

Dispute Resolution

Hearing both sides: structural safeguards for protecting fairness in family mediation

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Mediator

It [the mediation appointment] made me very anxious actually. I was really relieved when they saw us separately. It was really necessary that. That I think was the most valuable thing actually. Because that meant that both of us had our say. (Access to Agreement: A Consumer Study of Mediation in Family Disputes, Davis and Roberts, 1988, p. 43, Open University Press.)

I shall try to persuade you that fairness in procedures for resolving conflicts is the fundamental kind of fairness and that it is acknowledged as a value in most cultures, places and times: fairness in procedure is an invariable value, a constant in human nature. (Justice is Conflict, Hampshire, S. 2000, page 4, Princeton University Press.)

The very advantages of mediation over the adversarial legal process also create potential risks (J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (Jossey-Bass, 1984)). Mediation is held in private. Legal representatives are seldom present in family mediation. Procedures are informal and flexible. The safeguards of due process do not apply. There is always a danger that the more powerful interests will prevail over the weaker. Fairness, therefore, is a matter of central importance in mediation. The parties must feel that they have been treated fairly and that any agreement that they reach is fair, or as fair as is practicable in all the circumstances, not only to them, but to their children and whoever else is affected by their arrangements. Given that, in mediation, the issue of party authority for decision-making is so central and delicate, it is also only in the independence of mediation from other forms of intervention that the essential ethical and professional principles that safeguard the interests of a fair process can be fully realised. In addition a range of safeguards is necessary – procedural, structural and professional.

Safeguarding a fair mediation process

This article will focus on those structural features designed to promote the realisation of a constructive and fair process and outcome, and preserve and protect respect for the parties' dignity, privacy and autonomy. In the interests of terminology clarity, a distinction is drawn between the mediation *process* – a process of negotiation orchestrated by the mediator through the facilitation of exchanges of communication between the parties – and the *model* of mediation, namely, the structural arrangements put in place to realize the mediation process (see P H Gulliver, *Disputes and Negotiations: A Cross-cultural Perspective* (Academic Press, 1979) for the definitive empirically based, cross-cultural delineation of the mediation process). The main focus will be on the structural feature of allowing each party to mediation the opportunity, at an early stage in the session, to have separate time on their own with the mediator. This application of separate time is different from 'caucusing' which is most frequently used in the mediation of international, commercial and labour relations disputes. The caucus can also be applied as a powerful technique in other kinds of mediation for specific purposes, for example, of enabling the mediator to educate a

party about their negotiating approach, to explore possibilities of compromise or to address difficulties creating impasse (see C Moore, *The mediation process: Practical strategies for resolving conflict* (Jossey-Bass, 1986)). It can lead to ‘shuttle’ mediation with the mediator acting simply as a conduit between the separated parties (valuable, for example, in situations of expressed high conflict) or more actively negotiating on behalf of them (for more detail on shuttle mediation see M Roberts, *A-Z of Mediation* (Palgrave Macmillan, 2014)).

In the author’s view, the structural feature of separate time constitutes a vital safeguard in mediation practice, the significance of which is equivalent to that attached to one requirement of natural justice in third-party decision-making, namely the principle of *audi alteram partem* – ‘hear the other side’. This is a ‘necessary condition of procedural fairness’ to be found ‘in universally acceptable rational procedures of negotiation and in the intellectual procedures of adversary reasoning and compromise’ (S Hampshire, (2000) *Justice is Conflict* (Princeton University Press, 2000), at p 16, xi). There are additional ways in which fairness may be safeguarded (though not necessarily guaranteed) in mediation:

The principle of voluntariness: This is a vital safeguard against coercion, pressurisation or inappropriate referral (also embodied in the Council of Europe Recommendation on Family Mediation, No. R (98)).

The skill and integrity of the mediator: The mediator has an ethical responsibility to ensure the active and free participation of both parties in discussion and decision-making, addressing imbalances of power and negotiating skill.

