

Five things I learnt this year (and should have known already)

LEADR Fellow Geoff Sharp reflects on 2008 and the lessons learnt. Here he pulls together thoughts from his well-known blog, Mediator blah...blah...

1. That the joint session is at the heart of everything we do and the moment we are tempted to work solely in private session, we will lose what makes mediation tick

I have had a draft post sitting on my laptop for nearly 6 months now but I haven't posted it. I'm not ready to lose half my readers yet.

The working title is something like 'lazy mediators don't do joint sessions' or 'lazy mediators only meet in private'. I couldn't decide which one would offend least.

And it includes such pearls as 'joint is where we do our brain surgery - anyone can be a high-priced bellhop between rooms'.

I mean, it's not as if I haven't posted gently on this topic before.

At one stage, I even tentatively put forward a 'third mediation space' theory – a space with its own behaviours and protocols, in addition to joint and private spaces.

'... Corridors can be furtive and risky spaces on mediation days – 'don't ask me to cross the centre line, but I'm quite close to it' kinds of places, ideal for short line ups of lawyers or parties. My technique has evolved quite differently in each of these three spaces – so differently I wish someone would legitimise the humble

corridor encounter by giving it a fancy name and teaching a course on it.

Then more recently there was the changing nature of the plenary session in mediation.

Now my colleague, Stephanie West Allen, has unknowingly forced my hand by kindly sending me an article by her friend and long-time mediator, Joe McMahon.

[Moving mediation back toward its historic roots—suggested changes](#), published in this month's Colorado Lawyer, is possibly one of the most important, and I hope controversial, articles authored by a practitioner in the recent past.

And brave.

Well, you have to be to suggest that 'the legal community has learned to accept low-functioning mediation'.

Moving Mediation Back Toward Its Historic Roots does much more than just making the case for joint sessions, but when Joe suggests that the bright line that historically divided the field is no longer along the facilitative/evaluative fault line, but now more about a "dialogue-based" versus "separation-based" rift, I got interested.

There are some who think that is what mediation is - a process where you show up at a downtown building but never speak to

or even meet the room full of people with whom you have your problem and whose cooperation you require if you are to resolve it.

We know why some ('I don't let my client speak') lawyers resist joint - fear of the unknown, fear of the uncertainty and the unpredictable. Fear of a loss of control. And sometimes, as McMahon observes, 'a desire for anonymity in making very self centred proposals for settlement, relying on the mediator to convey the offer'.

But why some mediators also? Is it the same deal? Because we know it's harder in joint, and we know it's certainly uncertain and predictably unpredictable. Or is it a nod to the all knowing market?

Joe's article requires a response from provider organisations - time to defend your corner guys. Whether you like it or not, you are shaping our profession. And some of us don't like that shape.

After all, who employs the ex-high-stakes-litigators and the newly-retired-judges, and who sometimes promises telephone numbers to those without any experience in consensual models of dispute resolution?

'Perhaps it was error to frame the mediation debate of the 1990s as "facilitative" versus "evaluative." Instead, the debate should focus on "dialogue-based" versus "separation-based" processes.

It is important to consider why mediation may have diminished or even abandoned dialogue among conflicting parties. Doing so may have happened in response to market demand or in an effort to promote efficiency.

In some types of mediation, conflicting parties are separated and engage in little or no dialogue. That suggests the efforts and interventions of the mediator or facilitator must replace what would have been accomplished by dialogue. This places enormous power in the hands of the mediator.

If denial and avoidance are thought to be the most universal responses to conflict, it is important to consider whether separation-based mediation merely plays into and enables such a response to conflict. If so, it is time to evaluate whether mediation and facilitation were really intended to provide support for such denial...

Support for the market model of mediation ("the market knows what it needs and what it needs is the settlement conference") is claimed in the high settlement rates in commercial settlement conferences. However, a high percentage of civil cases always have settled, even long before mediation was in vogue...

McMahon asks of mediators; 'are you fully satisfied with the quality of dialogue among conflicting parties in the mediations in which you participate?'

What a wonderful question! In my case however, only occasionally.

As McMahon says, 'By broadly considering conflict and mediation, it may be possible... to move these processes back toward their historic roots—that being processes based on parties telling their stories in face-to-face dialogue aided by a mediator who can guide them to more effective communications.'

