

Get them in – Get them sorted – Get them out

‘Assessing the role of the mediator’

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Let me make it clear that this is not a presentation based on research but rather an enquiry based on professional clinical experience and largely within the framework of family mediation. My background is not in law, psychology, or the social sciences but in the Arts. In an earlier life I was a professor and foundation Dean of a Faculty of Visual and Performing Arts. For two decades I contained the emotional excesses of up to 100 academic and non-academic artists and performers and 1,000 young aspirants following in their footsteps as they worked through various degree and post-graduate courses. Disputes were a way of life and I was wholly engaged in workplace Dispute Resolution without knowing it or naming it. None of these disputes ever went as far as litigation. The process sometimes took place across a desk, round a table, or sometimes in a pub or café. Admittedly I had the ‘big stick’ but it wasn’t used because, in the end, good will had to prevail so that we could all go on working productively together for the sake of the students. It was very much a case of ‘get them in, get them sorted, and get them out’ but, it was the best training for eventual mediation in post-‘retirement’ life. IAMA, LEADR, and then Relationships Australia, in turn, subsequently shaped what I had been doing instinctively. Beyond that, and two years of full-time family mediation work, I claim no special expertise in raising these somewhat disjointed observations. Perhaps, though, I have a slightly different perception of the mediator role. I also recognise that the matters I raise reflect a limited coverage of mediation as I do not address a variety of challenging issues such as cultural complications, shuttle and telephone processes, multi-party mediation, child consultation, international negotiation etc.

So.... What is the role of the mediator? Why do people hire mediators? It’s accurate enough to say that people do so because they have a difference / dispute / problem that they cannot resolve themselves and they need the help of a third party to help them work it out. They want and need an outcome or resolution to their dispute, and a targeted resolution requires a well organised procedure or process. Dispute Resolution (or Alternative Dispute Resolution - ADR) can take many forms but is still basically a mediated process and the generally accepted process promoted by LEADR is one with which you are all familiar. It involves preliminary work, opening statements, summary, agenda setting, exploration, private sessions, and joint negotiation moving towards agreement. Even so the different emphasis that is placed on aspects of the process by different mediators makes the process variable. The given emphasis also defines the focus and style of mediation and there are several of these which have been developed in a major way. These variations are nonetheless considered by some mediators to simply be academic aberrations of the basic concept of mediation which, in itself, can be very straightforward. In his Practical Outline of Mediation, Sir Lawrence Street essentially describes mediation as a process

of opening channels of *Communication*, using these to develop bridges of *Understanding*, which focus on the emergence of a negotiated *Resolution*.

Given that clients are paying a mediator to help them sort their differences and reach a resolution, the mediator's job is to apply a process to achieve that outcome as efficiently and effectively as possible. That implies a professional, business-like approach which, in turn, requires an active professional who does not take sides but who can use and adapt processes to achieve a successful outcome. Mediators frequently describe themselves as 'neutral' or 'impartial' and use the terms synonymously and yet, although they are similarly defined the way that they are perceived or interpreted might be distinct. 'Neutral' has always seemed to me to project a grey, colourless, ambivalent persona which is difficult to reconcile with the image of the professional that I have just described. On the other hand to describe a mediator as being 'impartial' does not deny a potential to bring a certain dynamic to the process. Concern over neutrality or impartiality may simply come down to semantics but in marketing one's self professionally to potential clients I would suggest there is rather more to consider. With the recent emergence of the 'Family Dispute Resolution Practitioner' whose role is to ensure the best interests of children, the concept of neutrality perhaps becomes even less appropriate.

One of the most important assets of a mediator but one which is often overlooked is 'personality'. Personality characterises our individuality but it is often suppressed in the need to project neutrality and yet, if, or when, neutrality is central to a mediation, this may be necessary. There may be a place for neutrality when we accept that we all have inherent cultural prejudices, There are personality traits which we carry with us and which, as mediators, we do try to control. We have our cultural behaviours and values, and our moral and ethical beliefs, and we constantly have to be critically aware of these. In fact, that personality which is so valuable to us, is reflective of our cultural upbringing. The clients who come to mediation have no requirement to disguise their heritage and nor should it be ignored. A client's capacity to negotiate and compromise can often be substantially governed by cultural practice and beliefs. It is a central issue in family mediation and is continually being addressed, although not in this presentation.

