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Assessing mediator behaviour

How mediators assess behaviours in mediation

A survey was conducted among 27 experienced mediators at an Advanced Mediation Workshop conducted by the Dispute Resolution Centre, Bond University, at Noosa in late 2004. Part of the survey results are reproduced below, providing a reflection of how mediators assess their own interventions and other behaviours in the practice of mediation.

	Never	Occasionally	Often
1. Which of these (or analogous) interventions do you use?			
(a) No adequate disclosure, no mediation	9	8	4
(b) Insist on written legal advice from each lawyer	17	2	2
(c) Lawyers sit at far end of table	11	5	5
(d) 'I want to see clients without their lawyers'	4	9	5
(e) Without full authority to settle, no mediation?	5	3	13
(f) 'There's no point having a mediation, you are too far apart'	15	8	
(g) 'There's no point having a mediation, unless X attends'	10	8	3
(h) Divide parties into separate rooms and shuttle offers between them	2	17	4
(i) 'Here are the risks you take if you proceed to a court ...'	1	12	12
(j) I want to see lawyers without clients	7	12	1

- (k) Other (provided by respondents)
- Discuss with one party how they think the other might be feeling
 - Go to matters that are close to common ground first
 - Review place on mediation triangles – making progress
 - What would (child) think of that idea?
 - Preliminary canvassing of issues alleged in pleadings
 - Encourage parties to talk directly and interact themselves (unless abusive)
 - Encourage support person to be 'support' and not party
 - Reframe in strong terms so that the other side hears it from a third party
 - Acknowledge, empathise and move them on
 - Suggest possible options if parties agree to the mediator doing so
 - Ask the disputants to tell each other directly (not through lawyers) how they feel about the dispute
 - Agreement to a 'bargaining plan'
 - Parties must do a risk analysis of no agreement
 - 'In my experience, people sometimes do this...' What do you think?
 - Why haven't you been able to settle this yourselves?
 - If you were both still a couple together who would decide?
 - At the commencement of the mediation today we all agreed that we wanted to walk away taking with us an agreement...
 - Has your accountant given you an absolute guarantee that you will not be prosecuted by the ATO?
 - 'When will you know if ...?' type questions
 - I suggest that you each take a moment to think about how you might feel in 10 years time about the settlement proposed here
 - I understand that a lot has happened – there is a lot of weather between and around the two of you, can you stand outside that landscape completely to think of your children's needs



- You have decided to come to this mediation process. A lot has been said, but do you think you have listened to the other person?

	Never	Occasionally	Often
2. What behaviours/beliefs/emotions do you see jamming the negotiations/mediation?			
(a) A lawyer who has given wildly optimistic advice		15	10
(b) Lawyers who have become antagonistic/emotionally involved	2	12	9
(c) A client who is not listening to his/her own lawyer	1	17	6
(d) Poor summary and preparation of facts, BATNA (Best Alternative to Negotiated Agreement), offers, issues	17	8	
(e) Concentration on legal questions and missing commercial interests	2	14	7
(f) Uncertainty of legal rules and the shadow of the law	1	21	3
(g) Rollercoaster of emotions		9	17
(h) 'Entrapment' – disputants have invested too much in the conflict	1	14	11

(i) Other (provided by respondents)

- Inadequate data/information to enable party to make an informed settlement
- Kubler-Ross grief issues – still in grieving process
- Different values/principles – cultural, religious, basic assumptions
- Unrepresented clients (those who have not obtained advice)
- Clients who have a mental illness or disorder
- Partners (spouses) who are pushing a party further into the dispute for their own reasons
- Concern about creating adverse precedents in a workplace through settling
- Other litigation already on foot, reluctance to concede on this dispute as it may prejudice other position
- Total lack of trust in the other party
- One party is intent on using the process to punish the other party
- Influence upon the party from an outside source – eg a family member or new partner
- Total intransigence – not prepared to negotiate for fear that they are 'giving' too much to the other side
- Believing own rhetoric
- Persistent belief in the 'evil' of the other side – at one end of the spectrum it is disrespect, at another it is hate or desire for blood
- Telling lies in negotiation is 'part of the game'
- A party who has agreed to mediation, but has no evidenced intention of budging from their 'superior' position
- When one party takes part in the process as a 'fishing expedition'
- When one party attempts to manipulate the other party in the presence of an impartial third party, believing it is a safe environment
- When one party is too emotional and cannot, or loses the ability to, express their needs/interests and the other is adjusting quite well
- One client agrees to mediate, but the motive is to 'prove' they are reasonable and willing to negotiate, when in fact they attempt to manipulate the process without a genuine attempt to negotiate
- Client's inability to express their story and feelings – made worse when other client is very skillful at these processes
- People who haven't sought legal advice yet
- People who've been talking to 'my dad's girlfriend who is a legal secretary'
- People who have joined an aggrieved fathers' group and have lots of advice from that source
- Couples with negative net worth

