourselves completely to those whom we are helping to work through their differences. At the end of an intensive mediation, the mediator is often wrung out, but after debriefing and reflection there is personal growth and a real sense of being involved in something of immeasurable value.

From grace to law and back again

So what happened to me? I was deeply committed to a personal and pastoral ministry and fully involved in mediation between individuals and groups – why then take on the role of principal clerk to the General Assembly, the officer of the law in the Church of Scotland? There are many reasons, but one is to help develop a way of dealing with our differences which does not mean a headlong dash to litigation.

People who arrive in my office are often looking for answers that they think lie in an interpretation of the law or they are looking for satisfaction in a dispute, and think one view of the law will trump another. Most times, even when the answer is clear, it does not deal with the deeper hurts or heal the relationships that have been breached in the first place. My way of working is first to ask why the point of law needs to be clarified and I enjoy my job best when it leads to conversations which unlock the dispute and steer the parties to engage with one another with the help of a mediator. When that happens, it seldom leads to litigation.

The Church of Scotland is a Church with many rules, and the very nature of Presbyterianism is that we believe in (among other things) good order. I respect these rules and the framework gives us a discipline that is worth having. However, law in the Church has to be an enabling tool, not one that restricts our options. Law is about relationships and the regulation of our relationships, but it is exciting to be in on the re-discovery of an even better way of regulating these relationships through the power and the gift of mediation.

A place for hope

In committing to this transformative work, the Church of Scotland Guild is providing the seed-funding for A Place for Hope. This ecumenical initiative has among its ambitious aims, the hope of establishing a Centre for Peace and Reconciliation in Scotland and the vision that every congregation in Scotland would become a centre for peace and reconciliation within the community it serves. Core has not only been supportive of this initiative but its energy and active contribution have helped to make it possible.

It would be remiss of me to finish this essay without reference to the highest example of mediation at work. As a minister, first and foremost, my fundamental motivation comes through the One who mediates the unconditional love of God to the human situation. A watchword therefore comes from the pen of St Paul: 'We are Christ's representatives and God uses us to help men and women to drop their differences and enter into God's work of making things right between them.'

The settlement or the solution of all disputes or conflicts, of whatever nature or of whatever origin ... shall never be sought by either side except by peaceful means.

Kellogg-Briand Pact 1928

Hugh Donald is a former chairman and chief executive of law firm Shepherd and Wedderburn LLP, where he worked for 37 years. He is now a consultant, mediator with Core and a coach.

My journey to mediation

My first introduction to the world of mediation was in the early 1980s. As a lawyer with Shepherd and Wedderburn, I had a generalist litigation practice which then included family and divorce work, having grown up in the days of Saturday morning divorce hearings in the Court of Session.

Acting for anxious, harassed and at times angry parents attempting to sort out the arrangements for their children's care was an eye-opener to me. I witnessed how the courts sought to cope with the steady stream of custody and access orders, often hotly-contested. I recall with some embarrassment now my own informal attempts to 'mediate', which included arranging a Sunday afternoon tea at one of the parent's homes (including both sets of lawyers) to seek to normalise the situation for the children. They were too wise and vanished over the garden wall!

Prompted by an article written by John Wright QC, referring to a new form of conciliation service operating in Bristol, I joined a steering group chaired by the late Lord Caplan. In what seems a remarkably short time in hindsight, the group received financial support from the then Scottish Office to establish a pilot service in the Lothians. The rest is history! The obvious success of a service enabling families to discuss and resolve all manner of practical arrangements regarding their children, outwith the adversarial setting of the courts, led to a network of services across Scotland, along with the establishment of Family Mediation Scotland (conciliation becoming mediation).

I was privileged to be involved in various capacities with the work of family mediation, including training as a family mediator. It is fascinating to observe that from those early days, lawyers working in this specialised field have embraced the facilitative and collaborative skills required to resolve the very sensitive issues that arise when parents look to go their separate ways.

My next encounter in the world of mediation was through attending a workshop ten years ago hosted by John Sturrock. Becoming involved in the wider sphere of mediation seemed a natural progression for me, recognising that there were alternatives to those offered by the courts in resolving disputes. Subsequent to training on the Core course some seven years ago, I have operated as a mediator on an ad hoc basis, along with the opportunity to coach and train others in the skills of mediation.

Why mediation?

One of my earliest experiences in any mediation continues to have a considerable impact upon me and perhaps best defines my own motivation. This was a mediation in which I was representing one of the parties. After a very long day, an entrenched dispute that had been going on for years was resolved. It was two nights later that I received a telephone call from my client. He explained that while the resolution had not been without its financial cost, he had his first proper night's sleep in some years the night before. There is a huge price to pay in any conflict which often goes far beyond the financials. I believe that the skills and presence of the mediator are critical in enabling those in conflict to have that same sense of being unburdened.

As a mediator, it is a privilege to have the opportunity to meet people you have never met before, to listen to their stories and to open up conversations that can move to a resolution. Recently, one such opportunity arose working with parents where communication had broken down over the arrangements for sharing the care of their children. Despite the best efforts of their legal advisers, the impasse continued, with the likelihood of court action. Within only a couple of hours of coming together, both parents had the opportunity of listening to one another, expressing their heartfelt needs and through this a positive way forward was forged. I continue to be amazed by the power of the process.

My continuing journey

I have now moved on from the legal firm that I started in 37 years ago. Much of my time continues to be devoted to the world of conflict and exploring how people can be better-equipped to have effective conversations. One of my current roles is supporting the Church of Scotland in a key initiative, A Place For Hope. Its vision is for churches of all denominations to come together to create a centre for reconciliation and peacemaking to encourage and resource our communities across Scotland.

Future place of mediation

I believe that mediation has a much wider application than resolving disputes that otherwise would be addressed through our judicial systems, good as that is. At its heart, mediation offers key skills for our lives.

We will always encounter differences of opinion, differences of understanding and of expectations. Sometimes these differences, if not addressed, create tension which can escalate to conflict. Writing this in mid-November as we have just commemorated Remembrance Day, I think of the ultimate price that is paid when conflict escalates to warfare. Sadly, the words of the Kellogg-Briand Pact of 1928, negotiated between France and the United States among others, were soon lost sight of and remain an aspiration.

Fortunately most of us do not encounter that level of conflict. Our encounters arise in our families, in our places of work and in our communities. The core skills that we learn from mediation include the ability to be active listeners and curious questioners, to seek to understand the other person's perspective and to value our differences through identifying common purpose.

My hope is that mediation extends beyond a set of skills used for resolving disputes into core life skills which change and influence our behaviours and attitudes to our relationships with each other. In this context, the following quote rings true to me:

> 'Once a society loses this capacity [to dialogue], all that is left is a cacophony of voices battling it out to see who wins and who loses. There is no capacity to go deeper, to find a deeper meaning that transcends individual views and self-interest. It seems reasonable to ask whether many of our deeper problems in governing ourselves today, the so-called 'gridlock' and loss of mutual respect and caring might not stem from this lost capacity to talk with one another, to think together as part of a larger community.'
>
> Peter M. Senge

Those in positions of leadership have a key responsibility to develop and promote these skills and experiences. Our leaders, be they in the private, public or social sectors, have had to face and continue to face huge challenges as a result of the economic uncertainties within our society over the last two years. They have seen trust within their organisations undermined. As a result of financial constraints, leaders have to look at generating new ways of working through participation, partnership and consensus-making.

Leaders embracing and promoting the skills of mediation will recognise that communications can be improved, relationships strengthened and problem-solving expressed through peaceful, respectful, honest and empathetic conversation. As an initiator of many conversations, the leader becomes the facilitator, the leader of real discussion echoing the quoted words above, to find deeper meaning that transcends individual views and self-interest. In a time of considerable uncertainty and transition, I believe there exists a great opportunity to change our attitudes and behaviours in a manner that offers a genuine legacy for future generations.

Banking, Insurance, Insolvency and Intellectual Property

Carol Paton
Derek Allan
Judith Scott
Lucy Johnson
Jim Cormack

Carol Paton is head of litigation, retail and insurance for RBS Group. She has two children, who enjoy playing the 'Gain Game' for Smarties.

Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.

Abraham Lincoln

Hooray for Hollywood

My mediation baptism was in 1998 and was almost impossibly glamorous.

As a junior solicitor in RBS's legal department in Edinburgh, the largest file in my cabinet bore a Los Angeles court stamp. The bank was embroiled in a multi-million dollar US claim – at that time the biggest litigation that it had faced – and I was assisting our Chief Legal Officer, Derek Arnott, with the management of its defence. Given that my knowledge of Californian law was at that time derived exclusively from Raymond Chandler novels, this was a steep learning curve.

Everything about the case seemed to be sprinkled with stardust. The dispute concerned the finances of a deceased Hollywood star and a bitter family feud. The highly emotive court papers read in parts like a film plot and, to cap it all, one of our attorneys was the nephew of a famous film director. I was captivated by my first experience of US litigation, an interest that continues to this day.

Midway through the procedural phase of the case, the court ordered all the parties to attend mediation before a retired judge. This was common practice in the US but a new concept for us as Scottish lawyers. What exactly would mediation involve? If the mediator was a judge, surely he would want to give an opinion on the merits? Would discussions be 'without prejudice'? Would the fact we were the 'away' team playing on our opponents' home turf disadvantage us?

When I was told that I was to travel to LA with Derek to attend the mediation, I remember nodding in dignified agreement, then going out and doing star jumps in the corridor. My rather excessive enthusiasm was not misplaced; that week was to prove one of the best experiences of my career.

Despite the sunshine and palm trees, we approached the mediation with some trepidation. We really could not imagine a solution emerging. Years of rancour and suspicion had taken a heavy toll; the parties were bunkered in separate rooms. Our mediator was low-key but terrifically effective: tenacious, calm and well-prepared. From polar opposites, positions began to shift. Solutions emerged that we could never have reached alone. The parties' true desires began to emerge: to have security for the future; to rebuild family relationships; to achieve closure.

To our surprise, a settlement emerged. We found ourselves heading home from Hollywood with a signed agreement and sunburn. I was acutely aware of how privileged I had been to have worked on such a case, but the most lasting influence came from having seen how extraordinary a process mediation could be.

No mediation I have attended since that occasion in Tinseltown has had the same starry allure. What is true, however, is that every one has been a powerful experience and taught me important lessons about law and about life.

In a dispute, individuals' net worth and status are not reliable indicators of what their real needs and desires are; people are influenced by a myriad of financial, social and psychological drivers and in traditional litigation these are largely ignored in the battle for supremacy. Through mediation, however, these needs and desires can be aired, evaluated and used as building blocks for resolution. The moment in which scores are settled, relationships saved and closure achieved with a handshake is equally powerful whether the parties involved live in Beverly Hills or Glebe Street.

