

THE USE OF INTUITION IN MEDIATION

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How mediators make decisions about what to do in the mediation session is one of the least understood but also one of the most important issues in the study of mediation. This paper explores a number of different approaches including the use of intuition. It examines the effectiveness of developing pre-mediation strategies and hypotheses and their impact on the mediator's ability to engage with the parties in the here-and-now of the mediation session.

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A crucial issue for practising mediators is how they go about making decisions during a mediation session.

The decision of whether and how to intervene at any particular moment in the session has to be made constantly. Even deciding not to do something requires a decision. What makes the decision to ask a question or remain silent appropriate at one point of time and inappropriate minutes later?

Kressel and Pruitt (1989, p. 235) maintain that how mediators make decisions about what to do in mediation is one of the least understood but one of the most important issues in the study of mediation.

This issue is important for a number of reasons. First of all, from a mediator's perspective, it would be helpful to know how to maximise the chance of making the best intervention. This is related to the issue of how a mediator prepares for a mediation session.

Secondly, from a mediation service provider's perspective, it would be helpful in selecting and training mediators with the skills to make appropriate interventions.

Thirdly, there is an important issue for academics and theorists. The decision by the mediator to do something in the mediation session is the point at which theory meets practice. For academics and trainers it is important to know whether it is theory that informs the mediator's decisions or something beyond theory that is purely personal to the mediator. This leads on to the fundamental question of whether mediators are born or made.

Some theorists (Moore, 1986 and Haynes, 1996) argue that it is the use of the hypothesis that drives how mediators make decisions about what to do in mediation. Baruch Bush and Folger (1994) also suggest pre-mediation planning but with a focus on planning for opportunities to create a dynamic interaction between the parties.

Others argue that mediator interventions are based on training and experience (Carnevale, Lim and McLaughlin, 1989) and the ability to synthesise theory and technique into decisions and actions (Lang and Taylor, 2000).

However, practising mediators will describe how often their decision to intervene in a particular way just came to them. They

experience themselves giving an instantaneous response without any apparent forethought. This experience is often referred to as having an intuition. (Lang and Taylor, 2000, p. 111).

This article will examine competing theories on how mediators come to make decisions about what to do in mediation. It will specifically attempt to identify and place the use of intuition within a mediation context.

### Preparing an Hypothesis

Both Christopher Moore (1986) and John Haynes (1996) view the use of the hypothesis as the central driver of how mediators decide what interventions to adopt in the mediation session.

Moore proposes four steps to the mediation process. Firstly, the parties and the mediator observe the aspects of the dispute. Secondly, the mediator, having considered those observations, tries to identify the central critical situations or causes of the dispute. Thirdly, once the mediator believes that the central cause has been identified, the mediator proposes and builds an hypothesis. Fourthly, the mediator tests the hypothesis by designing interventions that challenge or modify the attitudes, behaviour or structural relationship of the disputants.

He provides a model called a "*Sphere of Conflict- Causes and Interventions*" (Moore, 1986, p. 27) which lists types of conflict and attaches to each type a list of possible interventions. He maintains that this 'conflict road map' allows the mediator to detail why the conflict

is occurring, to identify the barriers to settlement and to indicate procedures to manage or resolve the dispute.

Moore's technique is based on forward planning. His model places the responsibility on the mediator to drive the search for the central critical situation, the hypothesis and the intervention that would challenge the attitude and behaviour of the parties. He suggests the mediator's function is one of diagnosis followed by the application of a predetermined strategic approach.

Haynes takes a different approach to the use of the hypothesis. He maintains that we are shaped by our experiences in life both professionally and privately. These experiences form a prism through which we make sense of things.

Haynes sees a problem if the mediation is approached using a legal or therapy prism. He advocates using a mediation prism, which he suggests would separate out legal and emotional issues and focus on what he calls "*mediation issues*". (Haynes, 1996, p. 21).

Haynes' method is aimed at ensuring that only the mediation prism is at work in the mediation session. He does this through the use of the hypothesis. Haynes suggests that a hypothesis is developed to cover three issues: -

- the problem to be resolved in the negotiation
- the clients' goals and
- the clients' negotiating behaviour.

