Chapter 3

Maintaining a Favourable Climate

A good beginning makes a good ending

A. The role of the mediator in 'climate control'

3.1 Mediators have a role in creating and maintaining a favourable 'climate' for the mediating parties as they communicate, negotiate and make decisions.

As with the development of the foundations referred to in the previous chapter, this is not something that occurs at only one stage of the mediation process; it has to be considered and attended to through the whole process. However, it tends to be a more important responsibility for mediators before and during the early stages of mediation when the parties are likely to be most apprehensive, confused and defensive. The mediator has the equipment and tools for 'climate control' and can modify the temperature, humidity and atmospheric pressure as the circumstances require.

This chapter focuses on some of the reasons for the discomfort of mediation clients and on some of the ways in which mediators can deal with this factor.

Mediation skills and counselling concepts

3.2 While counselling is distinguishable from mediation, counselling concepts are clearly of significance for mediators, as they are for other skilled helpers. A difficulty for a book on mediation skills is that there are many different theories of psychology and counselling on matters such as motivation, behaviour and grief. It is not possible to canvass all relevant theories; nor is it wise to link mediation skills to a particular theory in one area. Therefore the book, especially this chapter, works eclectically with counselling and psychological concepts and recommends reference to more specialised texts on these topics.[1]

1 As a starting point, there is a good chapter on the relevance of counselling concepts for mediators in Folberg and Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation*, 1984, Ch 4.

B. Reasons for a poor climate

3.3 Conflict can be debilitating. To some people it appears confusing, even chaotic. It stirs the emotions and saps the energy and it almost always feels difficult to manage and resolve. Mediators can expect that parties coming into the process will be in negative emotional and psychological states. They will feel that their cause is just and that the other side has acted unfairly, or worse. They may also have invested a great deal of energy in the 'struggle' and be unwilling to negotiate towards a compromise on 'matters of principle'.

There may be several reasons for the negative state of mediation clients, which will be illustrated in the following fact scenario.

Ben and Southern Farms

Ben was employed by Southern Farms as a fruit picker. He had been seated on a tractor approximately 1.2m above the ground when the hydraulics failed and the seating collapsed and he fell to the ground. The fall caused him severe lower back pain. Since the accident he has not worked and has been restricted in his movements, affecting all his usual activities. He has had no treatment other than analgesics and some physiotherapy which he attended irregularly.

The medical reports suggest that Ben suffered a 'significant amount' and a 'moderate degree' of pain and suffering, but not as substantial as he claimed. The reports suggest that he will ultimately be capable of resuming suitable light work.

Ben alleges that since the accident he has had difficulty socialising and sleeping, relations with his wife have been disrupted and he has had to abandon plans for starting a family. He complains of constant throbbing in his back and occasional spasms and bruising. He has lost self-confidence and self-respect since the accident.

Proceedings were instituted for negligence. The solicitors arranged a mediation, attended by Ben, Southern Farms and their insurer.

Reasons pertaining to pre-mediation developments

3.4 Using the example, between the time of the accident and the mediation, there could be a number of developments which contributed to a further deterioration in Ben's original negative state. Seen from his perspective, these might include:

- Insulting offers from the insurer, which have 'poisoned the well'.
- The attitude and treatment of the defendant's doctors who were abrupt, rough, disbelieving and uncaring.
- The approach of the insurer in giving him the 'run around' with gross delays in authorising payment for medical treatment or in making a 'decent' offer.
- Increasing concern that his injuries might get worse.

- Well-meaning advice from friends or relatives not to talk to the insurer, not to trust any lawyer and not to settle the case.
- His growing belief that the defendant employer treats the whole workforce badly and must be taught a lesson.
- A slow realisation that the whole system is 'loaded against him', or his rights have been unreasonably disregarded, or that the defendant will not be reasonable until the door of the court.
- The very high expectations that counsel's advice have raised in his mind, particularly in relation to the monetary amounts mentioned.

Comparable considerations could have put the insurer's representative in a negative frame of mind if, for example, Ben were from 'a certain ethnic group', or if his lawyer had a notorious reputation among insurers and there had been a 'grossly inflated' monetary claim for a 'minimal injury'. The effect of these factors is to escalate the conflict beyond its original scope, rendering mediation more problematic than it otherwise might have been.

Reasons pertaining to the individual parties

The grieving process

3.5 Most parties in conflict have experienced an actual loss or a perception of loss and are consequently undergoing a process of grieving.[2] Depending on the circumstances, the sense of loss could be over a matrimonial partnership, a promising business venture, the full use of limbs or other bodily parts, or security of employment. According to different writers on attachment theory, the grieving process could involve a number of elements, though not in any strict sequence or linear progression. Using the example above, Ben could have experienced the following emotions in his grieving process:

- *Shock*: the state of numbness in which there is no ability to analyse, understand or feel what has happened and what is going on.
- *Denial*: the inability to accept or come to terms with the loss, and the belief that his health, job and family prospects, as the case may be, will be restored to what they were before.
- *Bargaining*: an attempt, usually futile, to recover whatever has been lost by 'negotiating' with the employer, insurer, or even God, accompanied by firm commitments to reform in the future.
- *Anger*: characterised by extreme hostility towards the 'cause' of the loss, such as Ben's employer, his boss, or fate, or even the victim himself.
- *Despair and disorganisation*: a loss of hope for the future and inability by the depressed person to plan, act and make logical decisions in his best interests.
- *Acceptance and reorganisation*: in which Ben comes to terms with the loss and decides that he 'wants to get on with my life'.

