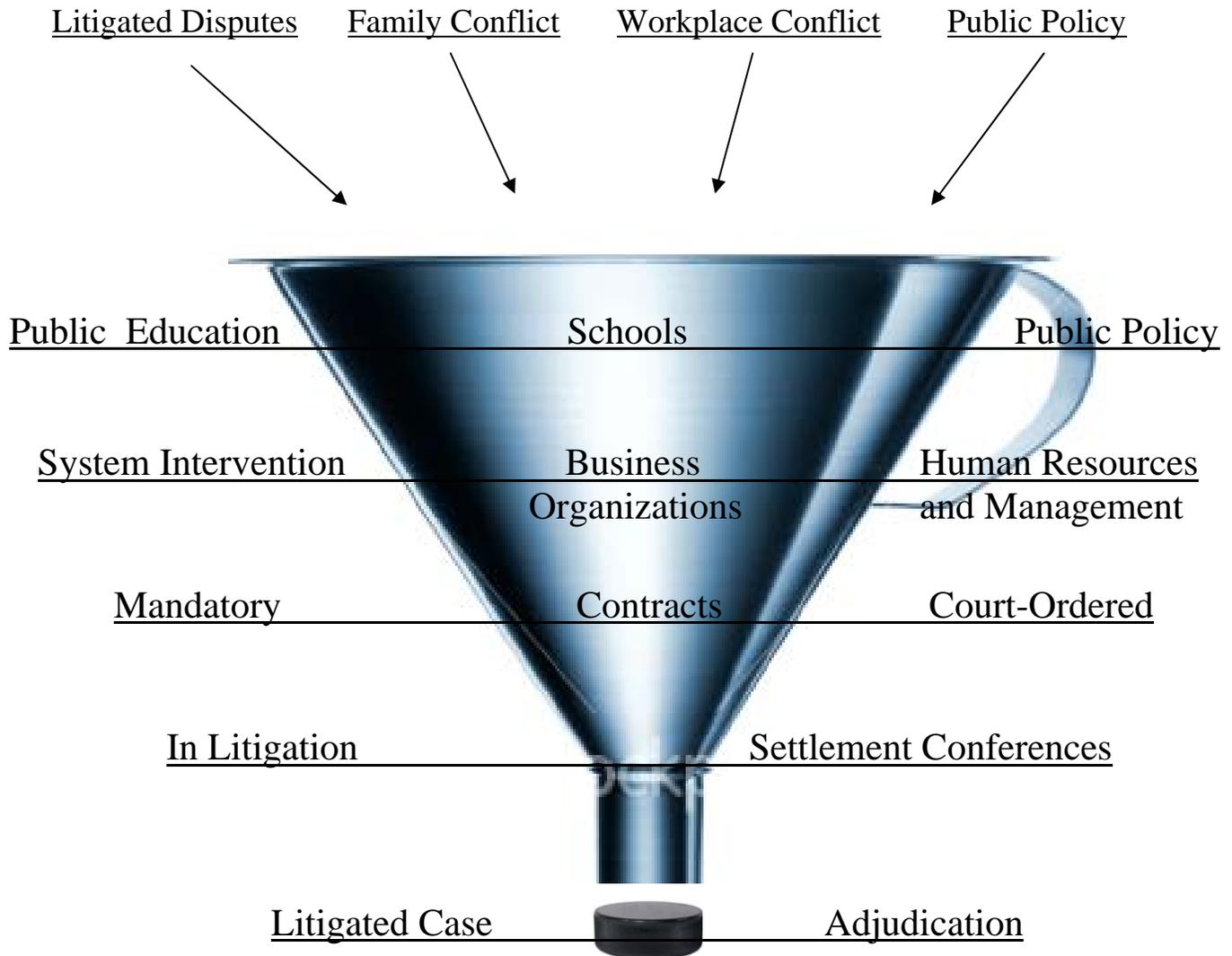


The Funnel of Conflict Resolution – Part One

The Stages of Conflict and Opportunities for Resolution

By Lee Jay Berman



The Stages of a Conflict

The world of conflict can act like a funnel, in that disputes can enter from any of a variety of areas of life and can take all forms (arguments, disputes, accidents, cultural trends). As a society, and as a mediation community, we can address these disputes at many different stages.

