

# Mediation and Environment

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## Introduction

As mediation continues to gain community acceptance as a legitimate and frequently preferred dispute resolution process, practitioners are investigating some of the subtle influences that contribute to a successful mediation conference. The physical environment within which mediation occurs is one such influence. Experienced mediators consistently report that the venue selected by the parties has an appreciable impact on the process and outcome of the mediation.

In 1990, Salacuse and Rubin noted (in relation to negotiation):

“Site selection, in fact, is always an important decision in negotiation. Parties frequently negotiate long and hard about where they are to meet long before they sit down to discuss what they will negotiate. The reason for this concern is that disputants almost always assume – and with good reason – that the particular location in which they negotiate will have consequences for the ensuing process and, ultimately, the results.”<sup>1</sup>

Practitioners and students of mediation, in turn, have been taught in fairly general terms that the mediation venue should be neutral, and perhaps that one or another seating arrangement should be favoured. Yet many parties, mediators and venue providers fail to maximise the supportiveness of the physical environment for the mediation process. Why? For many, the lack of a conceptual understanding of *how* the physical environment affects the process and outcome of mediation means they have no framework for expanding or evaluating their options. For others, it may be a lack of concrete suggestions or factors to consider, especially when time is pressing.

This short paper first explores the relationship between environment, process and outcomes at a conceptual level, which opens up new possibilities for analysis and understanding. It then suggests appropriate goals for designing or choosing (and setting up) a venue for mediation, and some of the specific factors that will influence the achievement of those goals.

## Communication and Environment

The key to understanding the effect of the physical environment on mediation is to understand its effect on **communication** – both between the parties and between the mediator and the parties. Communication is, of course, an essential element in mediation and negotiation generally. Indeed, it is the very mechanism by which negotiation of any kind occurs.

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<sup>1</sup> Salacuse, JW and Rubin, JZ, “Your Place or Mine? Site Location and Negotiation”, (1990) 6 *Negotiation Journal* 5. The authors considered the relative merits of four possible locations: my place, your place, another (neutral) place, and no place (such as the internet).

The most common methods of transmitting information are speech, writing and body language. Each of these communication modes requires an external context – an environment that provides a setting or mechanism for their occurrence. And just as the content of the communication conveys a message, so too does the ‘environment’ we select.

So, for example, a speaker may choose a tape recording or a vast auditorium to present their message. Written messages can be transmitted by fax, e-mail, or physical documents, each with many options for formatting. Body language is affected by furniture, clothing and physical positioning. In each instance, the messenger is exercising a choice about an appropriate external environment, and that choice in turn transmits information to others, which adds to the available data about the messenger’s state of mind.

The value of understanding environment as an aspect of communication is that it opens up a conceptual framework that’s been extensively researched. The kinds of questions, analysis and advice that we know are relevant to communication can now be brought to bear upon the choice and design of the mediation environment. For example, we can identify overt and hidden messages, as well as communication about both the substance and the process of the mediation.

Here are a few of our working assumptions about communication that build towards some useful advice for the mediation environment.

1. *The ultimate purpose of all communication in mediation is influence.*

To be truly influential, the intention underlying the communication must be appreciated by the recipient.

2. *The messages we intend to send are regularly misunderstood; and our capacity to affect the way in which others receive and understand our messages is limited to the way we send them.*

That is, we can’t get inside others’ heads to change the way they receive our messages. So the strategic choices we make about our communication – *how* we communicate, not just *what* – should help others to listen and understand. For example, offering someone encouragement for their effort and commitment is more likely to promote listening than a torrent of personal abuse. Likewise, listening to others is more likely to promote *their* listening to your messages without a stream of interruptions.

3. *A negotiator’s most persuasive communication tool is congruent behaviour – ensuring consistency between thought, speech and action.*

If a structured communication process like mediation is to be effective, the messages we send by speaking, writing or acting must be supported by the concurrent messages conveyed by our choice of, and the physical features within, the communication environment. If the environment we have selected conveys a different message, there is a danger that our substantive message will be distorted, diluted or lost.

The need for congruence between the content of our communication and the environment in which it occurs should be obvious to lawyers, especially courtroom advocates. Traditional courtrooms provide a classic illustration of the explicit messages about process being

supported and promoted by the attendant physical surroundings.<sup>2</sup> Everything about the court environment is intended to send a clear message to participants – from the way judges and barristers are dressed, to the configuration of seating arrangements. All of the vivid courtroom images support the important messages which the adversary system seeks to convey – messages about independence, authority, distance, sobriety, respect, neutrality – a place where decisions affecting people’s lives can be made impartially and fairly.

Imagine if hearings were held in the offices of one of the litigants or its representatives. Or if proceedings were opened by a judge who suggested that the advocates address him or her by a nickname. Or if everyone participating in the hearing (including the judge) found themselves at a round table with no pre-determined seating arrangements. We would expect that those involved in the process would feel a strong sense of dissonance, and that the mixed messages would undermine their confidence in the process and endanger its effectiveness.

