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Reflecting theoretically on mediation practice

What mediators bring to practice: process, philosophy, prejudice, personality

Linda Fisher

The following reflections on my practice over the past 20 years formed the basis of a talk to members of the Australian Dispute Resolution Association (ADRA). I present it here as food for thought.

History of mediation in Australia

Mediation in a formal or recognised way started in Australia in 1980 with the establishment of three Community Justice Centres in Redfern, Bankstown and Wollongong. It was a well timed idea. Jane Chart, a legal practitioner who worked for the then NSW Attorney-General Frank Walker, is credited as the 'mother of mediation' in Australia. She saw, and saw the demonstrated benefits of, community or neighbourhood mediation on a trip to the US; on her return to Sydney she enthused to Frank Walker about the possibilities of this type of 'alternative' to the legal system. Remarkably, he was able to build enthusiasm with politicians on both sides of the political fence and community mediation was launched with bipartisan support.

Mediation was an *alternative dispute resolution procedure*, that is, an alternative to the justice system in NSW for so called minor disputes — those which involved neighbours. There was no understanding that those 'minor' disputes had a major impact on peoples' lives, and that they could involve cases where dangerous weapons had been used, people had been seriously hurt and families had been destroyed by fighting. It was seen as something which would help those people, who would not otherwise have access to the law, to have their say. It was affordable (in fact

it did not cost anything); it was initially targeted to lower income earners; it focused on neighbourhood disputes; and it was promoted in the ethnic communities and through chamber magistrates.

The training course was developed by Clive Graham, a TAFE teacher of social sciences who won a Harkness Fellowship to research how mediators were trained in the US. On his return Clive designed a 'Community Justice Centres Mediator's Course' which he believed would fit the bill, and involved other TAFE social science teachers to deal with the expected class sizes. There were 35 of us in the metropolitan Sydney course alone, selected from around 250 hopefuls who had answered an advertisement in the *Sydney Morning Herald* which asked: 'Are you assertive, a good listener, wanting a challenge? Do you want to be a mediator?'

We met on Friday nights for three hours at Sydney Technical College for 12 weeks, became very close to each other, and at the end of the course had not once been able to agree on where to go for dinner afterwards. As neither Clive nor his teachers had actually mediated, they were exceptionally learned on the theory of mediation, but not the practice. It was difficult for them to supervise the role plays from their own experience, so the theory of mediation — the *philosophy* behind it — was as important as the practice. The principles of mediation — neutrality, maintaining a 'tolerance for ambiguity', allowing people to make their own decisions, and so on — were drummed into us.

We were comforted with a model outlining the stages and phases of

mediation; these were steps we could follow to lead parties towards solving their problems. We held onto what we were told: as long as we did what we should, going through all the stages and phases in the correct order, all would be well. And it was, more often than not.

Process

In our training, it was emphasised that we were *neutral and impartial facilitators* of the well defined *process*, who could not take sides or give advice.

After we started to mediate, the now hallowed steps of reading back each party's statements in turn and forming an agenda were added, together with what we called post caucus negotiation (a term with a vaguely sinful sound to it). The resulting *mediation process* consisted of the 'Twelve Steps to Mediating Nirvana', and what we called *process* was our god. We community mediators went through these stages quite zealously, even rigidly.

I was as anxious to 'do things the right way' as any of the mediators at that time, and perhaps even more anxious than most. It was clear that following the steps gave us, the mediators, confidence and also seemed to give the parties confidence that things were meant to happen in a certain order which would lead, inevitably, to an agreement. Reaching an agreement, of course, was the be all and end all; agreement was the vital statistic that told us how good we were as mediators, no matter how long it took to reach that agreement in just one session, and with no way of knowing whether the agreement lasted for a longer time than it took the parties to walk out of the door. There was another plus to the focus on the mediation process: having the security of a clearly defined, staged process meant that all the members of a panel of mediators were, presumably, providing the same service to the clients of the organisation.

