Pitfalls in mediation

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According to the *Shorter Oxford Dictionary* a 'pitfall' is a 'hidden or unsuspected danger, drawback, difficulty or opportunity for error'.

To illustrate the meaning of the word in context, the *Shorter Oxford Dictionary* quotes the popular singer Neil Sedaka who profoundly observed, 'My life too has had its brief summits and sudden pitfalls'.

The word owes its derivation to a concealed pit into which wild animals would fall and be unable to escape.

Like Neil Sedaka, most mediators have also experienced those brief summits or highs when the parties are able to let go of a debilitating dispute and are willing to commit to a resolution. Some of my most rewarding experiences as a mediator have been when the parties are able to ignore me and enter into a process of constructive negotiations between themselves, empowered by the realisation that they can actually communicate effectively with one another.

By the same token, most mediators have also experienced the sudden pitfalls which can occur during the mediation process, which sometimes result in protracted and exhausted negotiations, even after significant progress has been made, collapsing in acrimony over what seems to be a relatively small difference or a minor issue.

In writing this paper, which focuses on the pitfalls encountered by mediators, I do not propose that there is a foolproof method for conducting mediations, because there is none. Sigmund Freud once remarked that there were three tasks that were impossible to do well: run a country, raise a child and conduct a psychoanalysis. To this list can be added the task of mediating a dispute. It has also been pointed out[1] that mediators may wish and strive to be impartial, even-handed, impeccably trustworthy, empathetic and clear sighted; however, these objectives may soon be found to conflict with the need to overcome resistance, promote compromises and orchestrate a settlement of the dispute.

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1 Kressel K 'An exploratory analysis of role strain in international mediation' in Rubin J Z (ed) *Dynamics of Third Party Intervention* Praeger New York 1983 p 198.

In my experience, although mediation is not an easy task, there are a number of reasonably predictable pitfalls which can confront mediators in many mediations, but which can often be anticipated in advance and overcome by adopting effective strategies. Some of the pitfalls are obvious, such as the need for impartiality and neutrality which are vital to the mediation process. Some are less apparent and need to be watched for. I want to identify some of these pitfalls and suggest a number of preventative strategies.

Failure to control the process

One of the frequent dangers which can occur in a mediation is that the parties or their advisers attempt to dictate to the mediator how to conduct the process. This can include a range of procedural issues, such as:

- how long the mediation should take;
- the location for the mediation;
- whether there should be a joint session;
- who should attend the joint session;
- whether the parties themselves should talk, or only their legal advisors;
- the speaking order of the disputants;
- what are the issues in dispute;
- the order in which the issues in dispute should be addressed;
- which of the parties should make the first offer; and
- whether written terms of settlement, confirming an agreement in principle, should be prepared at the mediation conference, or subsequently by the parties.

These are all non-substantive process issues which should, if possible, be determined by the mediator rather than developed by the parties themselves. The mediator is selected for his or her process skills and should control the process, whilst the parties control the negotiations and the outcome. This means endeavouring to follow a particular process or set of negotiation procedures which the mediator knows, through training or experience, gives the best opportunity for resolving the dispute. I invariably follow a time honoured, established process which I know works for me. It is important, in my experience, that mediators ensure that the process which they prefer to use is not derailed, even with the best of intentions. Attempts by the parties to dictate the process is more often than not a recipe for problems and I make every effort to ensure that

the process which I desire to follow is observed. This is not done by adopting a dictatorial attitude; rather, by taking a firm and persuasive approach on process issues. For example, the mediator may say at a joint session:

> Mediations seem to work better if each party has the opportunity to present their concerns without interruption. It seems to me, that the following are the key issues in dispute between the parties, and I propose to identify them on the whiteboard.
> At this mediation, the mediator is in control of the process and the parties are in control of the outcome, so that it is important that we discuss the issues in an organised way.

Generally, with some degree of gentle persuasion, the parties accept the mediator's control of the process. On some occasions, I have even been willing to abort the mediation rather than to allow one of the parties to hijack the process by what I considered were unreasonable procedural demands.

Failure to listen

Perhaps the most significant error which many mediators make — and for that matter some arbitrators and judges — is a failure to listen. It is not surprising that the mediator, who has the job of chairing the negotiation sessions, is inclined to talk and frequently intervene, when in fact what the disputants are really looking for are listening skills. I regret that this is a particular problem of lawyer mediators. If I were to give myself instructions at the beginning of every mediation they would be to listen more and interrupt less. At a meeting of some 50 experienced commercial mediators at a facilitated workshop in Queensland in August 1999, the feature which they selected as most important in a chosen mediator was listening skills.[2] It is only by listening that a mediator is able to carry out the necessary diagnosis of the problems, which enables the mediator to pick up on what the *real* issues are between the parties, where their important interests and needs lie and, broadly, where they are coming from in the dispute. This allows the mediator to set the foundation for generating suitable options for settlement. Professor John Wade of Bond University prepared a summary of practices emphasised by the experienced

2 Wade J H 'What skills and attributes do experienced mediators possess?' LEADR Conference, 21-22 August 1999, Gold Coast, Australia.

mediators and arrived at the telling conclusion:

> An overwhelming emphasis of good practice and of what has been learned in the school of hard knocks by this group is — listen, listen, listen. There is magic in the air.[3]

Listening in the context of a mediation requires mediators generally to use active listening as a communication technique in which the mediator decodes a verbal message and restates it back to the speaker to allow the speaker and the mediator to verify that the message has been understood.[4] Active listening can be used in the context of picking up on the emotions which are being expressed.

