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On mediators' responsibilities

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Personal perspectives on ADR

On mediators' responsibilities

An interview with **Jonathan Rothfield**

This is the second in a series of interviews with prominent mediators, dispute resolution practitioners and authors on topical issues in ADR and conflict management. The first interview with David Bryson was published in Issue 6.10 of **The ADR Bulletin**.

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Jonathan, in his interview David Bryson spoke of a deep 'personal struggle' in his conciliation practice and suggested that 'the best we can give each other is the space to talk about it'. He referred to a conciliation in a workplace dispute where he thought he was facilitating between two diametrically different worlds and the individuals between them. To what extent do these thoughts have resonance for you as a reflective practitioner of mediation?

JR: One of my very first mediations related to the sale of a small business. The people present at the mediation were the husband and wife vendors, the husband and wife purchasers and their lawyers. The significant personal antagonism between the parties and my inexperience led me to break the parties into private session very early on in the mediation.

The purchasers were alleging fraud on the part of vendors as they said that the takings were one third of what had been represented. The vendors were saying that the takings were so low because of the business incompetence of the purchasers. I was in private session with the purchasers for about 30 minutes and most of the time I was just listening. I then spent significant time in private session with the vendors. The stories that I heard from the purchasers were so different from what I was hearing in the private session with the vendors that I had to ask myself whether I had mixed up my mediations. (I had three similar mediations on at about the same time.)

As I was listening to the different stories in the respective private sessions I thought that through some gigantic stuff up of my own I had somehow got the vendors of one business and the purchasers of a different business at the same mediation. I checked three times to make absolutely sure we were all talking about a business at the same address and a sequence of events that happened in the same months of the same year!

So in terms of ascertaining the 'truth' of the situation, the mediation process was not exactly effective?

JR: This was one of my first mediation experiences of how 'the truth' as seen by one party to a transaction can be so different to 'the truth' according to the other party to the transaction.

So I can very easily identify with David's experience of facilitating between two diametrically different worlds and the individuals within them.

But is this not also true of other areas of life, particularly in litigation, but also in more everyday activities?

JR: Yes, I now realise that to some extent the issue plays out not only in the mediation and litigation context but in so much of every day life. I've had many conversations with my father (whom I have known for a long time!) and we will leave the conversation with different understandings as to what happened. There

are many reasons for this, and one is that I take to the conversation different assumptions to the ones he has. I can have a discussion with a close friend for, say, 10 minutes and then it dawns on me that something I heard him say early in the conversation may not be what he intended. His intent and the impact on me can be very different.

Yet David's tension seemed to emanate not so much from difficulty in understanding the different perspectives. It seemed to revolve around the tension between the issues he was dealing with as a practitioner and the broader social context in which they were created. In other words, he seemed to be doubting his ability to achieve simple justice between the disputing parties.

JR: I have not yet considered carefully how ADR at the micro level fits into 'justice', the 'rule of law', a 'better society' and a 'better world' at the macro level. In these matters I think David's thinking is considerably more advanced than mine. However I am very troubled by many things at the micro level. Let me give some examples:

- I was brought up in a family where local and international political issues were discussed and analysed daily. The belief system I had as a youngster was that decisions are (always?) based on a rational and reasoned logical analysis. I think that view of decision-making is fundamental to our legal system which is based on statute and precedent.
  Yet in mediations of any length, regardless of the importance of rational logical and consistent thought, the emotional content is often very obvious and extremely important. (Incidentally, in this context co-mediating with a psychologist mediator is an eye-opener.) Many lawyers want to ignore the emotional content and many want to deny its existence. This attitude is frequently one of the reasons, in my view, why mediations do not proceed according to 'the model'. The people get in the way! If we cannot cross the last gap, in my view, it is often because we give the 'people content' insufficient attention earlier in the process.
- Some of the attendees at mediation show obvious signs of understanding the process and also the substantive issues. Other attendees are exactly the opposite. For example, despite everything I have said about the fact that I do not make decisions on the substantive issues, lawyers for parties will whisper in my ear that the parties think I am in the shoes of a judge and treat what I say accordingly.
- Some parties can have strong disagreements on content and yet can be very agreeable on a personal basis.
- Some people at mediations are belligerent, aggressive and arrogant and others very cooperative. In far too many mediations it is not only the parties who are 'at war' but the lawyers are also personally antagonistic towards each other. In one mediation I had a senior barrister refusing to sit in the joint session room because of the behaviour of the lawyer on the other side!
- Some clients become involved in the process and become active participants in joint session. Some are very quiet and leave you wondering whether they are really at the mediation at all. Even in private session they are mute and I find myself thinking 'I hope this lawyer knows what his client wants because I don't'.

