The transforming power of Mediation and Courthouse Conciliation

(Abridged Version)

El poder transformador de la mediación y la conciliación desarrollada en sede judicial

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Abstract: Giving one's opinion might jeopardize a conciliator's credibility as a neutral third party, and largely limit the benefits conciliation might provide participants with in terms of recognizing their self-determination abilities and the personal and relational implications of reinforcing the awareness of what each party is able to do. Not focusing on the agreement as the only goal of the process will allow the parties to achieve intermediate results (which is not necessarily of lesser importance). Conciliation hearings might be the appropriate space for people to feel they take back their «voice», that what they have to say is relevant and that there is someone who represents the State and is interested in their situation.

Resumen: La emisión de opiniones puede poner en riesgo la credibilidad del conciliador como tercero neutral frente a las partes así como limitar ampliamente los beneficios que la conciliación le puede reportar a los participantes en cuanto al reconocimiento de su capacidad de autodeterminación y las implicancias a nivel personal y relacional del fortalecimiento sobre la conciencia de lo que cada uno es capaz de hacer. No pensar en el acuerdo como único objetivo del proceso permitirá que las partes puedan lograr resultados intermedios; no necesariamente menos importantes. Las audiencias de conciliación pueden ser el espacio adecuado para que la gente pueda sentir que recupera «voz», que lo que tiene para decir es importante y que hay alguien en representación del Estado a quien le interesa su situación.

Keywords: Mediation. Conciliation. Judges. Hearings. Transforming.

Palabras clave: Mediación. Conciliación. Jueces. Audiencias. Transformador.

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Preliminary distinction between mediation and conciliation

In both mediation and conciliation a third neutral party assists the parties; however, it is them who make decisions on the content of the dispute and it is them who eventually decide whether or not to agree. One of the strengths of mediation and conciliation is their consensual nature. A democratic mature society means responsible citizens, able to handle differences with others and to voice these differences, learn from conflict and seek solutions by minimizing the intervention of third parties who decide for them and take away their ability to find the lost balance of their relations. The main difference between them is that the conciliator has the power to propose agreement plans. If are for the consensual nature of mediation and conciliation for the parties, any intervention against this principle (suggest, give your opinion about what should be done, say what is right or wrong, etc.) would be contrary to it.

Some practices have lead to forget the «values» provided by conciliation and mediation

Indeed, the «power» to propose agreement plans in most of the contexts where conciliation was applied in Argentina lead to a permanent use (and abuse) of making proposals as an excluding tool to get the parties involved and «closer». In addition to that, this has been formulated during the wrong phases of the process: often, almost at the beginning of the session right after listening to the parties' «positions», which means that an opinion is given without knowing the «interests» of the parties, only based on the initial position and grievances, and this has little to do with what each party really needs. Perhaps one the main reasons why this power is often abused, lies on the natural tendency of human beings to give an opinion about the conflict or about the attitudes of other people; and also, when we take part in a conflict we tend to expect others to tell us what we have to do. This is what we learnt and what is done especially in authoritarian societies.

Since 1996, the implementation of interest-based alternative dispute resolution methods started as a State policy in the Republic of Argentina. However, over the last 15 years the implementation (and practice) of mediation and conciliation seeks to meet a basic goal: reaching an agreement. Most of the court-related programs basically aim to decreasing the amount of cases that are filed at the judicial system. Both professional fees – that are set according to the amount in the agreement -, and the guidelines to evaluate the results of programs provided by mediation services – it is common to find references based on percentages of agreements reached – are mainly based on the realization of the agreement. As a result, the basic goal of a mediator is focused on the agreement, which leads him/her to take the parties to this place even if they do not see it appropriate.

On the contrary, some programs develop a mediation transformative approach in which satisfaction surveys filled in by participants in a mediation session reveal aspects that go beyond whether or not they have reached an agreement or agreed with the result (for instance, if they were listened to; if, as a result of mediation, they feel or felt more trust in their ability for decision-making, or what can be considered as valuable in the mediation process, etc.).

