Is it *RUDE* to talk about WHO WOULD WIN?

In part one of a two-part series, **Robert Fisher QC** considers the mismatch between rhetoric and reality in New Zealand mediation

Many mediation commentators and trainers will tell you with a straight face that even in a litigation context, mediations are essentially a journey to self-discovery. Along the way, the parties learn much about their own emotions, their distorted view of the past, their relationship with each other, and where their own best interests truly lie. Thus equipped, they join hands in crafting a mutually pleasing outcome.

Actually, this is accurate enough for some kinds of dispute. But for most people attending the mediation of a dispute over money, the reality is different. A major part of the discussion is taken up with two matters that often seem to be ignored by mediation experts – the result if the case went to trial, and protracted bargaining. There is a mismatch, in other words, between mediation rhetoric and mediation reality. How did this come about?

Traditional discussion between lawyers

Mediation as a routine means of resolving litigation disputes did not come to New Zealand until the 1990s. Until then, as now, most civil litigation was still settled, but the meetings took place in lawyers' offices. Clients were not present. There were no neutral intermediaries. Each lawyer put forward his or her best case in an attempt to persuade the other. Positional bargaining followed. The meeting usually culminated in a non-binding agreement to recommend a single solution or, failing that, an exchange of disparate offers. Each lawyer would then go off and discuss the situation with his or her client.

Although cases usually settled, there was a downside. The clients were left out of the process. There was no opportunity to address their emotional needs. They did not hear the other point of view. They could be reluctant to buy-in to a result to which they had not contributed. The testing of arguments was cursory. Sometimes the personalities of the lawyers got in the way. There was no referee to restore order and keep the discussion on track. Because the clients had to be consulted after the meetings, settlements were frequently delayed until the courtroom steps. By then, much costly preparation had been done.

The brave new world of mediation

Mediations overcame many of those problems. It dawned on everyone that the process belonged to the parties, not the lawyers; that not all disputes could be reduced to dollars and cents; and that what some parties were looking for was recognition, vindication, contrition, restoration of self-esteem, the opportunity to communicate with the other party in a safe environment, or ways of improving their relationship. It was recognised that for some kinds of problem the parties might need help to change their perception of the events that had occurred, to recognise where their underlying interests really lay, and to find an outcome that would meet the needs of all.

There was a strong reaction against the legal profession's perception that the settlement of disputes was a matter of imposing the lawyers' prediction of the outcome on the parties. Contributing much to the change of direction was Fisher and Ury's 1981 publication *Getting to Yes* (Penguin). Fisher and Ury advocated a "facilitative" model of mediation in which a non-interventionist mediator would help the parties find a win-win solution that met the previously hidden interests of all concerned.

Other models followed, often with a therapeutic emphasis. Prominent were "transformative mediation", focusing upon the underlying problems in the parties' relationship, and "narrative mediation", designed to help the parties deconstruct their competing stories and replace them with a newly perceived third story of shared understanding.

"[M]y clients are mostly interested in victory. They don't want to 'care' about the other side"

The rise of dogmatism

With the zeal of the newly converted, the new wave of mediation enthusiasts tended to see matters in simplistic terms. Each school was convinced that it alone had the right mediation technique, and that it extended to every kind of dispute. Particularly exaggerated claims were made for the application of therapeutic techniques to the resolution of litigated money claims.

A transformative mediator was therefore moved to say that even in commercial litigation, "Transformative mediation creates outcomes that are genuinely satisfactory to the clients. Frankly, we believe clients often accept mediated settlements only because their attorneys have told them they can't do any better. We believe they can." (Victoria Pynchon, "Can Transformative Mediation Work in Commercial Litigation? A Conversation with Joseph P Folger and Robert A Baruch Bush", February 2005, *The Southern California Mediation Association Newsletter*; www.mediate.com/articles/pynchonV1.cfm.)

Not to be outdone, narrative mediators left readers with the impression that "the development of an attitude of cooperation and respect may be more important than any substantive agreement", and that "when the mediation has reached the point ... when a degree of goodwill and respect are present, the largest part of the mediation has been accomplished" (*Narrative Mediation: A New Approach to Conflict Resolution*, John Winslade and Gerald Monk, Jossey-Bass, 2000).

For their part, facilitative mediators, who modestly saw their model as 'classical' or 'orthodox' mediation, abhorred direct mediator participation in negotiations and evaluative mediator input (the arguments for the latter are marshalled in Boulle, Goldblatt, and Green, *Mediation: Principles, Process, Practice* (Second New Zealand Edition), LexisNexis, 2009, at 31 and 32).