2 See the classic account in Kubler Ross, *On Death and Dying*, 1969.

3.6 As the grieving elements do not occur in a strict linear progression, persons may move between them with some irregularity, and at times slip 'backwards', for example, from partial acceptance to denial. It is also not unusual for persons who have been in a close relationship, for example, marriage or business partners, to be in different stages of the grieving process from each other. For example, one party might be at the stage of acceptance, while the other party is still in denial. The latter party may be seen as unfeeling and the former as unable to manage, further exacerbating the dispute.

Some writers, such as Emery, talk of a cyclical theory of grief, revolving around love, anger and sadness, in which there is a constant cycling back and forth between these conflicting emotions.[3] While the intensity of these emotions lessens over time, they can involve a lengthy and confusing process with the possibility of the person becoming stuck on one of the emotions of grief. Furthermore, where there are two parties, one the 'leaver' from a personal or business relationship and the other the 'left', the guilt of the former and rejection of the latter, and the continued contact between them, can perpetuate the cyclical process. As the leaver's emotions are usually less intense than those of the left party, the same misunderstanding and exacerbation can occur as described above.

3.7 In relation to mediation, parties in all stages of grieving will be in a complicated emotional state. In some cases, for example, where there is prolonged shock or denial, it might be inappropriate to negotiate and mediation should be deferred until these stages have passed. In others, for example, where one party is in the anger phase and the other at acceptance, the mediator will have to be aware of their different emotional realities without resorting to amateur counselling. The pace of the mediation may differ for each party in such cases – the mediator may have to spend more time in separate session with the angry party.

Power imbalances

3.8 Some parties come to mediation with a perception that they are in a grossly inferior position as far as their bargaining power is concerned. This is likely to be the case for someone in Ben's position. Even if the imbalance operates only at the level of perception, it is still a reality for the party concerned. In many situations both parties might feel at a disadvantage in terms of their bargaining power, causing anxiety and defensiveness all around. Specific ways of dealing with power imbalances are referred to in Chapter 10.[4]

Fear of losing altogether

3.9 Some parties come to mediation with a perception that they might lose altogether in the course of the mediation process. Even if this is, objectively speaking, an unlikely eventuality it is not less real in the subjective world of the fearful party. Again, someone in Ben's position may have this fear. Specific ways of dealing with this fear are also referred to below.[5]

3 R. Emery, *Renegotiating Family Relationships*, 1994, 26–9.
4 See 10.3–10.10.
5 See 3.39–3.40.

Reasons pertaining to the mediation process

3.10 The mediation process itself can be a source of anxiety and concern. At least one of the parties in mediation has usually not experienced the system before and 'first-timers', such as Ben, are likely to have more anxieties than the 'repeat users' of mediation, as in the case of an insurer or the parties' lawyers. The negative factors relating to the mediation process could include:

- Resentment at having been forced through financial or other circumstances, or the will of a stronger party, to attend mediation.
- Ambivalence about being at mediation, even where they have chosen this option themselves.
- Unfamiliarity with and ignorance about the mediation process and the mediator.
- Uncertainty over the actual role and likely behaviour of the mediator.
- Anxiety about their negotiating abilities.
- Concern about having to compromise on 'matters of principle'.
- Concern about the impact of outcomes achieved at mediation.

Cumulatively these factors could have a deeply negative and distrustful effect on disputing parties as they come into mediation and as they begin participating in the process. The rest of this chapter deals with ways in which the mediator can change the climate to a more positive one.

C. The trust factor

3.11 Experience suggests that a number of factors can contribute to a stormy climate for many mediations. This is compounded by the fact that parties in dispute frequently distrust each other. Here the word trust refers to one person's *willingness to believe, to be open to, and to take risks with*, another person. Another way to talk about trust is in terms of 'risk assessment'. The question then becomes, 'How can the mediation process favourably modify a party's assessment of the risks involved in coming to the negotiations, disclosing interests and needs, and exploring settlement options with the other side?'

Levels of trust may improve, deteriorate or stay the same during the course of the mediation, and a mediation is by no means a failure if the level of trust has not improved. It is too high an expectation of mediators that they turn embattled business partners or sceptical government representatives into trusting comrades. However, high levels of distrust can make it difficult or impossible to come to a joint decision. In these circumstances, mediators can generate some degree of trust in themselves and the mediation process, as a basis for getting the parties to move towards reaching an agreement with each other.

The central assumption here is that if the parties trust the mediator and the mediation process then they are more likely to remain at the negotiating table and to make attempts at settlement than if this trust were absent. Needless to say there are no guarantees.

