

# **Changing Assumptions about Mediation in Commercial Matters: Resolving Disputes *and* (Re)Building Relationships**

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*This article suggests that parties and mediators in commercial matters tend to operate on the assumption that building relationships between the parties is secondary to settling the substantive issues in dispute, and for this reason, the process of mediation is not realizing its full potential. The article offers a different perspective on the value of relationship in commercial disputes, and proposes a new process for mediating in these matters.*

## **Introduction**

Mediation has become a permanent feature of our dispute resolution landscape, yet its practice is highly varied. Some mediators are predominantly settlement oriented, while others spend time developing the relationship between the parties, with a view to effecting enduring behavioural change.

Some would attribute these differences in practice to the underlying nature of the dispute (that is, the area of law involved) and/or the background or personalities of the mediators. In my view, differences in practice are a result of different assumptions being made by both mediators and disputants about the value of relationship.

## **The problem**

My proposition is simple (albeit somewhat controversial): the full potential of mediation is not being realised in commercial disputes.

Let me explain. At a basic level, mediation promises swifter, cheaper justice, and party self-determination, with disputants having a greater role in the process and more control over the outcome. Yet, in my experience, perhaps the greatest allure of the process is the opportunity it provides for reconciliation – for empathetic understanding by the parties and the rebuilding of their relationship.

By this I'm referring to the capacity of mediation to move parties beyond the legal issues, to focus them upon their respective needs and concerns, to encourage each party to acknowledge and respect what is important to their counterpart, and to allow an outcome that involves a recognition of relative contributions to the conflict and any unintended impact of parties' actions - in short, the capacity to transform a legal battle into a problem to be solved between parties, and in doing so, to provide a base for a new and often more constructive relationship for the future. It is this unique<sup>1</sup> capacity of mediation that is presently under-utilised in commercial matters.

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<sup>1</sup> Unique by comparison with adversarial processes, which set up a win-lose dynamic, and consequently require parties to trade relationship for substantive victory. (Ironically, this very trade-off between substance and relationship often makes the ultimate victory a hollow one. In

From my observations of commercial mediation practice (which appear consistent with the experiences of many practitioners participating in commercial mediations), relationship is rarely an agenda item to be explicitly dealt with in the mediation. In fact, the process in commercial matters has evolved in such a way as to limit the opportunities for relationship development or individual and organisational growth. In many cases, the focus is almost exclusively upon the legal issues in dispute, encouraged by the mediator's call for "position statements" from the parties' legal representatives. Moreover, the attendance at mediation of the parties themselves is uncommon, which, for obvious reasons, tends to further impede the opportunity for relationship building. And, in those instances where the parties are present, their preparation for, and thus participation in, mediation appears confined to a discussion of legal positions. Consequently, each party has a limited ability to entertain a perspective different from their own, reducing the likelihood of interest-based outcomes, and improved relationships.

I should point out that I am not questioning the skill of commercial mediators to manage disputes. Many are expert at facilitating a settlement between the parties, and often the settlement is better than what could be achieved in the absence of mediation. My point is simply that there appears to be scant relationship-building going on in commercial mediations.

## **The Diagnosis**

### **Mediation or Settlement Conference?**

So why do commercial mediations look like pre-trial settlement conferences? One diagnosis could be that the majority of mediators conducting these cases in Victoria are practising commercial barristers, and thus mould the process to reflect what they know best. However, I think there is a less superficial explanation, and it goes to the assumptions that mediators and parties (or their lawyers) seem to be making in commercial matters about the value of relationship.

A common assumption made in commercial disputes is that where the parties have no intention of working together in the future, there is no relationship to be managed or there is no point in attempting to rebuild a working relationship. Alternatively, the relationship is regarded as having been "killed" by the dispute, and all that the parties want is to bury it and move on.

Even in cases where parties perceive that there is some relationship to be managed, they often assume that resolution of the substantive issues (the money, the goods, the terms and conditions) is the priority, and any subsequent relationship will depend upon how well or poorly the substance of the dispute has been settled. In a similar vein, some assume that the relationship will take care of itself, and that a settlement of the substantive issues will automatically improve the relationship.

For others, there may be a deep-rooted assumption that relationship belongs to the realm of family law, and has no place in commercial matters.

With any of the above as operating assumptions, it is little wonder that commercial mediators focus upon getting the parties to a settlement.

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so many cases, the inability of parties to work together post-litigation results in their reliance on the legal process to sort things out between them in the future.)

## The Solution

So, what is to be done? Arguably, the key to realising mediation's full potential in commercial disputes is to broaden the underlying assumption about the value of relationship in commercial matters. This requires us to reassess the assumptions noted above which support the conclusion that building relationship is relatively unimportant in all but a few commercial disputes (that is, those where the parties *must* work together in the future).

Let's begin with the assumption that relationship has no obvious place in commercial matters. This is perhaps the easiest to challenge. It's difficult to refute the role that relationship plays in commerce, between companies, within companies, and between a company and the public. Otherwise, why would companies spend so much money on advertising, quality control schemes, employee remuneration packages, and so on? Good business means having a good relationship with your customers, suppliers and staff.

However, accepting the value of relationship in commercial matters generally does not of itself suggest that relationship has value in *all* commercial disputes. What about those disputes where the parties have no apparent interest in working together in the future, and/or the relationship has deteriorated dramatically as a result of the dispute? An alternative assumption that could be made in these cases is that promoting a good working relationship between the parties will assist them to better deal with their differences and resolve their dispute more satisfactorily than might otherwise be achieved. Moreover, any commitments made are more likely to be kept in such circumstances, avoiding the financial and other costs associated in the relitigation where settlements have been breached.

