



Chartered  
Institute of  
Arbitrators

**CI Arb**

---

# ARBITRATION

---

THE INTERNATIONAL JOURNAL OF  
ARBITRATION, MEDIATION AND  
DISPUTE MANAGEMENT

Volume 73  
*Number 1*  
*February 2007*

THE CHARTERED INSTITUTE OF ARBITRATORS  
in association with

**THOMSON**  
—★—  
**SWEET & MAXWELL**

# The “Everywhen”<sup>1</sup> Mediator: the Virtues of Inconsistency and Paradox: the Strengths, Skills, Attributes and Behaviours of Excellent and Effective Mediators

by AMANDA BUCKLOW

## 1. INTRODUCTION

In a conversation with David Cornes earlier this year, I suggested that being a mediator was like being a photographer, in that a photographer is:

“looking for the detail that makes the picture; looking for the point of balance which is a reconciliation between several elements; reframing; editing and putting people at ease within a context that shows them off to their best advantage. If you get all those about right then any shortcomings on the technical side fade away.”

The metaphor might have been specific to our conversation, but the thinking behind it emerged from the responses to the interviews I had conducted as part of my research project. You will find some of the results, as revealed by practitioners and those who appoint them, throughout this article. However, these simple lists and charts are reductive and they are like words without the tone of voice and body language to complete the picture. Indeed, the most revealing part of the research was the narrative of the interviews and how people responded to the questionnaires and the insights they had along the way.

## 2. BACKGROUND TO THE RESEARCH

For the last 15 years and for some longer than that, mediators have been fully engaged in establishing mediation as the preferred method of alternative dispute resolution (ADR). We have been outwardly focused explaining the benefits of this very efficient process, lobbying for support, competing for work, developing training and more besides. As a consequence there has been neither time nor imperative to look within.

The available research would seem to endorse this. There are surveys and research papers about attitudes towards ADR, who is using it and how well it works and there are papers on the skills of a mediator mostly to provide some excellent guidance about selecting a mediator.<sup>2</sup> It is for the most part focused on tangible skills and tasks.<sup>3</sup> My research set out to

<sup>1</sup> Term coined by the anthropologist and historian, Professor W. H. Stanner to describe the Australian aboriginal concept of “Dreamtime”. Dreamtime is a condition beyond time and space where all things exist at once. This does not mean that they do not have a concept of linear time, but they consider the *everywhen* of the Dreaming to be objective, whilst linear time they consider a subjective creation of wakeful consciousness. This is in the reverse of the European concept which views dreams as subjective and linear time is considered objective. The condition that is Dreamtime is met when the tribal members live according to tribal rules and traditions and are initiated through rituals (process) and the hearing of tribal myths (stories).

<sup>2</sup> For example: “The Selection of the Mediator” by Margaret Shaw, Adjunct Professor, New York University School of Law (New York, United States of America), 1996: [www.wipo.int](http://www.wipo.int).

<sup>3</sup> In 2002, Mediation and Training Alternatives (MATA) conducted a short study called the Advanced Mediator Skills Project. The results underpinned the content of the much respected Advanced Mediator Training Course and series of annual Master Classes.

identify intangible strengths and to make a step towards what Shaw called the “unmeasurable” by focusing on what it means to be a mediator. Some mediators might prefer to resist such an examination in case, as one respondent put it, “by understanding what it is, I might lose the magic”.

It was not my intention to demystify or take away the magic, but I did seek to provide a better understanding of what is “magic” or intangible and what is tangible (measurable) through the identification of important strengths, skills, attributes and behaviours from both sides of the mediation relationship. For it would seem a difficult task indeed to improve or indeed retain something if you don’t know what it is or if you think you know what it is and actually you don’t! Indeed a better understanding is essential in order to inform decisions about standards of practice.

