

Introduction

Mediation and Wholeness

This is a book about how conflict resolution can be done with grace and dignity and how this fits in with larger societal changes. It is written particularly for those people whose insight, passion, work, or interests lead them to seek more of mediation's potential for resolving complex, highly sensitive, or otherwise multifaceted disputes. You will learn how mediation is changing the way we do business around disputes and how to apply this simple, versatile, and powerful tool to matters touching your business, organizational, and family life. I will show you what I have learned about stumbling blocks and cultural traps, as well as how to select and use professionals such as lawyers and mediators. There are stories in this book of how mediation has touched people's lives and hearts and insight into how they allowed flow into their conflict resolution experiences. *Flow* is a dynamic that arises of its own accord and is characterized by what Martin Buber calls an "elemental togetherness." (Buber quoted in Isaacs, 1999, p. 403). Flow carries a unique fruitfulness, which brings healing and life to all who are touched by it. To taste flow is to participate in life itself. We will look at what is happening in the field of mediation from many perspectives. To me, it is an adventure.

At a conference on construction industry dispute resolution in the mid-1990s, European engineer Guenther Raberger observed, "Our civilization is like a bird with one wing, flying round and round in circles. The other wing is the Feminine. Without it, we cannot go anywhere" (G. Raberger, personal interview, Oct. 1994). What he perceived in Europe is also evident in many other places in the Western world: the end of "the way it has always been done" mentality.

"The way it has always been done" suggests a certainty that has less and less validity. It has its weaknesses; as Oliver Wendell Holmes

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once said, “There must be some better reason for a rule of law than that it’s always been done that way.” Yet at the same time, it has been a source of strength through stability. As our civilization loses its rigidity, it may lose stability until some small but critical mass of humans learns to seek mutual gain—seeing themselves as part of a community, a whole, rather than as completely separate individuals pursuing purely personal gain.

Mediation is the feminine face of dispute resolution. Mediation is not the cause but a product of significant changes in society, and it is the beneficiary of a trend away from confrontation toward problem solving and beyond to mutual respect and wider gain. There is widespread evidence that people do not lose their human characteristics when they become litigants—that they prefer processes in which they have an opportunity for choice and for significant participation, particularly a chance to tell their stories.¹ The mediation process satisfies this preference better than any other form of alternative dispute resolution (ADR), which is perhaps more aptly termed *appropriate dispute resolution*. It also has procedural integrity in the hands of dedicated practitioners. Nonetheless, the habits of *old-mind* lawyers, judges, and professional litigants have yielded slowly, so that many are unaware of the potential of mediation being trampled underfoot.

THE STRENGTH OF WEAKNESS

Mediation’s strengths look like weaknesses from the point of view of *old-mind thinking*, which sees adversarial process as the norm and everything else as the alternative. For example, from the perspective of the war paradigm, it looks weak to have a broad focus and

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acknowledge dependence on the consent and trust of the parties. Yet these are hallmarks of mediation’s strength. It is the strength of water rather than the more apparent strength of rock. Few dispute, upon reflection, that water vanquishes rock every time.

Understanding mediation’s true potential requires engaging *new mind*, a paradigm holding that mutual gain is desirable and

possible through mutual effort, even in the face of apparently insurmountable difficulties. Fortunately, it is not necessary to choose between these two approaches, the combative and the problem-solving transformative, for the choice is not lost. But it is a choice—"adversarial mediation" is a contradiction in terms. Use mediation to build enough trust so that litigants, their lawyers, and their experts may pierce the adversarial facade and confront the reality of their situation. Mediation is, by definition, facilitative.

Trust is the currency of social capital: the ability of people, groups, and organizations to work together for common purposes (Fukuyama, 1995). When trust is low, all manner of enforcement mechanisms and control mechanisms need to be in place. Imagine the collection machinery that would be required if most people in this country did not more or less willingly assess and pay their perceived fair share of taxes. Consider penitentiaries, where we house people at a cost exceeding that of putting a student through a private college. It is far easier to function in high-trust societies, such as Western democracies—to secure not only basic needs but also recognition as a respected and appreciated individual. Most of us would agree that recognition is a primary motivator of human beings in community (Bush and Folger, 1994). The prosperity and organizational structures of modern society are dependent upon this quality of recognition, of being seen (Fukuyama, 1992).

