What Usually Happens in My Mediations

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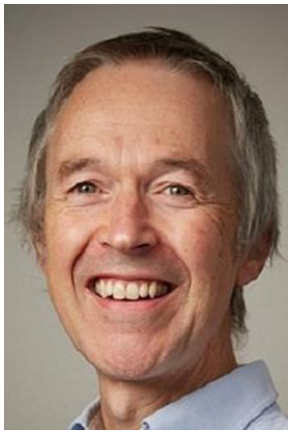

Charlie Irvine's thirty-year career as a mediator has included family, workplace, commercial and complaints against lawyers. He has an academic interest in the field and runs the LLM / MSc Programme in Mediation and Conflict Resolution at University of Strathclyde, Glasgow, Scotland. He is writing up a doctoral study on the justice thinking of unrepresented people in court-referred mediation. In the account below, he describes "what usually happens" when he mediates complaints against legal practitioners under a Scottish statutory scheme, though he remains wary of calling it a model. This exercise has reminded him of the values and principles driving the myriad "moves" mediators make.

John Lande set some of us the challenge of briefly describing our mediation system. This presents me with a problem. I rather like mediation models and get a certain intellectual satisfaction from trying to understand them. But I'm not very good at following them. Something always comes up. Real-world mediating constantly poses the question: *"Do I follow the model or do what seems right for these people in this moment?"* If I'm honest, the model usually goes out the window.

Having said that, if you do something often enough, patterns begin to emerge. Some things happen before other things. Some moves work and some fail. I've also developed a collection of mottos and "mini-speeches," useful heuristics for when the going gets tough. I probably have a style, though perhaps my clients would be the best people to ask about that. In this piece, I simply try to describe what usually happens.

My Contributions to My Mediations

My Background, Training and Experience

I come from Glasgow, Scotland, and I was a professional musician before I became a mediator. Being a musician may not seem as the obvious preparation for a career as a mediator, but anyone who has watched Spinal Tap and numerous other rock'n'roll biopics knows that bands can be little nests of interpersonal conflict. They're also a good training ground in deals and business. I recall our manager, Miles Copeland (who also managed The Police), telling us we couldn't be socialists because bands are entrepreneurs.

Sadly, world domination didn't follow. Keen to avoid my original career of law, I recalled a radio interview from the early 1980s. The speaker captivated me by describing a "better way" of handling divorce called family conciliation. So, in 1992, I looked it up in the phonebook (remember them?) and called the number. A nice

chap, who later became a friend and colleague, invited me in for chat and soon I joined Scotland's national family mediation training course.

It was reasonably terrifying. My fellow trainees were mostly female social workers with an endless supply of good questions. I began as a solo mediator and then an intake worker before I did a spell as the manager of the service that covered nearly half of Scotland's population. I loved the work, especially intake. It gave me the privilege of hearing both sides of family disputes. I must have spoken to more than a thousand individuals. One of my mediation mottos emerged from this experience: everybody's story makes sense to them. (I discuss another impact of this phenomenon in this post.)

After a few years, I started to question "the model" I was taught and I wanted to learn more about theory. Not so much about how it works as why it works. So I enrolled in the MSc (Master of Science) Programme in Conflict Resolution and Mediation Studies at Birkbeck University of London, a life-changing decision. Within six months, I gave up my job to work as a mediator. After graduating, I began developing my own master's programme with University of Strathclyde.

Since 2010, I've balanced running the LLM / MSc in Programme in Mediation and Conflict Resolution with mediation practice. Devising and teaching a postgrad programme is an education in itself. I've had to think about how to teach mediation to people who are not like me and who come from diverse cultures and speak different languages. This fuelled my wariness of models as I learned that what works for me can be meaningless to someone else. Conversely, tips and hints that I simply can't absorb sometimes are the key to a student's understanding.

Two other experiences have enriched my practice: mediation competitions and a mediation clinic. I started taking students to UK competitions in 2010, and our teams soon became regulars at the InterNational Academy of Dispute Resolution Student Mediation Tournament in Chicago. As coach and judge, I've enjoyed observing the American style but others too. Teams from India or Zimbabwe or Germany broadened our minds.

