The New South Wales Bar Association

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"*EVALUATIVE MEDIATION - IS IT WHAT CLIENTS WANT?*"

by

Robert Angyal SC

1 Definitions

1.1 Writers about mediation usually distinguish between facilitative mediation and evaluative mediation. See the very useful table attached from Professor Laurence Boulle's *Mediation - Principles Process Practice* (LexisNexis 2nd ed 2005) at pages 44-45.

1.2 The central concepts of facilitative mediation are:

1.2.1 The parties try to satisfy their underlying needs and interests, rather than vindicate their strict legal entitlements.

1.2.2 Commensurately with that, the mediator focuses on maintaining a constructive dialogue between the parties that will assist them to identify their underlying needs and interests and find ways of satisfying them. The mediator does not give advice on the likely outcome of disputed questions of law or fact or on the overall outcome in a Court, tribunal or arbitration.

1.3 The central concepts of evaluative mediation are:

1.3.1 The parties try to reach a settlement within the range of likely outcomes in a Court, tribunal or arbitration.

1.3.2 Commensurately with that, the mediator advises the parties on the likely outcome of disputed questions of law and fact and on the likely overall outcome in a Court, tribunal or arbitration.

2 Realities

Reality No. 1: There is a spectrum of approaches available to mediators between facilitative mediation and evaluative mediation.

2.1 Facilitative mediation and evaluative mediation, as defined above, are models of mediation that represent polar opposites.

2.2 A purely facilitative mediator who happened to know about a very recent High Court decision on time limitations, which apparently had the effect that one party to the mediation must fail in Court, would not tell either party about the decision.

2.3 An evaluative mediator would certainly tell at least the party whose case was doomed about the decision.

2.4 In practice, there is a spectrum of approaches available to mediators that stretches between facilitative mediation and evaluative mediation.

2.5 Sometimes, the differences between the two models are differences of form rather than substance. For example, there is not much difference in substance between these two scenarios:

2.5.1 An evaluative mediator who says to a party, "*You've got a real problem with the Limitations Act, haven't you?*"

2.5.2 A facilitative mediator who (while looking at the ceiling as though thinking aloud) says to a party, "*Gosh, I wonder whether it's occurred to anyone to consider whether - by any chance - there's a possibility of an issue arising in this case about limitations.*"

2.6 There is, however, a huge difference in the way that the respective parties are likely to perceive the role that the mediator is playing:

2.6.1 The evaluative mediator will be perceived as giving firm legal advice. It may be difficult for the mediator to be perceived as neutral by the party receiving the advice.

2.6.2 The facilitative mediator will be perceived as making an innocent inquiry. It is unlikely that the party hearing the "*inquiry*" will perceive the mediator as anything but neutral (prone to asking odd questions, but neutral).

2.7 In this situation, is the facilitative mediator appearing to be facilitative while, in reality, giving legal advice? Or is the facilitative mediator merely raising for consideration a vitally important issue that a party may have failed to consider? In practice, does it matter how we classify what the mediator is doing?

Reality No. 2: Many mediations are conducted in the shadow of the courthouse.

2.8 Many - perhaps most - of the mediations we participate in are conducted in the shadow of the courthouse, in the sense that if the dispute does not settle at mediation, it will go to hearing in a Court, tribunal or arbitration.

2.9 For this reason, the BATNA of each party is the result it is likely to achieve at that hearing. If a plaintiff has been advised by counsel that they are likely to be awarded damages of $2 million, a settlement offer at mediation of $500,000 is unlikely to be attractive.

2.10 It follows that neither party can sensibly make or consider offers without a fairly firm view of the likely outcome of the hearing.

2.11 It often happens that the parties have radically different views of the likely outcome of the hearing. A plaintiff may think that damages of $2 million is a likely outcome, whereas the defendant may think that there are good prospects of a V for the D.

2.12 It follows that, in this situation, the mediator (whether facilitative or evaluative) is very likely to spend a lot of time discussing with each party the risks inherent in not settling and going to hearing.