These are but some of the micro issues with which I'm still grappling.

You have spoken about the involvement of lawyers in mediation. How does this affect some of the factors you have mentioned?

JR: In the mediation world in which I operate, most parties are represented by lawyers. I am usually involved in a process in which I am asked to facilitate communication and negotiation between participants in their controversy and to assist them in reaching a voluntary agreement regarding their dispute. I do not hold myself out as having any responsibility at all for the substantive outcome. In fact I usually tell participants that I am interested in running a proper mediation process. I'm also interested in being paid. But I have no interest at all in the substantive outcome and it is not my job to be concerned with whether the substantive outcome is fair or reasonable.

I have all sorts of tensions with

which I live as a mediator but they are usually related to my ability to run what I see as a proper mediation process. I have not yet faced up to my role in the justice of the outcome of the mediation.

Jonathan, what are the implications of this tension for mediators as they practice their craft? After all, you have contributed to the literature on what you think you do as a mediator.[1]

JR: Yes, I have been immersed in this 'negotiation', 'mediation' and 'facilitation' world now for over seven years. What I try and do for myself is to have consistency between what I think, say, feel and do. And I find it very difficult. If someone who endeavours to be self-aware has difficulty, is it any wonder that others have difficulty as well?

Are there signs of optimism in terms of what mediators and the practice of mediation can bring to other areas of social life? For example, the political process is highly adversarial and there is a new unilateralism evident in the international order – are these areas in which mediation can make contributions?

JR: I despair when I see the state of the political process in Australia. Being a spectator in the House of Representatives is not an edifying experience. I find the world scene you refer to, and particularly Australia's involvement in Iraq, tragic. I do not understand how lawyers can somehow find a legal basis for Australia's involvement.

I have difficulty comprehending why so much of our life is concentrated on competition and so little (relatively) on cooperation.

And then I go to a mediation where the business people present are really skilled interest-based negotiators and their lawyers are also skilled interest-based negotiators and I get to be the audience in a cooperative 'negotiation play' and I get paid for the experience. And then I think there's hope for mankind.

But competition is becoming embedded in the structures of society. After all we have a National Competition Policy designed to ensure high levels of competition in the economy. Is this not establishing some kind of social norm?

JR: I am troubled by the apparent conflict between the desire to cooperate and humans' competitive nature. I think I value cooperation more than competition. I would like to think that mediators are cooperative by nature. But the stark reality is that mediators compete in their mediation marketplace. So I find that I must compete in a market-place where I talk about cooperation. I've not yet come to grips with these contradictions and inconsistencies.

One of the issues which David referred to was the need to protect the soul of the mediator. At a very practical level this involves professional indemnity insurance. One mediator in Victoria has already been sued. What are your views on the need for this type of protection?

JR: The view has been presented on many occasions that an action against a mediator by a dissatisfied client has a slim chance of success, particularly for a mediator who practises the facilitative model. Professor John Wade in his excellent case review in Issue 6.7 of the Bulletin[2] demonstrates in my view why ultimately the mediator in that situation has little to fear. And yet, the legal action did take place (or is still taking place).

As I get older I become more risk averse. I don't want to be sued and if I am sued I want to have a strong defence and also a strong insurance company standing in my shoes. In my mediation agreement I have a clause pursuant to which the parties agree that I am not liable for any act or omission in my conduct of the mediation. Further, there is an indemnity clause in respect of any claim that may be made against me. In addition, in most of my mediations I get the benefit of statutory immunity. And despite this I believe it is really important to protect myself against the disaster of litigation and thus it is really important that I have a meaningful professional indemnity insurance policy for my work as a mediator.

Does this issue not raise a broader question as to the nature of mediation practice? It is strange but true that after a quarter of a century of mediation development in this country, the contours of mediation practice are not clear, particularly in relation to responsibilities towards weaker parties.

JR: I have a personal story of my own which for me highlights power imbalance questions for mediators themselves, and also how little understanding there really is out there of the practice of mediation.