But why? If it isn't broke, don't fix it. Commercial parties are settling, users are

not up in arms are they? Heck, it's them who ring and say 'we don't do joint'.

Well grasshopper, there is a reason we should all be concerned if a separation based model is to become the norm.

And it's not about resolution rates, because I suspect they stack up.

No, it's all about the the timbre and tone of resolution.

**2. He aha te mea nui o te ao? He tangata! He tangata! He tangata!
[What is the most important thing in the world? It is people! It is people! It is people!]**

For me, [Tammy Lenski's piece](#) on the Conflict Zen website is about how everything – all the conflict we get in the middle of as mediators – is in the end about us; not us as mediators (it's never that) but us as individuals walking this planet, our kids, our communities, you know; **US**.

The post is about Carter and Begin at Camp David with Anwar Sadat in 1978 and about their own grandchildren and war. Those grandchildren will be parents themselves now I imagine.

Tammy says that "Years later, it was the memory of Carter's story that prompted me to place the photo of a sweet little girl in the middle of the table while mediating a difficult child guardianship matter... It's not about photos, of course. It's about staring into the eyes of the future and reminding ourselves what really matters and what's really on the table for resolution".

Which made me think again of the bitterly cold grey day this winter when I sat around a table with the remnants of a family of a

troubled teenager who had been taken too soon and in tragic circumstances. Also at the table were the people and organisations the family blamed for not protecting their lost and loving youngster like they should have.

No winners here.

And to remind us of that and the point Tammy makes by her post, there was an angel at my table and his ashes sat with us throughout our day.

I went home and hugged my kids but they just got annoyed.

3. What a generous community we mediators have created with so much valuable, hard-won mediation wisdom available for all online.

Well, I've said before that they put something in the water at Harvard a year or so ago and ever since the ivy clad walls have been tumbling down to reveal online treasures inside the hallowed grounds.

So it is that Harvard Negotiation Law Review has at last got itself an [online presence](#). >>

Recent posts include:

- Junctions Along the ADR Spectrum
- Collaborative Law — A New Choice for Divorcing Families
- Reporting on Palin: Negotiations in Political Theater

HNLN Online will include articles by ADR professors, students, and practitioners and plans to draw attention to important developments in the world of negotiation/ADR and comment on the negotiation angle to current events.

"We will publish cutting-edge articles about new negotiation/ADR trends and about innovative ways in which negotiation and ADR are being used to solve a variety of disputes. Comments will be enabled on all blog postings, and we anticipate a lively discussion on the interaction of negotiation theory and practice."

4. Just how fast this field is growing with talented young lawyers making their presence felt in the mediation room every day (see box) and mediator pioneers quietly bowing out leaving those who have stood on their shoulders for so many years to grapple with the new technology of conflict resolution, which surely must be our future

We all stand on the shoulders of our own Henry Browns. And one day I will tell you about mine. But for now, I imagine many UK mediators look to Henry Brown as their Henry Brown.

In this [interview with Brown](#), he provides a thoughtful look back at 25 years of life as a UK mediator.

In particular, Brown makes the point that the mediation process has not dealt well with the strong sense of fairness brought to the table by the many who use it.

'We've got to do more work on understanding people's attitudes towards their disputes; their ownership of disputes; their investment of energy into that dispute and how to help them find a way through that isn't based on something they will perceive to be unfair. It's a packaging issue,' he concludes, 'but it's a substance issue too...

Systemically I think we've caught ourselves up in not giving enough attention to

people's sense of fairness and right and wrong. Where necessary I deal with fairness if only to get it on the table so both sides can be heard and understand what each other's sense of fairness is. They might conclude, "we can't agree, now we'll deal pragmatically with what's in the future,"

Young lawyers make their presence felt in the mediation room

Okay, I still think of myself as young. Like, I jog.

I LOVE the latest Duffy album and Susan is forever telling me to grow up. And she would know if I had some left to do, wouldn't she?

