

Maximising self-determination — deal or no deal

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In thinking about the term “self-determination”, I have been wrestling with what it means, what are the key elements of self-determination and why it is that self-determination has any relevance or importance to mediation.

Prior to the creation of the *Australian National Mediator Accreditation Standards* in 2008 the usual definition of a mediation process was that of Folberg and Taylor in 1984:¹

... mediation is a process in which the participants with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and aim to reach a consensual agreement that will accommodate their needs.

In this definition the aim of mediation is to reach agreement.

After my early training as a mediator in 1992–93 I followed the sage advice of one of my early trainers, to conduct the interest-based process without change or demur for at least 200 mediations. This I faithfully did with some interesting consequences.

The disputes, with some rare exceptions, settled.

At these mediations, the disputes, which were almost all commercial in nature, focused on the content and rights-based aspects, ignoring or shutting down any relationship or emotional component of the dispute. I thought the emotional content was a distraction which would impede settlement. The parties, or rather their legal practitioners, tended to convert both the material and emotive elements of the dispute into money; in much the same way as economists do when describing money as merely a means of exchange. Thus money became the *lingua franca* of the mediations.

Initially I took great pride in the part I played in these mediations. Both the process skill, which I thought I brought, as well as my capacity to convert these disputes into money transactions could be chalked up as apparent successes.

The legal practitioners were of course great combatants, advocates and aides in achieving what Folberg and Taylor defined as the aim of the process, ie “a consensual agreement that will accommodate the parties’ needs”. However, as Immanuel Kant said: “Out of the crooked timber of humanity, no straight thing was ever made.”²

The parties’ “needs” had been redefined primarily as financial needs — the likelihood of success at trial, the cost of the litigation and the consequences of success or failure in obtaining the requisite rights-based orders at court. And so like lemmings, the parties and practitioners came and converted their needs into tangible negotiables and I, as a Pied Piper, assisted them to do so.

Initially, as I have said, I considered these outcomes as great successes. I had followed my mentor’s advice and stuck to the letter and spirit of the interest-based framework, and done so by assisting the parties to achieve a consensual agreement. However, I wondered if these outcomes were in fact successes and whether or not the agreements were accommodating the parties’ needs.

Increasingly, I observed that parties were entering into agreements reluctantly. Often, after executing terms of settlement, parties showed little or no indication of any joy, relief, reconnection or re-engagement with the other. Rather I often observed resignation, despondency, alienation and hostility towards the other.

This raised many questions in my mind. Was Folberg and Taylor’s assertion that the purpose of a mediation process was to achieve a consensual agreement actually correct? Was there necessarily a correlation between a consensual agreement framed through the legal prism of a financial means of exchange and the needs of the parties? Might the needs of the parties go beyond a financial resolution? Was the breakdown in the commercial relationship of the parties purely related to power or rights? To what extent were the parties’ human or emotional needs or values creating the climate for the dispute and to what extent did these have to be addressed within the mediation? What was the importance of the parties setting their own goals rather than proceeding on the assumption that a consensual agreement was the sole objective?

I have grappled with these questions since 1995, particularly the last question which can also be expressed as the relationship between making a deal and self-determination. What are the consequences if any part of a deal is made with little or no self-determination? What

if any consequences are there for a deal if self-determination is achieved? If self-determination is important, what actions or approach support it and what might undermine it?

The notion of self-determination appeared in Australia in 2008 in the *National Mediator Accreditation Standards — Practice Standards* (Practice Standards).

In Standard 2, entitled “description of a mediation process” the following sentence is highlighted in a box immediately below the title: “The purpose of a mediation process is to maximise participants’ decision making.”

Mediation is defined in s 2(1) of the Practice Standards as:

... a process in which the participants, with the support of the mediator, identify issues, develop options, consider alternatives and make decisions about future actions and outcomes. The mediator acts as a third party to assist the participants to reach their decision.”

Section 2(3) says “The goal of a mediation process is agreed upon by the participants with the assistance of the mediator.”

Note that in these definitions settlement is not the aim.

