Kluwer Mediation Blog

The Activist Mediator

Charlie Irvine (University of Strathclyde) · Thursday, September 10th, 2020

I wrote this piece for Strathclyde Mediation Clinic after a series of conversations with new and learner mediators. Some surprised me with their passivity in the face of parties' lack of knowledge or understanding. After some probing I learned that many new mediators recognise the problem but believe the model they were taught prohibits them from doing anything about it. This helped crystallise the idea of the activist mediator, which I set out below.

Three practice examples

1) I was mediating under a statutory scheme for complaints against legal practitioners. An elderly couple had made a claim under their legal expenses insurance over a disastrous fireplace installation. The appointed solicitor negotiated a settlement, which they accepted, only to discover that it did not cover the firm's fee of £5,000. They complained, claiming they weren't told about the fee and seeking a full refund. In the mediation we examined the file but it seemed to show that the fee had been explained to them, infuriating them all the more. In private the solicitor said the file was *"immaculate,"* but offered a goodwill reduction of £2,500 as that would cover her outlays.

The couple rejected this offer, maintaining that they sought a complete refund. At this point I did NOT convey their position back to the solicitor. Instead I made quite a different move. Here's an extract from my reflection: *I spent some time asking A and B what they knew about the scheme's complaints process. They were shocked to discover that, even if it did make a finding of inadequate professional service, most financial awards were in the hundreds rather than thousands. This altered their perspective. At one point the man turned to his wife and said "I think what Charlie's trying to say, but can't say, is that we're probably not going to get what we're looking for from the scheme."*

2) A conveyancing client complained about her solicitor's advice that underpinning would make no difference to her buy-to-let property's value or insurability. In fact her insurance premium increased by £150 and she feared a reduction the flat's re-sale value. The solicitor maintained that underpinning was common in the street and wouldn't affect the value; in fact the flat was a good bet because other properties had recently sold for more than she paid. The argument circled for a while.

Here's what my reflection says: *Eventually I pointed out that B was the one saying things would be fine, but A was the one exposed to risk if they weren't. I posed the question, "What if we switched*

the risk, so that you were in effect betting on your own professional knowledge and experience?" Immediately B made an offer. His firm would pay the marketing, estate agency and conveyancing costs for A to sell the property now. If she makes a profit, she can keep it and there is no loss and therefore she can withdraw her complaint. If she makes a loss, the complaint will have crystallised and we will know how much it is.

3) In another case a man complained about his ex-wife's solicitor. He sought a refund of £1,700 in legal fees be believed were caused by this lawyer's aggressive conduct of the case. The lawyer said she was acting on instructions and while there may have been some minor delay the most she would offer was £200. I tried a number of mediator 'moves': separating them, discussing the limits of the scheme, conveying offers. The closest we could get was £1,000 v £500.

My reflection records a closed question to the complainer: *I asked at one point, "Is it about the money?" He said, "It's about fairness." I brought them back together, ready to finish without agreement, and after clarifying one more thing the man suddenly leaned forward, offered his hand and said: "We're both professionals and we're wasting time here. Meet me half way." The solicitor accepted, shook his hand and they settled for £750.*

What to make of them?

What do these have in common? Some might say I was behaving in an "evaluative" fashion; yet at no point did I offer an evaluation of the merits of these cases. Others might question my neutrality, in each instance revealing something of my own thinking. I can honestly say the moves were spontaneous, driven by the exigences of the unfolding situation. I have come to view them as examples of the "activist mediator."

Is this unusual? I'd say not, and make no claim to uniqueness. The approach is probably the staple of commercial mediators and I see similar moves from colleagues and students in our small claims clinic. A recent mediator reflection spoke of "*suggesting an apology"* in private session. A client sent this feedback: *"Throughout the discussions the [mediators] were very clear in what they were asking of us – explained what could happen if the dispute was not resolved in the session – and helped us to arrive at a resolution, which, though not the one that we had initially hoped for, did bring the dispute to a conclusion and we are very grateful for that."*

The reason for attempting to name this activism is the reaction it often provokes, particularly among those more recently trained in the facilitative tradition. They say *"Can you do that?"* or *"That's a bit evaluative"* or *"Surely we have to be neutral."* Some even say *"That's not mediation."*

Why is mediator activism controversial?

What are the sources of this disagreement over what mediators ought to be doing? As long ago as 1997 Donald Weckstein described *"mediator activism"* in detail (1), surmising that resistance to it flowed largely from early *"discoverers of the magic of mediation"* (p. 511). So why do such objections persist?

One reason seems to be the doctrine of neutrality or impartiality, the former more thoroughgoing. A truly neutral mediator would be indifferent to the result. Impartiality focuses on being unbiased between parties. It follows that mediators should not express anything that might hint as to their opinions.

