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Surveying mediator practice quality

Poor quality mediation — a system failure?

Tania Sourdin

> In the early days of the American railroad, head-on collisions of locomotives were a common occurrence, ostensibly due to 'operator error' by signalmen who failed to alert conductors of oncoming rail traffic on the next segment of track. At some point, however, the railroad companies changed their frame of reference from thinking about these accidents as operator error to thinking about them as system errors. To address the systemic problem, they began laying two sets of railroad tracks side by side, with each set dedicated to trains travelling in a certain direction, thus eliminating the potential for signalman errors. Miraculously, the number of operator errors associated with head-on collisions declined precipitously.[1]

Mediation is the product of the personal skills and attributes of the mediator, the disputants and the representatives, as well as the product of the system that supports it. Focusing on one aspect of this production when considering quality in mediation is not unlike the mistakes made in the early days of the American railroad where accidents abounded until they were viewed and analysed from a broader perspective. This article considers quality in mediation from a range of perspectives and argues that additional systemic supports are required to enhance mediation quality.

Introduction

Mediation can in some respects be likened to a train ride. Our perceptions of the train ride will be determined by many factors and it is likely that passengers, frequent passengers, train guards and train drivers will all experience the train ride differently. Our perceptions will also be shaped by what happened before we got on the train (was it easy to get a ticket or get to the station?), any delays, whether we had any food for the trip, and, whether we got to our destination at the end. So it is with mediation and our perceptions of process. As mediators, (potentially train drivers although we may not know our destination) our experience of a quality travelling experience may be very different from the passengers — particularly if they experience a lack of security, are fearful or uncomfortable during the journey.

As mediators we may have a clear sense when the mediation has 'gone off the rails', resulted in an accident (or derailing) or ended up as a delayed journey. However, do we really understand what a quality journey is for mediation participants and how can we do more to make sure that the mediation (rail) system works effectively and is not of poor quality?

What is poor quality mediation anyway and how do we know it is of poor quality? This question seems simple enough for most mediators and the National Mediator Accreditation System (NMAS) provides guidance. Some poor quality mediation may be the result of a failing of individual mediators while others may be the result of broader systemic failings,or both. However, some poor quality mediation may not be recognised as such. Mediators, lawyers, parties and system operators (such as courts, agencies, referrers) may all have different perspectives on what is poor quality and may all play a role in supporting poor quality. While some interests may intersect — others may not. This article focuses on some of the more commonly cited causes of poor quality mediation processes. Thankfully, research[2] suggests that most mediation travellers experience a high quality journey and outcome.[3] However, this does not mean that we should ignore isolated, but recurrent, systemic process failures.

What is poor quality? Going off the rails

Lack of impartiality

Using the NMAS as a starting point it is clear for example that a mediator must be impartial. However, from a disputant perspective, a mediator may be perceived as biased although no one else (least of all the mediator) considers this to be the case. This understanding may be linked to the powerlessness experienced by the disputant or by other factors (linked for example to the cultural fit or narrative that may be connected to the conflict).

In one example in recent research,[4] a litigant perceived that the mediation process was unfair because the mediator had a relationship or knew the other disputant prior to the mediation. The litigant also indicated that the process was 'unfair' because of concerns about not only the other party but also because of the relationship that the mediator had with all the representatives. The litigant indicated that the mediator said in the mediation that they 'knew the other party' although they did not have a social relationship.[5]

> The mediator introduced himself, and said he knew X [i.e. the other party], even though hasn't been there for dinner, ha ha.

For some mediators, this example is an uncomfortable one. It may be even less comfortable in situations where mediators know all the legal representatives and may know them well. In such situations, parties have also expressed concerns and their views about the quality of the process have been shaped in part by their views about a lack of impartiality:[6]

> I can't really answer any of your questions — I wasn't even allowed in the room. It was like a boys club. I was so angry — I don't know if I will ever get over how I was treated.

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Again, this response not only indicates a disputant view about impartiality but also suggests dissatisfaction with the process and the sense of exclusion that was experienced. Lawyers engaged in the same mediation may have experienced no such dissatisfaction and may even have reported that the mediator did 'a great job'.

Although this mediation process may have resulted in travel to a destination that was acceptable, clearly the journey was of such poor quality that the passenger considered that they were damaged by the experience and were therefore unlikely to recommend travel by mediation to anyone else (or try it again). It is possible that this matter could have been attended to had the NMAS Practice Standards been adhered to.

