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Russell Hinchy

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General Editor



Laurence Boulle

*Professor of Law,
Bond University, Queensland*

Understanding ADR experiences

Commercial mediators: do they have style?

Russell Hinchy

This is the first in a series of articles arising out of a LEADR commercial mediators' colloquium held on the Gold Coast in August 1999. Leading commercial mediators from across Australia attended and shared mediation experiences in three broad areas: mediation styles, mediation skills and processes, and variations to the mediation process. This article outlines some observations from the colloquium concerning the theory and practice of commercial mediation styles. In particular, the article addresses the question of whether commercial mediation practice is consistent with theory or whether the experiences of the colloquium participants raise further questions regarding mediation theory and practice. 'Commercial mediation' here refers to any mediation of a dispute involving a contractual relationship, including insurance. LEADR engaged the services of the author to document the discussions at the colloquium.

Mediation: can it be defined?

Although mediation is defined widely in the literature and in statutes, no particular definition is generally accepted. Some definitions are highly normative and theoretical, stating what ought to happen (the conceptualist approach) while some are highly descriptive, stating what actually happens in practice (the descriptive approach).¹ Other definitions fall somewhere in between. Three examples illustrate this. In 1986, Christopher Moore used the conceptualist

approach to define mediation in terms of what ought to happen:

Mediation is the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.²

In contrast, the descriptive approach is used in s 96 of the *Supreme Court of Queensland Act 1991*, with mediation being defined as 'a process ... under which the parties use a mediator to help them resolve their dispute by negotiated agreement without adjudication'.

Moore's revised definition in 1996 is in between these two approaches:

Mediation is generally defined as the intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.³

It is interesting to note that Moore's 1986 definition is highly conceptualist, while his 1996 version is more descriptive. In the 1986 version the mediator is 'impartial' and 'neutral' with 'no authoritative decision-making power' in assisting the parties reach 'their own mutually acceptable settlement'. However, in 1996 Moore deletes the requirements of mediator impartiality and neutrality from his definition. He also adds 'limited' to the mediator's decision-making power and refers to 'a' mutually acceptable ➤



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➤ settlement rather than the parties reaching their 'own' settlement. In addition, the 1996 version acknowledges the problems in defining mediation by adding the phrase 'generally defined'.

Why is the task of finding a generally accepted definition of mediation proving so elusive? The reason, according to Professor Laurence Boulle, is that mediation 'does not provide a single analytical model which can be neatly described and distinguished from other decision-making processes'.⁴ The factors contributing to this are that:

- there is no generally accepted 'coherent theoretical base' or 'core features' of mediation to clearly distinguish it from other ADR processes;
- the term 'mediation' is taken to have different meanings by different users;
- there is uncertainty associated with the common use of terms such as 'voluntary' and 'neutrality' in definitions of mediation; and
- there is considerable diversity in the practice of mediation.⁵

Is there a solution to this problem?

Mediation style: the theory

To overcome the problem of defining mediation, Boulle identifies four broad styles of mediation: facilitative, settlement, therapeutic and evaluative.⁶ The colloquium used these styles as a theoretical basis and a starting point for analysis of the practical mediation experiences of the participants. Although four styles of mediation may be isolated in theory, Boulle stresses that in practice there is considerable overlap.⁷ The colloquium participants highlighted this fact and it is addressed below.

Facilitative mediation

Facilitative mediation focuses on the needs and interests of the parties rather than on their legal rights or identified positions. The emphasis is on process rather than outcome, with the mediator being experienced in the process itself. The dispute is defined in terms of underlying interests and mediator participation in the negotiation process is important. Facilitative mediation is used in family, environmental and partnership disputes. This style is consistent with the conceptualist approach to defining mediation.

Settlement mediation

The focus of settlement mediation is on positions rather than interests. In other words, what do the parties want? This positional based style usually requires a lawyer as the mediator in the commercial context. In view of the style's focus, the mediator does not have to be skilled in the mediation process. The mediator's main role is to determine the parties' 'bottom lines' and achieve a compromise. Settlement mediation is used in commercial, personal injury and industrial disputes. Settlement mediation is consistent with the descriptive definitional approach.

