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Restoring trust: the art of gestures in dispute resolution

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Practical dispute resolution

Restoring trust: the art of gestures in dispute resolution

Deborah Tyler and Roxane Shaw

In both mediation and conciliation the parties in dispute will often maintain a relationship despite the dispute, not by choice but by necessity. These include ex-partners who have continuing parental responsibilities, business operators and their financial institution, and a person with a disability and the agency that provides their personal care. In these circumstances depleted trust may impede coming to the table to discuss the dispute as well as reaching agreement and resolution.

Sometimes a symbolic gesture of good will can be useful in restoring trust and transforming the relationship. This discussion gives some examples of how gestures can work in different stages of mediation and conciliation.

As mediators we were taught that the people in dispute control the content and the mediator controls the process. Reflecting upon our joint experience as trainee mediators, we can understand the need to train us out of that sense of immediacy to leap to solutions or of being overly directive.

After many conciliation conferences, we have recognised that people in dispute will frequently talk around, or allude to, their real issues. This can include a strong belief that the other person has broken their trust. They will talk about 'it' in pre-conciliation or pre-mediation meetings, or in private sessions, but will very rarely name 'trust' as an issue for discussion.

Naming it

So what does a conciliator or mediator do when it is clear that the people in dispute will have an ongoing relationship, they feel ambivalent about that relationship, and yet they do not identify trust as an issue, let alone identify what might improve it? Do we simply say, 'well, that's a content issue' and leave it be?

Our view is no. Our position as a third party neutral provides us with a prime opportunity to assist people to name the problem and ultimately talk about its resolution.

Part of a mediator's or conciliator's toolbox is the art of empathic listening and probing.¹ We ask questions in all stages of the mediation or conciliation process to help the people in dispute focus on (their) relevant and important issues and to help them understand them more fully. This can include naming the issue when a person may talk around it or allude to it. By doing this we help the person to gain insight into what the issues are — to identify the sense of ambivalence and name it for what it is. It is a two stage process for the people in dispute:

- do I want to name this sense of unease or dispute?; and then
- do I want to include it in my list of issues to discuss?

Probing assists the parties by identifying potential issues from our position as a neutral. Looking at the landscape of ➤



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➤ their dispute we might point to unturned 'stones', and invite consideration. Once considered, it is still very much up to the parties as to whether they wish to incorporate it into their content. After all, a person's control of the content includes the control over what is excluded from the list of issues.

The use of probing is not a prescription to be directive or to hijack the agenda. Rather, we recommend judicious probing with the view to helping the person realise the insight, if they want. From our observations, if we identify an issue as 'trust' or 'future relationship' (or other terms meaningful to the people in dispute) and include it in the list of issues there is often an almost imperceptible sigh of relief. It permits the people to talk about a sensitive issue that neither was feeling quite courageous enough to name.

Resolving issues of trust

Mediators will be familiar with the 'act of apology' as a frequently used gesture to rebuild trust. An apology can be a powerful tool when it is genuine and well timed. However, relationships are complex and will often require a range of responses beyond an apology in order to resolve the past and replenish depleted trust.

In relationship therapy there is a technique called the 'Hurt Museum'² which provides a behavioural technique for dealing with significant hurts. The hurt is named, it is discussed and the partners agree on a 'penalty' to wipe out the item. It is agreed that once the penalty is performed, the partners must forgive and forget. The breach of trust is not to be raised in future arguments nor used in 'kitchen-sinking'.³

The 'Hurt Museum', while a catchy phrase, is inappropriate to mediation and conciliation simply because it is jargon and not every day language.⁴ Rather, we use the concept of 'symbolic gestures',⁵ although we express this concept in language meaningful to the people in dispute. For example, we ask the people in dispute whether there is some act or gesture that could signify that:

- the other person is serious or genuine about wanting to come to the table to resolve the dispute;
- the past has been learnt from and is resolved; and/or
- the future relationship will be different.

What that gesture might be is for the people in dispute to create and agree upon.

Role of gestures in pre-conciliation — helping the people in dispute come to the table

Experience has taught us that people in dispute find it hard to participate in conciliation, even if they have initiated the dispute resolution process by, for example, making a complaint of discrimination. Often, trust has been depleted by the act that lead to the dispute⁶ or by the fact that they have previously tried to resolve the dispute unsuccessfully through other mechanisms. In these circumstances a symbolic gesture that indicates a willingness to resolve may be required before conciliation commences.

