

# Learning from each others' mediation successes

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Asia-Pacific Mediation Forum Conference, Adelaide  
Notes from Advanced Skills Workshop, Saturday afternoon, 1 December 2001

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## **Objective, and changes in workshop format:**

The advertised objective (of providing a forum for a large group of widely experienced mediators to exchange lessons on what had "worked" for them in various challenging mediation situations) had to be adapted when travel exigencies necessitated the lunch-time closure of the conference before the Saturday afternoon's Advanced Skills Workshops. However, a smaller group comprising some experienced mediators and some newcomers to the field, met for an open discussion on various current issues in the practice of mediation. Some preliminary findings from the facilitator's research-in-progress on co-mediated two-party disputes were used as prompts for some of the discussion but are not reported here; readers are requested not to infer any of the research findings from the notes below. Contact concerning publication of that research would be welcome late in 2002, to [mcw@cyberspace.net.au](mailto:mcw@cyberspace.net.au).

## **Outcome measure: "To Agree or not to Agree":**

A "successful mediation" is not necessarily defined solely by whether or not agreement is reached. At times the provision of a safe forum in which discussion can occur between disputants is valuable in itself, (as is well known), whether or not formal agreement is reached. For example, mediators have often commented that "a safe forum, etc." had contributed to a worthwhile outcome between the parties.

Public agencies dependent on securing funds, however, can be under pressure to demonstrate their effective use of public monies by publishing favourable "agreement-rates", yet on the other hand mediators working within in such environments are usually trained not to be imposing in regards to achieving agreement.

The "transformative" approach to mediation, with its focus on recognition and on empowerment of parties, and "narrative mediation" derived from narrative therapy, are currently some of the initiatives influencing the practice of mediation. In many cases, however, parties are of course simply keen to reach a settlement of their troublesome dispute and then to move on, rather than work through an approach emphasising, say, their personal development; the agency and its mediators are providing the "safe" forum and the support for the parties to achieve this aim.

Follow-up surveys of party-satisfaction can provide useful indicators of "success" from the disputants' viewpoints, e.g. whether the mediation was worthwhile and whether any agreement reached had been effective and lasting, and some agencies undertake such surveys.

Availability of research into the practice of mediation:

"Pontifications" about what is or is not good mediation-practice abound, presumably based usually on solid experience. However, "hard" research findings about detailed aspects of practice are surprisingly limited. Research into mediation is diverse and abundant, but focus has been more on factors such as program evaluation, ranges of application, mediator characteristics, etc., rather than on such fundamental practice issues as agenda-construction, time-management of steps within mediation, and so on.

**Trust within mediation:**

Trust has to be developed in a mediation, between the parties and the mediators - and this has to be in both directions - and ideally trust has to be achieved also between the parties. Similarly, trust has to be developed between co-mediators so they can work effectively together, and each mediator must trust oneself as well as trust the mediation process.

**Neutrality of mediators:**

It was questioned how realistic is it to expect mediators, as human beings with their individual value-systems, to be totally "neutral" at all times through-out a mediation? However, it is reasonable to require mediators to strive for their own self-awareness of their reactions within a mediation, and to strive for neutrality and for non-judgementalism as goals. Even where a mediator may be known, say, to a party (or indeed some cultures may need the mediator to be known to be acceptable), an outward indication of "neutrality" still seems to be for the mediator to have no involvement in the dispute. Despite increasing challenge to the practicality of the ideal of neutrality, the avoidance by mediators of what could be construed as a "conflict of interest" remains fundamental.

**Power imbalances between parties:**

Several participants believed that power-imbalances between parties apply in almost every dispute and indeed underlie the dispute, and are often the reason the disputants come to mediation. Mediation provides the opportunity for dealing with such imbalances, so that a resolution that has been eluding the parties can become possible.

Assessing parties' power-imbalances is a difficult question for mediators; one suggestion is simply to ask them to "describe the power-imbalances you observed" (and then ask what effect the imbalances had on the mediation, and what if any strategies the mediators used to "deal" with the imbalances).

**Effect of power imbalances:**

Presumably when mediators detect power imbalances, they monitor the situation so that a fair and mutually acceptable resolution is not subverted; in other words, it could be expected that mediators will report that there were power-imbalances but it may be unlikely that the imbalances adversely affected the outcome. However, in disputes where financial factors are involved, settlement-rates may be higher than otherwise when the party who had taken the initiative for mediation and hence perhaps arguably(?) had the greater motivation to achieve resolution, also had the greater flexibility in economic resources.

**Agenda setting, and communication:**

It was agreed that language used by mediators should be comfortable for the parties and be natural for the circumstances of the mediation. For example, mediators often use uncomplicated language such as "what should we be talking about?", etc., rather than more formal terms such as "agenda" or "exploration".

It was also agreed that communication problems between parties are central to disputes; therefore it could be expected that paying specific attention in the mediation to how the parties communicate with one another, will aid their resolution of their dispute.

**Mediator feedback and debriefing:**

There are two principal types of post-mediation feedback, namely that back to the agency and that between the co-mediators. The first type is needed from the mediators primarily for the management, legal, case-record keeping, and training needs of their agency, and the second type primarily for co-mediators to debrief each other on what worked (or did not) and why, their reactions to the mediation, and on how they worked together.

