

Finding the mediator ... and the happy medium

“There are good mediators and there are bad mediators.”

I commonly hear this when presenting on the topic of mediation, and in training and assessing new mediators. The comment always intrigues me, because the motivation behind it is always different.

I agree that there is variability in the mediation marketplace. However, things can rarely be defined in such black and white terms.

Whether or not someone believes that a mediator has done a good or bad job often directly correlates with that person's *preference* for a mediator's style. It is even possible that a party to mediation is seeking a different type of process – *the term 'mediation' has been mistakenly applied*. These factors need to be distinguished from another basis for judgment – *competency*.

When I heard this comment recently from a commercial lawyer, I asked what they meant by it. The reply was: “A good mediator will tell you the answer and a bad mediator will ask you how you feel about it.”

The mediator style spectrum

In this case, the lawyer was not identifying a competency issue. Instead, their comment related to personal preference for a mediation style. Looking at it from this angle, we see that the lawyer was referring to two extremes on the style spectrum.

At one end of the spectrum is a mediation style that is ‘transformative’. In Australia, transformative mediation is most commonly employed in family law, particularly in matters pertaining to the care of children. There will be moments in this or in other contexts when asking a party how they feel about a statement or option is perfectly valid. At other times and in other contexts this may be the most infuriating question that a party could hear.

At the other end of the spectrum is a mediation style that is far more ‘evaluative’. Anecdotal evidence suggests that evaluative mediation is more commonly provided by mediators who are also senior counsel, or who have been part of the judiciary. It would be more common to find this style employed in a commercial dispute.

Purists would argue that this is not mediation at all, but another process entirely. This argument is based on the notion that a mediator acts as an impartial, neutral, and independent third party who has no vested interest in the outcome. In a pure mediation model it is argued that a mediator will not make a decision or provide legal advice, but will employ their skills to manage a process that fosters self-determination. They will manage a process, rather than content.

Meeting the national standard

Moving away from personal preference, we can look at mediator competency in light of training and experience.

In 2008 Australia adopted the National Mediator Accreditation System, comprised of two key documents – the National Approval Standards and the National Practice Standards.¹

The approval standards establish threshold training requirements for those wishing to become nationally accredited. Core mediation training and a subsequent assessment are based on a candidate meeting core competency requirements, using a ‘facilitative’ model of mediation. Facilitative mediation fosters the already mentioned principles of independence, neutrality and self-determination.

As mentioned previously, I personally agree with people when they say that there are competent and incompetent mediators, managing good or bad mediation processes. Anyone who has had their car serviced knows that there are good and bad mechanics in the marketplace. The same is true of mediation.

While the standards are highly important, and go quite some way towards the realisation of a benchmark standard, there is still the potential for someone to become accredited simply because they can ‘tick the boxes’ on assessment day. This may not necessarily mean that a candidate has any of the necessary instincts or attributes of a good mediator, or a dedication to some of the fundamental aspects and aspirations of the process.

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What do we mean when we say a mediator is 'good' or 'bad'? Are we in fact confusing the mediation style – which we may dislike – with the competency of the mediator? **Bianca Keys** explains.

Of course, some of these qualities can be developed. However, it is possible that a new mediator with these inherent instincts, attributes and dedication may do a better job than a more experienced mediator, who abandons process ideals in favour of doing their own thing. If a mediator's 'own thing' provides clients with the process that they desire, then that is a result in itself. However, there is a risk in calling something 'mediation' when it is in fact something else. That does no favours to the mediation process or to those investing in such a process.

Hallmarks of a good mediator

Essentially, and getting back to the two ends of the spectrum, I believe that a good mediator understands how to facilitate a discussion that fosters understanding, acknowledgment and self-determination. A good mediator will be able to move across the spectrum according to the needs and interests of the clients involved.

When it is appropriate, they will be able to ask the tough questions that test fixed positions in order to break an impasse. They will also be able to demonstrate empathy and an acknowledgement of the emotional aspects of a dispute when that is required.

A good mediator will be able to manage people's expectations regarding the process steps and will use their skills to help people reach their own informed decisions that meet core needs and interests.

This also highlights an essential paradigm shift in the mediation process. Mediation should move parties away from positional bargaining or rights-based discussions towards a problem-solving and interests-based dialogue. If a mediator understands this and helps clients to make the paradigm shift, then they have taken a large step towards the provision of a satisfying process (and a satisfying result).

In summary, someone might identify a mediator as being 'good' if they have been able to find a mediator with a style that suits their particular preferences. However, if a party to mediation is seeking a particular style, it is quite possible that the other party is seeking something different. This sets the stage for one to be satisfied with the process while the other person is not. There is also a risk that this style goes so far as to provide a process that is not in fact mediation. There is then potential for confusion in the marketplace.

Mediation is a process that aims to build understanding and consensus. It involves assistance for parties so that they can make informed decisions that address their interests. If a mediator can identify interests and address these, then they have met a key aim of the mediation process. If they can also be flexible in their approach, and provide a satisfying process for those involved, then they have shown themselves to be a skilled and responsive mediator.

Good mediation is about process and skills, married with instinct and behaviour.

As a legal representative you can play a vital role in providing a satisfying process for your client by employing the following strategy:

- Recognise whether your client requires mediation or another process.
- Find a practitioner whose competency *and* style match your clients' requirements.
- When looking for a mediator, check whether or not they are nationally accredited.

Be careful not to confuse the process that a practitioner will provide with the process that your clients require (or desire). This confusion will only heighten the chance of dissatisfaction with the provider and/or the process.

Bianca Keys (BA/LLB) is the director of Bianca Keys Dispute Resolution Consulting. She is a nationally accredited mediator with a decade of experience, focusing on commercial and workplace dispute resolution. Bianca has provided mediation training in Australia, South-East Asia and in the Middle East. See biancakeys.com.

Note

¹ For information on the National Mediator Accreditation System, see msb.org.au.



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