Generating trust in the mediator

3.12 The objective is that the parties develop trust in the mediator so that they may be able to take risks with him or her which they would not take with each other. Mediators can use the following techniques to impress on the parties that they are individuals who can be trusted:

- by affirming their credentials as mediators and dispute resolvers;
- by showing respect, courtesy and concern for the parties;
- by establishing a personal rapport with the parties;
- by being attentive, through open body language, eye contact
- and appropriate matching, or mismatching, of behaviours;
- through good active listening skills and acknowledgment of the parties' concerns;
- by allowing the parties to vent and to explore their needs and objectives;
- by being impartial and even-handed in the conduct of the process;
- by addressing the parties' concerns about the process and the respective roles at mediation;
- by reassuring the parties that the environment is safe for discussion, exploration and decision-making;
- by showing an understanding of each party's positions;
- by reframing and neutralising language;
- by coaching the parties on appropriate behaviours.

Generating trust in the mediation process

3.13 Here the objective is that the parties develop trust in the mediation process so that they are more likely to remain committed to it and to persist in their attempts to reach a settlement. Mediators can use the following techniques to help the parties generate trust in the process in which they are participating:

- by explaining, normalising and validating the mediation process;
- by reassuring the parties, where possible, on their anxieties about the process;
- by providing for equality of speaking time for the parties;
- by applying the mediation guidelines appropriately;[6]
- by using the separate meetings to keep the process moving.[7]

Helping parties to develop their negotiating abilities

3.14 As negotiation experts, mediators can identify relatively minor issues on which the parties can develop trust before moving on to more substantial matters.

6 See 5.5.
7 See 5.56–5.66.

By initiating successful discussion and decision-making on a 'process' issue, such as the venue for the mediation or the appropriate role for advisers or outsiders, the mediator can stimulate faith in the parties' ability to negotiate successfully together. The same can be achieved by the mediator targeting and gaining negotiated agreement on 'easy' matters first, for example, on where the children will spend Christmas Day in a parenting dispute, or on how interest will be calculated in a commercial dispute.

D. Managing expectations

3.15 In our experience, managing expectations is one of the most important functions of mediators. This function is relevant in relation to the pre-mediation activities of the mediator, to developments within the mediation, and even to what occurs after the mediation.

Reference has already been made to the problems caused by parties who come to mediation in a negative frame of mind and the role of the mediator in dealing with this issue. Conversely, some parties come to mediation with wildly optimistic expectations about the process, the role of the mediator, and likely mediation outcomes. These are some of the unrealistic expectations encountered in practice:

- That the mediation will vindicate the relevant party's version of the facts; it will establish the 'truth', or 'get to the bottom of' disputed facts, or that it will establish 'who is right or wrong'.
- That the mediator will find and hold the relevant party's case to be essentially just.
- That the parties are negotiating over a 'fixed pie' which will not be diminished in mediation, litigation or another dispute resolution process.
- That the mediation outcome will be in accordance with the party's most optimistic settlement prospects.
- That the matter can be sorted quickly, in accordance with a particular party's demands or expectations.
- That if the mediation is not successful the party will be vindicated by a judge in court and receive what they could not obtain in mediation.

These and other similar expectations are often quite unrealistic. One of the ways in which the mediator maintains a favourable climate during the mediation is by attempting throughout to manage expectations by bringing the parties to reality. This is done through the strategies and interventions referred to in this chapter, and throughout this book.

Another aspect of managing expectations is to provide parties with information that challenges 'selective perception'. People in conflict tend to see what they want to see and to distort information to support their expectations. They gather information that confirms their hypotheses and ignore information that does not support them. A mediator can change parties' perceptions through strategic use of information, appropriate questioning, reframing, paraphrasing and reality testing.[8]

8 L. Hall (ed), *Negotiation Strategies for Mutual Gain*, Sage, California, 1993.

E. Strategies for improving the climate

3.16 What follows are suggestions for ways in which mediators might improve the climate in which the mediation takes place. The appropriateness of each strategy will depend on the status and circumstances of each mediation.

Providing ritual for mediation

3.17 Ritual in mediation can take many forms:[9]

> Mediation in western societies has no established tradition of rituals. In communal societies … systems of conflict management … have numerous rituals involving the exchange of gifts, eating, drinking and smoking, signs of respect, singing and movement. Ritual lends a sanctity and mystique to the proceedings, suggesting that the business at hand has a social importance greater than the interests of the individuals. It also lends a sense of purpose and even-handedness to the proceedings. In the absence of equivalent rituals in western mediation, mediators need to consider spending time on preliminary courtesies among all present, on exchanging pleasantries …, on initiating a formal round of introductions, on attending to how the parties should address one another, and on making some acknowledgment and affirmation of all parties present.
>
> Mediators may also provide food, drink and other refreshments, which can be 'ritually' served in a way which shows respect for all and the equality of all parties present. Consumption becomes a common activity, participated in equally by all participants, which temporarily distracts attention from the negative features of the dispute during the settling-in phase.