Our legal institutions are products of earlier times and served far lower-trust societies than those in Western democracies today. It is time for dispute resolution models to become appropriate to and supportive of higher-trust ways of being together in society. Social capital is a fragile thing, relatively easy to destroy and impossible to bring into being. It grows organically out of the culture, and once it is deeply impaired, it can take a very long time to regrow (Fukuyama, 1995).

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THE ROLE OF COURTS

Courts that see themselves in the business of dispute resolution rather than merely in the business of litigation are seeking to develop a balanced, user-friendly, and effective system of dispute

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management and resolution. Our society is in desperate need of more effective and appropriate means of shepherding to their final resolution the 95 percent of filed lawsuits that will never be tried. Lawyers and disputants need more humane and effective tools for resolving disputes. What will help most is a recognition of mediation as the principal resource for dealing with the majority of civil disputes that will be settled. Mediation needs to be accepted on its own terms, not remade in an adversarial model, as happens when old mind runs the process. After that, courts need only integrate case management tools with a vision of alternative dispute resolution. What is at stake is the vast power of mediation to heal the conflict, the combatants, and the community. That requires new mind.

The advent of modern mediation is working profound changes in our social system in ways we cannot yet even imagine. Thomas Stipanowich tells us that “a quiet revolution is occurring in America and throughout the industrialized world. It has to do with the way people perceive the controversies that affect them, and their involvement in the search for solutions” (Stipanowich, 1996, p. 65). So great is the change brought about by mediation that observers struggle for words to describe it. ADR pioneer Frank Sander speaks of mediation as “the sleeping giant [of dispute resolution]” (Reuben, 1996, p. 54) and notes the differences between it and trial and arbitration (Lewis, 1995).

Societal changes of this magnitude are so large that we cannot see the pattern developing until it is pretty much fully formed. The order, symmetry, and power of the movement is hidden, as with fractals—shapes irregular and fragmented in appearance that look like nothing at all, but when viewed with high magnification, are revealed to be breathtakingly ordered and powerful—so it is with large-scale social movements such as collaborative ways of being in the world, from which mediation flows.

When people want more involvement in their search for solutions to controversies that affect them, and those controversies are perceived as problems to be solved rather than as victories to be won, the whole social underpinning of civil litigation begins to give way. This may help account for the relative decline in both filings and in civil trials over the past ten to fifteen years (Ostrom and Kauder, 1998).

As Western societies move toward more collaborative processes, there is serious question as to whether courts and lawyers will remain at the center of civil dispute resolution. Their centrality today is based on control of civil litigation, which in a rapidly increasing number of jurisdictions is the source of a large number of referrals to mediation. If courts and lawyers abandon the illusion of exclusive control, they may remain center stage in dispute resolution, although instead of occupying this space exclusively, courts will share their space with communities and provide resources to enable them to act wisely in their own behalf (Stuart, 1996). And lawyers will share the stage with people from other disciplines. If they do share the stage, both the public and the legal profession will be well served (Toben, 1996; MacNaughton, 2000b).

THE ATTRACTION OF SELF-DETERMINATION

Mediation is in one sense old as well as new. Our tendency to resolve disputes on our own is a central characteristic of our Anglo-American heritage. From the most remote antecedents of our legal system, there is evidence of procedures that gave disputants some control over their destiny (Sanchez, 1996). Blood feuds and self-help were common. And a mere legal judgment—absent a willingness to comply—had its limitations. In Anglo-Saxon England, from the seventh to the mid-eleventh centuries, the third-party decision makers often persuaded the losing party to come to terms with the winning party, thus promoting reconciliation. This occurred *after* winner-take-all judgments were announced to the parties but *before* these judgments were finalized by oath swearing. Reparation amounts for personal injury were made expressly subject to negotiation (Sanchez, 1996).