Interestingly in neither of the two mediations referred to above did a party make a complaint. In this regard, the lack of complaints about mediation may not indicate that 'all is well' and lack of complaints may not per se indicate that mediation processes are of high quality.

Inappropriate engagement with the parties and lawyers

Clearly, the styles of communication that are present in a mediation and the responses of mediators can be related to the disputant's and representative's characteristics as well as those of the mediator. Undoubtedly there is much flexibility in terms of the mediator response to any given interaction. The interaction style of the mediator may be governed by:

- process variations;
- objectives of the process — smart decision making, settlement or something else;
- mediator orientation — behaviours, beliefs, professional background;
- communication patterns — elicitative or directive;
- ideology — problem solving, relational or transformative.

The mediator response may also be determined by their professional placement — for example a mediator who is dependent on legal referrals from the 'market' could be less inclined to intervene or assert process requirements when faced with 'difficult representatives'.

What appears to disappoint most disputants who report low quality mediation is a failure by mediators to address bullying or irritating behaviour by either the other disputants, their representatives or at times (sadly) by the mediator themselves.

Victorian Supreme Court and County Court mediation research[7] revealed some interesting findings in relation to the interaction within mediation: [8]

> One lawyer mentioned: '… sometimes I find the lawyers get in the way, usually the barristers, or aggressive solicitors who want to show off in front of the client'.

Some litigants and representatives in that research reported situations in focus groups where they considered that the mediator was not 'firm' or 'assertive enough'. Patience and persistence are often viewed as core strengths of effective mediators. Essentially however, some litigants (and their representatives) were concerned that the mediator could have done more to support procedural fairness in the mediation process.

One disputant in that research commented: 'The mediation was a waste of time as the mediator was not strong enough to control it.'[9] Concerns expressed about the mediator also included assertions as to their being directive and overpowering, and in this way, not supporting procedural fairness for both sides. For example, a plaintiff related that: 'the mediator made negative comments and did not listen to us making comments such as "… it's not your money anyway".'[10]

The theme of poor quality mediation being related to the intervention approaches of the mediator also emerged in some recent unpublished research conducted in a community setting where representatives were not involved. Mediation participants (although generally very satisfied) reported in some instances:

> Felt that mediator allowed other party to be too aggressive and overbearing. Other party was not controlled very well.
>
> Mediator was not appropriate for the case.
>
> Legal facts were not taken into account — immediate needs of other party were considered. Facts ignored, not considered.
>
> Mediators favoured other party. Did

> not control other party who was intimidating. Mediators should have made both parties more comfortable. There was fear of the other party. There was not fair treatment.

The perceptions of mediation participants are shaped in part by their expectations of the process. It seems that many participants want to be able to participate, are disappointed when they cannot and that their incapacity to participate is often linked to the mediator style (which may exclude parties, prevent participation or support or, on the other hand not involve sufficient mediator control over a party or a representative).

In terms of the participation by disputants in the mediation process it is clear that some parties experience a 'legal take over'[11] — that is the lawyers take control of the mediation, exclude any direct party involvement and may even physically exclude a party ('I was so cold sitting outside on a bench for most of the day').

This phenomenon is experienced in a range of mediation processes. It has been the subject of reports from around Australia and is indeed a feature of some international mediation processes (where it may be linked to conciliation and rights-based processes).[12]

Mediator discomfort with direct party interaction can also be related to the professional backgrounds of the mediators: [13]

> I did my training at a course run by … [in the 1990s]. I like to think that I am reasonably hard-working in trying to get to the 'what's really going on' question for clients, but the 'put them together and let them have their say' model terrifies me.

The findings in research do not suggest that there is only one appropriate model of mediation or a 'one size fits all' approach in terms of mediator interventions. There can be very sound reasons why in certain mediations a mediator may adopt a high intervention approach particularly if the parties are exhibiting high conflict behaviour. There may be equally sound reasons for a mediator not to consciously intervene during a difficult exchange between parties — particularly if insights in behaviour are emerging. However, are mediators aware of these subtleties or at times are they restricted (or not sufficiently restricted) by the system that they operate in?

