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New dimensions in ADR

Mediating appreciatively: constraints, considerations and opportunities

Barbara Wilson

In surveying a range of disciplines and occupations, it is obvious that questions play a key role in the methodology of professional practice. Questions enable medical diagnoses to be made, research findings to be established, counselling feedback to be gleaned and material gained in numerous contexts and for a wide range of purposes. Questions are very much a part of our lives, from the time when, as children, we first ask 'why?' to the impact of the postmodernist thinking of Cooperrider and Srivastva, to which I shall return later.¹

This article addresses a range of issues of concern for mediation practitioners and discusses some of the opportunities for change which arise in practice. It argues that both are axiomatic to the mediation model (based on the usual five stage format widely employed in the UK and usefully defined by Butlin and Elliott).² It does not attempt a comprehensive overview of all the potential topics thereby arising, making only limited points for the purpose of discussion. Neither is its objective to compare and contrast mediation and counselling activities, although reference will be made to some of the boundaries that distinguish them.

Discourse in professions

All professions use discourse and all forms of discourse are, of course, interactional phenomena. However, as Nunan argues, 'the question is not "What is the speaker/writer trying to tell us about events and things in the world?" but "What is the speaker/writer *trying to achieve* through language?"' (emphasis added).³

A basic description of mediation is that of practitioners endeavouring

to assist the parties to achieve a satisfactory resolution of the issues they have identified between them as outstanding. Additionally, mediators may, through working together with clients, enable cathartic change; that is, an improvement in their relationship. However, it is at this point that most mediators, including those trained as therapists, would delineate the 'membrane' between the therapeutic change goal of counselling/therapy and the dispute resolution goal of mediation. Mediation may — or may not — improve the relationship between the parties and mediators do not define 'success' by overtly improved relational measurements. Indeed, it is perfectly possible to successfully mediate issues between parties whose underlying relationship does not alter, either for better or worse.

The questions asked by mediators have a specific purpose. Mediators do not attempt to establish blame, right or wrong, issues of morality or 'the facts' in the strictly legal sense, apart from obtaining an outline history of the case. This approach can be quite puzzling to new clients, who have usually already had at least one interview based on the legal model — that is, attempts by their solicitor to establish a case history with a view to advising on their rights at law. In fact, the courts take little account of issues of blame when disposing of cases, being only concerned with the behaviour of parties if it falls within certain brackets as defined by case law precedents or deemed relevant by a judge within his or her discretion.⁴

Coming to terms with the notion that the other person (who may be perceived to be 'to blame') is unlikely

to be either censured or penalised by the court is a source of great disappointment and irritation for some clients. Hodson describes this seeming anomaly as a 'tense and emotional subject'.⁵ The rationale of clients in regard to the judiciary is often 'the unwarranted assumption ... that other individuals — at least if they are objective and fair minded — will come to one's own views, once they are exposed to the "truth"'.⁶ Experience of contested ancillary relief proceedings, judicial discretion and adjudicated outcomes may provide a serious challenge to those cherishing such beliefs. Indeed, the wish of both parties to avoid this process, and to retain control of their negotiations, may underlie their decision to mediate.

Mediator activity

A number of features distinguish mediator activity. It is, primarily, a form of ADR (others being redress to the courts, negotiation via legal advisers and round table settlement conferences). Mediators are not stakeholders and do not have an interest in the outcome or terms of settlement. However, mediating divorce cases is carried out 'in the shadow of the law'.⁷ Kelly defines this 'shadow' thus:

... statutory law pervades all lower level decisions, as attorneys and parents negotiate ... at the heart of the adversarial process is the reliance upon legal precedent for making decisions, which limits different or innovative outcomes.⁸

Although addressing the child custody context in the US, Kelly's observation largely holds good for the UK family law jurisdiction. While mediators can, and do, work with clients to achieve creative solutions different from those which the court might impose, there are implied constraints. The implication is that solutions not considered as being in accord with precedent or statute might not automatically be upheld under substantive law, especially were they to be tested in court. Case and statutory laws thus obliquely but firmly impact on mediation. Further, legal advice given to clients often differs regarding

the likely adjudicated outcomes. This issue may surface during mediation and can sometimes create considerable tensions in the search for resolution as determined by the parties' wishes.

