

CAN THE LION LIE DOWN WITH THE LAMB?

*David Hurley**

I A MEDIATOR'S VIEWPOINT

Lawyers and mediators working together can achieve triumphs in conflict resolution, but equally the relationship can have its tensions. Both practitioners have a role in co-forming the conflict resolution environment. The objective of this joint session is to explore some of the potential tensions, how each can learn from the other, the expectations each has of the other and finding ways of enhancing the process to the benefit of the parties.

The issues will include exploring the differences in approach between the two practices. As long ago as the 1980s Professor L Riskin¹ was describing the different map references each has for conflict resolution. Lawyers try to identify provable facts, find law to support a point of view and winning and losing measured in money. Costs can become a critical factor. Mediators however are concerned with the parties respective stories about what happened;² civil law is relevant only to the extent the parties choose to make it so, and assisting the parties in meshing mutual needs and interests. Sometimes outcomes may not include money at all.

Other issues can include the tension between what lawyers think is the right outcome, with the mediator's desire to empower the party to make their own decisions. What if the lawyers are at loggerheads over the law? How does the mediator protect the lawyer's relationship with their party? What if the lawyer thinks the mediator is reframing the party's point of view inappropriately? Should lawyers (and mediators) be seen as additional parties to the conflict with their own needs and interests? Who is ultimately in control of the process?

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1 See more recently *Dispute Resolution and Lawyers* (4th Ed, Westgroup, 2009).

2 See Ghandi "All conflict is different perspectives illuminating the same truth". See also "narrative" mediation that focuses on the parties stories.

I want to be clear that I have had excellent experiences working with experienced lawyers who understand the mediation process. Tensions can arise however whenever a lawyer is not in tune with the natural flow of the process.

II THE KEY ELEMENTS OF MEDIATION

- Empowerment of the parties to come to their own decision
- Unique outcomes
- Independence and impartiality of mediator
- The mediator suspends judgement on the issues and is disinterested in the result.
- Confidentiality
- It is more about psychology than the law
- Emotions have their place
- Resolution is the aim, not just settlement.

III THE PROCESS

- A mediator's opening that lays the foundation for eventual agreement
- An explanation of the process and obtaining agreement to it
- Developing trust, rapport and credibility Enabling each party to have their say and "be heard"
- Emotional expression; so that once emotional issues have been heard then parties can relax and make a rational decision on outcomes
- An exchange on the past before moving from contentious issues to co-operative solution finding
- Identifying issues and sorting the easy issues from the unresolved
- Impasse breaking Agreement building Agreement drafting
- Signing agreements and (often) a farewell ritual or process.

IV MINIMALIST MEDIATION

The process can be simplified and a good example of minimalist mediation is the half hour mediations offered at the "Burning Man" festivals.³ Such concentration of the process is achieved by limiting questioning to four questions:

- Do you want to solve this issue?
- In one sentence what is the issue?
- What are the various outcomes that would work for you?

³ See "Challenging Conventions in Challenging Conditions: Thirty Minute Mediations at Burning Man" Hedeem and Kelly CRQ vol 27 Fall 2009.

- Even if you change your mind in the next 5 minutes what is the top outcome that comes to mind?

V *MEDIATION FLOW*

The flow of the process also echoes Otto Scharmer –"listening has 4 stages"⁴

- The initial reaction as to how a proposal will affect one's own interests (seeing the issues
- "from the inside")
- Marshalling facts to justify no change (Looking outside from the inside; and the basis of presentation of a court case)
- Empathetic listening – where the parties take the risk of being prepared to change by
- "standing in the shoes" of the other party
- Generative listening - where solutions are found that meet the needs of both parties.

VI *DISRUPTION TO THE FLOW*

Lawyers can unwittingly or otherwise upset that flow at every stage.

First impressions – Is it apparent the lawyer and client are interested in closure? The mediator's opening – what is the body language of each side?

The parties' opening statements – are they factual or emotionally loaded? (See below for the Davison definitions).

Mind-set – I have referred above to the map references for dispute resolution (Riskin) Traditional training for lawyer advocacy is that the lawyer controls the client's case - that is the lawyer decides what evidence to put before the court, whilst monitoring the court's procedures for possible breaches of evidential or other rules or natural justice. In the informality of mediation this can lead to going beyond controlling the case presentation and attempting to control the process.

Withholding critical information to use as an ambush in later proceedings.

Attacking the other side (from whom they later in the process want to extract money) Not listening to the other side.

Getting stuck and repeating facts and rather than agreeing to disagree, thus stalling the natural flow of the process.

Not allowing client's own voice to "be heard". Unhelpful body language.

4 See Otto Scharmer "Four Levels of Listening" <facweb.northseattle.edu/jreis>.

Avoiding the emotions (or not having the ability capable to handle same)
Letting ego get in the way (it's not about the lawyer).

Getting emotionally involved, either as a naive belief in their client's point of view, or personally interested in the factual matrix. Professional detachment is one of the key values a lawyer should bring to the negotiation table to assist the client through their emotional concerns.

