

Manipulation the technique that dare not speak its name

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The title of this presentation comes from a throw away remark I made to a colleague when we were discussing my complete inability to come to grips with transformative mediation, a technique which I have heard described as, "one which honours the capacity of the participants to run the mediation process themselves, with minimal or no intervention and thereby come to agreements that are fully devised and owned by them." This is a noble aim and one which I am singularly ill equipped to achieve. I manipulate and I think the majority of mediators do too. It's time we came out of the closet.

At the outset I assert that mediation is a self selecting profession. We all come into mediation from various fields with a particular and, with only a modicum of hubris, I would say, impressive skill set. We generally have high emotional intelligence, we read people well. We also have good timing and an extensive vocabulary range which we use with precision. We are empathetic. Importantly we generally like and are interested in people, and not in a creepy way. My argument is that those who don't have these skill sets soon leave the profession and those of us who do, use them, usually to manipulate. We honour our participants by assisting them, through manipulative techniques, to hear what the other has to say often for the first time in a long time, and to help externalise the disputes that they have in a way that allows them to examine and resolve them.

James Coben (2000) twigged to this some time ago. Coben, from the Hamline School of Law, wrote about manipulation as "mediation's dirty little secret". Interestingly this view has changed over time as Hamline founded its own ADR stream. Coben and Love (2011) have recently concluded that manipulation per se is not dirty and developed a framework for assessing the grubbiness of particular techniques.

So, how do we manipulate the mediation process? Let me count the ways, and in relation to a topic that is dear to the heart of every family law mediator: nits. Nits can be the source of toxic and ongoing conflict between separated parents.

We reframe statements in order to take the edge off hard meanings, or blur definitions to achieve shared meanings and shared understandings. *Client one: "I don't want them to be coming back to me with nits again. It's not rocket science to get the shampoo and do their hairs so get off your bum and do it."* *Client Two: "Yeah well I do wash their hair, it's not my fault your house is dirty and your partner's kids are so lousy they keep getting them over again."* *Mediator: "So, nits are a problem for both of you hey. And a really big problem I bet for the kids when they get sent home from school."*

We use humour to defuse tension and maintain rapport. *Mediator: "I'll tell you something. Most mediators I'm sure wish there was such a thing as a national nit day, where all the children in Australia got treated at the one time. It'd solve a lot of problems."*

We reality check to keep clients in the problem solving mode. *Mediator: "My former manager told me of one case where it cost the parents \$40,000.00 in legal fees, all over nit treatment!"*

And we empathise. *Mediator: "I can remember when my kids had nits; it was a bummer of a job to get rid of them. The first time, I didn't realise I had to wash all the bedding on the same day so they got the embarrassment of being sent home from school a second time, and I got all the looks from the other mothers in the playground"*.

Of course we also use those well known soft techniques. We provide a comfy space to mediate in (unless we are government funded of course, in which case we buy our own Minties and sit in Officeworks chairs).

Before the mediation ever commences we make connection with our clients, we establish rapport.

During the mediation we question with a purpose. For example, a common question in family law disputes is *"How do you think it feels to be your child in the world right now?"* Or *"How do you think your child would feel in her tummy if she were in the room right now?"*

These are all manipulative interventions, precise and well timed and to what end? In sum I would say they are to allow clients to stop feeling like they are intrinsically bad and start feeling that they can see the problem for what it is and work towards fixing it. In essence we are intervening to enhance the clients' capacity to come to their own resolution.

Critiques of mediation have honed in on our techniques they say we manipulate to push for solutions and settlement.

I believe they have missed the point and have mistaken or conflated skilled negotiation, with its attendant strategic positioning and game playing, with mediation. The skills we use are more subtle and much more powerful. We mediators know that we wield the power of the force. And so, to use Yoda's words "use it wisely we must".

How do we misuse our manipulative techniques? Purely and simply we become emotionally immersed in the dispute, we find we have a stake in the outcome and start using our skills to obtain it. This misuse is usually picked up on pretty quickly by our clients. But before that even happens, we can recognise it ourselves. The next time you have a mediation which doesn't work out, or where complaints are made, examine how you felt during the process. I would lay money on the fact that you felt it in your gut the moment things started to go awry. Hone your awareness of that feeling.

Another way that we keep ourselves true is to use a particular skill that mediators have, and which I have not yet heard defined in a word, which is to be simultaneously completely engaged with our clients and at the same time, stand outside that engagement to continuously analyse and strategise. We take part and we watch ourselves as we take part. That skerrick of distance allows us to internally vet and fashion the interventions we make.

We also have a code of ethics that we earnestly believe in. I do not know one mediator who has ever knowingly violated that code.

We are transparent with our clients. We let them know, in our private pre mediation session with them that we will be using techniques to progress the mediation, and we describe those techniques.

We never ever lie. If we have never had kids with nits, we would never say that we had, just to empathise. I have so I can.

And finally, we are clever enough to know there will be occasions when mediation is not the answer, times when fierce advocacy is needed and we are wise enough to know that we have to tell our clients that.

So there you have it. For those of you who recognize yourselves in this paper, a warm rainbow welcome. For those who don't I very much look forward to hearing your views at the conference.

References:

James Coben 'Mediation's Dirty Little Secret: Straight Talk about Mediator Manipulation and Deception', Journal of Alternate Dispute Resolution in Employment, 2000, Vol 2, No 4, p4

James Coben and Lela Love 'Trick or Treat: The Ethics of Mediator Manipulation', Dispute Resolution Magazine, Fall Issue 2010 pp17-19 and p30

Clare Swetenham, former Manager South Australia Centacare Family Dispute Resolution who I credit with the assessment technique of "knowing in your gut when it has gone wrong."