Other parts of the world have long perceived the New World—the source of the current impetus toward mediation—as a model of people's ability to work together. This is characteristic of pioneer societies. Stories of how North American pioneers built villages and communities through helping each other with fellowship, hard work, and perseverance take a back seat to the shootout at the OK corral, but they are perhaps the greater part of the Western cultural heritage. It is in this grand tradition of the new-mind way that mediation moves most comfortably.

THE SEARCH FOR JUSTICE

Civil court resolutions by themselves do not provide a satisfactory example of justice. Justice does not mean getting the same result on the same facts in all or even most instances; and despite the assumed certainty, there is more flexibility in the application of law than generally appears.² Nor is popular culture very helpful; it espouses a view of justice that leaves compassion and mercy out of the equation.

Justice without compassion is the kind of justice one demands for the other person—one who is not us. The *other* is not us personally and is not among those we consider our kind. Societies do things to *others* they would never tolerate for their members—enslaving them, for example. Many believe that doers of evil deeds have taken themselves out of society, so that they become others, to be killed or treated inhumanely (in ways we would not want our kind treated) because we no longer relate to them as human beings. The restorative justice movement³ is acting on the recognition that others (those we treat as other) do not readily become productive citizens when they return to society. For our own wholeness, we need to give them a way to pay for their misdeeds that integrates them back into the mainstream, so that they have a stake in protecting it. In this way, they lose their otherness.

Archbishop Desmond Tutu has written passionately of the deep African philosophical underpinnings for the Truth & Reconciliation Commission. There is, he says,

a central feature of the African Weltanschauung (or worldview)—what we know as *ubuntu* in the Nguni group of languages, or *botho* in the Sotho languages. What is it that constrained so many to choose to forgive rather than to demand retribution, to be so magnanimous rather than wreaking vengeance? *Ubuntu* is very difficult to render into a Western language. It speaks of the very essence of being human. When we want to give high praise to someone we say ‘*Yu, u nobuntu*’ ‘Hey, he or she has *ubuntu*.’ This means they are generous, hospitable, friendly, caring, and compassionate. They share what they have. It also means my humanity is caught up, is inextricably bound up, in theirs.

We belong in a bundle of life. We say, ‘a person is a person through other people.’ It is not ‘I think therefore I am.’ It says

rather: 'I am human because I belong.' I participate, I share. A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good; for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are [Tutu, 1999, p. 31].

In the great traditions of Western civilization, justice without mercy and compassion is no justice at all. Justice is symbolized by a blindfolded woman holding a scale and a sword. It is no accident that Justice is portrayed as a woman. Symbolically, the archetypal feminine speaks of whole-seeing and reason with wisdom (van der Post, 1994). Whole-seeing reads the hearts of those involved and is not limited to hearing their words. The blindfold aids this inner vision, this understanding.

Laurens van der Post spoke eloquently of our times as the period in recorded history when for the first time Sophia, the feminine archetype of wisdom, is emerging. He attributes much of the suffering of this century, particularly World War II and its antecedents, to the dominance of the Siegfried archetype, the heroic but immature masculine that disdains and rudely uses the feminine. Without Sophia, he says, we have no wisdom, and, without the feminine, no balance.

The scale of justice that Lady Justice holds represents the balancing of inner and outer powers, masculine and feminine powers, and the interests of the individual and society. The sword that Justice carries at rest represents the sword of discrimination and discernment, not the sword of vengeance (Fontana, 1993).

What does justice mean in the context of mediation? The law is only one factor that parties consider in evaluating settlement options. If mediation is about self-determination and if the affected participants reach an accommodation that works for them (absent a lack of capacity or other taint), why would a court question it?⁴ Carrie Menkel-Meadow points out that "people may choose out-of-court settlement precisely because legislatively enacted legal solutions do not meet the underlying needs or interests of parties in particular cases" (1995, p. 2676).

Perhaps we are looking for justice in the wrong place. We do not speak of justice in referring to what people do to or for themselves.