At that time mediation was new and exciting: we believed it was the universal panacea. There was no thought of the process going on in the room while the mediation was occurring, that is, the process of mediation — what was actually happening between all the participants,

including the mediator.

In the early 1990s, 10 years after the start of Community Justice Centres, I took with me this belief in process — or rather, the procedural steps of mediation — to Relationships Australia (NSW). And again, it was clear that this was something that worked. Or seemed to.

Family mediation — such as that practised at Unifam and Centacare as well as at Relationships Australia — did change somewhat from what was practised in community or neighbourhood-type mediation. For instance: sessions were not generally open-ended; the impact of violence on the relationship was recognised; acknowledgment and validation of emotions was encouraged; and there was a definite recognition of the quasi-counselling or therapeutic role that mediators often had to play in dealing with the emotional trauma that many couples were experiencing. However, there was still a great emphasis on a model or framework — a staged mediation process. This approach to mediation made supervision of the mediators easy: clearly, naughty mediators did not 'follow the process', leaving their co-mediators sometimes in the dark; good mediators did so.

Philosophy

In putting the emphasis on the procedural steps of mediation, there was a recognition that the philosophy behind couples mediation, as practised at Relationships Australia (NSW), was to help parties to reach their own agreements about their issues in dispute. There was also an increasing recognition that *personality* played a part in what was happening in the mediation room — that is, it impacted on the process that was occurring — whether we as mediators liked it or not.

At this stage in my mediating career, 22 years on, I strongly believe that the *mediation process* — the model one uses — is one of the less important things that mediators bring to practice. The model is the starting point, a good place to kick off; it is something to use — to adapt and mould — not something to be ruled by. I have learnt that the mediator's *philosophy*, the

mediator's *personality* and the mediator's *prejudices* have an enormous impact in the mediation room.

So what is *philosophy*? I have already touched on the dominant philosophy in western mediation today, that practised by the majority of mediators, all of whom have been influenced by the American or Western model of *problem solving*. I will come back to that later. First, let us examine other mediation philosophies.

Transformative mediation

The belief underpinning transformative mediation is that parties to a dispute have the ability to become transformed through the process of mediation.¹ In turn, society as a whole is able to become transformed, as parties (through their own resources) decide how they wish to tackle their problems now and in the future. Parties also decide if they wish to resolve their conflict.

Mediators using this approach encourage both *empowerment* and *recognition* during the process of mediation. The parties' sense of empowerment is brought about by the fostering of self-reliance, respect and confidence. As the process also fosters interpersonal realisation, parties have the potential to *acknowledge* each other as human beings, even though they may not resolve their dispute. This is the recognition dimension.

Robert A Baruch Bush and Joe Folger describe parties as empowered when they change from feeling unsettled, fearful and confused to feeling calmer, more decisive and stronger in realising what matters and is important to them, what goals they hold and why they hold them, and what options they have to achieve them.² Parties are given recognition when they are able to change focus from themselves, and reflect on and consider the needs and predicament of the other party in some way. This interpersonal realisation leads to an acknowledgment of the other party's experiences and an ability to see that party's behaviour in a different, and perhaps more empathetic, way.

The mediator's role in transformative mediation is described as being committed to fostering empowerment



and recognition. The mediator considers this to be successful when he or she does not feel responsible for the outcome, remains optimistic about parties' motives and abilities, and does not judge their decisions or points of view. So the mediator is responsive to parties' past experiences while being focused on the here and now interactions, the expressions of uncertainties and the emotional responses.