We live in a world of administrators, managers and bureaucrats. When I ceased being a consultant to a legal firm (at the end of 1999) I intended to concentrate my professional work in the mediation world as mediator. Up until that time my professional indemnity insurance cover had been with the Legal Practice Liability Committee in Victoria (LPLC). At that time, the more cautious view of the LPLC was that the practice of mediation was not the practice of law. It therefore followed that I would need professional indemnity insurance as a mediator quite distinct from the cover offered by the LPLC. I took out substantial cover with two large commercial insurers.[3] Initially the companies indicated that they would insert in the policy the following clause:

> Professional services: mediator, which term shall not include cover for or in respect of the provision by or on behalf of the insured of legal advice, investment advice, taxation advice or superannuation advice, nor shall it include cover for or in respect of any matter where the insured has a vested or financial interest in the outcome of the mediation.

I found this wording very restrictive and after months of negotiations the insurance companies agreed to amend the wording so that it read:

> Business description: mediator and conciliator, which term shall not include cover for or in respect of the provision by or on behalf of the insured of legal services, nor shall it include cover for or in respect of any matter where the insured has a vested or financial interest, other than remuneration for services rendered, in the outcome of the matter being mediated or conciliated.

The cover that I was ultimately offered took out the sting that I could not provide advice. It had been my view since attending an advanced course at the Bond University Dispute Resolution Centre in 1998 that the notion that mediators do not give advice is nonsense.

I might add by way of an aside that no claim has been made against me and I am not involved in any litigation.

When it came to renewal at the end of 2003 the company that had the prime cover indicated that it would no longer insure me other than through a group

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insurance scheme which it was arranging for a group of mediators. In my view that group insurance is fundamentally flawed and I refused to take out cover which I believe to be useless. So the prime insurance cover was no longer available. And here's the real catch. If in the year 2004 I am sued for something that I did or did not do in a mediation that I conducted in the year 2003, the prime insurance company say that I am not now insured. And the reason that I am not now insured is that they were only prepared to insure me if I took out group insurance cover which in my view was flawed. The other company with whom I had insurance indicated they would insure me if I agreed to five clauses that I believed were also flawed and inappropriate. If I had agreed to what the commercial insurance companies were asking me to agree to I would be paying premiums for a policy of little value, if any.

So I went back to the LPLC. The LPLC now agrees that for a legal practitioner (like myself) the role of mediation is part of legal practice. So I have done the full circle. I am now back where I started. But the fear of not being able to get insurance caused shivers and shudders down my spine and many sleepless nights and I was very seriously contemplating ceasing my practice as a mediator.

This was a big reminder to me of power imbalances. As a legal practitioner, with the support of the Law Institute of Victoria of which I am a member, I am able to get reasonable insurance cover. As a stand-alone sole mediator I was in no bargaining position at all and was being asked to agree by the insurance companies to clauses which negated the policy. I was being told to sign up or there is no insurance. I had no bargaining power in my negotiations with them. Incidentally, I blame the administrators, managers and bureaucrats for the nonsensical position which the insurance companies took.

It sounds as though the insurers want mediators to practice purely in the 'facilitative' mode. Much has been written and said about mediators' roles and responsibilities. What, for you, is the essence of the mediator's role?

JR: I see my job as assisting the participants to negotiate their own resolution of their conflict. I prefer to mediate in accordance with the principles of the facilitative model of mediation. However, I often need to satisfy the consumers' needs and the consumers often want me to step outside the 'purist' perception of the facilitative model. I do not see my role as giving advice on the substance of the dispute or the likely outcome of a court case. But I do see it as my role to give the parties advice in their negotiation. It follows that I give advice to a party as to how to negotiate.

NADRAC in their September 2003 paper on dispute resolution terminology encourages us to use descriptive language rather than definitions. The NADRAC standard description of mediation follows what I would call the facilitative model. NADRAC advance an alternative description of mediation as a process in which the parties to a dispute, with the assistance of the mediator negotiate in an endeavour to resolve their dispute. I choose to believe that my behaviour at mediations is consistent with that description.

I said earlier that I think it's a nonsense when mediators assert that they do not give advice. When mediators participate in mediation they are assisting the parties to negotiate, even if the mediators think they are not, and when the mediators assist the parties to negotiate they are expressly or impliedly advising the parties about how to negotiate. Supposed neutral information seeking questions, asked by the mediator, have hidden in the background a thrust which in my view amounts to advice in relation to the negotiation. ●

Jonathan Rothfield is a mediator in Victoria and more about him will be found at <www.mediationservices.com.au>.

Endnotes

1. See Rothfield J 'What (I Think) I Do As the Mediator' (2001) 12 ADRJ 240.
2. Wade J 'Liability of mediators for pressure, drafting and advice' (2003) 6 (7) *ADR Bulletin* 131.
3. I had what's called prime cover with company A and excess cover with companies A and B.