He maintains that mediators have to be aware of the hypothesis that they develop about the client's situation. It is used to guide the mediator through the session.

Like Moore, Haynes bases his technique on forward planning. He places great emphasis on the importance of the mediator questioning the parties. He states that without the hypothesis the mediator would not know which questions to ask. He maintains that it is not "*whether we work under a hypothesis. It is which hypothesis we are working under at any given moment*" (Haynes, 1996, p. 21).

Two things are striking about Haynes' approach. Firstly, the use of the question posed to the client by the mediator seems to be the vehicle he uses to drive his mediation process. The other observation is that Haynes, like Moore, puts the responsibility on the mediator to undertake the search for the problem to be solved as well as for the clients' goals and negotiating behaviour.

Haynes and Moore define the word hypothesis in a different way. However, they both see the formation of a hypothesis as a means to plan in advance what the mediator will do in the mediation.

### Planning for a Dynamic Interaction

Baruch Bush and Folger (1994) introduced the concept that the transformation of "*human moral awareness and conduct*" (Baruch Bush and Folger, 1994, p. 31) was more important than satisfaction and fairness.

They suggest that this transformative mediation approach, as they call it, is driven by the mediator creating a dynamic interaction between the twin goals of empowering the parties to gain a greater sense of self-respect, self-reliance and self-confidence and of encouraging them to recognise and understand the concerns of the other party. They call these concepts “*empowerment*” and “*recognition*”.

They suggest that the role of the mediator is to trigger the interdependence between empowerment and recognition in a way that will allow a momentum to build to help maximise their effect.

Baruch Bush and Folger suggest that the mediator adopt a micro-focus on the parties’ moves with the aim of encouraging deliberation and choice making and to foster “*perspective thinking*” (Baruch Bush and Folger, 1994, p. 197).

However, they suggest it is useful to have some ideas in advance about how to take these opportunities when presented and about what moves that can be used to utilise and exploit them when they occur. Like Moore (1986), they suggest a map and signposts, which can provide a model to guide mediators. These signposts can help mediators “*look out for, recognise and capture opportunities*” (Baruch Bush and Folger, 1994, p. 201).

## Relying on Experience and Training

Carnevale, Lim and McLaughlin (1989, p. 425) suggest three approaches that influence mediators' decisions about what they do in the mediation session:

- trial and error.
- rules learned in formal training such as a step-by-step mediation model.
- the rules of heuristics, which can be described as the dependence on inductive reasoning based on past experience or similar problems.

Perhaps mediators just decide what to do based on the sum of their experience to date. Novice mediators develop skills and abilities as a result of mediating with real people. They develop into experienced mediators over time and are able to decide what to do based simply on the accumulated wealth of that personal experience. In other words, experienced practitioners are better at deciding what to do than novice practitioners.

Lang and Taylor (2000) agree that mediators should have a strong foundation in skills, techniques, and strategies as well as mediation theories. However, they maintain that artistry in mediation is achieved by going one step further. It is achieved by the mediator being able to “*synthesise their knowledge and skills at the moment of interaction with the parties and to integrate theory and technique into a series of strategies and interventions*” (Lang and Taylor, 2000, p. 9).

They suggest that this ability is achieved by engaging in reflective practice and reflective coaching and supervision.

They maintain that what is often referred to as intuition is really only a *“highly developed capacity to synthesise theory and technique into decisions and actions”* (Lang and Taylor, 2000, p. 7). They suggest it is the integration of theory and practice that allows the mediator to make skilful and artistic responses. What passes for intuition is a form of artistry, which they say can be defined, understood and learned.

Lang and Taylor assert that it is theory, which helps them make sense of the parties. They maintain that where mediators ground their formulations in solid models and theory then the formulations act as an accurate guide for the mediator’s actions and decisions. It is on the basis of these formulations that the mediator builds interventions.

They also talk about the mediator becoming aware of what is directing their interventions. One way of becoming aware is to become intentional about the practice of mediation. They suggest that without awareness a mediator has less control over practice decisions.