So why? Why did I not have a clue what this young lawyer meant when she passed me this note in mediation yesterday that said;

Geoff, we had a break sn. w'r concern'd bout whr dis S goin n nd 2 spk 2 d client. cn w'v @ 1Est 1/2 an hour n cn u cum n 4t 1st 10 mins? we'll nd u 2 Xpln dis 18st dvlopmnt coz we ddnt Xpct 2hv 2 tlk bout it hre.

but you can't dump history and excise it,' Brown concludes. "

I don't know about you, but fairness, that's a tall order - I nailed my colours to the mast in my last post when I offered a view of negotiation in mediation as 'often unprincipled and pragmatic, not weighed down by 'the case', but more about what can be achieved around that table on that day with that amount of talking behind them' - and I'm not sure that fairness is a packaging issue at all...

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Ok, when you are truly a carbon neutral mediator in future years and refuse to travel big distances to your high stakes mediations, remember you heard about the first live holographic video feed here.

In the feed, you see three guys on stage together, but the chap on the left is in Bangalore, India and the two on the right are in San Jose, California.

My guess is that, within a decade, many of us will insist on mediating with 3D holographic display technology beaming up the parties and their lawyers effortlessly from all around the city, state, country or globe.

When you [play the video](#), watch the start as these Cisco executives, who are in the US, walk on stage in Bangalore.

5. What a cork on the ocean a sole mediator can sometimes be – with the economy worsening by the day does this mean more or less mediation work, a change of focus or a complete makeover or business as usual?

The announcement on the US JAMS' website about the formation of a special JAMS group of mediators to respond to the financial crisis is interesting –if you can get past the corporate gobbly-gook.

"We expect that the litigation fallout from this credit and financial crisis will be felt for years to come in a range of areas including class and individual litigation by investors and shareholders against both corporations and investment advisors as well as class and individual litigation between lending institutions and borrowers. An ADR approach -- either mediation or tailored arbitration -- can cost-effectively resolve a

broad range of claims for the benefit of all parties."

I agree. It's simple. There will be a huge wave of litigation as people go looking for their money. But they will have less than before and they will use litigation to get their intended target(s) into the ring and then they will use mediation to get the job done – purely because of cost and time savings.

My pick is that in the months ahead mediators everywhere may need to reinvent themselves to ensure they match their offering to the shifting sands of the mediation market in these uncertain times.

Depending on what *your* market is doing and *your* unique skill set, it may mean a subtle tweak of emphasis or an extreme makeover.

And you may feel a need to up-skill in a particular area – gain more substantive knowledge – especially if you are in a mature market like California where increasingly gatekeepers are picking mediators only if they have a practice specialty or niche.

But my hunch is that for the rest of us, mostly it will be about working out who the go-to-guys are we need to be in front of.

For instance, in my patch, I'm picking a dramatic increase in disputes around commercial property and leases, land development JV's and of course insolvency and credit recovery.

And, if I'm right, I'll need to reconnect with the bag-men from the late '80's/early '90's, but remember Geoff, you should dig the well long before you need a drink - so you had better be not just starting out on all this.

So, if my market is changing on me, how do I chart a new course? How do I get to my next mediation niche?

SWOT Analysis is a technique for understanding strengths and weaknesses and for looking at the opportunities and threats you are facing. You will need to ask these kinds of questions of yourself.

Strengths:

- What advantages does your mediation practice have?
- What do you do better than anyone else?
- What unique or lowest-cost resources do you have access to?
- What do people in your market see as your strengths?

- What factors mean that you get the next mediation?

Weaknesses:

- What could you improve?
- What should you avoid?
- What are people in your market likely to see as weaknesses?
- What factors lose you jobs?

[Online company Mind Tools explains SWOT analysis and provides worksheets too. >>](#)

All of these thoughts and more first appeared on Geoff Sharp's blog: www.mediatorblahblah.blogspot.com

About Geoff Sharp

Geoff Sharp is a commercial mediator and barrister from New Zealand. For 18 years until the late 1990s Geoff was a partner of a major NZ commercial law firm. Over the last 10 years, as a commercial mediator, Geoff has resolved many contentious matters. Geoff is regularly requested to mediate complex and hotly debated litigation covering a wide range of subject matter from insurance disputes to historic sexual abuse claims.

Geoff is on the advanced panel of LEADR mediators and on the AMINZ panel of specialist mediators. Geoff is also the first Australasian mediator to be elected a fellow of the International Academy of Mediators.