ETHICAL DILEMMAS IN MEDIATION: DO THE ENDS JUSTIFY THE MEANS?

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DO THE ENDS JUSTIFY THE MEANS?

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A moment's reflection upon the concept and nature of mediation as an instrument in dispute resolution, should suggest to the practitioner that the answer to the question posed in the topic for this presentation, is "No".

Mediation is often discussed in terms of its procedural aspects and the devices employed by the mediator in seeking to arrive at a settlement – as for example, whether it is facilitative or evaluative or directive mediation.

In the facilitative process the independent mediator operates to assist the respective parties to arrive at a resolution of the dispute without the mediator giving opinions or legal advice whereas in evaluative (directive) mediation, the mediator expresses his or her own views about the validity of an argument, or proposition being advanced in the dispute, expresses opinions about how the facts should be found and, sometimes, goes so far as to express an opinion as to which of the disputants will likely win at trial or, the mediator may express an opinion on a percentage chance for a particular result.

From the point of view of ethics of mediation, this dichotomy in procedure and style is irrelevant. While each has its adherents and although practitioners will sometimes regard the two competing styles as virtually exclusive to the point of mutual incompatibility, others will take the view that in any mediation, occasions will arise where aspects of each procedure or style have roles to play at different stages in the mediation process. The fact that practitioners can legitimately hold these opinions and conscientiously practise as mediators consistently with adherence to them, suggests quite powerfully that maintenance of ethical standards in the deployment of these procedural models does not present a difficulty.

I suggest that the underlying reason for this comfortable accommodation of ethical standards within differing mediation processes has to do with a fundamental recognition of the aim of mediation and the role of the mediator. Critical to understanding the concept is the need to realise that mediation is a dispute resolution process which lies outside of the Court process in the sense that it is not a decision making procedure by the independent professional in the middle. A mediator is not a judge nor is he an arbitrator. The mediator decides nothing although, in evaluative methodology, he gives opinions about the matters in dispute. His words do not bind the disputing parties and he cannot force his views upon any of them, much less can he impose legal sanction upon those who disagree with him.

This paradigm remains true even where the mediation process is Court annexed i.e. it is a feature made available to litigants by the Rules of Court in the system in which they are litigating. It is a process which a Court can engage by consent of the parties or it may be mandated by order in the face of opposition by any or all parties.

In my country, all civil jurisdictions across the continent have the capacity to order litigants to mediation at virtually any time or any stage of the litigation. As well as possessing this power, Australian judges have shown a growing appetite for its exercise. Despite,

sometimes, strenuous opposition to such orders coming from parties to litigation, nevertheless they go to mediation and frequently settle. In the Australian experience we find that the success rate in Court-ordered mediations is at least as good as it is where parties voluntarily decide to try to mediate their litigation. Thus, in Australia, success begets success. This is a phenomenon which is virtually self perpetuating, because of the appetite for it shown by business and, to an increasing extent, by government agencies.

Once it is accepted that mediation is not an arbitral or determinative process but a process of dispute resolution by negotiation or, a type of conciliation or accommodation and that the role of the mediator is to assist the parties (one way or another) to reach a settlement, it becomes clear that a mediator is not necessarily concerned to achieve, or guide the parties to achieve, a just, or fair result. Rather, the mediator's task is to guide the parties to a compact or agreement which the parties accept will end the disputation. In the parlance of the dispute settlement world in Australia, we speak of a mediation resulting in a settlement "with which the parties can live" – even if none of them is entirely happy with it. That is, the parties can be guided to a point where they can all see and appreciate that a particular settlement is more satisfactory to them that is the option of continuing the dispute in a Court or before an arbitrator or merely allowing it to go unresolved and continue to fester.