The above approaches suggest that the art of decision making is built on effective preparation. This is especially so when a mediator, like Haynes, uses questions to drive the mediation process. It implies a degree of forward planning to enable the mediator to have some control over their practice decisions and to test their hypothesis.

There is an assumption in all of this that there has to be some quality present in the mediator that informs how they decide what to do



in the mediation. It is suggested that this quality is an awareness of theory, which if looked at through the right prism or road map will help the mediator to prepare the right questions and choose the right interventions. *“At the heart of artistry [in practice] is a commitment to the notion that theory shapes practice”* (Lang and Taylor, 2000, p. 134).

### The Relationship between Theory and Practice

*“Theory only serves us well if it serves the client, and it is primarily clients who make theory, and not theory that makes therapy”* (Jacobs, 1995, p. 6). This quote challenges the proposition that theory shapes practice. It suggests that theory evolves out of the parties awakening to the theory rather than out of the mediator (or therapist) awakening to a theory. This is based on the proposition that you can only really know what has happened in an event after you truly experience it.

Theory is of its greatest value to the parties and the mediation process when it flows out of an experience by the parties in the mediation session rather than when it is presented to them prior to their own awakening.

Theory therefore arises out of the parties rather than out of the mediator. This theory will have greater power because it has come from the parties own awakening as opposed to something that has pre-formed in the mind of the mediator and then been tested as a hypothesis.

If this proposition is correct then it falls to the mediator to create an opportunity in the session for the parties to experience something that will trigger an awakening or realisation. The mediator can then help the party make sense of what just happened by reference to a theory. The parties will benefit as a result of experiencing something in the mediation, which allows them to make some sense of that theory.

What must be present in the mediator to allow the parties to experience the experience so that theory can become real for them? The answer might be found not so much in what should be present but rather, what should be absent.

This is an issue that has been engaging psychoanalysts since the beginning of the twentieth century. Sigmund Freud (1912) and Wilfred Bion (1967) suggest the answer lies in letting go of some personal attachments. Bion suggests that memory, desire and understanding should be absent whilst Freud suggests maintaining an evenly-suspended attention during the session.

The issue is relevant for psychoanalysts because of the importance they place on creating transference and counter-transference. These reactions and counter-reactions between therapist and patient develop when they truly engage with each other in the “here-and-now” of the session. It cannot occur with the patient simply lying on the couch having an intellectual discussion theorising about something that happened in the past.

Mediation has different aims and outcomes from therapy but it does share the dynamics of people interacting with each other in the here-and-now of a professional setting.

## Intuition

Intuition is defined in the Concise Oxford Dictionary (1964) as an “*immediate apprehension of the mind without reasoning*”. This definition implies the need for an absence, in this case “reasoning”.

Freud raised this issue in the second of his five papers on technique. He urged physicians who wished to practise analysis to develop a technique:

*“It consists simply in not directing one’s notice to anything in particular and in maintaining the same ‘evenly-suspended attention’ (as I have called it) in the face of all that one hears. In this way we spare ourselves a strain on our attention which could not in any case be kept up for several hours daily, and we avoid a danger which is inseparable from the exercise of deliberate attention. For as soon as one deliberately concentrates his attention to a certain degree, he begins to select from the material before him; one point will be fixed in his mind with particular clearness and some other will be correspondingly discarded, and in the making of*

*this selection he will be following his expectations or inclinations. This however, is precisely what must not be done. In making the selection; if he follows his expectations he is in danger of never finding anything but what he already knows; and if he follows his inclinations he will certainly falsify what he may perceive. It must not be forgotten that the things one hears are for the most part things whose meaning is only recognised later on”* (Freud, 1912, p. 432).

Freud’s main point is that you only know what really happened after the event. It is therefore important for a therapist to keep an open mind in order to experience the whole event fully. Allowing our attention to latch onto some point and mentally run with it will cause us to miss other points and perhaps the whole picture. Freud is suggesting the analyst experience the session first before allowing his or her thoughts to crystallise. Indeed, he encouraged therapists to “*allow themselves to be surprised*” (Havens, 1989, p. 6).

