

TECHNIQUES IN MEDIATION

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In the heart of every good lawyer lies a dead poet. Clarence Darrow

Leading text books identify a multitude of techniques used by mediators, either contingently (depending on the dispute and parties concerned) or non-contingently (always applicable.)ⁱⁱ This paper draws from research articles and a variety of disciplines in an attempt to explore some of these strategies from a conceptual basis that the ultimate goal of mediation is to facilitate the parties negotiation so that they achieve an outcome satisfactory to them. This begs the questions of what is a satisfactory outcome, and what techniques best lead to that end. Some emphasis is placed on the need for mediators to be self-aware, so that self is placed at the service of the process and not to block it.

Introduction

The term “mediation” is often used as a generic to cover a process with which most people have limited experience, or experience in only one context. This is confusing, because not only does the experience change with the style of the practitioner, but each practitioner may have a different philosophy of what it is that is intended to be achieved (from building settlements that work, to “transformation”). There is also a tremendous range of forms of dispute resolution, to which the name mediation is applied. These range from problem solving (pre-emptive dispute resolution) and facilitation on the one hand, to virtual arbitration or “arm twisting” on the other. Co-mediation adds a different dimension, with some practitioners of the view that this is the only way to carry out really effective mediation.

This ambiguity is apparent not only in the writings and utterances of the converted, but also in the critiques. One finds oneself reading a polemic on the dangers of mediation in, say, the family context, and crying out for the writer to define the precise mediation experience that has created the problems he or she describes.

In New Zealand, most practitioners will be familiar through the LEADR courses with the models espoused in North America from either Harvard, or the Colorado Dispute Resolution (CDR) training programmes. Some may have attended the rather different courses run by Dr. Dudley Weeks with his “Conflict Partnership” programme.ⁱⁱⁱ There has also been limited opportunities to hear other speakers on, for example, the Public Conversations Project, or Stanley Posthumus’ “Focused Thinking” mediation with its emphasis on the idea that “every word is a metaphor”. This diversity is enhanced in Wellington at least, by the work of the NZ Institute of Dispute Resolution.

There are also the training opportunities offered by the various universities and some individuals which are “homegrown”.

International writings show considerable process diversity, such as the “ARIA”^{iv} model of Jay Rothman^v (which emphasises the importance of venting of emotions

before addressing solutions; in contrast with alternative processes which focus on little agreements (do-ables), whilst putting emotions to one side. Both describe almost miraculous successes and in similar situations.

Others (including Ian MacDuff of the NZ Institute of Dispute Resolution) argue for a flexible, pure, almost “art” form of mediation that enables the parties to design whatever process is most appropriate for them and their particular dispute.

Mediation in New Zealand also springs from a number of disciplines - amongst which there is little enough discussion on concept and philosophy, either internally or together. Most of the available NZ writing on the subject has been from a legal perspective, with a notable exception being perhaps Butterworths Family Mediation Guidelines. Others have noted the disparity between academics and researchers on the one hand and practitioners on the other.

So we have ... a great deal of new information that practitioners seldom read and ... a great deal of practical experience that scholars fail to draw from effectively.^{vi}

Where researchers and practitioners work together the results can be of great interest - as in e.g. “When Talk Works - Profiles of Mediators”^{vii} discussions and observations on the work of 12 very different leading U.S. mediators, and the seminal review of this book and others by Carrie Menckel-Meadows.^{viii}

The Basics.

I suggest the only purpose of participating in mediation is where it is, for whatever reason, inappropriate to negotiate without an independent third party being present; and the parties wish to retain decision making power, or at least avoid the costs of arbitration or litigation.

First I note it is a privilege to be asked to be involved in another's conflict resolution. Second, it takes some courage for people to face someone with whom they are in conflict across a small room. It is easier to hide behind a lawyer at court.

The primary task of the mediator is therefore to make the process safe. This extends to all the details, such as room and seating layout through to closure, and enabling the parties to leave the meeting place without hassle - whether settlement is reached or not.

