CREATING CONFIDENCE IN MEDIATORS AND THE PROCESS: AN EXPLORATION OF THE ISSUES

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ASSUMPTIONS AND QUESTIONS

The 2010 Conference topic "*Creating confidence in mediators and the process*" contains some implicit assumptions and raises important issues for consideration.

If one encountered a conference topic entitled "*Creating confidence in lawyers and the legal process"* one might well assume that there was some kind of crisis of confidence that needed attention: a root and branch examination as to the causes of the lack of confidence and an exploration as to what might need to be done to the legal process and the profession to gain or regain public confidence.

Similarly, the reference to a required act of "creation" of confidence in mediation and mediators assumes a lack of confidence in the process and its practitioners that would benefit from a fundamental examination.

As mediators, many of us may believe that the mediation process is an ideal way to resolve most disputes and that if only litigators and disputants realised this, there would – and should – be a huge increase in the volume of mediation. There is, of course, a truth in this (writing as a mediator); but there are also other truths, which we need to understand if we are to inspire confidence in the process. Perhaps the case of *Halsey v Milton Keynes General NHS Trust*[1] can help provide some clues both to the value of the process and the reservations that many litigators may have. The aspect of the judgment relating to the circumstances in which a failure to mediate may result in costs sanctions was based on the Law Society's submissions as to the reasonableness or otherwise of a refusal to mediate; and those submissions had to be approved by both the Society's ADR Committee (as then constituted) and its Civil Litigation Committee – hence it contained a balance between practitioners committed to mediation and litigation lawyers who would be directly affected by the decision.[2]

One of *Halsey's* fundamental findings, adopted from the Law Society's submissions, was that "mediation and other ADR processes do not offer a panacea, and can have disadvantages as well as advantages: they are not appropriate for every case." The creation of confidence

[1] [2004] EWCA (Civ) 576

[2] The author of this paper was closely involved in co-writing the Law Society's submissions in *Halsey* that were adopted by the Court of Appeal.

in the mediation process may accordingly be a qualified exercise, constrained by the suitability of each dispute in accordance with the *Halsey* criteria and any others that may be considered appropriate.

CONFIDENCE IN THE MEDIATION PROCESS

What mediation process are we referring to?

There is of course a wide range of activity under the generic heading of "mediation process". Each field of activity has its own preferred model of practice, with limited overlap. So for example, in the civil-commercial field, the standard model involves setting aside of a block of time, commonly a day or two, for the mediation, which is generally attended by the parties and their lawyers and at which a joint opening session is followed by the parties separating and the mediator shuttling between them, carrying messages and proposals, maintaining separate confidences and seeking to find a basis for resolution. Other permutations may include meetings with lawyers, discussions with experts or further joint meetings.

The model of practice when mediating separation and divorce has (until recently) been and largely remains quite different and involves a series of joint meetings, weeks apart, commonly 1½ hours each, without lawyers in attendance. The mediator does not maintain separate confidences: this is a fundamental article of faith. The aim is to help the couple together arrive at mutually acceptable proposals over time that they can take to their lawyers for advice and formalisation. The mediator develops special skills in working extensively with the parties together. Recently, a hybrid model of family mediation has been developed that incorporates aspects of the civil-commercial model into family practice.

In the neighbourhood and restorative justice processes, the mediator may move between the parties individually before any joint meeting is held, to explore whether the process is acceptable to both and whether they are willing to meet jointly.

There are also different approaches within each model, including notably the level of evaluation and intervention that mediators adopt – either as a matter of training or individual style. Evaluative mediation has had a "bad press" for a long time, but in fact all mediation is facilitative and there is a wide spectrum of evaluation, starting at one end with little or no evaluation, through at the other end to a mediator being willing to express a view on the merits, with varying levels of evaluation – shades of grey – in between: selective questioning, "reality testing" and raised eyebrows being classic examples. Depending on the provider and the individual mediator, parties may find that the mediator has a substantially facilitative approach and wouldn't offer any guidance at all on the merits, or may express views directly or indirectly, or something in between. How do parties or lawyers know what approach their

mediator will take in each case and how do they choose the level of evaluation they prefer when levels of individual evaluation are not measured or defined?

