A wind does not have to be a gale

In the final part of a three-part series, **Robert Fisher QC** asks whether mediators should comment on the disputes that come before them

In the first two articles in this series, I was rash enough to tackle the mediator evaluation controversy. The controversy is whether there are ever any circumstances in which mediators should allow their own opinions to play a role in the mediation process. In the first two articles, I suggested that, for some disputes, mediators should bite their tongue. In others, there would be room for mediator participation in a discussion on the merits if, but only if, certain conditions were satisfied. Ideally, mediators would have the versatility to handle either approach and the wisdom to know which was appropriate on the day. In the last article, I described mediators of that kind as "versatile mediators".

At least in the United States, most mediators could be described as versatile mediators in that sense (see Zena Zumeta, "Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation", September 2000, http://www.mediate.com/articles/zumeta.cfm, citing Samuel Imperati and Leonard Riskin and the Northwest Chapter SPIDR Survey). It was also that type of mediator that was sought by the great majority of mediating parties in the survey conducted by the 2008 American Bar Association report, *Task Force on Improving Mediation Quality* (ABA Report).

For mediators of that kind, the question is not whether they will make some form of contribution to a discussion on the merits if needed. It is whether, when, and how they should make it in a particular case (ABA Report at 15 and 34). There is a big difference, for example, between asking constructive questions and handing down dogmatic judgments, between commenting as a last resort to avoid an impasse and intruding with one's own view at the outset, and between making the comments in caucus and making them in joint session. Different levels of intrusiveness are possible.

What are the possible levels of intrusiveness?

Choosing how far to intrude is intuitive and subconscious. Mediators do not sit around solemnly deciding whether to pitch their foray into the merits at levels four or five. In the literary equivalent of a laboratory, though, it is possible to give these levels a pseudo-scientific precision.

However unflattering the analogy, the Beaufort Scale of Wind Force has something to offer mediators in this regard. In ascending order, one can divide the sliding scale of potential intervention into the following possibilities:

- *Force 1*: Chairing a joint session in which the mediator passively repeats or records issues suggested by the parties ("what would you like to talk about next?"), facilitates direct discussion between the parties, and refrains from making even indirect suggestions as to possible solutions.
- *Force 2*: Summarising and reframing issues that have been suggested by the parties ("so your concern is that your neighbour is being unkind to your cat"), facilitating direct discussion through neutral questioning designed to help the parties tell their own stories ("what would you like to tell us about your cat?"), and/or making tentative suggestions as to the form in which negotiations might be conducted ("would you both like to talk now about how the problem can be avoided in the future?").
- *Force 3*: Actively suggesting what the key issues are after analysing the parties' mediation memoranda and/or opening statements ("arising out of what you've both been saying, do you agree that these are the critical issues?"), neutral questioning in joint session to ascertain the parties' positions in relation to those issues ("what do you each say about whether a contract was formed?"), active suggestions as to the form in which negotiations might be conducted ("I suggest that I take an offer from you to the other caucus"), and the form, as opposed to content, of a possible settlement ("why don't you offer them a lump sum payable by instalments").
- *Force 4*: Actively suggesting what the key issues are after analysing not only the parties' mediation memoranda and opening statements but also their pleadings, key exhibits, and/or evidence, neutral questioning in joint session in relation to the issues, loaded questioning in caucus, and active suggestions as to manner of negotiating and active suggestions as to the form, but not the content, of settlement.
- *Force 5*: Pointed questioning in caucus as to how a party proposes to deal with critical issues ("if this goes to a hearing, what were you intending to say in answer to the purchaser's acceptance email?"), and more insistent suggestions as to the form in which negotiations should be conducted ("if you want to progress this, I think you will have to make a counter-offer and explain it to the other party face to face").

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- *Force 6*: Commenting in caucus on the way in which a Court is likely to view critical issues ("no one can be sure what a judge will do on the day, but I have to say if it were me, I would probably regard the purchaser's acceptance email as sufficient to form a contract"), and making active suggestions as to content, as well as form, of negotiations and settlement ("the chances of a settlement are not looking good unless you can offer more than that").
- *Force 7*: Expressing a view in caucus as to a party's overall chances in the litigation ("quite frankly, if I were sitting in your chair, I'd be very worried about what will happen at trial").
- *Force 8*: Recommending a particular settlement ("my personal opinion is that if you want to settle this, you're going to have to pay $1 million").
- *Force 9*: Spitting the dummy ("For heaven's sake pay up, so we can all get out of here") (not recommended).

The final question is how mediators are to choose between those different levels of intervention. The first article in this series listed the disadvantages of mediator evaluation. The disadvantages suggest that, as a general rule, a mediator should not offer substantive help unless a number of conditions are satisfied. The conditions might be summarised as follows.

1. The kind of help offered should fit the kind of dispute.

For reasons discussed earlier, the closer the dispute to the feelings' end of the feelings-rights continuum, the less room there will be for useful mediator comment on the merits and the less interventionist the comment if provided.

At the rights' end of the continuum, help in evaluating the likely outcome in court is more likely to have a role and, under appropriate circumstances, to be more interventionist in character.

Most disputes will lie somewhere along that continuum and call for a response tailored accordingly (ABA Report at 14, 34, and 35).

2. The kind of help offered should meet the parties' wishes

Some parties or their lawyers do not want any form of evaluation from the mediator. Clearly, their wishes must be respected.

Conversely, many parties or their lawyers will go out of their way to ask for the mediator's view. They may be anxious about their chances in court and seek a preview from the mediator as an independent observer. Lawyers may seek the mediator's evaluation to validate their own advice and to soften an over-confident position taken by the client (ABA Report at 34).

The best way for a mediator to find out what the parties want is to ask. Although the way in which a mediation unfolds can never be prescripted, it will usually be helpful to discuss the potential role of evaluation at a preliminary conference.

3. The kind of help offered should fit the stage that the mediation has reached

Even in a case which might be susceptible to some level of mediator evaluation, the evaluative comment should be withheld for as long as possible.

The previously listed arguments against mediator evaluation continue to apply – disempowering of the parties, unjustified weight to a cursory opinion, perceptions of loss of neutrality, loss of trust, and power without accountability. If the parties can reach agreement without mediator evaluation – whether in direct negotiations or through the mediator as an intermediary – so much the better.

In the early stages of the mediation, a relatively non-interventionist approach is therefore called for. As the mediation progresses, increasing intervention may become necessary if nothing else seems to be working.

Comment as to the overall result in court represents a very high level of intervention. If it is to be made at all, it should be kept in reserve until it is clear that an agreement would not result without it (ABA Report at 14, 15, and 35). By that stage, there is little to be lost. But until then, every effort should be made to reach an agreement by other means.

4. The limitations to the mediator's input should be clearly spelled out

The status of a mediator's comment on the merits is easily misunderstood if unaccompanied by appropriate warnings.

In extreme cases, parties may even think that the mediator's view has some form of legal or moral authority which they are bound to follow. More likely is the danger that they will treat the mediator's opinion as if it were professional advice on which it would be safe to rely. This is particularly likely if the mediator is a lawyer or former judge, the dispute is essentially legal in nature, and the mediator is privately paid.

In that situation, there may be the misleading appearance of a professional relationship between party and mediator. Instead of looking to their own lawyers for advice, the parties may switch their reliance to the mediator. The sequel may be remonstrations or negligence proceedings against the mediator if a party later resiles from the settlement.

Steps can be taken to minimize the problem. The limits to the mediator's function, along with a disclaimer and

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