To be able to run a safe process, the mediator must have sufficient self knowledge to be able to identify where his or her own weaknesses may lie - most codes of ethics for mediators require referral on if the dispute is outside their range of skills and abilities. There are additional personal aspects that can change. Mediators not well centred in their own sexuality may cause great damage in sexual harassment cases. A mediator may feel unable to handle a mediation involving a car crash victim, if affected by the recent loss of a close friend or relative in similar circumstances. In short, an essential quality for a good mediator is the ability to step back, to ensure that the self is placed in the service of the parties negotiation, and not to block it.

Coupled with the need for self insight, is that of ongoing experience (it is easy to become “deskilled”) and again most codes of accreditation require basic levels of regular refresher courses or minimum numbers of cases handled.

I suggest there is a further need for self education, continual study and the eye to pick up information and clues from other disciplines and professions that might help in ones own work.

Comparable Processes.

A palliative care specialist describes the case of an elderly person in considerable pain from conventional treatments (life expectancy 6 months), and whose main reason for living was not for herself, but concern for children (in their 60s) and how they would cope. He was able to offer the alternative choice of a pain free high quality of life for shorter time during which the patient could help the family prepare for the inevitable. On acceptance, within 3 days the patient was pain free.

The specialist used a technique which is I suspect universal to the caring profession - that of observe, observe, observe, describe and analyze. (Nine-tenths is observation to ensure you have all essential information; description is to name what it is you have observed; and the analysis is in seeing the whole context). And then leave it to the individuals to use that information in the manner that suits them best. (In short - don't jump to answers too early, or impose one's own values and perspective.)

What struck me was that this model fits very comfortably into the "transformative" model of Bush and Folger^{ix} with its emphasis on recognition of the parties' own abilities to work it out themselves, and all that is necessary is to empower them (often with observed insights and then education as to options) to do so.

What Do People Want? The Many Aspects of Conflict Resolution.

Virginia Phillips has discussed the research papers that identify *satisfaction* or a *satisfactory outcome* as the desired goal of disputants.^x They may well describe this as meeting their sense of justice. Satisfaction is a feeling.

What is satisfactory will, however, vary with the individual - some of whom may not be able to articulate their needs.

It is generally accepted in the text books that disputes ended by power (e.g. strikes and lockouts) will be less satisfying to the parties than those ended by establishment of rights (litigation) which in turn will be less satisfactory than those ending by finding mutual interests.

Note also the increasing scale of satisfaction from results: settlement - usually where an answer is imposed; agreement - where the parties agree to disagree; and resolution - where the relationship is restored and all outstanding issues are laid to rest.

A *Kavanagh Q.C.* programme at the end of January told the story of a widow taking on the might of the medical establishment over the unnecessary death of her husband following surgery. After skillful cross-examination (of course) the necessary admissions are made, but at the moment of victory the client withdraws her claim for damages. Consternation in the Court. She wanted to prove her point, sheet home responsibility to those at fault, but no amount of money would bring her husband back to life.

There is a remarkable story about the South African Truth and Reconciliation Commission.

You may know of that particular incident, where the police blew up a bus because they believed that there were people on the bus who were planning some anti-apartheid activity. They didn't stop the bus, they didn't arrest them, they simply blew up the bus. So the mother of one of these young men said this:

"This thing called reconciliation ... if I'm understanding it correctly ... If it means this perpetrator, this man who killed Christopher Piet (her son) if it means he becomes human again, this man, so that I, so that all of us get our humanity back ... then I agree, then I support it."^{xi}

This plea illustrates the problem of victims in all circumstances - they are the ones left with powerful toxic emotions with which to deal. The desire for revenge may only lead to escalation. They need to forgive. But the transgressor needs to be worthy of forgiveness. Rhonda Pritchard and Gordon Hewitt in an unpublished paper set out a number of steps needed for forgiveness and reconciliation to occur. Fundamentally they involve the transgressor in taking full responsibility for his or her actions and then taking a number of steps in restitution - before an apology can be regarded as genuine. (The technique warrants a 2-day training programme rather than a 20-minute address.)