Cultural revolution

Having realised that I wanted to specialise in dispute resolution, I joined RBS's nascent litigation department. Its remit is to manage litigation and potential claims involving RBS Group companies anywhere in the world. Wherever court actions are commenced, we instruct and work with local lawyers, but also aim to resolve as many disputes in-house and pre-litigation as possible. The work is exceptionally varied – from low-value but legally significant consumer claims to multi-billion pound, international corporate disputes – and I cannot recall a dull day in the role.

In 2001, Stephen Pearson was appointed as RBS's first head of group litigation. After qualifying in Scotland, he had worked in City firms in London and witnessed first-hand the emergence of alternative dispute resolution and its gradual acceptance by the courts. He instigated a cultural revolution in RBS. An advocate for mediation, he correctly identified that the bank was too inflexible in the range of dispute resolution tools it employed. Litigation, while absolutely appropriate in certain cases, was being used as the default option with cases drifting towards substantive hearings without alternatives being considered. This was not serving the needs of any of the parties involved and a significant mindshift was required.

It took time for this new thinking to embed at all levels. We were accustomed to mediating US cases but mediation was at that time still rare in Scotland. There were concerns about the message that endorsing it might give; would it be seen as a sign of weakness? Stephen promoted the benefits that could flow in terms of time, cost and saving relationships. He set out to prove that a cultural shift in how RBS managed disputes would bring value for customers, shareholders and staff.

A number of measures were implemented which remain core to our department's philosophy. Every matter referred to us was to be assessed for its suitability for mediation. If we considered it qualified, we should seek to persuade our opponents to mediate. We understood that mediation would never be a panacea for all disputes and that it sometimes fails even in cases apparently ideal for it, but we celebrated each case successfully resolved.

Those mediations I attended on RBS's behalf were often gruelling. I realised early on that it is emphatically not a soft option. I have never yet left a mediation feeling

delighted; I always feel a little bruised and drained and it is only in the days following that I can properly rationalise the value of the outcome. Perhaps this is how good mediation *should* make you feel. If you depart triumphant that you have scored a clever or easy win, the other party is almost inevitably feeling the opposite, the agreement might fall apart and the whole value of mediation is lost.

A new toolkit

Stephen recognised the importance of lawyers in his team having a sound grasp of the theory and practice of mediation so they could be as effective as possible when representing RBS. Each solicitor in the Edinburgh team was sent for Core mediation training, one of the most challenging and thought-provoking courses I have attended.

The technical grounding in the process and principles of mediation has indeed proved useful, but the truly invaluable insight was how some of the most effective techniques mediators use in their roles can be deployed in everyday life. Simple tools like open questions, the 'power of the pause', active listening, allowing everyone a voice and not making assumptions are all incredibly powerful in defusing conflict, building rapport and finding solutions. Since then, I have consciously tried to develop these techniques in my interactions at work and home, in any situation where I am faced with tension, cynicism or direct confrontation. I can particularly recommend their effectiveness with recalcitrant toddlers.

In essence, even where formal mediation is not appropriate or necessary, the techniques and principles that underpin it can be used by all of us to neutralise disagreements and avert their escalation. This has to be a good thing.

Learning the lessons

Those who have attended a course led by John Sturrock will almost certainly have experienced the 'Gain Game' – which at first sight appears to reward selfish short-termism but which in reality highlights the value of putting shared reward ahead of individual triumph. I often think about this game, the extent to which these two contrasting approaches are evident in modern life and what each of us can do to encourage 'mutual gain' behaviour.

In an era when public opinion of banks has fallen so low, those of us who work in them must take every opportunity to challenge stereotypes and encourage customers, investors and commentators to look at us afresh. The banking industry is on a very public journey to financial recovery but it is also seeking reputational recovery and to regain the trust of the communities it serves.

Banks must, above all, be transparent in their handling of claims, seek to understand what has prompted them and strive to achieve fair outcomes. This is not important simply to avoid criticism from the media or politicians; rather, it is about *doing the right thing* for its own sake. This value is at the core of the Gain Game and, ultimately, of mediation itself. For banks, enabling staff to focus on serving customers rather than on litigation, encouraging dialogue rather than trench warfare and finding solutions that preserve rather than destroy relationships is undoubtedly the road that we must travel.

The law is designed to resolve problems with the least animosity and as speedily and economically as possible ... there is a case that this approach should become the lawyers' equivalent of the Hippocratic oath.

Lord Alexander of Weedon

Derek Allan is a litigation partner in law firm Brechin Tindal Oatts who specialises in professional indemnity claims.

My introduction to mediation

I first came across mediation about eight or nine years ago, not long after the formation of Core. The principal insurers with whom I have a long-standing working relationship, Royal & Sun Alliance, had experienced mediation before me – and encouraged all their panel solicitor firms involved in the investigation and defence of professional indemnity claims to consider whether such matters could potentially be resolved by way of mediation.

Coming from a litigation background, I was used to having claims resolved either by direct negotiation with my opposite number or, where that could not be achieved, by judicial determination in either the Court of Session or Sheriff Court. I had to be persuaded that mediation was something that could actually be used in my field of work. Like all litigators, I was comfortable working within a judicial context but to become involved in the field of mediation meant entering into an area outwith my immediate comfort zone!

A number of years after my initial involvement in mediation, I mediated a matter against a solicitor with no prior mediation experience. She was apprehensive in embarking upon mediation on behalf of her client against a solicitor who already had experience in that field and viewed matters almost as if I was seeking to take advantage of her naïvety. At the end of that mediation, which was successful, she admitted to both me and the mediator that she was now a convert!

My experience in mediation

I have now been involved in 15 or more mediations where I have represented a client. With the exception of a couple of occasions, I have always been representing professionals, mainly solicitors but also accountants and others, with their insurer representative at the mediation. I have also represented a private client at a mediation in the context of the pursuit of a claim against a firm of solicitors, so I have seen mediation from both sides of the table.

In all but two or three cases, the claim or dispute has been successfully resolved by way of mediation, supporting Core's statistics that more than 85 per cent of matters brought to them for mediation are successfully resolved by that process.

I am an enthusiast for mediation, but I am yet to be convinced all matters are capable of being resolved this way. However, since I became a qualified mediator in 2008, I have a greater understanding of the depth of the process and number of areas of dispute in which mediation could be utilised. It has resulted in

many instances in my adopting a new approach to the handling of day-to-day work. Having spent more than a week being trained and educated by John Sturrock and Pamela Lyall in mediation matters, it should be written on my tombstone: 'Open questions, Derek, open questions!'

Seeking to have matters resolved by mediation should not be regarded as taking the easy option. The preparation involved is as great – if not in some cases greater – than that involved in preparing to represent a client at court. Preparation is the key to bringing about a successful mediation, including educating your client as to how the day of the mediation will evolve, what the client requires to think about both in advance of and during the mediation – and most significantly, what the client might realistically expect to achieve at the end of the mediation if successfully concluded. Mediators engaged through Core quite properly seek to explain that one rarely achieves one's ultimate aims and most parties agree to some form of compromise they can live with – then move on.

What I have learned over the years is that mediation is not so much about managing issues but managing people, personalities and perceptions – and that these differ from case to case. I remember an early experience in mediation where having travelled some distance to the venue my client announced, completely out of the blue, that they were not prepared to sit in the same room as the claimant! My heart immediately sank; I had travelled all this distance for a mediation which was unlikely to get off the ground. Yet one of the benefits of mediation is its flexibility which, in that case, allowed matters to proceed with my client and the claimant never having to come face to face.

An insurer's perspective

From an insurer's perspective, the attractions of mediation are the potential speed of resolution of the claim and potential cost savings. Litigation of any professional indemnity matter is likely to be complex, time-consuming and expensive. All insurers now focus on issues of speed of resolution of claims from first intimation until closure of the file – and the costs of resolution of the claim.

Proactive consideration of the concept of mediation is encouraged and in many cases, the approach of an insurer is now not so much 'Why should this matter be mediated?' but 'Why should this matter not be mediated?' Dependent upon the nature of the matter and the issues in dispute, there is little doubt that mediation rather than judicial determination can bring about a more swift and ultimately a more cost-effective resolution. Certainly cases which focus less on issues of liability and more upon issues of quantification of any possible claim tend to be more appropriate for mediation. Where liability is an issue or where there is an issue of principle that can only be determined by the courts, mediation might not be the method of resolution. Having said that, I have recently resolved a matter at mediation where the collective views of legal adviser, insurer and insured were that the insured was not responsible for what had come about that had given rise to the claim. The matter was taken to mediation purely with a view to presenting the strength of the insured's position in repudiating the claim – and the approach was successful.

A professional client's perspective

From the perspective of a professional person – lawyer, accountant, surveyor or engineer – faced with an alleged breach of contract or negligence claim, the attractions of seeking to resolve matters by mediation are many. Firstly, if the professional/client

relationship is still capable of being re-established, there is more scope for that being achieved before parties take entrenched positions in litigation. Secondly, from the professional's standpoint if there is any risk of them being held to have been at fault, resolution by way of mediation is entirely confidential and avoids the professional having to place his or her head above the parapet in a court to be shot at.

Thirdly, in the context of a mediation, a simple apology or expression of regret can go a long way to resolving matters. The ability to make that apology or express that regret, especially in the context of a face to face meeting cannot normally be achieved in court. Finally, in a mediation, the mechanisms open to providing an acceptable resolution of a dispute or issue are far greater than in the context of litigation, where generally only monetary compensation is possible.

I am aware of one instance where, in a dispute between a student and an educational establishment taken to mediation, one of the factors that brought about a successful result was the agreement on the part of the educational establishment's insurer to provide the claimant with a specific type of laptop!

It is the flexibility of a combination of choice of mediator, timing, venue, and possible means of resolution, along with the overriding factor of confidentiality that, in appropriate circumstances, favours seeking to resolve matters by way of mediation.

The future of mediation?

I have little doubt the use of mediation and the areas in which mediation will be utilised to resolve conflict will increase in the years to come.

The more that first time, or limited, users of mediation become comfortable in its employment, the more the use of mediation will expand. Those who are regularly involved with its use require to expound on its benefits to other non-users providing, where confidentiality so permits, concrete examples where conflicts have been resolved by mediation, conflicts which could not have otherwise been resolved other than by greater expenditure of time and cost with no guarantee of success.

There is no doubt in the mind of an insurer, certainly an insurer operating in the field of professional indemnity insurance and claims, that mediation is unquestionably a tool in their defence box – one that, where possible, should be grasped in preference to a Summons or set of Defences!

Judith Scott is a chartered accountant, director of forensic accounting services for BDO LLP in Scotland and a mediator with Core.

By three methods we may learn wisdom: first by reflection, which is noblest; second by imitation, which is easiest; and third, by experience, which is the bitterest.

Confucius

Who I am

I provide expert accounting services to the legal profession, corporates and other organisations. I have specialised in this area for some 17 years, firstly with one of the big four accounting firms and since 2003 with BDO. Prior to that, I gained extensive experience over more than ten years of providing auditing and accounting advisory services to a wide variety of private and quoted companies across Scotland.

