

## **Mediator insights from the ABA Section of Dispute Resolution Conference on "The Golden State of ADR".. not rocket science but a reinjection**

There is nothing like being immersed in a melting pot of ideas (which is what a good conference is all about) to give your practice a charge. What I learnt at the conference <sup>1</sup> was not rocket science but a timely reminder of some essential truths about mediation. I am now armed and ready to experiment, to push out the boundaries and try new ideas. I hope that by sharing some of my insights and observations with others there may be a similar recharge, or at least a ripple effect, in your practices, either as mediators or lawyers acting as counsel in mediations.

### **Key Insights**

#### **Redefining mediation**

Mediation is a continuum of activity – a process – not an event. As mediators, we know this as a matter of theory, but when we translate it into our practices I believe we lose sight of it. It is a truism but it can be elusive.

It has been a powerful force making me reappraise my mediation frame. The lens has widened from a primary focus on the "big day out" in mediation. This emphasis is borrowed from our litigation backgrounds with the culmination of activity in the trial itself. As mediators, we need to shift from that microscopic viewpoint and see each step in the process as equally important.

This means that from the outset, from the moment of our engagement, the meter is running, (whether or not we start noting down billable units) and every intervention has an impact. Some of our most significant interventions may be those before the meeting where all the parties participate.

As significantly, the process has no clearly defined end point. If we consider the process to have at least some transformative qualities for the participants, including ourselves as mediators, then there is no resting place. It is ongoing. I believe there are transformative qualities in all mediations. We interact with each other in a private forum in a personal way. The subject matter can be commercially sensitive or highly intimate. We work together as a collaborative team in fashioning the final outcome. We make evaluations and judgements together. We are frank and direct in our communications which are directed towards achieving resolution. This "teamwork" impacts upon us all. It is an experience upon which we can, and will, reflect in the days to come.

The process is also not finite in terms of outcomes. Outcomes achieved on the day can be modified and rewritten the next day, the next month or the next year. In the latter case this may occur following "protocols" used during the mediation, or simply with the benefit of the new skills and wisdom gained in the process.

A corollary to this, from the mediator's perspective, is that there is no such thing as a failed mediation. I no longer believe this to be a cop out. It is a recognition of the realities of what people are doing in mediation. They are making hard decisions

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<sup>1</sup> ABA ADR Section Conference held in Los Angeles in April 2005.

often in the light of limited information. As mediators, we assist them to do that but we should not insist that it happen then and there. We should not demand that there is agreement to a whole new set of circumstances in the course of the day. If we are one day event orientated, this is what we will do.

The focus has been on getting an agreement here and now whilst all the parties are gathered in the mediation room. There is sense in this, but equally momentum can be maintained to allow time for reflection, advice taking and redevelopment of proposals in the light of further information. We should look more closely at mediator follow up and the resumption of a mediation meeting.

It may be that there are some expectations to be “undone” here. We owe it to ourselves, to the process and to the participants to challenge these expectations. Both mediators and lawyers engaged in mediation, will need to work together on this one.

### **Mediators are the lubricant which oil the wheels of negotiation**

As mediators, we need to redefine our role as well. We have thought long and hard about it; we have sought to define it in user friendly terms for newcomers to the process. We have looked myopically at its boundaries and argued over the facilitation/evaluation divide. Lets go back to basics – what are we there for and what do we do in mediation ? We add value to a communication and negotiation process – nothing more, nothing less.

We are certain that we are not ultimate deciders, although in some circumstances we may be asked to recommend. But we do not make binding decisions. I think we are clear on that. Where does that leave us in terms of the strategies available to us. I don't believe that our hands should be tied, provided we remember that every intervention will have an impact and some interventions (e.g. advice giving) will have more impact than others. We need to decide the level of impact we want/consider appropriate for us to have. This will depend on the context.

So we all need to be personally clear about our responsibilities and our purpose. The identification of mine means that I need to be upfront with the parties from the beginning of the process, asking questions such as “what are your goals?” and if resolution is one of them, “what is your plan to achieve it?”.