In some ways, the exclusion of the party voice is not unlike drawing a conclusion that a train system would work better if there were no passengers. This exclusion can be subtle and involve lawyers silencing their own parties often as a 'protective measure' or can stem from a lack of any understanding about interest-based negotiation. The silencing can be caused by the other representative or, as noted in my recent research, from service delivery models (for example where the representatives are responsible for the choice of mediator and adversarial behaviour may be more likely to be tolerated).

Under such circumstances, the mediator may discuss process with the representative and engage a number of interventions to attempt to ensure that the approach does not negatively impact on the mediation process. However some mediators may be concerned about continued referrals. It may be that where a mediator is dependent on the legal representatives for future mediation work that some mediators will be less likely to intervene and more likely to tolerate or ignore adversarial approaches, obstructive and uncooperative behaviour displayed by representatives.

As noted in my recent recommendations, from a system design perspective, courts could approach this issue in a range of ways. They could operate with a panel system. Alternatively they could use other methods to address cultural issues. Such approaches can include clearer guidelines for lawyers, litigants and mediators as well as mixed service delivery (which means that court-based models can foster more supportive negotiation cultures). Further supporting this notion, the Victorian Law Reform Commission refers to NADRAC's suggestion that parties be encouraged by the courts to use their 'best endeavours' during an ADR process to resolve disputes, which might oblige parties' representatives to act 'reasonably'.[14]

Clearly, this issue — that is the nature and sometimes poor quality of the interactions in mediation — calls for a multi-faceted response that does not just focus on the 'mediator' or the 'operator'. A systemic response is required and the research suggests that the response needs to be directed at disputants, lawyers and mediators. It is insufficient to simply educate mediators to a certain standard, ensure that they can facilitate in a training DVD, provide standards and then hope for the best. The system will not work unless policy makers, key players (courts and agencies) support quality interactions in mediations by supporting mediators and where necessary placing limits on party and representative abusive or derailing behaviour in mediations.

In some ways, the exclusion of the party voice is not unlike drawing a conclusion that a train system would work better if there were no passengers.

Blowing the whistle — bad behaviour in mediation

In terms of limits on parties and their representatives there have been considerable developments in recent years. The concept of 'good faith' and the requirements that exist in

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mediation and negotiations have been enshrined in legislation for some time. In the Victorian mediation research study[15] I suggested that the capacity for mediators to report a lack of 'good faith' may assist mediators to intervene so that they can ensure that the processes meet the needs of disputants.

Other commentators have noted that there has been little focus upon the role that lawyers play in ADR. Instead, a 'dominant popular view' has emerged that 'lawyers magnify the inherent divisiveness of dispute resolution'.[16] This view has also found favour in some parts of Australia as legislators seek to minimise the role of lawyers (and courts) in some types of disputes. However, such a view is at best simplistic and, at worst, offensive in terms of understanding the role lawyers play in dispute resolution. Many lawyers, and others,[17] have indicated that lawyers can play a very useful and constructive role in resolving disputes.[18]

How then, from a systemic perspective, can lawyers be supported in good quality mediation and problems of self-interest or gladiatorial behavior be avoided? Aside from banning lawyers (which creates multiple issues in terms of access to advice — and I and many others take the view that good quality lawyering can be an essential component of many good quality mediations) there are other options. Requiring certain standards of conduct in mediation, considering 'good faith' and supporting mediators can assist.

Doubtless good quality education and skills-based learning in law schools will also assist to curb adversarial excesses particularly if this is coupled with clear ethical rules regarding negotiation behavior. In this regard, a mediator in Adelaide recently asked:

> Why shouldn't all lawyers who appear in mediation be required to attend skills-based education so that they know what to do and how to behave in a mediation?

Lawyers are required to complete educational requirements before appearing in court — why not also impose requirements for lawyers attending a mediation?

Lazy, incompetent or inconsistent mediators

I was surprised when conducting recent mediation research to find that a very small number of mediators were regarded as incompetent because they lacked persistence or were generally regarded as 'ineffective'. In the Victorian study this was an issue for representatives who were generally very positive about mediation, but who considered that some mediators were not as effective as others. One lawyer noted, in the focus group that:[19]

> It's not that they're lazy, it's that they don't know how to do it.

One lawyer, noted about one mediator:[20]

> He was totally ineffective. I was quite annoyed. But the market will sort out these mediators, I won't be using him again.