At our first mediation competition, I couldn't help noticing that the Californian winners (besides having the best teeth) seemed more skilled than everyone else. Their coach explained the secret: They had been mediating real cases in something called a mediation clinic. It made so much sense, and I was inspired when they spoke of having to deal with actual human behaviour and messy legal disputes. I started our own clinic with the help of some enthusiastic students, and it currently provides small claims mediation in almost half the courts in our jurisdiction. This article describes the development of the clinic.

My Core Values and Goals in Mediation

Core values sound very close to ethics. Mediation struggles to agree on a universally acceptable approach to ethics, possibly because it is a relatively young profession, possibly because we work in such diverse contexts. We can learn a good deal from the world of counselling and psychotherapy. The UK's professional body rests its ethical framework on values, principles and personal moral qualities

and makes the important concession that some circumstances "may require choosing which principles to prioritise."[1] This is a helpful caveat to my core values listed below. They don't all apply all of the time, and other practitioners may choose different principles or values to prioritise.

I mentioned the motto "everybody's story makes sense to them." This flows from my early experience in family mediation where I often faced diametrically opposite views of the same situation. I've come to see this as a subset of another idea borrowed from counselling: unconditional positive regard. In mediation, this means assuming that when someone says something, they have good reasons for saying it. I may not like those reasons and, on occasion, see them as offensive. However, there seems little mileage in telling people off. If they change their mind, it will be their achievement, not mine.

Another core value is parsimony, sometimes expressed via the medieval idea of Occam's Razor. This means mediators should intervene to the minimum extent needed to achieve a result people can agree on. If parties can use the space to hold a calm, civilised conversation and resolve their dispute, why do I need to speak? If they run into difficulty, however, I'll step in to the extent needed. This doesn't mean that I'm the strong, silent type. I'm probably on the chatty end of the spectrum, but have learned that I know far less about people's lives than they know themselves. My interventions often are aimed at capturing what people have just said and offering it back to them. They choose what to do with it.

And yet, and yet . . . if people were capable of resolving matters themselves, they would have done so. Some need more care and attention than others, leading to a third core value: mediator activism. This may sound like it contradicts the principle of parsimony, but the two can be reconciled in the old joke: "I always find my key in the last place I look." In other words, a mediator does as little or as much as is needed to help the parties get where they need to go. Sometimes I don't need to do a great deal after the introduction. On other occasions, I'm steeped in the detail of the discussion, summarising, questioning, and hypothesising until clarity emerges. That activism may extend to the structure of the meeting – who speaks to whom, when to take a break, when to bring everyone together.

This flows from an early dose of the idea of empowerment. It was drummed into me as a family mediator trainee that parents know their own children best. I later discovered that some colleagues wanted to rescue children from the folly of their own parents. I never saw it that way. The last thing most of the people in my office needed was another professional making them feel guilty about their parenting.

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[1]British Association for Counselling and Psychotherapy, ethical framework. The full quotation is: "[P]ractitioners may encounter circumstances in which it is impossible to reconcile all the applicable principles. This may require choosing which principles to prioritise. A decision or course of action does not necessarily become unethical merely because it is controversial or because other practitioners would have reached different conclusions in similar circumstances. A practitioner's obligation is to consider all the relevant circumstances with as much care as possible and to be appropriately accountable for decisions made."

I later applied the principle of empowerment in workplace conflict and commercial disputes. I remember a strangely exhilarating moment in a complex inheritance case involving five siblings, three teams of lawyers, and two days of mediation. On the second afternoon, my co-mediator and I found ourselves drinking tea in the conference room while all the lawyers and parties were working their socks off to find a resolution . . . and they liked it! Of course, we still had work to do to wrap things up, but the principle remains: People feel a profound sense of achievement when they forge an agreement themselves.

