Choosing mediation and mediator selection

Some practical guidelines

By Deborah Clapshaw and David Hurley*

IN our first article[1] we addressed the range of potential outcomes achievable through mediation which include, but also go far beyond those available in litigation. One reason why people like the mediation process is that it can result in workable solutions that meet their sense of justice and fairness.

Mediation is not however an easy alternative, nor should it be seen as an indicator of readiness by either side to "give in". It takes courage to face someone with whom you are in dispute across a small room, and it can be more comfortable to hide behind a lawyer in litigation. One of the first tasks of the mediator in a mediation is to create an environment in which the parties (and their lawyers when present), can feel comfortable conducting their own negotiation. The ability to create the right kind of atmosphere for the parties is one of a number of skills which the mediator will bring to the process.

In this article we explore the types of issues which might be taken into account in assessing:

- when to choose mediation
- factors relevant to mediator selection

Mediation process

Whilst the mediation process can be infinitely variable it will usually contain the following basic elements:

- An opening in which the mediator explains the process, establishes initial agreements (such as commitment to the process and confidentiality) and begins to establish trust. The purpose of the opening is to begin to create the climate for a shared understanding of the process to be followed.
- Unlimited uninterrupted time for each side to put their issues on the table.
- An exchange when the various issues are debated, perspectives offered, challenges issued. A successful mediation is one where the parties are able to focus precisely on the issues in dispute. As conflict often arises from miscommunication, misunderstanding and misinformation, this stage of the process allows for clarification and different perspectives to be better understood.
- Problem solving (building the agreement) which occurs after the information exchange and may involve either plenary sessions (ie all around the table) or caucusing (separate meetings).
- Writing the agreement (if an outcome on all or any of the issues in dispute is reached).
- Closing. Some mediators like to complete the process by commending the parties for achieving a settlement (or expending energy in attempting to do so) and inviting them to talk about their experience of it.

When to mediate

The greater availability of trained and experienced mediators and other ADR consultants gives parties and their advisers options that did not exist a few years ago. This leads to the question of what factors should be taken into account in dispute resolution process selection.

A check list for choosing an appropriate dispute resolution process is[2]:

Alternative dispute resolution generally.

- Do the parties wish to keep the dispute private?
- Do the parties want to keep the results confidential?
- Does the dispute need to be settled expeditiously?
- Is there a need to customise a remedy to the problem? (One of the hallmarks of ADR is its ability to tailor each outcome to fit the dispute.)

To this list we would add with respect to mediation:

- Can the process be a useful stepping stone to litigation in helping define and narrow the issues to be argued?
- Will it be useful to assess the other side's case?
- Could the other side be impressed with the strength of your own?
- Is there an ongoing relationship to preserve?
- Will constructive communication be an advantage?
- Does this process provide a better opportunity for your client to have their claim acknowledged, be heard, and have their perspective validated? Is it important for your client to have a sense of control over the dispute?

Seven standards which can determine court action are[3]:

- Is there no need for speedy resolution? In other words would justice best be served by a slower, more deliberate time-line?
- Is there a need to offset a power imbalance?
- Has a risk analysis been performed and one party strongly believes it will get the best deal in court? This is important because people want to get the most they can. If after weighing all the factors and deciding that they can get their best shot before a judge, why should they choose ADR?
- Is there a need to force participation from the other side? In cases where the other side refuses to lay it all out on the table, court sanction may be necessary.
- Do the parties have no need for a continuing relationship with each other?
- Is there a need to apply strict rules of evidence and engage in comprehensive discovery in order to resolve the matter?
- Is there a need to set a precedent?

Even in cases which appear unlikely candidates, such as abuse, mediation can have a place. This may well mean tailoring the structure of the process to the needs of the situation.

Many writers have addressed these issues, and we include comments from two.

Kenneth Cloke's[4] formula for assessing the appropriateness of mediation in a particular case involves consideration of three factors: whether the power relations between the parties will preclude the meshing of mutual needs; whether dishonesty, in the sense of deliberate fraudulent behaviour is involved; and whether the parties are consumed by a desire for revenge. He considers that where any of these factors are present, they are unlikely to allow a negotiation to be conducted in good faith, which is an essential prerequisite of the mediation process.

Beryl Blaustone[5] identifies the 3 key questions an adviser contemplating mediation should consider as:

- Can your client handle the mediation process (and will the process allow lawyer representation)?
- Is the proposed mediator competent (ie has the necessary skills and sensitivity) to handle the needs of the particular case?
- Will other forms of dispute resolution be viable? (This will include an analysis of any enforcement concerns, such as will the parties adhere to any agreement?)

