

Kluwer Mediation Blog

What Mediators Know (or Can't Help Noticing Because of Their Unusual Job)

Charlie Irvine (University of Strathclyde) · Saturday, December 13th, 2014

(This is the first of three parts of a keynote address to the YMCA Conference "From Reactions to Relations" in Burton on Trent on 20 November 2014)

Here's an interesting phenomenon. When asked to play the part of an adversarial lawyer students have no difficulty. It's as if the script for this activity is carved into our DNA and reinforced by years of TV dramas. Yet when invited to play the role of mediator they seem both daunted and stuck. A small minority might be termed 'natural mediators' but for most of us this is not a usual way of behaving. Our culture doesn't provide us with a ready model.

I want to reflect on this counterintuitive activity. What, if anything, does playing the part of 'mediator' or 'go-between' teach us? I have been inspired by the work of John Forester, an American scholar of major societal conflicts (see John Forester, *Dealing With Differences: Dramas of Mediating Public Disputes*. Oxford: Oxford University Press, 2009). He talks about mediators' "practical wisdom". Borrowing from him I've called this talk 'What Mediators Know'. It is not my intention to imply that we are somehow superior. A more long-winded title would read 'What Mediators Can't Help Noticing Because of Their Unusual Job'. We may be re-inventing the wheel (unbeknownst to us others have discovered the same things) but years of immersion in other people's conflict probably does affect how we see the world.

It falls naturally into three sections: what mediators can't help noticing about our clients; what we can't help noticing about conflict; and what we can't help noticing about ourselves.

What mediators can't help noticing about our clients:

1. Everybody's story makes sense to them
2. Our clients care deeply about fairness and justice
3. What you see is as important as what you hear

1) Everybody's story makes sense to them

I was employed for several years as 'intake worker' for a family mediation service. This meant I was the first person to whom a client told their story. I once calculated that I heard at least two thousand stories of divorce and separation over a ten-year period.

Initially it was mind-blowing. A client would tell me a tale of pain, betrayal and sometimes sheer badness. Naturally I would form a view of the other person through the eyes of the teller. It might make me nervous, as I thought “Oh no, I’ve got to meet this monster!” Then I would meet the other. They would often turn out to be charming and reasonable, describing a surprisingly plausible mirror image of the same conflict.

After a while this worked a profound change in my thinking. Developmental psychologists might term it tolerance for ambiguity. Philosophers might speak of the social construction of reality. But to me it was simply that the concept of truth stopped being particularly useful. I had to think in terms of perspectives rather than facts; stories rather than evidence. This stance can be seen as both ethical and practical; ethical because we assume the best of people and don’t position ourselves as judges of right and wrong in their lives; practical because it allows us genuinely to join people in figuring out why they believe what they do. Once brought to the surface stories (unlike facts) can be challenged, revised, modified and re-worked.

2) Our clients care deeply about fairness and justice

There is a persistent mythology surrounding mediation: that mediators care more about relationships than justice (For a more detailed discussion see Charlie Irvine, ‘[Mediation and Social Norms: a Response to Dame Hazel Genn](#)’ 2009, Family Law, 351). To expand a little, it would include the idea that mediators are nice but ineffectual and that mediation works best with reasonable people.

My learning has been the opposite. In almost every conflict one or both people will see something as unfair. Until that unfairness is remedied, the other person becomes the source of their difficulties; in other words, the enemy. Once we view someone as the enemy we have to defend ourselves against them, whatever it takes. They stop being human and we stop being humane.

Conversely, once our sense of fairness starts to return we can drop our guard. Back come qualities like reciprocity, kindness and even generosity. If I’m getting what I need you should as well. Fair’s fair. So the direction of travel is from fairness and justice to restored relationships as much as the other way round.

One important mediation secret comes from a field of study known as ‘procedural justice’ (see Tom R Tyler, *Why People Obey the Law*. Princeton: Princeton University Press, 2006). In a nutshell, people care as much about how decisions are made as they do about what the decisions are. If we believe we have been fairly treated, we are more likely to regard the outcome as fair. Over thirty years of research has told us what is important to those in who come into contact with the justice system: voice (believing that they got the chance to state their views and concerns), being heard (believing that the ‘3rd party’ took their views and concerns seriously) and respectful treatment (believing that the way they were treated was even-handed and dignified). This confirms another thing mediators can’t help but noticing: that a person has to say their piece, even if it seems foolish or mistaken; that we need to demonstrate that we have understood that story; and that a person deserves to be treated well, no matter who, no matter what.

3) What you see is as important as what you hear

The way I was taught mediation tended to focus on words and meaning. I have characterised it as ‘mediating from the neck up’ (see <http://kluwermediationblog.com/2013/12/13/mediating-from-the-neck-up/>). And yet when I am

sitting in the mediation chair I feel as if I am watching a play. The expressions on people's faces; the way they sit; the way they move their hands; whether or when they smile; whether they look at each other; how far apart they are: all of these matter as much as the content of the words.

I once worked with two colleagues who were not getting on. Each described the other as unreasonable. They had had fierce arguments in front of the team. Their own words sounded innocuous; the other's an astonishing overreaction. But in our mediation I noticed a funny thing. When each was relating the other's words their face changed dramatically. When telling me their own views they were open, animated and friendly, using hands, eyes and smiles to convey meaning and secure my understanding. Yet when conveying what the other had said they looked disdainful, accusatory and dismissive, with pointing fingers and flashing eyes. It was as if the words themselves were insufficient; the full visual display was needed to ensure that I understood.

Of course we all know this. One famous experiment found that the content of what is said is less significant in people's recollection than the speaker's tone of voice or appearance (See http://en.wikipedia.org/wiki/Albert_Mehrabian for an explanation). Mediators can do something about this. We're in the business of interpretation, providing a forum for discussion (what were you trying to convey?) and feedback (you looked angry/anxious/defensive). By bringing the whole body to the table we have a more accurate conversation and correct what is sometimes known as the "empathy gap": the tendency to underestimate the influence or strength of emotions either in oneself or others.

[Next month I'll continue with what mediators can't help noticing about conflict]

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