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Justice has meaning only in a more public context—when people are done unto or acted upon, particularly when the one acted upon is required to submit. Protection of the mediation process is far more critical to the realization of mediation's potential than to the justice of the mediated agreement in the eyes of a third party.

As relevant to institutionally fostered mediation, justice means that mediation to which the parties are committed must not only be seen as fair and just but must be so in fact. This is no invitation for courts to control the process or the providers, for fairness and justice lie in the eyes of the users. As they are given options and choices about the appropriate dispute resolution process and the provider, justice in this sense will happen automatically.

POWER

Old mind thinks of power in terms of authority and compulsion. New mind knows better. Power is the ability to get results. There are two contending definitions of power vying for prominence in our society: *power over*, which wins people's hands and uses its resources to maintain control over what people do, and *power with*, which wins people's hearts and uses its resources to carry out a common purpose. Supporters of either view do not believe that the other side of the debate refers to power at all. The principal tools of power over are fear and authority; the principal tools of power with are reasoning, dialogue, leadership, and enthusiasm.⁵ Compared to power with, power over is limited, yet power with requires a more broadly defined self-interest, and many people still believe that those who seek power with are either weak or not grounded in reality.

Courts too are caught in the debate over what power means, for power is their lifeblood. Courts are constrained as long as all they can do is award money damages, order, and enjoin. For all of the social ills courts successfully have addressed, it seems they may be approaching the limit. In a society whose citizens are raising complex problems affecting relationships far beyond those before the court, the limited remedies available to courts are grossly inadequate.⁶ Monetary and injunctive relief fall far short of the broad range of remedies available when the discussion broadens into a problem-solving process and the parties fashion their own solutions

(Menkel-Meadow, 1984). The answer is not broader legal remedies but more appropriate processes for addressing problems that will bring out the best in lawyers and disputants. It is no secret that the adversary system often brings out the worst in advocates and litigants. And, in fact, it can be argued that the system is *designed* to bring out the worst (Resnik, 1995).

It takes negotiators and mediators to bring power with into the equation. And there is considerable evidence that power with is assuming primacy both at home and abroad. *Soft power* attracts others to want what you want rather than using force to get them to do what they do not want to do (Jaffe, 1997). Today, soft power is in—from international affairs, to rearing children, training horses, farming, and ranching. On a global scale, the United States's soft power is replacing force, the traditional currency of clout. America's economic and cultural hegemony in the world contrasts starkly with the tiny, withered fruits of would-be conquerors (Jaffe, 1997).

The days of “come home with your shield or on it” are over. The twentieth century, for all of its wars, may have demonstrated once and for all the futility of war and conquest. At the same time, it points to the wealth that is possible with an open society and a nation of generous people. Like mediation and other collaborative processes, soft power rests on a broad sense of self-interest, visible in the remarkable post-World War II Marshall Plan and America's comparatively wide-open society, unique in recorded history. In the light of this sea change in perception of what is good and what is effective, litigation's flaws and deficits stand out starkly.

In the twenty-first century, mediation and other collaborative processes such as partnering will become the tools of choice in conflict management. Partnering is an approach to construction and other projects in which owner, contractor, subcontractors, and the design team sit down and work out an agreement in advance to provide mechanisms for early conflict management and to minimize the incentives and opportunities for disruptions. (See Chapters Thirteen and Sixteen.) Lawyers will either be on board or be swept aside (Toben, 1996). The way in which courts and the legal profession respond to mediation and other collaborative conflict management processes will determine the degree to which they participate in what is more a birthing process than a titanic struggle.

A NEW APPRECIATION OF BALANCE

The truths about the nature of the problem-solving/transformational universe are reflected in the following rules of life, expressed by Tom Frantzen at a 1998 conference on holistic management in agriculture:

1. Everything is related to everything else.
2. Water always runs downhill.
3. Nature always laughs last.

These attitudes—such as *ubuntu*, described by Archbishop Desmond Tutu—are essentially inconsistent with a zero-sum approach. When the legal community adopts them, it moves away from an adversarial system into a fertile, diverse universe like nature's own. The world of courts and lawyers becomes at once generative and highly relevant to a society of people far more willing than they may have appeared in the historical past to take responsibility for constructive resolution of conflict.