Additionally, we might assume that there is value in promoting a good working relationship because it may enhance the ability of each party to deal with third parties more constructively in the future. By this, I mean that there is a learning component to the way that the present dispute is approached and managed. This may be particularly beneficial for institutional litigants like banks and insurers. For example, if the mediation process offers an insight into the concerns and interests of the other party, especially vis-a-vis their relationship with the institution, then this information can be used by the institutional party in re-shaping its relationships with future customers. In this way, a repetition of the problem that resulted in the original dispute may be avoided.

Finally, it's easy to imagine the "damage control" that can be achieved by valuing the relationship in the current dispute. Most, if not all, commercial lawyers have been involved in matters where a bad relationship between the parties impacts negatively upon one or even both parties' commercial reputation (and consequently, their ability to deal with others). We only need to remember the way that the (then) Westpac Bank suffered in the 1980's following its foreign currency transactions with farmers to appreciate how significant reputation is to commercial survival.<sup>2</sup>

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<sup>2</sup> Westpac's alleged failure to make farmers aware of the impact of exchange rate changes upon repayment obligations had serious consequences for Westpac's continuing independence. Its share price dropped dramatically and it received widespread public condemnation.

By changing our assumption about the value of relationship in commercial matters, the practice and consequently, the outcomes of mediation change. So, what does mediation look like when relationship is seen as a valuable asset? The example described below is the process of relational mediation that my colleagues and I use in all commercial matters.

Our relational mediation process involves three stages:

- preliminary sessions;
- individual preparation sessions; and
- a facilitated joint session(s).

### **The First Step**

The first stage involves a short preliminary interview with each party separately (if desired, with their lawyers present). The primary purpose of these interviews is to provide the co-mediators<sup>3</sup> with an insight into the perspective of each party, and to ensure that mediation is an appropriate process for the parties. A basic criterion is that the parties appear genuinely interested in discussing the issue with each other in an attempt to resolve their dispute. Where the mediation is court-ordered, we are more concerned to ensure that we understand the partisan perceptions involved in the dispute. A further purpose is to ensure that each party is clear about its own perspective. These preliminary interviews also provide an opportunity for the mediators to begin establishing rapport with the parties and to build their trust and confidence in the process, both of which are important to the successful conduct of subsequent sessions.

A preliminary conference involving all parties follows, during which the mediators provide a basic overview of the subsequent stages of the process, and the parties are invited to discuss their objectives for the mediation. It also provides an opportunity for parties to reach some process agreements about the scheduling of the preparation and joint sessions to follow - a small but useful step in their relationship-building.

### **The Individual Sessions**

The next stage in the mediation is critical. It sees the mediators working with each party individually to prepare them for the joint session. The mediators explore the entire dispute terrain with each party, moving through their various interests, options, alternatives to reaching agreement, and so on. In this way, parties have an opportunity to consider what is important to them, and how their priority interests are best met. Particular emphasis is given to the relationship between the parties, and the mediators endeavour to develop each party's understanding of the perspective of the other party or parties to the dispute. This is primarily achieved through the technique of role reversal, encouraging each party to see the dispute through the eyes of their counterpart/s.<sup>4</sup> By Focusing on empathic understanding in preparation, the parties are better able to listen to and acknowledge the perspectives

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<sup>3</sup> We use a co-mediation model in which two professional mediators (typically, a lawyer and a psychologist) facilitate the process. We believe that this ensures maximum attention to process and serves as an excellent check on mediator impartiality.

<sup>4</sup> Role reversal has the party assume the perspective of the other party or parties to the mediation with the assistance of the mediators. The mediators ask a series of carefully planned questions to enrol the party and have them see the dispute through the eyes of their counterpart(s).

of their counterpart(s) in the subsequent joint session. It also enables them to recognise their own contribution to the conflict, and take responsibility for any negative impact that their actions may have had on the other party. At a basic level, the process of role reversal tends to “re-humanise” the other party, which is an invaluable contribution to the re-building of relationship in the joint session.

Another feature of the preparation sessions is the focus on communication and other negotiation skills. The mediators offer parties guidance on effective negotiation techniques, as well as opportunities to role-play those scenarios that they feel less confident about going into the mediation.

All aspects of the preparation stage are designed to contribute to the development of a more productive relationship between the parties, both during and beyond the mediation. In fact, in some cases, the parties feel sufficiently empowered by the preparation to resolve the dispute by themselves without proceeding to the joint mediation session.

### **Stage Three**

The final stage of the process involves a joint session facilitated by the mediators, with careful attention given to the empowerment of the parties in the process. As a result of the intensive preparation, all parties are equipped to negotiate their dispute in a principled manner, with the work of the mediators being confined to realising opportunities for recognition,<sup>5</sup> and other appropriate communication interventions.

### **To Conclude**

Mediation holds enormous promise to parties in commercial matters. The onus now is on mediators and parties to realise its full potential, and to reshape the process as one in which disputes are not only resolved, but relationships are (re)built.

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<sup>5</sup> See R.A. Bush and J.P.Folger, ‘The Promise of Mediation: Responding to Conflict through Empowerment and Recognition’, (Jossey-Bass Publishers, SanFrancisco, 1994).