Participants and Cases in My Mediations

Types of Cases and Participants in My Mediations

My practice has been quite varied in the last couple of decades. It's now mostly complaints against legal practitioners and workplace mediation, with some inheritance disputes, commercial cases and occasional small claims. Most of my clients are unrepresented but I'm very comfortable working with parties' representatives, particularly in complex inheritance and commercial matters. In those cases, I often work with a co-mediator.

Common Patterns of Conflict Before and During My Mediations

It depends on the context. Workplace disputes tend to have quite a long history. By the time colleagues have been "sent" to mediation, they often see the other party as an implacable enemy. The only solution that most of them can imagine is that the other person leaves or, if that can't be achieved, they do as I described in *Do you see what I'm dealing with here?' Vicious circles in conflict*. It is not uncommon for each person to have their own supporters and confidantes, contributing to a wider atmosphere of tension. Often, this is the trigger for management or HR to involve a mediator.

Complaints against legal practitioners in Scotland are dealt with by a statutory body called the Scottish Legal Complaints Commission (SLCC). By a kind of accidental genius, this scheme has a couple of characteristics that make mediation particularly suitable. First, it doesn't deal with the most serious complaints. Those "conduct complaints" go to the Law Society of Scotland for a conventional adversarial hearing. The remaining "service complaints" concern the legal service that consumers received, and mediation is built into the process. Second, most cases are dealt with by monetary compensation, giving the complainer and practitioner something fungible to negotiate about. I've been on the SLCC mediation panel since it started in 2009.

Common Patterns of Parties' Goals, Interests, and Positions in My Mediations

The pattern of conflict between parties to my mediations is, once again, context driven. In complaints against lawyers, the parties are not equal. A professional has provided a service and their client is unhappy with what they received. Complainants often regard their former lawyer (solicitor) as a powerful figure who has used formality and delay to dismiss their concerns. Legal practitioners tend to see themselves quite differently. A number feel they are victims of unhappy clients

who blame them for things over which lawyers have little control (such as an acrimonious divorce). It's common to hear the lawyer say, "I went the extra mile for this client and got no thanks for it." On other occasions, the practitioner starts the mediation by acknowledging, "This was not our finest hour."

Goals for these mediations always include some element of financial compensation. However, it is not uncommon for complainers to say they would like an explanation of what happened and/or an apology. For practitioners, the goal generally is to deal with the complaint without going on to more formal investigation. Most accept that some payment will need to be made. However, a significant minority have concluded that the complainer is "at it," i.e., inventing a problem to avoid paying their fees. These are challenging cases, particularly if the practitioner's behaviour is correspondingly negative.

Workplace mediations are different. Most of my clients are colleagues on the same or similar level in an organisation. Often, their goal is to defend themselves from what they see as unjustified attacks. Some express the thought that the other person should be sacked but most manifest a blend of embarrassment and despair. The embarrassment stems from mediation itself: "It never should have come to this." Despair often follows previous unsuccessful attempts at resolution, leaving them feeling trapped and powerless.

My Mediation System Design

My Routine Mediation Procedures

Ken Kressel and colleagues found that, while most mediators see themselves as eclectic in their style, very few are. The majority in their study followed quite fixed patterns. I should therefore admit a similar predictability. At the risk of typecasting myself, I'll concentrate on complaints against lawyers, where I quickly forged a pattern that seemed to work for most cases.

Before the Mediation Starts

The SLCC mediation scheme differs from most UK contexts in that mediators have little contact with parties before the mediation. Since the pandemic, when all mediations moved onto Zoom, we now tend to have a short online chat a day or two before the session to iron out technical problems and answer any questions parties have. Before the mediation session, we receive a bundle of papers that includes the complaint and relevant correspondence, and I'm careful to read this through. Nonetheless, on the day of the mediation, I take time at the start to speak to each party in private. This begins the process of rapport-building, which is essential to our work. Clients probably are making a very rapid assessment of the mediator: What kind of person is this? Will they treat me with respect? And crucially, Can I trust them?

I tend to make a brief semi-formal remark about my role, setting the scene for what's about to take place. I'm also learning about the individuals I'm about to work with: Who will be cooperative? Who is wary? Who is upset?