Is there a significant problem with mediators who are not competent or sufficiently focused? Anecdotes abound regarding poor quality incompetent mediators. However the research findings suggest that this problem is rare and can, in large part, be cured by ensuring that mediators meet the NMAS requirements. Arguably it is not enough to have the 'market sort this out' and NMAS threshold requirements must be required in all but exceptional circumstances while ensuring that Recognised Mediator Accreditation Bodies (RMABs) appropriately audit and test accreditation requirements. This again requires a sound operating system of mediator accreditation and systemic promotion of standards.

Issues relating to inconsistent mediation processes are perhaps more difficult to address. An example of inconsistency emerges in the area of formality preferences. For example, if a mediator indicates 'This is an informal process. You can call me "judge" ...' it is possible that a participant may experience some discomfort as inconsistent information about process expectations has been proffered.

In a similar vein a mediator who indicates that 'it is up to you whether you settle' and then informs the party that 'you would be crazy not to take that offer' is not only advising a party, but also sending a series of inconsistent process expectation messages that are

likely to impact on the participants' perceptions.

The proffering of inconsistent messages can be addressed in part by the continuing education of mediators as well as exposure to evaluation and research materials and mentoring. This issue requires a systemic response — blaming the operator will not enhance quality (particularly if the operator never becomes aware of the concern).

Pointless mediation journeys

Some mediations are of poor quality for other reasons. Clearly, the mediation process is not the only ADR process available in conflict yet it can often be used with little triaging or attention to disputant needs. In other circumstances, the mediation process is used in a manner that means that it has little benefit.

As a practitioner I have experienced this where the parties are inadequately prepared and the necessary authority figure is not present. On one occasion I have formed the view that the parties in a mediation (all insurance legal representatives) wanted to continue the litigation because the legal fees to be earned were attractive. This seemed to me to be a clear situation where legal representative self-interest prevailed over all other interests.

Although unusual, this is apparently not an isolated case. Some disputant members of a focus group in recent research noted for example, that it would have been more satisfactory to go to court than mediation. Some claimed, 'it was a charade' and that the 'court ordered … we had to go'.[21]

Another suggestion that certain mediations were not useful was expressed by a lawyer in a focus group who stated (about the participants in a mediation) that:[22]

> They came to mediation so they could tick the form.

Another disputant asserted that despite being involved in a process that was defined as mediation:[23]

> You couldn't really call it mediation.

These comments all suggest that at times mediation is used in an inappropriate manner. This is not a new criticism and I approach it with some caution partly because it is clear that this criticism is relevant to only a small number of cases. However, research suggests that a systemic approach involving sanctions and incentives as well as reporting is required. Our US cousins have voiced these concerns for many years and noted that:[24]

> … ADR was just another stop in the 'litigation' game, which provides an opportunity for the manipulation of rules, time, information and ultimately, money.
>
> … ADR has become just another battleground for adversarial fighting rather than multi-dimensional problem solving.

Have you ever been in a train that just stopped for no apparent reason and you just waited and waited …

Mediation processes may involve lengthy private sessions with little explanation and, for at least some participants, with little apparent reason. From the disputant (passenger) perspective, the background, length of time and venue for the mediation journey are relevant in determining perceptions of quality. These factors can lead to a participant experiencing discomfort. On the other hand 'speediation' can leave disputants equally unsatisfied with a journey and resulting destination that has not met their interests.

A comparison of some past research showed that parties perceive fairness and are 'comfortable' with a mediation process if they understand what is going on and are able to participate effectively in the process.[25] Generally facilitative and transformative models of mediation that include explanations about process, timing and separate sessions can promote participation. Where parties are less able to participate they are more likely to experience discomfort and be dissatisfied with the process.

Identifying an agenda, listing issues and topics may also assist to support both participation and understanding — not unlike having a map of stations and even potential destinations visible when you are sitting in the train. Interestingly many mediators do not do this — or do not provide any visual 'map'. For example, 91% of mediators in the Victorian Study did not use a visual aid and more than 56% in the NSW study did not. Why not?

It seems inexplicable to uncover this result given that all industry training models promote visual aids and they can be important as they can help to objectify the issues, summarise, ensure thoroughness (using a 'checklist'), change the dynamics on the room, assist parties who may be more supported with visual forms of communication, address issues (rather than positions) and demonstrate that parties have been 'heard'.[26] The substantial divergence may be due to dominant cultures operating (that is, legal cultures which may be averse to using visual aids) or may be due to mediator interests or preferences that may not necessarily support disputant interests.