Screening for domestic abuse: Best practice in North America, UK (see Policy on Domestic Abuse, College of Mediators) and Australia, is unequivocal in requiring pre-mediation screening for suitability especially where there has been domestic abuse (the main purpose of the Mediation Information and Assessment Meeting (MIAM)). Continuing screening throughout is also necessary to ensure no new concerns arise as a consequence of mediation.

Review by mediation and independent legal review: Both provide the opportunity for reflection on outcomes and checks against unfairness.

Professional training and regulation: Training has to address the mediator’s own potential to exceed or abuse their role (eg. in exerting unacceptable pressures on or manipulation of the parties), anti-discriminatory practice and the impact of culture on disputes (see Shah-Kazemi, S. N. (2000), “A Critical View of the Dynamics of Culture in Family Disputes”, *International Journal of Law and the Family*, Vol.14, pp.302-25). Stringent quality assurance procedures are necessary to ensure that standards of professional practice are maintained and monitored.

The structural framework of mediation

‘For mediation, one is tempted to say that it is all process and no structure.’ (L L Fuller, (1971) ‘Mediation – Its Forms and Functions’ (1971) 44 *Southern California Law Review* 307)

What this observation highlights is the difference between the processes involved in mediation and those involved in adjudication. The latter is characterised by institutional rules, formal procedures and clearly demarcated roles and authority. It is within this formal pattern of due process that any dispute is dealt with. No such institutional framework occurs in negotiation processes. The parties seek to sort out their dispute by voluntary exchanges, negotiation and decision-making. But where the parties cannot manage to negotiate on their own and so resort to mediation, some structural changes are inevitable. As Simmel (*The Sociology of Georg Simmel* (1955, Free Press)) observes, in any interaction the presence of a third person, simply by being there, transforms the relationship qualitatively in the transformation from the dyad into the triad. First, a simple bilateral process is transformed into one involving a third party. Secondly, the very presence of this third party imposes

the rudiments of a framework on the encounter. Who participates? Where? When? Mediated negotiations require this minimum of a framework at least, though cross-culturally mediation processes differ greatly in the way they are organised and the degree of formality, a lack of formality by no means indicating a lack of control (S Roberts, 'The Study of Dispute: Anthropological Perspectives', in J A Bossy (ed), *Disputes and Settlements: Law and Human Relations in the West* (Cambridge University Press, 1983)).

There are a variety of structural arrangements that can frame the mediation process and no one model is best for all purposes. Examples include co-mediation, shuttle mediation, the anchor mediator, the use of the caucus, etc. Whatever model is adopted, the framework serves two main purposes: First, it enables the parties to negotiate together in a way that would not have been possible on their own. Ground rules, for example, are designed to prevent the parties going away worse off than when they arrived, the real failure of mediation. Secondly, the framework is designed to secure fairness and achieve equal opportunities for full and confidential expression. Structural protections are necessary therefore, both to offset inequalities, pre-existing and those that can be created within mediation, and to enhance the control of the parties, the weaker party, in particular. Research highlights the importance of avoiding the 'negative positioning' that can arise when the parties do not have equal access to the mediation process nor are able to participate fully and equally because of the structural arrangements of the session (S Cobb and J Rifkin, (1991) 'Practice and paradox: Deconstructing neutrality in mediation' (1991) 16(1) *Law and Social Inquiry*).

There are, therefore, some structural features that can assist in addressing the core issues of party authority for decision-making, mediator power and the protection of a fair process. These include:

- a) pre-mediation gathering of individual information and the separate screening of each party for suitability for mediation (as described above);
- b) a joint introduction;
- c) an opportunity (however brief) for each party to see the mediator on their own;
- d) the summing-up by the mediator of the issues as perceived by the parties. These are vital preliminaries (detailed below) to direct negotiation between the parties constituting the main content of the mediation session.

The separate opportunity for each party to talk alone to the mediator at an early stage of every session is one important structural safeguard that ideally should not be dispensed with if full and free expression is to be protected. Its significance and value depend on an understanding of its location both within the overall framework of the session as well as in relation to the general shape of the process of mediated negotiations. The interwoven nature of structure and process is a conspicuous characteristic of mediation – the structure encompassing the process, and the process itself informing the structure.

