1 The advantages of mediation and the pitfalls

1.1. Quick and easy – Plenty of temptations

Mediation is an easy and quick way to solve most of the civil conflicts brought before the courts of law. It is a process that can remove plenty of civil cases from overburdened courts. But the prospect involves a temptation to give priority to mediation processes that gives fast results with minimal resource consumption. Particularly, it is a temptation to let the judges act as mediators. They get their salaries anyway, so why should the judiciary pay mediators coming from outside, such as lawyers.

1.2. Consequences of not avoiding the temptations

But justice should resist this temptation, since it leads to mediation processes, which become more and more processes with a narrow legal focus. That development is not only a risk. It is a well documented fact, which applies for the United States and for Denmark and Norway. Judges who are trained in mediation, retain their culture of control and righteousness of the Law, and the culture destroys that quality of mediation, which the parties experience as quality. One might think that the same was true for the lawyers, who are trained as mediators. But experience has shown that it needs not to happen. However, it requires a follow-up supervision of lawyers' mediation processes. Mediation works best when the parties' autonomy is respected. My experience over 21 years as a mediator has convinced me that the parties have what it takes, and that one can leave the process in their hands. The parties do not use the word justice, but they will determine reasonable results in their own way. Several countries have initially demanded that a judge should approve the parties' agreements, but experience has shown that there is no need for control.

1.3. How to raise the number of mediations?

So judiciary should confine itself to rejoice that plenty of cases through mediation largely can disappear from overburdened courts. The legal system can do much to bring the parties and their lawyers in civil cases to choose mediation over litigation. The most effective way is to let a mediator go through the courts' lists of civil cases and let the mediator choose the cases from which he does *not* believe is suitable for mediation. The criterion should not be reversed to a way, where the mediator *positively* select the cases, which he thinks is suitable for mediation. It is an astonishingly high number of cases that are suitable for mediation. The heaviest cases involve custody, and if the legal system wants success with mediation from the very beginning, you should avoid to mediate these cases or assign them to specific skilled mediators.

1.4. Qualifications of mediators

It is not straightforward to find out, who are the most skilled mediators and one should in particular avoid to choose them on the basis of some form of certification. The simplest way to find the most skilled mediators is to ask the parties, who have just been through mediation. After each mediation, the parties may complete a questionnaire that allows them to evaluate the mediator's performance. It is important to employ major consideration when setting up the questions to the parties.

1.5. Rules in mediation is an oxymoron

When mediation is introduced for resolving civil disputes, history demonstrates how important it is to identify what the parties consider as quality and certainly not what the judicial system deems quality. The legal system should not regulate the styles adopted by the individual mediator, and experience shows that there is no reason to set standards for good mediator practice. The different styles of mediation are numerous, and new styles constantly emerge. Professional standards may stigmatize this development and establish a rule culture of mediation, which does not at all fit into what makes mediation work.

2.1. The variety of styles in mediation leads to different processes and outcomes

The styles, until now known, can largely be classified according to whether they are positivist modern and individual-oriented or whether they are postmodern and relationship oriented. 1) The modern styles can be subdivided into whether they are affective or cognitive. They may also be divided by the degree of empathy being a part of the process. Finally, they can be divided according to the type of communication adopted in the individual style. 2) The post-modern styles can be distinguished according to whether they are problem-oriented, whether they emphasise modification of the parties' discourses and positioning, or whether they take vantage point in communication and focus on optimizing the parties direct dialogue through improving empowerment and/or recognition

2.1.1. Training mediators in more styles

It is very important that the mediators offered to the parties are trained to offer the parties the process that best suits the parties' characteristics. The better the fit, the greater the chances of a settlement. For the skilled mediator, the adaptation of a suitable style to the parties leads to a settlement percent, which is higher than 90 %. The Parties communicate differently, they see the world differently, and they have a different relationship to the degree of empathy. Therefore, it is appropriate to find the style that best matches these characteristics. Consequently, the mediator should be able to switch to the process (style) that seems to fit best to the parties' characteristics.

2.2. Modern positivist individual-oriented styles

2.2.1. Community (generic) mediation

Of the modern styles, generic or community mediation first emerged, and from this style all the other styles have evolved. Generic mediation is in the beginning of the process an empathic listening process, and when the mediator believes that the parties have submitted enough data through their free and uncontrolled storytelling, the mediator change the process to become more cognitive and decision oriented. One can say that the parties future agreement in part, lies in the pile of data that the empathic listening to the parties' free storytelling has generated, and that the subsequent tasks for the parties is to analyse the pile of data, making the overlooked but present agreement emerge and materialise, in order to get it edited and finalized.

2.2.2. Settlement-driven mediation

Lawyers were enthusiastic about mediation, but they re-designed the generic style and shaped it according of their own culture. This meant that the empathic process disappeared, the process became from start to end cognitive, the negotiations came to focus on risk considerations, legal issues and other narrow issues. The parties' free storytelling was replaced with questions by the numbers. These changes made many important data disappear from the process. The court-annexed mediations, developed into this amputee process, which we call settlement-driven mediation.

2.2.3. Humanistic mediation

In some Victim Offender Mediation a very particular empathetic process developed, which we call humanistic mediation. But that process is more at home in Siri Kemenys post.

2.3. Postmodern relation-oriented styles

In the 1990s, three post-modern styles surfaced. We call them cognitive systemic, narrative and transformative mediation. The three styles are based on different ideologies. You can not perform these styles without being familiar with their different value systems. On the other hand, there is much to be gained by these post-modern styles. They lend themselves particularly to those who are not good for an empathic process or free associations .

2.3.1. Cognitive systemic mediation

The cognitive systemic style is based on systems theory. This means that the style recognizes that the parties' systems are closed until they hear something that they can use. The cognitive systemic mediator must therefore constantly adapt his process such that the parties open their systems and keep them open. Mediator asks *circular* questions to clarify unclear or mixed contexts. When the parties are clear about what they are talking about, this leads to empowerment. It's easier for the parties to negotiate, when they know exactly what can be negotiated.

2.3.2. Narrative mediation

Narrative mediation has theoretically much in common with cognitive systemic mediation, however, the narrative mediation appears quite different. The process is a kind of discourse analysis made jointly with the parties, and the purpose of the process is to open and change the closed discourses. Another purpose is to change the positioning, into which the parties have assigned themselves and each other. The process uses externalizing and deconstructing questions that make the parties to rediscover the importance of neglected – yet present – experiences that can form the basis for a common narrative about the future.

2.3.3. Transformative mediation

Transformative mediation is based on the language, and the purpose is to optimize the parties' conversation with each other directly. This is done by the mediator keeping an eye on the parties' level of empowerment and recognition and by intervening when there is an opportunity to improve the level of empowerment or recognition. The intervention method can be active listening or cognitive questions to the quality of the dialogue – not to the content of the dialogue.