Early intervention of conflict resolution requires that either those people in dispute are aware of mediation, or that mediators can find them early in their process. The best way to reach people early in the dispute is through generalized public education about mediation, increasing public awareness, and making it generally accessible and available to them. This can best be done in schools, as we try to teach youngsters about conflict resolution. It can also be approached through public policy measures, promoting and funding dispute resolution centers.

Most disputes that continue beyond this early stage, become more serious and formalized, in that they can begin to affect additional people (in businesses or organizations) and can require intervention through systems, including human resources, management and sometimes organizational consultants. Disputes at this stage can often be resolved in face to face negotiation, without the advent of additional parties.

Disputes that are not resolved at the system level, generally require more formal intervention, if not even a push or a mandate to seek out dispute resolution. This level often requires mandatory intervention, either through contractual requirements or public policy or a court order to attempt mediation before parties can take the next step in the escalation of the conflict (often arbitration, litigation, or administrative hearings). This is often what mediators call “the last rational moment”, meaning that it is the last opportunity for the disputants to engage in conflict resolution or problem solving before they have engaged in the polarizing activities of an adversarial process.

It is never too late to attempt to resolve a conflict. Often in the middle of the litigation process, even just on the eve of trial, parties can still engage in a form of conflict resolution, either through a late voluntary mediation or a settlement conference (either voluntary or mandatory). Seasoned mediators have even seen cases during trial, post-verdict, and upon and during an appeal. By this time, a compromise for the sake of avoiding risk is generally the best case scenario.

Finally, while self-determined resolution can happen at most any phase, some disputes (and some disputants) simply require a third-party determination. In this case, an arbitrator or judge decides the case for them.

How Conflicts Get Resolved at These Stages

When a conflict begins, it is often about the people involved. The conflict at this stage is often driven by, “I don’t like the way you treated me” or “You stopped returning my phone calls, so you left me no choice” or “I’ll show you...”. Resolutions at this early stage of the conflict can often take the form of correcting misunderstandings, better managing expectations, apologies and forgiveness, and reconciliation of the parties. The primary dispute resolution methods in this early phase often involve mutual dialogue, collaboration, creative problem solving and brainstorming.

As disputes remain unresolved and enter the next stage of the conflict, it can begin to center around the secondary effects of the dispute. This is where people act upon their assumptions

about the motives they ascribe to the other person and begin to take retaliatory steps or even what they perceive to be an uneven score between the parties. It sounds like, “Well, he did this to me, so I did that to him because he deserved it.” In complex organizations, it can take the form of passive-aggressive behavior such as torpedoing a project headed by that person or of more direct action like asking for a transfer. If it hasn’t been exposed by this time, this can be where the underlying conflict surfaces – the conflict that is driving the dispute. It can sound like, “You don’t like people like me, I’ve heard you say it before, so that’s why I know it was you who told so-and-so that I did this.”

By the more compressed stages of the conflict, it has generally been stated out loud, denied, and remains unresolved. The parties now clearly know what they are fighting about and have refused or been unable to have the kind of dialogue that can resolve the dispute. The parties’ stubbornness has been triggered, their competitive juices are flowing and each refuses to “back down”, and they both see a settlement as backing down. Each is now showing their bravado by escalating the fight, whether it is in a formal way by increasing the temerity of their discovery demands, or less formal by back-stabbing the other with friends and playing “social politics”. In this stage, they often need to be sent into a mandatory dispute resolution process, where the intervention is much more involuntary, and must be done with more strength. Sometimes, conflict resolution can occur at this level, but often times, resolving the instant dispute is the best that we can hope for. Sometimes, kindness and transformative mediation methods can work at this level, but more often, compromise, distributive negotiation and risk assessment are the prevalent dispute resolution techniques at this stage.

Finally, in the late mediations and settlement conferences, the only reasons that people will tell a story is to vent and get it off of their chest, and to attempt to justify their demands. They rarely tell a story at this stage because they are interested in reconciling the events or in restoring a relationship. Here, the dispute resolution method generally more closely resembles getting a settlement done and bringing an end to an otherwise distasteful experience.

What Happens to the Dispute (and the Disputants)

One reason for the shape of the funnel is that disputes are being resolved at every stage of the process, so by definition, fewer and fewer of them filter down to the next level. And at each declining level, the disputants become more hardened and more of the juice gets squeezed out, where the juice is the flavor, the seasoning, the softness of a dispute (and disputant), so much so that by the time it gets to the bottom and has been through the litigation process and is ready to be adjudicated, it has become so much about “just the facts” that the human element is almost removed.