Therapeutic mediation

Therapeutic or transformative mediation concentrates on the causes of a dispute. It is interest based. The aim is to improve the relationship between the parties in the hope that this will then improve the chances of resolving the problem. The dispute is usually defined in terms of behaviour, emotion and relationships. Consequently, it is preferable to have a mediator experienced in social work or psychology. Therapeutic mediation is used in family, matrimonial and continuing relationship disputes. Being interest based, the therapeutic style is closer to the conceptualist approach than the descriptive approach.

Evaluative mediation

Evaluative mediation attempts to resolve disputes in a manner consistent with legal rights. The mediator here is a lawyer with expertise in the subject matter of the dispute rather than skill in the mediation process. It is common for the mediator to take an active, interventionist role. This style is used in commercial, personal injury and trade practices disputes. The evaluative, rights based style is consistent with the descriptive approach.

Mediation style in practice

Colloquium response: four styles?

In referring to the four different mediation styles, Boulle states:

These are paradigm models which are not distinct alternatives to one another and which do not conform exactly to types of mediation in practice. Mediations in practice might display features of two or more models ... The notion that there are different models of mediation, ➤



➤ and not a single analytical model, assists in dealing with some of the definitional problems in this field. Much writing on and discussion about mediation has the *facilitative* model in mind ... In practice, however, the other three models influence and compete with facilitative mediation.⁸

At the colloquium, the settlement, evaluative and therapeutic styles certainly influenced and competed with the facilitative style. While some participants expressed difficulty in categorising mediation into four styles, others thought that commercial mediation involved the use of a variety of styles depending on the circumstances. Comments illustrating this included the following.

- Mediation is principally a facilitative process rather than a process of mere settlement.
- Mediation involves facilitation together with the identification of each party's position.
- Most mediators move between facilitation and settlement depending on the situation.
- At times the participation of lawyers in the facilitative model causes difficulty.
- The personality of the mediator could distort the four styles.
- Facilitative and transformative approaches are closer than the definitions indicate.
- Commercial mediation uses both settlement and evaluative styles.
- It is simply not possible to categorise mediation into different styles.

Parties and legal representatives

What mediation styles do the parties to a dispute and their legal representatives ask for and expect? The colloquium participants agreed that parties place significant importance in the management of the mediation process and the timeframe for completion. Although commercial mediation is perceived as result driven by the parties, the manner in which the result is achieved is still very important. Another issue raised was that if the parties in a commercial dispute are result driven, the choice of particular mediators may impact upon the process chosen. Result driven mediation focusing on outcomes is consistent with the settlement and evaluative styles. Emphasis placed on the mediation process itself is consistent with the facilitative style. In other words, in practice the parties to a commercial

mediation and their legal representatives appear to want a combination of styles.

What factors might influence the mediation style or combination of styles requested by parties and their representatives? The colloquium participants cited the following factors:

- the information provided to each party concerning the mediation process;
- the needs of the parties;
- the perceived legal position of the parties;
- whether the parties and their lawyers wish to control the mediation process;
- whether the parties and their lawyers expect the mediator to manage the process;
- the timeframe of the mediation process; and
- the desire for fairness in procedure.

Style, legal rights and commercial interests

The issue

A fundamental issue in commercial mediation is the reliance to be placed upon legal rights and commercial interests, or on a combination of both. As noted previously, the parties to a commercial dispute and their legal representatives are both result driven and process conscious. The parties are result driven because of the nature of the dispute. It is commercial. Their legal representatives are also result driven because the client's commercial position is at stake and the lawyer is chosen to protect this position. Both client and representative are process conscious, as they are attending a mediation; that is, an alternative dispute resolution mechanism.