The Bromley model

The way mediation is structured at the SE London Family Mediation Bureau constitutes the foundation of the practice model examined in this article. This model is based on the North American Coogler Model of Structured Mediation instituted in 1979 when the Bureau was established in Bromley, SE London, (hence the epithet) by Fred Gibbons (O J Coogler *Structured Mediation in Divorce Settlement* (Lexington Books, 1978). The significance of the Coogler Model is two-fold:

First, central issues of party autonomy, mediator authority and power, and the protection of a fair process are explicitly addressed by means of structure. Coogler's emphasis is on the importance of a clear structure composed of the integration of three structural components –the Procedural, Value and Psychological Structures, designed to protect the parties procedurally (to secure an orderly process), ethically (to secure a fair process and ethical standards of exchange) and emotionally (to secure psychological and physical safety). Secondly, is the way in which these issues are addressed

in practice, namely the focus on the ‘modest’ profile of the mediator as well as on the deployment of structure. The issues, whatever they are, are limited to those for which decisions are needed for settlement to be reached. The role of the mediator is to ensure that the parties are the decision – makers. There is advance agreement upon ‘rules’ of procedure and the guidelines to be followed.

One of the distinctive features of the Coogler model is that the framework builds in separate time with each party at an early stage in every session. Another is the encouragement towards direct negotiation between the parties. The Bromley Model was adopted originally for mediation on children issues only, although Coogler focussed on all family issues (including the decision as to whether or not to separate or divorce, children, finance and property and communication). This structural framework is of particular value in relation to the mediation of disputes over children in comparison to the mediation of financial and property matters, which, document-based in the main, create their own structural requirements (for example, to accommodate the way in which legal or other expertise may need to be incorporated into the process). In this article the application of the model is illustrated in relation to the mediation of high conflict disputes relating to children both because, in the view of the author, that subject matter best reveals how the model works most effectively, and because it is the area of practice in which the author specialises.

Structuring the session

The session is usually at least 2 hours in length. By the end of this meeting there is usually a concrete outcome on most, if not all, items on the agenda, often on an interim or trial basis (for example, child arrangements), to be reviewed in mediation after an agreed period. It is unusual for there to be more than three sessions in most child issue cases.

Each single session of the mediation process is structured to progress through four stages.

Stage I: establish the arena; the joint meeting

The start of the session is a joint one with both parties present (presuming the prior pre-mediation assessment of the suitability for mediation of the circumstances, the dispute and the parties). There are three reasons for this. First, the mediator must establish an even-handed relationship with both parties from the start. Furthermore, the mediator must be seen to do so. Initial separate meetings could lay the mediator open to charges of bias or prior recruitment. Second, if the mediator’s main objective is to launch the parties on the joint enterprise of negotiation and decision- making, they ought to begin the way they wish to continue – in direct contact, if not yet in direct communication. Third, a joint meeting is the best means of explaining and clarifying the purpose of the meeting, the structural arrangements to be deployed to best achieve this, the principles operating (voluntariness, confidentiality, etc.) and the ground rules including expectations for ensuring a calm and safe opportunity for reasonable exchange. Often, upon the parties learning that shortly each will have separate time with the mediator, there is a palpable easing of tension and anxiety.

Stage II: define and clarify the issues; the separate interviews

This is the vital second stage of the session when each party always has separate time with the mediator. The main purpose is to give each party their own separate opportunity to state to the mediator their objectives and perceptions, any apprehensions they may have in coming to mediation, and whatever background history may be relevant to an understanding of why they are there and what they want. The order in which the parties are seen can be left up to them to decide though the mediator should make it clear that it does not matter who is first. This does not usually create any difficulty or raise any concern about fairness though both need to have roughly similar amounts of time with the mediator. At the end of the separate time the mediator asks expressly if there is anything stated that the party does not want repeated back in the feedback summary. The mediator should respect this request where it is not incompatible with mediation proceeding fully

and frankly (see discussion below on the implications and dilemmas of this approach to confidentiality).