Nevertheless, mediators have a duty to encourage clients to obtain independent legal advice in order to assist their deliberations, since no mediator (even if qualified to do so) may give their mediation clients legal advice. The law and courts are thus ultimately privileged over the parties, since either person may leave the mediation process to seek a legal determination of their dispute. Most clients wish to obtain the finality of a court order and use mediation as a route to this goal. Their proposals are thus likely to take account of this objective. It is impossible to conduct family mediation without both awareness that these tensions and constraints exist and having strategies to deal with them.

Clients need to provide full financial disclosure in 'all issues' cases; that is, those involving property and finance as well as contact and residence issues relating to children. Mediating 'all issues' cases means dealing with large amounts of data for the purpose of disclosure (the formal exchange of full financial information between the parties). This may include considerable monetary information, such as mortgage redemption and bank statements, endowment surrender values, shares, debts and pension valuations. Full disclosure is vital as it enables the parties to gain a proper understanding of their financial position and seek advice, where desired, in order to achieve a negotiated division of their assets and liabilities. Failure to disclose fully (whether through mediation or solicitors) may result in court orders being overturned if it is subsequently found that material information was withheld by either party. Management of financial data is therefore intrinsic to 'all issues' mediation.

Documenting the final proposals for the distribution of assets and liabilities, and also decisions regarding any children, is done by way of a memorandum of understanding (MOU). This is the mediator's task

and assists the parties to obtain a consent order of court or a deed of separation — usually via their solicitors, but generally without the need for court appearances. The MOU (which is a record of the outcome, not the process) follows a pre-ordered format and typically includes specific headings regarding child support, pensions, the family home and the like. Mediation practice involves the practitioner in a complex relationship with the MOU, given its preordained headings and privileged and 'without prejudice' nature (apart from financial disclosure). 'All issues' mediation involves assembling significant amounts of information regarding how the parties have apportioned their assets and liabilities, with the purpose of reflecting their unique situation. The preparation of MOUs is usually a challenging and lengthy process, making considerable demands on the mediator's drafting skills.

Such considerations appear to take us a long way from therapeutic interventions. They highlight some of the key procedural and contextual differences between therapy and divorce/separation mediation. As stated above, and despite these intrinsic differences, cathartic change does occur for many clients as a result of using mediation to resolve their disputes. The fact that the mediator demonstrates respect for both, deals with them even-handedly and joins with them to achieve a common goal (akin to the therapeutic alliance) may enable catharsis, albeit as a by-product and not a goal.

Mediation as collaboration

Mediation is essentially a collaborative process. For instance, the mediator might reframe the essential financial disclosure tasks as a co-operative endeavour towards achieving solutions, rather than a demand for monetary information made of one party by the other. Phillips describes the mediator's role thus:

I would add that they do not see themselves as sole managers of the process, but they seek to involve their clients' own expertise and contribution to the work of building and maintaining the mediation container, which will



allow the most powerful results for the parties. They are comfortable sharing power.⁹

Sharing power with clients is an important component of mediating. However, I believe it is overly simplistic to label mediator activity as solely providing a context in which it is possible for people to reach their own decisions. Mediation tasks are distinguished not only by their discrete

inquisitions aimed at exposing or defeating the opposing party. Practising within the discrete framework of mediation involves assisting people to understand that our questions have specific mediatory goals; that is, they are formulated with a view to helping the parties to reach the resolution of their dispute and to optimise their options and choices towards that goal. The manner in which we conduct our

Sharing power with clients is an important component of mediating.

nature but also by the fact that they must be adequately accomplished if the parties' deliberations are to result in a MOU. This interweaving requires appropriate mediator interventions, skills and knowledge, and an interface between the parties' decisions and how the mediator presents them in the MOU. Against this must be balanced the requirement that power and influence over the parties must not be unethically exerted towards reaching the mediator's own preferred outcome.

