



Two years' research into the skills, attributes and behaviours of effective commercial mediators has produced some interesting findings for mediators and users of mediation. Amanda Bucklow outlines her research, based on the experience of more than 2,000 mediations

About 2,700 years ago, the Etruscans started building the city of Rome. Originally emigrants due to famine in their homelands, they brought with them a wide range of skills in engineering, medicine, divining and the plastic arts (using materials that can be moulded or modulated in some way). Their understanding of medicine and health prompted their ingenuity in designing drainage and water delivery solutions. They favoured teamwork, collaboration and strong alliances.

For a time, the Etruscans coexisted with the Romans, but the Etruscans were finally absorbed by their neighbours and their art and beliefs were promptly discarded. But their practical skills were adopted and, for a long time, considered Roman rather than Etruscan.

You might be forgiven for thinking that I am about to relate this story to the potential waning of litigation in favour of mediation, but in fact the last thing I hope for is the decline of effective litigation. It is an important part of a democratic society. I wish to propose something else — that the intangible strengths, the artistry and magic of mediation, the very strengths that

are at the heart of its success, are at risk of being discarded or marginalised in favour of pragmatic, practical and 'measurable' strengths.

The swinging pendulum

Ten years ago, the legal profession was cynical about mediation. Today, mediation is viewed, for the most part, as an important dispute resolution skill by lawyers, coexisting with full-blown litigation skills.

For the most part, the current enthusiasm and acceptance of mediation is very good news indeed. I am, however, reminded of the ancient proverb: "Be careful what you wish for, lest you get it" or, alternatively, the Law of Unintended Consequences.

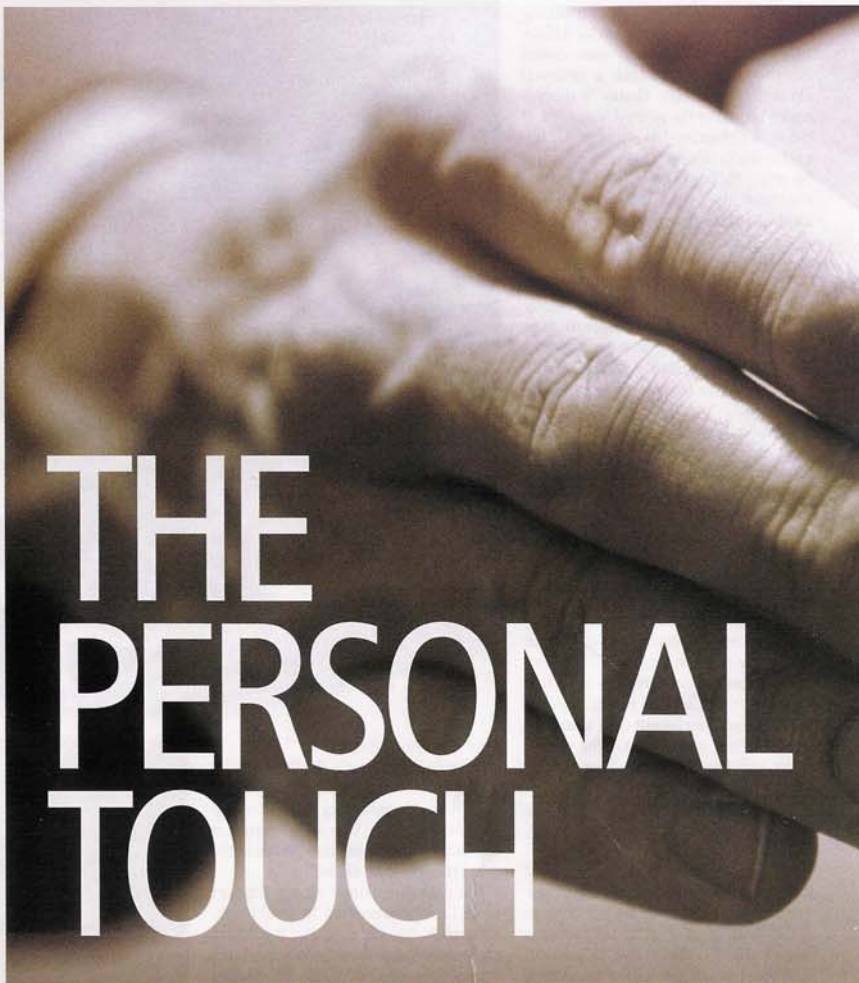
I say this because I sense most strongly that the pendulum is about to swing past the point of balance. I hear my mediator colleagues debate the virtues of arb-med, describing how the parties want mediators to be evaluative, the challenges for mediators on deciding if they should direct the parties towards a settlement figure, and placing settlements in envelopes because the parties want a decision having paid £Xk to hold the mediation. All of these developments are apparently in response to the market and the consumer.