Case illustration 1

During the preconciliation meeting with Ayesha⁷ (the complainant in a discrimination matter), the question of whether Jane (the representative from the respondent company) would participate in good faith in conciliation was raised.

The conciliator asked Ayesha what Jane might be able to do or say that would indicate that Jane was genuinely committed to trying to resolve her complaint. Ayesha was concerned that the company would drag things out through conciliation when she wanted things resolved quickly. She was also concerned that the company wouldn't give her the answers to questions that she felt were important for her to know in order to resolve her complaint.

The conciliator suggested that as part of the conciliation process, and prior to the face to face conference, Ayesha could write down her questions and they could be put to Jane. With Ayesha's agreement, the proposal was put to Jane, who agreed to provide the information. For Ayesha this conciliatory gesture indicated Jane's good faith, and that of the company.

Role of gestures in breaking the impasse about financial compensation — making the pie bigger⁸

Experience has taught us that the issue of financial compensation can make or break a conciliation agreement. The people in ➤



➤ dispute often see money as a way of making the other person feel what they have experienced by 'punishing' them in a way significant to the other — 'hit them where it hurts, in the hip pocket'. So what happens when the people in dispute cannot agree on what that penalty should be or how it should be used? We have found that symbolic gestures can play an important role in brokering the difference.

Case illustration 2

John made a complaint of discrimination against the educational institution where he was studying. While conciliation had proceeded positively and John had accepted what he felt to be a genuine verbal and written apology from the educational institution, negotiations reached an impasse over money.

During the private session the conciliator explored with John what he might gain from the educational institution paying him financial compensation. For John it was important that the educational institution was reminded of the lessons learnt from his complaint.⁹ As the private sessions continued with John and the institution, the conciliator explored some alternatives including the institution offering a bursary in John's name. The institution agreed in principle.

This gesture proved to be very powerful. It broke the impasse over money and redirected and cemented a more positive relationship between John and the institution. While, in the end, the bursary couldn't carry John's name, the complaint still settled, predominantly because the gesture had been genuinely offered and pursued. The level of trust between the people in dispute had been replenished.

Role of gestures in keeping conciliation alive

Experience has also taught us that people in dispute can wax and wane in their sense of trust and confidence in themselves and in their relationship with the other person during the conciliation process. At a critical point one person might feel, without careful consideration, that they can no longer participate in a process where trust is required, and that arbitration offers more

hope for resolution of their issues. At this point a symbolic gesture can encourage the party to not leave conciliation prematurely and can put a positive focus on the negotiating relationship.

Case illustration 3

Alex was finding it difficult to sit across the table with the person who represented an employment relationship that had been deleterious. In part, this was because Alex had been deeply hurt by the harassing behaviour of colleagues and felt powerless. During a conciliation conference, Alex's support person raised these concerns and suggested that without some intense support, Alex simply wouldn't be able to continue with conciliation.

At this point, Alex's employer offered to fund counselling support for Alex during and beyond conciliation, regardless of whether the complaint settled. This gesture of concern and good will enabled Alex to continue the conciliation process and established the foundations for successful resolution of the complaint.

Role of gestures in dealing with apprehension

Experience has also taught us that people can be hesitant about agreeing to restore a relationship because they fear that the other person has unrealistic expectations about what that relationship can provide.

Case illustration 4

Steven had not been at work for nearly a year as a result of alleged discrimination and harassment by his supervisor, who had left the organisation. Options such as returning to work or taking a redundancy had been generated and Steven had spoken about his vision of what the workplace could be like, based upon his experience working for a previous supervisor.

In the private session the manager expressed her concerns that the workplace could not return to the vision described by Steven. The conciliator reminded the manager that constructively discussing their views about the reality of options, and how to resolve concerns, was a legitimate part of conciliation.

The manager returned to the conciliation

conference, acknowledged Steven's better memories of his workplace and gently pointed out that it was not possible to 'go back'. The conciliator then raised the question of whether symbolic gesture might indicate to all that there was going to be a fresh start. The people in dispute agreed that a welcome back morning tea would be held and that manager would address staff to ensure that everyone knew that the dispute had been resolved and they could now move on from what had happened. Further, the people in dispute agreed to record in their agreement that each acknowledged that the past incidents would have no bearing upon their behaviour towards each other.

Shadow of gestures

As with any tool of any profession, it is possible to use symbolic gestures incorrectly. The dangers, or shadow as Egan¹⁰ refers to it, need to be recognised and avoided.