I have been fortunate to be involved in some significant and absorbing assignments over the years, ranging from bid defence work when Britoil was taken over by BP, to transaction-related work for many of Scotland's well-known public companies, to a 14-month insider dealing investigation in London into transactions in the shares of a FTSE 100 company. I have provided expert accounting services in a wide range of disputes including business interruption, professional negligence and breach of contract claims and in many share valuation, partnership, completion accounts and warranty disputes as well as numerous investigations into fraud, accounting misstatement and a major advance fee fraud. Many of these cases led to giving expert evidence in the courts of Scotland.

Why mediation?

The professional experience gained over the years has exposed me to many long-running and bitter disputes and other difficult situations. I have all too often seen the way in which a commercial dispute begins to dominate the business, eat into management time and distract from growth opportunities.

I first met John Sturrock in the mid-1990s when he was leading advocacy training at the Scottish Bar. I assisted in the courses which John ran for advocates, and later devils, as a guinea pig expert witness in a share valuation dispute used for training purposes. Shortly after I joined BDO, with the aim of focusing on dispute resolution services, I caught up with John again just after he had started the Core journey. John's commitment and enthusiasm to promoting the more extensive use of mediation in Scotland coupled with my increasing awareness, based on my own professional experiences, of the time and negative energy required to resolve commercial disputes through more conventional routes, inspired me to decide to train as a mediator with Core.

I have seen all too often the serious impact of long and bitter disputes on businesses and individuals. Businesses should of course consider the whole spectrum of dispute resolution from

negotiation to independent determination, adjudication, arbitration and ultimately litigation. But it's important that businesses should also be aware that mediation can be used at any point in this spectrum to find a solution that is acceptable to both parties and thus bring to an end a potentially costly and damaging dispute.

Mediation is a natural partner to the work I do in areas such as expert determinations and share valuation, completion accounts and warranty disputes. It also suits my own personal style which inclines me towards collaboration in problem-solving rather than the adversarial approach. My raison d'être is using my personal and financial skills to help people and organisations find acceptable solutions to their disputes and allow them to move on.

My experience of mediation

I gained accreditation as a mediator with Core in early 2004 and was asked to join the Core panel of mediators in late 2005. Since then, I have been involved in more than ten mediations and have attended three in my role as an expert for one of the parties. I have also mediated in a number of smaller cases as part of a Glasgow Sheriff Court pilot scheme into the use of mediation.

The issues have ranged from partnership disputes to matrimonial disputes, from breach of commercial contracts to unfair prejudice claims, from property-related disputes to professional negligence claims, from personal injury claims to insolvency.

My colleagues at BDO who specialise in insolvency have found that the proper use of mediation in insolvency cases has led to cost-effective recoveries and net recoveries (after costs) which could not, in our view, have been matched by full-blown litigation.

The size of recoveries in insolvency matters is often more a function of the size of the pot from which recoveries can be made, than necessarily the strength of the case, in that even the best case is not worth pursuing if there are no assets from which to recover, although clearly a good claim needs to exist before there is recourse to law.

Mediation is ideally suited for this scenario, particularly, but not exclusively, where insurers (either directors and officers or professional negligence insurers) are involved. It is a great opportunity to get all relevant parties round the table and explain the strength of the case to them and to obtain or confirm relevant information about available assets and insurance cover.

In our experience, where there is a good claim and available assets and/or insurance, a reasonable and probably acceptable offer is likely to be made to avoid bankruptcy or reduce the overall insurance payout. This is often at an earlier stage than if a good claim is pursued through the courts without the same level of risk associated with court proceedings.

What I have learned about mediation

Almost every mediation experience I have been involved in has left me with a quiet feeling of satisfaction that the parties have been able to find a solution to their issues, often with apologies being given and sometimes relationships restored. It is by no means an easy process and there are often difficult conversations and compromises to be made but the opportunity which the process offers to the parties to resolve their issues with the benefit of the skills of an experienced neutral mediator is powerful indeed.

I particularly recall two cases which highlight the benefits to be gained from mediation. In one a solution was found to a long-standing family dispute which was impacting on an otherwise successful business. But what was doubly valuable was that both the business dispute was resolved and various family members were reconciled.

In another case, the mediation was convened to try to find a solution to a prospective contractual dispute where termination of the contract was being threatened. This was a great opportunity to address a live issue and try to find a solution which would prevent a long-running contractual dispute and/or find a way to restore contractual relations. A solution was found and the business relationship continued – I am sure most CEOs would prefer this route rather than costly and time-consuming litigation.

Potential for the growth of mediation

In my own area of work, I certainly see the potential for more use of mediation in areas such as professional partnership and family business disputes, contractual disputes, financial issues in matrimonial cases and, as I have referred to above, in insolvency matters. For the business world, the particular advantages of mediation include:

- remaining in control of the issues but with the aid of a neutral mediator where positions have become polarised and communication has broken down
- the opportunity to find creative solutions
- the possibility of preserving business relationships, and
- the confidentiality and privacy of the process where difficult issues are involved but in a safe and supported environment.

More widely, I believe the speed of business and technology today will increasingly favour the use of this type of process – mediation can offer businesses faster decisions at an acceptable cost through a process in which they take control of the solution. I also think that mediation may be something which is attractive to the younger generation – it is less formal and more flexible. In our changing world, let us hope that more people will be persuaded of the benefits of 'jaw, jaw, not war, war'.

Confront the difficult while it is still easy; accomplish the great task by a series of small acts.

Lao Tzu

Lucy Johnson is a director, Patents with Murgitroyd & Company and an avid reader of *The Third Side* by William Ury.

How did I get here?

I am, by nature, a passive personality with an aversion to conflict. I have learned through many trips and falls along the way that a passive nature is not always helpful for the resolution of disputes. In fact, how many times do we ask of someone 'Why can't *you* make a decision?', 'Why is it always *me* who plays the bad guy?', 'What is it that *you* want?' or 'Why is it always down to *me*?' There are many times at work and home when we need to make decisions that affect other people. Mediation has helped me as a passive personality to cope with those decisions and to accept the criticism that comes with responsibility.

Mediation began for me at BATMark back in 2005. The then head of intellectual property at BAT, Michael Leathes, handed me a videotape and asked me to travel to Edinburgh to work with the team at Core Solutions. The video contained a mock mediation in which a deal was brokered between two, apparently aggressive, competitors who had been involved in a dispute relating to a trade mark dispute between the companies. By this time, Michael was already a staunch supporter of mediation and its role as a tool in deal negotiation. Mediation is something I have come to understand and rely upon both as a patent attorney and as a parent.

The Macdonald Hotel at Holyrood had opened days before my arrival and the budget for the Parliament building was skyrocketing when I met John and the team at Core for the first time. I can say now that I had no idea what I was letting myself in for nor how the experience would mould me as a person, a parent and a patent attorney.

As I later told John, in those five short days I believe that I learned to hear people for the first time. I had been told since pre-school that human beings were incapable of talking and listening at the same time but I had now learned that people often didn't hear when they were listening. I had been introduced to the power of active listening and to hearing what people didn't say as well as the things they did. How important I found it to watch and listen to how words were delivered and to the often unnoticed or misinterpreted movement or intonation that accompanies speech.

Why am I an advocate of mediation?

Michael Leathes' office wall was always adorned with many quotations and pictures with inspirational and motivational messages for those with time to take note of them. One A4 sheet of paper in particular caught my attention and now has a place on my own noticeboard. My children know this simply as 'the piece of cheese'. The image of three mice each staring at the same block

of cheese – one seeing a triangle, one seeing a square and the other a rectangle – has resolved many disagreements and led my children and I to understand there are many different views of any issue, many of which have merit and all of which deserve to be heard.

In the early years following my training at Core, my experience of mediation was restricted to drafting clauses in legal contracts, or so I thought. Only later did I realise that I used mediation in business meetings, when negotiating contracts, while helping erstwhile confused inventors to understand why they needed to explain the alternatives to their inventions to me in such great and infuriating detail – and in keeping a balanced and happy home.

I joined Murgitroyd & Company in spring 2006 and met John's team at Core again in 2007 as part of my own mediation journey. By this time, I had begun to advocate mediation to clients as a genuine alternative to the court system in resolving intellectual property disputes, not least because during the mediation process a client has, I believe, much more of a say in the outcome of the dispute than is the case when the matter is in the hands of legal counsel and judges. The mediation process relies so much more on non-legal issues than the courts and it is often the underlying human element of a dispute that needs a voice as much as the cold hard facts.

My experience of mediation

A most surprising moment occurred during a dispute at which legal advisers were present with their respective clients. A difference of opinion between the advisers relating to the interpretation of law put the likelihood of the clients reaching a compromised settlement at serious risk. Had the legal advisers continued to argue about legal issues, an agreement would never have been reached. Instead, discussions were steered down a commercial route by the clients themselves and agreement was reached. In a dispute in which the commercial aims of the clients were converging while the legal professionals became distracted by a difference of opinion on the interpretation of law, the sidelining of legal issues led to a relatively swift and commercially relevant solution. Once the legal disagreements had been sidelined, the commercial and human elements of the dispute were quickly aired and a resolution found.

I am always amazed when apparently long-term adversaries shake hands and agree to move on and work together in surprising ways. I am still staggered by the power of mediation to facilitate a resolution where there seems to be none and the ability of people to reach the most unlikely of solutions when they genuinely approach the process with an open mind and prepared to reach a compromise.

Mediation at Murgitroyd & Company

I am increasingly finding myself recommending or, at the very least, advocating the use of mediation as an alternative to, or precursor to, any adversarial action in intellectual property disputes. The costs of resolving a dispute involving intellectual property in a court setting are often sufficient to interest clients in the mediation process. For the most part, I have found clients pleasantly surprised by the flexibility of the process and the degree of control retained by them during the course of mediation.

Clients and legal advisers are, I believe, more willing than ever to use the mediation process and find it a useful and powerful tool in dispute resolution and deal brokering. Earlier this year, John delivered Murgitroyd & Company's first seminar dedicated to

mediation and its role in the resolution of disputes involving intellectual property. Whenever John speaks about mediation, he tends to increase the general appetite for the subject among his audience.

Mediation and intellectual property

I have, albeit briefly, touched upon some of the reasons to advocate the mediation process in disputes involving intellectual property. Historically, such disputes have resulted in all parties incurring heavy costs in monetary and in human terms during the preparation for and in undertaking litigation. The alternatives to mediation, primarily the judicial system, require a monumental human and legal effort even before the case reaches court and those involved are often left with an imprint of the process upon them.

Mediation offers a relatively open forum where any number of potential solutions may be offered, considered, refused, re-tabled, re-considered, altered and accepted. Two parties in conflict might choose to accept a commercial settlement irrespective of the legal issues which might, ultimately, remain unresolved. After all, the goal should surely be the resolution of the commercial issues rather than a gladiatorial contest involving parties slugging it out until one of them ultimately falls.