Imaginative mediators might develop additional rituals appropriate to the mediation process.

Promoting a positive tone

3.18 The mediator sets a positive tone from the outset with a quiet, confident approach and a mood of optimism. This is reinforced by emphasising and upholding the fairness of the process, highlighting its flexibility, benefits and problem-solving nature, and pointing out its ultimate goal ('to reach settlement …', 'to make decisions satisfactory to you both …'). Themes of mutuality and cooperativeness are emphasised from the beginning ('You are here to make decisions to suit both your needs and interests …'). Confidence and optimism are maintained throughout the process by emphasising progress, particularly through the intervention of summarising.[10] Positive language is used wherever possible.[11]

A positive tone can be set by acknowledging co-operation between the parties, or if any positive actions have already been taken, or if there has been a good

9 L. Boulle, *Mediation Principles Process Practice,* 2005, 180–1.
10 See 6.53–6.55.
11 See 6.17–6.18.

relationship in the past. Providing the parties with feedback and suggestions helps them to participate and provides comfort with the process. Asking a party 'what would it feel like if this matter were resolved today' is another technique for encouraging optimism and a future focus.

Providing structure, control and security

3.19 Mediation is not the forum to continue destructive fighting and the mediator must neutralise the situation to some extent. He or she provides a non-threatening atmosphere, controls the parties' accusations and defences to accusations, emphasises the confidentiality of the discussions and otherwise creates a secure environment for dispute resolution. The causes of destructive behaviour, and possible mediator interventions, are discussed in Chapter 6.

3.20 Mediators may encounter threats directed at the structure and control they provide. One of the ways in which mediators provide a favourable climate for decision-making is by taking charge of the mediation procedure and by keeping it moving according to the design plan in respect of which they have the expertise. This function is referred to more fully in Chapter 5. These stages are designed to ensure that the process is even-handed, that each side has sufficient 'air time', and that neither side is able to take control of the mediation or disadvantage the other through tactical manoeuvres. Therefore, at least initially, mediators should be assertive in their process control function.

3.21 The mediation guidelines are a way of asserting control and providing security for the parties.[12] They provide a simple set of standards for behaviour during the mediation and give the mediator some 'objective' criteria against which to measure party behaviour. However, where a party breaches the guidelines, the mediator has a range of possible responses, depending on the severity of the breach and other circumstances of the mediation. Thus the mediator might, in ascending degrees of assertiveness:

- Ignore the breach if it is not significant, or if it occurs very early in the mediation, and continue without any reference to it.
- Distract or disarm the party or parties with a deflective question.[13]
- Neutrally restate the guidelines and ask both parties to recommit to them.
- Rebuke or reprimand the offending party or parties.
- Break into separate meetings in order to discuss the breach.
- Terminate the mediation – a rare last resort in cases of consistent breaches.

3.22 In each case, the mediator will have to make a tactical judgment as to the appropriate intervention. The judgment is made with the overall objective of providing a good climate for decision-making through the appropriate amount and form of control. Sometimes the judgment will be correct, in others it will not, and there is no exact formula which can be applied to all situations.

12 See Chapter 5.
13 See 6.46.

Acknowledging concerns

3.23 Here the mediator does what might not have been done by any other professional or helper with whom the party has been involved, namely to acknowledge the nature and intensity of their concerns. This is achieved through appropriate questioning and active listening, which is dealt with further in Chapter 6.[14] Active listening is hard work. It requires being non-judgmental, picking up signals from body language, and being aware of feelings and emotions, not just the facts.

Normalising

3.24 Normalising is the other side of the acknowledging coin. While mediation clients might be convinced that their problems are unique and unprecedented in their gravity, it is appropriate at certain times to normalise their situation. Thus they might be informed that it is normal for people in business to make mistakes and normal to attribute malice to the other party. Likewise the difficulties which the parties are encountering in their negotiations can be normalised, for example, that it is usual for negotiating parties to feel that they have conceded too much and have difficulty making the final concession.

One objective of normalising is to open the parties to the notion that as other persons have been in their situation, they might consider how they have resolved the same kinds of problem. This is intended to shift them from the perception that their situation is hopeless and without remedy to one in which there are precedents and possibilities which they could be thinking about.

Getting out of the past into the future

3.25 It is normal to feel intense emotion, in particular anger, about the past, but less easy to do so about the future. A discussion about the past can be cathartic for parties. A party may feel it is necessary to explain what steps have been taken to deal with a problem. Some discussion about the past can help parties to explain the context and allow movement so that parties can then turn to a discussion about the future. While a mediation might have to devote some time to dealing with prior events, it is not obsessed with the past and with historical facts, as are other forms of dispute resolution, such as litigation or adjudication.

The mediator is gently able to redirect the parties' attention from a negative and destructive past to a future which can be different and more attractive. Focusing the party on the future also creates an atmosphere of problem-solving. It encourages parties to identify their priorities.