I cannot deny that when these versions of mediation are practised by very experienced mediators in certain circumstances they can be appropriate and effective. However, the practice requires great subtlety and skill. I have seen it done very badly. Parties have told me that they have experience of it being done very badly and that it felt like 'bullying'.

The trend raises important questions:

- Exactly who is the consumer?
- What are the underlying beliefs influencing the acceptance of the trend?
- Why would a party want to swap one kind of judgment for another?
- Is it simply that they get to choose the 'judge' rather than have one imposed on them?
- Is it a question of more certainty — more control, perhaps?

The acceptance of the trend also suggests a devaluation of the skills, qualities and attributes that experienced (particularly non-lawyer) mediators develop and use to get out of 'deadlock' and achieve settlement. From my research those are principally about building rapport, lis-



THE PERSONAL TOUCH

'MEDIATION IS MUCH CLOSER TO AN ART THAN A SCIENCE. YOU WILL LOSE THE ARTISTIC FLAIR AND FLAIR GET SETTLEMENTS. YOU WOULD NOT TELL MATISSE THAT HE SHOULD BE REGULATED'

Martin Fox, CMS Cameron McKenna



tening, stamina, empathy, patience and humour. (See box, page 27)

When I ask my colleagues (mediators and lawyers) they tell me that parties are asking for mediators to be 'more evaluative'. Are they? Since most parties are first-timers, how would they know to ask for that?

Compassion and optimism

Two years ago I became very curious about this emerging trend. My provisional research had revealed a very interesting phenomenon. I found about 40 adjectives that parties use to describe their positive experiences of mediation in their feedback. Of those 40 words, only four are concerned with cost, speed or expert knowledge and none refer to anything like adjudication or evaluation. The skills and qualities that are valued by parties and their advisers who have experienced mediation are essentially the intangible human qualities of, dare I say it, compassionate people.

For example, trustworthiness, gravitas, patience, confidence, even-handed-

ness, impartiality, optimism, persistence, understanding, imagination, empathetic, instinctive and, most interestingly, 'quick on the uptake'. And the most frequently mentioned of these is optimism...

I was surprised, and my surprise raised more questions. Would mediators and parties corroborate the stories and perceptions that were becoming common currency? Did anyone still value the potential therapeutic benefits we talked about in the early days, albeit *sotto voce*?

I am a well-known advocate of the therapeutic effect of mediation. This potential for bias makes me even more critical of my observations and, try as I may, I do not see therapeutic potential as incompatible with a good process and a pragmatic outcome. Nor with speed, reduced costs or efficiency — on the contrary. When the underlying belief that the role of a mediator was to be 'attendant' to the issues, it worked rather well.

I do believe that there is a vital interdependence to be nurtured between the legal process and the mediation process



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Jane Andrewartha, Clyde & Co



'THERE IS NOTHING QUITE LIKE THE PHYSICAL EXPERIENCE OF THE PARTIES OF BEING STUCK IN THE SAME PLACE — WITHOUT THAT YOU WILL NOT GET A RESULT'

Jamie Morck-Mason, Hill Dickinson



there are three key features: someone's behaviour was unacceptable to someone else; someone broke their word either unintentionally or because it no longer suited them to keep it; someone is unwilling or unable to take their share of responsibility or continue with their undertakings. The underlying emotion is survival or fear of not surviving and the antidote to fear is not certainty, but courage.

Mediation is a people process and people are unpredictable. What parties and their advisers seem to value most about mediation is its flexibility, informality and creativity and perhaps the encouragement that mediators bring in all sorts of guises.

What I see is a really exciting opportunity to continue in the same pioneering spirit that has ensured the development of mediation over the past 15 years. My preferred route would be to resist regulation *per se*, and focus on selection and training of mediators which includes appropriate recognition of the essential 'people skills'.

I am motivated to propose this because of two important factors in my own work. First, I am a vocational mediator and extremely interested in maintaining the quality and variety of practising mediators within the profession. Second, a great part of my professional life has been spent dealing with competency-related issues and the way we value people. In many disputes there have been issues of competency, of not feeling valued, or a focus on performance indicators or targets.

