Letting the punishment fit the crime

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

Aromatherapists, iridologists, naturopaths, and homeopaths share a tendency to approach ailments in the expectation that they will all yield to their chosen method of diagnosis or treatment. In the first article in this series, I suggested that something similar had occurred in the field of mediation. Some schools of mediation have tended to assume that their favourite method of mediating will be suitable for all forms of dispute. A dispute over the care of children is thought to call for the same fundamental approach as a dispute over the interpretation of a debenture trust deed.

Tunnel vision of that kind has coloured attitudes to mediator evaluation. Some find it unthinkable that a mediator should ever influence the parties' views on the merits, however indirectly and regardless of the circumstances. Others have seen mediator evaluation as a routine requirement. In the previous article, I questioned whether those holding strong views on the subject had given enough thought to the diversity of disputes and to the range of possible mediator responses.

Recognising the variables

Marginally more sophisticated would be an approach which put disputes into different categories, some attracting mediator evaluation (eg commercial) and others being immune from it (eg care of children).

There is something peculiarly comforting about creating an arbitrary world in which everything can be allocated to its own category and every category can attract a preordained response. Lawyers have done this for years. An understanding between two people is categorised as either a contract or not a contract. If it is a contract, we give damages for its breach. If it is not a contract, we (normally) give no legal remedy at all. The categorisation is brutal, but unavoidable. The legal system could not operate without it.

Disappointingly, negotiating parties refuse to assign themselves to neat categories. Nor do they always respond well to preordained solutions. While we can talk about tendencies and emphases, disputes are infinitely complex and call for infinitely complex responses.

This has not always been recognised by the schools of mediation previously mentioned. Yet we would not think much of a doctor who always prescribed the same treatment for particular kinds of complaint. Most complaints can be treated conservatively with bed rest and medication. Sometimes surgery is unavoidable, however traumatic for the patient. There is some analogy here with dispute resolution. Most parties will come to their own compromise on the merits without substantive influence from the mediator. Some will not.

Nor does it help to assume that when it comes to evaluation, mediators are presented with a binary choice. Evaluative input is a matter of degree. In the previous article, I referred to the American Bar Association's Section on Dispute Resolution's 2008 report, *Task Force on Improving Mediation Quality* (ABA Report). What the ABA survey has demonstrated, among other things, is that even where some form of mediator comment is appropriate, the form and extent of the comment must vary according to the circumstances (ABA Report at 15 and 34). We are talking about matters of degree, not kind.

It follows that instead of trying to force disputes and responses into pigeonholes, it is more productive to identify continuums. Two of particular interest in the field of mediation are: (i) the continuum from feelings to rights when considering the nature of a given dispute; and (ii) the continuum from non-directive to directive when considering possible responses from the mediator.

The continuum from feelings to rights

It is possible to place every dispute at some point along a continuum which has feelings at one end and rights at the other. Those disputes nearer the feelings end of the continuum tend to be dominated by matters which are personal to the parties and the way in which they relate to each other. Examples are disputes in relation to families, communities, medical services, social services, continuing employment, and other continuing relationships. At the other end of the spectrum are those disputes which tend to be dominated by the parties' legal rights, particularly where they will never meet again. Examples are litigated claims for damages, money, and property.

In practice, no dispute lies wholly at one extreme or the other. Even in a neighbourhood dispute concerned primarily with feelings, the reasonableness or unreasonableness of the parties' attitudes will play some part. And even the most hard-headed business executive will find it difficult to remain entirely uninfluenced by feelings and attitudes. That is why it is more useful to measure disputes by reference to a dimension than to categories.

The position that a dispute occupies on the feelings-rights continuum says much as to the nature of the responses called for from the mediator. If a cohabiting couple are having trouble in their relationship, there is little point in the mediator pronouncing that the wife lacked the legal right to throw the evening meal at the husband. What the couple are looking for is help in improving their relationship for the future, not a post-mortem on the technicalities of assault.

At the rights end of the continuum, the most important consideration will be the result which a court would impose if the parties were unable to agree. There is usually little point in beginning a mediation about the interpretation of a debenture with a group hug. If the best alternative to a negotiated agreement is a judge's decision, it will be in the interests of both parties to learn as much as they can about the way the decision is likely to go. In assessing the parties' chances, all or most of the assistance will come from direct discussion between the parties and their lawyers. But if they have widely divergent views on the matter, comment from an objective third party may help to guide them towards a common understanding.