I believe this involves a category error. In an effort to avoid revealing their views on the potential outcome of the dispute, some mediators avoid expressing any opinion at all. Taken to extremes it precludes sharing knowledge about matters in the public domain, such as the limits of a statutory scheme, or timescales, or the practical hurdles parties face in taking matters further. It would also prevent a mediator from posing a hypothesis, a counterfactual or a closed question designed to highlight a problem.

A second source of inhibition is the teaching of Baruch Bush and Joseph Folger on their model of transformative mediation. (2) They have been highly critical of "problem-solving" mediators, parodying efforts to support informed decision-making as disempowering. In fact I question whether skilled transformative practitioners are particularly passive, but a surface familiarity with the term can lead mediators to censor themselves.

Perhaps all mediation practitioners face a moment of epiphany when they realise that strictly applying their early understanding of neutrality means reducing party self-determination. In my first example, had I said nothing and accepted the impasse it was predictable that, rather than the £5,000 they sought, the couple would receive somewhere between £100 and £1,000 (after several months delay). I distinctly recall thinking "Whose interests am I serving if I go home with that knowledge locked inside my head?"

What does the activist mediator actually do?

i) The offering

I am not advocating advocacy. The sharing of a perspective, a challenge or an idea must be done carefully and with humility. These are offerings, for parties to accept or reject. The activist mediator probably doesn't come fully-formed into the world, the practice requiring a precision of touch that only comes after some tens or even hundreds of cases. After mediating for while I realised the line between questions and statements was becoming blurred. Statements had a provisional tone about them; questions often contained propositions (breaching all our training in open-ended questions). The concept of "the offering" probably best captures this: it's up to the parties whether they act on it.

ii) "No stone unturned"

The approach goes beyond reality testing. I'd call it leaving no stone unturned in the search for a resolution. It does NOT mean predicting or evaluating the outcome. In its 2008 Report on Improving Mediator Quality the American Bar Association noted users' strong approval of "analytical techniques used by the mediator" . These included making suggestions (95%) and

giving opinions (70%). However, there were serious caveats, with focus groups not favouring the mediator telling people what to do or saying things like "If I were you, I'd offer $70,000 and be done with it." (3)

I offer the following examples of the activist mediator:

• Hypothesising about possible future scenarios, inside and outside the court process. E.g *"If X happened, how might it affect you? How might it affect the other party?"*

• Walking people through likely next steps. E.g. *"So, if things are not resolved today you will need to do X, the court is likely to do Y and it will probably take Z weeks/months."*

• Posing challenging questions in private session. E.g. *"Do you mind if I play Devil's Advocate? I've heard judges say to parties in your position, 'Did you seriously think you could pay nothing at all for the parts of the job that were satisfactory?'"*

• Leading the search for solutions. E.g. [in private session] *"You say you can't offer any more money. Can you think of anything else you could do that might make it easier for them to accept your offer?"*

• Coaching about negotiation. This can include sharing (in private) the mediator's hunch about the likely response to an offer or counter offer; input about wording; or input on the "negotiation dance" – e.g. *"You are £2,000 apart. If you come down by £100 they may conclude this is simply too big a gap to resolve and terminate the mediation."*

Conclusion

The activist mediator is not a new or radical idea. It can be controversial, and there are certainly drawbacks when mediators overplay their hand or knowledge. I'm grateful to my colleague Dr Roy Poyntz for pointing out the stress on settlement in my thinking – for some this is less important that the conversation itself.

However, rather than set up a binary debate (is it good, is it bad?) I finish by suggesting that mediator activism is a developmental stage. It is wise for new mediators to be cautious about how they come across. If they have a previous career as an advisor or problem-solver they probably have to un-learn responsibility for outcomes. But as time goes on and we get comfortable with the role I suspect most of us have similar thoughts to mine about going home with knowledge locked inside our heads. I believe this work impels us to do the best for our clients, and over a career emboldens us to move from passivity to activism.

FOOTNOTES

1) Weckstein D T (1997) In praise of party empowerment – and of mediator activism. *Willamette Law Review* 33, 501–563.
2) Bush RAB and Folger J, *The Promise of Mediation: The Transformative Approach to Conflict* (2nd edn, Jossey-Bass 2005)
3) ABA Section of Dispute Resolution, *'Task Force on Improving Mediation Quality: Final Report'* (2008), p. 14

To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please subscribe here.

This entry was posted on Thursday, September 10th, 2020 at 5:02 pm and is filed under Developing the Field, Experience, Instinct, Intuition, mediation models, Mediation Practice, mediation process, mediation traditions, Neutrality, Practical Challenges for Mediators, Scotland, Stages of mediation, The role of the mediator, Uncategorized, Understanding mediation
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.