The research project was focused on the positive aspects of being a mediator. Having said that, I will mention that there was a very small number of criticisms. These stories were not sought; they were given as examples of when the “positive” didn’t happen. For example, one mediator left the mediation without telling anyone and no one realised for quite some time that the mediator had indeed gone home (respect, commitment). In another, the mediator told one side early on that their case was “hopeless” (toned down version for publication), at which point their lawyer decided the case needed more work before going any further, thereby bringing the mediation to an abrupt end much to the fury of the other party (offering legal opinion, preparation). Without an understanding of the context and the precursors we cannot say whether or not this was appropriate, only that the parties were left feeling cross.

For the most part, our profession has measured success by settlement rates and repeat business with irregular feedback forms thrown in. Add to that the isolation within which most mediators operate and the limited scope of further training, and you don’t have a convincing package for either understanding what you are doing well or where you might best develop your skills. Indeed, the majority of respondents commented that the questionnaire was the first time they had had the opportunity to reflect on their practice and style in a structured way. One respondent went further and said:

“something like this should definitely form part of the mediator accreditation process. I would like to have a questionnaire like this one to help me become aware of changes in my approach and attitudes. It should happen at least every six months.”<sup>4</sup>

I mention feedback forms. At this point it might be worth looking a little more closely at what they mean for us, since feedback is considered one of the principle sources of information on what works and what doesn’t work. Feedback forms were my starting point for information on “strengths” in scoping the research questionnaires and in particular for the end-user part of the research. I gathered countless quotations from feedback to collate the initial 40 adjectives that end users had used to describe their experience of mediation. The resulting analysis revealed that just four (10 per cent) could be considered measurable. They were communication skills, experience, knowledge (commercial) and managing the process.

Over the years the feedback form has become both less meaningful and more meaningful for me and that is true whether it is positive feedback or not so positive. I think the reason for this is that we are in a phase where the benefits of mediation are better understood, but what makes effective mediators is not, and at the same time the more experienced you are the more “daring” you become in some ways, which increases the risk of getting something

<sup>4</sup> A questionnaire and assessment, designed to help mediators and those wishing to train as mediators to establish an understanding of their style and or suitability for mediation, is in development at the time of writing.

## THE “EVERYWHEN” MEDIATOR

wrong. We are by nature people who seek newness and challenge and how else are we to know whether or not our risk-taking was appropriate?

Feedback forms tend to record the way parties feel at the end of the mediation and in many cases may even record those feelings several days or even weeks after the mediation. If the feedback is positive, then it is frequently non-specific. By that I mean that respondents may or may not be able to identify behaviours or qualities in relation to specific points of the mediation. If, on the other hand, the feedback is not so positive, then there is often a dilemma about taking it on board. Personally, I do pay attention to comments, because they are the valid view of the “customer” and what they think really matters; and equally I don’t when I can recall some mitigating factor. For example: after a mediation which settled very well to everyone’s satisfaction, one of the parties, who had used mediation on several occasions, noted the following on my feedback form: “I think all mediators should be harder on the participants . . . I think we could have got to the £sd more quickly”. Apparently the feedback wasn’t entirely personal, but of course I considered it as if it was and it made me uneasy! At the same time, I wanted to say that his opposite number was so much better prepared than he was; had coached his client including a run through of many different scenarios and they had a plan. The party clearly felt supported and able to negotiate well. Sadly, we don’t often get the opportunity to have that conversation.

I am conscious that on this occasion I didn’t do a better job of communicating why I adopted the strategy I did—and I will do better next time! My observation is that I accepted and at the same time rejected the feedback. However, this is not about selective listening. It is about two apparently conflicting states being true at the same time: confident and uneasy. I have found this to be a consistent theme in the results of my research. I have noticed from the interviews and the results that mediators operate in a place where they are in two apparently conflicting states at the same time and it is this phenomenon that makes them both effective and excellent. Mediators, it seems, are masters of paradox,<sup>5</sup> are apparently inconsistent and have made a virtue of that! Here are a number of examples. I am sure you can think of others:

- being pragmatic and optimistic;
- being firm and flexible;
- being supportive and challenging;
- being impartial and on side;
- being with the parties and keeping a space between you and the parties;
- being sensitive and having a fairly thick hide;
- being committed and detached;
- having influence and not influencing;
- raising the eye line and bringing people down to earth;
- creating stability and mixing it;
- directing and following;
- making things simple and revealing the complexity;
- being tough and soft; and
- being informed and insatiably curious.