These examples go beyond the ordinary - although that may be only a matter of degree.

There are of course many who react differently, and who say they want "blood on the floor."

So what do people really want from any dispute resolution process?

One suspects that mediators from different disciplines would answer the question in different ways depending on their experience and training.

Counselors and psychologists might well look for outcomes which would give lasting satisfaction and enable their clients to grow as people.

Managers would be looking for solutions which would give the antagonists skills to avoid, or resolve for themselves similar conflicts that might arise in the future.

It is easy for lawyers to assume that all outcomes are to be identified in terms of referral to an abstract rule of law, and that cases are "won" or "lost" with the results being measured in money. As long ago as 1992 Riskin^{xii} noted this mindset was diametrically opposed to the principles of mediation, wherein rules of law are only relevant to the extent the parties think it appropriate; that the goal is to mesh mutual interests (not even "win/win" language is necessary); and where money may be a minor aspect of settlement if relevant at all. To this analysis might be added that litigation depends on establishing rights based on an assessment of past facts ascertained by reference (often) to fallible human memories, whilst mediation can not only do that, but also look to the ongoing needs and interests of the parties in the future.

In my view all the above answers are important. Finding ways to address the past may be an essential pre-condition to any forward progress. I am also impressed with the creativity lawyers can bring to future problem solving. Other disciplines can bring new ways to address past injustices other than by assessing litigation outcomes.

How many of us ask our clients what it is they want to achieve?

Note that the wording in this question is crucial. Not - what do you want from the process? (This links in to what they have been told might happen). “What do you want to achieve” gives the opportunity for expression of feelings, and altruism.

The sort of responses to this question have been discussed elsewhere.^{xiii} Suffice to say that in the employment field of unjustified dismissals, a common first reply is “I want my good name restored” and “I want to make sure what happened to me doesn’t happen to anyone else.” Money may well be important - but in context it is not what is “on top.”

Money may also be used for a variety of purposes. It may have to serve the purpose of “making them sit up and take notice.” Or it may be seen as *a metaphor for pain*. Such needs may vary enormously and have little relationship to a cost and risk analysis of litigation outcomes (which may be where the other side is at.) One “technique” is therefore to “unpack” the underlying emotional and other needs of the parties and find ways to address them more directly.^{xiv}

Physiology Factors.

What do we know about the physical effects on people of being in dispute?

It is not the purpose of this paper to offer an in-depth physiology of conflict. Three points suffice.

It is well known that in facing danger (in the modern world this means conflict) the most primitive part of the brain cuts in - either “flight or fight.” This is an essential survival strategy, and operates without conscious thought. The “safety net” of mediation enables people to talk rationally through their dispute without having to respond by avoidance or violence. Often, however, they have to work through those feelings - hence “venting” in a safe environment can be an important stage in mediation. This discharge of feelings can also occur in the safety of lawyers’ offices. I’m not suggesting we “double-guess” our clients, but this may be all the “blood on the floor” man is doing. How many will have had the experience of letting a client calm down - negotiating a realistic outcome, and having him acknowledge later that this was the best result?

The amygdala (a part of the brain) is becoming recognised as the seat of strong emotion, and the physical changes in it when therapy has released the trauma are now observable.^{xv} This is a major validation for the counseling professions to whom these changes have long been observable in improvements in the mental and physical health of their patients. One goal of mediation might therefore be regarded as “to do nothing that would interfere with the prospects of healing.” This, to me, means no more (nor less) than running a clean, transparent process in which people feel empowered, from which healing can occur. Note the research identified by Virginia Phillips to the effect

that the parties' view of the fairness of the mediator has a significant bearing on their perception of the justice of or satisfaction they attain from any outcome.^{xvi} I am not of the view that mediation of itself will heal (although shifts in personal growth can occur for all involved, not least the mediator.)