So often with mediation we talk about the 'win-win' outcome. Rarely, if ever, is such an outcome reached in an adversarial contest. After all, the solutions open to the judiciary in a court setting are limited by statute and, very often, even the victor does not feel as though they have truly 'won'. On the other hand, during mediation, many alternative solutions can be reached. Licensing deals may be brokered, an intellectual property exchange may be agreed in which ownership is negotiated and a commercial settlement reached, and in some cases future joint ventures and working relationships replace conflicts. A mediated negotiation is also a forum for more than one dispute. Parties may table all of the issues between them rather than simply dealing with one matter of conflict at a time.

There is room within mediation for both the mediator and the parties to be creative in the way in which the dispute is resolved, favouring speedy, commercially relevant solutions shaped by the parties themselves.

What next for mediation?

Although progress is, at times, painfully slow, through the ever expanding network of mediators and friends, mediation continues to make its way into everyday thinking in the world of intellectual property. Through this network of the mediation-aware, the impact of mediation in the workplace and at home continues to be felt. Long may this subject continue to inspire and change us.

Jim Cormack is a partner with McGrigors LLP. He trained as a solicitor with the firm, then McGrigor Donald. He became a partner in 2001, after five years in practice as an advocate.

The first thing we do, let's kill all the lawyers.
William Shakespeare, Henry VI (Part 2)

Personal background

I qualified as a solicitor in Scotland in 1993. In 1995, I decided to pursue a long-held ambition of becoming an advocate and I was admitted as a member of the Faculty of Advocates in 1996 (in the first batch of 'devils' to have the great benefit of the Foundation Course introduced by John Sturrock in his then role as the Faculty's Director of Training).

I thoroughly enjoyed working as a member of Faculty but, in 2001, I decided to return to the solicitor's branch of the profession and became a partner in McGrigor Donald, the law firm in which I had originally trained. I made this move for a variety of reasons, one of which was the hope that I could combine the sort of work which I had done at the Bar with the development of the more long-standing client relationships which the different way of practice as a solicitor offers.

The firm has now evolved into McGrigors LLP, a full-service national commercial law firm with a major focus on risk and dispute resolution advice for a broad range of business clients. Mediation and alternative dispute resolution (ADR) more generally form a key element of our work.

Involvement in mediation

About eight years ago, I became conscious of increasing discussion in the profession about a new way of resolving disputes by facilitated negotiation or mediation. It struck me that the best way of getting under the skin of this new approach was to train as a mediator and I enlisted on a Core course and subsequently did a more advanced course – again with Core.

By the time of my first training as a mediator, I liked to think of myself as an experienced litigator with, I hope, a sound idea of at least generally what to do in most types of hearings and other contentious situations. However, it rapidly became clear that mediation is totally different and that my bank of instinctive strategies and responses from professional experience to date did not really provide for what to do and that training in and reflection on this new approach were essential. This is, of course, consistent with mediation being a different approach to resolving disputes – although, with hindsight, it was only later that I really came fully to appreciate this.

Having acquired some grasp of mediation techniques, I started to advise and represent clients in mediation as part of my practice. This was partly client-driven: many clients came to adopt mediation and other forms of ADR as some of the compulsory matters which advisers must consider when acting in any contentious matter under their standing instructions.

Looking back on it, I think that in the first few years of mediation experience, I had not in fact really got under the skin of mediation but rather had put mediation on the list of possible options for working by the traditional litigator's techniques of analysis, presentation and argument – albeit with some mediation-specific training layered on top.

What I think I have started to appreciate more and more is that, while those techniques remain very relevant, mediation is an environment which really encourages some very key things to happen. These include proper communication and exchange of information (listening as well as talking), relationship-building and reflection on position and interests. These key things can happen not just between each party to the dispute but between the people involved on each of the sides as well.

As a result, I hope that I have lost some of my initial impatience to 'get to the point' and recognised the importance of just letting the process happen. This is partly because a dispute is not just (or often mainly) about the facts and the legal arguments, it is about peoples' feelings, sensitivities and relationships and working through the issues arising from those.

Two examples from my mediation experience spring to mind. The first related to a large multi-faceted construction contract dispute. The parties agreed to co-operate in the selection and appointment of a suitably-qualified mediator and the exercise of interviewing potential mediators in itself fostered an atmosphere of co-operation and almost of teambuilding between the respective sets of solicitors.

It then became apparent that the sheer flow of information in the case was an issue in itself in terms of the mediation process because actual or perceived failures to supply information in the past had themselves become a block to progress. As a result, an initial mediation day was held about a month in advance of the main session with the only purpose being to identify the key pieces of relevant information and arrangements for them to flow in advance of the main event when an agreement resolving the dispute suitable to both sides was negotiated.

The second example related to a very difficult sale of goods dispute where our client had invested so much of his own time and effort in investigating and putting together the claim over a period of years that he was almost wedded to running it in court, despite the risks and expenses involved.

Again, the mediation process fostered an atmosphere of team work between the opposing parties, in the sense of working together to explore the issues in an open way so that everyone was in the best position to evaluate true risk. His involvement in this process, in effect, led our client to 'give himself permission' to resolve the claim which he did by agreement reached with the other party. The next day he called me to say that he had woken up with an overwhelming sense of relief at getting the matter resolved!

Mediation and intellectual property disputes

The old conventional wisdom was that intellectual property disputes are not readily suited to resolution by mediation. It was said that such disputes tended to involve absolute results being sought, rather than the sort of flexible solutions which mediation tends to enable: the intellectual property owner would typically seek an interdict or injunction to bring an end to the alleged infringement whereas the alleged infringer might seek invalidation of the intellectual property right itself.

There do of course remain various types of intellectual property disputes where it is very difficult to see where middle ground might be created between the parties. In certain cases, protection of their commercial and legal interests will dictate that intellectual property owners must seek to bring infringing conduct to an end rather than co-existing with it, even on terms which involve the intellectual property owner obtaining a return, by means of a royalty or otherwise, in exchange for allowing the conduct which has been identified as an infringement.

However, like everyone else who litigates, intellectual property owners must still seek to learn about and to manage risk. This strongly suggests that mediation should be an important feature of dispute resolution in this field. It is often the case that what is at first glance a dispute of limited scope turns out to be capable of a multi-faceted resolution. For example, when dealing with resolution of patent disputes about technology in the oil and gas sector, we have often found that the other side has something else in their intellectual property portfolio or something they need to add to their intellectual property portfolio, aside from the particular intellectual property being litigated over, which can enable a resolution to be achieved such as by mutual cross-licensing of rights.

The relevance of mediation to intellectual property disputes has been confirmed, for example, by the fact that the UK Intellectual Property Office itself offers a mediation service.

The potential for mediation

For me, the fundamental benefit of mediation is that it encourages and enables good quality decision-making – and I am not equating good quality decision-making with decisions to settle. That will often be the right outcome but that is not necessarily so and the parties should retain the freedom to litigate about their rights before the courts should they wish to do so. I feel that process rather than outcome is what defines good decision-making. Mediation is important in that it promotes the exchange of information and perspectives between parties and their advisers in an environment that promotes genuine thinking and reflection about what the other side (and indeed, people on your own side) have to say and what they think and feel.

The possibility of mediation means that advisers must have regard to how their client's case might go down before the court but also how that case, and indeed the client's position and interests, might be viewed in the context of mediation. In a sense, the potential for mediation lies in the influence which experience of it has on the way parties and advisers think about disputes and other difficult situations – and the advice they give about resolving them.

Construction, Agriculture, Commercial Litigation and International

Ken Williamson
Crispin Agnew
Ewan Easton
Phil Ray

Ken Williamson is a partner in architects' firm, the Hurd Rolland Partnership, in charge of the construction technology section, which provides expert witness and other consultancy services.

O wad some Power the giftie gie us, To see oursels as ithers see us!
It wad frae monie a blunder free us, An' foolish notion…

Robert Burns

Who I am

I am first and foremost an architect. I completed the CIArb introductory course for arbitration around ten years ago, and the Core mediation course around six or seven years ago. I am a Member of the Chartered Institute of Arbitrators and on the RIAS panel of Arbitrators, Adjudicators and Mediators.

It is largely my technical training – combined with the wide variety of private and public sector construction contracts I have been involved in – that provides the essential background to my present involvement in the technical analysis of construction disputes.

What follows is a personal view of mediation based on my own experiences. It is underpinned by a sense that mediation has become a prominent consideration in the resolution of construction disputes and has substantial potential for growth in this sector.

My interest in mediation

My introduction to dispute resolution was as an expert witness in an exceptionally protracted and expensive arbitration which over a three-year period failed to conclude, cost hundreds of thousands of pounds in legal and expert fees and left a good deal of bitterness on the part of all those concerned.

The dispute was eventually resolved through a bespoke extended negotiation (with a not inconsiderable consequent secondary action being resolved through formal mediation).

I suspect this case coloured my view, from early on; that notwithstanding excessive amounts of time and money expended on legal and technical posturing, construction disputes tend towards being concluded through some form of negotiation.

During the subsequent ten or so years of my involvement in construction disputes, adjudication has become the principal alternative to court action as a formalised procedure for resolution. (I have not been involved in arbitration since that initial case, although it remains to be seen if the new Arbitration Act will re-establish its relevance.)

My experience of resolution through court actions is that, in almost every case, these are settled during the days (and more often than not the hours) prior to the first full court hearing taking place. The imperative for settlement is the excessive cost-to-risk ratio of entering into the hearing phase. Even where a construction case commences in court, there is an almost continual undercurrent of potential settlement.

In relation to resolution through adjudication, the basic costs are substantially less. However an imperative towards settlement still exists, in light of the extremely high risk of a 'bad decision' and consequent risk of a protracted follow-on court action.

At present, imminent or ongoing exceptional costs or the threat of an imposed decision are the key drivers towards negotiated settlement. In an essentially pragmatic industry, this is the preferred means of resolving disputes.

My interest in mediation is rooted in a belief that the vast majority of construction disputes are suited to early, facilitated, negotiated settlement.

My experience and what I've learned of mediation

For me, the Core course provided a definitive form to mediation; to that point, I had considered it merely a generic term for enlightened negotiation. Since then I have been involved in a number of mediations, generally as an expert witness acting for one of the parties.

From my own observations, key requirements for a successful construction mediation include:

- trust in the mediator by all parties
- the presence of key decision-makers – those empowered to reach an agreement
- flexibility of the process (controlled by the mediator)
- the parties understanding their own and the other party's position prior to mediation (through an exchange of written statements). Technical issues are not intended to be resolved during mediation but they have to be aired and the parties' own perception of strength and weakness tested.
- management of expectations
- consideration of the other party's views –'to see oursels as ithers see us'
- developing and explaining the imperative for reaching an agreement – the cost of carrying on (personal and financial), the advantages of moving on
- emphasising the unique opportunity to resolve the dispute there and then
- pace of the mediation: giving an even pace to the introductory phase, to the airing of the parties' views, to the consideration of the other parties' views, to developing the imperative for reaching an agreement, an increasing urgency regarding the unique and present opportunity to reach agreement.