Section 2(4) identifies a number of non-exhaustive possible opportunities that mediation may provide participants:

- a) assist the participants to define and clarify the issues under consideration;
- b) assist participants to communicate and exchange relevant information;
- c) invite the clarification of issues and disputes to increase the range of options;
- d) provide opportunities for understanding;
- e) facilitate an awareness of mutual and individual interests;
- f) help the participants generate and evaluate various options; and
- g) promote a focus on the interests and needs of those who may be subject to, or affected by, the situation and proposed options.

Section 2(5) states that: “Mediation is essentially a process that maximises the self-determination of the participants.”

Thus, since 1984 there has been a significant shift in concept from mediation being a process that primarily aims to reach a consensual agreement that will accommodate the participants’ needs,³ to mediation being a process that assists parties to make decisions, ie maximises the self-determination of the parties. The notion of self-determination extends to the goals the participants may set, the opportunities the parties may have within the mediation and the decisions the parties may reach.

These changes highlight three important questions:

1. What does self-determination mean?

2. Is the change important and if so how?

3. What impact might the change have on mediation practice?

Here are some dictionary definitions of self-determination:

- *The American Heritage Dictionary of the English Language* defines it as “determination of one’s own fate or course of action without compulsion; free will”.
- In the *Collins English Dictionary* it is “the power or ability to make a decision for oneself without influence from outside”.
- *Merriam-Webster’s Collegiate Dictionary* describes it as “the freedom to live as one chooses, or to act or decide without consulting others”.

Isaiah Berlin, the British philosopher, said:⁴

Few things have done more harm than the belief on the part of individuals or groups that he or she or they are in the sole possession of the truth; especially about how to live, what to be and do and that those that differ from them are not merely mistaken but wicked or mad, and need restraining or suppressing. It is a terrible and dangerous arrogance to believe that you alone are right: have a magical eye which sees the truth and that others cannot be right if they disagree.

Berlin’s observation is powerful. This often describes the perspective of each of the participants. It is in my view even more apposite where the mediator believes that he or she knows best.

As Kenneth Cloke says:⁵

... for mediators ... how do we know, even in petty conflicts, whether we are silencing the disempowered or achieving a temporary peace by suppressing someone’s desire for justice? How can we be sure we are not promoting peace to reinforce an unfair status quo or petty tyranny? What do we do when we discover that our efforts at settlement have turned into a form of suppression?

I have, on a number of occasions, spoken to people who have taken part in mediations who felt that the outcome of the mediation was a fair, consensual agreement. However they were extremely distressed by the mediation and went on to say that they would never use mediation again. This, you can imagine, raised my curiosity.

Why so, I asked? The answer invariably was along the lines that although the outcome may have been fair from a financial or economic perspective, and may well have been a good resolution of the court case, they had been unable to talk about what was important to them. Either they were shut down by their lawyer or the mediator and told that those issues would not assist the

resolution of the matter, or they were placed into separate rooms so that they had no opportunity for any dialogue or decision making around what should or could be discussed.⁶

Viktor Frankl was a psychiatrist in Vienna prior to the outbreak of World War 2. He survived the war in a number of concentration camps. He describes his experiences in his book *Man's Search for Meaning*. While the book describes the privations and brutality of the existence he endured, his primary purpose is to examine the role and importance of self-determination and meaning in life.

He describes an opportunity to escape:⁷

I made a quick last round of my patients, who were lying huddled on the rotten planks of wood on either side of the huts. I came to my only countryman, who was almost dying, and whose life it had been my ambition to save in spite of his condition. I had to keep my intention to escape to myself, but my comrade seemed to guess that something was wrong (perhaps I showed a little nervousness). In a tired voice he asked me, "You, too, are getting out?" I denied it, but I found it difficult to avoid his sad look. After my round I returned to him. Again a hopeless look greeted me and somehow I felt it to be an accusation. The unpleasant feeling that had gripped me as soon as I told my friend I would escape with him became more intense. Suddenly I decided to take fate into my own hands for once. I ran out of the hut and told my friend that I could not go with him. As soon as I had told him with finality that I had made up my mind to stay with my patients, the unhappy feeling left me. I did not know what the following days would bring, but I had gained an inward peace that I had never experienced before. I returned to the hut, sat down on the boards at my countryman's feet and tried to comfort him; then I chatted with the others, trying to quiet them in their delirium.