> 'You are obviously hurt and disappointed by what was done.'
> 'Yes I was, I felt that my employer had not appreciated what I had contributed to the company.'

Active listening can also be used to confirm the issues and concerns of the parties.

> 'Am I correct in understanding that what is important for you is to have fair recognition of the time and effort which you put into building up the business?'
> 'Yes it is, all I want is to be treated fairly.'

When parties believe that they have been listened to and understood, they can relax and move on. The focus of the mediation then moves from anger, recrimination and justification to searching for a mutual solution to specific issues.

Active listening should also take place not only in the joint session, but also in private, or caucus sessions, when the parties are sometimes more frank and explicit about the real needs or interests which they need to fulfil to obtain a satisfactory resolution.

My practice in virtually every mediation is to directly ask the parties in private session what each party's important goals and interests are in the dispute. I emphasise the responses by visually identifying them on a whiteboard.

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3 Wade, above note 2.

4 Moore C W *The Mediation Process* Jossey Bass San Francisco 1986.

Typical of the responses which parties give are the following.

'I want to get on with my life.'
'This case needs to be settled because I can't afford to spend any more time in conferences with lawyers.'
'I would prefer not to expend any more on legal costs.'

I also carry out a further intervention strategy in which I request each of the parties in private session to place themselves in the 'shoes' of the other party in order to identify what they believe to be the 'goals' of the other party to the dispute — although the response are often along the lines of 'greed', 'they just want money,' or 'revenge', the question forces the parties to focus on the important interests and concerns of the other party which need to be satisfied before a mutual solution can be reached.

Active listening skills are, of course, not merely demonstrated by restating or rephrasing what has been said, but also by eye contact and in body language. It is more important, in my view, to make eye contact with a speaker and symbolise understanding by nodding your head or appropriate facial gestures than to take detailed notes of what is being said. There is indeed magic in the air, if you listen for it. If you fail to do so, you will miss valuable clues and opportunities.

The opening offers pitfall

I want to address a 'concealed pit' which often presents itself at the opening offers stage of the mediation, into which a mediator can easily fall and may never be rescued. Usually, two important issues arise at the stage at which negotiations are ready to commence.

1. Which of the parties is to make the first offer?
2. When should the first offer be made?[5]

In my view, it is very much a mediator process decision as to which party will be approached to 'get the ball rolling' in the negotiations. By and large there is an expectation that the respondent to a claim puts the first offer on the table.

5 Wade J H 'The last gap in negotiations — why is it so important? How can it be crossed?' ADRJ May 1995 at 93.

On some occasions, particularly when there are lawyers involved, the parties may seek to avoid making the first offer and mediators should prepare a strategy for this possiblity. This may result in a test of wills involving process. A common strategy which I use is to advise a party in private session that there can be important advantages in making the first offer, as the first offer is the foundation upon which the later negotiations rest — a reasonable first offer is likely to elicit an equivalent response. Sometimes it is desirable for the mediator to be quite firm and make an intervention along these lines.

> 'We could spend quite some time debating which party is going to make the first offer. I think that the mediation process would be better assisted if you started the ball rolling and we could at least see how far the parties are apart.'

A firm intervention of this kind is usually sufficient to persuade a party to formulate a first offer.

What kind of first offer should be made?

In my experience there are two kinds of offers which are frequently made to open negotiations. The first is what is known as the 'soft high' offer, or what has been described as a maximalist or extreme opening offer in which the party making the offer gives away very little. The second is what is known as a 'final offer' first offer, in which a party says, 'We intend to put our best offer on the table and the other side can take it or leave it'.

Both these kinds of offers present a real risk of aborting the mediation at an early stage. The soft high offer, particularly when used against an experienced negotiator, may result in considerable anger on the basis that the offer simply confirms how 'unreasonable' the other side are, or the fact that they are not really bona fide about negotiating a resolution. This may result in the offeree refusing to make a counter offer, walking out of the mediation, or as more usually occurs responding by making an extreme counter offer, which then leads to incremental bargaining with a very large last gap to cross. The final offer first offer invariably results in a counter offer, as a result of which the initial offeror may have difficulty in continuing with the mediation without losing face.