Surprisingly in mediation writings there is little reference to 'personality' and yet it is perhaps the strongest feature of our individual uniqueness and something that enables us to establish relationships and the communication skills which are vital characteristics for a mediator. There are many facets to personality. Most living creatures have, or can develop, personality, however an aspect of human personality that is much more sophisticated is the ability to empathise with other people. Empathy, not to be confused with sympathy, requires an active intellectual effort. It is proactive. Sympathy, on the other hand, can be both passive and reactive. The capacity to empathise with individual clients can be a really significant asset to a mediator and particularly in the preliminary conference / pre-mediation session. It enables the central mediation aspect of 'understanding', referred to by Sir Lawrence Street, to be realised. It requires

both sensitivity and intuition and helps to establish an element of trust between the client and mediator. In turn, that trust can lead to a relatively co-operative attitude in the mediation and a certain professional confidence in the mediator and optimise the likelihood of a successful outcome. It would be unfortunate therefore not to recognise the value of personality and to suppress it in the desire to appear neutral.

Sensitivity is yet another resource for the mediator. In mediating over matters of commercial property, workplace, and family, there is almost a sliding scale of need for sensitivity. In these businesslike mediations around property disputes, whilst the mediator needs to be sensitive to subtle nuances that may emerge as confronting clients deal with their issues and address their needs and rights, speed and efficiency and effectiveness are likely to be the real priorities even though emotions run high. On the other hand in workplace disputes whilst efficiency and effectiveness of outcome will be important to both employer and employee, there will almost always be a high charge of emotion to be dealt with and a consequent requirement for the mediator to be sensitive to individual as well as collective needs and their implications. In each of these areas of mediation there is always the need for varying degrees of sensitivity but in family dispute circumstances the need for sensitivity is extremely high. When a family has broken up and the future arrangements for children and the distribution of treasured and very personal property is being negotiated, sensitivity to needs and emotions is paramount. In the end a facilitated outcome is still needed and it is in this area where the 'process' versus 'outcome' debate manifests itself.

In the traditional mediation model there is the segment for 'exploration' in the first joint session. The purposes of this session as proposed by Charlton & Dewdney are:-

To allow parties to identify and explore in detail the major elements of their dispute, including new issues that might emerge;

To encourage and facilitate direct communication between the parties and provide them with opportunities to express their feelings;

To provide parties with the opportunity to clarify the past, which facilitates their mutual understanding of past events and perspectives and maintains a level of optimism about the future;

To facilitate parties' shifting from entrenched positions and demands to identifying needs and interests;

To provide opportunities for noting options, emerging common ground, concessions and agreements in principle; and

To enable the mediator to understand the parties' perspectives on the past and the future in order to set the scene for reality testing in ensuing private or joint sessions.

This describes the generally accepted purposes of the 'exploration' stage in the process but in the Family Dispute Resolution (FDR) arena the segment often has a somewhat larger part of the whole. There is a significant body of opinion that, in the FDR process, 'exploration' is critical and, to some extent, is more valuable than reaching an agreement. Full and proper exploration is seen as vital in enabling a couple to recognise and understand their circumstances as well as

their responsibilities. It is viewed as a potentially cathartic experience not to be underestimated and is very much couched in the 'transformative' concept of mediation. Therein lies a dilemma.

In family mediation is the mediator equipped to enable a very profound and often intimate level of exploration? These mediators are registered by the Attorney General, not as mediators, but as Family Dispute Resolution *Practitioners!* (FDRP's) which enables them to take a proactive role and thus distinguish themselves from the traditional mediator role. The FDRP's are there to represent the best interests of the children when a couple have separated and to ensure that the facilitated agreement reached reflects that goal. They operate within the aegis of the Family Law Act as amended in 2006 to reflect 'Shared Parental Responsibility' and have been trained accordingly. Notwithstanding that, such training does not equip them with the clinical resources to engage clients in a cathartic examination of their intimate circumstances and emotions. This self realisation goes beyond enabling parents to become aware of their behaviours and the need to reduce conflict and build alliances. As it happens, the majority of FDRP's have a socio / psych background as a consequence of the original criteria prescribed by the AG's Dept. Many others, however, have law and other backgrounds and are competent, highly skilled family mediators but may well be less secure or able in penetrative interpersonal exploration. In some of the FRC's where the co-mediation model is used there is much more scope to engage in extensive exploration when one of the mediators has an appropriate background and, in fact, the co-mediation model is particularly well suited to the FDR process. Nonetheless it might be that the nature and extent of 'exploration' in the process is best left to the individual mediator to decide.