A problem-solving/transformational approach, unlike the adversarial approach, is naturally balanced. The balance required in dispute resolution is more concerned with the mutual good of the parties. Historically, the adversarial process has focused on winners and losers and assumed that one wins and the other loses. It has tended to produce more losers than winners, because of transaction costs. A wiser approach incorporates the feminine elements in the search for mutually and more broadly beneficial solutions. This too can become a self-fulfilling prophecy. When self-interest is defined more broadly, the adoption of cooperative attitudes and collaborative processes will follow.

There is increasing evidence, from international affairs to the advent of partnering to archaeology from the prehistoric period, that collaborative processes are more consistent with human nature than adversarial ones. Consider the steps that have been taken to loosen the stranglehold of identity-based conflicts that present themselves as ideological, ethnic, and religious wars (Rothman, 1997). From Northern Ireland, to the Middle East, to the Berlin Wall, huge progress has been made, even if the steps taken to keep the peace have been faltering at times. William Ury and Raine Eisler, in their separate books, point out that for tens of

thousands of years, until roughly the last eight thousand, there was no evidence of the glorification of combat, conquest, wars and warriors (Eisler, 1991; Ury, 1999).

RESTORATION OF BALANCE

The engineer's comment about civilization being like a bird with one wing calls to mind what Joseph Campbell called the central myth of Western civilization. In the quest for the Holy Grail, brave knights battled dragons and all manner of evil, finding no rest in their search. But the Grail, a vessel filled with blood, is none other than the sacred feminine. (Appendix E elaborates on the qualities of the sacred feminine.) The Grail myth tells us that what we have been searching for throughout the history of Western civilization is *balance* of the feminine with the masculine. The feminine is part of all human beings, and when we fail to respect its qualities, such as its intuitive, relational, nurturing, indirect, and compassionate attributes, we deny part of ourselves, whatever our gender. Until we embrace this fundamental part of our nature, we are hopelessly and destructively out of balance.

The filters of the dominant culture distort both our lives and how we perceive what is real and important in the world. For several thousand years, we have accepted that a world deprived of the deep feminine and respect for gentleness is just a reflection of the way things are. Our parks are decorated with figures of warriors and conquerors. War metaphors define us in many arenas, from health care to conflict resolution to religion. These are old-mind ways of thinking that are beginning to yield to this sea change in paradigm that we are now experiencing.

There seems to be an inherent balance between self-interest and interest in the whole community, within the human psyche. How these intertwine in a mature and healthy psyche is shown in Spiral Dynamics,TM a model of human psychological evolution and personality states. Spiral Dynamics offers a whole new model of human nature to explain why we are as we are and what the development of the whole person is really about. Beck and Cowan demonstrate that:

1. Human nature has the built-in ability to change as the conditions of existence change, thus forming new systems;

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2. When a new level is activated, we change our view of the world and our rules for living to adapt;
3. We live in a potentially open system of values with an infinite number of modes of living available to us; and
4. We can respond positively only to messages and other inputs that are appropriate to our current worldview [1996, p. 29].

The spiral ascends alternatively through me-views (survival, power, achievement, and flexibility) and we-views (kinship, purpose, consent, and globalism). It is not value driven: each level can be positive or negative; both the street gang leader and the great warrior draw heavily on the power level but in different ways. From the perspective of Spiral Dynamics, it appears that self-interest and societal interest was never an either-or proposition. The more highly evolved a person is—the more of these levels he or she has passed through—the richer and deeper the spiritual resources he or she has to draw on. The term *spiritual* is used here in a nonreligious sense to indicate the ability to function with a high level of refinement in thought, feeling, and intuition.