The need for a complementary environment is equally apparent in mediation. The environment should send signals that are congruent with the structured communication process that the mediator and parties seek to enact. This explains why experienced mediators have found that venues that support or reinforce essential aspects of the mediation process are likely to assist all participants to achieve a satisfactory outcome to their dispute.

*4. In communication, as in most things, purpose drives practice.*

Identifying a clear goal for your communication is critical to success. The next section develops some goals for the mediation environment that promote congruence with the explicit and implicit verbal messages about the mediation process that the mediator, in particular, needs to send.

### **Goals for a supportive mediation environment**

The left column of the table below shows some of the well-accepted characteristics of the mediation process. These do not arise automatically, however, by virtue of calling a process “mediation.” Rather, in every mediation they need to be communicated to each party by the mediator and, to some extent, by the other parties.

In the right hand column, we identify some environmental qualities that promote each characteristic and reinforce communication about them. These desirable environmental qualities serve as goals for anyone seeking to identify or design a mediation environment that is congruent with the mediator’s description of the mediation process and supportive of the parties’ own communication.

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<sup>2</sup> More modern courtrooms are also interesting for their deliberate use of windows, soft furnishings and warm colours to send similar messages in a less intimidating way

<b>Mediation is a process in which:</b>	<b>The environment, therefore, should:</b>
Private discussions are held without prejudice to the legal rights of each party.	a. support the confidentiality of the process b. be free of any trappings that suggest that the mediation is part of a legal proceeding
An impartial and independent intervener nominated by the parties manages the process.	c. reinforce the mediator's impartiality d. provide an appropriate space for the mediator's methods
The mediator assists each party to develop a better understanding of the other's perspectives concerning the matter(s) in dispute.	e. be accessible to the parties f. feel semi-formal, yet familiar and comfortable to the parties g. encourage open and constructive communication among all relevant parties
Caucuses are often used for private discussions among party representatives or with the mediator.	h. include appropriate break-out rooms which themselves are confidential and functional
Participants are encouraged to persuade rather than coerce their counterparts to reach agreements	i. not encourage an adversarial attitude j. support creative decision-making processes such as brainstorming
Parties in dispute are empowered to make their own decisions.	k. not suggest that the mediator has any authority or special status over the parties.

## **Achieving the Goals**

What does this mean in practice? We can now suggest some more detailed, concrete steps that will achieve these goals for a congruent and supportive mediation environment. Some of these take the form of universal, prescriptive advice. However, others may not be relevant in every mediation, and some are factors that may apply differently in diverse mediation contexts. Nor is the following discussion intended to suggest an exhaustive checklist. Nevertheless, this framework of broad goals and specific factors is both more flexible and more comprehensive than a simple choice between "your place, my place or the mediator's office."

### **Goal (a) and (h): The mediation venue should promote privacy and confidentiality**

**Factors:** The mediation room should be soundproofed to a high standard, and should offer at least the option for visual privacy as well. Other relevant factors include the proximity of

and access to caucusing rooms that are themselves private, storage facilities, document shredders and private telephone services.

**Goals (b), (i) and (k): The mediation venue should avoid images or features usually associated with the adversary system, and should not suggest a judge-like status for the mediator.**

**Factors:** Location is a factor that can suggest a legal or adversarial proceeding, from which mediation should be distinguished, even when it occurs in the context of actual or threatened litigation. Special care is necessary, for example, where mediation occurs within a court precinct, or when the mediator is a retired judge or QC. Within the building, the layout of the room (floor space, table and/or chair arrangement) should not elevate the mediator to a judge-like status, nor separate the parties from each other unnecessarily. A space that readily allows the parties to shift their focus between the mediator, each other and a "single text" device (such as a whiteboard or flip chart) is ideal in this respect. Such an environment clearly distinguishes mediation from an adversarial process like litigation or arbitration.

**Goal (c): The mediation venue should be neutral.**

**Factors:** If congruence is to be maintained, the venue should 'mirror' the neutrality of the mediator. The venue should be independent of the place of business or home of the disputants and their representatives. This much is perhaps obvious, yet its importance is sometimes overlooked by legal practitioners who prefer their own conference rooms.<sup>3</sup> Other factors besides the geographical location may also be relevant. For example, it should go without saying that the seating arrangement should not create any discomfort for, or suggest the special status of, any party.

**Goal (d) and (h): The venue should provide an appropriate space for the mediator's methods**

**Factors:** If the mediator is to manage the process, it is important that the physical space facilitate their preferred methods. The specific considerations will therefore vary between mediators, so if the parties are arranging the venue, they should ask their mediator about their needs. These may include the availability of whiteboards, flip charts and the like, and sufficient space to use them; computer support; sufficient room for the mediator to move around; caucusing rooms with their own communication devices; and so on.