Haranguing.

Interrupting.

Not acting in good faith.

VII LITIGIZATION

"Litigization" is a new term developed in America to describe the process by which lawyers can undermine the potential of mediation by focussing on seeing conflict resolution through a glass ground to a legal prism only. This perception can include "getting the best deal for the client" even if an extra \$1,000 is really immaterial to the overall settlement; focussing on "cutting to the chase" and avoiding emotions; and keeping time in mediation to a minimum.

Deborah Rothman⁵ identifies this development for which she blames both lawyers and mediators by suggesting that both have bought into a game of playing "competitive edge". Reducing time in mediation where both some mediators and lawyers charge on time has been a key driver. She notes however the down side practices of "spinning" or manipulating the mediator; no joint sessions (time consuming) thus preventing the possibility of a cathartic experience for the parties; and unwittingly sabotaging the chance of settlement. Neuroscience research now indicates that good decisions cannot be made without involving both sides of the brain – that emotions have as much importance as the rational brain. A further note is that a common need of each side is for their story to be heard. It doesn't have to be agreed but being heard by the other side is critical. It is not uncommon for mediators to use the technique of asking the other side to repeat back a précis of what they have heard; obviously on the basis that it is a repeat back only, not an acceptance of the content. Caucus only sessions prevent this happening.

5 See "Who took the "Me" out of Mediation" Deborah Rothman in <mediate.com/articles/RothmanD2.cfm>.

VIII HOW MISTAKES CAN OCCUR

These mistakes have been identified in a light-hearted way by Mitchell Rose in the Canadian Lawyer Magazine and could be described as how to destroy the process despite the mediator's best efforts.⁶

Don't prepare until mediator is giving opening.

Don't bring client to mediation.

Leave cell phone on.

Make unrealistic limits on time.

Don't engage in the other party's opening statement – flick pages over, divert attention to yourself.

Take issue with room setup, support people, additional counsel.

Indicate you are more experienced than counsel on other side.

Open aggressively – and at length.

Don't let client speak at all – especially to the mediator; and certainly not to the other party.

Focus on people not issues.

Find ways to inflate your own ego.

Undermine the relationship between the other party and their client.

Oppose joint sessions.

Don't listen at all or if you do – do not listen empathetically.

Use extreme language ("this is the worst case I have dealt with in 20 years")
Talk to client whilst other side is speaking.

Remember this is about you – not the client.

IX THE DAVIDSON DEFINITIONS

The Davidson definitions,⁷ are also relevant.

6 From "How to sabotage a mediation: An impractical guide for lawyers" Mitchell Rose in the Canadian Lawyer Magazine 27 May 2013.

7 Ian Davidson was a Member of the Employment Tribunal based in Auckland. These definitions were first presented in an unpublished address to the Auckland Branch of LEADR 1997, and quoted in "Lawtalk" 486 p 40.

The Bismark Syndrome - the advocate fires an enormous salvo of rhetoric, often including a personal attack on the character of the other side, and then concludes limply - "But we are here to settle."

Collegiate Empathists - those advocates who enjoy a delightful discussion between themselves on esoteric issues of law of no interest or relevance to the parties or the mediator.

Monolingualists - those with no understanding of body language.

"Motown" Strategists - Those who arrive without a strategy for settlement and are merely "wishing and hoping."

The Von Munchhausen Approach - those who have skim read the text books but it has not stopped their falling into well marked but deep holes.

The Venue Pauperis - the advocate who has taken instructions by phone interviewed the client on the steps of the tribunal, and finishes preparation during the process.

The Maginot Line Specialist - Those who cannot adjust their thinking, let alone strategy, when awkward new facts come to light.

The Hydra Complex - As the mediator thinks the last issue has been resolved another appears out of left field.

The Stockholm complex - Those who identify so closely with their client that they lose objectivity

The Two Birds in the Bush Strategist - Those who can not do sums involving calculations of future costs of litigation.

The Blinkered Approach - Those without listening capacity.

X COPING STRATEGIES

So – how does a mediator deal with lawyers wittingly or otherwise interfering with the process? I am a firm believer that if the parties both express a desire to settle, the mediator continues an open, safe transparent process and the lawyers go with the flow, then resolution will be achieved. Mediators are interested in all the relationships in the room, and this includes the relationship between client and representative. That is a fiduciary relationship and to be supported. Much can be done by modelling behaviour, careful questioning, deflecting, use of humour and sometimes challenging. For me the most powerful direct intervention a mediator can make is to comment on what is happening in the room – whether in plenary session or caucus. For example if a lawyer is reading papers during the mediator's opening and thereby undermining the environment the mediator is

trying to create, then an offer to wait until the lawyer is finished can be salutary. If the reply is they can multi-task then that can lead to a useful conversation on the importance of body language and respect for the process.

XI FINAL THOUGHTS

I return to the first point in this paper. Good lawyers with understanding of mediation and working with the mediator (who is disinterested in the outcome) can achieve miracles.