How do we deal with this as mediators? It seems unlikely that visual aids do not assist parties although notably agendas are not used in some mediation models. For example, research from a wide range of fields suggests that visual aids are extremely important in assisting understanding and decision making.[27]

Is this a systemic issue? Maybe it is. Perhaps our response should be to ask mediators who don't use visual aids — why not? Is, for example, the lack of visual aids related to mediator rather than party preference? Is it an education issue or is it related to venue issues (where whiteboards may not be present)?

The venue and the associated issues that arise with inappropriate venues can also be important in shaping participant experiences and perceptions of their mediation journey. These are often systemic issues. In a recent unpublished research study some mediation participants commented that:

> The venue for mediation was the magistrate courtroom due to the mediation facilities being booked. Not very private as they had to exit into foyer of courtroom.
>
> Too many other people around.
>
> Other party brought child into mediation and this was uncomfortable and got in the way. Arrangements should have been made — was not able to concentrate
>
> Not sufficient contact with [support] staff during the mediation. Questions could not be answered.

For participants a mediation venue

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needs to be a supportive, safe and appropriate environment. This reality was brought home to me recently when a decision was made to move an effective mediation venue and unit to another site (some 20 kilometres away). Fortunately the decision appears to have been reversed however the move would have greatly impacted on the participants in the mediation who would have (mostly) been required to travel for an additional hour to access the venue.

Another decision to move a mediation venue for a rural directed indigenous service to the upper levels of a city skyscraper left many participants confused (some of them had never travelled in an elevator and did not wish to do so).

One mediator described the conditions under which they were mediating as akin to the cupboard under the stairs that Harry Potter lived in while with the Dursleys.

It is these 'little things' — the venue, the spaces and the soundproofing — that can assist to shape perceptions of a poor quality mediation. Venue providers and mediators need to ensure that venues are appropriate and that spaces are not inaccessible, inadequate, given low priority or at times made to look like the poor cousin of the court system.

Getting rid of poor quality — staying on track

There are many competing interests at play in any mediation insofar as mediators are concerned. Using the train trip analogy:

- Mediators may be expected in some cases to stick to an unrealistic timetable, arrive at pre-selected destinations, be confronted by unruly lawyers (train guards using the train analogy) and passengers, be given inadequate time for breaks and have little training in power dynamics.[28]
- The venues may be inappropriate and the guards (lawyers) may be responsible for the performance appraisal of the driver and even whether the driver gets more work in the future.
- The system may be more focused on timetables rather than passengers and some of those who are travelling may be more suited to other forms of transport.
- The system may not be integrated into the broader system and if something goes wrong there may be no one to assist.

What we do know as mediators is that if in most cases we follow an industry mediation model (the safe route) we are likely to travel to the destination with satisfied customers and less likely to run off the track. If we don't: we and the participants are more likely to experience poor quality mediation, although at times as mediators we clearly need to be creative and adaptive and a standard model might not always be the best fit for the participants (the more tricky route).

Sometimes however, it is not just up to us as the mediator. Sometimes the system needs to be changed so that we can ensure that the mediations are of a high quality:

- We may need clear overarching values so that we are all working together (for example mediator values relating to respect, reciprocity and the like can be articulated).
- We may need systemic help to ensure that our processes are understood and not derailed by the participants, their representatives or the external environment (charters, pledges, good faith requirements?).

Sometimes the system needs to be changed so that we can ensure that the mediations are of a high quality.

- We need to understand what participants experience so that we can be responsive (evaluation and research).
- We may need to weed out poor quality practice (responsive accreditation and education) and ensure that those who are not suited to 'train' travel have other ADR options.

There are also, of course, those who never get to catch a train — that is, access the mediation journey — whether a result of education, income or geographical isolation or some other factor. From a systemic perspective we need ensure that our mediation system promotes broad access as well as process drivers that are reflective of the demographics of our broader community.

A systemic response would assist to ensure that there are no barriers to either mediation access or participation and that the process would be available to all classes of passenger.