In order to develop a consistent transformative approach, a mediator needs to embrace the concepts of empowerment and recognition at every stage of the mediation process. In addition, the mediator needs not only to recognise opportunities to foster these outcomes, but to model them; for

Example

If a party wanted to leave a mediation session because he or she feels uncomfortable, or for any other reason, the mediator would accept that decision without question. The mediator would not say, for instance, 'You have the right to do that, but before you leave, let's talk together privately' or 'Before you go, take a few minutes to think about what you have achieved so far today.' Nor would the mediator stand up and match the person, leading him or her back, ever so subtly, into the room. Nor would the mediator find any other way of talking that person into staying. The mediator would simply say, for instance, 'Fine, please feel free to do so.' It is important that these words would not be said as a

The mediator has to genuinely believe that any decision making is up to the party, and that the mediator must honour the party's decision, because that is what empowerment is all about.

example, by slowing down the interactions, by exploring and inviting elaboration and choices, by encouraging parties to share perspectives and by providing acknowledgment and recognition. The transformative mindset requires that a mediator consciously avoid any interventions that counteract or undermine these principles, allowing the options for resolving all or some issues to remain with the parties. If this is achieved, the parties and the mediator will be left with a sense that something valuable and important has happened during the session, although a formal agreement may not have been achieved.

With this particular philosophical outlook, communication rather than problem solving is the key, and the mediator does not lead the parties through stages of mediation but works from moment to moment, reflecting back what they are saying and encouraging them to elaborate on their perspectives.

tactical response, so that the party might reflect and stay. The mediator has to genuinely believe that any decision making is up to the party, and that the mediator must honour the party's decision, because that is what empowerment is all about.

Narrative mediation

Narrative mediation has developed out of the narrative therapy techniques pioneered by Michael White.³ The principles underpinning narrative mediation come from a social constructionist belief that we are influenced by our social and cultural environment. The messages we have heard while growing up, and how we talk about ideas through conversations or discourses, shape what we think about ourselves and the world around us. This means that people coming to mediation bring with them a certain *construction* of their relationship, and the breakdown of that relationship — whether they are family members, work

colleagues or neighbours. These constructs impact greatly on the solutions that parties seek, or limit their views on possible outcomes.

Example

A father may be having an affair and, as such, is no longer considered an appropriate parent by the mother. He, in turn, may be insisting that the children need to relate to his new partner as they are living together.

Conflict, in the narrative framework, can be understood as the collision of different constructs or *stories* brought by the parties to the mediation table. The social constructionist view is that everyone lives his or her life according to these stories, some of which are helpful and some not. However, the story is just a small selection of data strung together; the lived experience may become the dominant story in which the problem is embedded.⁴

Example

A woman may say to the mediator 'I have been a working mother all my life, and I am scared that the judge might give the kids to my partner because he is unemployed and is at home.' The story could be about 'not being a good mother'. The mediator's task would be to *deconstruct* the story, to draw out the assumptions about being a good enough parent, and to assist the mother to think in *unstoried* ways, and to develop alternative stories.

As stories are sets of ideas rather than 'the truth', the mediator focuses on the deconstruction of each story to achieve separateness from that story. The main technique by which this is done is *discursive listening*, which externalises the conflict by naming it as 'it' or 'this' or 'your conflict'. Conflict is thus personalised and is not the subjective experience of the parties. The narrative mediator might therefore say 'Your conflict is causing you pain' rather than 'You feel bad because ...'. This technique allows the party to detach from the conflict by locating the problem in the past, and assessing what influence the conflict has had on each of them. The conflict becomes a 'third party' in the relationship.

Mediators and therapists using a narrative approach are encouraged to take a stand against social inequities and

injustices by stating their opinions, and by challenging norms and traditions, for example those of patriarchy, racism, sexism and violence. This is the very antithesis of a transformative approach.

Problem solving or solution focused mediation

Mediators working within this philosophical framework believe that assisting people to decide what is the *best solution to the problem* or to the issues in dispute is the role of the mediator. There is a strict delineation between what is classed as *counselling* and what is classed as *mediation*, and although there is an acknowledgment that feelings need to be validated, they are not dealt with as they might be by a therapist.

Assisting people to reach agreements which are in the best interests of all the parties concerned — and conversely, assisting people not to make agreements that are not in the best interests of everyone — forms the focus of the mediation session. The metaphor for this type of mediation, which is the dominant paradigm in this country and in the western world, is the *contract*. Agreements can take the form of a settlement, an interim agreement, a partial resolution, or a decision to continue the 'fight' in another forum such as a court or tribunal.