Stage III: explore the issues; return to the joint meeting

After seeing each party on their own, there is a return to the joint meeting (a good moment for offering refreshments) and the mediator then briefly summarises the issues, objectives and feelings of the parties. The way that this is done can vary particularly where co- mediators are involved. The approach, its reasons and advantages as the author has experienced, is set out in detail below:

First, the mediator explains to *both* parties that she/he shall be summarising the main aspects of what each has expressed, starting in the order in which they were seen separately., Both parties are requested not to comment or interrupt until both summaries are complete. The mediator explains that they may well hear things they do not agree with or perceive differently. It is explained that they will be welcome to question, comment, challenge, or refute what they have heard but only after both the summaries have been completed.

Then the mediator summarises the main matters highlighted in the separate interview, addressing the summary to the *same* person whose account it is. In the author's view, this approach is preferable to that whereby the mediator summarises one party's perspectives to the other party as this risks the appearance of advocacy. Where there are co-workers such risks are compounded as the parties might imagine, incorrectly, that each has their own mediator 'advocate'. Co-mediators can, on the other hand, share the demanding task, each taking responsibility for summarising in the same way to one party, again avoiding the risk that they may be perceived to be acting in a representative or advocacy capacity. The gender implications of allocation of mediator to party may need to be considered in advance, bearing in mind that gender alliances are not infrequently perceived to be formed across, rather than along, gender lines (G Davis and M Roberts, *Access to Agreement: A Consumer Study of Mediation in Family Disputes* (Open University Press, 1988)).

The purpose of each summary is to ensure that each party's perspective, issues and objectives are clearly and accurately expressed, and understood to their satisfaction. In this way, the validity of each person's view is affirmed, whatever their differences. At the completion of the summary, the mediator checks with the party that it does, in fact, represent an accurate account and inviting that party to add, correct or highlight any aspect. What this individual time with each party is also intended to impart is a particular quality of attention. Therefore the mediator needs to attend extremely carefully as well as to remember what has been conveyed in order to be able to report back accurately. Note taking should also be kept to a minimum. It is each party's perceptions and meanings that are relevant here rather than any interpretations of the mediator.

On completion of the summaries, the mediator then invites both the parties to respond, if they wish, to what they have heard. It may be that there is new information that emerges, that differences are fewer than anticipated, that the parties have heard it all before, or, more usually, that they want to challenge and refute some or all of what they have heard.

This introduces, in a managed and structured way, the most difficult, contentious and potentially acrimonious phase in the mediation process, when the most distance and the most hostility between the parties will be manifest.. Here the 'vivid monologues' and the stating of 'maximal demands' have an important function, that of 'the setting up the negotiating range ... [and] ... an exhaustive determination of the outer limits of the range within which they [the parties] will have to do business with each other' (A Douglas, *Industrial Peacemaking* (Columbia University Press, 1962) p 20). This phase, exploring the dimensions of the field, calls for 'preliminary emphasis of the disagreement factors'. The exploration of difference will be necessary therefore if movement towards the narrowing of difference is to be perceived and before there can be any likely readiness towards the consideration of common interests.

Stage IV: development of options and Stage V: securing agreement (not covered in this article)

These latter phases are those towards which the earlier phases (overlapping and progressive) lead (if properly orchestrated by the mediator) – in a process in which change is intrinsic and which the parties themselves need to experience, as negotiators, participating in a dynamic process of exploration leading towards the ending of the dispute, if not the conflict (Gulliver, *ibid*, 1979).

The rationale for structuring for separate time

The structural model set out above is one that enables the mediation process to progress with maximum efficacy from both a negotiation and a psychological perspective. It is the start of a process that is itself the gradual creation of order and co-ordination between the parties (Gulliver, *ibid*, 1979). The intended objectives of structuring for separate time are summarised below:

- It is the time in the mediation session expressly allotted for each party to be heard. Each party can have their own say free from fear of interruption or contradiction.
- The mediator has the opportunity to gain a clear understanding – from each party's perspective – of the issues in dispute, ethical and emotional aspects, the historical context of the dispute, and any current or future fears about safety or other relevant matters.
- It is the occasion when the mediator, in attending to the perceptions and meanings of each party can give worth to each perspective, whatever their differences.