Indeed, the way we measure, monitor and motivate people at the moment and the focus on performance makes far too many ill, as the rise in stress-related cases might confirm. There are more doctors, lawyers and other 'regulated' professionals in therapy at London's pri-

vate clinics than you might imagine.

On the other hand, every mediator colleague I know loves their work. When I asked each of my interviewees what motivated them to become a mediator, all but one replied with a version of: 'I just saw it as a better way'.

I would like to see the profession rise to the challenge of an alternative to imposed regulation. The opportunity is to design a form of management with a 'lightness of touch' which is more about selecting and training people with a strong suit in intangible strengths and developing those strengths. One day, with the work being done in 'positive psychology', we might be able to measure them.

When mediation was less established, those who chose to do the training did so because of personal motivations and very often they had to pay for it themselves. There was an inbuilt self-selection process which worked very well. Now that mediation is a desirable skill for the CV, many more are doing the training without the same analysis or personal investment. I am delighted that more are training. I believe that it is a unique and valuable life skill, but I do see more and more who perhaps should not practise.

Our success in meeting this challenge would be a triumph, not just for the mediation profession, but in leading the way for professions generally. So can we aspire to a form of management that reflects the spirit of the profession and keeps it focused on human skills? I imagine the Etruscans might have an interesting point of view with the benefit of hindsight. ■

Amanda Bucklow is a full-time commercial mediator and trainer. The research has been conducted in association with Dr Alex Linley, Leicester University and the Centre for Applied Psychology.

and that neither should become the other. They have much to offer in making each more effective in meeting society's needs. I am, however, deeply uncomfortable with the increasing emphasis on the tangible benefits that mediators bring to settling commercial disputes at the expense of their intangible strengths.

I see the change as an indicator or symptom of a more significant shift in the way mediation is practised which will eventually change the profile of practising mediators and reduce the breadth, depth and variety of the profession.

Understanding behaviour

Over the past 12 months, I have interviewed a significant number of mediators and 'serial' mediation users. Their combined experience of mediations is close to 2,000 cases — I believe we must take the opportunity to try to understand the value of attributes and behaviours which are hard to measure and then actively protect them until we understand why they work.

If the trend continues towards an even

greater degree of adjudication, then the very things that make mediation work well will be filtered out. The people who do it well will either be 'shaped up' into a certain mould which appeals to a structured and risk-averse culture where skills are counted and boxes ticked, or they will be excluded. Someone in authority will become nervous that some mediators are making judgments with no supervision or proven ability.

It is then only a short step to regulating the profession in the belief that it will control the risks and protect the consumer. I am convinced that it will do neither, because I do not believe we have the appropriate capabilities to deal with regulation of a profession in which most of the skills cannot be measured.

My research indicates that just 10% of what makes an excellent and effective mediator can be measured. The balance of 90%, the intangible qualities and attributes, is highly valued by the parties and their advisers.

When it comes down to a simple assessment of why disputes happen



'THE COMMERCIAL MARKETPLACE DRIVES COMPETENCE AND PROFESSIONAL EXPERTISE MUCH MORE EFFECTIVELY THAN REGULATION. IF YOU DO A BAD JOB, YOU LOSE YOUR REPUTATION'

Trevor Chamberlain, Beachcroft

MEDIATION — THE CORE SKILLS

Core mediator strengths; reported by users of mediation

- Communicating with clarity
- Building a rapport with people
- Inspiring trust
- Empathy
- Being incisive
- Professionalism

Benefits of regulation; reported by users of mediation

- Boosts professional credibility and public confidence
- Allows increased numbers of mediators through recognised training routes
- Quality assurance

Risks of regulation; reported by users of mediation

- Costs
- Increased bureaucracy
- Stifles creativity/flexibility
- Used to protect poor practice; poor mediators continue to practise because they are 'accredited', rather than being driven by the market and their reputation

Core mediator strengths; reported by mediators

- Listening
- Building a rapport with people
- Empathy
- Patience
- Sense of humour
- Stamina/persistence

Benefits of regulation; reported by mediators

- Contributes to public confidence in mediation
- Establishes common professional and ethical standards
- Quality control for mediators' work

Risks of regulation; reported by mediators

- Costs
- Increased bureaucracy
- Damages the diversity of the profession through standardisation
- Stifles creativity/flexibility
- Enforces 'science' on what is perceived as an art