Mediation training programmes in the UK tend to follow fairly narrow models of practice. This may be justified on the basis that trainee mediators need a clear structure until they have enough experience to exercise their discretion about moving into more complex areas of practice. Programmes also tend to teach a substantially facilitative, non-evaluative approach, the rationale here perhaps being that this is the "pure" model, that mediation should not be evaluative (at all, or in some views at least until practitioners gain more experience and can exercise discretion about how and when to introduce a measure of evaluation) and that in any event mediation is about party decision-making and that the mediator should not influence the outcome by expressing a view on the merits.

Should we be content with "one size fits all"?

These policies of training and practice have substantial merit, but a downside is that trainee mediators are not always made aware of the range of options that may in due course be available for them to add to their repertoire and skills, so that these are not seen as a natural progression. Nor is there usually enough consideration about the different ways in which evaluation takes place, with the result that instead of having this as a structured development in their training, they are left to their own devices in adapting the process and in deciding whether, when and how to evaluate. For some, this may follow naturally and effectively; but this is a hit-and-miss process; and mediators do not necessarily have norms against which to judge their individual approaches to evaluation. It's no surprise then that users have no way of anticipating what a mediator's individual approach to evaluation will be.

The civil-commercial model with which we are all familiar is an excellent way of working, and one which we can promote with confidence. However, we should not be satisfied with a "one size fits all" approach nor should we expect parties and their lawyers to do so. Some people will want a purely facilitative and non-directive mediator, others may want and need a mediator who will help them firmly forward and nudge them (or their opponents) back on course if they are clearly following mistaken paths: this can be done in a way that facilitates their own decision-making and does not press them into any course favoured by the mediator, and hence would be perfectly proper for mediation.

The fixed time (e.g. one-day) model will no doubt continue to be the format appropriate for most commercial disputes, but there will be times when it is inappropriate. For example, long-running high conflict disputes may need to move forward with small steps over time. Relationship breakdown disputes may require a series of pre-arranged meetings. Ongoing conflict may need to be managed over time rather than tackled in one day. In all of these

cases, fixing one block of time may be counter-productive because it sets up an expectation that the matter can and should be resolved in that time, and if this does not happen, this is perceived as an "unsuccessful" mediation, even if an adjournment is arranged – rather than the concept of process over time being accepted as normal and appropriate.

One of the problems about developing these concepts is that litigation lawyers have become familiar with the established ways of mediating, and have fixed expectations about process. This is reinforced by the practice of most mediation providers (and independent mediators) in setting up mediations for a block of time as a standard policy without enquiry as to whether anything different may be more appropriate to the particular dispute. A preliminary meeting, where practicable, is a very helpful way to enhance the process by jointly dealing with practicalities such as fixing the timetable, venue, documentation and other preparatory matters; considering process and the specific needs of the individual case; discussing representation and issues of authority; exploring and agreeing ways of narrowing the issues; and generally establishing early rapport and better understandings.

Issues to consider about process

Discussion about the mediation process might perhaps include consideration of the following:

- Is the mediation model in which we seek to inspire confidence the best available at this time?[3] While we know its excellence and that it serves us extremely well for most situations, should we not be developing, teaching and promoting models that integrate the best elements used in all fields, and which widen the scope of what we can offer?

- In particular, might we be able to offer bespoke processes for high conflict, relationship breakdown and other disputes where these might be appropriate, perhaps building in process over time rather than just a single succeed-or-fail day?

- Can we introduce preliminary meetings into more of our mediations, giving parties and/or their lawyers a better chance of "hitting the ground running" at the substantive meeting, or designing the procedure for the needs of individual cases? Will provider bodies adapt their procedures to allow for this where it seems appropriate? Will lawyers and disputants accept this more readily as part of the process?

- The facilitative model remains the primary way of mediating, but it is not "pure" or "real" mediation. Mediators may need to facilitate in different ways including perhaps

[3] The term "best practice" is avoided, which suggests that nothing else is or can be as good. Anyone who doesn't follow "best practice" is at risk of criticism (and perhaps of a negligence claim) when trying to innovate. However, sooner or later some other practice will almost certainly develop that is as good or better. "Best practice" inhibits innovation and creativity and it is a shame that we use this term so widely and inappropriately.

challenging parties' inappropriate perceptions privately as to the strength of their positions and helping them to gain a better understanding of the situation and the merits. Is it time to examine whether, how and when this can be done ethically and effectively rather than leaving it as an unstated element of the process?[4]

CONFIDENCE IN MEDIATORS

Another analogy may be helpful here: does the public have confidence in dentists? The answer would probably be: it depends. To have confidence in dentists as a profession, we need to know that all dentists undergo a rigorous professional training and that every dentist will conform to certain minimum professional standards, set at a high level. Whether we have confidence in an individual dentist may depend on whether in our experience and by reputation he or she is effective, good at what s/he does, has a good professional manner, keeps up to date with relevant developments and has other positive professional and personal attributes.

