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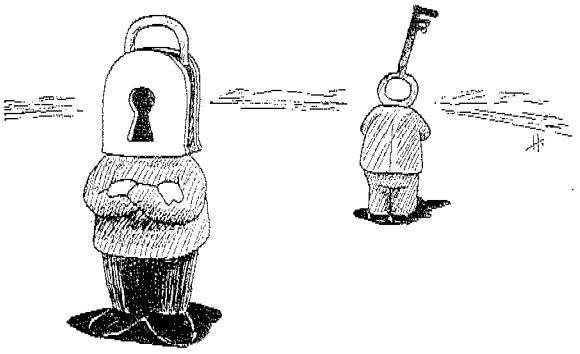
Mediation and the rise of relationship contracting



A decade of change for lawyers

THE LAST decade has been marked by a radical shift in how the law and lawyers are perceived by the public. The rise of mediation has partly driven this change. It has lead to a re-evaluation of the ways we deal with conflict. Mediation has marked a move towards seeing conflict as a positive challenge to resolve rather than as something to be overcome by litigation.

The commercial world has taken this on board and has come up with contractual arrangements that push way beyond current legal practice and judicial precedent. In short, these arrangements seek to oust the jurisdiction of the courts in relation to conflict, to create agreements that are, in effect, agreements to agree, and to emphasise personal relationships over lawyer-driven fixed and binding contracts.

These delivery systems have been used successfully in a number of major projects including the new National Museum in Canberra and the turnaround of the $1 billion Pacific Motorway in Queensland.

This article will discuss how these systems have developed in parallel with mediation and their implication for lawyers.

The mediation experiment

A decade has passed since the first mediation settlement weeks held in Queensland and New South Wales and the Victorian Spring Offensive. In reflecting on what has happened over those 10 years, one can simply note the number of mediations, the success rates, the reduction in court waiting lists and so on. However, statistics do not accurately reflect how the rise and rise of mediation is altering the traditional role played by lawyers and the courts in our society.

The immediate effect of these initiatives was to demonstrate the effectiveness of providing a venue in which legal practitioners for both parties were compelled to pull files out of filing cabinets and seriously review them. Up until then it was only the spectre of the "door of the court" that brought about such behaviour.

Mediation's capacity to provide a venue for settlement has been one of its most enduring qualities. It has led to the rise of mandated mediations in many Australian courts and tribunals.

The pressure to mediate

It was at first thought that people would flock to mediation as an alternative to litigation. This has proven not to be the case.

In our culture it is much easier to engage in adversarial conduct than to sit down with your opponent and talk.

Some courts have recognised this and have put pressure on parties to attend mediation.

Some of the concerns that have been raised by making mediation quasi-compulsory have been dealt with by differentiating between attendance and participation. It is compulsory to attend but once the session starts it becomes voluntary. Keeping mediation a purely voluntary process would not have overcome client fears and lawyer scepticism. Without overt pressure to attend, mediation would have languished as an alternative to litigation.

However, there is a growing interest among legislators in regulating parties' behaviour once the mediation starts. Requirements have ranged from the vague "must participate" to the more vague "negotiate in good faith". Yet the legislature can have only limited influence on what, in essence, are behavioural issues.

One benefit of court-directed mediation is that it has neutralised the common problem of parties' fearing the other side will assume they have a weak position if they make an offer to mediate. This fear

has kept many firmly on the slippery slope of litigation when their interests would have been better served by mediation. A culture of negotiation bravado drives many seemingly intractable disputes.

It is no coincidence that courts, such as the Supreme Court of Queensland, which have actively pressured practitioners and their clients to mediate, have had trial waiting times eliminated. Other courts, such as the Family Court of Australia, which have simply re-badged their existing counselling services as mediation, have seen little improvement in trial waiting times, which are still measured in years.

Is there a duty to negotiate?

The effects of mediation on the practice of law go way beyond reduced trial waiting times. Mediation, like litigation, is now a standard part of legal practice. There is a clear duty on lawyers to advise their clients properly about mediation. However, an issue that is beginning to emerge is whether a professional duty arises for the legal representative once the mediation session starts, particularly with regard to their negotiating behaviour.

The courts are already venturing down the path of defining what is meant by good faith negotiation. We might not be far off seeing courts defining what is unprofessional negotiating conduct by lawyers both in and outside the mediation session.

In my view the role and duties of a lawyer negotiator will continue to evolve especially as the profession starts to take up the broader creative aspects of mediation.

Mediation used as an adversarial process

Up until now the legal profession has, I believe, made only limited use of the process of mediation. There is a tendency to simply transfer the legal adversarial litigation culture and positional negotiating behaviour into the setting of the mediation room.

You can see examples of this culture played out in courtroom settings especially where the bench gives a clear hint to the bar table about the direction in which the case is heading. In the short adjournment that usually follows, recalcitrant clients are often given forceful legal advice by their lawyers. This type of advice is often referred to as "the facts of life". Frequently the result is an immediate settlement. It is this interplay between legal reality and applied legal pressure that is the driver of this form of negotiation. I would suggest that this type of interplay drives the majority of legally referred mediations.

