

Construction mediation as a developmental process

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ABSTRACT

This paper seeks to argue that mediation has been hitherto conceived in the construction industry, and indeed by practitioners in other related disciplines such as property management, as largely a “problem-solving” mechanism. Whilst this is clearly an aim of mediation there is also the appended danger that the value of mediation is conceived in these terms alone. If this is the case, then its value, or success, is conceived very narrowly. The aim of this paper is, then, to argue that there are wider values to mediation in a construction setting. These values can be considered as a “family” of related attitudes, skills and perceptions that can positively affect the persons involved. By affecting growth in individuals an organisational change may follow. This, in turn, can result in a significant cultural change in the industry, and associated professions as a whole, as well as having a positive impact on construction education. The paper begins by an overview of the development of mediation and proceeds to consider its current use of mediation in construction. It then considers the question of how mediation success is conceived. The paper argues that both the current practice of construction mediation and the way in which its success is measured are too narrow. It argues that a wider approach to construction mediation is required. Finally, drawing from the literature on “idealist” mediation an account of mediation as a developmental process is developed.

Keywords: mediation, construction, education, professional practice, transformation

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CONSTRUCTION MEDIATION: A BRIEF HISTORY

Alternative dispute resolution in the guise of arbitration has been important to the construction industry since at least the nineteenth century. However, many have questioned whether, in fact, arbitration has become in recent times “litigation without the wigs”¹ due to its increasingly adversarial approach and its similarity to traditional litigation with its attendant cost implications.^{2,3} In the UK, despite this discontent, there was little evidence of the widespread use of mediation in a number of studies from the 1990s.^{4,5,6} A factor in this may have been the increasing use of statutory adjudication following its introduction in the *Housing Grants, Construction and Regeneration Act 1996* following the recommendations by Latham.⁷ There is evidence that there has, though, been some growth over the past decade or so, possibly encouraged by a number of well-documented cases such as *Halsey v. Milton Keynes*⁸ in the light of the implantation of the Civil Procedure Rules in 1998. Brooker⁹ suggests that “between 170 and 300 construction mediations [are] taking place annually.” Thus, whilst still small, this is not a negligible figure. A recent study however, by Gould et al.,¹⁰ suggests that construction mediation may actually be more prevalent than was previously supposed. Agapiou and Clark¹¹ in their study of construction mediation in Scotland also noted a small but growing use of mediation by lawyers. Further, their study revealed high satisfaction and settlement rates.¹² Due to a lack of any overarching reporting mechanism, the precise numbers of construction mediations can only be estimated. Mediation clauses can now be inserted into a number of standard form contracts. The 2005 edition of The Joint Contracts Tribunal (JCT) Design and Build Contract (section 9) specifically mentions the option of mediation whilst the Institution of Civil Engineers (ICE) Conditions of Contract 2004 (clause 66) has the option of “amicable resolution” alongside adjudication and arbitration. Amicable resolution refers to conciliation (under the ICE Conciliation Procedure 1999) or mediation (under the ICE Mediation Procedure 2002).^{13,14}

MEDIATION IN PRACTICE: ADVANTAGES AND CONCERNS

There are clear reasons for both the judicial encouragement of mediation and its gradual increase in popularity. Many authors have noted the particular strengths of mediation over traditional litigation or, indeed, over other adjudication-based systems. For instance, Brett et al.,¹⁵ noted the speed and cost savings in relation to both arbitration and litigation. The privacy of mediation, which is advantageous in commercial settings, is another important benefit that, of course, also applies to other forms of alternative dispute resolution.¹⁶ Mediation may also be particularly beneficial for disputes where there is an on-going relationship to preserve: this is often characterised as being largely the preservation of family or domestic relationships; however, many commercial relationships, from landlord and tenant

¹Anthony Speaight & Gregory Stone, *Architect's Legal Handbook* (8th ed., Architectural Press 2004).

²Michael Latham, *Trust and Money: Interim Report of the Joint Government and Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry*, HMSO (1993)

³John Uff, *Construction Law* (10th ed., Sweet & Maxwell, 2009)

⁴Nicholas Gould et al., *An Evaluation of the Dispute Resolution Techniques in The British Construction Industry: A Survey and Series of Case Studies of British Practice* (DETR Partners in Tech. Rpt. 1998)

⁵Penny Brooker & Anthony Lavers, *Perceptions of ADR as Constraints Upon its Use on the UK Construction Industry*, 15 *Const. Mgt. & Econ.* 519–526 (1997)

⁶Penny Brooker & Anthony Lavers, *Issues in the Development of ADR for Commercial and Construction Disputes*, 19 *Civ. Just. Q.* 353–370 (2000).