The answer to her first question is partly bound up in the second. A mediator who is fully competent to deal with minor claims for damages may lack the skills to handle intense interpersonal conflict. In many cases co-mediation may be desirable with combinations →

about past events
- Conflict can be a long term affair: Viewing an intervention as one point in a larger sequence of conflict interaction
- Small steps count: Feeling a sense of success when empowerment and recognition occur, even in small degrees.

In our experience the process-oriented end of the spectrum requires more sophisticated skills and techniques, and can yield more satisfactory results to the parties than substance-oriented mediation, but its use does not preclude the mediator from using a variety of approaches as the mediation progresses.

Mediator roles

In simple terms, the primary roles of a mediator may be identified as:
- Managing the process, which includes setting the scene, facilitating the information exchange, controlling the stages of negotiation, managing the agenda and assisting the parties to make the transition from positional to interest-based bargaining
- Facilitating communication
- Isolating the issues in dispute
- Assisting in the generation of options for settlement
- Reality testing which involves testing the positions of the parties and any proposed agreements. A skilled mediator will check whether positions are realistic, by questioning the validity or applicability of the parties' arguments and exploring the parties BATNA (Best alternative to a negotiated agreement) WATNA (Worst alternative to a negotiated agreement) and MLATNA (Most likely alternative to a negotiated agreement). A skilled mediator will also check the viability of proposals for settlement with the parties by posing hypothetical problems that might result form a particular solution
- Power balancing; this involves shaping the exercise of power by the parties

Role classification

A more analytical classification of mediator roles has been developed by Norma S Guerra and Gregory M Elliott[10] as follows:
- *Analyst* - helps the parties to look at their problem in new ways. The analyst looks for common interests and shared commitments that transcend the conflict of which the disputants may be unaware.
- *Catalyst* - initiates and maintains communication between the parties. A catalyst may keep dialogue going by asking open ended questions.
- *Critic* - the reality tester plays devil's advocate, raises questions which challenge long held assumptions in an attempt to redefine the problem in a new way to facilitate resolution.
- *Definer* - the definer brings a sense of order to the chaos of the disputants' differing views.
- *Emotional monitor* - guides and maintains the emotional climate throughout the mediation. This can be done through the use of reflecting back emotions, by offering feedback, by empathy, and by the use of humour to relieve tension.
- *Interpreter* - clarifies and explains the views and concerns of each party so that there is potential for understanding.
- *Summariser* - ensures that there is equal understanding of what has been communicated and of the areas of agreement.
- *Synthesiser* - reviews the summarised information for the purpose of clarification, negotiation and agreement building. He/she brings the parties back together pointing out common interests and facilitating the process of forming an agreement that is equitable and acceptable to the parties.
- *Task monitor* - keeps the process moving, sets and enforces ground rules, reminds the disputants of their priorities and determines when private sessions are required. →

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such as legal/counselling skills, or mixed gender mediators.

Mediation is not the panacea for all ills. However it is potentially a dispute resolution option in the majority of disputes. If the statistics indicate that 95% of cases settle before they reach court, then at least that percentage of cases might have been settled with the assistance of a mediator.

Mediator selection

A checklist of questions which you might wish to ask a proposed mediator is provided in Figure 1. Word of mouth reference is also important.

Figure 1: Questions to ask mediators to determine style and experience:

- What is the mediator's specific training and background?
- What is the mediator's experience in the substantive area of the dispute?
- Does the mediator belong to a professional organisation and meet their standards and/or certification qualifications?
- What are the costs of the process, what services are included in the fees quoted and how will such costs be allocated to the parties?
- What style of mediation does the mediator use? Process-oriented or substance-oriented? Is the mediator comfortable with both approaches? How flexible can he/she be?
- How will the mediator ensure that the parties' rights of self determination, confidential and neutral treatment are maintained?
- Do any conflicts of interest or appearances of conflict exist between the parties to the mediation and/or their lawyers and the potential mediator?
- Does the mediator subscribe to a code of ethics?
- Is the mediator's personal style and tone comfortable for the parties?
- Does the mediator have a list of references to share?

(Substantially adapted from Amadei and Lehrburger, "The World of Mediation, A Spectrum of Styles" Dispute Resolution Journal October 1996, p 62)

Mediator styles

There is a wide range of styles or approaches to mediation. At one end of the spectrum there is a substance-oriented style of mediation; at the other a process-oriented style.

At the substance-oriented end are those mediators who may make recommendations to the parties, indicate the likely outcome of the dispute in litigation and apply (to varying degrees) pressure on the parties. Mediators at this end of the spectrum will have expertise in the particular subject matter of the dispute and may be ex-judges or other lawyers, who are used to retaining control over the outcome, giving advice and having their suggestions followed.