It was clear from the narrative that this was “at the same time” and not at different stages of the mediation. Interestingly, this was a constant theme in the responses from both the mediators and the end users.

<sup>5</sup> “A seemingly absurd or self-contradictory statement or proposition which when investigated or explained may prove to be well founded or true; somebody who has qualities that seem to contradict each other”, *Oxford English Dictionary*.

### 3. DESIGNING THE QUESTIONNAIRES

In scoping the project and designing the interviews I wanted to capture both the instinctive responses and more reflective responses. There was a need to make it reasonably short so that respondents were not over-burdened and yet long enough to enable me to get beneath some of the preconceptions which are particular to mediators and end users of mediation because we have (through our intensive marketing) written an effective script.

The research is qualitative and that made it necessary to pay extra attention to strict protocols to ensure consistency of approach and therefore reliable results. For example, each interviewee received exactly the same introduction to the interview to explain what, why and how. I also had a number of additional questions which were the same for everyone only to be used if they raised the relevant issues. I also had a list of consistent “prompts” for when respondents faltered. From the interviewees’ point of view they were not aware of this, so it appeared to them that the interview was more free-form than it actually was.

The end user questionnaire was even more structured than the one designed for practising mediators. The reason was that I allowed for the adjectives to emerge from the mediator’s narrative and I wanted to provide a more structured base from the end users to compare the results. The user questionnaire was also designed to cross check initial responses not once but twice after the interviewee had “warmed up”, thereby capturing instinctive and considered responses. And this is where one of the most interesting results emerged. Over 80 per cent of end-user respondents said at some point something like “but I’m contradicting myself aren’t I?” or wanted to revisit what they had said earlier in the questionnaire in order to be consistent and then found that it didn’t help in making the choice. They found it challenging and frequently gave examples of when what they had just said might not be true.

Several respondents preferred a facilitative mediator, but also one who would be prepared to “take people on”. Another volunteered “openness and transparency” as essential and yet earlier in the interview “very open” was marked as not relevant. I don’t believe that this was simply inconsistency, but rather a discovery that to feel openness and transparency is essential as part of a very complex package and that “very open” in isolation is not an absolute requirement; in fact on occasions it might be quite disconcerting. End users like to know what they are getting in a mediator, but not that the mediator is predictable. In selecting the mediator they want certainty and comfort, but not necessarily during the process. One end user described one mediator’s style as “it depends what he had for breakfast”, yet found him very effective. Another mediator was described as having a very facilitative style and very open, yet was at the same time described as a completely closed book!

There is not enough space to continue with the numerous examples to be found in both sides of the research. The analysis of this extremely rich data will continue for some time and certain questions invite further research in order to provide useful insights.

In the title of this article I refer to the “everywhen” mediator. This is the way I articulate what I have understood. I have borrowed the term from Professor Stanner<sup>6</sup> and I use it to describe what we are and where we are when we are doing things well and why seemingly contradictory states may nonetheless co-exist. There is a “Dreamtime”<sup>7</sup> quality to a good mediation. It is a time and space when all things can exist at once—the past, the present and the future—where everybody can be objective or observers of what is happening and still be in the picture. It is possible (and the research says desirable) for mediators to be alongside the parties and still remain impartial and where many things are possible without reference to linear time. I for one am constantly delighted and amazed at how much can be achieved in such a short space of “time”, most of all when everyone’s stories can be told and heard through the process (ritual).

<sup>6</sup> Above fn.1.

<sup>7</sup> Aboriginal people call Dreaming or Dreamtime the *all-at-once* time because they experience it as the past, present and future co-existing.