The pragmatists strike back

However successful and appropriate such techniques were in their own fields, it quickly emerged that at the hard end of monetary litigation, the parties and their lawyers were looking for something else. Speaking of apologies, for example, one lawyer commented:

> "[S]easoned participants in mediation are wise to the game. They know that mediators are trained to view financial issues as proxies for underlying emotional issues, and that many mediators believe that resolution of the emotional issues will make it easier to bring parties together on financial terms. So, trial lawyers will now commonly tell mediators in private caucuses: 'That apology was very nice, but we didn't believe a word of it. We think they said it only to try to soften us up on the money. It won't work. We don't believe their little stunt. We still want what we believe the case is worth."
> (Jeff Kichaven, "Apology in Mediation: Sorry To Say, It's Much Overrated"; First published on IMRI.com; see also www.mediate.com/articles/kichavenJ2.cfm.)

Another had this to say of narrative mediation:

> "In many ways the process outlined in Narrative Mediation is more appropriately one for use in therapy (from whence it came) than in mediation... While it may be necessary to achieve some initial shifts in the parties' perceptions of themselves and the problem in order to get down to work, the goal should not be to shift understanding as an end to itself, but simply as a step towards resolution of the conflict."
> (Robert Collins, *The Alternative Newsletter*, www.mediate.com\articles\monk.cfm reviewing *Narrative Mediation*.)

One experienced commercial litigator put it even more succinctly: "[M]y clients are mostly interested in victory. They don't want to 'care' about the other side" (Pynchon).

Nor did the classically pure model of facilitative mediation fair any better. As Pynchon commented, "I find that most lawyers simply want a neutral case evaluation followed by a couple of hours of third party negotiations." In litigation circles, the benefit of mediation was thought to be that it "can afford a mechanism through the efforts of trained intermediaries for opening the eyes of the parties to the merits of the opponent's case, the issues involved, the risks and costs of litigation and the attractions of a settlement" (Sir Gavin Lightman, SJ Berwin Lecture, "Mediation: An Approximation to Justice", 28 June 2007, reviewed in *The Barrister*, issue 34, 2007, www.barristermagazine.com).

At least overseas, many in the mediation intelligentsia responded to these calls for pragmatism. Among facilitative exponents, in particular, there was a growing recognition that substantive abstinence by mediators was an illusion. Their substantive input had been disguised all along as "reality testing", "creating doubt", and "reframing". Nor was substantive input from the mediator a bad thing, so long as it did not threaten ultimate self-determination by the parties (B Mayer, *Beyond Neutrality*, Jossey Bass, 2004; H Astor, "Mediator Neutrality: Making Sense of Theory and Practice" (2007) 16 *Social and Legal Studies* 22; H Astor, "Some Contemporary Theories of Power in Mediation: A Primer for the Puzzled Practitioner" (2005) 16 *Australasian Dispute Resolution Journal* 30; Tom Fisher, "Advice by Another Name" (2001-02) *Conflict Resolution Quarterly* 19(2) 197-214, and see the modifications evident in the second edition of Fisher and Ury's *Getting to Yes* itself).

Where have matters finished up among mediation experts overseas?

Although every overseas mediator will have his or her own approach, the majority involved in civil litigation would probably agree with the following:

- Although mediation techniques can be classified in various ways ("transformative", "narrative", "classic facilitative", "settlement", "evaluative" etcetera), the differences tend to be matters of emphasis only. In practice, the responses required of a mediator will be as infinitely variable as human behaviour itself.
- It follows that no single mediation technique will ever be a complete answer. In particular, imperial claims for the comprehensive effectiveness of transformative, narrative, or classic facilitative techniques at the hard money end of the spectrum must be taken with a grain of salt.
- Despite the overlaps, transformative, narrative, and classic facilitative techniques are likely to play a greater part in solving problems at the personal/relationship end of the spectrum (eg family, community, medical, social services, franchise, partnership, joint venture), and settlement/evaluative techniques a greater part at the end occupied by those litigated money disputes in which the parties will never see each other again (eg a claim under an insurance policy).
- Although the parties go to a litigation mediation looking for a settlement, most expect the process to offer something more than simply an opportunity for clever bargaining. Among other things, they will want help in evaluating the merits of the dispute.
- Properly conducted evaluative mediations do not threaten party autonomy. The only evaluation that matters is evaluation by the parties, not evaluation by mediators.
- It follows that at civil litigation mediations, the parties must be given a properly structured opportunity to talk about who would win.

The second article in this series will consider the way in which these developments have played out in New Zealand.

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