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Evaluative Mediation: The Endless Argument

Jeremy Gormly (National Alternative Dispute Resolution Advisory Council) · Monday, September 5th, 2011

When do mediators get to talk to one another? There are of course various conferences. They produce a lot of useful papers and discussions but time is short. Co-mediators get to talk a little but it is usually about the issue at hand. Even mediators who work in a mediation practice are off mediating and time to discuss is often limited. It must be rare for a mediator to be able to manage the obvious confidentiality issues and ring one another for advice during the mediation. I have not heard of that happening.

In this respect mediators are not unlike counsellors or even judges. They deal with other people's problems but can be quite isolated themselves—an irony for counsellors who so frequently deal with the problems of social isolation.

I am surprised at how rarely mediators can do what doctors lawyers engineers and counsellors do and discuss sometimes depersonalized versions of a current problem with a colleague. So far as I can tell that is because mediation usually produces a fairly speedy outcome and it over before the chance to discuss a problem arises. If a mediation is not completed within the day and the parties feel a prospect of settlement coming on, there is an imperative to bring about further mediation meetings sooner rather than later. If there is an "adjournment" of a mediation it is often because there needs to be something quite defined found out or undertaken before the parties can usefully re-convene. That is often a good step with a clarity about it that excludes a need for "discussion". All wait for the outcome. The point is that mediation is generally a resolution of a problem that has a pent-up quality about it so outcomes often come quickly after some blockage has been dealt with. That epitomises the benefits of mediation. It resolves nuggetty problems in a way acceptable to the parties with remarkable speed.

But when mediators do get to talk what do they talk about? It must differ from place to place but in Australia and so far as I can see especially in Sydney at present, there is an ongoing debate about the validity or integrity of evaluative mediation.

I use the term "evaluative mediation" to reflect the way it is being used in the debate—a wide definition. Evaluative mediation occurs when the mediator at some stage during the mediation either by volunteering a view or at the invitation of one or other party usually in private session, expresses a view about a topic—usually a technical topic in the area of special knowledge for which the mediator has been chosen but not necessarily—and where that view is not usually conveyed to any other party.

Classically a mediator does not express a personal opinions to a party. The mediator is detached from the merits. The task of the mediator is to assist the parties to find their way to their own solution. It is a commonplace experience for mediators to be asked “what do you think?” That may be asked even after extensive comments in an opening session about the non-determinative role of the mediator, the impartiality of the mediator and the trust the parties must have that the mediator is not an advocate for any party. The mediator may ask questions of a party in private session, cause a party to re-consider a view they hold, or cause a party to test assumptions. A mediator may even portray parties’ arguments in different lights to show the different ways in which another party might look at the same matter.

The debate about evaluative mediation seemed to have arisen in two ways. The first is that in some types of mediation the mediator has been chosen because they hold expertise of some type and a party wants to make use of it to get an evaluation of their position. The second way it has arisen emerges I suspect from what has been perceived to be a defect in the classic model of mediation.

In earlier years in Sydney many mediators had a good classic opening session which would not differ significantly from a modern opening session. After the opening some mediators allowed the parties to negotiate without the mediator’s involvement unless there was a problem. I suspect they saw that as a form of impartiality. Alternatively, if more active in style they acted as a messenger shuttling proposals between the parties with little added value other than personal emotional support for the actual disputants. In short in this from of early mediation the mediator took up a role of detachment not only from the issues but from debate that might bring about any suspicion of involvement in the issues.

Not surprisingly those who made frequent use of mediation became impatient with such a passive model of mediation and sought greater “intervention”. The arrival of mediators on the scene early this decade—quite visible in Sydney–trained classically but more vigorous in style, made an impact. The new mediator had usually experienced a lot of mediation. They were generally more controlling of the events of the day. They would frequently insist on being informed of every proposal or offer, being present at every discussion between parties and above all, willing to become involved in quite active discussion of the issues in private session. They made the earlier style seem uninvolved. The newer style overcame the view that the mediator was an assistant to the process rather than a participant in it. It may be that this new style was never or rarely evaluative but it looked evaluative. It certainly seemed to be value adding in a way that the more passive style had not.

It is hard to detect when a change occurred. My guess is that it was shortly after the arrival of the more participatory mediators on the scene—so there may be a connection. But the regular users of mediation (and this was very obvious where litigation had commenced), sought what they variously called “interventionist mediators”, “pushier mediators” “active mediators” or more bluntly mediators who would read the riot Act to unreasonable parties. Mediators of any type may not have been happy with these expectations but there was a clear expression of market preference. Mediation of course even in the most classic mould, need not be passive or lacking vigour. It can be a vigorous process especially where there is unreasonableness. Generally however, it is seen as polite, quieter and more contemplative than say arbitration or a court hearing. It is common to hear stories of the person who enters mediation thinking they can cross examine, make speeches or act adversarially. So far as one can tell the response to this apparent market demand was a more vigorous approach and the entry of evaluative techniques into classic mediation.

A classicist may assert that there is no such thing as evaluative mediation. If it's evaluative it's not mediation. If private evaluation is sought the party should go to an evaluator or the process should be called conciliation not mediation.

There are arguments in favour of evaluative mediation. What is occurring at mediation is *not about* mediation—it just uses mediation. The event is the resolution of a particular dispute between parties by whatever means will appropriately achieve it. Resolution is the goal not purity of form. There is no reason why other tools cannot be applied in the same process so long as the processes do not conflict and so long as the parties know at the outset that another process might occur. You cannot have an arbitrator giving private evaluation. The two things conflict. An arbitrator determines questions and must be open until award is delivered. That is inconsistent with giving an opinion to one party. You ought not be evaluating in mediation unless all parties know at the outset that you might do that. It needs to be in the mediation agreement.

One limitation may be that a mediator should not express a view about the ultimate matter in issue or about the merits of the claim being pressed or defended. If a party thinks the mediator shares a view on the merits of their claim it will cause them to think that they have a partisan on their side. The situation may be different if expressing a negative view. It may be reasonable to say to one party if asked "On my assessment you are unlikely to be successful" but quite inappropriate to say "You will be successful " or "Right is on your side".

Good mediation technique should bring parties to their own realization without evaluation by the mediator. There are situations however where there is a blockage caused by face, obstinacy or ignorance or by error or assumption — and an evaluative word may make the difference. Should it be ruled out?

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