

Mediation: Who For?

By Robert Vial

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As mediation is being seriously considered and used for resolving disputes, there is an important question that must be addressed: "Whose mediation is it and why is it being conducted?"

Many articles have been published in the *Law Institute Journal*, the *Australian Dispute Resolution Journal* and overseas mediation journals that touch on this question.

Is it for the parties themselves to participate in the decision making using the mediation process, given that they have been unable to resolve their dispute through normal channels of discussion, negotiation or other legitimate means? Is it for the parties, their lawyers or other advisors who may wish to use the mediation as a "fishing expedition" to find out more about the other's case before going to court? Is it for the mediator to practise skills learnt at a recent mediation training course (for which good money has been paid to attend) in the hope of gaining some positive runs on the board for future work in this area? Is it for the relevant court or tribunal to "clear its lists" and manage caseload more effectively?

Depending on who one talks with, there will be different points of view raised and very different answers suggested to these questions.

My experience over the past 11 years of working as a mediator has led me to consider many of these and other questions. Issues of case management are important. It is also important that parties not sign agreements at mediation unless they have been fully advised concerning their rights and the implications of what

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they are signing (whether legal, financial or other). Advisors obviously play a very important role at this stage at least.

However, I subscribe to the theory that a mediator, while being flexible during the mediation process, should ultimately check with the parties themselves (or those attending with the authority to settle) about the implications of the options or proposals they are considering for resolving the dispute. The mediator, whoever he or she is, must constantly ask the parties such questions as "How is this agreement you are about to enter going to work in reality?" and "What if...?"

Asking these sorts of questions takes skill, patience, the ability to work with people and to help them maintain the trust in both the mediator and the mediation process that has hopefully developed during the course of the mediation. Basically, it assists the parties in making decisions they can all live with.

Working as a mediator is about understanding and working with the dynamics of how people are relating to each other during the whole mediation process. This, in my view, starts

as soon as the mediator is contacted. It means not just working with the dynamics of how people are relating with each other, but how their legal representatives or others involved in the process are relating and understanding the negotiating styles of all. Questions about the parties' willingness and capacity and those of their advisors to be involved in a mediation always have to be addressed.

For those who are serious about working as mediators, it is important that they constantly work at developing these and other basic interpersonal skills (such as active listening, summarising and reframing) that are essential, in my view, to be effective in this field. Some people will have natural skills in these areas, some must work hard to acquire them, others will never acquire them, no matter how hard they work. Being a mediator is not suitable for all, just as being a barrister or solicitor is not suitable for all.

Investing and spending time on professional skill development is essential in this line of work and those wishing to work as mediators must invest in their skill development and constantly address quality control issues. Attendance at a three- or four-day basic mediation training course is just a small first step.



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