## THE “EVERYWHEN” MEDIATOR

Dreamtime is a place that musicians go when they improvise. Improvisation in this context is not about “making it up” or having a great idea or insight to get you out of a hole. Improvisation is only possible when you have endlessly practised the scales and arpeggios and indeed continue to practise them every day. Those exercises become a stepping stone to “possibility”, where you may break the rules without losing your audience. However, improvisation rarely happens at the beginning of a concert. The performer must first create the possibility by building trust.

It is also the same place that artists go. Botticelli has a problem with human anatomy! The arms on his cherubs would cause real consternation you if you saw them on a real child! And Michelangelo’s *Pietà* suggests an impossibly tall Madonna and yet looks perfect.

### 4. PROFILE OF MEDIATORS

There are some statistics on the profile of mediators that I think might be useful to note. Averages disguise extremes and the extremes often provide the most interesting points, but in the case of *age* the average is fairly representative of the majority at 55 years. The youngest was 44 and the eldest 77; 68 per cent were men and 68 per cent were lawyers, although not the same people. As it turns out, this is probably a representative sample in terms of balance. The group (30) had completed over 1,200 mediations during the previous 12 months.

I was interested to see if cultural background would reveal anything particular or common amongst mediators, so I included a general warm-up question about cultural background. The prompts I used to encourage the flow were type of school/education, born/lived/worked abroad, military service and any religious influence. Over 66 per cent reported a strong faith-related or ethical influence during their early lives.

The average number of years practising as an accredited mediator was 13.4. This was a very experienced group. The breakdown is:

No. of years	% respondents
4–7	33.33%
8–11	26.66%
13–17	40%

There was a specific question about what motivated them to become mediators. I suggest there are two groups: those who were the pioneers and those who joined a more established profession. Arguably, those with 10 years’ experience or more might be considered as the pioneers. The replies were varied, but on closer inspection they fall into three overarching categories.

1. pure frustration with the law:

- “on the point of leaving the law ...”;
- “disappointed in settlements achieved through litigation and arbitration”;

2a. More suited to personality or natural way of doing things:

- “a better way to do business ...”;
- “fell into it”;
- “someone put a name to what I was doing naturally”;
- “I liked settlements and finding solutions”;
- “I liked the more durable and creative nature of the solutions”;
- “I was a round peg in a square litigation hole (sic)”;
- “a natural progression from what I was doing and I wanted to add ‘neutrality’”;
- “I had relevant skills and liked the immediacy of helping people”;
- “seeking something more collaborative”;

— “I spent most of my time as a barrister persuading people not to litigate”;

2b. Frustration was often combined with more suited to personality:

— “frustration with the law and it equated to the way I looked at life”;

— “square peg in a round hole; the way I see the world; it integrates my personality”;

— “seemed familiar to me, I enjoyed understanding the underlying agendas and I think the law courts are a blunt instrument”;

— “alternative to the adversarial processes”;

3. Curiosity:

— “the enthusiasm of someone already doing it”;

— “I experienced a mediation and wanted to know more”;

— “changing career, I liked the “newness”.

There was also one that combined all three:

“frustration with the effort of going to trial especially when you have an idea how it will turn out; natural facilitator, wanted to try something new.”

There was a small number that didn't quite group!

— “told to go on the training course”;

— “I was speaking on the subject and thought I had better train”;

— “to earn a living”.

The predominant theme may be summarised thus:

“becoming a mediator allowed me to better express my personality and my natural attributes in my work and gain much more satisfaction in doing so.”

What is remarkable is the capacity for “work” from this group, equalled only by their enduring enthusiasm for their “work”. It suggests that when you are in the right place, doing the right thing, then energy and capacity grow out of all proportion to expectation. Perhaps an “everywhen” mediator doesn't get tired, which is bad news for those hoping they will retire!