By the end stage, the lawyers and jury consultants have sometimes squeezed all of what matters to the disputant out of the story, and reduced it to the most relevant and compelling facts. “Why” doesn’t matter any longer, only “What” does. The stories have been told so many times, that they don’t carry any feeling with them any longer, and to the extent that they do, it’s more the aggravation of the process they have been through (or perceive the other as having put them through) than their real outrage or hurt over the original event.

The Disputants are no longer in it to heal, and most aren't in it to right a wrong at this stage, they are mostly still in it because they want what they think is fair (in the form of a resource – money or some other thing), or because at this stage, they are simply resigned to winning at all costs.

Simply put, the earlier in a dispute it can be resolved, the better it is for all involved. Outcomes tend to be more creative, collaborative and restorative. People work together to resolve a problem, rather than oppositionally. And the mediator can be creative and can be involved in building something, rather than surgically removing two people for once and for all.

How We Grow Mediation

Because mediators who work at all of these differing levels of the funnel understand this, and assuming that while it may make logical sense to a person if it is explained to them, the reality is that when involved in a dispute of their own, they will abandon all such understanding and act as anyone does who is involved in a dispute – emotionally.

In many markets in the United States and abroad, mediation of litigated cases has hit a point of saturation. Like ants to a picnic, mediators ran to the courts first in an effort to demonstrate the value of mediation in a litigated setting. Like when the reporter once asked Willie Sutton, the famous bank robber, why he robbed banks and he answered, “Because that’s where the money is.”, mediators will answer, “because that’s where the disputes are.” Truth be told, though, like money, disputes are everywhere. What Sutton meant is that banks were the place where the most money was consolidated together in one place. The same goes for disputes, while the courts certainly hold a consolidated mass of them, they actually only hold a very small percentage of them. Think about every dispute in your life – does it rise to the level of litigating? Only a small percentage of them really do. And if we’re following Warren Berger’s advice, we’re only using the courts as our last resort.

Building on this logic, if mediators everywhere are running to the courts to find disputes to mediate, and given that at least in California, civil filings are down, that means two things. First, it means that we are intervening into disputes at the latest and toughest stages, often allowing mediators to utilize a small portion of their skill set to hammer out compromises (or, worse yet, causing mediators to only develop those skills that they need for that purpose). Second, it means that there is a limited number of matters available to be mediated, as there is a fixed number of litigated cases filed each year, and in some mature mediation markets, if you divide those cases by the number of mediators, there is not much of a career there.

The latest studies say that of all of the cases filed these days, only 1.5% of them actually go through trial. That means that 98.5% of all cases are disposed of at some time between filing and trial. I believe that the same proportion applies to disputes – that of all of the disputes that happen in the world, only about 1.5% of them end up being filed as lawsuits. The rest, like the lawsuits, are resolved somehow, or people just walk away from them. When two basketball players get into a fight on the court, or a teenaged boyfriend and girlfriend have an argument, or a parent gets upset with a child, the public rarely hears about it. So, if only 1.5% (or some number like that) of all disputes make it to the court house, that would imply that the

overwhelming majority of disputes live outside of the courthouse, or upstream in our funnel.

In order for mediation to grow as a profession, it has to push back up the funnel closer and closer to the top. If what comes out the bottom of the funnel, after it had been through litigation as well as all of the processes along the way, is a juice-less, hardened, dried out, densely compressed disk like a hockey puck, then for every one of those there are dozens or hundreds or thousands coming into the top of the funnel. They enter the funnel fluffy and pliable like cotton candy, and that is when mediators should want to get to them.

For mediators, this means connecting with (from the bottom, up) insurance adjusters for claims that haven't yet reached litigation, to human resource professionals, to leaders of religious congregations, non-profit boards and organizations and through mass media, volunteering in schools, and working with public policy and non-profit dispute resolution providers to help spread awareness of the availability of mediation and mediators.

In the end, while a small number of disputes will always be headed on a bee-line right for the bottom as they enter the funnel, the majority can be resolved much earlier, if mediators can intervene earlier and educate the public more broadly, both by empowering them with conflict resolution skills and by making them aware of the availability of mediation early in the dispute.

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