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Discussion

The Law of Unintended Consequences, or Repeated Patterns?

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About 2,700 years ago the Etruscans started building the city of Rome. Originally emigrants from famine in their homelands, they brought with them a wide range of skills in engineering, medicine, divining and the plastic arts. Their understanding of medicine and health prompted their ingenuity in designing drainage and water delivery. They favoured team work, collaboration and strong alliances and were keen therapists and diviners. For a time the Etruscans and Romans coexisted, with the Romans adopting many of the Etruscan skills but not the beliefs or understanding that underpinned them which the Romans considered superstitious nonsense. The Etruscans were finally absorbed by their Roman neighbours and their art and beliefs were promptly discarded; their practical skills, however, were adopted and for a long time considered Roman and not Etruscan.

You might be forgiven for thinking that I am about to relate this story to the potential waning of litigation in favour of mediation but in fact the last thing I hope for is the decline of effective litigation. It is an important part of a democratic society. I wish to propose something else: that the intangible strengths, the artistry and magic of mediation, the very strengths that are at the heart of its success, are at risk of being discarded or marginalised in favour of pragmatic, practical and 'measurable' strengths.

Ten years ago, when I did my training, the legal profession was cynical about mediation. Today mediation is viewed, for the most part, as an important dispute resolution skill by lawyers. We are probably at the co-existence part of the cycle. For those of us who have spent many hours providing awareness seminars to demonstrate the benefits of mediation, this is our finest hour! We focused on tangible benefits such as cost and time savings. In our marketing we talked about an alternative not a complementary process and we didn't mention psychology for fear of perpetuating the labels therapy or touchy-feely; we promoted faster, cheaper, more efficient and successful resolution of commercial disputes which were, after all, a fact of life.

Amongst those practical and measureable benefits we slipped in our observations about the extraordinary power of an apology and the excitement of people taking charge of their own problems and designing their own solutions, which were often better than they could have imagined. Despite the extraordinarily consistent statistic of 8 out of 10 mediations settling on the day or shortly afterwards it took hard work and skill to bring people to the mediation table. Those mediation statistics were achieved by people who believed that the final decision lay with the parties, that a mediator was non-judgmental and impartial and that mediation had a potential to transform the business lives and working relationships of the parties with lasting and positive consequences. For the most part the current enthusiasm and acceptance of mediation is very good news indeed: support from the courts, many more lawyers talking with their clients about using mediation much earlier in a dispute and the uncertainty of cost consequences where mediation is not properly considered as an option. I am, however, reminded of the ancient proverb "be careful what you wish for, lest you get it!" or alternatively the Law of Unintended Consequences!

I say this because I sense most strongly that the pendulum is about to swing past the point of balance. I wonder if others have noticed that? I hear my mediator colleagues debate the virtues of arb-med, describing how the parties want mediators to be evaluative, the

challenges for mediators on deciding if they should direct the parties towards a settlement figure, placing settlements in envelopes because the parties want a decision having paid £x thousands to hold the mediation. All these developments are apparently in response to the market and the consumer. I cannot deny that when these versions of mediation are practised by very experienced mediators in certain circumstances they can be appropriate and effective. However, the practice requires great subtlety and skill. I have seen it done very badly. Parties have told me that they have experience of it being done very badly, too early and that it felt like “bullying”.

The trend raises important questions: who is the consumer exactly? And what are the underlying beliefs influencing the acceptance of the trend? Why would a party want to swap one kind of judgment for another? Is it simply that they get to choose the “judge” rather than have one imposed on them? Is it a question of more certainty, more control, perhaps? The acceptance of the trend also suggests a devaluation of the extraordinary skills, qualities and attributes that experienced (particularly non-lawyer) mediators develop and use to get out of “deadlock” and achieve settlement. From my research those are principally about building rapport, stamina, optimism, creativity and intelligence. When I ask my colleagues (mediators and lawyers) they tell me “parties are asking for mediators to be more evaluative”. Are they? Since most parties are first timers how would they know to ask for that?

Eighteen months ago I became curious about this emerging trend. My provisional research revealed an interesting phenomenon. I found about 40 adjectives that parties use to describe their positive experiences of mediation in their feedback. Mediators helpfully post a lot of feedback on their web sites. Of those 40 words only 4 are concerned with cost, speed or expert knowledge and none refer to anything like adjudication or evaluation. The skills and qualities that are valued by parties who have experienced mediation are essentially the intangible human qualities of, dare I say it, compassionate *people*. For example, trustworthiness, gravitas, patience, confidence, even-handedness, impartiality, optimism, persistence, understanding, imagination, empathetic, instinctive and most interestingly “quick on the uptake”. And the most frequently mentioned of these is optimism . . .

I was surprised and my surprise raised more questions. Would mediators and parties corroborate the stories and perceptions that were becoming common currency? Did they value the intangible strengths identified in the preliminary research? Did anyone still value the potential therapeutic benefits we talked about in the early days, albeit *sotto voce*? For those of you who might be a little uncomfortable with the idea of mediation being therapeutic, your comfort level might be further challenged by the following description of the therapeutic process from R.D. Laing, a psychiatrist specialising in the study of psychosis and schizophrenia. Laing was regarded as anti-psychiatry for most of his career although he denied it.

In *Dialogue with R.D. Laing*¹ Evans writes:

“Laing noted that the term therapist is derived from *theraps*, a Greek word meaning ‘attendant’. Rather than intervene, dispute the individual’s claims or numb the fears with medication, Laing observed and provided . . . empathy so that he could eventually reconstruct the individual’s situation and understand the fears being defended against. No matter how meaningless, odd, or even destructive the schizophrenic’s behaviors may be, their aim is to save what is left of his/her being. Although often misguided, they are attempts at self-survival.”