Our professional reliance on questions, not only to gain access to information but also to test hypotheses in order to assist parties, is germane to our work. Testing hypotheses suggests an inherent power imbalance between ourselves and those we question; that is, we have a sense of the material we wish to explore and the understanding and information we seek. The purpose may not be immediately apparent to the interviewees and it can be helpful to demystify our questions by explaining their relevance. As mediators, we are, in this sense, in charge of both the process and the environment in which they negotiate. Our conduct of the process necessitates a learning curve for most clients, who seldom know exactly how mediation 'works'. Again, they may have come with a completely different 'frame',¹⁰ such as the opinions of friends and family or information obtained from the media.

Mediatory goals

Everyone is familiar with televised court dramas with their gladiatorial

questioning — with equity and balance — is in itself a core mediation skill. Evenhandedness and respect are fundamental to good practice regarding how we question people. If clients see that we can help them to establish the issues and content to be negotiated — without being partial or discourteous towards either of them — we are more likely to create an environment where openness and sharing can be maximised.

It would be disingenuous not to address other, less palatable, considerations mediators must deal with — matters such as delay, deceit and dissembling. These are uncomfortable areas for most of us, committed as we are to respectful practice that values and honours the parties and their right to self-determination. However, we cannot escape these concerns since our clients may express worries in this regard from time to time (and we must also take account of such accusations as are sometimes voiced by the critics of mediation).

Delay is an important consideration for all who have dealings with children, either directly or indirectly, and is deemed contrary to the 'best interests' principle of the *Children Act 1989* (UK). It may be unrealistic to expect to work through complicated schedules for child contact, or emotive issues regarding residence, in just one mediation session; however, the mediator must bear in mind the amount of progress being made and whether the children's — and the

clients' — best interests are served by the continuation of mediation. Timescales and outcomes need to be monitored accordingly. Mediators must also be mindful of potential child protection issues and follow the appropriate professional guidelines if such circumstances arise. Mediators are therefore not 'value free' in this regard.

Adequate disclosure

There are sometimes concerns about whether the other party will fully disclose their financial situation in mediation. Behind this may be a history of previous financial misdemeanours (such as activity within the 'black economy' during the lifetime of the relationship — sometimes with the knowledge of both parties). A lack of trust thus engendered will undoubtedly impact on the mediation. While mediators must do all they can to ensure both parties fully disclose (and practitioners take this matter very seriously), the clients remain responsible for disclosure of material. Disclosure can therefore be a very contentious issue.

However, there is no guarantee, even in contested legal proceedings, that litigants determined to be devious will make a clean breast of their circumstances to the court, despite the risk of being penalised as a result if discovered. Only the wealthy, in 'big money' cases, can afford the relative luxury of litigation, lengthy cross-examination by counsel and forensic accountants to conduct detailed investigations; indeed, the courts largely discourage such strategies, especially when likely to disproportionately inflate costs.

Mediators have a fiduciary relationship with both clients and it is not their function to interrogate either person in a hostile manner. Thus, parties are always encouraged to take independent legal and financial advice regarding the disclosure of documents. Mediators must, however, have awareness and knowledge of these issues and how to address any difficulties that may arise. These are delicate, complex areas, which often involve issues of power and control and are at the interface of mediation and legal

proceedings — indeed, stretching towards the 'shadow of the law'. Mediators must raise unresolved concerns promptly in professional practice consultancy (supervision), as well as taking responsibility for keeping their own legal and financial knowledge updated.

Other safeguards, however, do exist. The clients have access to their own advisers at all stages of the process and may leave at any time. The mediator also may deem it appropriate to withdraw in certain circumstances. Further, as Vrij posits — quoting considerable scholarly findings in support — 'research has consistently indicated that people become better at detecting truth and lies when they are familiar with the truthful behaviour of the person they have to judge'.¹¹ Arguably, therefore, the people best able to detect inconsistencies when negotiating with their ex-partners are the parties themselves.