Inappropriate pacing¹¹ through the conciliation process by too quickly revealing what is hidden under the stone can result in confrontation and loss of faith or trust in the conciliator. If used badly it can damage the credibility of the mediator or conciliator and of the process.

Gestures can only be provided in conjunction with the mediator or conciliator demonstrating respect for the people in dispute.¹² Using gestures along with an inappropriate parental style¹³ on the part of the conciliator will simply lead to hollow gestures where the people say sorry because they have been told they must.

Similarly, gestures used in conjunction with sympathy can result in the person feeling hoodwinked into providing the gesture,¹⁴ which can end up with the person being resentful. It is a tool to be used in conjunction with empathy.

Lastly, it may not be an appropriate tool for a problem resolving process where the people in dispute really have no interest in maintaining, nor need to maintain, a relationship. It is not a magic bullet for every dispute that comes along.



'The development of gestures came about as part of our struggle to better meet the needs of the people in dispute ... The feedback from them has indicated that as a tool it works well, provided it is used judiciously and not as a tool of manipulation.'

Conclusion

➤ It is at this point we should draw some significant conclusions about the evidence supporting the tool we have described. This is difficult given that our evidence is anecdotal. The development of gestures came about as part of our struggle to better meet the needs of the people in dispute — the people whom we serve. The feedback from them has indicated that as a tool it works well, provided it is used judiciously and not as a tool of manipulation. The people in dispute have left with an agreement that is meaningful and reflects their decision to restore their faith in each other.

It builds upon the notion that the people in dispute can often identify a gesture that is easy¹⁵ to give and important for the other person to receive, and that by that act, they receive much in return. It helps build a principled agreement and relationship.

Fostering gestures is an art, where deft, delicate application can result in heartfelt transformation. It demands selective and careful use by mediators or conciliators who see themselves as catalysts rather than controllers.

We offer the concept to the dispute resolution community for consideration and analysis. ●

Both Deborah Tyler and Roxane Shaw are registered Mediators and are, or have been until recently, Senior Conciliators with the ACT Human Rights Office. The views expressed in this article are the authors' and do not necessarily reflect the views of the ACT Human Rights Office. Comments on this article can be sent to them at kt Tyler@cyberone.com.au.

Endnotes

1. Egan G *The Skilled Helper: A Problem-Management Approach to Helping* (5th ed) Brooks/Cole Publishing Company California 1994. See chapter 6.

2. This technique was taught to Deborah Tyler by another psychologist, Margaret Barnes, in 1985. Unfortunately we have not been able to locate the creator of the 'Hurt Museum'.

3. This term refers to a capacity in an argument to throw everything that a person has been perceived to have done wrong.

4. NADRAC *A Fair Say: Managing Differences in Mediation and Conciliation* Commonwealth of Australia Canberra 1999 p 4.

5. Fisher R and Ury W *Getting to Yes* Arrow Books London 1990 p 32. Fisher and Ury use the term to denote apologies, notes of sympathy, shaking hands or embracing, eating together and so on as priceless opportunities to improve a hostile emotional situation at a small cost.

6. The act of alleged discrimination or harassment can be a betrayal of trust; for example, the inappropriate disclosure of information about a person's disability or inappropriately fondling or touching a person.

7. All the details of cases presented here have been changed to protect the identities of the people involved.

8. Fisher and Ury above note 5.

9. This is not the sum total of John's thoughts; he also wanted to make sure that the institution understood the magnitude of his hurt and that he could have confidence in his continuing studies.

10. Egan above note 1. In his book Egan sets out the dangers of each of the skills taught, using the term 'shadow' which he defines as 'All those things that adversely affect the helping process [or in our case, the mediation or conciliation process], its outcomes, and its impact in substantive ways but that are not identified and explored by helper [mediator or conciliator] or client [people in dispute]'.

11. Grinder M *Advanced Mediation Using Neuro Linguistic Programming* workshop presented by M Grinder in 1991.

12. By respect we mean the conciliator must show genuine concern and treatment for the people in dispute as their equals.

13. Berne E *Games People Play: The Psychology of Human Relationships* Penguin New York 1976.

14. An example of its use with sympathy might be where the conciliator or mediator says 'I know just how you feel and it's so awful, but what if you just apologised?'.

15. The act itself may be easy to do but it does require genuineness on the part of the giver.