The challenge to achieve such a result involves being able to get the parties to view their positions at more than one level – i.e. not merely win or lose, in the sense of the case as propounded by the Court pleadings, but rather to achieve a settlement in a commercial or personal sense. Frequently, commercial settlements involve exploring solutions and achieving results for the settling parties, which the Courts could not give them. This is the abiding genius of mediation in commercial dispute resolution. The significance of this can be appreciated once it is realised that in a commercial dispute, the parties may have deployed significant time and capital in establishing the relationship which produced the contract and in the delivery of which a dispute has broken out. If at all possible, it is desirable to assist the parties to a settlement which preserves, or at least does not destroy, that commercial relationship.

If the preceding discussion has captured the essence of mediation as a concept and a process, why is it necessary or desirable to inject the notion that there might be a role for following a course designed to achieve a result by any possible means? One answer is that if there is no role for such a notion, it is best to make that point as quickly and, hopefully, as decisively as one can.

The problem with following or entertaining the notion that "the ends justify the means" is that a mediator adhering to this philosophy, has thereby ceased to function as a mediator and has become a dictator and probably a "standover man" as well. No doubt many mediators in the course of their professional engagements have encountered disputing parties whom they would dearly have loved to have "stood over" and forced to accept a particular result. But experience, prudence and a keen sense of mission act as circuit breakers on the mediator – who must not weaken in the face of such temptation.

Whether the mediator is following the facilitation model or the evaluative model, it is easy to see how the processes of each could be corrupted in the process of trying to "assist" the parties to reach a settlement. In the case of facilitative mediation, the mediator could breach the confidence of one side or the other and tell the opposite party something of which the other side is thinking or hoping to achieve or indeed something about the strength of the other party's case – all or any of which could seriously weaken the position of the party whose confidence has been betrayed in the process. In the case of an evaluative mediation, the mediator could, knowingly, give a skewed or biased assessment of an argument or of how a fact finding might be made, and thus mislead one side or other in the mediation.

Of course, these two examples suggest utterly reprehensible behaviour by the mediator, of such a serious kind as to strike at the process itself. But they are two examples of how the "means" could theoretically be employed to achieve an "end" and coincidentally demonstrate the untenability of a "Yes" answer, to the topic.

It is probably worth noting that precisely the same effect and result could be wrought upon a dispute at mediation, by a well meaning, yet incompetent, mediator. One does not need bias or malevolence to be operative before propriety is destroyed. Stupidity or inexperience can also cause havoc. Which is why mediation requires both standards and standing. The standards, which are set either by licensing authorities (such as Bar Associations or Law Societies), must be well understood and enforceable. By "standing", I refer to the personal qualities and experience of the mediator. In the Australian experience, we have people of standing who were the pioneers of mediation (senior ex-judges, senior members of the Inner Bar) who set the standard, so to speak, and as mediation has become more popular, and the number of mediators has increased, there has been a recognition that there should be standards, both of ethics and competence, to which adherence is required and the satisfaction of which is a prerequisite for a license to practise as a mediator – even if the practitioner is a silk or a senior solicitor.

Ethical Standards

I suggest that the observance of high ethical standards by mediators and by legal practitioners engaged in mediations who are representing parties, is at the heart of the matter. Ethical behaviour and the expectation of it, underlies the existence of trust. It is obvious that for a mediator to be able to perform his or her role, in whatever style of mediation is being practised, if the parties cannot confer with the mediator confidentially, safe in the knowledge that he or she can be trusted, then the process is doomed.

Likewise, ethical behaviour is required of the participants in the mediation process. I deal below with the notion of good faith, but ethical behaviour is a broader notion. As a matter of ethics, mediators for example are not permitted to accept a brief from any of the parties in the mediation should it not settle and the litigation proceed to court or arbitration. As a matter of ethics, mediators are required to divulge to the parties before the execution of the mediation agreement, whether they have a personal or professional association with any of the parties which might be of relevance to their independence. Lawyer advocates appearing in the mediation have their own ethical obligations which arise by reason of their professional positions as legal practitioners. In a mediation, the mediation agreement should give voice to these matters by explaining the nature of the process and by imposing in the clearest of terms, the obligations of disclosure upon the mediator and those of confidentiality which are imposed upon the persons present in the mediation.