Bion drew from Freud’s work to suggest that therapists approach a session “*without memory and desire*” (Bion, 1967, pp. 259-260). Bion maintains that learning or evolving comes from “*experiencing the experience*” (Grotstein, 1981, p. 29). In the therapeutic session the patient and the therapist have to experience a real experience in order for them both to learn and evolve. The

therapeutic session has to be a real encounter rather than an academic discussion.

These same principles can be applied to a mediation context. Both therapists and mediators can put a barrier between themselves and some of the unpleasantness they have to observe from parties who are in distress. This barrier can take the form of the therapist and mediator intellectualising what is happening. This intellectualising can hinder our observation of what is truly happening in the session. To truly observe you have to experience what is happening even if that experience is uncomfortable.

Bion maintained that it is your memory, desire and understanding that reduce the power of your observation in the session. An over-investment in the session in one's memory, desire and understanding can reflect a defensive stance by the therapist/mediator. This protective barrier, set up by the therapist against uncomfortable parts of the encounter, inhibits him or her from sharing the patient's experience.

Bion acknowledged that we all have memory, desires and understanding. Having them is not the problem. The problem is our attachment to them in the session. It is not about forgetting them. What is required is a positive act of refraining from your memories, desires and understanding.

Bion is not against a therapist "*understanding*" the reality of a situation. The danger is the holding of a preconceived understanding that inhibits being in the moment and therefore inhibits the coming to a

new understanding. Although Bion is referring to the relationship between therapist and patient it is submitted that these principles can also apply to the relationship between the mediator and the parties.

A difficulty that arises with an attachment to memories, desires and understanding is that it occupies a space in our mind that should be available for a new experience. It can be used by the therapist and the mediator as a defence against their own feelings of uncertainty and the anxiety of not knowing what the outcome might be. These feelings can tap into powerful feelings of helplessness and uncertainty that most of us have experienced at some time.

It is more than likely that the parties in mediation are experiencing similar feelings of uncertainty and the anxiety of not knowing how their dispute will be resolved. If mediators can sit with their own uncertainty and can keep a space open in their minds to allow in a new experience then this act can powerfully influence the parties to do the same. The mediator can be a role model for parties who are in distress.

There are many differences between mediation and therapy. This paper is not seeking to draw any comparisons between them other than that both professions are working with the uncertainties of the session while seeking to uncover what they do not know. Both professions assist people to discover things that are not as yet clear to them.

The unknown in a mediation sense can be defined in part as the truth behind each party's behaviour and position. What is the key

element, which if brought into existence would reconcile the competing positions taken by the parties?

It is interesting to note that Moore states, “*each move or action a negotiator conducts involves rational decision making*” (Moore, 1986, p. 24). The Concise Oxford Dictionary (1964) defines rational as “*rejecting what is unreasonable or cannot be tested by reason in religion or custom*”. It would therefore appear that the formation of a hypothesis requires the presence of conscious reasoning and intuition its absence.

Bion (Mawson, 1997) refers to the concept of negative capability. He drew this concept from a passage in a letter of the poet John Keats to his brothers, George and Thomas (Rollins, 1958). Bion defined negative capability as “*When a man is capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason*” (Mawson, 1997).

Mawson maintains that Bion did not take negative capability to mean that the analyst puts aside all consideration of helping the patient. Rather he suggested it means putting desires aside in the present moment of the session and giving priority to the unknown of the immediate contact with the patients.

It does not really matter if the supposition that Moore and Haynes put forward for testing turns out to be identical to something arrived at via an intuitive thought. In the writer’s view it is the process used to get to the supposition or intuitive thought that is the important difference between the two approaches.

Allowing a space for mediator interventions to emerge out of the creative tension of the session can create a springboard effect for what follows. Often something emerges that is quite different from what is expected. It is often something that is incapable of being predicted.

If the mediator can sit with his or her own uncomfortable feelings of uncertainty and give priority to the unknown and to the immediate contact with the parties, then the feelings that arise in the mediator (their intuitive response) can produce a rich source of data. The mediator can draw on this intuitive response to decide what to do with that data. This data is immediate and specific to the parties at that particular point of time in the mediation session. It is not the product of mediator speculation even if that speculation is drawn from extensive knowledge of theory and practical experience.