Mutualising the unhappiness

3.26 Charlton and Dewdney use this phrase, which highlights an important educative function of mediators.[15] Parties often assume that the unhappiness in

14 See 6.34.
15 Charlton and Dewdney, *The Mediator's Handbook*, 2004.

the mediation room is theirs alone, and that the other side is in a state of bliss or mild euphoria. Where this is not the case, and it seldom is, the mediator can point out that the other side is in reality unhappy about the fact that they have had to move considerably from their positions or have had to make a concession on key issues. This has the potential effect of reassuring each side on the acceptability of a proposed settlement – while it may not be what they wanted, it is not what the others wanted either. Needless to say the disclosure of the mutual unhappiness might require the consent of the parties – one or both may not wish to reveal the extent of their dissatisfaction with the way the mediation is unfolding and with an imminent settlement.

Reducing the pressure to settle

3.27 There is often a misconception by parties at mediation, especially in commercial cases, that the process is a horse-trading exercise, with pressure being imposed by the mediator and lawyers to settle. It is a considerably more subtle and powerful process. The mediator can challenge parties on their views and positions, on possible solutions and on how workable or realistic various options are.

Where there is a great sense of pressure to achieve resolution in mediation, however, it can provoke resentment, resistance and a major obstacle to settlement. One way of reducing the feeling of pressure on the parties is by reassuring them that they are not obliged to settle in the mediation. This is to emphasise the self-determination principle, namely that it is up to the parties to make decisions on all matters, including on whether mediation is the right place for them to be. In some contexts there might be drastic consequences of not reaching settlement, for example, denial of further legal aid or limited access to the court process. Nevertheless, it is a defining feature of mediation that there will only be a settlement if both parties agree, and the 'no deal unless you both accede' theme can be a reassurance for parties. It could be taken further, with a light touch, for example, 'It's OK not to agree – someone has to make up the 15% of cases that do not settle in mediation.'

This approach also alleviates pressure to rush into making demands, proposals or concessions. In turn, it avoids a rights-based focus, and can provide an opportunity to re-focus attention on parties' concerns and needs and to explore how those might be met.

Relieving tension through humour

3.28 Humour can be an appropriate way of relieving tension in many situations, from the classroom to the dentist's room. Humour provides physical relief through laughter, relaxes people emotionally, and takes them out of the characters they have been playing. Laughter is also a shared and common response from people who might not have much else in common. It can also provide insight and a change of perspective.

In mediation, the timing and focus of humour is critical. Mediators should leave their party routines at the door, and use great sensitivity in the joke-telling department. If humour is used too early it may set a flippant tone and suggest that the mediator is not taking the matter seriously enough. It should preferably be aimed at mediators'

own frailties ('Please speak up, I'm deaf in one ear and can't hear out of the other') or at the situation ('No one gets to relieve their bladder until we've settled') and should not be aimed at the parties.

Acknowledging autonomy, status and roles

3.29 Fisher and Shapiro provide a model for creating a positive emotional environment, which recognises that:

- Parties need freedom and space to make decisions.
- Parties need acknowledgement of their status and expertise to effectively engage in negotiations.
- Parties need to feel that they have fulfilled a role in negotiations.[16]

F. Dealing with intense emotions

3.30 Emotion can be triggered more quickly than it takes the rational mind to assess a situation and decide how to react. While 'positive' emotions, such as joy and contentment, are not a major problem ,'negative' emotions, such as fear and anger, are a difficult challenge for most mediators.

Intense and strongly expressed emotions can seriously affect the climate of a mediation. Strong emotions are often expressed in mediation, despite the naive view that because mediation is a 'collaborative' and 'non-adversarial' process all destructive and negative elements are miraculously avoided. This view confuses structure, on one hand, with style and behaviour, on the other. Mediation is collaborative in structure, but this will not always prevent parties from being positional, adversarial and bloody-minded in style and behaviour.

3.31 Some mediators attempt to prohibit the expression of negative emotion as it is seen to be dysfunctional in the mediation, although one suspects that it might also be because they feel uncomfortable with high emotion themselves or do not feel professionally equipped to deal with it.[17] Suppressing emotion is not normally effective:

- Any attempt to suppress emotion may not work.
- Suppressing emotions can impair a person's cognitive skills.
- Avoiding or suppressing emotion can lead to poor physical and mental health.
- Avoiding emotion can lead to poor outcomes, ongoing conflict and difficulties with compliance with agreements reached.[18]

16 Roger Fisher and Daniel Shapiro, *Beyond Reason – Using Emotion as you Negotiate*, Viking, New York, 2005. Refer also to Robert S. Adler et al, 'Emotions in Negotiation – how to Manage Fear and Anger', in 14 *Negotiation Journal* 16 (1998).

17 See also H. S. Golann and D. Golann, 'Why is it Hard for Lawyers to Deal with Emotional Issues?' in (2003) 9 *Disp. Resol. Mag.* 26

18 C Freshmen et al, 'The Lawyer-Negotiator as Mood Scientist: What we Know and don't Know about how Mood Relates to Successful Negotiation' in (2002) *J Disp Resol* 1.