My overwhelming experience of successful mediation is the clear sense of relief from the burden of dispute by all parties present. That is not to say that this is not relatively swiftly followed by consideration of whether the result was the best that could have been achieved – but no matter the terms of the settlement, I have rarely sensed regret.

Mediation and the expert witness

The role of expert witness tends to become tailored to the form of resolution to be adopted. The most comprehensive investigations relate to cases that are being pursued in court, where the investigation and expert report(s) can evolve over more than a year or so. In this role, the ultimate duty of the expert is, and must be seen to be, to the court. Investigations and reports for adjudications tend to be more intense and immediate. As a result, an element of reliance on the party's stated position becomes involved, as does a slightly more partisan approach.

In the case of mediations, technical issues have the capacity to take up a large part of a mediation day. It is generally acknowledged that, in real terms, they will rarely be resolved during the mediation. Rather, it is both parties' understanding of the strengths and weaknesses of their position that is the critical factor.

In one case, involving a few hundred thousand pounds, I was instructed literally the week prior to a two-day mediation. In this instance the imperative was the threat of adjudication, although the financial needs of the party I was representing was an underlying factor.

My client was pursuing the other party in relation to delay caused by the late production of design information. A programme analysis had been undertaken by our side and while this clearly rattled the other side, it fell slightly short of demonstrating full cause and effect. Needless to say, the other side pitched up on the day with their own expert witness.

The first day was given over to two poker-faced experts proselytising and attempting to hold positions that had been thrust upon them only days before. Only halfway through the second day did the technical positioning come to an end.

In such a situation, it is the experts' ability to hold a technical position under duress that is the essential component to establishing the negotiating position of the party. This involves particular skills and a quickness of mind on the part of the expert witness, tending more to negotiation than traditional measured analysis.

The corollary to this is the secondary mediation mentioned earlier, where subsequent to two or more years of legal wrangling, a couple of weeks prior to the first court hearing, both parties agreed to mediation. This dispute was settled in a sum of millions, with very little airing of the already extensively-analysed technical positions.

From my own standpoint, while the detailed analysis of a dispute is both intellectually stimulating and distinctly profitable, as an expert witness, the rapid route to a mediated settlement can be a more immediately rewarding test of skills.

The potential for the growth of construction mediation

Over recent years, mediation has become a more and more popular staging-post towards construction dispute resolution, where it is largely proffered as an escape hatch along the way. However, successful mediations, like traditional negotiations, still tend to be driven by imminent events such as, most commonly, court hearings or the threat of adjudication. Consequently, by the time settlement is reached, substantial legal and professional costs are already very likely to have been expended. Ultimately this situation is not much more advantageous than 'settling on the steps of the courthouse'.

My evolving view is that to fulfil its full potential benefits to the parties involved, the imperative for reaching a mediated settlement has to be established earlier in the dispute resolution process, preferably before external legal and technical representation is involved.

I believe a next important step might be to promote the inclusion of mediation as the formal obligation in standard forms of professional appointments and building contracts, where at present adjudication and arbitration are the promoted means of dispute resolution. In this regard, the dispute can be dealt with at source, with

parties' positions defined by those immediately involved. Parties will inevitably seek legal and technical representation similar to the present situation where adjudication or arbitration is the obligatory means of resolution, but I believe this might give the best opportunity to minimise external costs and, in so doing, create a substantial justification for the use of mediation in construction.

Sir Crispin Agnew of Lochnaw Bt QC spent 20 years in the Royal Highland Fusiliers, and became an advocate in 1982. Now specialising in rural property and environmental law and some aspects of local authority law, he has written a number of legal text books.

It's not our differences which separate us but our judgments about each other.
Meg Wheatley

Mediation saves anxiety, costs and face.

Cyprus 1966, a hilltop occupied by the Greek militia. Proudly wearing my UN Blue Beret and sporting two new pips of a lieutenant, I sat with my armed escort and sipped very sweet Turkish coffee, while listening to the Turkish village elders decrying the threats and bullying from the neighbouring Greek villagers who had previously promised not to occupy the hilltop that dominated the Turkish village.

The elders emphasised to me the vengeance they intended to extract if the Greeks did not pull off the hill. After a long hour of listening and trying to get a word in edgeways, my armed convoy made its way over the hill tracks to the neighbouring Greek village. There I sipped very sweet Greek coffee only to hear tales of threats and bullying from the Turkish village and why it was necessary to occupy the hilltop again to protect their village.

Shuttling backwards and forwards, supported only by the threat that if either side did anything, I would report them to the UN in New York, I hoped I had defused the situation and persuaded the Greeks to give up their hilltop again. While I might have had a temporary success that day, the situation in Cyprus deteriorated and led to the eventual partition, which is still a problem for the European Union to this day.

Fast forward three years to the streets of Strabane in Northern Ireland and my two pips were confronting a group of loyalists intent on stopping a civil rights march, which the government had said should go ahead. Shuttling backwards and forwards between the two groups with the police, I had to try to help allow the march to take place peacefully. Eventually, in a very fraught atmosphere, the march went ahead and community relations deteriorated because I had not been able to defuse the situation. The Northern Ireland troubles took off and worsened until, more or less, settled by the Good Friday agreement.

Looking back on those days and with the benefit of Core's mediation training, I now realise that I was trying to mediate in situations where if mediation failed, violence was almost certain to follow. Yet I had had no training on how to mediate. I suspect my 'mediation' only succeeded because I was the better-armed and could perhaps enforce the solution that I considered to be the most appropriate in the circumstances – something I am now told a mediator should never do.

I sometimes wonder what the outcome might have been if those of us in the army, who were dealing with those complex situations at the time, had undergone mediation training. If we

had all been mediating properly and so defusing each local situation and bringing more understanding, would the many little mediations have helped resolve the overall situation and maybe prevented the escalation that took place?

These experiences have always make me more willing to negotiate a solution rather than to resolve the conflict with force, but that does not appear to me to be the norm. Having become an advocate, I soon realised that a good deal of my time would be spent horse-trading at the door of the court to settle an action in a manner that left no-one satisfied and usually with a compromise that was not the best that could have been achieved. However, that was the way things worked and so I accepted the situation and either horse-traded a settlement or fought the case to its conclusion. Unfortunately, even the successful party is often not satisfied with the result at the conclusion of a contested litigation, whereas mediation may bring closure to both parties.

Unexpectedly, a number of years ago I was asked to act for a client in a mediation to resolve a difficult professional negligence claim. Knowing little about mediation, beyond the fact that there were some who advocated it, I agreed to take part with a rather sceptical approach to the whole process and not knowing what was to be involved. At the end of a very long day, a year before we would have had a 12-day hearing of the evidence, we had reached a settlement which accorded with my views of what might have been horse-traded at the door of the court. Furthermore, the client more fully understood his case and, more importantly, his opponent's case, so he came away understanding the settlement that had been negotiated during the course of the day.

After that experience, I have always encouraged mediation as a means of resolving court cases, but continue to meet with resistance, because either the parties or their advisers continue to be suspicious of the process. I have been involved in further complex mediations which have, so far, achieved acceptable settlements. The mediations have involved competition law issues where the experts radically disagreed, a family farming dispute where settlement was not achieved until 3:30am and further professional negligence cases. All the mediations ultimately led to settlements with which the parties were reasonably happy but, more importantly, where they fully understood the issues involved and why the settlements were reasonable.

After my first mediation, I was taken by the whole process. I suddenly understood why it was so important to have an independent party present at the negotiations. I realised that mediation might be ideal in my agricultural practice, where landlord and tenant disputes and disputes in a farming partnership usually had deep-seated origins, which often had nothing to do with the cases that ended up in the Land Court. I remember one case where we had long evidence of a grievance of what the landlord's grandfather's factor had done to the tenant's grandfather, when the dispute related to the compensation that had to be paid for the termination of part of the tenancy. Where family partnerships break down, as often happens when the farm passes to the next generation, either there has to be a negotiated settlement (which is difficult when relationships have broken down) or the appointment of a judicial factor where the whole value of the farm usually disappears in the fees. Both these situations are ideal for mediation, because there are so many issues that have boiled up that need to be resolved and cannot be properly resolved in a judicial process.

I now recognise that the mediator could make the parties, and their advisers, face the strengths and weaknesses of their case in a way that advisers find very difficult, where the client perceives that he has a strong or, more dangerously, a principled case and cannot be persuaded otherwise.

I was impressed by the skill of the mediator in bringing the parties together, where they had been at loggerheads and very mistrustful for years, and teasing out unthought-of options for settlement, which ultimately led to a successful conclusion.

As the settlement was achieved long before a lengthy hearing, the savings in costs were substantial and therefore the settlement, although at a sum I reckoned would have been achieved at the door of the court, was probably more valuable. A settlement at the doors of the court would most likely have been on a 'no expenses due to or by' basis or with restricted expenses, thus reducing the capital sum payable.

The logical extension of my conversion to mediation was for me to undertake the Core course and qualify as a mediator. This I did last year. The course was intensely interesting, not only in teaching the skills of mediation, but also in explaining the underlying theory and principles of negotiation. I was vaguely aware of these theories and principles, but to have them focused was very rewarding and has made me much more aware of what is required to achieve a satisfactory settlement, whether through mediation or negotiation.

I had not fully appreciated that the way to achieve a settlement was to have an understanding of the needs of your opponent. If you can understand those needs, you can understand the way that a settlement might be achieved, in the best interests of your own client.

With my special interest in farming law, it is clear that mediation can play a significant role in settling disputes in the agricultural field. Frequently the reasons for the breakdown cannot be reflected in any legal remedy and so the parties litigate about issues that are unlikely to resolve the conflict. Usually when there is a breakdown, there are a myriad of issues between the parties that have built up over the years. I am certain that mediation might well be able to tease these issues out and hopefully bring about a resolution that meets everyone's needs, and safeguards the parties' property.

He who knows only his own side of the case knows little of that.
John Stuart Mill

Ewan Easton is a partner in the commercial dispute resolution department of Maclay Murray & Spens and head of their mediation unit.

An early exercise in consensus building

As a newly assumed partner of Maclay Murray & Spens in the late 1980s, it fell to me to identify a route to the publication of our first practice brochure. This was less an exercise in authorship than in diplomacy. The grudging consent of a sceptical partnership was won only by a solemn promise to avoid the route most expected – not for us the solution of a solemn text and a collection of partner mugshots that might not have looked out of place among the records of some particularly sinister penitentiary.

What then to do? I opted to capture the different aspects of our expertise with a text supported by notable paintings and a number of quotations with some resonance – some tangential, some even a little subversive. In matters of commercial dispute resolution, the John Stuart Mill quotation caught our approach.