⁷Michael Latham, *Constructing The Team: Final Report of the Government/Industry Review of Procurement and Contractual Arrangements In The UK Construction Industry* (The Stationary Office 1994).

⁸Penny Brooker, *Criteria for the Appropriate Use of Mediation in Construction Disputes: Judicial Statements in the English Technology and Construction Court*, 1 *Int'l J. L. in the Built Env't* 82–97 (2009).

⁹*Mediation in the Construction Industry: An International Review* (Penny Brooker & Suzanne Wilkinson eds., Taylor & Francis Ltd. 2010).

¹⁰Nicholas Gould et al., *The Use of Mediation in Construction Disputes: Summary Report of the Final Results May 2009*, (available at <http://www.fenwickelliott.co.uk/files/Summary%20Report%20of%20the%20Final%20Results.pdf>).

¹¹Andrew Agapiou & Bryan Clark, *Scottish Construction Lawyers and Mediation: An Investigation into Attitudes and Experiences*, 3 *Int'l J. L. in the Built Env't* 159–181 (2011).

¹²The settlement rate in the study was 74 percent, rising to 83 percent when partial settlements were included (p.165). In addition, 76.6 percent of the respondents were always or often satisfied with the outcome of the mediation.

¹³The Institution of Civil Engineers, *Construction Mediation Procedure 2002* (Thomas Telford Pub. 2002).

¹⁴*Id.* at 3.

¹⁵Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 *Negot. J.* 259–269 (1996).

¹⁶Susan Blake et al., *A Practical Approach to ADR* (OUP 2010).

relationships to employment relationships, benefit from the preservation and enhancement of on-going relationships, and construction is no different in this respect.^{17,18,19} Feinberg²⁰ notes its informality and flexibility. This flexibility, which could be termed creativity, is described by Boulle and Nestic:

Parties may agree on outcomes which could never be available as a court remedy. Thus they may agree upon one party performing a personal service for another, on a dismissed employee being re-employed in another branch of the firm, or on one party giving the other an employment reference.²¹

Further, a number of studies have reported high levels of user satisfaction with mediation in a number of different areas of dispute.^{22,23} Whilst these benefits are not universally applicable to all construction disputes, there appears to be at least the potential for mediation to be a valuable dispute resolution tool in some construction disputes and therefore a *prima facie* case for its validity as a method of construction dispute resolution has been made.

Clearly, whilst there are many advantages, there are also some disadvantages that may make people cautious about mediation. Many of these objections are based around the role of lawyers and other professional advisors in regard to mediation. Genn,²⁴ for example, noted that some lawyers use their litigation skills in mediation. This can result in an inherently litigious and adversarial approach and one more akin to arbitration. Brooker and Lavers found the following:

Lawyer interviewees also report tactical advantages from engaging in mediation. These range from providing the opportunity to examine the strengths and weaknesses of the case to testing witnesses and evidence. The data suggests that lawyers are developing new practices in mediation, such as proposing the process in order to provide proof to the courts of willingness to compromise or participating in mediation in order to send messages to the opposition.²⁵

The willingness of lawyers to use mediation potentially as a tactical weapon to further the interests of their clients was also noted by Brooker.²⁶ A number of concerns were found by Sidoli del Ceno in a study of commercial lawyers including those who engaged in construction work.²⁷ The respondents' perception that mediation was not "real law" was noted, as was, the fact that the designation "mediator" lacked status in comparison with a "solicitor" or "barrister." Further, there was ignorance of the possibilities of mediation and a feeling that traditional legal culture, which emphasised the virtues of conflict and litigation, were additional factors that discouraged many from recommending the process, and hence may hinder mediation's future growth and development.

There are others who have fundamental rather than practical concerns with mediation. Fiss' famous *Against Settlement*,²⁸ again assumes that mediation's only benefit is its potential to settle claims and in doing so he accuses the process of compromising fundamental legal rights. Recently, some members of the English judiciary have criticised mediation using a similar line of argument. Lord Neuberger MR in the Slynn Memorial Lecture 2010,²⁹ argued that the system of civil justice is part of the

¹⁷Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J.Dis. Res. 53–117 (1997).