Kressel and Pruitt (1989) in their research into mediator behaviour noted that in relation to the topic of the mediator's choice of tactics they found that, despite some fruitful beginnings, the research showed no connection between mediator tactical behaviour and any coherent theories of conflict. *"Mediators appear influenced by an immediate stimulus (such as rising hostility) and perhaps by a generalised preference for a particular style of mediation, but not by any integrated perspective about the proper response to various underlying dysfunctional dynamics."* (Kressel and Pruitt, 1989, p. 425). Christopher Moore noted: *"The stages of mediation are often difficult*



*to identify. Mediator and negotiator moves seem to blend together in an undifferentiated continuum of interaction” (Moore, 1986, p. 29).*

The “*immediate stimulus*” and “*interaction*” referred to in the above quotes confirm what many mediation practitioners have experienced. That is, nothing can be predicted with certainty in mediation. Mediation is the art of working with uncertainty. If the mediator cannot bear uncertainty and be able to sit with it in the session then how can they expect the parties to do so?

Donald Schon notes that “*outstanding practitioners are not said to have more professional knowledge but more ‘wisdom’, ‘talent’, ‘intuition’, or ‘artistry’ – They are used as junk categories, attaching names to phenomena that elude conventional strategies of explanation” (Lang and Taylor, 2000, p. 5).*

Baruch Bush and Folger (1996, p. 272) come closest to the proposition put by Freud and Bion when they refer to the experienced mediator who made the paradoxical observation that she was probably doing well during the mediation if she was still not sure what the dispute was about after an hour or so into the session. She maintained that her comfort with ambiguity allowed her to remain open to the parties.

Senge, Scharmer, Jaworski and Flowers (2005, p. 31) refer to the capacity to suspend. They state: “*In practice, suspension requires patience and a willingness not to impose pre-established frameworks or mental models on what we are seeing. If we simply observe without forming conclusions as to what our observations mean and allow*

*ourselves to sit with all the seemingly unrelated bits and pieces of information we see, fresh ways to understand a situation can eventually emerge".* (2005 p. 31)

Thomas Moore (1994) suggests that working on relationships is ninety percent observation and ten percent action. He suggests that we watch, "*without heroic interventions*" (Moore, 1994, p. xv) and allow transformations to take place of their own accord.

He notes that there is a tendency for people to try to resolve tension as soon as possible. He suggests that this is such a natural reaction that it may seem strange to suggest that parties willingly remain in their discomfort. He states that we are conditioned to want quick solutions. However he points out that there are benefits from being patient with contradictions and paradoxes.

He suggests that one benefit is the possibility of finding more profound and lasting solutions to life's problems. A rush to find solutions can lead to something being quickly put together. Yet, he says, if we can tolerate moments of chaos and confusion then something truly new can come to light. "*There may be new tensions and unfamiliar ambiguities to deal with, but having won a fresh vantage point through the courageous endurance of tension, we may be better equipped to understand the process, realising that illusions and follies have their own roles to play in the mysterious alchemy of the soulful life*"(Moore, 1994, p. 141-142).

### An Example from Practice.

An example of how this approach can be applied in practice can be drawn from the writer's involvement in mediating meetings between victims of sexual abuse and bishops and heads of religious orders from the Catholic and Anglican Churches in Australia (Rooney and Ross 2007).

Both churches have developed protocols for handling complaints of sexual abuse which involve a mediated meeting in which a personal apology is given by the bishop and financial assistance offered to help the complainant move forward with his or her life. The perpetrator of the abuse is not involved in any way with these processes.

The mediator meets with the complainant and the bishop separately prior to the mediation to assess their suitability to attend and to prepare them for the face to face meeting. The complainant often presents as someone whose emotions are starting to burst out after many years of suppression. At the same time bishops tend to have spent many of their later years performing administrative duties and a significant number approach the mediation with an intellectualised view of the situation.