Spiral Dynamics offers research evidence to support those who would be hopeful about the ability of humans to make the best of changed circumstances—such as, the lessened interest in adversarial procedures and the movement toward taking greater responsibility for the resolution of conflict in which one is involved. It also provides a cautionary insight: people can respond positively *only* to messages and other inputs that are appropriate to their current worldview. Part of the purpose of this book is to support a broader worldview around conflict resolution and to woo those who still do not see the point.

This broader worldview is the *ubuntu*, holding that “a person is a person through other people.” It appears in human affairs as the difference between cursing your neighbors because their children and their dogs make noise and taking them raspberries from your overloaded vines; as the difference between allowing time for a person being deposed—questioned by a lawyer under oath—to rest when fatigue sets in and insisting on boring ahead with the next fifty pages of questions. Generosity produces wealth: the neighbor gives you sacks of apples from his tree, and you have apple pies and apple crisps to share all up and down the street. A refreshed wit-

ness can better recall those things that might have been missed had questioning continued unabated. More reliable information is provided, and wasteful arguments are avoided later on. Wholeness expresses itself in the larger world as participation in life and community as you effortlessly walk your talk in your experience around conflict and in everyday life. When there is wholeness, there will not be a split between what you most value and what you do.

The old mind does not think. In words attributed to Peter Garrett,⁷ “what mostly passes for thinking is thoughting—the replaying of old tapes involves no new thinking at all.” It creates a powerful inertia that resists change tenaciously. It is embedded in institutions such as the formal justice system (Stuart, 1998) and in cultures, such as the lawyer culture, discussed in Chapter Six. And it is reflected in governmental and organizational persistence in following policies long recognized to be unneeded and even downright harmful to the objectives they allegedly support (Tuchman, 1992).

The new mind treasures wholeness and looks for ways of implementing it. This has not been lost on jurists, some of whom are among those engaged in the search, recognizing the limitations of justice as it has been pursued in the courts. Judge Barry D. Stuart of the Yukon Territorial Court writes this about criminal justice issues:

Current bureaucratic dominance over community justice issues suggests a profound mistrust of local communities to be reasonable, prudent or knowledgeable about acting in their best interests. An anti-democratic, paternalistic attitude underlines most Justice policies, and denies the evolution of community-based partnerships that advance the collective best interests of the community, the justice agencies, the offenders and the victims [Stuart, 1998, p. 108].

Taking this open-minded perspective into the mediation field, New Zealand lawyer Roger Chapman wrote:

It is not merely the outcome of the dispute which must meet the client’s needs and interests; it is just as important that the process by which it is reached should be felt by the client to be appropriate and satisfying. However good the result may be when viewed in legal terms, the client will probably feel some dissatisfaction if it was arrived at by a process which the client did not understand; or if the client was unable to participate as fully as he or she wished;

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or if the client did not have an adequate opportunity to explain his or her perspective on the problem and know that it had been heard; or if the cost was too high; or if the process endangered important relationships [Chapman, 1996, pp. 186, 187].

Another example is the recent experience of Maryland, which in the hallowed precincts of the chief judge's office, decided to consider how mediation and other collaborative processes might best be implemented in that state. When all was said and done, public discussions, which ultimately involved over seven hundred participants and every major institution—the courts, law enforcement, juvenile and family service agencies, the educational system—came up with one of the most far-reaching charters for the role of collaborative dispute resolution in the twenty-first century (see Chapter Sixteen).

In a very real sense, conflict resolution is everyone's business. After hundreds of years of moving disputants further and further apart from each other and making their exchanges increasingly ritualized and formal, the tide has turned. In Native American cultures, when one is sick, the community comes together for healing not just of the sick one but of the entire community. When the sick one is healed, the community is healed. Conflict, by analogy, is not something that happens just to one or another. The whole society is affected, and it is affected by how that conflict is dealt with.

Mediation, restorative justice, peacemaking circles, partnering, consensus building, and facilitation are all tools for allowing our conflict resolution systems to get back into balance. There is an intimacy and an accountability that allows human imperfections to be self-correcting and problems to dissolve. This book is about how these threads weave together to enable each one of us to participate in the design and development of dispute resolution systems worth having.



The Mediation Field Guide



