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## ADR in practice

# Commercial mediators: can they intervene and still remain impartial and neutral?

Russell Hinchy

*This is the second in a series of articles arising out of a LEADR commercial mediators' colloquium held on the Gold Coast in August 1999. The first article addressed commercial mediation styles in theory and practice. It concluded that commercial mediators across Australia use a combination of the facilitative, therapeutic, settlement and evaluative styles. The emphasis in practice, however, is principally on the settlement and evaluative styles. This second article examines the extent to which commercial mediators can intervene in a mediation and still remain impartial and neutral. The article also examines the issue of trust in relation to intervention, impartiality and neutrality.*

## Mediator interventions

### What is mediator intervention?

Christopher Moore divides mediator interventions into two broad categories, with various stages of intervention within each category:

- (1) activities carried out by the mediator prior to the commencement of the formal mediation process:
  - establishing a relationship with disputing parties;
  - selecting a strategy to guide mediation;
  - collecting and analysing background information;
  - designing a detailed plan for mediation;
  - building trust and co-operation; and
- (2) activities initiated by the mediator in joint or private sessions after the formal mediation process has

commenced:

- beginning the mediation session;
- defining issues and setting an agenda;
- uncovering hidden interests of the disputing parties;
- generating options for settlement;
- assessing options for settlement;
- final bargaining; and
- achieving formal settlement.<sup>1</sup>

### Intake and preparation

The intake process of mediation refers to the stages of intervention undertaken prior to the commencement of formal mediation. Intake therefore covers the five stages of Moore's first intervention category. Three questions concerning intake were discussed at the colloquium. The questions and a summary of responses are set out below. The responses to the questions illustrate a variety of approaches.

- *What practices are being used in intake and preparation?*
  1. A two stage intake involving a preliminary conference with the parties and a separate preliminary conference with the parties' lawyers.
  2. A one stage intake involving a preliminary conference with the parties and their lawyers.
  3. An intake involving contact with the parties and their lawyers by telephone or written correspondence.
  4. An intake through a telephone hook-up (lasting about 30 minutes) covering who will be present at the mediation, identifying the issues in dispute, and the preparation of the parties.

5. Where intake conferences are not possible due to time restrictions, the use of detailed written correspondence is often sufficient.

- *What summaries of legal advice (if any) are required by mediators?*

1. It would appear that it is uncommon for commercial mediators to make specific requests for written summaries of legal positions.

- *What practices are being used where there is actual or suspected limited authority to settle?*

1. Whether a party at mediation has actual or limited authority to settle is an important issue which should be addressed at an early stage of the mediation.

2. Where the authority issue is not clarified at the beginning of the mediation problems may later arise; for example, if it appears that the dispute has been resolved but it then becomes apparent that a particular party does not have actual authority to settle.

3. Prior to commencing the mediation the mediator should ask the parties to disclose their actual authority to settle.

4. The parties should sign a confidentiality agreement regarding their actual authority to settle. Where such an agreement has been signed the mediator should point out to the parties that if they do not have the stated authority then the issue of breach of contract could arise.

5. The mediator should explain to the parties that 'authority to settle' means that a person at the mediation has the actual authority to settle the dispute.

6. In Victorian court-annexed mediation, the court direction referring parties to mediation contains an order that the parties present at the mediation must have actual authority to settle the dispute. It is then up to the mediator to point out to the parties who are present that if this is not the case then they are in contempt of court.

7. Mediation agreements should include a requirement that the parties present at the mediation have sufficient authority to bind their organisation on the basis that the other party is completely correct.

8. Where a mediator suspects that a party has ➤



➤ limited authority the matter should be clarified immediately in private session. However, it should be kept in mind that a statement of limited authority may be purely a negotiating ploy. Consequently, the approach taken to the mediation process by a party acting with limited authority may be different to the approach taken when acting with actual authority.

The above responses cover the first four stages of intervention. The fifth stage, building trust and co-operation, is discussed below.