This is the opportunity for the expression, at the appropriate time, of strongly felt emotional and ethical concerns, for example, personal feelings of fault, hurt, betrayal, hostility and anger and any grievances about unfairness (relating to the past, present and or the future). The opportunity to have these intense experiences and feelings aired, listened to, and acknowledged, can lead to a palpable reduction in tension and anxiety even at this early phase. Grillo goes further, not only challenging the traditional refusal of mediator to allow a focus on the past in mediation, but also highlighting the value of this opportunity for the exploration of the historical context as a path to clarity, strength and energy, for women in particular (T Grillo, 'The mediation alternative: Process dangers for women' (1991) 100 (6) *Yale Law Journal*).

- In addition, these potentially disruptive powerful issues or strong feelings, once aired, heard and acknowledged, are then much less likely to erupt to sabotage negotiations at a later stage in the process.
- It is the common experience of mediators that a version of the issues with which both parties apparently agree in the introductory joint session often turns out to be perceived quite differently by one party when interviewed alone. That is why this structural safeguard is never dispensed with even though (or precisely because) parties might occasionally urge that this stage be omitted (because there is no need for it as they are in agreement as to the issues) when the structure is first explained in the introductory stage.
- Screening for domestic abuse must take place routinely before mediation. The separate time provides further occasion for continuing screening throughout mediation—necessary, for example, where threatening behaviour might emerge for the first time or for the monitoring of current or past abusive behaviour.
- Separate time is also the only opportunity early in the session for specific safeguards to be agreed in advance in order to address any apprehensions about behaviour or other concerns that might manifest during the session. For example, pre-determined signals can be agreed with the mediator (for example, placing a handbag on a lap) to signify the urgent need for a break. Such a safeguard cannot, of course, be set in place in the presence of both parties.

The rationale for the summing up stage following separate time

There are several objectives that may be achieved by means of the structured summaries following

separate time with each party.

- The mediator is able to report the substance of the dispute/issue and the accompanying strength of feeling (that the party feels strongly, how strongly they feel, and what they feel strongly about) but free of the angry tone, aggravating facial expressions and acrimonious language that can so easily trigger emotional recriminations and escalate the conflict.

‘The non-partisan shows each party the claims and arguments of the other; they thus lose the tone of subjective passion which usually provokes the same tone on the part of the adversary.’ (Simmel, *ibid*, pp 146–147)

‘This is the start of “limiting all complaints and requests to their objective contents ... To put it psychologically, antagonism of the will is reduced to intellectual antagonism. *Reason is everywhere the principle of understanding.* It is the function of the mediator to bring this reduction about, to represent it, as it were, in himself [sic]; or to form a transformation point where, no matter in what form the conflict enters from one side, it is transmitted to the other only in an objective form; a point where all is retained which would merely intensify the conflict in the absence of mediation.’ (Simmel, *ibid*, p 148 emphasis added)

- Both parties are more likely to listen calmly to the mediator than to each other at this stage.
- Misunderstandings can be sorted out as early as possible. Where communication has been difficult or non-existent, or has taken place through lawyers or other third persons, the potential for misunderstanding is enormous. It is not uncommon for parties to discover that much less divides them than they had imagined once clear lines of communication are opened.
- Acknowledgment of the validity of different perspectives can be demonstrated in the equal worth the mediator accords to each person’s viewpoint, feelings and objectives.
- Giving due weight to each person’s views and objectives in this way also demonstrates the impartiality of the mediator. The structural arrangements can therefore enhance impartiality in enabling it to be seen to operate.
- The mediator explicitly acknowledges the likelihood of disagreement thereby legitimising its expression both in an established calm and safe environment and at the appropriate stage.
- Analytically two distinct phases may be discerned emerging from Stages II and III. The first is the identification of the issues that are important to the parties, ethical and emotional as well as practical and legal. The second phase is the creation of the agenda for mediation, that is, the clarification of the items that must constitute the joint agenda for mediation. These can only be the *negotiable* issues, those issues about which decisions can be made (it is not possible, for example, to negotiate over the past, fault, facts or values, important though these may be to the parties). These two phases highlight that matters may need to be aired and addressed that are not confined to any narrow definition of an issue. The summing up of these issues by the mediator thus facilitates the process of agenda formation.