## 5. FRAMING THE QUESTIONS

It might be helpful to describe the way in which the questions were framed. For the purposes of assisting respondents and to bring a measure of consistency to the resulting data, there were separate questions on characteristics/attributes, core skills, core strengths and behaviours. It was important to use these classifications in order to understand what were considered skills. As I have mentioned, my preliminary review covered material that was for the most part focused on tangible skills and tasks. Indeed, Shaw<sup>8</sup> makes the following comment on the importance of building trust:

“At least one commentator has objected that ‘building trust’ is a key to effectiveness as a mediator (Salem, 1993). While this Methodology does not disagree as such, to use such a term directly is to pursue the unmeasurable. Furthermore, mediators engage in certain behaviours to gain the parties’ trust—and those behaviours can be described more easily. The document therefore treats trust-building as a compound product of many of the tasks and skills it describes.”

<sup>8</sup> Above fn.2.

## THE “EVERYWHEN” MEDIATOR

Ten years on and based on this research, I suggest that building trust is much more than the expression of tasks and skills and I would say the same about building rapport.

The terms used were defined to each respondent as follows:

- characteristics/attributes are personal to the mediator and part of their personality and/or developed or acquired as part of their professional life;
- core skills can be trained or enhanced through training;
- core strengths were not explained, as I wished to capture what the respondents thought strengths were in order to cross check with the other “explained” categories;
- behaviours are the outward expression of underlying values, e.g. respectful.

These definitions were intended to be helpful to those who were not familiar with these terms in this context, terms which are hotly debated in the academic world as is the definition of competency!

The beauty of the English language is its richness and the infinite degrees of meaning. That is not such a boon when undertaking qualitative research. So by necessity there has been some categorisation informed by the context in which the “description” was used. Throughout the research it was a real benefit to be an experienced mediator both in terms of understanding the context and clarifying meanings as far as possible. Fortunately (and unfortunately) mediators are very precise with the English language and most attentive to degrees of meaning.

Here are the top five in no particular order.

Core mediator strengths reported by mediators:

- listening;
- building rapport with people;
- having empathy;
- being patient;
- having a sense of humour;
- having stamina/persistence.

Core mediator strengths reported by users of mediation:

- communicating with clarity;
- building rapport with people;
- inspiring trust;
- having empathy;
- being incisive;
- being professional.

Apparently no surprises until you look a little closer. First, mediators didn’t mention trust as often as you might have expected. I noticed this during the interviews and towards the end of the interviewing (and after the completion of that particular interview) I asked one mediator why he hadn’t mentioned trust. He replied “probably because I consider trust as a given”. I have not had the opportunity to check with the handful of other respondents who didn’t make a point of mentioning trust.

I also find it very interesting that mediators placed high importance on having a sense of humour, whilst mediation users often marked sense of humour as either “useful sometimes” or “not relevant”. I wouldn’t be without mine in a tricky moment! Many mediators described a sense of humour as being an important part of “building rapport” and changing the dynamics particularly when people are tired and need to keep going. It is an important



way of communicating energy and helping to shift a mind set. Laughter has a powerful physiological effect on the body.<sup>9</sup>

Being incisive is an interesting inclusion in the top five. It was most often revealed within the context of speed and efficiency which tugs a little at "patience", although it sits well with intelligence and "quick grasp of the issues", which were both frequently mentioned by mediators and end users as essential.

These simple lists filter out the nuances contained within the narrative of responses. This is particularly true of the user responses. I frequently noted a conflict between the criteria for choosing a mediator and what was actually valued during the mediation. This is where the "contradiction" occurred. This is the area that the questionnaire checked three times.

First I asked the respondents if they had chosen the same mediator more than once, why they chose the same mediator and why they chose a different mediator. Then they were asked to think of up to three mediators and describe their style: facilitative, evaluative and blend on a scale of 1 to 10. For the purposes of the research, "facilitative" was described as not offering an overt opinion either legal or commercial, but possibly "skilled at suggesting without being directional". "Evaluative" was described as willing to offer an opinion, either legal or commercial, and openly suggesting settlement figures. Furthermore, a "blend" was a scale of 1 (facilitative) to 10 (evaluative). When asked which model had been the most successful for them in terms of (i) outcome and (ii) overall experience, the answers were:

- facilitative model: 47 per cent;
- evaluative mode: 10 per cent;
- blend (average 5 on the scale): 47 per cent;
- no preference: 6 per cent.