Bio-geneticists working internationally and in NZ argue for the existence of, as well as a gene for aggression, a gene for altruism. This, they argue, is the evolutionary difference that has enabled humankind to be so successful in making the world so suitable as a habitat. This is a concept to be conjured with from many perspectives. In dispute resolution, its significance lies in appreciating that all people have care of others as a core value within them - even if they have to be reminded of this occasionally.

In Japan, mediators can take to mediation a perfectly round ceramic bowl mounted on 3 legs. Above the sphere is a bridge on which stand 2 figures, and above that another bridge on the ends of which stand figures of gods. The mediator says to the parties - here you stand (on the first level) on the bridge of mediation, and any agreement you reach must be whole and never-ending like the circle and owned by you both. But as you stand here, remember the gods above and negotiate from beyond pure self interest.^{xvii}

Categorization of the elements of conflict -A.S.P.I.R.E.

The foregoing discussion is intended to show why conflict resolution can involve more than a simple cost and risk analysis of going to Court.

Mitchell Hammer (Association of American Universities) argues that conflict involves 4 elements to which he gives the acronym F.I.R.E. This stands for Face (the saving of, for both sides); Instrumentality (i.e. litigation costs and risk analysis); Relationships; and Emotions.

I have some reservations about FIRE because it omits the reality that for some people or cultures, and in some cases, spiritual elements (or religious or moral)^{xviii} will also be important. Moreover "Face" is not necessarily a generic concept, culturally or individually.

Discussions with Ian MacDuff lead to S.P.I.R.E. - in which S stands for spirituality, and Face becomes Personal issues (that is, issues of simple human dignity, or mana or face saving.) Add to that Altruism, and the acronym becomes both more comprehensive, and the resultant ASPIRE perhaps more appropriate to a problem-solving co-operative process than the original.

Techniques.

The leading textbooks all have detailed sections dealing with various processes, mediator styles, tactics, strategies and techniques. I don't propose to take too clinical an approach to definitions, but merely concentrate on a few major elements which have been helpful or challenging in practice.

Communication techniques.

This paper is not intended to cover the full extent of communication strategies in mediation, which justifies a separate paper, and on the theory of which many books have been written.^{xix} Some lawyers will be familiar with NLP training programmes. These could suggest that body language may be the most important communication element of all that a mediator does.

It is hoped the following may trigger some thoughts and ideas.

Use of Paradox.

In conflict management a paradox can arise where the risk of a problem arising is directly addressed, and as a result - no problem. It is the equivalent of carrying an umbrella to ensure it shines. (Even if it rains you are prepared.)

If parties are told that the threshold of expectation is only that they have the opportunity to focus precisely on the issues between them, then the pressure to settle is removed, and they feel more empowered. Less pressure means more readiness to settle.

The safe handling of strong emotion is important. Do you leave it until it arises? Or set up safety systems in advance (the opening) so that people know what will happen? Most people want to know that they have been heard (in any dispute resolution process) and this may include hearing the feelings. Many men are uncomfortable with women's anger or tears. Some women may be concerned that they will not be allowed to talk about their feelings. A mechanism that allows feelings to be expressed but in ways that will be safe lays the groundwork for trust in the mediator and the process. Trust will be established when the mediator makes good on the promise to intervene. (See further note 20 below for more detailed discussion on this point.)

Safety agreements in the opening.

Opening statements by the mediator fall into categories that Christopher Moore would describe as "non-contingent" (elements which are included in every mediation, as opposed to "contingent" elements which vary on a case by case basis.)^{xx} Mediators will vary considerably in the extent and content of their openings. I am a firm believer in the Bush/Folger doctrine that the success of a mediation is based on the building blocks of the opening. In it the mediator makes certain promises to the parties relating to the conduct of the process, and as each promise is fulfilled, trust is built in both sides. Little agreements lead to bigger ones.