As the expression of emotion is an important form of communication, a blanket prohibition policy will restrict certain forms of communication and undermine many of the potential benefits of mediation. Legitimately expressed anger can have the advantage of indicating to others a depth of feeling, and even sincerity. However, anger can also change the parties' focus from the problem to the emotion, cloud their objectivity, lead to angry retaliation and entrenchment.

3.32 There are various ways of dealing with strongly expressed emotions during the course of a mediation. There are differing views in the literature and among mediation practitioners about the most appropriate interventions. In keeping with the style of this book, no attempt is made to indicate whether a particular approach is suitable or not. Instead some suggestions are made as to the potential advantages and disadvantages of each. As usual, these responses shade into one another and there may be elements of more than one in a single mediator intervention.

Some ways in which mediators might respond to intense feelings are set out below. Reference will be made to the following workplace fact scenario in assessing each approach.

Fact scenario

Ian, a supervisor, has demoted and changed the sales areas of Patricia, a salesperson, for not meeting her specified performance criteria. Patricia has lodged a complaint over the demotion and changed sales areas. In terms of company policy the matter has been referred, in the first instance, to the HR director, who undertakes an internal mediation. Patricia has just had an intense outburst of anger and frustration over victimisation, discrimination and lack of training, allegedly arising from Ian's actions and inactions.

Discourage the expression of intense emotion

3.33 Mediator: 'Patricia, it's not going to help here if you get angry and shout. Let's talk about how you calculated your sales figures against the target figures for the last six months.'

As suggested above, this is often the practice of mediators who feel unable to deal with high emotion or regard it as irrelevant to the problem, and therefore attempt to prevent its expression as soon as it commences. This might be advantageous where resource limitations necessitate only a very short mediation and the parties need to be kept focused. It has the potential disadvantage, however, of causing further frustration and discontent for the emotive party and of jeopardising the longer term success of the mediation.

Ignore the emotion and proceed with the mediation

3.34 Mediator: 'Patricia and Ian, I thought you were trying to provide some answers to the second question on the flipchart, namely how can the sales areas be divided in a way which is fair to Patricia and other salespersons. Let's see how this can be done …'

Here the mediator does not intervene to suppress the expression of emotion, but ignores it and moves on. He uses the visuals on the whiteboard to focus the parties' attention on the problem, and distracts them from the interpersonal hostility. This has much the same advantages and disadvantages as the policy of discouraging the expression of emotions in the first place. A refinement on this strategy involves distinguishing between positive and negative emotions: mediators acknowledge and validate the former, for example, the optimism and hope present in the early stages of a joint initiative between the mediating parties, and ignore and disregard the latter, for example, intense anger over a party feeling betrayed.

Acknowledge the emotion, and then continue

3.35 Mediator: 'Patricia, it sounds as though your treatment has made you extremely frustrated and angry and that your last four months at work have been exceptionally difficult….'.

Here the mediator explicitly acknowledges the presence of the emotions, and their intensity, whether they are expressed directly by the party, or are merely evident from behaviour, tone of voice or body language. This approach is designed to give the emotive party the experience of being heard and understood by at least one professional. There is an expectation that this validation will encourage Patricia to move forward from the emotional state to practical decision-making. This intervention (if it happens in a joint meeting) also results in the other party having to listen to the emotion being identified and named by the mediator. Some mediators are nervous that such acknowledgment might provide a licence for more extensive emotional outbursts and further complicate the dispute. However, acknowledgment does not equate with approval, and in our experience, continued emotiveness is a rare occurrence where strongly felt emotions are expressed and acknowledged. The mediator might wish to add an educational dimension to this approach by indicating that mediation in itself might not resolve the intense hurt or anger and that other forms of assistance would be appropriate for these goals.

Encourage venting of the emotion

3.36 Mediator: 'Patricia, tell Ian exactly what you felt about the demotion and what effect it had on you emotionally and physically …'.

Here the mediator explicitly invites an expression of emotion: in turn, the mediator might (if this is in a joint session) invite Ian to explain how he felt about making the demotion decision or how he feels now about Patricia's condition. The advantage of this approach is that it allows the parties to get things off their chests, to release pent-up feelings and, after an emotional catharsis, to move on to the problem at hand. Judgment and control is required if this is done in a joint session to ensure that neither party is injured by the other's emotional venting, and there also needs to be a limit on the duration of this exercise. This approach has the same potential benefits and disadvantages as the previous one. It might be particularly valuable where a party is inhibited or uncomfortable about expressing emotion without some encouragement from the mediator. It can also be a particularly valuable way to start a private session following a highly emotional opening.

Identify and deal with the underlying problem therapeutically

3.37 Mediator: 'Patricia, it sounds as though you have been traumatised by this ordeal, and that you have lost confidence and self-esteem. You may also be clinically depressed. Those issues need to be dealt with first …'.