At this stage, I often offer the legal practitioner some coaching about these mediations. I explain that I'll invite the complainer to speak first and it usually works best when they begin by listening respectfully, even where they disagree profoundly with what's being said. Depending on their reaction, I may go further and set out how highly skilled professionals, like them, tend to be very quick at diagnosing problems and proposing solutions. However, if a former client has gone as far as making a formal complaint, they probably want the chance to be heard even where the solution seems obvious. This pre-session chat, with its element of process guidance, probably places me in the activist camp.

Opening

The first few minutes are a bit of a set-piece. I've borrowed (stolen) phrases from some expert people and I try to be concise. I have a working theory that parties' attention span is short at this stage and so my monologue needs to be brief – no more than two to three minutes. I have a preference for plain speaking over mediator jargon. I'll say that I'm there to help them negotiate a resolution to the complaint (purpose). I explain that I'm working within a statutory scheme (context). I tell them I'll work hard to be impartial and that if they think I'm not, can they please let me know. I don't use the term "neutral." I use the term "confidential" and go on to say what it means in practice: They can't use what's said in mediation nor call me as a witness if the matter goes to investigation. I explain that the outcome is their decision and that I won't impose one on them. My work isn't finished until I hear the word "yes" from both parties. I also set out the rough shape of the meeting. We'll spend an hour or so establishing what happened with the help of the lawyer's file. Then we'll take a quick break. At this point, we'll start thinking about possible ways to resolve the complaint.

Sometimes I borrow an idea from a US commercial mediator: Here's my commitment to you (all of the above) and this is what I ask of you in return (patience and flexibility). Throughout the intro I'll ask, "Is that OK with you?" or "Any questions?" I'm trying to model conversation rather than me droning on. I don't use the term "opening statement," preferring to invite people to tell me "what we need to tackle and what you'd like to get out of it."

My "opening" includes my initial efforts to impose some order on the conversation. Pre-pandemic, I used a flipchart to write up emergent issues. Things they both mention go in the middle, and those distinct to each party sit in a column under their name. In the online domain, the whiteboard function feels too clunky and I usually simply read the headings back from my notebook. I'm careful to frame this as an offering, subject to their approval: Have I captured that accurately? Would you word it differently?

The Story

When I was a new mediator, I remember the sense of alarm as this part approached. I controlled the intro and it was fairly straightforward to take charge of identifying the issues, topics, agenda or whatever you want to call it. But once you invite people to tell their story, anything can happen. You can feel like a novice parachutist leaving the safety of the plane to step out into nothingness.

Here again, I'm grateful to have the chance to reflect on my practice. The goal of this phase is to reveal as much or as little of the story as is needed to move to the next phase (see below). The core practice is listening and reflecting. That requires a certain atmosphere or climate.

It strikes me that my capacity to offer undivided attention has grown in proportion to the amount of unpredictable, unhelpful, and downright provoking behaviour I've encountered. I've had to develop a strategy for interruptions, raised eyebrows, and meaningful sighs. There's another strategy for the less obvious, but equally challenging, problem of rambling or long-windedness.

I'm not claiming special insight or training. Rather, simple repetition. Faced with these challenges, you have to try something. If it works, you use it again. If it fails spectacularly, you avoid it. Soon I noticed moves that worked in one case fail in another, and I began to tweak how and when I used them. I've also co-mediated and sat in gratitude as my colleague rescued me with an elegant phrase or novel move. I'm sure most mediators, after a few years, build a repertoire of moves and approaches that can get them out of trouble, like drivers who lose their learner's nerves and start to enjoy the open road.

So, I aim to be a calm presence and concentrate on what I'm hearing and seeing. What follows is a three-way conversation. We tend to start with the complainer's story. I'll listen for a time, all the while checking how the lawyer is responding. I use summaries and supplementary questions to maintain focus. If someone is launching into their life history, I fast forward with an enquiry about the specifics of their complaint. If they tend towards the monosyllabic, I may use the "empathy loop": asking, listening, and then checking my understanding. As soon as an opportunity presents itself, I will turn to the lawyer and check their understanding of the same events. If they correspond to the complainer's story, well and good. If they're divergent, that's equally interesting, and I'll invite the legal practitioner to explain their thinking.