¹⁸Ludwig F. Lowenstein, *The Value of Mediation in Child Custody Disputes (Recent Research 1996–2001)*, 166 Just. of the Peace 739–744 (2000).

¹⁹Bill Ezzell, *Inside the Minds of America's Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes*, 25 L. & Psychol. Rev. 119–143 (2001).

²⁰Kenneth R. Feinberg *Creative Use of ADR: The Court-Appointed Special Settlement Master*, 59 Alb. L. Rev. 881 (1996)

²¹Laurence Boulle & Miryana Nestic, *Mediation: Principles Process Practice* (Bloomsbury Pub. 2001).

²²Chris Guthrie & James Levin, *Party Satisfaction Perspective on a Comprehensive Mediation Statute*, 13 Ohio St. J. on Dis. Res. 885–908 (1998).

²³Roselle Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 Conflict Res. Q. 55 (2004).

²⁴Hazel Genn, *Solving Civil Justice Problems: What Might be Best?* Scottish Consumer Council Seminar on Civil Justice (Jan. 19, 2005).

²⁵Penny Brooker & Anthony Lavers, *Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom*, 5 Pepp. Dis. Res. L.J. 161–213 (2005).

²⁶*Id.* at 7

²⁷Julian Sidoli del Ceno, *An Investigation into Lawyer Attitudes Towards the Use of Mediation in Commercial Property Disputes in England and Wales*, 3 Int'l J.- L. in the Built Env't 182–198 (2011).

²⁸Owen Fiss, *Against Settlement*, 93 Yale L. J. 1073 (1984).

²⁹David Neuberger, *Has Mediation Had Its Day?* The Slynn Memorial Lecture (Nov. 10, 2010) (transcript available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/moj-speech-mediation-lectureA.pdf>).

very constitutional framework of the country and that it guaranteed fundamental rights and freedoms. He argued the following:

[T]he justice system is part of our constitutional framework; it is part of government. The delivery of justice is not a service. On the other hand, the provision of mediation and other forms of ADR is a service. To conflate or confuse the two is to make a profound constitutional mistake.

Jackson³⁰ whilst again encouraging the use of mediation, stopped short of suggesting that it could ever be mandated despite the fact that mandatory mediation is common in Australia, parts of Europe, and elsewhere without any corresponding jurisprudential concerns. The assumption here is again that mediation is only about settlement or the final outcome. Certainly two of the most common models of mediation, facilitative and evaluative, are concerned primarily with settlement. This is not the case, however, with other models. These varying accounts of mediation will be considered below and it will be argued that mediation, properly conceived, ought to be considered as something more than merely a tool for achieving settlement.

MODELS OF MEDIATION

There are a number of differing conceptual models of mediation. Indeed, mapping the conceptual ground of mediation appears to be very much a work in progress as there is no agreed schema. For example, Menkel-Meadow³¹ derives eight models of mediation from existing literature, whilst Boulle³² recognises four models, and Alexander³³ describes six “meta-models.” In jurisdictions where construction mediation is in its infancy, a facilitative model tends to be favoured, whereas in those with a longer history of construction mediation (the UK and Australia are cited as examples), an evaluative model is often, although not exclusively, adopted.³⁴ It is, perhaps, not surprising to see this preponderance of evaluative mediation. This is largely because mediators in construction disputes tend to be appointed because of their particular technical expertise, as is often the case in construction adjudication. They are therefore bringing assumptions and industry norms with them. The parties, too, are often keen to submit to the views of an “expert” rather than a mere facilitator. Riskin³⁵ describes the facilitative approach:

The mediator who facilitates assumes that the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers. Accordingly, the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.

Facilitative mediation, then, fits the description provided by Menkel-Meadow³⁶ as “pure” mediation in that there is no adjudicative direction of any kind or any assumption of substantive expertise by the mediator. This can be contrasted with evaluative mediation. Brown states that “[t]he evaluative mediator’s tasks include finding facts by properly weighing evidence, judging credibility and allocating burden of proof, determining and applying relevant law, rules or customs and rendering an opinion.”³⁷ Both these predominant models appear to implicitly depend on an “outcome” being achieved. They can therefore, perhaps, be labelled as “pragmatic” forms of mediation. The outcome is either the final settlement of the dispute, or, at the very least, a partial settlement through a narrowing of the issues. Both of these models fail to consider, or at least appear to ignore, other strengths or possible advantages of mediation. Other models, which are here termed “idealist,” attempt to move away from this. Transformative mediation is one widely recognised approach that seeks to emphasise

³⁰Rupert M. Jackson, *Review of Civil Litigation Costs – Final Report* (TSO 2010).