To help bishops prepare for the meeting it is suggested that they not prepare in their minds or on paper any formal apology. They are

asked to wait for the mediation session to listen to the victim and trust that when the mediator turns to them and ask for their thoughts about what they have heard that the right words will come out of their mouths. What generally happens is that they are so affected by the pain present in the victims that they struggle to find words. This struggle is picked up by the victim and a connection between the two people occurs. This is the point at which the parties and the mediator experience the experience. The word sorry is hardly ever used but, if the victim is open to it, the feelings of sorrow are received.

The art for the mediator is to hold the space for the victim to feel safe to talk about whatever he or she feel they need to say while at the same time keeping the bishop in a state of suspension. It is at this point that the mediator abandons any attachment he or she has to memories of his or her own childhood and religious experiences and any desire for a successful outcome to the encounter.

If the mediator can maintain an evenly suspended attention at this critical and highly charged moment then the mediator's intuitive response can help them decide when to turn to the bishop and ask for his thoughts. This is an example of the mediator allowing intuition to determine the next move or intervention.

It is only afterwards that sense can be made of what just happened in terms of a particular theory. To ponder, at this crucial point in the mediation, transformative mediation theory and whether the victim had benefited from the empowering effects of the process and the recognition of their story by the bishop, would involve the

mediator entering a rational mental plane separating them from the parties and the moment. This would distract the mediator from being fully present in the transition from the apology stage of the process to negotiating the accompanying financial assistance package.

The challenge for the mediator is to hold onto the goodwill created by the apology while negotiating the money issue, particularly when the financial expectations of the victim are not met by the bishop. This is the most difficult part of the mediation but, paradoxically, by all parties, including the mediator, embracing the uncomfortable feelings associated with this transition and working through it, appears to be the key to helping many victims move forward with their lives. The mediator can not afford, in a mental sense, to leave the room to explore the theoretical implications of the moment.

## Conclusion

This paper acknowledges the importance of research into why mediators do what they do in mediation. An understanding of this issue and the naming of various theories and models of mediation can provide a creative and critical focus for all involved in this evolving profession.

What this paper does challenge is how mediators apply theory to their preparation for and interventions during the mediation session. It suggests that mediators let go of any attachment to theories and hypothesis when entering the mediation session. It recommends that they intentionally move out of an intellectual and rational mental plane

and allow an empty space to form in their mind; that they allow themselves the space to be surprised by the experiences that take place in the session and fully experience that experience. It is only after experiencing this experience that they should allow their thoughts to crystallise. It is often much later that sense can be made of the experience in terms of fitting it into an existing or new theory.

This is not to suggest that the mediator abandon all models or structures that frame the mediation session. There still needs to be a framework within which the mediator and the parties work together. However this framework (or process) should be one that gives space to allow fluid and dynamic events to take place. The skills that are important for the mediator to master are those that facilitate the paradox of creating a safe place for the parties whilst at the same time allowing them to reach their point of most tension.

This paradox lies at the heart of the mediation process. Mediators assess parties to see if they are suitable for mediation. They check safety issues and power imbalances. If they proceed to mediation they are responsible for nurturing that safety whilst at the same time encouraging the parties to move to the focal point of their conflict.

This is a balancing act that requires an ability to be comfortable with uncertainty and uncomfortable feelings. The mediator needs to be able to support a relationship being built between the parties, even if it is only a negotiation relationship that lasts for the duration of the session. The mediator's ability to be comfortable with

the uncertainty of the moment can be a role model for parties and help them to manage their own feelings of uncertainty. The catalyst is the mediator's ability to share, with the parties, a true and immediate experience within the session.

The result of this approach is that the mediator becomes receptive to some of the unconscious messages (projections) put out by the parties. The thought that arises in the mediator's mind out of this unconscious connection can be defined as "intuition". These intuitive thoughts can help a mediator make some sense of an event, decide on an intervention or form a credible hypothesis. However this hypothesis is drawn out of the parties' experiences and awakenings rather than from mediator speculation prior to that awakening.

The ability to create a climate in the mediation session for the intuitive thought to emerge requires the relinquishment by the mediator of an attachment to the need to be skilful, the need to be in control and the need to understand what is happening. If the mediator can let go of these needs and allow him or herself to truly experience the experience of the parties then this can lead to a reassessment by the parties of their own illusions and follies.

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