Example

Mediators favouring this approach generally start with an agreement — or contract — to mediate, and end with a mediated agreement — or contract. Even where the dispute is between parents and their adolescent child, agreements are generally written out in contractual form, such as 'Bill and Betty agree that they will allow their daughter Barbara to stay out until 10.30 pm on Friday and Saturday nights. Barbara agrees that she will put 30 cents into a jar each time she uses the phone, and agrees that she will not make any STD calls without permission'.

Many of the mediation models favouring the problem solving approach are conceptualised by the use of triangles or a diamond. There is usually a number of steps or stages through which the mediator is expected to guide the parties, hence the 'Twelve Step Model'

mentioned previously. Organisations using variations of the solution focused model include Community Justice Centres, Australian Commercial Disputes Centre and LEADR.

Mediators who believe their role is to assist the parties to decide what they want to do about a problem, or believe that mediation is a better way to resolve a dispute than going to court because the parties have the ability to forge a solution that suits their needs (or the needs of their children), are committed to the problem solving philosophy of mediation.

Impact of the mediator

The values and ideologies of mediation, as defined by participants at a conference convened by ADRA in 1993, were as follows:

- taking responsibility for oneself;
- equality;
- voluntariness;
- freedom of choice;
- self-determination;
- non-judgmental process;
- taking people at face value;
- an assumption of honesty;
- no withholding of relevant information;
- equal power relationships;
- need to redress power imbalances;
- assertiveness;
- exclusion of retribution; and
- mediator neutrality and impartiality.⁵

At the 1991 ADRA conference on domestic violence and mediation Greg Tillet famously said in his conference summing up: 'As far as I'm concerned, the only neutral mediator is a dead one, because human beings by definition are not neutral.'⁶ There were gasps from the participants. We could not believe what we had heard and he was metaphorically shot down in flames at the time. Despite the reaction, he kept saying it and went on to talk about what he called the 'Myths of Mediation'.

Greg was absolutely right. We cannot discount the effect of ourselves on the process of mediation. We are influenced by a myriad of conflicting beliefs. How can we tell parties we are impartial when we do care about the sort of outcomes people are making? We do judge the worth or otherwise of the agreements they reach and we do give advice — I use the word 'advice' advisedly. Furthermore, unless we are



firmly wedded to the philosophy underlying transformative mediation, we are also facilitators of outcome.

We have an enormous impact on the *process going on in the mediation room* because we are part of that process.

One so called 'myth' is the accepted wisdom that mediators have only procedural power: it is the parties who reach a decision on what to do. The reality is that we steer the mediation every inch of the way in terms of content as well as process. We do this by being more (or less) directive, and more (or less) interventionist, depending on our personality and our prejudices.

Example

One of the values of mediation is that mediators need to balance the negotiating power between parties. Mediators use their procedural power to accomplish this, as follows:

- outlining the mediation process and its benefits, prior to mediation;
- establishing the times and locations for mediation;
- organising the physical setting in the most effective way;
- being aware of the powerful use of body language;
- setting ground rules with the parties, that is, rules of behaviour that we ask them to agree will be helpful to the mediation, and by which everyone will act;
- enforcing those rules by making procedural decisions such as when the negotiations begin, the length of each session, the timing of information exchanged between the parties, and so on;
- managing the communication between the parties, for example by using reframing or paraphrasing to ensure that the messages they send each other are clearly understood;
- controlling the communication between the parties, for example by asking one party to explain to the other why a particular proposal is important;
- using private sessions to challenge a party, or to support a party;
- shuttling between the parties if there is too much heat in the room; and
- suggesting interim agreements, or

suggesting that agreements are reviewed at the end of a specified time period.

However, the procedural power invested in us ensures that we also influence the parties in substantive ways.

Example

One way we influence parties is by choosing who is to make the first statement at the start of a mediation session. In this way the mediator is able to influence what items will be discussed during the session. This is because the second party will generally try to rebut the allegations and offer a different interpretation. The agenda items can usually be set from what is said by the first speaker.

