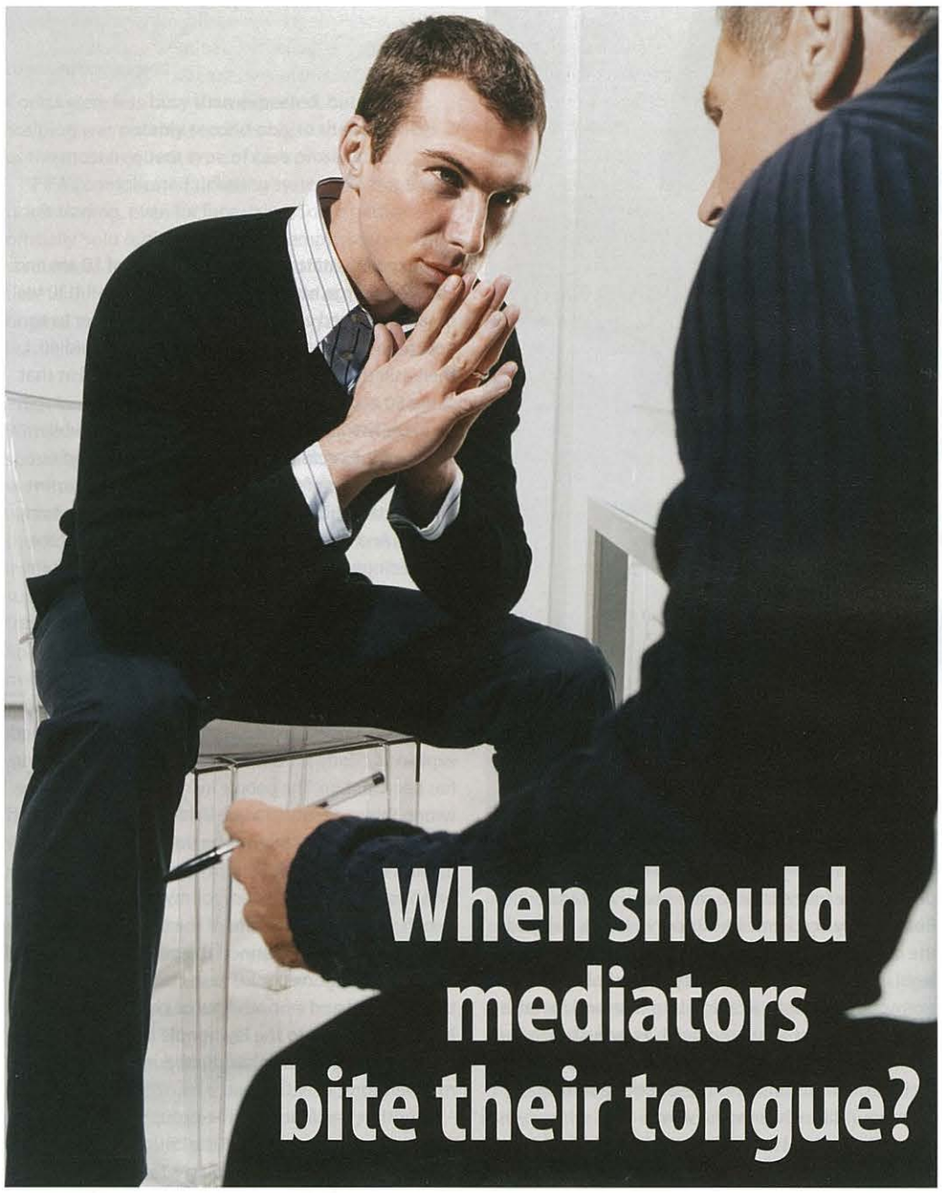

When should mediators bite their tongue?

In the first of a three-part series, **Robert Fisher QC** considers whether mediators should comment on the disputes that come before them

I am generally in favour of disputes. They have provided many of us with a living for years, whether as mediators, arbitrators, judges, lawyers, or experts. The last thing we need is harmony throughout the land.

On the other hand, disputes between dispute resolvers themselves is taking this a little far. Their job is to resolve other people's disputes, not start their own. Regrettably, an issue guaranteed to set mediators at loggerheads is whether there are ever any circumstances in which they should reveal what they think about disputes coming before them. The practice of doing so is commonly, if misleadingly, known as "mediator evaluation".