Lawyers are generally comfortable with this adversarial style of negotiation. It is therefore not surprising that the majority of litigious matters referred to mediation by the profession have been directed to mediators who are retired judges and senior barristers. The legal "facts of life" can now be delivered directly to the parties by the judge-mediator with supporting roles played by the parties' legal representatives. The legal profession and judiciary are comfortable with these roles and do them with great skill.

In this style of mediation the legal representatives remain as advocates and seek to tilt the legal "facts of life" in their clients' favour. This results in a mediation process, which differs little from the adversarial litigation process it is seeking to replace.

Not all adversarial style mediations are "head-butting" exercises. Most of these mediators possess deft interpersonal skills and a commonsense approach to conflict resolution. However, it is the use of legal opinion as a leverage on the parties that marks this form of mediation.

I am not suggesting that this is anything other than valid and effective form of mediation. I simply question whether it should be the predominant form used by the legal profession. Is it really meeting the needs of clients or is it preferred only because it fits within the legal profession's comfort zone?

This approach has become the standard form of mediation undertaken by the Victorian legal profession. As a general rule, in Victoria, it is the parties' legal representatives who lead the negotiation even to the extent of making their clients' opening statements.

Mediation used as a risk management process

Over the last 10 years an alternative approach to the adversarial form of mediation has been developing. It is an approach that seeks to suspend the contest for the duration of the mediation session and to enter into what is, in effect, a risk-management exercise. It looks for better outcomes for clients by encouraging them to step back from adversarial behaviours.

In this method the parties contract with the mediator to take time out from the adversarial contest in order to work together to see what can be placed on the table at the end of the mediation. Each party then has the opportunity to make an informed decision as to whether to accept what is on the table or return to the adversarial litigation process. It is suggested to the parties that a decision made at the end of the mediation will be one that is more informed and one that will allow each party and his or her legal representatives to assess the risks when making a final decision to settle or fight on.

This process calls for a different style of mediator, chosen for the ability to create an environment that helps everyone step back from the heat of the contest. The mediator creates a safe place for parties to restructure their thinking about the problem. Developing a good negotiating relationship is the main driver of this approach. The aim is to get the best possible result.

The mediator's judicial status and legal expertise are of less relevance with this approach. The mediator is chosen more for his or her management and facilitation skills.

In these mediations the role of the parties' legal advisor is quite different. It is a more supportive role for their client. They

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assist the mediator to manage the process so as to maximise what is on the table at the end of the day.

It is a far subtler and more creative role than the role of positional advocate in the adversarial mediation model. They will still influence the negotiation by the legal advice they give but it will be done within the context of collaboration rather than competition.

I am not suggesting that the parties who participate in this risk management approach to mediation are any less adversarial or positional than those who partake in the adversarial form. They also mediate in the shadow of their power differentials and the relative strengths of their legal position. However, they are forced to stand in a different place. This process attempts to create enough time and space for everyone to adjust to looking at the problem from a different perspective. It is this dissonance which gives this more "relationship-based" mediation process its strength and effectiveness.

What do clients want from their lawyers?

We really cannot forget our clients in all of this. What do they want, and is it the same as what we lawyers want?

Clients no longer unquestioningly place their trust and welfare totally in the hands of professionals. They are more informed and discerning than previous generations.

Clients want their lawyers to provide realistic and creative options for dealing with disputes. They would prefer options that create opportunities as well as minimise the risk of involvement in further disputes.

Not only have clients changed but so too has the world in which they live. The Internet has sped up business transactions. Commercially it is now harder to operate as a single unit. Collaboration in the form of alliances and partnering is becoming the only realistic option to survive and be able to compete effectively. Maintaining these relationships has become a major issue for management. Any breakdown in relationships between alliance partners can prove commercially fatal.

Commercial organisations can no longer afford to use the adversarial court system to resolve conflict. The problem is not the legal cost of litigating. Litigation costs have always been high. What is different now is that any breakdown in a commercial relationship can cause irreparable damage to organisations. This risk is forcing organisations to reappraise how they deal with conflict. They are prepared to look for creative options even if it means venturing into the legal unknown.

Lawyers today need to be able to offer clients more than an enviable reputation for hard-nosed negotiation and litigation prowess. They need to be able to offer clients relationship-based processes such as mediation, dispute systems design, project alliancing and relationship contracting.

Conflict viewed as a system—dispute systems design

Managers have been looking at creative ways to deal with conflict and disputes. One approach that has been evolving over the last 10 years is called dispute systems design.

It is an approach that looks at conflict as a valuable tool in assessing the health of an organisation. It is a move away from conflict avoidance to seeing conflict as a normal part of corporate and personal life that will always be there in some form. It is a naturally occurring phenomenon which, if acknowledged and dealt with, can lead to personal and organisational growth.

Conflict within organisations is often viewed as a series of ad hoc events rather than as a system.