- Power imbalance – less powerful party suddenly finding strength and using it in mediation
- Living for the dispute/living in past/not facing future issues and needs
- Focusing on small details and losing sight of the big picture
- Loss of trust in other person
- ‘Raising the bar’ – coming up with extra requirements after other party thinks they have met needs/demands.
- Unreasonable time frames
- Client unable to see beyond the ‘principle’
- The lawyer talking over other party
- The lawyer cross examining other party
- The lawyer smirking at other party’s comments (bad body language)
- Controlling personality – ‘my way is the right way’
- Not ready to mediate – eg too early in process
- Using the dispute and its resolution as a means of ‘getting back at’ the other party
- Using mediation as a means of endeavouring to achieve an objective that cannot be achieved in court
- Party feeling ‘attacked’ if mediator appears to take a position
- Emotionally charged person who is not interested in getting a result
- When a party has an unshakeable belief in being right
- A person full of negativity and spite
- Power, one party deciding to use litigation to win by causing the other party to keep paying for lawyers
- We have been ‘forced’ here by the court against our wishes

	Never	Occasionally	Often
3. What helpful behaviour have you seen from skilled helpers (eg lawyers, accountants) before or during mediations?			
(a) Provide mediator with short written summaries of facts and evidence	4	15	6
(b) Provide mediator with short written summaries of legal issues, rules and arguments	8	15	1
(c) Provide mediator with short written summaries of commercial questions, risks and a range of possible solutions	11	9	1
(d) Suggest possible causes of conflict and reasons for jam	5	15	4
(e) Suggest mediator interventions which may be helpful	8	13	3
(f) Encourage clients to speak themselves		12	12
(g) Are obviously prepared and organised		7	17
(h) Use non-inflammatory language	1	6	17
(i) Use outstanding communication techniques with appropriate questions, summaries, ‘what if...’ proposals, etc	1	17	5
(j) Consult readily with mediator about breaks, hurdles	2	14	7

- (k) Other (provided by respondents)
- Preparation of clients by intake specialist with provision of information about mediation process and other options that might be appropriate
 - Feedback to parents by child consultant in family law matters
 - Counselling working concurrently with mediation, especially with families
 - Provide all legal, court and financial materials, as well as any other written communications between the parties – ie give the mediator the full brief beforehand
 - ‘Crunch their client’ – talk in very frank terms about the BATNA and WATNA (Worst Alternative to Negotiated Agreement) scenarios and help the client to understand the best outcome
 - Calm the client down, de-stress and comfort the client because they know the client’s personality better than the mediator does



- *During mediation privately tell the mediator 'where the client is at' and what the hurdles are for the client to come to an agreement*
 - *Speak to both parties 'openly' at the mediation*
 - *Have available and produce relevant documentation*
 - *Make concessions that there could be a 'range' of values*
 - *Provide an indication of the range in which settlement could and could not be reached*
 - *Deal with areas of conflict that are least contentious first*
 - *Discuss first positive aspects of matter and what parties can agree on*
 - *Acknowledge other parties' feelings*
 - *Work health matters – apart from the worker and insurer, the presence of employers very useful, actively/directly listen to the worker*
 - *When lawyers provide realistic outcomes to their clients, before they take part in the mediation process*
 - *Family lawyers have provided excellent 'ball-park' scenarios and reasons to clients. Sadly, other family lawyers appear to have 'advised' clients along the lines of what the clients wanted to hear/accept*
 - *Have briefed client prior to mediation on the process so client is better prepared*
 - *Able to be empathetic to clients overcome by emotion and assist in steering process through difficult stages*
 - *Ability to liaise with the helpers prior to conference to clarify issues and sensitive areas*
 - *Assist in controlling difficult or argumentative behaviour*
 - *Consult with the mediator (before the process) about other agendas causing the conflict*
 - *Assist with advice where required during the process*
 - *Union official advising where the real settlement zone is*
 - *'Head banging' – lawyers who support mediation process taking clients aside and heavying on WATNA*
 - *Strongly supportive of mediation process*
 - *Active listening both to client and mediator*
 - *Maintaining eye contact with mediator and client*
 - *Wise friend behaviour (controlling emotions – 'hearing' what is actually said)*
 - *Risk analysis to party*
 - *Interpreting the process for party*
 - *Flagging possible options or positive 'add ons'*
 - *Not being aggressively partisan – 'We're all reasonable ...we are all interested in a way out of dilemma'*
 - *Declaring the 'bottom line' for a successful negotiation to take place*
 - *Choosing when to speak so that unpalatable things are being said by lawyer rather than party*
 - *Suggestions to clients of positive outcomes*
 - *Sensible advice about consequences of not reaching agreement or at least narrowing issues*
4. ***Write out at least three things you have learned in the last year of your mediation practice which you believe have made you a better mediator.***
- *Patience; listening skills; to see there are two sides to disputes; necessary for litigants to believe they have been heard*
 - *Never take at face value the position put by lawyer/helper about their client; always go the extra step to check directly with client, otherwise there can be last minute hitches on proposed settlement terms outlined by lawyer/helper*
 - *Ensure parties have ample opportunity to outline their view on evidence, despite what may appear to be overwhelming evidence to the contrary*
 - *Take time to seek independent evidence in circumstances where the facts are obscure, or there are strong doubts about bona fides of existing evidence*
 - *Importance of breaks and relieving tension/levity/small talk when needed*
 - *Deflecting personal questions to me from family law parties, for example – how many children do you have?*