A possible list includes: agreement to the process (which in itself will contain a number of agreements)^{xxi}; that decision makers are present; the extent of confidentiality; how high emotions will be managed^{xxii}; record keeping, and what happens to copies of submissions produced only for mediation purposes; there are to be no interruptions (i.e. cell phones will be turned off; there is no one yet to come who expects to be late); and agreement around the amount of time to be set aside. (7 agreements before you start.) It doesn't do any harm to comment on the process at that stage - "Well, that's 7 agreements already - that's mediation in action - that

augurs well”). It brings a laugh, but the parties appreciate they have already been practicing respectful negotiation with each other, and that it can work.

Commenting on the Process.

To me this is the most powerful (for the mediator) and effective intervention that can be made. It is directly within the mediator’s role to manage the process. An example may be saying to a party “when you do ... (describe behaviour) it has the following effect... (describe). Do you really want to give that impression?” If a party pores through his or her papers or talks to their advocate whilst the other side is telling their story, then it looks bad for a number of reasons. A simple intervention can be to emphasize the importance to the speaker in being heard, that the same courtesy has already been extended to them (or will be) and you wouldn’t want them to be seen to be in a false position of giving the impression of being uncommitted to the process (or even contemptuous of the other’s deeply held thoughts). This strategy can be very powerful, and may need to be done in caucus to avoid “showing up” the individual in a way that affects the power balance in the room.

Equally, if something of great value happens, then a pause to describe the event will mark its significance, and give time for people to appreciate it before the discussion moves on.

Use of Humour

Laughter is often the best “ice-breaker” - but used inappropriately can backfire. At its best it will help carry parties past impasse, and at its worst they will feel they, and their issues are demeaned. The ethics of the extent to which mediators should go to help people past stuck places (manipulation would be an abuse of the process) are important in this context.

On a related point, and for a useful and challenging discussion, see Robert D. Benjamin “The Mediator as Trickster: The Folkloric Figure as Professional Role Model.”^{xxiii} Benjamin argues that the traditional professional models of law, medicine and mental health are not well suited to the purposes and practice of mediation because they are *fundamentally anchored in a technical-rational conceptual orientation that encourages the professional to be an expert. ... The (folkloric) trickster figure, like the mediator, demonstrates the effective integration of both the analytical skill and the intuitive sensibilities necessary to be effective in the management of conflict.*

Benjamin argues for treating people and their problems holistically rather than mechanically. Note he draws a clear distinction between mediator expertise and the mediator as expert (in the particular field.) The latter may well lead to advice giving - which the author argues is the prerogative of the advocate - adviser, and if conducted by the mediator is a form of arbitration.

Intervention Techniques.

The text books contain considerable lists of interventions appropriate for different cases. These include the obvious skills of clarifying, reframing, “unpacking” underlying issues, keeping the parties focused etc. Professor John H. Wade (Bond University) lists a repertoire of some 44 interventions,^{xxiv} but highlights the absence of research on their effectiveness. Associate Professor Lim Lan Yuam (of the National University of Singapore) in a useful article offers some 9 interventions based on practical experience, as a contribution to the discussion.^{xxv} He emphasizes the importance of power-balancing, and empowerment of the parties so that responsibility for the solution does not move to the mediator and away from the parties who have to live with the consequences.

Name the Demon

Psychologists would say that the old stories of demons, controllable when you knew their names, is an allegory for our own internal toxic dysfunction. If you acknowledge, say depression, then you can be in control, rather than the other way around. Translated to the mediation setting, this can mean describing to the parties what it is that is going wrong between them - for example, mutual attribution error is a common problem. Once empowered with this insight, the parties can work out their own solutions.

Use of Metaphor

People use metaphor all the time as a method of achieving shared meaning through identifying shared experience or understanding. There can be gender differences. Men use sport, war and sexual images, and it does not register to some that all of these may be alien or even offensive to women. There can be traps in cross-cultural mediations. Mediator use of metaphor can substantially help or hinder the process.^{xxvi} Metaphors of journeying, landscapes, prisms and light tend to be generic to the human condition.