As the American Bar Association (ABA)'s Section of Dispute Resolution recently put it in *Task Force on Improving Mediation Quality: Final Report* (February 2008) (ABA Report), the question of mediator evaluation is a landmine. An example of the heat it generates is the battle that occurred when the committee reviewing the 1992 *Florida Rules for Certified and Court-Appointed Mediators* tried to agree on the potential role of mediator evaluation in Florida mediations (Zena Zumeta in "Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation", September 2000, http://www.mediate.com/articles/zumeta.cfm).

The subject is a landmine because some of the more important schools of mediation consider mediator evaluation to be incompatible with the core objects of mediation (for such schools see Boulle, Goldblatt, Green: *Mediation Principles, Process, Practice*, Second edition (LexisNexis, 2008) at 31 and 32, and others collected in my previous *NZLawyer* series, "Is it Rude to Talk About Who Would Win?" (issue 129, 5 February 2010, and issue 130, 19 February 2010). At the other extreme, some think that it is always appropriate. So among mediators there are perpetual arguments about it.

Defining our way out of trouble

Attempts have been made to pre-empt the debate by re-defining the word "mediation" and its derivatives. On this approach, "evaluative mediation" is an oxymoron. An institutionalised example is found in the Mediation Rules of the Institute of Arbitrators and Mediators Australia (IAMA). The effect of the Rules is that if disputing parties say they want a 'mediator', the role of the third party neutral is confined to matters of process and identifying, defining, resolving, and narrowing the issues in dispute (Rules 5(2)(a) and 3(a) and (b)). If the parties want the third party neutral to go on to give opinions as to what would be reasonable, or to make suggestions for settlement, they must describe the neutral not as a 'mediator' but as a 'conciliator' (Rule 5(5)(a) and (b)).

However valiant the attempt, it seems doubtful whether the sting can be drawn from the controversy by simply redefining the word 'mediator'. To begin with, the narrow meaning proposed would be difficult to reconcile with general usage, at least outside Australia (for examples to the contrary see *Collins English Dictionary*, Third Edition; *NZ Oxford Dictionary*; *NZLawyer*, issue 130, 19 February 2010; and the ABA Report above). More importantly, what matters is how professional dispute resolvers can best help disputing parties, not the labels we choose to put on the process. A rose by any other name would smell as sweet.

For mediators, there is no shirking the question whether there are ever any circumstances in which it might be helpful to disclose to the parties what they think about the dispute. The arguments for and against are equally cogent. I begin with those against.

Arguments against mediator evaluation

The arguments normally advanced against mediator evaluation are these:

- *The merits should not be the main focus*. A mediator's evaluation of the merits may distract the parties from other more important matters such as attitudes, perceptions, future relationships, and wider interests.
- *Disempowerment*. If a third party provides the answer to the dispute, the parties will no longer own the process, control their own destiny, and take responsibility for the outcome.
- *Unjustified weight*. Parties and mediators alike may overestimate the weight that should be afforded to a mediator's opinion. Compared with the parties and their advisers, the mediator will usually have limited opportunity to assimilate the facts and research the legal complexities. The danger of unwarranted weight will be particularly acute if the mediator is an expert or former judge and the parties are not legally represented.
- *Breach of natural justice*. A process in which a mediator expresses a view after caucusing with the parties is incompatible with natural justice. Neither party has the opportunity of commenting on information provided by the other in confidence. Nor does each party hear what the other is told.
- *Loss of trust and neutrality*. Parties are less likely to be candid in caucus if they feel that what they say may be used against them in an evaluation. There is an associated danger that, in urging a particular point of view, a mediator will lose, or appear to lose, neutrality (ABA at p16).
- *Power without accountability*. A mediator expressing a view is not legally accountable. There is no right of appeal or control over quality and objectivity.
- *Undermining the bargaining process*. Handled in the wrong way, a mediator's comment on the merits can unhelpfully raise one party's expectations at the expense of the other's negotiating power.

- *Exposure of mediator to claims*. A disgruntled party could sue the mediator for negligence in forming the opinion on which that party had relied (as has occurred in New Zealand in *McCosh v Williams* (Court of Appeal CA275/02, 12 August 2003, Justices Keith, Blanchard, and Tipping); although, in that case, the criticism related to a determination made by the mediator after conclusion of the mediation proper).

The arguments against mediator evaluation are therefore formidable, at least if the evaluation is offered in the wrong way at the wrong time.