³¹Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities – What We Learn From Mediation*, 56 *Modern L. Rev.* 361–379 (1993).

³²Laurence Boulle, *Mediation: Principles, Process, Practice* (2nd ed., LexisNexis Butterworths 2005).

³³Nadja Alexander, *The Mediation Metamodel: Understanding Practice*, 26 *Conflict Res. Q.* 97–123 (2008) www.ausdispute.unisa.edu.au/apmf/2008/papers/KEYNOTE%20NADJA.pdf (last accessed Dec, 2012).

³⁴*Id.* at 8.

³⁵Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 *Har. Negot. L. Rev.* 7–51 (1997).

³⁶*Id.* at 30.

³⁷Carole Brown, *Facilitative mediation: The Classic Approach retails its appeal*, 4 *Pepperdine Dispute Resolution Journal* 279–290 (2003).

the value of the process itself and which distances itself from the rather narrow results-driven conceptions discussed above. It is associated primarily with the work of Bush and Folger who describe it as thus “The transformative approach instead defines the objective as improving the parties themselves from what they were before. In transformative mediation, success is achieved when the parties as persons are changed for the better, to some degree, by what has occurred in the mediation process.”³⁸ Another model of the idealist persuasion seeks to argue that the insights of therapeutic jurisprudence can be productively applied to mediation. Daicoff is one who has recognised the link between mediation and transformative justice:

All of the disciplines comprising the comprehensive law movement share at least two features in common: (1) a desire to maximize the emotional, psychological, and relational wellbeing of the individuals and communities involved in each legal matter; and (2) a focus on more than just strict legal rights, responsibilities, duties, obligations, and entitlements. These two features unify the vectors and distinguish them from more traditional approaches to law and lawyering.³⁹

The debate about models of mediation will not be settled here. It is likely to persist and indeed expand as non-western perspectives increasingly add to the debate.^{40,41,42,43} These models are, however, central to the issue of what constitutes mediation success.

MEDIATION AND SUCCESS – A CONTESTED NOTION

The typical approach to mediation success is based on a pragmatic or outcome model. The well-known work of Fisher and Ury⁴⁴, which focuses on negotiated outcomes, is of that school. It is also exemplified in numerous empirical studies. This pragmatic model is typically based around the number of cases that settle. It appears that the “fact” of settlement is considered to be central in most cases rather than any perceived qualitative aspect to the settlement itself. For example, Prince⁴⁵ in a study of court-based mediation at Exeter County Court found that 70 percent of cases referred to the small-claims track in her study settled. This implicitly focuses the success of mediation in terms of the rates of settlement, although Prince does later raise other criteria and importantly notes that: “there is not an obvious correlation between settlement and satisfaction” (p.76). Wissler in a survey that examined ten separate small-claims mediation studies found again that: “virtually all studies examined the rate of settlement in mediation.”⁴⁶ However, other aspects were also examined. For instance, a number of studies sought to explore the impact on the parties’ relationships with each other. Further studies surveyed sought to consider the views and perspectives of the parties themselves. It is this aspect of mediation “success,” and the wider value or values that emerge from it, that is perhaps the most enigmatic and hence the hardest to assess.

Importantly, Shepherd⁴⁷ divides the concept of mediation success into two aspects – process and outcome. Clearly, it is the latter that has been the focus of most mainstream empirical studies which has understandably led to the process aspect being somewhat under-considered. Furthermore, it is this outcome-based approach with what can be termed its “concrete” aspect of whether an agreement has been made or not that has come to dominate judicial thinking as was noted above. This fundamental assumption that outcome or settlement is the only driver of mediation has also been the basis of many fundamental critiques of mediation. It is perhaps reasonable to agree with Bercovitch in a study of mediation success where he concludes:

³⁸Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1st ed., Jossey-Bass 1994).

³⁹Susan Swaim Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 Pepp. Dis. Res. L.J. (2006).s

⁴⁰Jerold S. Auerbach, *Justice without Law? Resolving Disputes without Lawyers* (1st ed., OUP 1983).