The converse and more traditional approach is less personally intrusive but no less purposeful. Following preliminary individual interviews couples come into mediation ready to negotiate and compromise and are prepared to consider the agenda of issues in a pragmatic way to assess their relativity, be able to discuss them, and generate some options. In these cases a possible consequence of in-depth exploration is that pain and poison from the past can be brought to the surface and lead to highly charged emotions. In turn that emotional turmoil can lead to negotiation becoming highly improbable. Whether a couple would benefit more from a very subjective investigation of their circumstances without agreement than they would had they negotiated a set of behavioural rules for themselves in the best interests of their children is certainly debatable. At the very least the mediation process would be substantially prolonged and likely to extend into several sessions. The question is whether that depth of exploration is appropriate or is it really an extension into the realm of couples counselling.

Any aspect of social engagement inevitably results in academic enquiry and development and mediation is no exception. Two of the best known process developments are the Narrative and Transformative approaches. The latter takes the concept of exploration to new depths to reach beyond the immediate presenting issues of the clients and is a much less mediator directed process. The mediator is far less interventionist than is possible in an outcome focussed process.

The transformative mediation process seeks to enable each client to develop a deeper understanding of the other and themselves. Each becomes more aware of their problem from the other's point of view and, through such understanding they, rather than the mediator, define the issues and generate more options for dealing with them. The mediator's role is to encourage the clients to move themselves through the process and enable discussion to go where they decide. It can be a very emotional experience and, in some cases, traumatic. In his book 'Mediating Dangerously', Kenneth Cloke deals with how mediation can be a really deep and searching experience enabling deeper levels of transformative change. The process can open wounds and challenge assumptions and not all mediators are equipped for such responsibility. Solutions are de-emphasised so again the role of the mediator needs to be questioned. Often there is also the issue of time as transformative work is time consuming and may need multiple sessions.

A popular and revised text on the Narrative approach to mediation is by Winslade and Monk. It is very much a 'how to do it' book and deals with the fact that we all listen to the sequence of events leading to a dispute as they are presented by each client. What they do is tell a story from their point of view. Using the 'story' therefore seems to be a logical tool to use in dealing with the problem and clarifying issues. In simplistic terms what the mediator does is recognise the stories for what they are. Rather than trying to isolate their truth the mediator tries to identify aspects of the stories to present them in a different perspective recognising that what has been presented by each client is a highly personalised and compacted summary of events that took place over an extended period of time. The context of these stories is generally very emotional and so the role of the mediator is to de-personalise them with the clients and this is done through a process of deconstruction to help the clients become aware of what has been happening. Whereas the initial compacted story focuses on the negative aspects of a relationship there will inevitably have been positive aspects buried in the history. By identifying these and enabling them to emerge it becomes possible to reconstruct the story in a more objective way so that it becomes a constructive common denominator to the two initial histories. In this way it becomes easier to identify and deal with the real issues. There are a variety of individual approaches to narrative mediation and it remains a useful technique for interpretation by mediators..

These two processes are well removed from the mantra of 'Get them in, Get them sorted, Get them out' which is very much associated with the outcome focussed approach. Nevertheless they do reflect a studied approach to the concept of mediating between two parties and there is no real evidence yet that any one way is better than another. Mediators need to modify any process to suit their experience, their personalities, and the apparent needs of their clients. Human phenomenology is limitless so, in the professional need train people to help others, the need to generalise is inevitable. Our traditional mediation process reflects this generalisation but it is only proper that, within the bounds of professionalism, individual mediators should enable their own pathways to evolve.

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