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At the other end of the spectrum, is the process-oriented approach. This style of mediation presumes that the parties are in the best position to determine a fair solution to the dispute and that with process assistance they will be able to do so. Process-oriented mediators are facilitators interested in administering the process, not the substance.

The Courts Consultative Committee Discussion Paper[6] suggested process-centred mediation was usually seen as preferable because the parties were more likely "to achieve an interest based solution with optimal satisfaction for both sides and the opportunity to heal damaged relationships. However, it is also more time consuming and open ended, and requires a less directive approach. A substance-oriented approach is generally more comfortable for mediators with a legal background, as the solutions are achieved from an analysis of the issues and tend to be based on the parties' rights."

In a similar vein, Virginia Phillips uses the terms "deal-making" and "orchestrator" to describe the mediator styles where the focus is respectively, rights-based and interest-based.[7]

A number of different mediator style "classifications" can be identified along this spectrum.

Carrie Menckel-Meadows[8] identifies the following styles :

- "pure" where the mediator plays a facililtative role as to both process and substance
- "evaluative" where the mediator offers a view on the outcome, a style which can be regarded as a hybrid of mediation and arbitration
- "transformative" (see the detailed description below) - but on a number of levels the mediator seeks to change either the dispute or the disputants (altering their appraisal of each other and their place in the world); which may be through education in the mediation process.
- "bureaucratic" where the mediator's process has been overtaken by a financial controller's insistence on outputs measured in settlements rather than less measurable resolutions
- "open" and "closed" describing the degree of flexibility the mediator allows in the process
- "activist" in which the mediator not only has a role in determining who attends mediation, but may even have a role in crafting the outcome.

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- "community" which may start from well intentioned community workers with little knowledge of theory but a lot of practical experience, but descend into "bureaucratic" if funded from a public source, and
- "pragmatic" when for example a need to mediate an emergency such as gang violence leads the mediator to use whatever strategies work.

The latest exponents of a process-oriented approach are Joseph P Folger and Robert A Baruch Bush in their book *The Promise of Mediation*. They set out ten hallmarks of transformative mediation as follows[9]:

- The opening statement says it all: Describing the mediator's role and objectives in terms based on empowerment and recognition.
- It's ultimately the parties' choice: Leaving responsibility for outcomes with the parties
- The parties know best: Consciously refusing to be judgmental about the parties' views and decisions
- The parties have what it takes: Taking an optimistic view of parties' competence and motives
- There are facts in the feelings: Allowing and being responsive to parties' expression of emotions
- Clarity emerges from confusion: Allowing for and exploring parties uncertainty
- The action is "in the room": Remaining focused on the here and now of the conflict interaction
- Discussing the past has value to the present: Being responsive to parties' statements ➔

Conclusion

The field of dispute resolution is being developed extensively with new ideas and processes becoming available in New Zealand, such as Dr Dudley Weeks' "conflict partnership facilitation" and peace-building; other processes designed to move people away from entrenched positions, such as the Public Conversations Project; conferencing; and styles of mediation such as "narrative" and "transformative". Most of these can be seen as being at some point along the continuum between substance and process orientation, in the main developing the empowerment (process) dimension. As this option is better understood in the community, we suggest greater demand for it will emerge. Our recommendation therefore is that as far as possible advisers to clients should explore the process-oriented end of the continuum because it contains the potential for the parties to be empowered to find within themselves the ability to resolve the conflict. Skills acquired in doing so will assist them to deal successfully with new conflict.

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Footnotes

1 *Lawtalk* 479, 23 June 1997 14,15.

2 "Alternative Dispute Resolution - One Way to Stay out of Court" *Corporate Controller V* p N6 pp 55 to 60, July/August 1992 by Nancy Stead and Sam Leonard.

3 Stead and Leonard ibid.

4 *Mediation. Revenge and the Magic of Forgiveness* Second Edition 1994 (Kenneth Cloke).

5 "Training the Modern Lawyer; Incorporating the Study of Mediation into Required Law School Courses" *South Western University Law Review* Vol 21 p1317.

6 "Court Referral to ADR: a Proposal to Extend the Use of ADR in Civil Cases" January 1997 para 18, page 9.

7 Virginia Phillips "Mediation: The Influence of Style and Gender on Disputants' Perception of Justice" [1996] NZIRJ Vol 21(3); 297-311.

8 "The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices" *Negotiation Journal* July 1995 217-241.

9 "Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice" *Mediation Quarterly* Vol 13 no 4 Summer 1996.

10 "Cognitive Roles in the Mediation Process: Development of the Mediation Inventory for Cognitive Roles Assessment" *Mediation Quarterly* Vol 14 no 2 Winter 1996 p 135.