

SESSION #7:
Mediation Tool Kit

Moderator: Catherine Bickley, Pay Equity Hearings Tribunal

Speaker: Kathleen Kelly, ADR Chambers

This session had three parts: an interactive exercise based on Edward De Bono's Six Hats, an overview of four performance-based mediation processes and a collection of mediation tips and strategies.

1/ Edward De Bono's Six Hats

Ms. Kelly involved the audience in a role-playing game. The goal of the exercise was to help us formulate better processes and procedures at our respective tribunals or boards, based on the teachings of Edward De Bono.

Imagine a circle of coloured hats. Each colour has a meaning.

The white hat represents neutral and objective information like facts, figures, objectives, criteria.

The red hat is intuitive, how we feel about something.

The black hat is the negative, what is wrong with a concept or what can go wrong.

The yellow hat represents the benefits, what is positive.

The green hat represents creativeness.

The blue hat represents the process and procedure, an overview, an agenda.

The audience was then divided into groups. The groups were given 3 minutes to reflect on the meaning of each hat and how it would relate to the creation of a mediation program. After each brainstorming session, thoughts were compiled, and we moved to the next hat/colour. The goal was to have everybody think at the same time along the same lines. Ms. Kelly pointed out that although it would not be possible to work out an entire plan because of time constraints, the audience would nevertheless get some sense of the de Bono approach and technique.

Blue hat: How do you develop a performance/result-based mediation program that gets cases closed, settled or resolved with durable and implementable solutions that respect the public interest mandate of your tribunal? A good question, requires no further development or parsing.

White hat: What are the facts, figures, statistics, or other information you need to set up a program? Variables might include: number of cases, number of adjudicators necessary, hiring criteria for adjudicators, location of the mediation sessions.

Red hat: How do you feel about a performance/result-based mediation program? Feelings were mixed. There could be challenges to independence. Will results be threatened by performance-driven mediation?

Black hat: What are the negatives of this goal? Results could be set too high; a cookie-cutter approach to mediation could be disastrous; a result-driven approach might pressure people to have recourse to mediation.

Yellow hat: What are the positives in a performance/result-based mediation program? Cost savings; greater congruency and addressing the public interest in terms of time constraints.

Green hat: What creative ideas, solutions can you think about for a performance-based mediation program? Make sure that clients know what to expect from the mediation (this might include streaming the clients).

2/ Four Examples of performance-based mediation programs:

(1) the *Consortium for Appropriate Dispute Resolution in Special Education (USA)*;

(2) the *United States Institute for Environmental Conflict Resolution (USA)*

Both these programs look at performance measures provide an interesting illustration of the role-playing game that the audience had just played.

The Consortium for Appropriate Dispute Resolution in Special Education found that the cost per participant in mediation was lower, that it took less time to refer a case to mediation, that the outcomes were more durable and the relationships between the parties improved. Other advantages of this system were: appropriateness and usefulness of the mediation process, the preparation of the mediation, the education of the client. Education may help the outcome. Fairness of the mediation is a hallmark (tell the story, feel understood, receive respectful treatment, control over outcomes according to the participants). The knowledge, impartiality and skills of the mediator are crucial.

The Consortium was innovative in evaluating performances of ADR processes by obtaining feedback from participants but also from other parents, mediators and school personnel. Their questionnaires, asking what works in mediation and what needed to be changed, were distributed in person, by mail and online.

The United States Institute for Environmental Conflict Resolution also uses performance measures. Full or partial agreements were reached; signed agreements were made; agreements were implemented; costs to the participants were favourable; outcomes of the mediation were positive and satisfied the participants; durability of the outcomes; fairness, impartiality and knowledge of the mediator; program neutrality; impact on the relationships between parties.

Ms. Kelly stressed the importance of the last point (impact on relationships) for those working in tribunals. Parties who participate in a respectful process keep that feeling for the long term. This is beneficial to the parties as between themselves, and the parties vis-à-vis the tribunal.

The Institute uses multi-agency evaluation forms which allow homogeneity in the evaluation criteria. Several assessment tools were developed.

(3) *Centre for Effective Dispute Resolution (CEDR, United Kingdom)*

The CEDR published its 4th Mediation Audit (May 11, 2010) available online for download (<http://www.cedr.com/news/?347>). The Audit underlines the efficiency of mediation processes. Ms. Kelly pointed out the high amount of savings for national economies by achieving earlier resolutions of cases, and the importance of the value of the cases mediated.

(4) *United States Navy*

The Navy reported that a case normally takes 528 days to reach a final agency decision. On the other hand, ADR resolves cases in an average of 23 days when used in the informal stage. More formal settlements usually take 338 days.

Ms. Kelly then moved on to giving practical tips and strategies regarding mediation processes.

3/ Mediation processes: tips and strategies for mediators

- Educate and explain the process to the parties. Demystify the process and explain how it is different from other processes.
- Make parties aware that they are empowered, including not to settle, or to articulate what they would like in their agreement.
- Remember that you do not own the dispute and that the parties have the obligation of working towards a settlement. A mediator is there to help the parties reach an agreement but is not under the obligation to reach an agreement.
- Remember that you have to be careful of your body language, facial expressions, tone of voice.

Ms. Kelly showed the audience three acronyms to remember key strategies as a mediator. They allow parties to overcome impasses.

a) LIAR:

- **L**isten. Listen to the story, the complaints, the hurt.
- **I**dentify the issue or emotions being expressed.
- **A**cknowledge the emotion, validate the feelings, (ex: if that happened to me, I might feel offended too).
- **R**espond appropriately to the initial story and to the complaint.

LIAR must be applied in sequence, otherwise the recipient will keep talking and will not feel satisfied.

b) PIES: this tool helps determining what people want.

- **P**ositions
- **I**nformation

- **E**xpectations
- **S**olution

c) CINS: this tool helps determining why people want something.

- **C**oncerns
- **I**nterests
- **N**eeds
- **S**olution

Each tool is illustrated online with a story. See presentation slides for more detail.