- Importance of frequent reframing and summaries and encouragement to parties re progress made so far
- Importance of stressing to parties how they have to keep litigating if no successful outcome, especially if felt to be 'matter of principle'
- Capacity to listen and 'take on' what a party is putting forward
- Ability to control or manage difficult behaviour
- To tell parties important things about the legal process without giving legal advice as such
- Get in the right frame of mind before the mediation
- Listen hard, listen actively, but don't fall into the trap of just listening
- Learn to listen better and allow people to vent
- Be willing to paint a picture of a desirable state for an organisation to be in
- Don't despair when interest-based bargaining turns position – it will!
- Trying to have parties focus on preparation as well
- Getting parties to perform risk analysis or at least consider it after consulting with legal adviser; suggesting it as homework toward end of mediation which is stuck positionally
- Patience – allowing parties the time to express themselves
- That visualisation of the disputes (by noting on a whiteboard) is helpful
- The use of a pre-mediation session for coaching of parties in negotiation
- Evocation of empathy smoothes the path
- Persevere with intakes until you have a pretty good idea of what's involved and what's likely to be negotiable
- Have focused on being less directive than I was
- Have been able to become more disinterested (not uninterested), more dispassionate – has helped to avoid being personally involved
- How to use private sessions more constructively in family mediations – once I had a tendency to use them as 'time-outs' to allow cooling down of emotion/outbursts/negative language, now I use them more strategically to work with clients on developing proposals
- Emphasis on pre-mediation has grown, though I feel people in separation situations take in less than half the information given
- I create spreadsheets, contact cycles, etc on whiteboard and notice that people get focused and more contributive with such aids to conceptualise the task
- I have just started to experiment with involving some children in pre-mediation, to add to the parents' available information regarding residence and contact issues – early days and some dangers
- Acknowledge client's emotions and by doing so validate them
- In family matters, especially with children, may need to hang in there for the long haul
- LEADR workshop looking at 'breaking deadlocks' suggested using strategies to help parties understand the other's point of view
- Better/more detailed preparation and involving the client in that preparation
- Congratulating both parties (in each other's presence) with the progress in resolving the matter
- What is hidden is often the most important factor in a dispute
- That people like to be heard, not rushed over
- Age, wisdom and experience – 23 years of fighting and aggression as a criminal/family lawyer made mediation/settlement a great way to live longer (win/win for everyone including me)
- Listen, acknowledge and reframe
- No matter how tough it gets in mediation it is still preferable to the nasty, aggressive cross examination of a witness to deliberately discredit him in front of a jury and being attacked by a prosecutor and/or judge
- Break immediately if there is anything resembling a personal attack by a lawyer or an opposing client
- Be patient not to insist on getting offer and counter offer going too quickly

- Learn to 'hang in' there and be patient with difficult clients
- Recognise the need to be 'assertive' when appropriate.