Find the Best, not just the First Solution.

One of the great advantages of mediation is the ability to look beyond the first, or most expedient solution. Therefore it may be important to brainstorm all possible options before resolution, to ensure the greatest satisfaction for the parties.

Techniques for Advocates.

There are useful articles available on the positive aspects of the role of advocates generally in mediation.^{xxvii} As a mediator in a field which involves many lawyers and advocates of varying skills, I note it can be easier to describe the wrong way to participate, rather than the right. (The best advocates have a sensitivity to the process that can be of enormous help to the process, the mediator and their client.)

The Davidson definitions,^{xxviii} however, are so good that they deserve being repeated here.

The Bismark Syndrome -The advocate fires an enormous salvo of rhetoric, often including a personal attack on the character of the other side, and then concludes - “But we are here to settle.”

Collegiate Empathists - Those advocates who enjoy a delightful discussion between themselves on esoteric issues of law of no interest or relevance to the parties or the mediator.

Monolingualists - those with no understanding of body language.

"Motown" Strategists - Those who arrive without a strategy for settlement and are merely "wishing and hoping."

The Von Munchhausen Approach - Those who have skim read the "Purple Book" but it hasn't stopped their falling into well marked but deep holes.

The Venue Pauperis - The advocate who has taken instructions by phone interviewed the client on the steps of the tribunal, and finishes preparation during the process.

The Maginot Line Specialist - Those who cannot adjust their thinking, let alone strategy, when awkward new facts come to light.

The Hydra Complex - As the mediator thinks the last issue has been resolved another appears out of left field.

The Stockholm complex - Those who identify so closely with their client that they lose objectivity

The Two Birds in the Bush Strategist - Those who can't do sums involving calculations of future costs of litigation.

The Blinkered Approach - Those without listening capacity.

The Costs Protector - Clients want to know what will be left over for them after payment of costs. Over preparation such as filing proceedings in a number of jurisdictions can render a mediated settlement so hollow that high litigation risk is preferable to being left with residual debt.

Conclusion

Lawyers can be remarkably intuitive to their clients' needs, and creative in generating options. Conflict resolution, however, should not be seen through spectacles ground to the prescription of law.

When people agree to mediate, they are more than halfway to agreement, and it is likely 65% of the cases will settle provided the mediator does nothing to muck it up. (Often people simply want a conclusion on a basis with which they can live, and at not too great an expense.) Silence, and backing out of the dispute (letting the parties do their own negotiation) may be the best technique.

Up to 90% of cases will settle with increasing levels of mediator skill required. There are some cases which are inappropriate or impractical to settle, - maybe 5-10%. The cases which extend the mediator are those in the 90-95% range which may also be extremely conflicted, and difficult and time-consuming to litigate. They can bring the most professional satisfaction. They can also require the most sophisticated techniques.

You may have reservations about much of the discussion in this paper. My own views may well change. But mediation as a process seems here to stay, and discussion on its practice and theory is of increasing importance. The extent of governmentally approved conflict resolution by ADR is increasing as is shown in the annexed schedule of statutes which is included for interest.

ANNEXURE

The following is a list of NZ Statutes located by use of computer search under: mediation, mediator, conflict/resolution, conciliation, pre-hearing, facilitation and dispute resolution - as at early 1997. It was prepared by C. Johnson as research assistant for Claire Baylis (Deputy Director, NZ Institute of Dispute Resolution, Senior Lecturer, Victoria University of Wellington) in connection with her work in the review of statutory models of dispute resolution in NZ. The list covers some repealed statutes, and because of its timing obviously needs updating to the present day. No responsibility is taken for accuracy. It does not include similar dispute procedures established by way of Regulation.