I note that in the final sentence, where respondents summarise what makes an excellent and effective mediator, not one mentions the ability to offer a sound opinion or expert knowledge. Even those who preferred a more evaluative style were more interested in experience and communication skills (being similarly measurable). I must mention one which I particularly liked:

"An excellent and effective mediator should be ... someone with a proven record of mediation, professional and courteous exterior and when required the necessary deviousness."

For my future research I have an interesting question. Having observed how important the intangible strengths are to the quality and effectiveness of the mediator, which have their roots firmly in the persona and not the role, there is a strong sense of "being there", substance but not "weight". I have discovered some very interesting research in the area of clinical medicine on the nature of the placebo.<sup>10</sup> One particular study on the effectiveness of a certain type of knee surgery concluded<sup>11</sup>:

<sup>9</sup> The effect of laughter on the central nervous system is not well known. There is an increase in catecholamine levels. Current theories suggest that this may affect mental functions such as increasing interpersonal responsiveness, alertness and memory. W. F. Fry Jr, "The Physiological Effects of Humor, Mirth and Laughter" (1992) 267(13) *JAMA, Journal of the American Medical Association* 1857.

<sup>10</sup> A drug containing no active ingredients given to a patient participating in a clinical trial in order to assess the performance of a new drug.

<sup>11</sup> J. Bruce Moseley and others, "A Controlled Trial of Arthroscopic Surgery for Osteoarthritis of the Knee" (2002) 347:2 *New England Journal of Medicine* 81-88.

## THE “EVERYWHEN” MEDIATOR

“In this controlled trial involving patients with osteoarthritis of the knee, the outcomes after arthroscopic lavage or arthroscopic débridement were no better than those after a placebo procedure.”

Some might assume that the treatment was not effective. However, Moseley was intrigued and in a subsequent interview<sup>12</sup> suggested that it was the attention, listening and hearing the patient, the care, passion and enthusiasm with which the team approached the patients that might have a significant role in why the placebo was just as effective. Research continues.

Furthermore, in a similar link with medicine, universities in Israel have adopted a new selection procedure<sup>13</sup> for medical students designed to reduce the rate of attrition at universities and during the early years of medical practice by “examining qualities such as sensitivity, integrity, empathy and interpersonal communication” and “candidates receive points for involvement in a certain hobby for years, such as playing the violin, because this attests to perseverance”. You might think that these qualities have always been important for doctors and yet the selection criteria have been academic excellence. It looks like things are changing.

On a final note I will extend my original metaphor by adding:

“... and you do this in a place which is both here and out there, connected and detached. It is a place where you are simultaneously in the picture and not in the picture but not at the expense of practicality, pragmatism and good process.”<sup>14</sup>

<sup>12</sup> Professor Kathy Sykes, *Alternative Medicine*, BBC2, February 7, 2006.

<sup>13</sup> Tel Aviv University, Technion—Israel Institute of Technology, Hebrew University in Jerusalem, Ben-Gurion University of the Negev.

<sup>14</sup> I would like to thank all those who participated for their generosity in revealing what they really thought in a way that I consider to be a personal compliment. I continue with my interviews in order to build the database which I hope will make a contribution to the wider understanding of strengths and the role they play in professional competence. I also thank Dr Alex Linley, previously at Leicester University and now Director of the Centre of Applied Positive Psychology ([www.capp.eu.org](http://www.capp.eu.org)) for his invaluable support in this pioneering partnership and for the validation, encouragement and hard work in providing the results. Any shortcomings are mine. Anyone who wishes to contribute to my research can contact me by completing the enquiry form at: [www.amandabucklow.co.uk](http://www.amandabucklow.co.uk).