Drawing on this to consider the question of confidence in mediators, the following may be relevant:

- Rigorous professional training for mediators must include theoretical understanding and practical application of mediation principles; listening, questioning, summarising, acknowledging, reframing, observing body language and other communication and facilitation skills; managing the process; ethical awareness; managing conflict and the expression of emotions; creative thinking; and encouraging a problem-solving mode.
- Continuing professional development (CPD) is not just something that needs to be done to comply with formal requirements, but should be seen as part of lifelong professional learning, extending and enhancing one's skills and abilities, keeping up to date with professional developments and adding to one's toolkit of resources.
- Mediators should comply with a Code of Practice or other ethical and practical framework, as stipulated by provider organisations or professional bodies (such as the Law Society). There is an EU Code to which mediators may voluntarily commit.[5] The public should be made widely aware of the fact of any such commitment and its terms.

[4] For those who might contend that introducing any element of evaluation into the process is not "real mediation", it may be worth noting the debate that took place in the US more than a decade ago: "What is 'real mediation' and who decides?"

[5] See http://www.cto.int/Portals/0/docs/adr/adr_ec_code_conduct_en.pdf

- Given that there is still some uncertainty about how mediation is conducted, and especially in view of the disparity of approaches between organisations and individual mediators, the terms on which it is conducted should be clear and specific. There should obviously be an Agreement to Mediate, setting out the key provisions including those regarding confidentiality, evidential privilege, process, fees and expenses, and the relevant provisions of any applicable Code of Conduct. In addition, it would be helpful to the creation of confidence to have a note that briefly sets out the process and the individual mediator's approach to material aspects particularly evaluation. (How this is done will need some discussion and coordination between organisations and mediators).
- In family mediation, perhaps because of the sensitivities of dealing with fragile family situations and perhaps also because of the influence of mediators from a counselling, therapeutic and social work background alongside lawyers, the notion of some form of "supervision" of mediators throughout their careers has taken root. However, as supervision would be a misnomer in these circumstances, it takes the form of professional practice consultancy (PPC), to which family mediators belonging to the main family mediation organisations are expected to subscribe, however senior or experienced they may be. PPC tends to be minimal relative to the counselling or social work equivalents, but nevertheless rather alien to the legal culture: perhaps a couple of one-hour sessions per year. This concept has not been taken up in civil-commercial mediation, though coaching and occasional mentoring is optionally available.

Coordinating and regulating practice

There seems little doubt that the public and legal profession would be reassured if all civil-commercial mediation organisations and independent mediators could agree on objectively high standards for the training, qualification, accreditation and regulation of mediators; and the courts would be able to adjourn cases for mediation more widely and with greater confidence.

In an ideal world, it should be possible and would be in their mutual interests for organisations and mediators to agree on all these aspects and on an effective regulatory regime. However, we do not live in an ideal world[6] and a number of considerations may impact on the question of agreeing on appropriate regulation, including:

- There is some understandable ambivalence among many mediators about the whole issue of regulation – not just whether and to what extent to regulate, but who should do so, on what terms and basis (including whether it should be voluntary or mandatory – and

[6] Cf Lenard Marlow's definition of mediation as "an imperfect procedure that employs an imperfect third person to help two imperfect people conclude an imperfect agreement in an imperfect world".

whether and how one could make it obligatory), how it would be managed, administered and funded, and what the implications would be for accreditation and practice.