⁴¹Bee Chen Goh, *Law Without Lawyers, Justice Without Courts: On Traditional Chinese Mediation* (Ashgate 2002).

⁴²Siew Fang Law, *Culturally Sensitive Mediation: The Importance of Culture in Mediation Accreditation*, 20 Australasian J. Dis. Res. 162–171 (2009).

⁴³Dale Bagshaw & Elisabeth Porter, *Mediation in the Asia Pacific Region: Transforming Conflicts and Building Peace* (Routledge 2009).

⁴⁴William L. Ury et al., *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed., Houghton Mifflin Harcourt 1992).

⁴⁵Sue Prince, *Court-Based Mediation: A Preliminary Analysis of the SmallClaims Mediation Scheme at Exeter County Court* (Civil Justice Council 2004).

⁴⁶*Id.* at 22.

⁴⁷Blair Sheppard, *Third Party Conflict Intervention: A Procedural Framework*, 6 Res. Organizational Behav. 141–190 (1984).

Success in conflict management is an elusive quest. Often what appears as successful to one person may be seen as unsuccessful by others. What is more, mediation may seem successful at one time, only to be seen as totally unsuccessful months or years later. We face considerable challenges in thinking about success or evaluating mediation outcomes. As suggested above, there are different perspectives of thinking about success. It seems odd that so many of these perspectives define success in terms of some other equally complex abstract notion. The challenge we face is in recognizing the multiplicity of perspectives, and the different conceptions of, and approaches to, success.⁴⁸

It is this perspective that is developed below within the context of construction. It will aim to demonstrate that mediation success—which has largely been conceived hitherto either as something that focuses on measuring the rate of settlement, or, as something concerned almost solely with personal growth—can actually be considered from both perspectives and that there exists a false dichotomy between “pragmatic” and “idealist” forms of mediation.

MEDIATION AS DEVELOPMENT

The argument so far has attempted to show that the two most widely-used pragmatic models of mediation in construction, the facilitative and the evaluative, are both essentially outcome or settlement based. These approaches largely ignore the process aspect alluded to above.⁴⁹ Whilst outcome and settlement are clearly goals of mediation, it can be argued that mediation to be properly considered and utilised as a tool for dispute resolution in construction ought to be conceived more widely. This emphasis on process and on the long-term benefits that can ensue from engaging in a non-confrontational and empowering process, ought to be given more consideration by construction professionals. This is particularly true in the case of evaluative mediation where the mediator assumes a dominant role. Indeed, some have argued that evaluative mediation is not really a type of mediation at all, but ought to be considered simply as another adjudicative method.⁵⁰ The wider benefits that can emerge from the process of mediation have largely not been noted in relation to the field of construction, or, where they have, they have been dismissed,⁵¹ although the benefits have been greeted with approval by many in other areas of dispute, most notably in the context of family and community mediation.

Brooker and Wilkinson⁵² argue that transformative and therapeutic mediation are unlikely to be used extensively in construction mediation” although they concede that “some mediators may adopt some of the techniques within their practice.” The argument appears to be that for these more substantial changes in attitude to take place, more sessions of mediation over a greater time frame are required and these are unlikely to take place in a pressured commercial scenario where time is of the essence.⁵³ If one assumes that these methods and processes are mutually exclusive then that may be the case. However, there is little to suggest that a facilitative approach that keeps outcomes as a central focus need ignore the value of the actual process. There is no reason why, then, they must be seen in opposition. Indeed, by giving greater emphasis to the process, and the wider values that they enshrine, an increase in the actual rate of settlement as participants gain greater understanding of the perspectives of others may ensue.⁵⁴ Both Stemple⁵⁵ and Golan⁵⁶ have also commented that in reality there is an inevitable fusion of styles, perspectives and approaches used by mediators. It is important therefore not to perceive these varying models as necessarily in conflict. Nonetheless, it is useful to conceptually separate them in order to more fully understand the distinct roles that they play.

⁴⁸Jacob Bercovitch, *Mediation Success or Failure: A Search for the Elusive Criteria*, 7 Cardozo J. Conflict Res. 289–302 (2007).

⁴⁹*Id.* at 46.

⁵⁰Cris Currie, *Mediating Off the Grid*, 59 Dis. Res. J. (2004).