	Essential	Preferable	Not necessary
5. Assume you are involved personally as a disputant in a dispute over management and distribution of profit in a large business. What features would you like to find in your chosen mediator?			
(a) Warmth and friendliness	6	10	6
(b) Substantive expertise in the area of dispute – eg, law, accounting, engineering.	5	13	4
(c) Follows a predictable mediation process	10	12	2
(d) Highly organised	14	9	
(e) Stickler on process rules, good behaviour, speaking in turn	11	12	1
(f) Good sense of humour	2	14	8
(g) Excellent diversion strategies	11	11	1
(h) Ready to express strong opinions; give strong advice		5	18
(i) Strong opinions on process; but reluctant to give opinions on judicial outcomes	9	9	3
(j) Protects the reputations of lawyers		3	20
(k) Persistence and patience	21	5	
(l) Excellent communication skills – listening	26		
(m) Reframing, summarising skills	21	5	
(n) Good drafter of documents	4	12	7

- (o) Other (provided by respondents)
- *Through good insight able to clarify issues*
 - *Good negotiation skills*
 - *Ability to move parties from 'positional' to 'interest based'*
 - *Ability to establish good rapport with parties*
 - *Uses private caucus creatively*
 - *Does not overly pressure either side*
 - *Impartiality*
 - *Strong hand on the parties' process*
 - *Good financial literacy skills*
 - *Good standing with the other side/s*
 - *Trustworthiness – confidentiality*
 - *Well prepared – across issues*
 - *Accessibility prior to and possibly after the mediation*
 - *Effective control of mediation*
 - *Able to 'hose' down and keep calm*
 - *Maintain neutrality*
 - *To be able to be 'quiet'*
 - *Creative thinker*
 - *Ability to recognise opportunities for resolution*
 - *Ability to recognise when people have had enough and how to adjourn without losing momentum*
 - *Willing to be somewhat flexible in approach*
 - *Not capable of being persuaded by skilled advocate for one party*
 - *Not be 'rushed' in process*
 - *Experience in mediations*
 - *Excellent framer of questions*
 - *'Plain English' exponent*
 - *Excellent use of whiteboard*

- Speedy return of phone-calls, messages etc
- Takes what time it takes
- Gives space for discovery of emotional underpinning of disputing
- Good reality checker
- Is not wedded to the idea of producing a document and chalking up a success
- Ability to think creatively/laterally
- Have a comprehensive grasp and knowledge of all the details of the case both legal issues and other 'surrounding' information
- Substantive knowledge 'across the board', experienced in law, finance and with the personal qualities to manage difficult people
- Someone who when asked can provide a range of workable options so that the matter can resolve
- Ability to break 'log jams'
- Know when to call for a break in the process – 'time out'
- Knowing when to call for private sessions
- Does not breach confidences from private party sessions
- Well organised and in control
- Knows the documents and dispute backwards
- Confident
- Mediator who can get results and/or solve the problem with the assistance of the parties
- The values of persistence, patience, empathy and wisdom
- Be mindful that the parties and 'I' do not necessarily think in the same way – different values and interest
- Use of simple 'jargon' ●

For further information on this and similar surveys contact The Administrator, Dispute Resolution Centre, at drc@bond.edu.au.

diary and happenings

- LEADR is holding its **8th International Mediation Conference** on 31 August–2 September 2005 at the International College of Tourism and Hotel Management, Sydney. For more information, or to express interest, visit www.leadr.com.au.
- **Creative Facilitation: A Manual for Group Leadership and Conflict Management** is an essential resource for managers, mediators, human resources officers, teachers and all those who regularly work in groups. It presents new ways of analysing and managing conflict as well as working with resistance. The author, Peter Condliffe, is a Barrister (Victoria), specialist mediator and facilitator, and Director of Mediate and Facilitate Australia. RRP is \$75 (GST and postage included). Contact the author at pcmediate@bigpond.com or 03 9225 6888 to order your copy.
- The **Australian Commercial Disputes Centre** has released the dates for its forthcoming **training courses** up to June 2005. Training courses to help ADR professionals develop their skills through a series of stages are available, as well as a number of one-day options including two new one-day courses – 'Mediation/Conciliation: Advanced Negotiation Techniques' and 'Concilio-Arbitration and how do you do it'. Visit www.acdcltd.com.au for more information.
- The **Trillium Group** is conducting **4-day ADR Certificate Workshops (Level 1)** and **Advanced ADR Certificate Workshops (Level 2)** in Sydney, Melbourne, Canberra and Townsville throughout 2005. For more information call 1-800-636-869 toll free or 02 9036 0333 or visit www.thetrilliumgroup.com.au.