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Mediation training in the corporation

Moulding the mediator

Stephan Randolph

Mediation and arbitration are not just court proceedings conducted in a different place. They require distinct skills, novel approaches, different techniques and a new psychology.

The Honourable Justice Michael Kirby, AC CMG July 1999.

The distinct skills of mediation are well understood and are included in the negotiation segment of most corporate training packages. 'Novel approaches, different techniques and new psychology' however, can only be assessed by value judgement based on the experience of the trainer and the character of the candidate.

Distinct skills

In training corporate candidates for the negotiation process, I have found that revelation through role play leads the candidate to a list of skills that are compatible with the core competencies.

Trainees are taken through the following steps.

- Trainees undertake a realistic role play letting them witness first hand the need for skills and the scope of the challenges they face.
- During the improvised scenarios they compile a list of skills that they soon become dedicated to developing.
- To the above skills are added the generic competencies of mediation: active listening; strategic questioning; patience;

focus; timing; and diplomacy.

- Candidates then identify personal weaknesses that need to improve or, at least, be acknowledged and avoided.
- Trainees complete a 'learning styles' test to determine which learning process best serves them.

During the role play candidates work through each of the following steps simulating a typical mediation:

- receiving pre-mediation briefs on the essence of the dispute;
- introducing themselves, explaining mediation process to their clients, assuring confidentiality and giving parties a chance to explain their positions;
- ensuring that parties understand that the mediator is not representing them legally and that proceeding without counsel entails some risk;
- meeting privately with each party to
 - evaluate the dispute strengths and weaknesses,
 - identify genuine interests and settlement proposals, and
 - communicate settlement proposals to each party;
- teaching each party how best to respond to the other's proposal; and
- handling industry specific disputes with research or referral to an expert.

Derived, then, from these role plays are personal lists of skills that trainees identified

as already in place but requiring refinement through training and practice, or skills of which they were unaware that need new instruction.

This list is blended with the core competencies, and training begins. A more detailed list of the core competencies includes:

- active listening for empathy and understanding;
- strategic questioning to clear up any hidden agenda or grey areas and getting to a successful resolution;
- 'surround thinking', a term coined to encompass the full breadth of possible solutions and reasonable outcomes;
- effective response ensuring that only the intended message is sent — this examines all non-verbal clues that a client might see as contradictory to a verbal message;
- breaking the routine — often disputes enter a 'deadlock' but these can be broken by 'surround thinking';
- determining when and if to break negotiations for a recess; and
- recognising and developing an enduring solution not a 'band aid'.

A guided discussion with the Key Centre for Ethics, Law, Justice and Governance (KCEJG) from Griffith University on the role of ethics and integrity is recommended here.

Trainees must find their own reading material on the psychology of conflict and present its essence to the group.

Trainees will also discuss situations where it must be recognised that the mediator him/herself may be inappropriate due to fee, conflict of interest or other unresolvable issues with ➤



'The candidate learns what they may not be able to cope with and hence which skills they need to develop and what kinds of mediation might be unsuitable.'

► the parties.

At this time subtler concepts are introduced and candidates encouraged to discuss and reflect on topics with titles such as:

- 'there are no small disputes, only small mediators';
- keeping it civil — maintaining respect for the process and the parties;
- recognising the mediator's role and its attendant psychology;
- appropriate reaction to sudden eruption into verbal abuse or violence;
- smoothing the way, making it easy for parties to get to agreement; and
- the value of entertainment, humour, hypotheticals.

Identifying personal weaknesses is a longer process that develops throughout training but, through participation in or witnessing of intensive role play upfront, candidates discover qualities about themselves that might have led to the downfall of a real mediation if not corrected or at least identified.

The candidate learns what they may not be able to cope with and hence which skills they need to develop and what kinds of mediation might be unsuitable.

The speed at which a trainee learns the process depends, to a large extent, on their inherent qualities: patience, empathy, and a favourable personal agenda and professional attitude. If these are in place, the learning curve is much shorter.

Novel approaches: techniques in practice

In negotiations and dispute resolution with contractors, government departments, and developers, and between Japanese and western companies, I spotted identifiable techniques, skillfully employed, that led to resolution while maintaining working relationships.