2.13 A facilitative mediator, while strictly adhering to the model, can point out to the plaintiff that the outcomes at hearing range from an award of damages of $2 million and payment of most of their costs, to a verdict for the defendant and bankruptcy because being ordered to pay the defendant's costs.

2.14 Likewise, the facilitative mediator can point out to the defendant that its outcomes range from paying the plaintiff $2 million plus costs as agreed or assessed, plus paying its own costs on a solicitor-client basis, to achieving a V for the D but still having to pay the shortfall between party-party costs and its solicitor- client costs (or perhaps, as in many personal injury cases, having no hope of recovering any costs).

2.15 Having outlined to each party the range of outcomes in Court to which it is exposed, can and should a facilitative mediator, in private session, express some tentative views about where in the range the party is likely to end up?

2.16 What if the party asks the mediator to do this?

2.17 What if a mediator, experienced in the subject matter area, forms the view that one or both parties' legal advisors are excessively bullish, or are missing some obvious difficulties in their client's case?

Reality No. 3: Many mediations involve sophisticated clients, warring silks, no continuing relationships and are only about money

2.18 Consider the typical multi-party personal injury case. The plaintiff was driving a truck up a steep ramp in an open-cut mine. The truck rolled over and the plaintiff was injured. He sued his employer, claiming crippling injuries.

2.19 By the time of the mediation, the employer has claimed that the employee's contributory negligence in not wearing a seat belt largely was responsible for his injuries. The employee has total amnesia about the accident but says he always did up his seat belt. Photos found on the employee's Facebook page suggest to the employer that the injuries are not nearly as bad as the plaintiff claims.

2.20 The employer has cross-claimed against the manufacturer of the truck for contribution, claiming the truck was unstable, and also against the civil engineer who designed the ramp, claiming that it was too steep. The manufacturer of the truck has cross-claimed against the company that made special modifications to the truck, blaming the modifications for the instability. The modification company has cross-claimed against the structural engineering company that designed and built the modifications.

2.21 All parties except the plaintiff are insured. All parties are represented at the mediation by senior and junior counsel and a partner in a major law firm, plus at least one less senior solicitor. Each defendant has at the mediation a senior officer of its insurance company, except one who ultimately is insured by London underwriters who cannot be contacted because of the time difference, but who assures the mediator that instructions have been obtained from London that permit it to settle "*within the range*".

2.22 Before the mediation, all parties have received from their respective senior and junior counsel joint advices on liability and quantum.

2.23 The mediation is only about money. None of the parties is likely to have any continuing relationship with any other party.

2.24 In a mediation like this, exploration of the parties' underlying interests and needs is unlikely to be productive. Each either wants to receive money or wants not to pay out money. The parties will not be interested in attempting to expand the pie because it is a zero-sum game. Nor will they be interested in enhancing their commercial relationships, because they do not have any.

2.25 As a result, a mediator who conducts a purely facilitative mediation is likely to spend most of the time being a messenger boy/girl transmitting offers:

2.25.1 Between the defendants about the extent to which they are prepared to contribute to the plaintiff's damages, and

2.25.2 Between the defendants as a group and the plaintiff about how much the plaintiff wants and how much the defendants are prepared to pay him.

2.26 This is a remunerative but not very creative role. Can and should the mediator do more than play this role? There are two views:

2.26.1 Each defendant has a written joint opinion on liability and quantum from its chosen counsel. Being an insurance company, it is a professional litigant. It has relied on its counsel's advice to form a view on how much it is prepared to pay the plaintiff. The plaintiff is relying on the joint opinion prepared by his senior and junior counsel. The last thing any party wants is the opinion of a mediator who knows less about the case than anyone else present and (unlike all the other counsel present) may not even be a personal injury specialist. The mediator who ventures an opinion is likely to be regarded as naive or unqualified and, in either event, not neutral.

2.26.2 For the very reason that each party has legal advice which is irreconcilable, they will welcome the input of a mediator who is disinterested and presumably wise.

2.27 Both views have been presented to me with equal cogency. Being a largely facilitative mediator, I do not regard it as my role to advise on which is correct. That is a matter for this audience.

Robert Angyal S.C.
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