Thus the response is usually a series of ad hoc reactions such as litigation and mediation. It is only when the number of disputes is so great and exposes the organisation to liability that the conflict is viewed as a systems problem. A dispute systems design approach recognises that internal and external conflict should be treated as a system in much the same way as finances, safety, marketing and human resources are viewed as systems.

As an example, consider the situation where a corporation regularly instructs its lawyers to issue statements of claim. In addition to initiating those proceedings, the lawyer could work with the client to examine what the disputes reveal about the organisation from a systems perspective. It is a way to help a client organisation learn about itself and discover changes that might need to be made. It is a move away from conflict avoidance to a conflict-embracing strategy.

Dispute systems design is a process that can provide an opportunity for lawyers to work with their clients to improve business performance. It opens the door for lawyers to provide a value-added service to their clients rather than continually being seen only as revenue negative.

Like mediation, the techniques used to develop a systems approach to conflict have as their basis relationship building strategies. Universities and practical legal training courses will need to expose students to these relationship-based strategies so that lawyers of the future can compete with other professions in the provision of business-enhancing services.

Relationship contracting and project alliancing

Other developments which are already having an impact on how law is practised are project alliancing and relationship contracting. The commercial world is looking for fluidity and adaptability in commercial relationships to deal with the complications of multi-tiered projects. Unresolved conflict and litigation are untenable for successful outcomes.

These project-delivery systems are designed to create a structure for resolving conflict on the spot and without recourse to litigation or mediation. Clauses are inserted in tender documents requiring the successful tenderer to agree to what are, in effect, agreements to oust the jurisdiction of the courts in relation to disputes.

There is also a move away from the traditional fixed-price contractual arrangements and pro forma contracts. The contractual arrangements are developed over a number of meetings and focus on risk-sharing and relationship-building strategies. A virtual company is

created out of the participants so that the focus is always directed at the project rather than the written legal contract. The option of keeping lawyers out of this phase of the process is gaining favour with many in management. The adversarial culture is seen as an impediment to successful outcomes.

My view is that lawyers need to be part of these relationship-building processes and the agreements that flow from them. However, this requires lawyers to develop an understanding of how they work and how to structure flexible contractual agreements. If lawyers do not meet these challenges, then organisations will find people with degrees in business, commerce, psychology and engineering who will.

The challenge this poses for lawyers is twofold. Firstly, they must avoid becoming sidelined. A problem for lawyers is that they will often fix their mind on what they believe will be a desired outcome for a client and push hard for it. However, with these arrangements the process of getting to the solution is more important. In fact the process is the solution. Hard-nosed adversarial negotiating behaviour runs counter to relationship building and will lead to exclusion.

Secondly, they will have to be able to work with the uncertainty created by contractual agreements that evolve out of a relationship-building process. These contractual arrangements verge on being agreements to agree. This is dangerous ground as case law in Australia is not supportive of vagueness in contractual relationships.

Looking to the future

The point I would like to make about mediation is that it has taken us almost a decade to wake up to the fact that mediation is not just another adversarial process. Our commercial clients realised this some time ago and have jumped ahead of us with processes like project alliancing, relationship contracting and dispute systems design.

Over the last decade we have seen our clients drift away from the traditional mainstream legal approach to commercial arrangements and resolving conflict. I suspect the reason for this is primarily that our clients have awoken to the commercial advantages of getting on with each other.

I wonder whether we lawyers have really understood this movement.

The commercial world appears to have taken matters into its own hands. It has discovered the commercial benefits of relationship-driven contracts and good faith behaviour. It is demanding professional assistance to put these fluid and behaviour-based delivery systems in place.

Solicitors will need to think hard about sending valued long-term clients into short-term risky litigation and adversarial mediation when other creative processes are available.

The degree to which lawyers will play a part in these new systems will be proportional to their ability to move beyond traditional adversarial behaviours and embrace relationship-based processes.

I do not think we will get much help from the courts. There is currently a tension between legislative attempts to mandate good-faith behaviour and the judiciary's reluctance to condone such uncertainty in contractual agreements. Where there is an intention by the commercial world to resolve conflict in-house then it is also less likely that one of these fluid arrangements will become a test case.

It is not hard to imagine that the lawyer of the future will be chosen for his or her ability to get on with people rather than for being a hard-nosed negotiator. They will need to be able to work with the uncertainty of fluid, relationship-based agreements and know how to encourage relationship building and collaborative behaviour.

Legal firms will have to consider adopting this focus with their own legal and administrative staff. It will be difficult to work with clients in relationship building when your own office culture resembles the feudal system of the Dark Ages. Unless firms become culturally aware of the link between relationship building and success they will see major clients move to boutique firms that do.

I also sense that development of these relationship-based approaches will put the control of dispute management more firmly in the hands of the solicitor's branch of the profession. Solicitors by the nature of their work structure develop longer-term relationships with clients. Barristers, on the other hand, are structured to work in short-term relationships, a conference, then a hearing and on to the next brief.

Solicitors will need to think hard about sending valued long-term clients into short-term risky litigation and adversarial mediation when other creative processes are available.

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