Does anyone else hear echoes of the early principles of mediation? I am well known for my advocacy of the therapeutic effect of mediation so you may called me biased. However, the potential for bias makes me even more critical of my observations and, try as I may, I do not see therapeutic potential as incompatible with a good process and a pragmatic outcome.

¹ R. Evans, *Dialogue with RD Laing* (New York, Praeger, 1976), pp.80 and 141.

Nor with speed, reduced costs or efficiency. On the contrary. When the underlying belief that the role of a mediator was to be “attendant” to the issues, it worked rather well.

I do believe that there is a vital interdependence to be nurtured between the legal process and the mediation process and that neither should become the other. They have much to offer in making each more effective in meeting society’s needs. I am however, deeply uncomfortable with mediators offering “judgments” notwithstanding the parties don’t have to agree to abide by them. The fact that they are not obliged to accept them is for me a rather weak salve, because it dismisses the incredible influence mediators can have whether they know it or not, and particularly ignores the powerful, unspoken influence of mediators who are better known as a barrister or a judge. You simply do not lose your past life when you take on a new title. And to offer judgments requires a different skill set and competency and lots of experience. I see the change as an indicator or symptom of a more significant shift in the way mediators practise mediation which will eventually change the profile of practising mediators and reduce the breadth, depth and variety of the profession. Over the last 12 months I have interviewed a significant number of mediators and “serial” mediation users. Their combined experience of mediations is close to 2,000 cases. I will be publishing the full results later this year. In the meantime, I can share with you that I am constantly surprised by the data. The evidence, which is indeed qualitative, would suggest that someone may have offered an observation that started a rumour which became myth and will become “truth” if we do not take the opportunity to try and understand the value of attributes and behaviours which are hard to measure and then actively protect them until we understand why they work.

If the trend continues towards an even greater degree of adjudication then the very things that make mediation work well will be filtered out and the people who do it well will either be “shaped up” into competent mediators which appeal to a structured and risk-averse culture where skills are counted and boxes ticked, or they will be excluded. Someone in authority will become nervous (and perhaps this has already happened) that some mediators are making judgments with no supervision or proven ability. It is then only a short step to regulating the profession in the belief that it will control the risks and protect the consumer. I am convinced that it will do neither because I do not believe we have the appropriate capabilities to deal with regulation of a profession where most of the *skills* cannot be measured. In my experience “if you can’t measure it, it doesn’t count.” My research indicates that just 10 per cent of what makes an excellent and effective mediator can be measured. The balance of 90 per cent, the intangible qualities and attributes, is highly valued by the parties and their advisers in infinitely variable mixes and flexible intensity and cannot be measured in a conventional way.

When it comes down to a simple assessment of why disputes happen, there are three key features: someone’s behaviour was unacceptable to someone else; someone broke their word either unintentionally or because it no longer suited them to keep it; someone is unwilling or unable to take their share of responsibility or continue with their undertakings. The underlying emotion is survival or fear of not surviving and the antidote to fear is not certainty but courage. Mediation is a people process and people are messy and unpredictable and frequently “schizophrenic”. The things that parties and their advisers seem to value most about mediation are the flexibility and informality of the process. And perhaps *encouragement*?

What I see is a really exciting opportunity to continue in the same pioneering spirit that has ensured the development of mediation over the last 15 years: to do something differently. My preferred route would be to resist regulation per se and focus on selection and training of mediators which includes acknowledgment of the *therapeutic* element, (for that read “people skills”). I am motivated to propose this because of two important factors in my own work. First, I am a vocational mediator and extremely interested in maintaining the quality and variety of practising mediators within the profession. Secondly, a great part of my professional life has been spent dealing with competency-related issues and the way we value people. Somewhere in nearly every mediation I have mediated there has been a breach

of trust, and what is breach of trust if not a people issue? In many disputes there have been issues of competency of not feeling valued or a focus on performance indicators or targets. Indeed the way we measure, monitor and motivate people at the moment and the focus on performance makes far too many ill, as the rise in stress-related cases might confirm. There are more doctors, lawyers and other professionals in “therapy” or “retreat-ment” at London’s private clinics than you might imagine. On the other hand, all my mediator colleagues love their work. When I asked each of my interviewees what motivated them to become a mediator, all but one said a version of: “I just saw it as a better way.”

I would like to see the profession rise to the challenge of AIR (Alternative to Imposed Regulation) and do something differently once again. The opportunity is to design a form of regulation or management with a “lightness of touch” which is more about selecting and training people with a strong suit in intangible strengths. These are the ingredients for excellent and effective mediators. Our success in meeting this challenge would be a triumph not just for the mediation profession but in leading the way for professions generally. I have gathered some of the pieces of the jigsaw and we need to develop others.

When mediation was less established, those who chose to do the training did so because of personal motivations and often they had to pay for it themselves. There was an inbuilt self-selection process which worked well. Now that mediation is a desirable skill for the CV, many more are doing the training without the same analysis or personal investment. I am delighted that more are training. I believe that it is a unique and valuable life skill but I do see more and more who perhaps shouldn’t practise. So can we aspire to a form of regulation or management that reflects the spirit of the profession and keeps it focused on human skills, even if our measurement systems aren’t quite perfect yet? Or will we watch the pendulum swing and hope that when something is imposed on us it won’t affect us personally? I imagine the Etruscans might have an interesting point of view with the benefit of hindsight.