- In the family field, there is some sense that practice may have become over-regulated. Not only did each individual mediation organisation have its own programme and criteria for training, accreditation and practice, but two bodies sought a supervening regulatory role: the Law Society (for lawyer mediators) and the UK College of Family Mediators, which maintained a register of mediator members – however, membership was optional and not widely sought. The UK College reached a critical stage in 2007 when it ceased to function and its Director from 1999-2007, Hugh England, resigned and in a subsequent article outlined his views as to the reasons for the organisation's failure, which included "disarray: different groups, warring tribes" (referring to the different backgrounds – law and the voluntary sector with a 'social welfare' focus), disappointment, and a "suspicion or scepticism about large organisations". Also, the existence of a number of different mediation bodies with different interests inhibited cooperation.[7] On top of this, the Legal Aid Board/Legal Services Commission established its own criteria and system for accreditation of mediators undertaking publicly funded work. Arguably, this proliferation of regulation did not produce a commensurate enhancement of practice.
- The civil-commercial field too has a number of organisations with different membership and leadership, who while sharing a common interest in the development of mediation are also competitors. These bodies have different training programmes, different trainers, different Codes of Conduct, different accreditation criteria and procedures and CPD requirements. In seeking to agree on these, the likely outcome is adoption of the lowest common denominator, which does not satisfy those with higher standards and does not provide the high level of confidence that consumers may be entitled to expect. However, there may not be agreement as to the extent that "higher standards" are indeed helpful and appropriate for practitioners: this is part of the discussion that will be needed.
- Personality differences sometimes assert themselves. Referring to "Planet Family Mediation", Hugh England wrote that "it is a matter of obvious irony – more obvious perhaps to the visitor than to the inhabitants – that in their own affairs family mediators seem to have so little sensitivity or momentum towards consensus, when the very practice of family mediation is based upon its achievement." It is to be hoped that this state of affairs would not arise in the commercial mediation community.

[7] "Planet Family Mediation – A Visitor's Notes On A World Of Promise, Flaws And Faultlines" by Hugh England. See http://knapp-axmouth.com/ . The UK College of Family Mediators was reconstituted under a different name, the College of Mediators in 2008. Various of the functions of the UK College were taken over in 2007 by the Family Mediation Council: see http://www.familymediationcouncil.org.uk/ .

- Apart from organisations providing mediation, there is also a body of independent mediators who may have affiliations with provider bodies, but whose practices are primarily personal, and who do not necessarily mediate through provider bodies. Currently resources such as the National Mediation Helpline are not structured to reflect the practice of these independent practitioners; and there is a risk that regulation will similarly have inadequate regard for these independents – many of whom are very senior in the profession – in fixing regulatory mechanisms.
- There is also some mistrust about the ability of any organisation to manage regulation effectively, fairly and economically. Who are the people who will monitor practice, how will they do so, what experience do they have of the demands of highly complex work, how will they impose their judgment on those with extensive personal experience? Who will fund the expensive machinery needed to enforce regulatory compliance? These and other concerns will need to be articulated and addressed.
- Attempts have been made in the civil-commercial mediation world to coordinate the regulation of mediators. The Civil Mediation Council (CMC) was initially not intended or perceived as a regulatory body, but it has taken steps in that direction. The International Mediation Institute is seeking to go down this route on an international basis. Neither has attracted a substantial proportion of the commercial mediation population. Individual mediation bodies who might seek to do this face the problem that other ADR bodies might not support unilateral initiatives. What is it that mediators want – or don't want – in prospective regulatory organisations? Some complex research may be needed.
- If the mediation profession cannot organise its own regulation, might some outside body – governmentally appointed perhaps – step in and do so? Should this not be a strong incentive to mediators to "get their act together"?

CHALLENGES AND OPPORTUNITIES

The Chartered Institute's 2010 seminar topic necessarily involves an exploration of communication with the public and the legal profession, the establishment and maintenance of standards, and elements of marketing.

It would however be a pity if it were limited to that narrow ambit. This is an opportunity for mediators to widen their viewpoint of mediation and to consider how the process can be moved forward to another stage. It also allows mediators to take a long, hard view of the process from a sceptical vantage point – that of parties who trust neither the other side nor a process perceived by some as providing compromise rather than justice, or that of litigators who may see the process as challenging their ability to manage their cases effectively.

The litigation perspective

At an academic level, criticism of ADR goes back quite a long way. One of the primary concerns about the use of mediation is that it places compromise ahead of justice. US professor Owen Fiss wrote an essay *Against Settlement* in 1984, arguing that settlement was "a capitulation to the conditions of mass society and should be neither encouraged nor praised….parties might settle while leaving justice undone."[8] These views have engendered considerable debate, both for and against, and are to some extent mirrored in the more recent views of Professor Dame Hazel Genn, who said in 2008 that "mediation is not about just settlement, It is just about settlement".[9]

These views may be frustrating for those practitioners who have had extensive personal experience of the value of mediated settlements and the acknowledgments received from people who were hugely appreciative of having resolved their dispute while avoiding the stress, uncertainty and risks, costs and delay of going to trial, and in some cases the unwanted publicity. However, in the context of creating confidence in mediation, it is vital to understand this point of view, as well as the perspective of the litigation lawyers who are primarily responsible for achieving the best outcome for their clients.