Since long before the dawn of the expression 'commercial mediation', a key objective has been to achieve a full understanding of a dispute as part of the initial appraisal for a client. Not for us the bombastic disregard of an opponent's position and, with that, the conveyor belt of remorseless court procedure. An MMS client should instead have a three-dimensional understanding of his or her options from the outset.

Steeped in this approach during my training at MMS, I spent a period with Herbert Smith in London. Then, and perhaps still, one of the world's most creative dispute resolution practices, from Herbert Smith came further insights into the needs of different commercial clients. That crucial experience came at the start of the era of claimant forum shopping. The party who initiates litigation is often now able to choose the place in which to bring the claim.

The way the wind blows

Commercial clients, naturally, have a wide range of motives and requirements when first they become involved in a dispute. Four key factors will influence the claimant in choosing where to pursue his or her dispute.

- *Efficiency*: access to a speedy and reliable outcome including scope to obtain early rulings on particular issues
- *Transparency*: ability for the client to understand, and influence, the management of the dispute
- *Cost*: outright cost is of course important but of perhaps greater importance is a system that rapidly brings home the cost of prevarication to a delinquent opponent
- *Vitality*: often overlooked is the need for a legal system to generate sufficient case-law to remain viable in all commercial sectors – if insufficient issues reach final determination, gangrene can set in.

The drift of some commercial issues to major international centres is not inevitable. Smaller respected jurisdictions can, and do, compete partly because costs can be less but also because reform and renewal processes can be less hamstrung.

To the lighthouse

In the jurisdictions with which I have been most concerned, the 1990s saw much valuable reform. In England the most notable spur was the Woolf Report and the introduction of Lord Woolf's reforms in 1999. Most relevant in this context was the recognition of an important role for commercial mediation.

In Scotland, those ten years saw the introduction of the current Commercial Court and a burst of creative reform in the handling of interlocutory matters. So near and yet so far: the sanctity of the sometimes dilatory Proof, or civil trial, remained unchallenged.

An inspirational client, a US in-house lawyer, though mightily impressed by the opening phases of his commercial action, brought this creaking part of our system to my attention in a way that only an outsider can. Having lost patience as the evidence crept out from oceans of obfuscation, he absented himself from court and sourced for me a copy of *A Sudden Outbreak of Common Sense* by Andrew Floyer Acland. One of the most interesting conversations of my career then took place. The book, subtitled *Managing Conflict through Mediation*, led in time to my acquiring accreditation as a commercial mediator with Core and with CEDR.

In the last ten years, I have been involved, in one capacity or another, with approaching 50 mediations. Most, but not all, have had their roots in Scotland. They have embraced international trade, real estate, partnership, professional negligence, agriculture, personal injury, construction, public administration, party political issues, stress at work claims, intellectual property and family disputes. Some have tested conflict management to its very limits.

I have seen mediations successfully used in very demanding circumstances and seen some fail through inappropriate timing. My work has included cases where a largely failed mediation nonetheless usefully established the boundaries of an otherwise muddled dispute. I have also attempted perhaps the most ambitious use of commercial mediation – the use of the process to narrow issues in a case where, from the outset, parties have recognised that the central issue would require a trial.

The way we live now

In many countries, commercial mediation has become a proven method of dispute resolution. That Scotland can be included in that context, at all, is in no small measure down to the sterling efforts of John Sturrock and his colleagues at Core.

Commercial mediation scores highly against most of those four key factors. Well-timed, it can bring an *efficient* outcome – or at least a much better focus to the area of true dispute. For the client the *transparency* is revelatory. The *cost* implications are also significant. Preparation for mediation must be thorough. However, judged against a full Proof, even a two-day mediation is massively cost-effective.

On only the fourth objective, the *vitality* of our legal system, is the score less satisfactory. Commercial mediation is rarely used, as it might be, to narrow the issues to facilitate a legal ruling. Instead, it is more often the case that parties feel bludgeoned into a mediated settlement by the sheer cost and unpredictability of the alternative.

Bleak house

Yet commercial mediation in Scotland remains at the fringes. Sadly, it is as yet no more than a private commercialised concept understood by only a small part of the business community – albeit undoubtedly a growing part.

It is sobering to reflect upon the following:

- Even now there is almost no formal recognition of mediation by those with the responsibility for civil justice in Scotland. Although personal injury claims are regarded worldwide as one of the areas most suited to this method of dispute resolution, in Scotland, in 2003, when new personal injury rules were introduced, they made no provision for the use of mediation in any form.
- Ten years on from the Woolf reforms in England, we are still wrestling with the concept of truly specialist judges working in an area for most of their judicial careers. An inevitable consequence is that the instances of tightly-focused legal hearings designed to unlock complex factual disputes remain very rare.
- In England, recalcitrant defender can find the implications of their actions visited upon them in costs orders made by judges within days of the start of some disputes; in Scotland, that process typically still occurs only many months after the final conclusion of a case. It is then entrusted to a court appointee handling the costs issue as part of an essentially private business with, weirdly, the potential to yield an income far in excess of the most senior judge in the UK. Truly, Dickens still haunts corners of our system of civil justice in Scotland.

Servants of the people

So where now for mediation in commercial Scotland?

Encouraging ideas are emerging from the need to scrutinise public spending. In England, funding is to be withheld in some areas unless mediation has been attempted. Might the Scottish Justice Minister go further?

A Judicial Mediation Service, designed to step in at an early stage, could enable cases to be resolved without the need for hearings in the form of Proofs and Debates – an odd recipient of public subsidy when one considers the modest court fees that are charged for these resource-hungry stages.

A Mediation Judge might help the parties to resolve their case. Crucially, he or she might also assist in the identification of defined issues for an early ruling by a mainstream judge.

What if that option is frustrated or circumvented? The Mediation Judge might be empowered to require either or both parties to pay the full cost to the State of the Proof or Debate, regardless of outcome. Such an order would require to be open to review at the conclusion of the case by the different judge allocated to that hearing.

Efficient, transparent and cost-effective, such a system might serve both to tackle wasted public expenditure and to bring some much-needed vitality to our legal system here in Scotland.

Phil Ray
is Senior Counsel at Siemens AG's Energy Sector, Transmission Division, a lawyer by profession, and a teacher and a technology enthusiast by inclination.

'Your time is limited, so don't waste it living someone else's life. Don't be trapped by dogma – which is living with the results of other people's thinking. Don't let the noise of others' opinions drown out your own inner voice. And most important, have the courage to follow your heart and intuition. They somehow already know what you truly want to become… 'Stay hungry, stay foolish'.

Steve Jobs, Commencement Speech, Stanford University, 2005

My journey to mediation

My long and winding road to mediation is analogous to the first story in Steve Jobs' commencement speech – 'connecting the dots'. In 1980 in Washington DC, as a US Commerce Department legal adviser, my passion for international dispute negotiation was awakened in an extraordinary seminar by Herb Cohen and in 1984 was re-kindled in a *Getting to Yes* seminar by its co-author, Roger Fisher – the same year Apple's Mac was born.

This passion received a jump-start in 1990 involving three – at the time unconnected – 'dots'. The first dot was teaching international business transactions law at Georgia State University and initial publication of my article *Enforcement of International Contracts*, which included mediation.

The second dot was the 1990 annual Siemens US legal department meeting, which devoted an entire day to mediation training by the International Institute of Conflict Prevention and Resolution (CPR). At that time, the German parent company representative expressed scepticism. He thought having a mediator was an admission by the parties that they were incapable of resolving a problem themselves – and, in such cases, Siemens contracts specified international arbitration, not mediation.

The third dot was my being selected as a pioneer as the first Siemens US in-house attorney to undertake a three-year delegation with the German parent's legal department (1991–94). It was a privilege that caused me to feel much like Br'er Rabbit, who had been thrown into the briar patch he had hoped for, where he could further develop his passion for international dispute negotiation, even if in an unconventional manner.

As a common law Br'er Rabbit, I had the extraordinary opportunity to practise international dispute negotiation at the German parent's industrial centre in Erlangen and at previously undreamed-of levels. This included challenging discussions with equally passionate German civil law colleagues about international arbitration and mediation. This third dot culminated in transforming the German parent's initial scepticism to its current preference for mediation or other Alternative Dispute Resolution (ADR) instruments, if suitable and if party negotiations fail. International arbitration is now a last resort.

My experience of mediation

My experience with mediation, as corporate in-house counsel, has been limited, externally, to mediation advocacy for Siemens AG in international disputes – and, internally, to the role of supportive catalyst for mediation.

My best-case external success story as mediation advocate occurred in 1996 after returning permanently as an in-house counsel with Siemens AG in Erlangen. I had the unique opportunity to jump into the first mediation 'briar patch' between the German parent and a subcontractor and apply *Getting to Yes* principles to a real-life international dispute.

The South African subcontractor proposed mediation and a well-respected US mediator, reputed to be a creative catalyst, to help the parties resolve their dispute. However, the parties ultimately agreed on a Swiss law professor as mediator because their contract was governed by Swiss law. He had no mediation experience but very good international arbitration experience. Although the mediation process was primarily party-driven, it resolved the two-year dispute at a cost and in a timeframe of approximately 10 per cent of the average for Siemens' international arbitrations.

My worst-case external failure involved a French subcontractor, in a dispute governed by French law. The subcontractor took advantage of the parties' efforts to agree on mediation and, instead, filed a *référé* (expedited preliminary injunction) in the French commercial court. It requested a French court expert proceeding, which would have further delayed resolution of the dispute. Siemens AG successfully objected to the *référé*, but had to go through a costly, lengthy arbitration. Although the arbitration award was in Siemens AG's favour, the proceedings exceeded Siemens' average timeframe and costs – not to mention the strains on business relations and tying up internal resources that could have been used more productively.

My role as internal supportive catalyst for mediation has provided opportunities to participate in mind-stretching opportunities highlighted by three more 'dots', also, at the time, unconnected.

The first dot was in 2004, when I was privileged to be Siemens AG's representative at CPR's first European Business Mediation Congress. It took me to the 'mountain-top' of mediation potential and inspired me to organise a 2006 Association of Corporate Counsel event: *The Use of Mediation in the United States and Western Europe to Add Value to Transactions and Effectively Resolve Commercial Disputes*. Five US and European-based multinationals were involved.

The second dot was my superb learning opportunities at the World Intellectual Property Organisation (WIPO) Arbitration and Mediation Centre mediation workshops led by US Professors Robert Mnookin and Gary Friedman. They applied *Getting to Yes* principles and the paradigm of joint-meeting-only mediations so the parties could collaboratively learn about each other's interests 'beneath the iceberg'. This WIPO dot led me further into the mediation world.

Dots 1 and 2 led to the third dot in 2010 – the exceptional Core mediation course, which enables participants to go beyond the WIPO joint-meeting-only-mediation paradigm.

What I have learned about mediation?

My 1996 best-case experience convinced me that mediation could be more time- and cost-effective than the lengthy, expensive options of arbitration or litigation for suitable international disputes. Mediation offers the potential for mutually acceptable (and possibly transformative) resolution at a high success rate by going below the tip of the iceberg of adversarial options, applying the law to the facts from the parties' respective positions and by exploring and understanding their interests, concerns, needs, emotions, hopes and fears.