Another is by reframing, so that toxicity is removed and a future focus is established. In this way, the parties are directed towards problem solving, rather than sniping at each other. Reframing is a highly manipulative technique because it steers parties away from the personal conflicts (and perhaps, also, the personality conflicts) and towards something more constructive. The conflicts are not dealt with, simply disregarded.

Another way in which mediators influence parties is by using private sessions. Techniques such as requesting information, asking why a proposal is important to a party, making general suggestions or specific suggestions, referring a party to sources of information, and so on, enable mediators to direct parties towards one solution or another.

Yet another way is by encouraging parties to stay with the process. Each time we urge parties to deal with their differences by talking things over rather than hitting each other, or by going to a solicitor and engaging in a court process, we advise them about what is best for them. Any explanation of the benefits of mediation is biased towards what we advise, not information.

Prejudices

Clearly, the mediator is the most powerful person in the mediation room. Even where mediators *consciously* use techniques such as allowing the parties to decide

themselves who is going to make the first opening statement, or clarifying communication difficulties between parties only by using paraphrasing and summarising, or banishing private sessions from their repertoire, mediators are *unconsciously* influenced in their work.

The messages we bring with us into the mediation room from our families of origin, our personal and professional development and our attitudes and beliefs can subtly influence our work as mediators. Each of us hears things differently, sees things differently, and feels things differently: we are individuals, with different senses of truth. Our self-identity — what we 'are', as distinguished from other persons — is made up of what we know and believe to be true (although we do not know how we know), what we hold dear and revere, and what meaning our existence has for us.

These frames of reference — what George Kelly called our *cognitive maps* or schema — which we each hold are vital to effective and organised behaviour.⁷ However, as every one of us has only partial, approximate and very different perceptions of reality and different senses of how the world works, we have to make assumptions to guide us through the complexities of dealing with the world around us.

These assumptions are the cause of our psychological vulnerabilities and influence us unconsciously in our work as mediators.

Example

How might we be thinking about the parties when we read the pre-mediation information, or meet them at an intake session or preliminary conference? What assumptions might we be making?

What sort of reaction is being triggered in us by their appearance, their clothes, the way they speak, their attitudes, values and beliefs? Deep down, what are our beliefs about Aboriginal people? Do we believe the 'boat people' are asylum seekers or queue jumpers?

Is the reaction positive or negative? How might these biases impact on the way we structure a session, or deal with the parties? What are our expectations?

What might we consider to be the most appropriate outcome for the particular dispute? Are we pushing the mediation towards a particular settlement? If so, why might that be? What is going on for us if they are resistant to reaching that particular settlement?

What values do we bring to the mediation table as family and child mediators when we ask parties to make decisions which are in 'the best interests of the children'?

How do we feel and how might we respond if the session is not going the way we hoped it would? For example if it goes over time? Or if one party is so distressed that they ask to be in another room, even though we believe the mediation will not be as successful unless they are able to talk directly to each other?

How do we deal with feelings of frustration towards the parties? How might these feelings impact on what we say or do?

Personality

One of the ways that can help us understand how we prefer to deal with the world around us is by gaining some understanding of 'what makes us tick'. The Myers-Briggs Type Indicator® (MBTI®) is one of a number of psychological instruments that help us to do this by giving an indication of what personality type or style we might be.⁸

Research suggests that mediators do have different mediating styles which are linked to their personality type, and that these styles in turn are closely linked to their other occupations. For instance, lawyer mediators are often clustered around particular 'types', while counsellor mediators tend to cluster around other 'types'.⁹ The choices mediators make during the mediation can be influenced by:

- whether they are interested in possibilities (intuitive, 'N') or in actualities (sensate, 'S');
- how they prefer to obtain information from the world around, by way of the five senses, (inductively) or by processing information by way of a 'sixth' sense, (deductively);

- whether they make decisions on the basis of logic and objective considerations (thinking, 'T') or on the basis of personal, subjective values (feeling, 'F');
- whether they are active, drawing their energy from the environment, the outer world of people and things (extraversion, 'E') or are energised by the inner world of ideas and reflections (introversion, 'I'); and
- whether their attitude to life is planned, decisive and orderly, encouraging a solution (judging, 'J') or flexible, adaptable and spontaneous, remaining open to possibilities (perceiving, 'P').