### **Building trust and co-operation**

According to Moore:

The importance of trust in conducting productive negotiations has been identified by numerous researchers and practitioners. Trust usually refers to a person's capacity to depend on or place confidence in the truthfulness or accuracy of another's statements or behaviour ... At the start of negotiations ... the parties and the mediator face the challenge of creating perceptions, if not actual behaviour, that induce trust between disputants.<sup>2</sup>

Laurence Boulle lists the following as ways of acquiring and enhancing trust:

- (1) through showing concern and respect;
- (2) through affirming the mediator's experience and credentials;
- (3) by explaining and validating the mediation process;
- (4) through good listening skills and understanding of the parties;
- (5) through sound interpersonal skills, impartiality and even handed conduct of the parties; and
- (6) through empathy and bonding during the separate meetings.<sup>3</sup>

At the colloquium, the participants thought that building trust was a crucial factor in gaining the confidence of the parties in the mediation process. For example, the issue of trust arose in relation to 'repeat players', such as defendant insurers who have become familiar with the mediation process and are using mediation to improve their position. The mediator must have the confidence and trust of all parties to the dispute.

Another example is where a corporate defendant, such as an

insurance company, pays for the costs of mediation. In this situation the plaintiff may lack confidence in the process. If only one party pays there is a possibility that both parties will not fully participate in the mediation.

### **Intervention and the formal mediation process**

#### **Intervention and style**

An important and contested issue in mediation is the extent to which a mediator should 'intervene' in a dispute once formal mediation has commenced.<sup>4</sup> Should a mediator be restricted to 'process interventions', or is 'content intervention' also legitimate? In other words, should intervention be restricted to the actual mediation process itself, or is it appropriate for the mediator to intervene in the substantive issues of the dispute?

This issue is related to mediation style. The facilitative style focuses on the process of mediation rather than on the outcome. There is minimal intervention in the substantive issues of the dispute as the emphasis is on the underlying needs and interests of the parties.

In contrast, the mediator intervenes in the content of the dispute in the settlement and evaluative styles. In the settlement style the mediator attempts to determine the parties' 'bottom line', while in the evaluative style the mediator attempts to achieve a resolution consistent with legal rights. In both the settlement and evaluative styles the commercial mediator takes an active, interventionist role in the substantive issues.

#### **Types of intervention**

Moore identifies four aspects of intervention:<sup>5</sup>

- (1) the level of intervention;
- (2) the individual or group to be targeted by the intervention;
- (3) the focus of the intervention; and
- (4) the intensity of the intervention.

#### **Level of intervention**

The level of intervention refers to the extent to which the mediator helps the parties in general problem-solving and, in particular, deadlocks.

#### **Target of intervention**

The target of intervention refers to whether mediators direct their moves to only one party or to both parties. For example, the mediator may concentrate on the more powerful party in an attempt to break a deadlock. In relation to the target of intervention, the colloquium participants were asked for techniques for responding to lawyers and other experts who hold unrealistic views. The responses included the following.

- Continue mediation without the presence of lawyers.
- Take lawyers aside and obtain agreement to put aside legal rights.
- Question lawyers as to whether they have checked issues with clients.
- Conduct the mediation on a commercial level taking commercial considerations into account.
- Obtain the agreements of experts.
- Where a particular lawyer has taken an unrealistic view of their client's position, it is up to the mediator to treat the situation delicately so that the lawyer does not lose face with the client.

However, the colloquium recognised the importance of the role played by lawyers in the commercial mediation process. Both lawyers and mediators need to appreciate this role, because the chances of a successful mediation may be increased by all parties' awareness of the process to be followed. The role of lawyers in mediation is also important where the mediation is court-annexed. In view of the role played by lawyers in mediation, it is important that they receive proper training in the process.

#### **Focus of intervention**

The focus of intervention refers to where the mediator directs their moves to specific critical situations. Here the mediator may attempt to change the psychological relationship between the parties. This is consistent with the therapeutic style. The mediator may also attempt to change from one mediation style to another. For example, there may be a change from process intervention (the facilitative style) to content intervention (the settlement and evaluative styles) in an attempt to narrow the range of options being considered.