⁵¹Susan Oberman, *Mediation Theory vs. Practice: What Are We Really Doing? Resolving a Professional Conundrum*, 20 Ohio St. J. on Dis. Res. 775–822 (2005).

⁵²*Id.* at 8.

⁵³Ellen A. Waldman, *The Evaluative-Facilitative Din Mediation: Applying the Lens of Therapeutic Jurisprudence*, 82 Marq. L. Rev. 155–170 (1998).

⁵⁴Robert A. Baruch Bush & Sally G. Pope, *Changing the Quality of Conflict Interaction: the Principles and practice of Transformative Adjudication*, 3 Pepp. Dis. Res. L.J. 67–96 (2002).

⁵⁵Jeffrey W. Stemple, *Identifying Real Dichotomies Underlying the False Dichotomy, Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. Dis. Res. 371–394 (2000).

⁵⁶Dwight Golann, *Variations in Mediation: How-and Why-Legal Mediators Change Styles in the Course of a Case*, 2000 J. Dis. Res. 41–62 (2000).

Whilst it is easy to agree that there are at least two parts to mediation—process and settlement—there is perhaps really a third. This can be termed “post-settlement” factors. It is what is taken away from the mediation as a whole, including both the process and the outcome. Another model is not being offered however, nor is an appeal to the active adoption of an “idealist” model. It is, instead, an argument that mediation properly conceived as facilitative mediation carries with it—implicitly—the wider values argued for by scholars such as Bush and Folger⁵⁷ and Daicoff.⁵⁸ Greater emphasis ought then to be given to understanding, assessing, and quantifying these “further” benefits of mediation and giving them a more concrete identity rather than dwelling on the potentially abstract notions of “transformation” or “therapeutic jurisprudence.” Bush and Folger are aware of this criticism of abstraction but their attempt to move beyond it nonetheless remains substantially wedded to jurisprudential notions of “empowerment” and “recognition,” rather than overtly practical goals that can apply directly to commercial concerns. It is better, then, to use the term “educative” or “developmental” as these terms are more accessible to the construction professional not versed in philosophy or jurisprudence and they carry with them the notion of continuous professional learning that is widely understood. Mediation has the capacity, then, to provide an opportunity for the construction professional to learn and grow. These are values that are innate but also can provide clear, practical benefits that can be added to the already well-established benefits of mediation as discussed earlier. Defining these benefits, their scope and quantification, is a separate task, but in order to commence the discussion, some possible examples that are necessarily linked, will be briefly offered.

Communication

Communication is considered to be a central skill and, indeed, a value in construction management.⁵⁹ There are many inherent issues that make effective communication particularly difficult in a construction context, for example, the uniqueness of each construction project and the intensity and short time scales involved in many contracts.⁶⁰ The possibility for misunderstanding because of *different “vocabularies”*⁶¹ and cultural preferences⁶² appears to be widely noted. Mediation is fundamentally concerned with communication. By engaging with the process of mediation, construction professionals may develop better, more nuanced communication skills which in turn can lead to wider personal development.

Personal and professional development

Mediation also typically involves reflection not just upon the dispute itself but also related issues that may have had a causal link to the dispute. Things such as record keeping, the handling of professional relationships, and an awareness of the perspectives of others are matters that may be relevant to the dispute, but are also of general relevance to a construction manager. Engaging with the process of mediation may allow the reflective professional to engage with many of these issues and may aid the development of important mental and social attitudes that allow for mutually empowered and productive relationships. Education is key to fostering this.

Legal education for construction professionals

Construction education necessarily involves the transferring of knowledge and the acquisition of practical skills.⁶³ Beyond the level of basic trade training however, there is a widespread belief that construction education ought to encourage a variety of other skills. Ahn et al.,⁶⁴ are among many that

⁵⁷*Id* at 37.

⁵⁸*Id* at 38.

⁵⁹Andrew Dainty et al., *Communication in Construction: Theory and Practice* (Taylor & Francis 2006).

⁶⁰Martin Loosemore et al., *Human Resource Management in Construction Projects, Strategic and Operational Approaches* (Spon Press 2003).

⁶¹Connie L. Delisle & David Olson, *Would the Real Project Management Language Please Stand Up*, 22 Int'l J. Project Mgt. 327–337 (2004).