Reflecting on the importance of self-determination, he said:⁸

... it becomes clear that the sort of person the prisoner became was the result of an inner decision and not the result of camp influences alone. Fundamentally, therefore any man can, even under such circumstances decide what shall become of him — mentally and spiritually.

Frankl concludes by saying:⁹

Life ultimately means taking the responsibility to find the right answers to its problems and to fulfil the tasks which it constantly sets for each individual. These tasks and therefore the meaning of life differ from man to man, and from moment to moment ... No man and destiny can be compared with any other man or any other destiny. No situation repeats itself, and each situation calls for a different response.

Self-determination does not necessarily lead to the best outcome from a rational point of view. It may not lead to the most successful legal outcome. However, as Frankl demonstrates in the starkest of ways, it is essential for an inner peace and equilibrium to be

achieved and perhaps even more importantly, it enables us to take ownership and responsibility for the outcome.

What impact does the aim of self-determination have on mediation practice?

It has been an essential part of our culture to look for rational answers, rather than to trust individuals to use intuition. Ever since Descartes said: "I think therefore I am", rational thinking has been the guiding light of Western values. There is an idea that persists in the mediation world which runs counter to self-determination. This is the notion that professionals know what is best or are expected to know what is best for people in conflict. It is also counterproductive to self-determination, when coupled with a desire to protect or shield people from their relative disadvantage. Each of these approaches tends to limit or hinder self-determination, as does the desire or need to impose process steps or rules on participants.

The shift in focus to self-determination in the Practice Standards acknowledges that the notion of rational deal making, based on what "makes sense" to us as mediators, is not certain to lead to satisfaction or find support from the participants in a conflict and if imposed is likely to diminish any real commitment they might have to the outcome.

I have observed that the automatic and consistent response to difficult conflict always entails a twofold response. First, a sense of disempowerment is reflected through uncertainty, lack of clarity and emotional upset. Second, there is a sense of alienation from the other, self-absorption, and a perception that the other is the cause of all your pain and suffering.

The antidote to this experience is to help people find their voice and make choices through empathic dialogue processes. This inevitably involves a three dimensional approach in which the mediator assists the parties to consider the content of the dispute, the process used, and their emotional responses so that they can make the decisions they need to, whatever they relate to. Open minded and open hearted processes are essential to support people in making difficult choices about their own priorities and to enable them to be responsive to those with whom they are in conflict.

What does this mean for mediation practice?

How can we best support self-determination?

These are big questions which need to be addressed; unfortunately I can't do that today. What I can say, in the briefest of terms, is that as mediators we need to:

- collect without judgment all available information about the content of the dispute and the parties' emotions or their values from their words, their body language and through the use of all our senses and intuition;

- monitor our impulses as mediators to intervene in the parties' dialogue and ask ourselves honestly whether these interventions are likely to support or hinder the parties' own efforts in making decisions or their engagement with or responsiveness to the other party. We must do this whether our desire to intervene and "help" deals with the content of the dispute, the process to be used or in the emotions expressed; and
- respond openly, honestly, intuitively and, most importantly, empathically to support but not lead the parties in their decision making and/or their attempts at responsiveness to the other party regardless of whether it leads to resolution or not and whether or not it makes rational sense to us.

These are of course merely general comments, which I have found to be fundamentally important in maximising parties' self-determination while performing my duties as a mediator.



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Footnotes

1. J Folberg and A Taylor *Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation* Jossey-Bass Publishers, San Francisco 1984 p 7.
2. H Hardy (ed) *Isaiah Berlin: Letters 1928-1946 Volume One* Cambridge University Press, 2004 p 72.
3. Above, n 1.
4. I Berlin "Notes on Prejudice", 1984, cited in *New York Review of Books* 18 October 2001 p 12.
5. K Cloke *Mediating Dangerously: The Frontiers of Conflict Resolution* Jossey-Bass Publishers, New York 2001 p 21.
6. This was illustrated in T Sourdin and N Balvin "Mediation in the Supreme and County Courts of Victoria: a summary of the results" (2009) 11(3) *ADR Bulletin* 1, available at <http://epublications.bond.edu.au>.
7. V Frankl *Man's Search for Meaning: The classic tribute to hope from the Holocaust* Ebury Publishing London, 2004 p 68.
8. Above, n 7, p 75.
9. Above, n 7, p 85.