'Don't win the first time around. Win the last time around.' This Roman wisdom, passed on to charioteers, is often the philosophy employed by the Japanese ►

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► when negotiating with western multinationals.

In an effort to avert longwinded discussion, the western, particularly American approach, is to lay all the cards on the table from the outset. It's a gesture of overt honesty but the Japanese, in addition to wanting to build a long term relationship with their new business associates, prefer a method which recognises that things change as the relationship unfolds.

Letting the other party 'give themselves away' provides an opportunity for solutions that may exceed their initial demands. It was apparent in cases with which I was directly involved that frequently the Japanese did, indeed, come off better than the Americans, yet both parties seemed satisfied.

It should be noted, however, that the American approach in long term projects where numerous disputes will arise is often to build a legal case with innuendo embedded in correspondence designed to be retrieved later and used in the final negotiations for variation claims. To presume that the Japanese won't pick this up is to underestimate the Japanese and I have witnessed a number of moments in which the Americans came to grief over this presumption.

I have also seen this frequently in Australian business practice. Lawyers spend significant time wading through correspondence to build a picture of what each party communicated to the other in an effort to determine how far this departed from the spirit of the contract. Mediation then proceeds.

In the case of construction projects, owners, developers and government departments often entered a negotiation or mediation with the clear impression that the special conditions of a contract clearly put the entire obligation on the constructor and that the mediator's role was simply to explain this to the constructor.

Times have changed and, following years of painful arbitration, new paradigms have emerged together with new attitudes brought about by employing

the qualities of ADR raised in the first section of this article.

A recent example of this is with Queensland Main Roads Department (MRD) where a very senior engineer was appointed to develop lasting relationships with major Queensland contractors following disastrous disputes on the M1 Motorway in 1999. ADR principles were employed to develop those relationships.

MRD now has a permanent relationships person on staff to ensure that the framework remains in place and that disputes requiring extensive mediation are resolved before they become a major issue.

ADR skills are now part of police training in many North American forces. They form the basis for dealing civilly with uncivil individuals and negotiating rather than pulling out the batons.

Some contention, however, still exists over the situation that police find most unpalatable and extremely dangerous, that is, attending domestic disputes. When tempers are flaring, ADR principles are acutely tested.

New psychology: the will

Attending the 2001 ethics conference with KCEUG at Griffith University I noted with considerable interest that willingness on the part of major players was, as it is with the Kyoto Protocol for example, critical to the adoption of ethical practice by junior players.

Who can doubt that the will for a fair resolution for both parties is decidedly missing in a number of international disputes, notably the Middle East and Northern Ireland?

High profile mediators, often trained in specialist institutions including the Carter Centre for Conflict Resolution or the Carnegie Foundation for Peace, know in advance that they are merely forestalling all out war or bloody civil conflict rather than embarking on a lasting peace. But rhetoric for the media must be observed and to not negotiate is tantamount to a declaration of war.

So the new psychology relies on the mediator's recognition of the ►

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► willingness of each party to mediate 'in good faith' for an acceptable, workable resolution.

Empathy without involvement

It has been reported by mediators in domestic and civil matters that empathy with both parties gives an 'in touch with their needs' atmosphere. The parties, usually not versed with due process, feel less alienated from the system, which in turn facilitates the inevitable conciliation and compromise that both parties have to make. The mediator must ensure that he or she does not succumb to the emotive side of the dispute.

Self-confidence under pressure

On the principle of 'lifting 80kg several times will make lifting 50kg easy', I have put corporate trainees through a role play well beyond what they are likely to face. They fail in a few areas until they know how to deal with failure and move on without it affecting the final outcome.

Not only are they better able to cope with situations that can get well out of control, but their confidence is suitably indestructible — a quality that is easily read by negotiating parties.

The training I have outlined, mostly carried out in Japan, does not result in accreditation with the Institute of Arbitrators and Mediators Australia nor continuing professional development of which 25 hours training per year are required for accreditation for Grade 1 & 2 Arbitrators and Accredited Mediators.

It does, however, provide the basic tools with which a mediator can competently run mediation to its successful resolution. ●

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'... the new psychology relies on the mediator's recognition of the willingness of each party to mediate 'in good faith' for an acceptable, workable resolution.'