In which circumstances are the ➤



➤ different styles of mediation appropriate? The responses from the colloquium participants to this question included the following.

- Mediation styles are largely dependent on the circumstances. Mediation should therefore be a flexible procedure capable of adjusting to changes in the circumstances.
- In changing mediation styles the mediator must use discretion. For example, the mediator may wish to change from an evaluative to a facilitative or therapeutic approach where the future continuing relationship of the parties has commercial ramifications.
- The expectations of the parties are important. The mediator must read the mood and the expectations of the parties as the mediation progresses.
- The mediator should ask the parties whether the adopted style is appropriate.
- The flexible nature of mediation is an important feature of the process.

### Impartiality and neutrality

Impartiality and neutrality are important factors in commercial mediation. However, what do the terms actually mean? It is not uncommon for definitions to refer to the mediator as a 'neutral' third party. Do mediators have to be neutral?<sup>6</sup> Is there also a requirement for them to act impartially? Whereas impartiality refers to the absence of mediator bias, neutrality refers to the relationship between the mediator and the parties.<sup>7</sup> Impartiality is therefore concerned with objectivity and fairness. Mediator neutrality, on the other hand, is concerned with any prior contact with the parties, any personal interest in the actual process or substantive outcome, and any expertise in the subject matter of the dispute.<sup>8</sup> However, according to Boule:

There is a core requirement of impartiality, but beyond this there may be many variations in regard to neutrality. It is not possible to assert as a matter of definition that mediators are always neutral. However, whatever their lack of neutrality, they are required to act impartially, that is fairly and without bias.<sup>9</sup>

The colloquium specifically addressed the issue of prior contact with a party. An issue

for the mediator to consider is whether prior association with one of the parties requires disclosure to the other party. The participants expressed different approaches here.

On one hand it was considered that prior association should always be disclosed. By contrast, if the parties believe it is not the mediator's role to determine a solution to the dispute, then prior association is not an issue. Additional issues here include the triggers for disclosure and the appropriate level of disclosure. The participants generally thought it is up to the mediator to decide whether to disclose prior associations. However, in some circumstances this may be a difficult task.

An important issue concerning impartiality is the extent to which mediators should meet the parties alone in private session. The colloquium participants expressed the following views.

- A mediator should never consult one party individually without the consent of all parties.
- It may be dangerous to meet the parties in private session if there are emotional issues involved.
- A mediator should not see a party alone without the lawyer's consent.
- After opening presentations it is often beneficial to talk to the parties alone without their lawyers being present.
- Where there are multiple parties to a dispute it is important to see the parties alone.
- Where one party's lawyer feels that the other party's lawyer is an impediment to the mediation, it may be important for the parties to be seen separately.
- The approaches taken by the mediator in conducting private sessions without lawyers present depends on the circumstances of the dispute itself.

In the above approaches to private meetings, the participants stressed the need to act fairly and objectively — that is, with impartiality. The view was also expressed that there must be an appearance of mediator impartiality so that the trust of the parties is developed and maintained.

### Conclusion

Can commercial mediators intervene in the mediation process and still be impartial

and neutral? Can they develop and maintain trust at the same time? Yes they can. The responses of the colloquium participants clearly indicated a recognition of the importance of actual and perceived impartiality, neutrality and trust while intervening in the mediation process. ●

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*LEADR engaged the services of Hinchy to document the discussions at the colloquium. The views expressed are those of the author. The next article in this series deals with issues concerning the mediation process.*

### Endnotes

1. Moore C, *The Mediation Process: Practical Strategies for Resolving Conflict* Jossey-Bass Publishers, 1996, pp 64-67.
2. As above, p 177.
3. Boule L, *Mediation: Principles Process Practice* Butterworths, 1996, p 125.
4. As above, pp 23-26.
5. Moore, above note 1, pp 76-77.
6. Boule, above note 3, pp 18-21.
7. Moore, above note 1, p 52.
8. Boule, above note 3, p 19.
9. Boule, above note 3, p 21.

### Conference

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