And what of those mediations where no destination is reached? Are they of poor quality? Sadly some agencies and courts may mark a failure to reach an agreement as evidence of low quality or poor mediator performance. This may be the case in a small percentage of cases and there is some evidence that highly skilled mediators who support party participation and whose personal skills are appropriate to the participants are more likely to assist parties to agree.[29] However, parties may fail to reach an agreement for a myriad of reasons that are unrelated to mediator quality, process quality or even systemic issues. In these cases, the mediation train ride is perhaps part of the much bigger journey to be undertaken by the participants. ●

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Endnotes

1. P Hannaford-Agor (2003) 'Helping the pro se litigant: A changing landscape' *Court Review — The Journal of the American Judge Association* (Winter) 8 at 15.

2. See for example; T Sourdin, *Mediation in the Supreme and County Courts of Victoria* Department of Justice, Melbourne, 2009; T Sourdin, *Dispute Resolution Processes for Credit Consumers.* (La Trobe University, Melbourne, 2007); T Sourdin and J Elix, *Review of the Financial Industry Complaints Scheme – What are the Issues?* La Trobe University, Melbourne, 2002; T Sourdin and T Matruglio, *Evaluating Mediation – New South Wales Settlement Scheme 2002* La Trobe University and the Law Society of New South Wales, Melbourne, 2004.

3. See summary of research in T Sourdin, *Alternative Dispute Resolution* (3rd Ed, Thomson Reuters, NSW, 2008) Appendix G.

4. T Sourdin, *Mediation in the Supreme and County Courts of Victoria* (Department of Justice, Melbourne, 2009).

5. Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).

6. Mediation survey recipient May 2008.

7. This was part of the research conducted for the *Mediation in the Supreme and County Courts of Victoria* report, above note 4.

8. Barrister's comment at lawyers focus group (Melbourne, 11 July 2008).

9. Comment in plaintiff focus group (conducted at the Law I--s' *LEADR Update*, 5 June 2007 at 9.

12. O Rundle (2008) 'Barking dogs; lawyer attitudes towards direct disputant participation in court — connected mediation of general civil cases' *QUTLJJ* vol 8 no 1 at 84.

13. Excerpt from a mediator in correspondence in 2008.

14. Victorian Law Reform Commission, *Civil Justice Review Report* Victorian Law Reform Commission, Melbourne, March 2008 at p 167.

15. Above note 4.

16. RJ Gilson, and RH Mnookin (1994) 'Disputing through agents: Cooperation and conflict between lawyers in litigation' 94 *Columbia Law Review* 509 at 511.

17. J Wade (1995) 'In search of new conflict management processes — the lawyer as macro and micro diagnostic problem solver', 10 *Australian Family Lawyer* Part I, 23.

18. Above note 16.

19. Barrister's comment in lawyer focus group (conducted at the Australian Centre for Peace and Conflict Studies Offices, 11 July 2008).

20. Comment by lawyer-and-mediator in mediator focus group (conducted at the Law Institute of Victoria, 15 July 2008).

21. Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).

22. Barrister's comment in lawyer focus group 11 July 2008).

23. Comment in plaintiff focus group (conducted at the Law Institute of Victoria, 10 July 2008).

24. See Australian Law Reform Commission, Issues Paper 25: *Review of the adversarial system of litigation. ADR – its role in federal dispute resolution* ALRC, Canberra, June 1998 referring to C Menkel Meadow (1991) 'Pursuing settlement in an adversary culture: A tale of innovation co-opted or "The Law of ADR"' 19 *Florida State University Law Review.*

25. See T Sourdin and N Balvin (2009) 'Mediation styles and their impact: Lessons from the Supreme and County Courts of Victoria research project' 20 *Australasian Dispute Resolution Journal* 142.

26. T Sourdin and T Matruglio *Evaluating Mediation* above note 2 at p 44 and T Sourdin *Alternative Dispute Resolution* Thomson Reuters (3rd ed) Sydney 2008 at pp 134 and 135.

27. See for example University of Pennsylvania 'Visual learners convert words to pictures in the brain and vice versa, says psychology study' *ScienceDaily* 28 March 2009 (accessed 19 August 2009 <www.sciencedaily.com /releases/2009/03/090325091834.htm>. B Madonik *I hear what you say but what are you telling me? The strategic use of non verbal communication in mediation* Jossey Bass, San Francisco, 2001; or even EA Levenson (2003) 'On seeing what is said: Visual aids to the psychoanalytic process *Contemporary Psychoanalysis* 39:233–249.

28. See, for example, B Mayer *Staying with Conflict* Jossey Bass, San Francisco, 2009.

29. See above note 25 at 151.

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