In short, the potential for evaluative input from a mediator is dictated to a very large extent by the nature of the dispute. This has not always been fully appreciated by mediators. An inflexible 'cookie cutter' approach (to use the ABA Report's expression at 12) overlooks the need to let the punishment fit the crime. Even for civil disputes, the ABA Report found that:

> "...nearly half of the users surveyed indicated that there are times when it is not appropriate for a mediator to give an assessment of strengths and weaknesses, and nearly half also indicated that it is sometimes not appropriate to recommend a specific settlement. User reservations on these issues should give pause to mediators who routinely offer such analysis and opinions."

The continuum from non-directive to directive

The other popular fallacy among some schools of mediation is the assumption that substantive input from mediators is an all or nothing affair. One commonly hears mediators say that they are 'for' or 'against' evaluative mediation as if there were a binary choice between handing down a definitive oral judgment ("In my view, the plaintiff will win.") and assiduously avoiding any influence over substantive discussions for fear of contaminating them ("What would you like to talk about next?").

In fact, it seems doubtful whether even the most therapeutic and non-directive of mediators can wholly conceal his or her subliminal reactions to the subject matter of the dispute. And as for classic facilitative mediation, there has been a growing recognition that a mediator's 'reframing', 'reality-testing', 'creating doubt', and/or 'exploration of BATNAs and WATNAs' was always a disguised form of substantive input, albeit indirect (for references see my earlier article, "Is it rude to talk about who would win?", *NZLawyer*, issue 129, 5 February 2010).

Even suggesting to the parties what issues are relevant is an indirect way of influencing their conclusions. The parties may start out by telling the mediator that the principal issue is whether a binding contract was formed. The result of drilling down may be the emergence of a more focused issue. Whether a binding contract was formed may ultimately turn on the factual question whether a certain email recording the vendor's revocation of offer preceded a certain email from the purchaser accepting the offer. The answer to the latter question may be demonstrable on the documents. The very process of refining issues will usually take the parties a very long way towards arriving at a conclusion.

The same is true of asking questions. Raising a topic in the form of a question ("What do you intend to say to the Judge about the timing of the purchaser's email in relation to yours?") is certainly preferable to expressing a personal opinion ("You have no show of overcoming the fact that the purchaser accepted your offer before you withdrew it"), but the effect may be the same.

Evaluative input from mediators is therefore a matter of degree, not kind. It is to be assessed by reference to a continuum of possible responses ranging from non-directive to directive.

Evaluation in dispute resolution generally

The last point is best illustrated by considering the role of evaluation in dispute resolution generally. Somewhat simplistically, the dispute resolution choices available to disputing parties can be arrayed in ascending order from non-directive to directive as follows:

- *Level 1*: Therapeutic, transformative, and narrative mediators dealing with personal and relationship problems where comment on rights and wrongs would be meaningless.
- *Level 2*: Versatile mediators dealing with a range of disputes in only some of which it will be helpful to provide input on the merits in some form at some stage of the mediation.
- *Level 3*: Mediators who have a legislative obligation to comment on the merits in certain circumstances (an example is the *Mediation Council of Illinois Standard IV (C) Best Interest of Children* rules which state: "While the mediator has a duty to be impartial, the mediator also has a responsibility to promote the best interests of the children and other persons who are unable to give voluntary informed consent... If the mediator believes that any proposed agreement does not protect the best interests of the children, the mediator has a duty to inform the couple of his or her belief and its basis", cited by Zena Zumeta in "Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation", September 2000, http://www.mediate.com/articles/zumeta.cfm).
- *Level 4*: Evaluative mediators who habitually express their own view on the merits. Evaluation is particularly common in judicial settlement conferences.
- *Level 5*: Mediators on whom there is a contractual obligation to recommend a solution in the absence of agreement (an example is found in the Institute of Arbitrators & Mediators Australia *Mediation and Conciliation Rules*, Rule 5(5)(c) applicable to 'conciliators'). In some cases, the recommended solution binds the parties in the absence of specific objection from either within a stated period.
- *Level 6*: Early neutral evaluation in which truncated presentations are followed by a non-binding view from a third-party neutral.
- *Level 7*: Med-arbs and med-determinations in which, following a breakdown in negotiations, the mediator changes hats and issues a binding determination.
- *Level 8*: Arbitrations and court hearings in which an arbitrator or judge hears presentations from the parties, evaluates the claim and imposes a binding result.

Seen in that wider context, there is nothing sacrosanct about non-evaluative mediation. It is simply the lowest in a range of ascending levels of intervention by the third-party neutral. The fact that so many disputing parties prefer other approaches suggests that, in their experience, a higher level of evaluative input will better serve their interests in resolving some types of dispute.

The third article in this series will consider the conditions which must be satisfied before evaluative input is offered and the different ways in which it can be provided.

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