There is no 'right' or 'wrong' way of operating in the world — just as there is no 'right' or 'wrong' way of operating in mediation. Each of us operates in each arena depending on circumstances, and each dimension is equally valid.

Knowing one's personality type, however, helps us to analyse why we might be feeling or doing the things we do, and allows us to recognise the strengths — as well as the limitations — of what we bring to the mediation table.

Example

One mediator (INTP, that is, an Introverted, iNtuitive, Thinking and Perceptive type) might prefer to remain detached from the emotional content of the session, asking that the parties think carefully about what might happen in the future, and analyse the options that have been raised for settlement.

Another mediator (ESFJ, that is, an Extraverted, Sensate, Feeling and Judging type) might focus more on the here and now aspects of the dispute, such as the effect on the people involved, and encourage the parties to reach a decision as soon as possible so the matter can be settled and relationships restored to some harmony.

Informing practice

If we accept the hypothesis that we are influenced by our personality, prejudices and philosophy, how do we deal with the impact of these on the process of mediation?



There are several ways in which we can do this, in practice.

Co-mediation. Mediators talk about gender balancing and ethnic balancing to ensure the comfort of parties in a session. Personality balancing, too, can be helpful, especially if the mediation team contains two types which are complementary rather than similar.

Continual assessment and self-reflection during the session. This can be achieved by asking oneself: 'What is going on for me here?' 'How am I feeling about their decision?'

Walking in the shoes of the parties: being outfocused. Mediators often focus inwardly, asking themselves 'Did I remember to explain the ground rules?' or 'Is it time for a private session?' Instead, the internal dialogue could consist of questions such as 'If I were this party, how might I be feeling?' and 'What might I like to have said to me now?'

Noticing the physiological response from one party to the other, as well as noting the actual words spoken. As words make up only 7 per cent of the total impact of a message,¹⁰ the mediator's ability to pick up on the physiological response (such as tone and pitch of voice, hesitations, silences, glances, eye movements and so on) can assist in determining the effect of the process of mediation on the parties.

Supervision. Whether this is formal or informal, mediators need to be able to talk through their experiences and make sense of why they have acted in the way they have, and the effect of those actions on the process.

Conclusion

In Laurence Boulle's words, each mediation has its own DNA — it is unique.¹¹ That is what makes mediation so fascinating and provides the challenge. Each mediation has its own process, which is influenced by the content of the dispute, the expectations of all the participants, and the philosophy, personality and prejudices of the mediator. ●

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Endnotes

1. Part of the discussion on transformative mediation is taken from Fisher L and Brandon M *Mediating with Families: Making the Difference* Pearson Education Australia Sydney 2002.

2. Bush R A B and Folger J *The Promise of Mediation* Jossey-Bass San Francisco 1994.

3. Part of the discussion on narrative mediation is taken from Fisher L and Brandon M above note 1.

4. See for example Winslade J and Cotter A 'A narrative approach to the practice of mediation' (1998) 14 *Negotiation Journal* 1 at 21.

5. See 'Cross-cultural communication in dispute resolution' in Claremont R (ed) *Australian Made Dispute Resolution — Community Options for the Future: Proceedings of the National Conference 1993* ADRA 1993.

6. See 'Summary of Conference' in *Domestic Violence and Mediation Conference Papers* ADRA 1991.

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10. Pease A *Body Language* Pease Training International Sydney 1998 p 96.

11. Boulle L 'Foreword' in Fisher L and Brandon M *Mediating with Families — Making the Difference*, Pearson Education Australia Sydney 2002 p iv.