Some reasons why mediators and conciliators should not propose any idea even if they are conceptually empowered to do so

Giving one's opinion might jeopardize a conciliator's credibility as a neutral third party, and largely limit the benefits conciliation might provide participants with in terms of recognizing their self-determination abilities and the personal and relational implications of reinforcing the awareness of what each party is able to do. Why? Because of three basic reasons:

1) Our view of what the other should do or should not do, or what is better or worse for them, might be applicable for us but not necessarily for other people. In a conflict in which a neutral third party intervenes there is not two sets of values or ways to view things at stake: there are three: those of the two parties, and the one of the mediator/conciliator. This is why the repeatedly mentioned neutrality does not exist because we always have our own opinion about the dispute contents, the parties' attitudes, etc. But for us to suspend value judgement we need to first recognize that we assess the other in a spontaneous way. Recognizing this and the necessary personal introspection should be the starting point of each intervention so that we are more impartial and less directive. If we don't do this, all our interventions will be impregnated of this underlying value judgement.

2) When we express an idea or give an opinion we provide information to the parties about what we think of the problem, their actions and, often about what we think concerning who is right and who is wrong. This jeopardizes the parties' perception and our impartiality.

3) People are more likely to honor the agreement if it is achieved as a result of their own reflection, not if the latter was suggested or proposed by a third party. According to the information provided by Magistrates of the Appeal Court for Civil Cases of the Republic of Argentina, 80% of court decisions are not respected. On the other hand, the same source reports that less than 10% of the agreements reached in mediation require a later court order for implementation.

What if I want or it seems useful to me to propose an agreement?

In practice, the problem is not a conciliator should propose any form of agreement, but rather the time and how these proposals are made. Proposals should be made at the end of the process, not at the onset. Some ideas might be proposed but not as something to be accepted or rejected by the parties but as a trigger of their own ideas, and we need to make sure that what we suggest does not favor one or the other. We have to be aware that this «suggestion» comes from us and might be not interesting for the parties. Moreover, it is fundamental to know that we are conducting an intervention that is not coherent with the main idea of the process, based on the parties' consensual agreement and self-determination.

The conciliator might attempt to draw attention on any point in the agreement that, in his/her opinion, might affect a norm that should not be violated, and he/she could do this openly or, which is most adequately for us, help the parties and their counselors to reflect upon the feasibility of this point, and he/she should not undermine the relevant role they play in evaluating and deciding, while preserving their own opinion (the conciliator's one) in that matter.

The role of judges in conciliation hearings

Based on the support given by norms and convinced that hearings are useful and appropriate, judges increasingly use conciliation hearings in different jurisdictions to attempt to make the parties come closer. It is also worth noting that few judges have been trained or have knowledge beyond what was acquired thanks to the practical experience of trial and error. One of the tools judges use the most is the subtle (often not much) anticipation of the result of the court decision. This mechanism is nothing but making pressure on the parties, and they will feel so.

On the other hand, ideas are being developed concerning the advantages of working out conciliation in a non-directive fashion, without giving our own opinion. Bush and Folger's (1996) transformative approach might be an extremely useful tool for conciliators to avoid being directive, and for the parties to attempt to reach the before mentioned benefits of an agreement. Even if no agreement is reached, the parties might leave a hearing feeling that it was very useful and that important achievements or benefits were obtained. If the agreement is possible, it is because it was reached after having worked out these aspects, which leads to long lasting agreements.

Towards a new judge's intervention paradigm for dispute resolution

Conciliation hearings might be the appropriate space for people to feel they take back their «voice», that what they have to say is relevant and that there is someone who represents the State and is interested in their situation. When someone who plays the conciliator role is a Judge or a court official who shows interest in them and allow the parties to express themselves and to personally recount his/her perspective of the situation (even things that have not legal content and that often are the focus or the cause of the complaint). This is crucial for them to feel they are heard and increase their self-esteem. However, this is useful not only for conflict-related things and for the parties' feelings but also to help enhance the image society has of the administration of Justice through a concerned and empathetic intervention of the Judge or official during the conciliation hearing. To do this, it is necessary to change judge's paradigm. From a judge delivering judgments and enforcing law to a judge committed to solving the parties' problems, being closer to them, having the ability to show understating even if he/she does not agree with what the parties confide to him/her. A judge that is able to hold things, and help to mitigate the pain of the disputants. A judge that does not think that conciliation exists only to avoid one more case to be sentenced but that rather takes that opportunity to offer each party in particular and society at large, much more than just an agreement.

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