The lawyer's file is a crucial prop. In my brief time in private practice, I recall "the file" as the source of the firm's collective memory. Most lawyers have far too many clients to carry all the details in their heads. Divergent opinions on what actually happened are gold dust for mediators because they allow us to ask "daft laddie" questions. I may say: "Do you have that in front of you?" or "Can we just check the date?" or some other detail. I might ask, "Would you mind reading out the wording of that email?" The aim is to build as much of an agreed narrative as we can, not because that will solve everything but because it lets us narrow the discussion to what actually is disputed.

Disagreements and anger also belong in this phase. I'm strongly resistant to shielding people from reality. If the ex-client is furious, the lawyer does well to listen to why. I'll take responsibility for the tone or temperature of the interaction, though this can be a very subjective matter. Some legal practitioners are clearly uncomfortable at what they see as "unreasonable" criticism. Others will listen patiently before responding.

I have to work a little harder to create space for the lawyer's perspective. Some choose to reveal very little, which I must respect. Others feel impelled to defend themselves, and here I tend to intervene depending on the complainer's reaction. I don't seek to prevent or forbid defensiveness but to frame it as a legitimate contribution to the conversation. I often use phrases like, "So, from your point of view . . .?" or "Ah, I see. The way it looks to the firm is . . .?" I may say, "You clearly see things quite differently. That's why we're here." Sometimes it feels like my job is to save lawyers from themselves.

By the end of this period, I'm hoping for a degree of clarity. We don't need to deal with everything. Sometimes all that's really clear is that these people are never going to agree. Sometimes there's a reasonably shared narrative and the only remaining question is what, if anything, the legal practitioner is going to do about it. Events, however, only take us so far. Now it's time to negotiate.

"The story" phase almost always ends with a set piece. At a certain point, roughly 60-90 minutes into the meeting, I'll say, "So, . . . (pause) let's take a quick break. Grab yourself a coffee and I'm going to come and speak to each of you about where we go from here." The "So . . ." is important. It's a placeholder, telling the parties (a) it's time to move to a new phase, (b) we're not going to keep going round in circles, (c) I'm in charge and will bring this to a conclusion within the allotted three-hour time.

<u>The Negotiation</u>

The next phase usually starts in private meetings (called "caucuses" in North America but typically not in the UK). Zoom's breakout function is useful but, pre-2020, I simply walked one or both parties to a separate room. I often start with the legal practitioner, though I may pop my head into the complainer's room and explain that I'll be with them in few minutes.

The key opening question is, "What do you make of what you've heard so far?" This reveals fresh data for the mediator. I may have a hunch, but there's no substitute for the practitioner putting it in their own words. Mostly, I hear some combination of frustration at being misunderstood and irritation at the error or omission that has put them in this position. Sometimes, the practitioner adopts a more extreme stance. On one end of the spectrum, they express deep sorrow at how badly the firm has treated their client. At the other, they are dismissive, telling me the complainer is "at it."

Whatever the answer, my next question tends to be, "What, if anything, would you like to do about it?" This is a focused open question, directing the listener's attention to the problem at hand while leaving the response entirely to them. Some lawyers launch into a rant about how unfair the SLCC scheme is, or how modern practice is so much more stressful that it used to be – the "Golden Age Syndrome." Others turn businesslike, figuring out the likely costs to the firm if they allow the complaints to continue through the system. I aim to emerge from this first private conversation with an offer or at least a fair idea of the ballpark we're operating in.

The conversation with the complainer and their supporters is a mirror image, with the same opening and a slightly different follow-up, “What, from your point of view, could the practitioner do to address your complaint?” Here again, some are quite businesslike and tell me a figure. Others will take the opportunity to reiterate the harm they’ve experienced at the lawyer’s hands, wondering if they could be disbarred. Some insist on an apology.