There appear to be considerable variations in post-mediation reporting practices between agencies, presumably reflecting internal agency needs, and not oriented towards research objectives.

**Post-mediation reporting, and use of forms:**

The post-mediation review, by its very circumstances, is conducted when the mediators may be tired

and/or under time-pressure (e.g. to vacate the venue or meet other commitments, etc); however, if the review is conducted even later, such as on the following day, immediacy and accuracy of recall will be further reduced. During a mediation, the mediators' focus must be fully concentrated on their parties, rather than on a concurrent evaluation of process, and some workshop participants were convinced that the filling in of formal post-mediation reports is inconsistent with that priority focus. (This is the polite wording of how this sentiment was expressed by those holding it! The coffee-shop/pub based debriefing should not be underestimated.)

If an agency requires post-mediation reporting from their mediators, and it is recognised that there are many valid reasons for this task, such as those outlined above, then it is essential that the information collected be truly necessary and be used by the agency. The report forms should not be designed just by the agency's mediators and office staff, but also with input from professionals whose speciality is form-design.

Seeking to derive research-information from forms not specifically designed for that purpose, is very difficult. After the experience of attempting to generate variables and information useful for research purposes, from everyday post-mediation report-forms, the workshop facilitator strongly believes that an optimum combination is to use basic reporting forms for all mediations, for essential management needs, but then to supplement these from time to time by properly constructed research-based forms for specific studies; in this way proper and efficient research methodology can be applied.

#### **Relationship between co-mediators:**

The de-briefing discussions between co-mediators on how they have worked together in their mediation are very private to them, if the discussions are to be valid and informative; e.g. difficulties with one another should not be glossed over and it can be expected that co-mediators will not record in writing to their agency anything other than at least "satisfactory" working together! A check-list of what they should discuss in their mutual self-review can be a useful guide - if they follow it. A useful question could simply be: "in what ways did you work together?"

It was agreed that the relationship between co-mediators is "all important" to the success of a mediation.

#### **"Seriousness" of dispute:**

Seriousness of a dispute is identified conventionally in escalation or physical impressions (e.g. argue/abuse/ threats/ violence). Another dimension that is usually not identified could be in terms of "impact"; for example a dispute may be regarded by intake workers or mediators as at the lower end of "seriousness" when it is at an "argue" stage. However, the effect of there being an argument, or of the topic of the dispute, could be devastating in some cases for the parties. In other words, there are two dimensions to seriousness of a dispute, its stage of escalation and its impact, and the latter is often not recognized or at least not recorded.

#### **Support persons/lawyers:**

Mediators need not necessarily assume difficulty when parties have lawyers assisting them. If the lawyers have understanding of mediation as a non-adversarial approach, the lawyers can for example help craft effective agreements acceptable to all parties, as well as protecting the legal rights of their clients. Some workshop-participants found the presence of lawyers useful in various other ways, including assisting equalise power-imbalances, and as one participant put it, in controlling their client's behaviour if otherwise unruly.

#### **New technologies (I.T.):**

In mediations which go over more than one session, and/or which require the further collection and exchange of detailed information between parties, some practitioners are finding that emails or other written electronic communications can speed the overall negotiation process. Mediators can also use email communication between themselves and parties as an adjunct to caucusing/ private-session, and to their feedback of summaries etc. to parties, and for gaining parties' responses to proposals.

#### **Expanding areas of application of mediation:**

As is well known, the early areas of the post-60's application of mediation (family, neighbourhood,

court-annexed, commercial, etc) are continually extending. One current example in Australia (and elsewhere) of increasing interest to several of the workshop participants, is multi-party mediation in land-use planning and environmental disputes. Mediation principles and processes are also being applied in discourse with indigenous-people. Interest in international-level mediation is now recognized in Australia, for example by the conduct of this Asia Pacific Mediation Forum and by the activities of the International Conflict Resolution Centre at the University of Melbourne under Assoc. Prof. Di Bretherton (and whose students were active in assisting this Forum). Mediation is also increasingly applied in social welfare areas, work-place disputes, school peer-groups, insurance settlements, community consultations, and very many other areas. This listing does not attempt to be exhaustive but merely illustrates some of the increasing and diverse fields of application of mediation in Australia.

**Practice experience for newly trained mediators:**

Despite the expansion of the application of mediation, there does not seem to be a balance between availability of work and the numbers of people being trained in mediation. Many tertiary and other areas are offering training in mediation, (and most courses are presumably experiential in learning approach) but there seems to be a growing difficulty for newcomer-mediators to gain practical experience after their training if they are not attached to an agency, say. Even observational opportunities for newly trained mediators are limited, for practical reasons. Whilst mediation training provides some useful life-skills that can be applied in many personal and professional situations, it is frustrating for those people who have trained but cannot find work as mediators. (The relevance of the old adage of "don't give up your day-job" is of little consolation.)

**Concluding remarks:**

Jim Brown commented that this workshop illustrated how as mediators we learn from one another, and how important it is to do that. Furthermore, we should not be afraid of making mistakes if we are to extend our experience and capabilities; we must keep learning more about the practice of mediation.

(Notes prepared by Michael Willis)