This response is something that can only be undertaken by those professionally qualified to do so. It has the advantage of dealing with underlying emotional or relationship difficulties which might prevent the parties from coming to a decision, or which might jeopardise the long-term durability of any decision reached. It has the disadvantage of delaying the making of decisions on matters requiring immediate attention, and of blurring the boundaries between mediation and counselling. Many mediators would adjourn the mediation and refer Patricia to another professional if they decided that the problem needed therapeutic handling.

In selecting a strategy the mediator needs to recognise the emotion distinct from the symptoms (for example, a party may be attempting to suppress fear or anger), diagnose it tentatively, and test out an intervention:

- If the diagnosis is that a party is deliberately using anger to force a compromise, the appropriate response may be to ignore it.
- If the mediator diagnoses a potential build-up in emotion, he or she may attempt to defuse it.
- If the emotion is genuine but not too serious the mediator might use behavioural techniques such as calling for an adjournment, bringing in refreshments, conducting a round of separate meetings, getting the parties to write points on the whiteboard and making other changes in the process to allow for a cooling-off.

Ultimately, mediators are providing a secure environment in which the dispute can be played out in a constructive manner. As with other skilled helpers, mediators also need to be attuned to their own responses to emotional outbursts and develop mechanisms to manage those without affecting the mediation.

G. Dealing with criticism

3.38 Because of the way in which mediating parties view the dispute and each other, they often expressly or impliedly engage in criticism. Many people deal poorly with criticism as it is often experienced as an attack on the innate value of the person.[19] This provokes an angry, defensive or diversionary response.

Ideally, mediators should attempt to keep the parties out of a cycle of criticism, defence, justification and counter-criticism, though this may not always be possible or even wise. Indeed, they should try to understand better what the criticism is about and acknowledge the underlying emotional feelings.

Where there is strong criticism, mediators need to judge which of the following strategies, or combination of strategies, might be appropriate. The responses are

19 Sheehy, *Pathfinders*, 1982.

based on a manufacturer criticising a supplier for being 'slack, inept and unreliable' over times for the delivery of supplies:

- Reframe the criticism in terms of actions, events or views and not in terms of the innate value of the criticised party:[20] 'Are you saying that the late deliveries affected your production schedule?'
- Ask the criticised party to make a response in relation to the action, behaviour or idea, and deflect attention from the self: 'Are you able to explain what made it difficult to deliver the goods on time?'
- Ask the criticising party to move from the general to the specific and to avoid imputing motives to the other. 'In relation to timing of deliveries, can you give some examples of when the goods arrived after the date on which you expected them?'
- Ask the criticised party to indicate how they feel about the criticism, and get the criticising party to respond to the other's feeling statement: 'How does the manufacturer's criticism make you feel?'
- Ask the parties to suggest ways of dealing with the criticism in the present and for the future: 'Are there ways in which you can ensure reliable deliveries in the future?'

H. Overcoming clients' fundamental fears

3.39 It is clear from the previous sections in this chapter that mediators can have an important role in reducing the defensiveness of the negotiating parties. Many parties in mediation anticipate the worst possible outcome (for example, that they will never see their children or that they will receive no compensation for their injuries or that their business might not survive) which causes them to defend their positional claims at all costs. Of course, there may be some realism to this anxiety, but a party could also be negatively obsessed with an outcome which has not been decided and is not inevitable. In either event, this fear-induced defensiveness is not conducive to constructive problem-solving.

3.40 Haynes and Charlesworth refer to the need for mediators to attempt to reduce the defensiveness of the parties.[21] They suggest that the mediator can reduce fear early in the process by asking the parties, 'What is the worst possible outcome of working with me?'

When a party outlines any fear, it is usually an unrealistic concern, that is, one based not on fact but on emotion. The mediator then asks each party if they can agree that the worst fear of the other party will not materialise in the mediation. For example, in a family dispute, if both parents state that the worst possible outcome would be 'losing the children', the mediator asks each parent to affirm that the other will not lose their role in parenting the children in the negotiations. As this is understood and accepted by each parent, the need to defend against the possibility is diminished, and each parent can spend their energy thinking about new solutions rather than defending against old fears.

20 On reframing, see 6.38–6.44 and the examples in Appendix 5.
21 Haynes and Charlesworth, *The Fundamentals of Family Mediation*, 1995, 163.

The same strategy can be adopted in respect of any mediation where the 'fundamental fear' syndrome is evident or suspected.

I. Preserving face and avoiding loss of face

3.41 Here the term 'face' is used in a loose way to refer to the need which people have to retain a sense of dignity and self-worth in the eyes of others and in their own eyes. Conversely, a loss of face involves a perceived loss of dignity and self-worth. The 'face' issue can be a major factor in the continuation, escalation or even origins of conflict, whether between two siblings over their academic achievements or between two countries over their performances in a soccer match.

A mediating party might feel they have lost face where they have made significant concessions from their original position; and their refusal to make further concessions, however commercially logical, might be motivated by the need to maintain vestiges of face. Another common occurrence is for a party to be motivated by the fear of how they will appear to outside 'ratifiers' if they make further concessions.[22] In each case this subjective factor becomes the dominant interest of the party, as opposed to the objective factors over which they are negotiating.