For that reason, I invariably separate the disputants before any offers are made, and press the parties in private session to make reasonable opening offers by pointing out the potential disadvantages of 'high soft' or 'final offer' first

offers. I also usually communicate the first offers in a way that will hopefully deflect angry reactions by 'damage control' to keep the mediation process on track. For example, if despite my requests an offeror decides to proceed with a high soft first offer, as is often the case, I point out to the other party in private session, before introducing the offer, that although the first offer may appear to be 'high' or 'unreasonable' it is not unusual for parties at mediation to start with a high initial offer; this does not mean there may not be considerable room for negotiations to take place. I often indicate that in my experience, generally the best way to respond to such an offer is to 'change the game' by putting forward a reasonable counter proposal. I also have no hesitation in telling the parties that mediation is a little like a predictable game or ritual, in which the parties expect to negotiate, and where there is invariably a ritual of exchanges of offers no matter how attractive the opening offers may seem. The style and substance of the opening offer generally establishes a precedent for the remainder of the negotiations. An effective mediator will anticipate the potential difficulties which may occur and develop strategies to encourage the parties to open reasonably and to be clear and consistent in their communications.

The last gap in negotiations pitfall

Negotiations in a mediation almost always reach a last gap, which has to be surmounted before a settlement can be achieved. This last gap generally occurs following lengthy negotiations, at the stage where both parties refuse to make any further concessions. The effective mediator needs to have a range of strategies available to deal with this likely contingency. Sometimes the final gap to be crossed can be ridiculously small in the context of the dispute but may occupy an important point of principle in the eyes of the disputants. At other times, the gap can be significant or almost uncrossable.

What can the mediator do?

A number of explanations for this last pitfall to a negotiated resolution have been suggested by Professor John Wade in the context of family disputes.[6] I consider that some of these have equal application in commercial and construction disputes:

6 Wade, above note 5.

- the desire to cling to the conflict, which for some parties almost gives a meaning to life;
- unfinished emotional business, when the parties cling on to the dispute until some emotional need such as sense of anger or betrayal is acknowledged;
- the 'I have given up so much already' syndrome, in which each side insists that they have been making concessions all day and require the other party to make the final concession;
- a sense of having been tricked, in which one side believes that the other side commenced by exaggerating the first offer and now seeks to take advantage of this by 'splitting the difference';
- commercial advisers seeking to prove their worth by insisting upon coming out ahead by 'winning' the last gap; and
- recriminations for lost time and money for which the other side has to be punished for the disappointment caused by the dispute.

What can readily be seen is that the cause, or causes, of the last gap can involve a range of possible diagnostic explanations. It presents a challenge for even the most skillful mediators to anticipate the problem, diagnose a hypothetical cause and establish a variety of strategies to help the parties to 'cross the gap', in order to prevent a premature collapse of the mediation before all possible solutions have been exhausted.

Professor Wade[7] suggests 15 methods which can be used to break the impasse of the last gap. These range from tossing a coin to the mediator simulating a tantrum to force the parties into making further concessions. My own strategies range from suggesting a face saving solution, which is put forward as the proposal of the mediator and can be accepted by both parties without loss of face, or expanding the pie by adding some further item of value which corresponds to some particular interest or need of either of the parties; for example, 'if the other side is willing to pay $100,000, would you be willing to accept it in instalments over three months?'.

Crossing the last gap is one of the major, if not the major, conundrum for every mediator. The problem can often be overcome by good third party management skills, involving a diagnosis as to why the difficulty is occurring and having a range of possible strategies available to deal with the problem.

7 Wade, above note 5.

A lack of patience and persistence

It is important for mediators to appreciate that mediation is often a lengthy, difficult and frustrating process that requires a considerable measure of time, patience and innovation. One of the major pitfalls of inexperienced mediators is to attempt to conduct a mediation within an unrealistically short timeframe, sometimes proposed by the parties themselves, or allowing the mediation to collapse before all the possibilities have been explored. Interestingly, the survey of experienced mediators placed persistence and patience as the second most essential quality that they would realistically like to find in their chosen mediator, just below listening skills.

In my experience it is remarkable how often negotiations that appear hopeless can, with a measure of patience and persistence, result in a concluded resolution. This does not mean that I do not impose deadlines or threaten to terminate the mediation unless further progress is made; these are strategies which I occasionally use as valuable mediator interventions. It does mean that I try a number of different intervention strategies before I am willing to terminate a mediation conference. Usually, rather than concluding a mediation process, I will try to adjourn the matter over to another date. This gives the parties an opportunity to reassess what has taken place to date and to come up with some possible new options or ideas, or reappraise their existing negotiating stances.

Conclusion

Virtually every mediation has the potential for unexpected problems which require contingent strategies. However, it should be appreciated that mediation is not a process like psychoanalysis, which should only be attempted after many years of training and self-analysis. It is more a discipline which demands an understanding of the process, the development of a repertoire of readily available strategic interventions to keep the process on track and deal with potential problems, some ability to relate to parties on an interpersonal level, and a large measure of patience and persistence.

Returning back to the survey of experienced mediators, a consistent theme which came from this group is the strong emphasis which should be placed upon the mediator not trying to work too hard, but rather, trying to relax, being warm and friendly, retaining a good sense of humour and proportion, and letting the parties in the process do much of the work. Try it sometime! ⌘