Antarctica Environmental Protection Act 1994 No119
Article 18
Arbitration (International Investments Disputes) Act 1979 No 39
Article 28
Biosecurity Act 1993 No 95
Ss 96; (S142?)
Children, Young Persons and their Families Act 1989 No24
Ss 170-177
Commodity Levies Act 1990 No 127
S 11(d)
Crown Minerals Act 1991 No 70
S 68
Education Act 1989 No 80
Ss 114-115
Employment Contracts Act 1991 No 22
Ss 39, 79-81, 88,102, 181,187
Environment Act 1986
Ss 13(d),31
Equal Pay Act 1972 No 118
Family Proceedings Act 1980 No 94
Ss 13-18 (S 13 as amended in 1991)
Fire Service Act 1975 No 42
Ss 14, 46, 64, 65
Fisheries Act 1996 No 88
Ss 114,356
Health and Disability Commissioner Act 1994 No 88
Ss 10, 61
Human Rights Act 1993 No 82
Ss77-82
Industrial Conciliation and Arbitration Act 1954
Industrial Relations Act 1973
Labour Relations Act 1987
Medical Practitioners Act 1995 No 5
S94
National Provident Fund Restructuring Act 1990 No1 (Part 1)
New Zealand Railways Corporation Act 1981 No 119
S 17
Parental Leave and Employment Protection Act 1987 No 129 S 58

Police Act No 109
 Fourth Schedule, Ss9(a), 64
 Police Complaints Authority Act 1988
 S 17
 Privacy Act 1993
 Protection of Personal and Property Rights Act 1988 No 4
 Ss63, 66-73
 Race Relations Act 1971 No 50
 Ss10-20
 Repealed Ozone layer Protection Act 1990 No 50
 Article II: Settlement of Disputes
 Residential Tenancies Act 1986 No 120
 Ss76,88,89(1), 90(1)(2), 99(1)(2).
 Resource Management Act 1991 No 69
 Ss99,268(1)(2)
 School Trustees Act 1989 No 3
 Ss22(4)(a)(b)
 State Sector Act 1988
 Sharemilking Agreements Act 1937 No 37
 Treaty Of Waitangi Act 1975
 Treaty of Waitangi (State Fisheries) Act 1988
 Veterinarians Act 1994, S 27

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ⁱⁱ See particularly Christopher W. Moore “The Mediation Process. Practical Strategies for resolving Conflict” 2nd Edition 1996, Jossey-Bass

ⁱⁱⁱ See e.g. “The Eight Essential Steps to Conflict Resolution” (1992 Tarcher Putnam)

^{iv} A(ntagonism) Adversarial Framing (letting it all come out)
 R(esonance) Reflexive Reframing (finding the issues in common)
 I(nvention) Inventing creative options and solutions
 A(ction) Agenda setting leading to action.

^v “Resolving Identity Based Conflict” (1997 Jossey-Bass). Rothman uses the metaphor of making music throughout his exposition.

^{vi} Christopher Honeyman “Frames of Reference” Mediation Quarterly vol. 15 no. 4 pp. 269-275. The author argues inter alia for recognition of “bridge people” who see coordination of both contributions as being of central value to their work.