While the 'face' phenomenon is probably common to all strands of humanity, it does have different significance in different cultures. In some cultures any notion of compromise or concession on principle involves a loss of face, whereas in others the problem is less acute.

3.42 The ideal is that in mediation everyone should preserve face, and conversely, that no-one should lose face. Mediators can contribute to these goals by conducting the mediation along best-practice lines in terms of the principles referred in this book. In addition, there are some specific techniques which can be adopted:

- Using 'objective criteria' as a basis for getting a party's agreement rather than having them feel that they are conceding to the other side's proposal.[23]
- Using the technique of blaming a third party, such as the bank or the government or an external factor, such as the economy, in order to remove blame and a sense of responsibility from the disputing parties.
- Using the 'scapegoat strategy'. This is where the mediator engineers things so that the parties can blame him or her for a proposal or outcome, thereby justifying their own conduct. Alternatively, the mediator might personally endorse a mediated outcome, even in writing, in order to assist one of the parties to deal with outside ratifiers or constituents. This is, however, a risky strategy and might lead to the mediator being held liable for the outcome.[24]

22 See 5.75.

23 'Open to reason, closed to pressure' to use the language of Fisher and Ury in *Getting to Yes,* Hutchinson, 1992. See also 7.43–7.45.

24 On liability issues, refer to the Australian case of *Tapoohi v Lewenberg and Others* [2003] VSC 379 (10 October 2003) and the New Zealand case of *McCosh v Williams* [2003] NZCA 192 (12 August 2003). Refer also to Chapter 12.

- Using the technique of 'mediator vulnerability'. If one party does not understand a term, ask for your sake that it be explained. If the parties continually interrupt each other, explain that you are having difficulty in hearing or concentrating on what is said. Again, there are obvious limitations on this technique, lest you appear feeble.
- Providing reasons for a change in negotiating position, for example, 'in the light of the new information which you have heard for the first time today …', or 'in light of the concessions you have heard them make …'. These can be useful interventions for professional advisers who need face-saving reasons for departing from the advice they have previously given to their clients.
- Using interim agreements. This is a classical negotiation strategy and is used to get deals accepted on a short-term basis ('say for the next two months …') without making any face-losing concessions on matters of principle which can still be negotiated on in the future. In some cases 'the temporary becomes the permanent' and the interim agreement is ratified without problem because it can be done without loss of face.

3.43 The following scenario illustrates some of the above principles.

Case illustration: improving the climate

A young child had died during surgery to correct a heart defect and the parents brought an action against the public hospital. After a lengthy coronial inquiry, legal proceedings had been instituted by the parents. The mediation was conducted in difficult circumstances because of the grief of the parents, the continuing semi-denial of the mother over the death of her son, the seeming intransigence of the hospital and the government's concern about adverse publicity which was escalating in the media.

The following steps were taken to improve the climate for the parents:

1. A relaxed, informal venue was chosen for the mediation (namely, the clubhouse of a golf-course).
2. Care was taken in restricting the number of professionals at the mediation; all parties agreed to exclude barristers, technical experts and accountants who might otherwise have been present.
3. The parents were educated extensively by their lawyers and the mediator about the nature of the mediation process and about their own roles in it.
4. Through prior agreement of the professionals, the parents were given extensive time to talk about the circumstances of the accident, the effect of the loss on their lives and their outrage at official responses to their plight, without any restrictions in relation to length or relevance.
5. There was considerable acknowledgment by the hospital's solicitor, who had undertaken mediation training, of the parents' loss, anger and frustration.
6. During the 'technical' discussions on liability and quantum of damages the parents were allowed to leave the room and wander around the grounds, returning in their own time.

7. When agreement was reached on all matters, it was further decided to allow the parents 24 hours in which to consider the agreement before committing to it.

While these actions were mainly for the benefit of one party only, they had the support of the others, and illustrate the practical application of some of this chapter's principles.

J. Summary

3.44 This chapter raises the following points of particular significance:

- Mediators need to be aware of a range of negative emotions or feelings which mediating parties may have.
- In order to generate an improvement in the climate of the mediation and manage the clients' expectations, mediators need to develop their clients' trust both in themselves and in the mediation process.
- While the mediator is not acting as a counsellor or psychologist, he or she needs to draw from a broad range of techniques inherent in the mediation process to improve the problem-solving climate for the parties.

K. Tasks for beginner mediators

3.45 Identify a dispute of some magnitude in which you have been involved as an employee, a consumer, a tenant or a student. Write out a list of the things which the employer, retailer, landlord or educational institution did or did not do between the emergence of the dispute and its 'resolution' and describe the effect these factors had on your emotional state.

3.46 Assume you are the mediator between Ben and Southern Farms. What steps would you take to create a favourable climate for Ben? What effect might these steps have on the representative of Southern Farms?

3.47 Discuss with a friend or colleague how each of you responds to intense sadness and anger. Develop some strategies you might use for dealing with these emotions if you were working as a professional mediator.

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