US mediator Robert Benjamin has written about the Judeo-Christian resistance to the concept of compromise. There is a sense that processes must rather favour justice. John Wayne, he says, does not ride into town with his guns blazing crying "I've come to seek compromise!"[10] He writes that "fighting has the edge over negotiation as the first inclination of most people when faced with conflict. Our human brain chemistry lubricates the preference for warfare and the use of force, while negotiation, by contrast, requires a willed, determined and conscious effort….And, those who negotiate or mediate conflict are not left untainted by the suspicion of the process. While they often like to think of themselves as "peacemakers" and consider their work noble, few others see them that way. They are more likely to be cast ignobly as appeasers, who are weak, and sometimes even immoral and cowardly."[11]

Some of the responses to the growth of ADR, both generally and in the specific context of *Halsey*, indicate that litigation lawyers are not universally supportive of the development of mediation. This is not because they perceive ADR as a threat to their income, although for a few there is probably some element of that, but rather because they genuinely believe that

[8] Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075, 1085 (1984).

[9] December 2008. See the *Law Society's Gazette* referring to Professor Genn's Hamlyn lecture: http://www.lawgazette.co.uk/opinion/joshua-rozenberg/dame-hazel-genn-warns-039downgrading039-civil-justice

[10] "Negotiation and Evil: The Sources of Religious and Moral Resistance to the Settlement of Conflicts." Robert D. Benjamin, *Mediation Quarterly*, vol. 15, no. 3, Spring 1998. Jossey-Bass Publishers, San Francisco, Calif.

[11] See Benjamin, "The Dirty, Risky Business of Negotiation: Ideology and the Risk of Appeasement" June 2008 at http://www.mediate.com//articles/benjaminappeasement.cfm.

their clients will be better served by what they offer: pursuing the case with vigour and either running a successful trial and/or taking a strong line in negotiations. The following are some of the practical reasons for reservations about the growth of ADR:

- Mediation and other forms of ADR are not necessarily right for every case. *Halsey* brought a greater sense of realism into the line of cases by recognising this and providing criteria for assessing the relevance of ADR to each case.[12]
- Mediation is expensive (not just the cost of the mediator and any provider organisation, but the lawyers attending) and adds to the cost burden if it does not result in settlement.
- Compulsion to mediate would result in a waste of resources and unnecessary delay as reluctant parties and/or their lawyers are likely to go through the motions without a genuine intention to settle.[13]
- ADR may be seen by some claimants as a way to gain something out of a hopeless case on the basis that there has to be some compromise; it is perceived as improper that a party completely "in the right" could nevertheless be penalised for refusing to negotiate.[14]
- Parties are entitled to have their cases decided by the court without being pressed to compromise: this is a fundamental right especially where there are issues of principle involved – and the judges' role is to make this decision.

This is undoubtedly not comprehensive, but should give a strong flavour of the nature of the reservations about ADR, even among some supporters.

Concluding thoughts and summary

Given the broad issues raised in this paper, creating confidence in mediators and the process perhaps involves addressing challenging as well as practical aspects and may include the following matters:

- Mediation is a hugely valuable resource but it is not a panacea and we should adopt a critical approach to its use. At present the *Halsey* criteria may guide us as to suitability:

[12] In fact, the *Halsey* judgment advanced ADR by stipulating that "the value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR" and by introducing criteria for assessing its relevance to individual cases. These criteria go a long way to meeting the criticism of ADR voiced by Professor Fiss and others, that mediation and other ADR processes are not necessarily suitable for all cases.

[13] There is also an argument that compulsion to mediate might infringe Article 6 of the European Convention on Human Rights, and indeed this was a view expressed by the Court in *Halsey* though this was not fully argued and definitively decided. The issue of Article 6 was raised by one of the counsel of his own volition and had not been considered by the Law Society, whose paper was adopted by the Court: this issue remains to be fully considered, argued and decided. It does not seem likely that the requirement to mediate as a step in the legal process could be properly construed as an infringing obstruction on parties' right of access to the court.