Even if the parties choose another ADR instrument, such as dispute board, expert determination or adjudication, the facilitative mediation skills still add value – by listening actively, non-defensively and non-judgementally and asking open questions to encourage and improve dialogue between the disputants. Mediation skills are transferable and could add value not only to resolving disputes with other companies but also to internal company disputes.

What is Siemens AG's use of mediation?

To paraphrase the Virginia Slims commercial, Siemens AG has 'come a long way, baby' from its initial scepticism to realising the added value of mediation for resolving international disputes. Its current policy preference includes mediation as one ADR instrument suitable for resolving international disputes, if party negotiations fail. Under this policy, mediation would be assessed on a case-by-case basis, along with other ADR instruments.

For the first time in its 163-year-old history, Siemens AG created in 2008 a Corporate Legal Litigation (CL LIT) department. Its responsibility is to represent Siemens' interests in all material disputes worldwide in all forums across all sectors.

In the context of parties seeking time- and cost-effective resolution, CL LIT was a leader in the Conflict Management Rules recently issued by the German Institute for Arbitration. These rules offer an innovative opportunity for parties to deal with the choice of the appropriate ADR instrument, including mediation, in a structured process with professional support.

As Siemens' voice at institutions dealing with mediation, CL LIT exercises its responsibility for governance and policy issues relating to mediation. This includes Siemens AG being a signatory of the CPR's pledge on ADR and a leader in round-table mediation and conflict management in Germany.

What is the potential for growth of mediation?

On this question, put me in the optimist camp, based primarily on my enthusiasm for international dispute negotiations and the use of technology in its practice *à la* Richard Susskind's provocative *End of Lawyers?* But mediation stakeholders will need to 'think different' – Apple's motto adopted after Steve Jobs' return – or resort to 'thinking differently', Core's motto.

To succeed, I believe this 'think different' attitude will need to undergo a transformation as significant as Apple's transformation from a personal computer company to one that has transformed the music and smartphone industries. Such transformation is likely to include mediation emerging as a profession in its own right and increasing use of technology in mediation practice and in the learning and teaching of mediation.

Currently imaginable uses of technology include Apps, Podcasts, You Tube and the use of social media, such as LinkedIn, FaceBook and Twitter, for mediation training and making mediation mainstream. Some of these already exist: Tele-Presence (virtual life-like video-conferencing) offers the prospect to have multi-country mediation meetings and save travel costs and time.

Today, mediation might seem unimaginable as the major instrument for international dispute resolution, but it could happen. Not so long ago, no-one had heard of iPods, iPhones and iPads. Today, it's unimaginable to have a world without them.

Retrospective

Pamela Lyall

Pamela Lyall was formerly an insurance litigation partner in a law firm and for a number of years has been Core's director of mediation services – and a mediator, trainer and coach.

There is a field out beyond right and wrong. I will meet you there.
Rumi (Persian poet)

If you have dipped into this book and read a few chapters that particularly interested you, or if you have read it from the beginning, you will have become aware of a number of similar themes running throughout the text. Many have commented on the better communication and decision-making which mediation encourages, its cost-effectiveness and speed, the possibility of finding creative solutions and how it puts people at the heart of finding a solution.

Intriguingly, there are many common themes, yet each of the contributors has a unique and individual voice through very powerful and personal stories. Certainly my own experience of developing the necessary skills and learning about the process of mediation is that few go through this experience unchanged.

My journey to mediation

In 1998, when working as an insurance litigation partner in a major commercial law firm, I discovered that I was pregnant with our fourth child. This rocked me back on my heels but also gave me the space, while on maternity leave, to review just where I was going in life. I had been very fortunate in my legal career as the firm that I was with pioneered the way for women with a flexible approach to working time and indeed I was the first part-time partner they ever had. My work had also been varied and interesting and the people I worked with were not only intellectually stimulating but also really good people to be around.

Yet I felt something was missing and increasingly, I could not see myself remaining in law for the rest of my working life. By coincidence – is there such a thing? – I met up again with John Sturrock who at that time had not long undergone mediation training and was clearly passionate about it. The thing that struck me as he spoke was not only his enthusiasm for the mediation process but his firm belief that the people at the heart of the conflict had the ability to sort it out for themselves. What they needed was the context in which to have that conversation (and that might of course include the need for good legal support) rather than a third party taking the matter away from them and making decisions for them about what was right and wrong.

So began a chain of events – starting with my initial mediation training and not long afterwards, the set-up of Core in 2001 – which continues to this day as I keep on learning and growing in my mediation practice.

Why mediation?

The need for something beyond traditional lawyering was what drew me into the mediation world – only to discover that there was so much more to it than that! I realise looking back how little I understood about the potential for mediation and the impact it could have. Better communication, the opportunity to be heard and to listen, acknowledging and managing the emotional aspects, the possibility for creative solutions, efficiency and transparency. These are just a few dimensions and have been highlighted by many in the preceding pages.

The breadth of areas in which mediation can make a difference – and not just in the rather narrow alternative to litigation – is clearly demonstrated by the wide range and depth of possibilities and opportunities covered in this book .

For me, as at the outset of my journey, the most important issue has been the people at the heart of the dispute. One of the very first mediations I undertook involved the break-up of a long-standing professional partnership. The impact this was having on friendships forged over many years, multi-layered family relationships as well as the more obvious financial implications, struck me forcibly at the time and has stayed with me ever since. Sitting in a room with a middle-aged male partner of the firm with his head in his hands as he explained the impact the situation was having on his family, and especially one of his young sons at school, was revealing – and incredibly moving.

It is an enormous privilege to work with people when they are often at their most vulnerable and to hear their innermost thoughts. There are often tears – in commercial situations as well as the more obviously emotional workplace scenarios – and other displays of strong feeling. Increasingly, I am aware that something is beginning to happen where there is a display of strong emotion and this might be a necessary part of the process.

What makes mediation such an empowering and powerful process? Is it encouraging people to deal with their own problems for themselves, taking responsibility and moving from polarised positions? Is it suggesting they might step into the other's shoes, and giving them opportunities to have conversations they should have had some time ago? I think it is all of this – and more.

My experience of mediation

Over the last ten years it has been my privilege to mediate in well over 100 different disputes all over Scotland and in some parts of England as well, including London. Many have involved commercial matters – contracts, health services, professional negligence, intellectual property, building and construction, partnership, property and use of land, charitable organisations and others. Increasingly, issues around employment and discrimination, senior management and workplace situations have been the focus. The subject matters have been diverse. And even where the issues are similar the individuals involved – not only the parties but the team of solicitors, accountants, experts in many different fields and family members or others there to offer their support and encouragement – are always different and individual.

People are at the very heart of mediation. It is a constant challenge to build good working relationships with teams and to enable them to be open to thinking in a different way from the approach taken so far, to hear what others need to say and to confront and grapple with difficult matters.

I am often amazed by the ability of people to do some quite extraordinary things at moments of greatest need – to give the apology, to offer forgiveness, to make a concession without looking for anything in return, to reach out to others as one human being to another. I have seen enough to know there is reason to have faith in humankind.

And at the same time, and running in parallel, there are usually robust commercial issues to be addressed and risks to be assessed, analysed and managed through the process. Negotiation needs to take place. People need to be separated from the problem and challenged to take hard pragmatic decisions. In the vast majority of cases, options are narrowed, issues are more clearly focused and resolutions emerge – including the restoration of broken relationships.

The potential for mediation

In the last ten years mediation in Scotland has become firmly established as more than just another tool in the kitbag for dispute resolution but as a way of thinking about how we handle difficult situations generally. There is much to be gained as we move towards a more mediative culture.

If one ever thought that mediation had a fairly narrow application, one only needs to look at some of the other chapters in this book to get a sense of the enormous potential for where mediation might be used in the future.

It will be exciting to witness the growth and development of mediation in our country over the next ten years as many others join the growing mediation community and help to take it forward. This book spells out some of the challenges as well as the opportunities. Within both the public and private sectors and within education (at all levels), there are challenges for organisations, for leaders and decision-makers, and for politicians and civil servants. Above all, there is a need for imaginative thinking.

If we can continue to enhance our abilities to use the skills and frameworks which provide a comprehensive and preventative approach to resolving differences, wherever these arise, it is clear from those who have contributed to this book that mediation has the potential to reach the parts that no other process can!

A Global Perspective – and Afterword

Kenneth Cloke

Dr Kenneth Cloke is President of Mediators Beyond Borders and has served as a mediator, arbitrator, consultant and trainer, specialising in complex multi-party conflicts and designing conflict resolution systems for organisations. He is an internationally-recognised speaker and author of several leading books in this field.

Human history becomes more and more a race between education and catastrophe.

H.G. Wells

The recent BP oil spill in the Gulf of Mexico highlights an escalating set of difficulties in our responses to environmental catastrophes, with echoes that resonate and reverberate with experiences responding to Hurricane Katrina in New Orleans, earthquakes in Haiti and Peru, firestorms in Russia, flooding in Pakistan, the tsunami in Indonesia and others.

As population, technology and globalisation continue to increase, so will environmental deterioration, including global warming, allowing us to reasonably anticipate, and perhaps predict, the following outcomes:

- that environmental disasters will become more widespread, severe, impactful, costly and common
- that conflicts will be triggered by these events, and escalate as more individuals, groups, nations and eco-systems are impacted
- that these conflicts will accumulate around the failures in local, national and global emergency response systems
- that the ability to resolve these conflicts quickly and effectively will have a direct impact on the degree of damage they create
- that mediation, collaborative negotiation and allied conflict resolution methodologies will increasingly be used to address and resolve disputes that result from environmental disasters.

As human populations have grown more numerous and technologically advanced, we have naturally had a greater ecological impact on the planet.

Simply by not paying attention for centuries and seeking to maximise our separate competitive short-term advantage as nations, corporations and separated communities, we have wasted exhaustible resources, despoiled and desecrated our environment, and created the preconditions for mass extinction and global catastrophe.

As a consequence, it is no longer possible to pursue non-sustainable approaches to survival, particularly those that aggravate the problems we already face.

Instead, these problems demand not only the collective attention of everyone, but respectful, collaborative, democratic ways of communicating; complex, creative, paradoxical ways of solving problems, as well as interest-based methods for resolving conflicts over how to address them. Without these shifts, it is likely that many people around the planet will not survive.

What needs fixing?

The most serious problems we face today include:

- the size and density of human populations
- CO_2 and methane emissions that increase global warming
- species extinctions
- loss of biodiversity
- loss of tropical rainforest and woodland
- desertification, erosion and loss of arable land
- decreasing genetic diversity in agricultural commodities
- loss of potable water
- loss of fish stocks
- resistance to antibiotics
- pollution, loss of bio-degradability and use of toxic chemicals
- vulnerability to pandemics
- rising cost of medical care
- disruption of weather patterns
- increasing severity of natural catastrophes and weather conditions
- the global effect of local, relatively minor environmental decisions.