I am the lubricant for the wheels and the motor fuel to keep the engine of good communication and negotiation running. I am sometimes the driver of the vehicle but I do not have a road map with signs to the final destination. The parties have that. It is my task to help them uncover or draw it for themselves. I will share the driving seat but I believe the parties will find their ultimate destination with the wise guidance of both mediators and counsel.

### **Mediators need to be strategically creative, not formulaic**

I have to throw out some of my old hats. This is hard to do. I have ruminated since the conference on the hats I can keep and those I need to ditch. This will be an ongoing battle. I am not a hat hoarder but there are challenges to learning new tricks.

I don't mean we need to take parties by surprise; being creative is not at the expense of transparency. We simply need to continue to be inventive. The lubricant will freeze up or lose its potency unless we refresh it. So we need to try and experiment.

Again we will need to gain the support of the lawyers to work with us here. As Robert Creo, commercial mediator from Pittsburgh says "Lawyers like predictability, a formula, control, ability to understand the rules, play by them and bend them where necessary". The challenge for mediators and lawyers alike, is in learning new ways of moving through the mediation process.

### **No such thing as an impasse**

What wonderful words. They are music to the ears of most mediators. I need to attribute them to Lee Jay Berman, a mediator from Los Angeles. It is going to be something of an intellectual stretch for me to believe them. But unless I do, impasse will loom both in my imagination and in reality. We have to put the idea of impasse aside. I suggest that we reframe the way we think about impasse to see it as an opportunity for something new to happen; a creative idea to be born.

It is our job to disbelieve the barriers put in front of us, to push the parties to devise their own plans for achieving movement in the values on the table and to enable them to save face throughout that process. Ideally, we promote a credible and realistic negotiation from the outset so that the emergent gaps are not so great.

### **We need to understand more about the psychological dimensions of negotiation**

This is an untapped resource. There was a fascinating paper at the conference entitled "Mediators can practice what psychologists teach". This session overflowed with delegates and it was not hard to understand why. It dealt with current psychological theories on how and why people face barriers to effective communication and rational decision making. We heard about priming, reactive devaluation, anchoring, biased assimilation, reciprocity, commitment and consistency and loss aversion. Understanding the psychological dimensions of behaviour enables us to understand what makes people tick in negotiation, how they decide when faced with unpalatable and uncomfortable choices. The challenge for mediators is how to use these theories in our practices.

Julie Turchin from Stanford University was one of the speakers. She is doing a PhD examining how biases in perceptions of fairness impact the ability to resolve conflicts successfully. I hope that she will come and share some of her wisdom with negotiators and mediators in New Zealand in 2006 and will keep you posted on this possibility.

At an even deeper level, there was a session on the hidden wisdom of negotiation lead by Erica Fox, the founder and director of the Harvard Negotiation Insight Initiative. The Insight Initiative explores the interface between the great wisdom traditions and contemporary dispute resolution theory and practice. The idea is to look beneath the surface, to access a deeper wisdom – in people and in systems – even in situations that seem intractable and entrenched.

## **Books/websites**

I cannot vouch for the recommendations as I have only just started my own readathon but I respect the judgements of the speakers who recommended the following books.

The Tipping Point and Blink by Malcolm Gladwell (Blink is also recommended by John Campbell!!!)

Applying Influence by Robert Cialdine

Bargaining for Advantage by Richard Shell

Decision Making by Scott Plous

Exploring an Integrative Framework for Understanding Mediation by Cheryl Picard

What's going on in Mediation; an Empirical Analysis of the Influence of a Mediator Style on Party Satisfaction and Monetary Benefit by Patrick McDermitt & Ruth Obar.

New websites which may be worth exploring:

Harvard Negotiation Insight Initiative website at [www.pon.harvard.edu/hnii](http://www.pon.harvard.edu/hnii)  
and the CPR Institute for Dispute Resolution [www.cpradr.org](http://www.cpradr.org).

## **Conclusion**

To all my mediator colleagues, happy reading and good luck with breaking through those barriers. To my lawyer colleagues, I enjoy our collaborative endeavours. In the mediation process our objectives are mutual. If we work closely together in pursuit of the same goals, we will make the process even more effective for the parties to it. So next time I ask you to consider making a realistic offer, how about it?

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