^{vii} By Deborah Kolb & Associates. 1994 Jossey-Bass

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- viii "The Many Ways of Mediation: The Transformation of Tradition, Ideologies, Paradigms and Practices" *Negotiation Journal* July 1995 pp.217-241.
- ix "The Promise of Mediation" 1994 Jossey-Bass
- x See "Mediation: The Influence of Style and Gender on Disputants' Perception of Justice" 1996 *NZILR* Vol.21(3) pp. 297-311
- xi Quoted in Martha Minow "Between Vengeance and Forgiveness" viewable at <<http://www.ksg.harvard.edu/hri/minow.htm>> (Current as at 14/02/99)
- xii "Mediation and Lawyers" 43 *Ohio STLJ* 29,41-60
- xiii See *Lawtalk* Vol.486 p 41.
- xiv For a systematic approach see Wade "Crossing the Last Gap; Why it is Important" *AJDR*
- xv See Van der Kolk "The Body Keeps the Score: Memory and the Evolving Psychobiology of Posttraumatic Stress" *Harvard Rev Psychiatry* January/February 1994 pp. 253-265.
- xvi *Op. cit.* Footnote 11.
- xvii In discussion with Justice E. Durie from his experience during a trip to Japan.
- xviii See e.g. "Negotiation and Evil: The Sources of Religious and Moral Resistance to the Settlement of Conflicts" Robert J. Benjamin *Mediation Quarterly* vol. 15 no 2 pp. 245 - 266; "Understanding Shame in Mediation and Dispute Resolution" Natasha Serventy, 1998 *ADRJ* 150-160. See also generally "Mediation: Revenge and the Magic of Forgiveness" Kenneth Cloke 1994
- xix See "A Communication Perspective for Mediation: Translating Theory into Practice" Jonathan H. Millen *Mediation Quarterly* 1994 Vol.21 no. 2 pp.275 - 284 ; "Communication in Mediation" David Hurley, Address to the AMINZ AGM 1998 and bibliography.
- xx "The Mediation Process" Second Edition Jossey-Bass
- xxi This can include a number of agreements such as not to interrupt each other, not to use personal insults or insulting gestures, to work by consensus, to be honest with each other, that the purpose is problem solving etc. If these agreements are breached, it can help the mediator considerably to remind the transgressor of the agreement they made at the beginning of the process.
- xxii For some assistance see "Emotions in Negotiation: How to Manage Fear and Anger" Robert S. Adler, Benson Rosen, and Elliot M. Silverstein *Negotiation Journal* April 1998 161-179. I offer the following: Acknowledge in the opening that one of the outcomes people want from any dispute resolution process is to be heard - not necessarily agreed with, but heard. (*part of the value of the "day in Court" - even if it isn't in public.*) Accordingly it is OK for the parties to express their feelings - not advocates - but the parties. (*You don't want theatrics from those not directly involved - that will escalate the conflict.*) But if it becomes unsafe to stay in the same room then the reason for mediation is obviously undermined. Therefore 2 protections are offered - the mediator will monitor the level of tension and if he/she deems it inappropriate then a halt will be called for a cup of coffee, and cooling off before resuming. (*This assures the parties that something will happen if they are too scared to speak up, or don't want to appear as wimps.*) But if anyone wants a break for any reason just say and it will happen. (*So they know if the mediator misses something then they can still get a respite. And without it necessarily being seen as a weakness - it may merely be to go to the bathroom.*) But if you promise to intervene in this way - you have to make good if the problem arises or lose credibility and the parties' trust.
- Having said this, you don't necessarily want all emotion to disappear. Its expression can sometimes be the real impasse breaker when one side for the first time sees the other as real people in distress, rather than as ciphers.
- xxiii *Mediation Quarterly* 1996 Vol.13 no. 2 pp. 131-149
- xxiv "Strategic Interventions Used By Mediators and Facilitators and Conciliators" 1994 November *ADRJ* 292-304.
- xxv "An Analysis of Intervention Techniques in Mediation" August 1998 *ADRJ* 196 - 205.
- xxvi For a fascinating analysis of dialogue form the metaphor perspective see the 3 articles by John Haynes accessible only on the net through the web page of the Mediation Information and Resources Center (MIRC) The address is available through the Links page of the NZ Institute of Dispute Resolution - http://www.ac.nz/~nzidr/a_link.htm
- xxvii See e.g. "The Lawyers Role in Mediation" Bridget Sordo *ADRJ* February 1996, pp.20 -30. "The Role of Lawyers in Mediation" Roger Chapman *NZLJ* May 1996 pp. 186-189,192
- xxviii Ian Davidson is a Member of the Employment tribunal based in Auckland. These definitions were first presented in an unpublished address to the Auckland Branch of LEADR 1997, and quoted in "Lawtalk" 486 p40.