[14] Of course, parties who feel that they are in a very strong position can use the mediation process to bring that reality home to the other side without making significant concessions, but taking a view on discounting risk.

perhaps we can sharpen and develop these so that parties and the legal profession can have better guidance as to the appropriateness and timing of use of mediation.[15]

- We need not feel too diffident about recognising the extent of positive acceptance of mediation and ADR over just a couple of decades. There is a continuing run of judgments supporting their use, government has given an "ADR Pledge", procedural protocols and court guides provide for mediation and ADR to be used, there are thousands of trained mediators (in all sectors) and dozens of provider organisations, solicitors and barristers have widely embraced the process and the concept is now in the public's awareness and field of vision. Rather than being unduly concerned about "creating" confidence we might want to think about further "enhancing" confidence, and establishing the right framework and conditions for the process to be more widely used.
- Alongside this, we should recognise that mediation is a partner of litigation rather than a competitor; and more importantly, we should not present litigation as some sort of failure or threat: on the contrary, these are symbiotic dispute resolution processes and mediation would not be effective in most cases without the backstop of litigation or some form of adjudication. Mediation takes place "in the shadow of the law".[16] A mutuality of respect is called for. The reservations of litigators need to be understood.
- How are genuine and sometimes deeply felt differences about the merits of the dispute and issues of fairness and justice addressed in the mediation? May it sometimes be appropriate to have some available structure apart from formal opening statements?
- We need as a profession and as individual mediators to be clearer about our attitudes and approaches towards evaluation and what it means. This is a difficult issue because of the range of views on it, the blurry nature of the subject and its implications; but perhaps it is now time to discuss and address it.
- Our toolkit of resources needs ideally to accommodate a range of ways of working, including preliminary meetings, single block substantive sessions, series of meetings, separate caucuses and joint meetings, virtual meetings, e-mail and other forms of communication. Our models of working may need re-examination to see whether and how they may perhaps be enhanced.

[15] Briefly, the *Halsey* factors which indicate whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.

[16] Cf Mnookin and Kornhauser "Bargaining in the Shadow of the Law, The Case of Divorce" 88 YLJ 950 (1979)

- Mediators may sometimes have greater opportunities to be creative and to take a wider view than the narrower constraints of litigators, who generally have to manage a large caseload and in each case to represent one viewpoint.[17] To enhance this mode of working, we should seek to widen our understanding of human behaviour,[18] develop awareness of the unconscious and irrational forces that motivate people in their decision-making, learn why some people are "difficult" and what underlies high conflict and what strategies may be effective in dealing with such situations, and see how developments in neuroscience have enhanced our understanding of behaviour patterns including those involving conflict.[19]
- Perhaps we should maintain open minds about the possibility of mediation becoming a mandatory step in the litigation process. This falls outside the scope of this paper and would certainly warrant a seminar and discussion in its own right, with pros and cons immediately discernible. However, the argument for mediation first needs to be won in the hearts and minds of those in the front line.

These are exciting and challenging times with possibilities for the further development of ADR processes especially mediation, alongside adjudicatory processes including litigation. But we cannot and should not expect this to fall into our laps. Mediators need to show that the process is effective and responsive and that they are really listening.

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[17] Edward de Bono, who coined the term "lateral thinking" in his book of that name, refers to the need to have a third way of resolving conflicts, apart from fight/litigate and negotiate/bargain. He refers to creating a "design idiom" which "demands a third party that can look at the situation from the third party angle": *Conflicts: A better way to resolve them* Penguin 1985. He describes creativity as "a key part of the design process".

[18] As indeed a number of mediators do and have written about including for example Paul Randolph in his and the late Freddie Strasser's book: *Mediation: A Psychological Insight into Conflict Resolution* Continuum International Publishing 2004; Robert Benjamin in many of his writings – see his varied articles at http://www.rbenjamin.com/pg226.cfm including "The Joy Of Impasse: The Neuroscience Of 'Insight' And Creative Problem Solving" (February 2009); and the book and DVD co-written by the author of this paper: *Managing Difficult Divorce Relationships: A multimedia training programme for family lawyers* by Henry Brown, Neil Dawson & Brenda McHugh, Resolution 2006.

[19] There are many books on these subjects, explaining for example the power and limitations of intuition, the extent that irrationality may trump rational decision-making and the management of "difficult" people. These topics will also be included in the forthcoming 3rd edition of the work co-written by the author of this paper: Brown & Marriott's *ADR Principles and Practice* (Sweet & Maxwell).