

POTENTIAL ROLES OF MEDIATION WITHIN THE COURT SYSTEMS:
LET TEARS MEDIATE

By

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Abstract

In this paper we will describe our experience as mediators in the court system for family law during “hybrid audiences”. The judge, lawyers, parts and mediators work together. Mediators help as facilitators for the dialogue to be built, and try to reach a solid agreement. Agreements are born through the possibility of the “emotional reflexive thought”. The pain, joy, sadness or other feelings, if given the time and space to be expressed in an audience, can be an experience of putting the parts of the dispute in “the other’s feet”. The audience is lived as a ritual that can change their lives, so why not take full advantage of this special and powerful moment to change old patterns? For that to happen the judge, lawyers and parts should be open to the experience of thinking about the best possibility to use the mediators as facilitators of dialogue. The Mediator should work on himself first, in order to be a good listener and to deal with the feelings that may emerge in him and in the others during the audience. Although lawyers defend a position, the interest and needs of the family are better attended to if emotions can be orchestrated and worked through by a well prepared Mediator. He has to be reflexive and open to the tune of the discourse. If an agreement is possible, it can spare pain for the parts and for the whole family. Mediation here will be considered as a holistic process. Examples from experience will be given to illustrate this concept.

Introduction

Mediation is a form of alternative dispute resolution to assist two or more disputants in reaching an agreement. The parties determine what is to be agreed. The Mediator acts as a facilitator for the parties to search for alternatives to the litigious solution. For that matter he uses creativity and tries to build a bridge in communication, seeking for common interests between the parties and avoiding them to set positions as who the winner or who the loser is.

Although the scenario of various theories that range from a more dynamic to a more strict theoretic approach term focus, mediation is always a point between Psychology and Law. From our experience we have seen that it is very important to focus on the symbolic meaning of the communication as well as the manifest content. *Lapsus*, symptoms and jokes are a wonderful source to understand a conflict.

For example in an hybrid audience*, where the judge and the parties were discussing a child's alimony, the mother suddenly said "but our kids need more". Until that *lapsus* we thought the parties had only one child and then we asked "Kids? Isn't there only one child?". Then the mother said the father would not register the second child. Immediately, the judge asked the father if he would like to register the second child. "Yes!", he said, very moved, with tears in his eyes. "Today I have inherited my father's house and have a place for them to go."

The *lapsus* on the number of kids gave life to the second one, even in the birth certificate! What a change, a transformative audience!

If there was not a Facilitator Mediator in the room, with trained ears to listen to the *lapsus* and interpret them, very likely the judge would have noticed the slip. I was very attentive because of my former training as a psychoanalyst, in touch with the unconscious and its revelations.

This particular audience was to set the visits. After years of dispute, the father wanted to visit his child for it was Father's Day, his father had died three months before and he owned a house for the first time. He wanted to show the property to his child, probably to leave it to him on his will. And there they were two! What a change!

That was the lite-motif for this title "Let tears mediate".

The best instrument we have in order to understand what goes on during any conversation is empathy. Empathy is usually defined as one's ability to recognize, perceive and feel directly the emotion of another person or to "put oneself in another's shoes" or an emotional resonance.

The latests findings in neurobiology show that when we listen to the other with empathy we kind of feel for a moment a simulation that we are the other and then we respond with our linguistic and emotional repertoire of experiences that are less filled with anxiety and we give a new code of response to address that feeling. Then we put ourselves in our own shoes again to talk to the other.

What we listen is not impartial but we are affected with the emotions we already have in our memoir, that we are ready to experience. In other words memory is like an emotional text and while we respond to it we are “editing our lives in public” (Damásio, A). That means we are empathic while we change. Even the brain has chemical and physiological changes in certain areas that can be registered in a laboratory. Traumas and unaccessible experiences, if too painful to be recalled, are not part of the repertoire of empathy.