Arguments for mediator evaluation

Equally strong arguments have been advanced in support of mediator evaluation:

- *Principled outcome*. Most parties to litigation have a strong sense of justice. At least, in retrospect, they are likely to take a jaundiced view of an agreement that had been driven by clever bargaining, splitting the difference, or mental exhaustion. A third party's evaluation can provide a principled basis for settlement.
- *Breaking an impasse*. What most parties are looking for is a way of breaking the deadlock so they can move on. In that situation, mediator evaluation is quicker, cheaper, and less stressful, than fighting it out in court. Mediator evaluation may be the tiebreaker they require.
- *Mediator objectivity*. The parties usually have too much emotional and financial investment in the dispute to see it objectively. Even their advisers may have lived with the file so long that it is hard for them to see the wood for the trees. Coming to it afresh, a mediator can provide a foretaste of the way in which the case is likely to be viewed by a judge or arbitrator. Better that the parties discover how the case will look to an outsider now than discover it at the end of a time-consuming and costly trial.
- *Mediator expertise*. An appropriately chosen mediator should be able to bring to the table an additional source of expertise or litigation experience.

In short, mediator evaluation can bring advantages as well as problems.

What do mediating parties want from their mediator?

Faced with those competing points of view, it seems relevant to ask what the parties themselves want. Most of us think we know from personal experience. The ABA recently put this on a more scientific footing. The ABA Report was the result of a two-year survey of mediators, mediating parties, lawyers, and non-lawyers in nine cities across the United States and Canada.

Importantly, the ABA survey was confined to "private practice civil cases (including commercial, tort, employment, construction, and other kinds of disputes that are typically litigated in civil cases, but not domestic, family or community disputes) where the parties are usually represented by counsel in mediation" (ABA Report at 2).

In short, the survey was confined to mainstream civil litigation. However, in that broad category, the findings were unmistakeable:

- 80 per cent of surveyed participants wanted analytical input from the mediator;
- 95 per cent of users regarded mediator suggestions as important, very important, or essential; and
- 70 per cent regarded the giving of opinions by mediators as important, very important, or essential.

Users were also asked what kind of mediator assistance would be helpful in half or more of their cases. Of those asked, 95 per cent wanted pointed questions that raised issues, 95 per cent wanted analysis of the case including strengths and weaknesses, 60 per cent wanted a prediction about likely court results, 100 per cent wanted suggestions as to possible ways of resolving the issues, 84 per cent wanted recommendations as to a specific settlement, and 74 per cent wanted some pressure to accept a specific solution (ABA Report at 14).

Reinforcing the conclusions were the further findings that 100 per cent of users thought it important, very important, or essential for mediators to know the file and read the documents before the mediation (ABA Report at 7) and 96 per cent thought that pre-mediation preparation by a mediator was important, very important, or essential (ABA Report at 7). "To a very substantial degree", users endorsed the importance of "subject matter knowledge" on the part of the mediator. In complex areas, they went further and considered that the mediator also required "subject matter expertise" (ABA Report at 9).

Commentator Jeff Kichaven concluded in "Evaluative mediation techniques help achieve success" (September 2008, see: http://www.mediate.com/articles/kichavenJ14.cfm) that the ABA's report:

> "...confirms what is obvious to all who participate in commercial mediation: There is 'overwhelming support' for the conclusion that lawyers want mediators to provide 'analytical input', or, as we more commonly call it 'evaluative mediation'. The marketplace has spoken. The Task Force's conclusion allows litigators and mediators to enter into a new discussion about how all parties can work together to serve clients better. We no longer have to beat the dead horse of the debate between 'evaluative' and 'facilitative' mediation."

It is hard to believe that the result would fundamentally differ if a similar survey were to be conducted in New Zealand. The needs and experiences of mediation users throughout the Western world are broadly the same. In fact, many of our bigger commercial disputes involve parties and lawyers from North America. It seems safe to conclude that in appropriate cases, and handled in the right way, New Zealanders do want some form of substantive help from mediators in assessing the merits of their dispute.

It does not follow that mediators should unburden themselves to the parties at the first opportunity. To begin with, the ABA survey was limited to "private practice civil cases". It tells us nothing useful as to disputes of a more personal or community-based nature. And even for disputes of the kind surveyed, no one has suggested that mediators should give any indication of their thinking except in particular circumstances and in particular ways. The arguments against inappropriate mediator evaluation outlined earlier remain as valid as ever.

What the survey does confirm, however, is that the question of mediator evaluation is more complex than the warring schools of mediation would have us believe. The factions have tended to view the issue through the prism of their own favourite method of mediating. They have not given enough thought to the diversity of disputes or to the range of possible responses.

A second article in this series will consider the circumstances in which substantive input from a mediator can assist and the ways in which it might usefully be delivered.

This article is a revised version of paper presented to the joint AMINZ-IAMA conference in Christchurch on 5 August 2010 by the Honourable Robert Fisher QC, arbitrator and mediator, Bankside Chambers, www.robertfisher.co.nz.