Rights versus interests

How then does each mediation style deal with legal rights and commercial interests? The facilitative and therapeutic styles are interest based. In settlement mediation, the focus is on positions adopted by the parties in view of their perceived legal rights. On the other hand, the evaluative style places emphasis upon the merits of each party's claim in light of the mediator's view of each party's legal rights. In theory, the settlement and evaluative styles are commonly used in commercial disputes. This, of course, is not to say that theory has no place for ➤

'The colloquium participants agreed that parties place significant importance in the management of the mediation process ... Although commercial mediation is perceived as result driven by the parties, the manner in which the result is achieved is still very important.'



➤ facilitative or therapeutic mediation at any stage of a commercial dispute. What is the position in practice?

Colloquium response

Whether the focus is on rights (settlement or evaluative) or interests (facilitative or therapeutic) may depend upon the stage of the dispute. If mediation occurs after the issue of a writ then the focus may be upon the parties' interests. On the other hand, if mediation occurs after the first hearing, legal rights have been addressed and it may well be impossible to disassociate rights from interests. In this situation, it is up to the mediator to focus the parties' attention on their interests rather than on their perceived legal positions.

Most parties attending mediation conducted by lawyer mediators have received legal advice on the dispute and their lawyers are generally present during the mediation. Further, the mediator is often a lawyer and sometimes an ex-judge. The issue therefore arises as to how the mediator deals with the parties' perceived legal positions while attempting to identify their interests. In other words, what style can be used by the mediator to get the parties and their lawyers away from issues of liability so that the focus is on commercial interests? The following comments by the colloquium participants identify various approaches to this issue.

- Mediators should say to lawyers, 'I don't want to see the pleadings. I want to see a list of the clients' interests.'
- Mediators should take lawyers aside in private sessions and discuss legal issues. Legal issues should never be discussed in front of the parties in joint sessions.
- A facilitative style should be used in joint sessions, whereas in private sessions a settlement or evaluative style may be more appropriate.

A difficult issue for the mediator arises when the mediator believes that legal advice given to one party may be incorrect. Does the mediator point this out to the lawyer concerned or is such an approach beyond the role of a mediator? Approaches to dealing with this difficult ethical problem might include taking the party aside in private session and advising

them that they have a serious problem. It would appear ethical to advise a party in this way. On the other hand it would not be ethical to disclose that a party has a strong case. It would be risky to suggest to a party that alternative legal advice should be sought, as the issue of defamation may arise in addition to any ethical issue of taking such an approach.

Conclusion

Do commercial mediators have style? Yes they do. This is so irrespective of whether or not they are conscious of using a particular mediation style at a particular time. Depending on the circumstances, it was quite apparent from the colloquium that to varying degrees the facilitative, therapeutic, settlement and evaluative styles are all used in commercial mediation in Australia. It would appear, however, that the emphasis in practice is principally on the settlement and the evaluative styles. This is consistent with theory. Does this mean there is a theoretical basis for commercial mediation practice? Is mediation no longer a practice in search of a theory? ●

Russell Hinchy is a PhD student at the University of Queensland and can be contacted at <r.hinchy@qut.edu.au>.

The next article in this series will deal with mediator interventions, neutrality and impartiality.

Endnotes

1. Boule L, *Mediation: Principles Process Practice* Butterworths, Sydney 1996, pp 4-5.
2. Moore C, *The Mediation Process: Practical Strategies for Resolving Conflict* Jossey-Bass Publishers, San Francisco 1986, p 14.
3. Moore C, *The Mediation Process: Practical Strategies for Resolving Conflict* Jossey-Bass Publishers, San Francisco 1996, p 15.
4. Boule L, above note 1, p 3.
5. Boule L, above note 1, p 3. See also a recent article by Garwood M, 'Managing Quality of ADR for Commercial Disputes' (1999) 10 ADRJ 173.
6. Boule L, above note 1, pp 28-30.
7. Boule L, above note 1, p 28.
8. Boule L, above note 1, p 28.

'Whether the focus is on rights (settlement or evaluative) or interests (facilitative or therapeutic) may depend upon the stage of the dispute.'