In addition to these, we are facing worldwide problems in other areas that can easily trigger severe environmental consequences, escalate conflicts, and make it more difficult for us to solve these problems, including:

- the increasing destructive power and availability of military technology
- nuclear proliferation
- willingness to use war and resort to violence
- intentional targeting of civilians in warfare
- terrorism and unending cycles of revenge and retaliation
- acceptability of the use of torture and cruelty in response
- global financial crises
- financial cutbacks in government services, especially in education, corporate regulation and science and technology
- unregulated economic transactions
- increasing poverty, social inequality and economic inequity
- destabilisation due to political autocracy and dictatorship
- rise in prejudice and intolerance
- hostility to immigrants, refugees, minorities and outsiders
- genocidal policies and 'ethnic cleansing'
- growth of the drug trade, sexual trafficking and organised crime.

What can we do?

To solve any of these problems, and others, that we will inevitably confront as we proliferate, develop and expand, our disparate races, religions, cultures, societies, organisations and institutions need to learn how to work together. To do so, we need

better ways of communicating with each other, expanded skills in open and honest dialogue, and better techniques for solving problems, negotiating collaboratively, and resolving disputes without warfare, coercion and other adversarial methods.

This may sound simplistic, even idealistic. Clearly, our history of working together to solve pressing social, economic, political and ecological problems offers few reasons for confidence. Instead, it reveals an astonishing record of avoidable disasters, pointless miseries and needless deaths. For centuries, we have gotten away with murder, and no longer have resources to waste.

What is worse, these escalating problems *cannot* be solved completely or in time by nation states, or even by large groups of countries, or by the use of military, bureaucratic and autocratic methods. Indeed, none of the following well-established, centuries-old problem-solving mechanisms by themselves can succeed in solving these problems:

- military force
- treaties and international agreements
- legal interventions and rule of law
- administrative rules and regulations or policies and procedures
- power-based diplomatic negotiations
- national political leaders and institutions
- capitalism and market principles
- the United Nations, as presently constituted.

So what is left? The answer is, we are. While it sounds ridiculous, when it comes to solving global problems, mediators matter. The good news is that as our problems have multiplied, so has our social and technological capacity to solve them. We have not only vastly increased our scientific and technological capabilities, we have also enormously improved our understanding and skills in communication, facilitation, creative problem-solving, public dialogue, collaborative negotiation, prejudice reduction and bias awareness, mediation, conflict resolution system design and similar methods. And it is precisely these skills that we now need in order to 'save the planet.'

If we consider the BP oil spill as an example, there were numerous problems that led to that environmental disaster or contributed to making it worse. To my mind, these include:

- dependence on fossil fuels
- powerful oil and gas companies with assets and sales larger than the gross domestic products of all but a handful of nations
- inadequate market mechanisms to dampen the lust for quick profits, creating an incentive to cut corners on costs, including safety
- regulatory agencies that are led, managed and lobbied by people who pay greater attention to corporate influence than public safety and environmental sustainability
- disputes over how to manage the off-shore platform that were resolved hierarchically, bureaucratically and autocratically, leaving those with direct experience of the problem without the power or authority to solve it
- concentrating the problem-solving authority in the hands of those who were more concerned with company profits than safety or environmental damage.

In the BP spill, as in the Exxon Valdez spill before it, there was a concerted effort in political circles and in the media to find someone to blame for what happened. Yet a secondary effect of blaming individuals is that the system that permitted or encouraged the mistake is ignored or let off the hook, increasing the likelihood that there will be fresh problems in the future.

Environmental catastrophes are increasing in frequency, reach and cost, generating conflicts around the world, including arguments over causation, responsibility, and competition for scarce aid resources. Without mediation, the negotiation and implementation of solutions to these problems, assistance with recovery and systemic prevention will be delayed by years, if not decades.

In BP and most similar disasters, political leaders have relied on the use of classic diplomacy, that is, adversarial, distributive, power-based negotiations in which there is a strict separation between:

1. public declarations and statements in which all the right things are said but no-one engages in dialogue, or genuinely comes to grips with what others are saying, or really focuses on finding solutions to the problem; along with
2. traditional behind the scenes 'hardball' negotiations, with arm-twisting, hidden agendas, and adversarial styles, in which the largest, most powerful and wealthiest parties 'win,' while others feel excluded, disempowered and disrespected.

What can mediators do?

Clearly, mediators can design a better process for reaching agreements. For example, we could:

1. conduct in-depth collaborative evaluations of the processes used in response to earlier environmental disasters to identify what worked and what didn't.
2. consult broadly with diverse organisations and individuals with experience to design dispute resolution systems on ways of improving the aid delivery process.
3. ask the United Nations to assist in creating international aid protocols that include mediation, dialogue and similar methods.
4. send negotiation facilitators and mediators to meet with competing aid organisations in advance to help set targets and timetables, and encourage compromises that could lead to better and quicker agreements.
5. include among decision-makers and problem-solvers representatives of those who have been most injured by the event, along with mediators and facilitators who can assist in bridging differences as they occur.
6. assign UN mediators to co-ordinate collaboration between competing groups.
7. reach agreement on a variety of next steps that can be taken in the event that consensus is not reached, including open dialogue, informal problem-solving, collaborative negotiation and mediation.
8. select regional aid co-ordination and disaster relief teams with experts representing a cross-section of nations, groups and blocs, with professional facilitators and recorders to aid them in their work.
9. consider the entire process as a conflict system and design better ways of responding to it
10. focus efforts not only on amelioration but prevention so as to reduce the severity of future problems.

This list is not meant to be comprehensive, but simply to suggest that it is possible for mediators, facilitators and conflict resolution systems designers to come up with useful suggestions that can make the process more effective and collaborative. All that is lacking is our realisation that we can indeed make a difference. The world is waiting. As the surrealist artist Andre Breton wrote, 'What are we waiting for? A woman? Two trees? Three flags? Nothing. What are we waiting for?'

Afterword

Many of the ideas in this chapter were presented for the first time at a seminar hosted by Core Solutions in Edinburgh, with whom I had the pleasure of working in 2008, and again in 2009 when John Sturrock made it possible for me also to present them in a panel discussion on climate change at the Scottish Parliament.

On both of these occasions, Core Solutions was at the forefront, not only of strengthening mediation skills among committed practitioners, but of advancing the most difficult and risky applications of mediation to problems on a global scale. Core Solutions has not given in to the temptation to limit its focus to simple, more lucrative commercial cases, but has also recognised its larger responsibility, broadened its reach, and as a result, contributed significantly to improving the acceptability and understanding of conflict resolution both in Scotland and in the global community of conflict resolvers.

On my last trip to Scotland, thanks to John and Core, I was able to work with a group of mediators to improve conflict resolution skills in the leadership of the Church of Scotland. At first glance, this may appear to have little to do with climate change, but I believe there is a mediation version of the 'butterfly effect,' in which tiny, insignificant changes in people's skills, in the 'culture of conflict,' and in their capacity to work together to solve problems can produce transformational results that make future solutions easier to find.

So I offer this article with deep gratitude for the amazing work you are doing, to John and to the entire Core team. Keep those butterfly wings flapping!

A Postscript for Scotland

Michael Leathes

Michael Leathes is a former in-house lawyer with various international corporations and a user of mediation worldwide. He was *pro bono* executive director of the International Mediation Institute (IMI) from 2007 to 2009 and is now a member of IMI's board of directors.

At the precise moment that Core Solutions was founded in Edinburgh, Professor Arthur Herman who taught at George Mason University, Georgetown, completed his manuscript for *Scottish Enlightenment – How the Scots Invented the Modern World*. In 2001, it hit the New York Times bestseller list. Here's an extract:

> Before the eighteenth century was over, Scotland would generate the basic institutions, ideas, attitudes, and habits of mind that characterise the modern age. Scotland and the Scots would go on and blaze a trail across the global landscape in both a literal and a figurative sense, and open a new era in human history… The Scots … embarked on nothing less than a massive reordering of human knowledge [that] sought to transform every branch of learning – literature and the arts; the social sciences; biology, chemistry, geology and the other physical and natural sciences – into a series of organised disciplines that could be taught and passed on to posterity…

Scotland has approached mediation in the way Professor Herman admired. Ten years ago, commercial mediation was virtually unknown in Scotland, even though it had been developing in England since 1990. Since 2000, the Scottish Mediation Network has been created and has helped mediation to grow in family, community, workplace and other areas and awareness has increased significantly. Core Solutions, the leading provider and training institution in Edinburgh, has smartly inherited the status quo and is now, as Herman predicted, *reordering the knowledge* developed in North America, Australasia and England, and applying and improving it in Scotland.

Leading thinkers in the global field have presented in Edinburgh at Core's invitation. William Ury, Harvard Law School Professor, co-author of *Getting to Yes* and co-founder of the Program on Negotiation and Ken Cloke, founder of Mediators Beyond Borders and author of *Conflict Revolution – Mediating Evil, War, Injustice and Terrorism* have inspired many in Scotland. Increasingly, the true power of mediation is understood in Scotland.

Core has one of the world's leading-edge training and coaching programmes for mediators, conflict resolvers and those wanting to improve their negotiation skills. Hundreds of people have passed through these programmes successfully. Professionalism in this field is on the march in Scotland.

Now what Scotland can do, if it reaches for it, is to take the vacant global centre stage in conflict resolution, leveraging its position as a unique bridge between the common and civil law systems, to offer a forum for dispute resolution learning and practices. The country has the educational underpinning, the providers, the trainers, the standards and the experienced mediators to pull this

off. It needs strong government support and vision. If Scotland doesn't do it, another country surely will.

Once more, Scotland, and the Scots, are poised to 'go on and blaze a trail across the global landscape'.

'You see things and you say "Why?" but I dream things that never were, and say "Why not?"' **George Bernard Shaw**

This book celebrates the journey of a small business breaking new ground. It perhaps also tells of a road less travelled over ten years. It records the experience of 30 individuals from a variety of professional and business backgrounds who have trained in mediation and conflict management skills with Core Solutions Group since 2001.

To their contributions are added the words of leading figures in politics and conflict resolution.

'Mediation offers society and business a different way of doing things, which reflects values of co-operation and collaboration, rather than winning and losing, and which sustains long-term positive and productive interaction amongst people in families, communities and businesses.'
Jim Mather

'The challenge now for Scotland as a country is to use its place in the world to increase our understanding of what mediators and other Third Siders can do.'
William Ury

'Core has .... recognised its larger responsibility, broadened its reach, and as a result, contributed significantly to improving the acceptability and understanding of conflict resolution both in Scotland and in the global community of conflict resolvers.'
Ken Cloke

'Now what Scotland can do, if it reaches for it, is to take the vacant global centre stage in conflict resolution.'
Michael Leathes

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