The structure facilitates the management by the mediator of two of the more difficult transitions in the mediation process, from defining and clarifying the issues to exploring those issues – from examining difference therefore, to the next more constructive phase of developing options. Distance is necessary if subsequent movement is to become apparent. As Douglas vividly illustrates, the parties ‘need the opportunity to experience the exhaustion of their demands’ ... and ... ‘premature movement robs them of this experience’. ‘The exhausting of topics offers one of the most useful criteria for measuring the timeliness of movement’ (Douglas, *ibid*, pp 42 and 49). If all goes well, parallel psychological transitions are effected in conjunction with the negotiation transitions – insecurity, anxiety, hostility, uncertainty, fear and ignorance are lessened as the wheels of communication exchange generate greater learning, improved understanding, and therefore the reduction of uncertainty, fear and competition and the progressive modification of expectations and behaviour (Gulliver, *ibid*, 1979).

The dilemmas of confidentiality

Confidentiality is integral to the relationship between the mediator and the parties and is one of the four fundamental and universal characteristics of mediation. (J P McCrory, (1981), 'Environmental mediation – Another piece for the puzzle' (1981) 16(1) *Vermont law Review*) It is the cornerstone of the relationship of trust that must exist between the mediator and the parties and of the free and frank disclosure that is necessary if obstacles to settlement are to be overcome. It is crucial to the voluntariness of participation of the parties and to the impartiality of the mediator.

Confidential information vouchsafed separately to the mediator by each of the parties is recognised to be problematic in the context of the caucus (J Moore, 1986; J Folberg and A Milne, *Divorce Mediation: Theory and Practice* (The Guilford Press, 1988). It can be difficult to maintain impartiality in circumstances when information is being imparted to the mediator in the absence of the other. Some mediators pre-empt this by stating in advance that all information disclosed separately must be able to be shared in the joint session. There shall be no 'secrets'. This is intended to prevent alliances or the perceptions of alliances being formed between the mediator and one party. Other mediators engage the caucus on the basis that its benefits outweigh the disadvantages and that separate confidential communication can enhance the potential for subsequent constructive exchanges.

Where mediators do allow separate confidential communications in the context of an early, established stage in the structure of the joint session, as described above, the parties are informed about the nature and purpose of the model at the start. Often, such confidential disclosures have little direct bearing on the content or resolution of the matters in hand, in which case there is no problem (for example, the expression of negative feelings about another family member; or past grievances about an ex-partner).

There is a problem, however, when information, imparted in confidence to the mediator by one party, is central to subsequent joint discussion of the issue. If that party cannot be persuaded to make the necessary disclosure to the other party, then it will be necessary to end the mediation session. This will be preferable to negotiations taking place fettered by the concealment of vital information, unbeknown to the mediator and one of the parties, which might occur if separate confidential communications were not allowed in the first place.

Conclusion

The structural arrangements described above, focussing on the way in which separate time early in the process is built into each session, illustrate one long-established model of mediation practice in the field of family disputes in the UK. It exemplifies an explicit, theoretically-based approach to achieving procedural fairness and meeting the needs of the parties ethically and emotionally. It is an approach that is designed to make optimal use of session time, in ensuring both purposive structuring and that the session length is sufficient for the negotiation process to be realised – the session is unlikely to end therefore at its most difficult phase in the process when conflict is at its most expressed (a risk inherent in any shorter session). .

In this way the negotiation process is given the maximum chance to achieve its most constructive realisation in mediation. The mediator, working within a structured environment, can fulfill their difficult role, in their own unique style, orchestrating the mediation process effectively, flexibly and creatively. Clarity and confidence in an established model of practice are of most value where the dynamic reality, characterising family breakdown is one of stress, complexity and unpredictability. Trust in the process and optimism can be enhanced. Above all, the parties have a real opportunity to try to reach consensual, fair and mutually satisfactory decisions, and in addition, to maximise for themselves and especially for their children, the process benefits of mediation - better understanding, improved communication, a lessening of conflict and an improved capacity to negotiate together in the future.

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