Towards 'appreciative' mediation

Turning from these logistical considerations, I return to the work of Cooperrider and Srivastva, whose seminal writing on appreciative inquiry in organisational life derives from action research and from whose thinking the word 'appreciative' in the title of this article is borrowed. Bushe, frequently citing the work of these authors, describes appreciative inquiry as 'a theory of organising and method for changing social systems', stating that, as a product of the socio-rationalist paradigm, appreciative inquiry 'treats social and psychological reality as a product of the moment, open to continuous reconstruction'.¹²

Cooperrider and Srivastva argue for movement away from the 'logical positivist idea of "certainty through science"',¹³ quoting the work of Gergen:

As it is commonly said, one's actions appear to be vitally linked to the manner in which one understands or construes the world of experience ... the symbolic translation of one's experiences virtually transforms their implications and thereby alters the range of one's potential reactions.¹⁴

Whether or not their relationship is improved through mediation, the

experience of addressing and resolving conflict in a way that is mutually beneficial and respectful provides such a vehicle for reconstruction and altered reaction for clients. It is the mediation process itself that can achieve these changes.

Mediation is not covert therapy and it is unethical to engage with clients with a hidden agenda or purpose. Nevertheless, mediation can effect lasting and beneficial change, indicated not just by the avoidance of court proceedings but demonstrated also by client satisfaction and enduring agreements. It would be foolish to claim such beneficence for all mediations — but equally incorrect to dismiss mediation's power, relevance and even healing potential for those able to use it.

Mediating 'appreciatively' is a valuable concept for practitioners in both senses of the word. Practitioners should seek to be 'appreciative' of their clients by according them respect and working as professionally as possible with both. This can be challenging when confronted with distressed, angry and hurt people whose feelings sometimes prevent them from benefiting from the process. Clients in this position may be unable to undertake mediation and are better served by litigation. So also, usually, are those disempowered by a relationship history of abuse or oppression. However, it is the writer's experience that some targets of abuse (if properly safeguarded by prior engagement in supportive counselling (including self-esteem and self-actualisation work), legal advice and after giving fully informed consent to the process) may choose mediation because it provides an opportunity to meet their former partner on more equal terms.

'Appreciative' mediation also means maximising the opportunities for negotiation, especially through the option development phase, when the parties can examine — and discard if inappropriate — the fullest possible range of potential outcomes. The 'added value' of mediation, encouraged by the privileged nature of the discussions, means that clients can think the unthinkable and speak the unspeakable. They may engage in trade offs which, although sometimes tangential to the



core issues, can be of vital importance to one or other of them. Practitioners often find that the unblocking of what may appear relatively small 'logjams' can assist the settlement of substantive issues and impasses. It is this attention to detail, facilitated by sensitive and relevant questioning, that underpins 'appreciative' practice. This stance rejects a deficit model typified by negatively labelling clients as dysfunctional or awkward. Parties are instead viewed positively and appreciated as self-determining co-authors of outcomes.

Such 'appreciation' may alarm those who confuse our wish to bring out the best in people with a benign naivety. It is of course vital that mediators take nothing at face value. We are, and must continue to be, alert to the concerns mentioned earlier. We do not promote appreciative practice as the simplistic acceptance of everything that is said — or done — by every mediation client. We do, however, argue that appreciative inquiry's contribution to our thinking is marked by a challenge to logical positivism and an acknowledgment that 'we need a fundamentally different perspective toward our organisational world, one that admits to its uncertainties, ambiguities, mysteries and inexplicable, miraculous nature'.¹⁵ As Robinson states, arguing against the proposition that 'science is the only route to positive knowledge', 'there is no experimental disconfirmation of alternative formulations ... the choice is largely aesthetic and governed by an implicit metaphysics'.¹⁶

I close with further quotations from Cooperrider and Srivastva:

Because the questions we ask largely determine what we find, we should place a premium on that which informs our curiosity and thought ...

The generative-theoretical questions of compelling new possibilities will never go away.¹⁷

And, finally, a statement likely to resonate with those mediators who view clients not merely as parties having problems to be solved, but as people with opportunities to be explored and embraced:

... through our assumptions and choice of method we largely create the world we later discover.¹⁸ ●

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Endnotes

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14. Gergen K *Towards Transformation in Social Knowledge* Springer New York 1982 pp 1–17.
15. Above note 13.
16. Robinson D *An Intellectual History of Psychology* University of Wisconsin Press Madison 1986 p 432.
17. Above note 13.
18. Above note 13 at 129.