⁶²Ralf Müller & J. Rodney Turner, *Cultural Differences in Project Owner - Manager Communication*, in *Innovations: Project Management Research* (Slevin et al., eds., Project Management Institute 2004).

⁶³Bolivar A. Senior, *Infusing Practical Components into Construction Education*, 3 J. Constr. Educ. 92–101 (1998)

⁶⁴Yong Han Ahn et al., Paper Presentation, *Key Competencies for U.S. Construction Graduates: An Exploratory Factor Analysis* (ASC 46th Annual International Conference, 7 Apr. 2010) (paper available at <http://ascpro.ascweb.org/chair/paper/CERT17,0002010.pdf>).

have attempted to categorise the various elements required in a graduate level construction programme. They include leadership, problem solving, collaborative skills and ethical issues amongst others. Many, if not all undergraduate and postgraduate students study law as an element of their course. Litigiousness and procedure predominate. Mediation properly integrated into construction education has the possibility of changing the value set of construction managers. A widespread adoption of such values may subsequently contribute to wider cultural change within the industry.

Cultural change

The value of changing cultural norms and the variety of ways in which this happens has been noted by among others, Meyerson and Martin.⁶⁵ Mediation because of its strong emphasis on communication and understanding the perspective of other parties is ideally placed to help foster such change. The value of partnership and co-operation in construction has already been recognised by a number of authors.⁶⁶ With the construction industry having already changed significantly over recent decades,⁶⁷ and with more change likely, mediation might also have a formative role in this by fostering a collaborative approach to dispute resolution and professional practice generally. Mediation might have a particularly important role in the growth of building information modelling (BIM) where there is inherently a shared reserve of “knowledge” or “activity”. Possible legal problems with BIM have already been identified.⁶⁸ Further, this collaborative and non-litigious approach might appeal particularly to women and other unrepresented groups.^{69,70} Change here should be considered as more than merely individual or organisational change. Rather it is a cultural transformation of the industry as a whole.

CONCLUSION

Society tends to have a settled view that the “Law” in all cases is about, or ought to be about, justice. Justice tends to be conceived as an unchanging, pyramidal structure with the judge or arbitrator delivering a top-down judgment with the parties being no more than bystanders to the process. This view of justice is not by any means the only one. Mediation, for example, works on a different paradigm: “In mediation, justice can be understood as the justice that the parties themselves experience, articulate, and embody in their resolution of dispute.”⁷¹

If this account is accepted, at least in part, then this ought to open the gates to a consideration of mediation from the point of view of its process. The process of mediation, separated conceptually from any outcome or settlement that it might achieve, allows for individual professional development, organisational development and industry change. Those active in construction education might wish to reflect on this fully and consider how it might influence their practice. Finally, it can be argued that modern “rights” discourse that feeds the insatiable growth of litigation has gone too far. We must try to address this by creating the necessary foundations for achieving a wider cultural change away from perennial conflict and towards a more conciliatory view of human interaction. On a mercenary note, profitability is likely to be increased by just such a move.

⁶⁵Debra Meyerson & Joanne Martin, *Cultural change: An Integration of Three Different Views*, 24 J. Mgt. Stud. 623–647 (1987).

⁶⁶Peter McDermott et al., *Trust in Construction Projects*, 10 J. Fin. Mgt. of Prop. & Constr. 19–31 (2005).

⁶⁷Clara Greed, Paper Presentation, *Cultural Change in Construction* 1, 22–21 (ARCOM 13th Annual Conference, 15 Sept. 1997) (available at http://www.arcom.ac.uk/-docs/proceedings/ar1997-011-021_Greed.pdf).

⁶⁸Douglas B. Arensman & Mehmet E. Ozbek, *Building Information Modeling and Potential Legal Issues*, 8 Int'l J. Constr. Educ. & Res. 146–156 (2012).

⁶⁹Carol Gilligan et al., *Mapping the Moral Domain: A Contribution of Women's Thinking to Psychological Theory and Education* (Harvard University Press, 1988).

⁷⁰Michal Alberstein, *The Jurisprudence of Mediation: Between Formalism, Feminism and Identity Conversations*, 11 Cardozo J. Conflict Res. 1 (2009).

⁷¹Evan M. Rock, *Mindfulness Mediation, the Cultivation of Awareness, Mediator Neutrality, and the Possibility of Justice*, 6 Cardozo J. Conflict Res. 347–365 (2006).