Ethical standards should be amongst the matters kept under regular review by the licensing authorities and recognition needs to be given to the fact that not all persons practising as mediators are necessarily lawyers nor need they necessarily have had much professional contact with ethical issues. Mediation courses need to recognise this also and include such matters upon their programmes of instruction.

Good Faith

Increasingly lawyers engaged in litigation about contractual rights are encountering issues which might be collected together under the rubric "good faith". In commercial contexts, attention is currently focussed upon the obligation of good faith in relation to provisions which appear to create a mechanism for conflict resolution but which require the contracting parties to confer and attempt to reach a solution "in good faith". Such provisions may be neither

arbitration clauses nor mediation clauses but there is little doubt that they are directly concerned with dispute resolution and with the creation of circumstances which the parties to the contract saw as appropriate for that task at the time that they made their bargain. In *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 (30th April 2009) the Full Court of the Federal Court of Australia said, in the context of the statutory obligation imposed under the Native Title Act 1993 that the parties negotiate in good faith, that:

> [20] "It has been repeatedly recognised that the requirement for good faith is directed to the quality of a party's conduct. It is to be assessed by reference to what a party has done or failed to do in the course of negotiations and is directed to and is concerned with a party's state of mind as manifested by its conduct in negotiations: see for example *Brownley v Western Australia (No 1)* [1999] FCA 1139; (1999) 95 FCR 152 at [24]-[25] per Lee J, *Strickland* 85 FCR 303 at 319-320 and *Western Australia/Thomas on behalf of the Walgen People/Anaconda Nickel Ltd* [1998] NNTTA8 at [7]-[18]."
>
> see [2009] FCAFC 49 at [20].

In the course of this judgment the Full Court went on to explore some examples of good faith negotiations and also described conduct which would not satisfy the obligation, thus:

> [24] "It may be accepted, as contended for by PKKP, that it is not sufficient for good faith negotiations to merely 'go through the motions' with a closed mind or a rigid or predetermined position but there is no suggestion at all on the Tribunal's findings that that was the attitude taken by FMG. To the contrary, the Tribunal concluded that FMG approached its negotiations with both native title parties with an open mind. It did initiate communications, did make proposals and did punctually respond to communications. It organised and attended meetings, facilitated and engaged in discussion, made counter proposals, sent properly authorised negotiations and did not adopt a rigid non-negotiable position ([91]). The Tribunal concluded that FMG had from the outset a genuine desire to reach accord with the native title parties……
> ……..
>
> [27] Good faith is to be construed contextually (that is, it is necessary to identify what the good faith obligation is intended to achieve)……
> ……."

However, apart from the general commercial, contractual sense, good faith obligations are sometimes found to be located in mediation clauses in contracts and often expressed in quite clear terms. But what does compliance with such a duty involve? As we have seen, the FMG case may provide some assistance even though it came up for debate in a non-mediation environment.

Some ten years earlier a judge of the Supreme Court of New South Wales had to consider, inter alia, the nature of the obligation imposed by a dispute resolution clause in a building and engineering contract which mandated that mediation occur before the exercise of any right to have recourse to legal action or "Expert Resolution", and which relevantly cast the mediation obligation as follows:

> "(h) The parties agree to use all reasonable endeavours in good faith to expeditiously resolve the Dispute by mediation".
>
> see: *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 at 239.

In *Aiton*, Einstein J conducted a searching review of the case law and relevant academic literature to that time in his analysis of the context of the good faith obligation and the extent

to which such an obligation located in a dispute resolution provision might be enforceable. His Honour concluded, relevantly, thus:

> "……To my mind, but without being exhaustive, the essential or core content of an obligation to negotiate in good faith may be expressed in the following terms:
>
> (1) to undertake to subject oneself to the process of negotiation or mediation (which must be sufficiently precisely defined by the agreement to be certain and hence enforceable);
>
> (2) to undertake in subjecting oneself to that process, to have an open mind in the sense of:
>
> (a) a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate;
>
> (b) a willingness to give consideration to putting forward options for the resolution of the dispute.
>
> Subject only to these undertakings, the obligations of a party who contracts to negotiate or mediate in good faith, do not oblige nor require the party:
>
> (a) to act for or on behalf or in the interest of the other party;
>
> (b) to act otherwise than by having regard to self-interest."
>
> see: (1999) 153 FLR 231 at 268.