**Goal (e): The venue should should be accessible to all parties**

**Factors:** Most mediators require the parties themselves to be present, so a fundamental goal is the accessibility of the venue to the parties. The location should be as convenient as possible, according to the mode of transport used by the parties (e.g., close to public transport, parking facilities etc.). It should be fully accessible to any participants with physical disabilities. If there are people who should be involved but who cannot attend in

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<sup>3</sup> These may indeed meet other goals discussed here to a greater extent than, say, the mediator's office. However, the search for other, more satisfactory neutral spaces should not be given up so lightly.

person, the availability of videoconferencing facilities can transform a frustrating situation into a productive mediation.

**Goal (f): The mediation venue should feel semi-formal, yet familiar and comfortable to the parties**

**Factors:** Several basic factors of the physical space are important for physical comfort over a long period of time: the size of rooms, quality of air conditioning, natural or other lighting, appropriate and sufficient seating and so on. When mediation sessions continue for half a day or more, the presence of artworks or windows with views can help stimulate the parties' energy and creativity. Finally, access to good quality refreshments can make a significant difference to the productivity of a long mediation session.

In addition, the type and quality of the furnishings and layout of the room should support the psychological comfort of the parties by feeling relatively familiar to them. This will increase their sense of involvement and control in the process. Depending on the parties, this might suggest a boardroom set-up or a lounge-room one. It may even warrant an outdoor setting, as is often the case in Native Title mediations

Similarly, achieving the appropriate degree of formality will depend on the normal context in which the parties interact: a conference room style may feel informal to business executives but not to disputing neighbours; a more homely room might suit the neighbours but feel too informal to the executives. In any case a courtroom setting is likely to be overly formal, and will (as noted above) send conflicting signals about the nature of the process.

**Goal (g) and (j): The mediation venue should promote open and constructive communication (including processes such as brainstorming) among all relevant parties**

**Factors:** Mediators have long been aware of the significance of table and seating configurations, although views differ on which arrangement(s) should be preferred. The mediation venue should therefore be flexible enough to accommodate the mediator's preferred layout.<sup>4</sup> And communication aides such as whiteboards, flip charts, audiovisual facilities and the like are essential to the communication process in mediation. Similarly, support functions such as photocopiers, computers and printers, and secretariat services are often essential communication aids.

In rare cases, for example where there is severe conflict or a history of violence, the mediator may consider it more helpful to shelter the parties from direct communication for part or all of the process. Here the environment should provide such shelter or distance, as well as an opportunity for more direct communication if and when this becomes appropriate.

During mediation, participants often identify a need to contact experts, staff, legal advisers, constituents or others. They may also need to access documents or other information that

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<sup>4</sup> A discussion of mediation via the internet is outside the scope of this article. However, we should note briefly that although most of the goals seem to be theoretically achievable in cyberspace, the real debate on the usefulness of internet mediation often centres on this goal of face-to-face (or side-by-side) interaction of the parties.

they haven't brought with them. Such communication can greatly assist the mediation, but it may also be important that the momentum of the process is not lost. The ready availability of facilities like phones, faxes, and/or internet connections can therefore be an important factor affecting the supportiveness of the mediation venue.

## **Summary and Conclusion**

Mediation is often complicated, stressful and physically and emotionally draining for all involved. The unfamiliarity of the territory for most participants heightens the need for the mediation process to sound a consistent note at all levels, including the immediate environment for the conduct of the mediation. Of all the elements in the mediation, the environment is probably the least dynamic and therefore the most easily controlled.

Clearly, the choices to be made about the mediation environment are not just about my place, your place or a neutral place (or even no place). A venue that is neutral – such as a courtroom, or a small and poorly equipped mediator's office – may nevertheless be quite unhelpful to the mediation process for other reasons. We have therefore identified a set of goals, and some of the concrete factors relevant to achieving those goals, that together provide a framework for creating or adapting a mediation venue that is both flexible and comprehensive.

More fundamentally, we have suggested that the theoretical key to understanding the significance of the environment is its impact on communication between the mediator and the parties about the process of mediation, as well as on communication between the parties about the substance of their dispute. From this starting point, it may be possible to identify further goals and concrete applications than those we have discussed here.

In practice, mediators should alert the parties to the relevant factors prior to their selection of a venue for the mediation, perhaps at some point during the preliminary conference. Furthermore, mediators should be wary of practitioners who, for the sake of convenience and by virtue of their growing experience and confidence with the process, ignore the important role that the environment plays in the communication process. For in so doing, they can disempower the mediator and their own clients, and limit the potential of mediation. Finally, mediators and providers of meeting spaces can do much to enhance the potential of mediation by taking into account the goals and specific factors discussed here when designing or recommending a venue for mediation.