SEMINAR PAPER

REPORTING BACK ON THE MEDIATING DISPUTES COURSE AT HARVARD LAW SCHOOL

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By

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Introduction

1. I attended the Mediating Disputes course at Harvard Law School late last year. I made the mistake of telling Royden about the course and how much I'd enjoyed it. The next time I saw him, he asked me in his genial way whether I might do him a small favour. Rashly I said "yes", and now I'm here!

2. The course was held at the Sheraton Commander Hotel in Cambridge Massachusetts, just across the road from Harvard Law School. The Sheraton Commander is so named because it was built on the site where George Washington took command of the continental armies on 3 July 1775, at the beginning of the American Revolution. I may be paraphrasing here, but I understand that Washington's rallying cry was something along the lines of:

> "*Boys, lets show George III what his WATNA looks like*…."

3. The course was attended by some 45 students, from around the world. They were a varied and really interesting bunch. At one end was "LD" from rural Texas. LD was an elected judge, on a Republican ticket. I'm not entirely sure that he was convinced by modern mediation theory. He told me, with some approval, about the method of a local mediator he knew:

> "*He lines the parties up in the morning. He says: "gentlemen, I'll be back at noon. Make sure you have your best offer on the table by then, and we'll see if we got a deal.*""

At the other end was a very nice, genial, shaggy-haired Dutch guy called Freek. As it happened, appearances were somewhat deceptive. Early in the course we were set a distributive bargaining task which Freek topped the class at. It turned out that he is the head of a Dutch NGO that works in war zones. His negotiation experience included negotiating with Joseph Koni of the Lord's Resistance Army in Uganda.

4. The teaching of the course was led by: Harvard Law professor Bob Mnookin, who apparently coined the phrase: "*bargaining in the shadow of the law*"; Gary Friedman, who has been mediating since the late 70s, and was described as: "*the father of American mediation*"; and Dana Curtis, a successful San Francisco mediator and mediation academic.

5. The take outs for me from the course were many and varied. But there were three areas that I thought I would touch on this morning:

   (a) Analysis of the barriers to the negotiated resolution of conflict;

   (b) The role of empathy; and

   (c) "The understanding model" – a mediation format promoted at Harvard that entirely eschews private sessions with the mediator.

Analysis of the barriers to the negotiated resolution of conflict

6. Bob Mnookin provided some interesting insight into the barriers to the negotiated resolution of conflict[1]. There was a real multi-disciplinary aspect to this work. Tactical and strategic barriers were addressed. So too were psychological barriers.

7. The tactical and strategic barriers tend to be those which arise from the efforts of bargainers to maximise their outcomes. These are the province of game theories, and the economic analysis of bargaining. They include strategies such as concealment or misrepresentation of true interests (eg feigned lack of interest in settlement, or a particular kind of settlement), and undue intransigence. These are the sorts of tactics that we see every day in disputes. The point was made that these tactics can of course lead to unnecessary deadlocks, costly delays, and failures to discover the most efficient trade or outcomes.

8. The problem with breaking down these tactical and strategic barriers is that, generally, the parties need to retreat from them in a mutual and even-handed way. If only one party drops the pretence, it may be disadvantaged vis a vis the other party who does not. Bob Mnookin and Gary Friedman would say that the best way to achieve such a mutual retreat from tactical and strategic barriers in mediation is via what they call "the understanding model". More on that later.

9. Psychological barriers can affect parties' ability to assess settlement rationally. Importantly, parties tend to create an internal narrative of righteousness to give themselves confidence and solace. This colours their approach to settlement. To quote Bob Mnookin[2]:

> "…*disputants are apt to misdiagnose or misattribute the source of the deadlock, both by failing to recognise the impact of various psychological processes and biases on their own evaluations and responses and by erroneously inferring subtle, devious, strategic motives on the part of their adversary."*

10. This really rang true for me in terms of my own experience in dealing with negotiators. I am often surprised by the extent to which parties read cunning and dastardly plans into the actions of their opponents. Everyone seems to think their dispute is an episode of House of Cards.

11. Another related psychological barrier touched on was the tendency of parties to reactively devalue compromises and concessions put forward by the other side. The "*it can't be worth much if they offered it*" syndrome. This highlighted the importance of giving context to offers.

12. There was also material on the phenomenon of "judgmental overconfidence". The basic point was that people tend to place unwarranted confidence in their own predictions of future events. Information and assessment asymmetries are key culprits here. People tend to know more, and prefer, information that suits their own version of events. They also tend to favour analyses of that information that suit their version of events.

13. Consulting with peers and advisors, or group deliberation, can make judgmental overconfidence worse. The peers and advisors may be subject to the same information and assessment asymmetries. Or they may be reluctant to express doubt for fear of appearing weak, disloyal or stupid. My own sense is that multi-party

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[1] *Barriers to Conflict Resolution*, Ed. Mnookin et al
[2] Ibid, pp10-11

leaky home disputes, with their factions and large numbers of lawyers and experts, are particularly susceptible to this phenomenon arising amongst some of the groups involved.

The role of empathy

14. It will not come as news to you that empathy can be an important aspect of mediation practice. But Dana Curtis made some observations on the role of empathy that I thought were compelling[3].

15. She warned against making the assumption that certain disputants are genuinely indifferent to the quality of the interaction, or the effect that mediation might have on their relationship. She suggested that, too often, particularly in ostensibly "just about the money" disputes, the parties miss a valuable reconciliation opportunity. She contended that providing and encouraging empathy can be the key to unlocking that opportunity.