Mediators need to be careful in considering assertions by one or more parties in a mediation that another party or other parties are not negotiating in good faith. Such assertions are not infrequently made in mediations where there have been prior attempts by the parties to negotiate a settlement which has failed in acrimonious circumstances. One is confronted with assertions of bad faith in circumstances where one party alleges that the other is now making offers which are less attractive than were previous, rejected offers. Other frequently encountered circumstances are, for example, where it appears that one side is disinterested in a proposal put forward to it or where a party seems to have adopted a particularly strong or obstinate stand. Such circumstances require the mediator to consider quite closely the impugned conduct and to approach the impasse with a sense of diplomacy and with, perhaps, some inventiveness in order to flush out the underlying position and whether or not the allegedly offending party is merely employing a tactical device – but not engaging in an exercise of bad faith or something worse.

In a sense, the essential ingredient of good faith in the conduct of a mediation appears obvious. As a matter of course, a mediator would expect it of the parties in their dealings with each other, regardless of whether it was mentioned specifically in an ADR clause in a contract. Where a mediation is requested by parties to a piece of litigation already before a court, tribunal or arbitrator such a consensual resort to mediation would automatically carry such an obligation. Of course, there could hardly be any doubt about it where a court ordered parties to mediate, regardless of their views. The court would expect good faith negotiation to be attempted.

Recently, the New South Wales Court of Appeal considered the nature of the obligation in a commercial contract for parties to undertake "genuine and good faith negotiations" see *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177. Out of consideration for the reader of this paper, I will not deal extensively with this very significant decision, written by Allsop P and expressly agreed in by Ipp and Macfarlan JJA.

However, it is presently relevant to observe that the judgment reinforces the view that that the precise content of the duty in any case is contextual, and that the court took the opportunity to expound upon basic elements of the duty, namely:

> "72……
> ……That the phrase 'good faith' contains the notion of fidelity (or faithfulness) to the bargain conforms with what other jurisdictions have seen as the core of the concept and with historical uses of the phrase……
>
> 73……An honest and genuine approach to settling a contractual dispute, giving fidelity to the existing bargain, does constrain a party……...
> ……..
> A party would not be entitled to pretend to negotiate, having decided not to settle what is recognised to be a good claim, in order to drive the other party into an expensive arbitration that it believes the other party cannot afford……
> ……
>
> It is sufficient to say that the standard required by the notion of genuineness and good faith within a process of otherwise tactical and self-interested behaviour (negotiation) is rooted in the honest and genuine views of the parties about their existing bargain and the controversy that has arisen in connection with it within the limits of a clause such as Cl.35.1……..
>
> 74…….
> a promise to negotiate (that is to treat and discuss) genuinely and in good faith with a view to resolving claims to entitlement by reference to a known body of rights is not vague, illusory or uncertain. It may be comprised of wide notions difficult to falsify. However, a business person, an arbitrator, or a judge may well be able to identify some conduct (if it exists) which departs from the contractual norm that the parties have agreed even if doubt may attend other conduct……..
> ……..
>
> Uncertainty of proof, however, does not mean that this is not a real obligation with real content."

Conclusion

It seems to me that the efficient and effective conduct of mediation requires the existence of some key elements. First, there is a need for the process to be understood by the parties who are to engage in it. Second, the mediator and the legal representatives of the parties need to observe ethical standards of behaviour in the conduct of their respective functions. Third, the mediator and the legal representatives need to be competent in the discharge of their functions. Fourth, the parties must deal with each other and the mediator in good faith.

There is no role in mediation for the notion that "the ends justify the means". Mediation is a professional, legal process, often conducted as an adjunct to the litigation process. Propriety is at its core. The effective and ethical conduct of mediation should not contemplate let alone permit, the undermining of this basic principle.

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