The next step steers firmly away from the classic image of a facilitative mediator. The Scottish Legal Complaints Commission has published a tariff of non-quantifiable loss which I generally introduce at this point. I started doing this after a run of cases where one or both parties seemed to hold an overoptimistic view of their prospects in formal investigation. The gap between them often was too big to bridge. My logic is: “If I go home after parties fail to reach agreement with publicly available information locked inside my head, who am I helping?” Others may see it differently. I don’t see this as “evaluative” mediation because I make no prediction about how the tariff will be applied. Rather I’d call it an activist approach.

Once parties have read and absorbed this information, the negotiation tends to crystalise at two ends of a narrower spectrum. I don’t want to suggest it’s easy. Successful mediations seem to need a moment of impasse. Parties continually surprise me, appearing to be completely stuck before making one final move. It’s as if we have to believe that we’ve achieved a hard-won result after squeezing the other party as far as they’ll go. The more mediations I do, the less I think I can predict what will happen.

So I often take offers and counter-offers back and forth for a while. I may contribute some musings, not on what the SLCC will decide, but on how the other party is likely to react. If a practitioner seems about to make an insulting offer, I may ask to talk it through with them. If they actually want to insult their former client, they’re welcome, but I won’t be their message-bearer and they can do it themselves. They may not have thought through the implications of increments that invite stubbornness in return. Some lawyers don’t welcome input, but most are quite appreciative. Complainers are just as likely to scupper a productive negotiation by extreme and insulting positions.

Often the solution is more creative than simple cash and it makes sense to bring the parties back together. One example is where the practitioner is offering to do some remedial work. This becomes a problem-solving exercise where various options are considered and the mediator turns from optimist to pessimist, asking how this is going to work, when that will be done, or what happens if it is unsuccessful.

The Written Word

There’s something powerful about putting things in writing. Once we have the outline of an agreement, I like to bring the parties back together for this. There’s a great discipline in speaking out the words as I record them, revealing any lack of precision. I continually stress that my work isn’t complete until they both say “yes” to the agreement.

I won't go into the detail of online signatures but I still miss having parties sign a piece of paper on the day. Most of the time, we can achieve the same effect by electronic means but very occasionally the goodwill unravels. For me, the key learning is to be very patient in getting the wording right, then move briskly to capture it.

I encourage some sort of ending. Societies have developed rituals to symbolise parting on reasonable terms. In face-to-face days, the handshake did a pretty good job. Online is a little harder, but if I finish by thanking the parties for their efforts, it often prompts some quite conciliatory remarks between them. People will say it should never have come to this and the lawyer may concede that they want to achieve a higher standard of service in future. Occasionally, a spontaneous apology pops out. The atmosphere at this point can become quite warm and friendly, and I've seen people suddenly drop their guard and treat each other like human beings for the first time that day.

Reflection

What Writing This Document Has Made Me Conscious Of

The length and detail of this piece has brought to the fore mediation's almost infinite detail and complexity. Trying to describe my apparently routine procedures for a single context involved hundreds of choices. Underpinning each move is a set of values or principles. I do what seems right in the moment but that itself is dictated by a set of beliefs about conflict.

I named them above and recap here:

- Unconditional positive regard – everybody's story makes sense to them
- Parsimony – do the least necessary to achieve the goal
- Mediator activism – lead the search for solutions
- Empowerment – people like taking charge of their own lives

I'm reminded again that these seem contradictory. So be it. This work has taught me to be flexible. Questions and statements have come to resemble each other. In a sense both are offerings for the parties to accept, reject, or modify. Sometimes I sit back and observe. Sometimes I put my foot on the gas. And sometimes nothing works and I have to admit defeat and pass the problem back to the people who own it.

I was never comfortable calling this a model. Models imply prescription – spelling out how it should be done. I'm barely capable of description – telling how it is done. If we adopt the term "dispute system design," this is a snapshot of my design for a single context: what usually happens when I mediate complaints against lawyers under a statutory scheme. That design can be adapted for other contexts (workplace, commercial, family, inheritance) or even for the same context on a different day. I finish with Ken Kressel's wise remark: "All mediation is local."

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