16. Dana Curtis cited a case she had mediated, between an insurance carrier and a paraplegic plaintiff in a personal injury case – in the US a classic distributive bargaining mediation. She described the parties being able to talk to one another in a very human way. The insurer expressing compassion and respect for the way the plaintiff had dealt with her adversity. The plaintiff acknowledging the insurer's business considerations, and the conflict its representatives faced between their personal viewpoints and professional responsibilities. The case settled for a dollar amount, but the parties also both left happier than they might well have been if empathy had not been front and centre.

17. Further points included the following:

    (a) An empathiser gains credibility and reliability in the eyes of the person they are empathising with – "you have the sensitivity and intelligence to understand what I am saying". A person who is empathised with is consequently more amenable to suggestions from the person doing the empathising;

    (b) Research has shown that the more effectively the speaker is empathised with, the more fully s/he will express himself;

    (c) Research has also shown that adrenalin secretions in empathetic conversations decrease, whereas they increase in conversations which are not empathetic; and

    (d) Mediators, especially seasoned litigators, often respond to parties' statements with questions without first empathising by showing that they understand the statement. Even if the question is a very good one, asking it before first empathising can have negative consequences. It can limit understanding, and change the course of the discussion prematurely.

18. I found what I heard at Harvard about empathy to be valuable. I wonder whether, as mediators here, there is still much greater scope for us to explore empathy in ostensibly "just about the money" contexts. Leaky home and earthquake disputes, where for plaintiffs there is so much heartbreak, spring directly to mind.

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[3] *ADR Personalities and Practice Tips*, Dana Curtis, pp53-63

The understanding model

19. I've left the real banger for last. The aspect of the Harvard course that struck me as most radical was the promotion of what they call: "the understanding model". And the reason it struck me as radical was because the model eschewed parties having private sessions with the mediator.

20. The understanding model has been developed by Gary Friedman, and another American mediator, Jack Himmelstien. The theory behind it emphasises[4]:

    (a) The power of understanding rather than the power of coercion;

    (b) That the parties themselves must take primary responsibility for whether and how the dispute will be resolved;

    (c) That the parties are best served by working together and making decisions;

    (d) That conflicts are best resolved by uncovering what lies under the level at which the parties experience the problem.

21. Much of that might sound fairly uncontroversial. But, in practical terms, the model looks a bit different to what we tend to be used to. Gary Friedman suggests that the parties should decide the format and rules for the mediation, whether there is an agenda, and what it might contain. He prefers not to mediate with a table in between the parties. And he will not participate in private sessions with the parties.

22. The arguments against private sessions run along these lines:

    (a) The goal of mediation is to allow the parties to reach a fuller understanding of their conflict and each other, and to use that understanding to come to a resolution that fulfils both their emotional and practical needs;

    (b) When the mediator gets involved in private sessions, s/he ends up with more information that the parties, which puts the mediator in a position of power. That takes power away from the parties, and can detract from the integrity of the process as far as they are concerned;

    (c) In private sessions, the mediator can manipulate the parties, and/or be perceived by the parties to do so. That detracts from the parties' ability to truly understand one another; and

    (d) It is only by conducting the mediation with all parties present, that the parties can gain a full and honest understanding of one another.

23. The proponents of the understanding model say that it can be used across all types of dispute. Bob Mnookin and Gary Friedman talked of using it in complex multi-million dollar commercial cases with success.

24. However, my sense was that in the US this approach was still fairly unusual, and controversial.

25. The American lawyers on the course suggested that private sessions were still the norm in their day to day experience.

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[4] *Challenging Conflict: Mediation Through Understanding*, Friedman & Himmelstien

26. There is a fine *Negotiation Journal* paper by David Hoffman, a mediator, and also a teacher at Harvard, on private sessions and shuttle diplomacy[5] It also takes issue with the understanding model.

27. David Hoffman starts by citing the Camp David talks in 1977 as a classic example of the efficacy of private sessions and shuttle diplomacy. Apparently Menachem Begin and Anwar Sadat couldn't stand each other. Early in the piece, Jimmy Carter realised that it was not going to be productive to have them in the same room. For the last ten days of the talks, Begin and Sadat never saw each other, despite being in cottages just a hundred yards apart. Instead, Carter went back and forth between the two of them until an agreement was reached.

28. David Hoffman goes on to argue that:

    (a) Parties want to empower the mediator to help them get to an agreement that they could not get to themselves. They recognise and expect that, in this context:

        (i) The mediator may hold more information than them; and

        (ii) There may be a degree of subtle manipulation by the mediator;

    (b) Reality testing is a far more candid and useful exercise when undertaken in private;

    (c) Private sessions can assist in where there are power imbalances;

    (d) Private sessions enable negotiation coaching – how best to present an offer, which can be vital;

    (e) Management of issues within factions in multi-party disputes can often be best dealt with in private sessions; and

    (f) In most cases, parties are less concerned about empowerment and understanding than they are with getting efficiently to a result.

29. Here in New Zealand I know that there are a variety of approaches taken by different mediators in different contexts. But I'm not aware of anyone who has eschewed private sessions altogether.

30. In my experience, in New Zealand commercial mediations, there is a high degree of expectation that parties will go to, and largely remain in, private sessions quite early in the piece.

31. Whilst I think that joint sessions are a very important part of the mediation dynamic, for my part, and with the greatest of deference to my teachers, I wasn't so convinced by what I heard at Harvard that I will encourage parties to forgo private sessions as a matter of course. I doubt that most would anyway.

Final remarks

32. My comments here have just been brush strokes. The course was short but intense, and came with a great deal of reading. I felt like I learnt a lot, and would certainly be happy to discuss any aspect of it with anyone who has any questions.

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[5] *Negotiation Journal* July 2011, p263

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