Cultural diversities, if too intense also do not permit ourselves to “simulate we are the other” (Damásio, A) How can a mediator from a metropolis understand the culture of a countryside bedouin? Although it is difficult it is not impossible because we have all a common human nature that needs to be fed from childhood, dressed and cared. We all have babies, and mothers, fathers and if families are different around the globe, there is an invariant range of feelings that are primordial since the man from the caves. It has been discovered in Lascaux the first hospital in a cave as some food was found next to bones from a broken leg. That means someone had been feeding this man with a broken leg, bringing him food for years because of the age-tests made on the bones. So humanity is a universal bond between different countries and cultures. We all have pains, health and conflicts. It is interesting how Kaplan was able to mediate different races and cultures not mentioning the Bible but talking about domestic violence, health problems, sports etc. to unite them.

Nevertheless, some theories still consider mediation a simple and practical way of agreement between conflicted parties. They state that the mediator’s professional background should be put aside and that he should be neutral in order to help the process. What about hospitality in Mediation? Do we follow specific codes in every country? This is both a point for reflection and for argument. This leads us to the formation of mediators. Of course and it is taken for granted that mediators exist and are formed within specific context of culture and ethics.

In my case for example, I had psychoanalytical training and went to a systemic training in mediation. I wanted to learn another vertex of knowledge. I was oriented to forget my previous background to improve my work, and learn to mediate. Strict rules were to be followed and the setting was very formal, sometimes I asked myself where the hospitality was.

During the mediation training in the Institute, I was supposed not to mention the past, the history or the origins of the conflict although they were in front of me. I could not avoid being empathic with the pain the mediated were going through.

I remember a case where a family was in great disharmony because the two year old baby was still being breast fed, the mother would not leave his room while her husband was sleeping with the elder son. The father complained no one could sleep the whole night, the small boy cried, the mother breast fed, and he did not have a wife anymore. I asked myself why this man could not be the third part in the pair mother-infant, leave the child with his brother and bring his wife back to her place.

I wondered what kind of father and mother these parents had as models. Then I made them that question and, very moved, they told us that his father was a very weak person that never dared to contradict his mother. He was in tears thinking about his background. That story melted the hostility, a new way of living started taking off. The mother said her own mother was in despair when she was born because of her father's death. She was a daughter from a "dead mother" (Green). Although alive, she never felt very much her presence. She was busy greaving. To be a mother for her was to be in a symbiotic relation. Understanding this dynamic transformed the family relation. Next mediation the mother had stopped breast-feeding the baby and returned to her place in the family scenario. Even the older boy said he would help mother to overcome the pain of leaving the toddler. This was a Family Mediation. The eldest boy was not going to school because his mother was too tired to take him in the morning. Now he was again having her to take him. That mediation implied using all my intuition, knowledge and memory about me feeding my babies, the pain to take them to school and leave them with a teacher, to adapt seeing them grow and leaving the house, to my concepts of family and my culture etc, etc.

Contrasting to my mind full of experiences was the lemma mediation focuses on the "From now on", the future. I would say that I helped the family to change the patern of behavior, to empower the father to "walk on his own feet" and the mother to let her child grow.

Dale Bagshaw reccomends we ask ourselves two questions after each mediation What did you learn from the exchanges between X and Y that followed your intervention? What did you hope that your question would produce? (Dale Bagshaw, Reflective Mediator).

A judge once said about our participation in the audience: The parties even cried and thanked us! Apparently they were very thankful for our presence and help. In that case the couple was to settle alimony but what the wife really wanted was the father to return her son's bicycle and her daughter's doll.

The father said "Is that all? Of course I accept!", and he agreed to give her back some objects.

Next week I find her all happy saying how the kids where excited to see the father bringing their toys home on Children's Day!

Simple as it is, this situation is powerful to move affections. We where all moved in the audience. What made all the difference was our presence asking them what their needs were. The judge was moved too. He must have had his reasons and associations to be empathic with this particular case.

The part sometimes does not know how to ask what she or he needs. The lawyers are usually very involved in the conflict. The mediators, on the other hand, are able to listen and help the story to came out. Not a full story but just the one that is important to help the parties to settle.

The more we attend hybrid audiences* the more the judge indicates mediation, especially if the case is about children's custody or visits. The mediators can help promoting the dialogue between the parents in order to raise healthy kids, especially in these days where

divorce raise is increasing and we know how hard it can be for the children to be moved from one house to another, not knowing how to reunite the separated parents.

*Hybrid audience: an audience with the presence of the judge and the mediators.

References

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