Mediation - Pros & Cons

Written by: Professor Kim Lovegrove FAIB Partner Lovegrove Solicitors & Conjoint Professor University of Newcastle

MEDIATION

Definitions

Mediation has been defined as "A method of dispute resolution which includes undertaking any activity for the purpose of promoting the discussion and settlement of disputes, bringing together the parties to any dispute for that purpose, and the follow up of any matter being the subject of such discussion or settlement…An impartial third party attempt to facilitate settlement by encouraging the disputing parties to generate solutions that focus on their mutual interests and preserve ongoing relationships…Mediation may take place before or after an application has been made to court. Mediation should be conducted with as little formality and technicality, and with as much expedition, as possible. Generally the rules of evidence do not apply to mediation sessions". (Butterworths Australian Legal Dictionary page 736)

A further definition of mediation is "A settlement of a dispute or controversy by setting up an independent person between two contending parties in order to aid them in their settlement of their disagreement" (The Faxlex Online Dictionary www.encyclopedia.thefreedictionary.com).

Mediation has become very popular in the West over the last 2 decades and has some compellingly useful attributes. There is however a mounting body of research that casts a negative light on this form of dispute resolution; the disquiet will be dealt canvassed in this chapter.

Mediation is where, be it through the courts or a tribunal or a term of contract, the parties are compelled to refer their dispute to mediation. A mediator is appointed to convene a meeting that is designed to facilitate negotiation

and ultimately compromise. The mediator is a facilitator, a cajoler if you will, and has no power to compel the parties to agree upon the outcome.

A useful definition of mediation is provided by Ms Robyn Carroll who defines mediation as

"Mediation is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted".

(Robyn Carroll (2001), "Mediator Immunity in Australia", 23 Sydney Law Review 185 at page 188)

If the mediator is unable to facilitate the resolution of a dispute then the mediation fails and resort will be had to the more adversarial models of dispute resolution.

It is critical that the appointed mediator is independent and impartial and controls the temptation to force an outcome.

"A mediator does not determine the parties' legal rights and entitlements and therefore they should not have the same broad immunity of judicial officers".

(Robyn Carroll (2001), "Mediator Immunity in Australia", 23 Sydney Law Review 185 at page 207)

The Process

The process for mediation will be dependent upon how mediation is triggered. Mediation can be triggered by:

A contract

A court or tribunal

An agreement to mediate.

A contract can state that when a dispute occurs to do with the contract or any matter of contractual import or bearing the parties must go to mediation. A well-crafted mediation clause will provide that the parties must agree upon a mediator or in the absence of agreement the contract should provide that the matter must be referred to a nomination body to nominate a mediator.

The contract should also provide that the parties will remunerate the mediator on a 50/50 basis and that the mediator will be entitled to have moneys placed into an account in advance of the mediation.

The contract will provide that the parties must meet with the mediator and the contract will provide that a disputant invoking the mediation clause will provide a written dispute synopsis to the mediator once the mediation is triggered.

The contract will provide that the mediator will be free to conduct the mediation as he or she sees fit, but the contract will also provide that if the mediation breaks down then the parties are at liberty to abort the mediation. Conversely the contract will provide that if resolution of the dispute through mediation is effected then the terms of settlement that underpin that accord must be in writing, must be co-signed by the parties and the mediator and the accord will then be binding.

An example of a contract induced mediation clause is below.

The Parties must mediate disputes.

The parties to the contract must use the mediation procedure to resolve a dispute before commencing legal proceedings.

The mediation procedure is:

These provisions emanate from a plain English contract that the author prepared in conjunction with the Victorian Law Reform Commission for the Law Institute of Victoria in the early nineties

The party who wishes to resolve a dispute must give a notice of dispute to the other party, and to the selected mediator, or, if that mediator is not available, to a mediator appointed by the president of the Law Institute.

The notice of dispute must state that a dispute had arisen, and state the matters in dispute.

The parties must cooperate with the mediator in an effort to give an opinion to technical matters. Each party must pay a half share of the cost of the opinion.
If the dispute is settled, the parties must sign a copy of the terms of settlement.
If the dispute is not resolved in 14 days after the mediator had been given notice, or within any extended time that the parties agreed to in writing, the mediation must cease.
Each party must pay a half share of the costs of the mediator to the mediator.
The terms of the settlement are binding on the parties and override the terms of the contract if there is any conflict.
Either party may commence legal proceedings when mediation ceases.
The terms of settlement may be tendered in evidence in any mediation or legal proceedings.
The parties agree that written statements given to the mediator or to one another and any discussions between the parties or between the parties and the mediator during the mediation period are not admissible by the recipient in any legal proceedings.

Court or Tribunal Ordered Mediation

Most courts require litigated matters to be referred to mediation before the case goes to hearing. The courts normally have a published list of mediators that the parties can choose from and each party has to pay the costs of the mediator.
If the mediation facilitates a settlement then the matter is concluded and the legal proceedings will be aborted by consent. If the mediation is unsuccessful then the matter will in all likelihood proceed to trial.
In some jurisdictions like the VCAT (Victorian Civil and Administrative Tribunal) the parties do not have to pay for the mediator and this is a significant cost saving and benefit that flows from such benevolence.

Agreement Based Mediation

Any party to any dispute be it civil, commercial or planning can at any time agree to mediate. All the parties need to do is to find a mediator and then in good faith attempt to settle the matter.
There still however needs to be a rigour, there is little point in settling a dispute unless the settlement is agreed in writing, is witnessed and is evidenced by an instrument that states that the parties have agreed to resolve all of their disputes and differences to do with the subject matter.
Any mediated settlement agreement has to be comprehensive, well drafted and must embrace all matters that gave rise to the dispute. Poorly drafted settlement agreements are open to challenge and are frequently challenged when one of the parties in hindsight thinks that result could have been better.
One problem with a mediated outcome that occurs outside the auspices of a court or a tribunal is that its enforceability may be in question. It is prudent to engage lawyers to appear at the mediation, to advise upon the terms of the mediation settlement and the consequence and import of such terms. There should even be a clause in the terms of settlement along the following lines -
In settling this matter I have agreed to do so of my own volition and free will and understand every term and condition of the settlement agreement. I have also had the terms of settlement explained to me by a lawyer and I am prepared to settle dispute on the basis of the terms herein.

The Virtues

If matters can be mediated at the gestation of a dispute, a mediated outcome has considerable merit. There is little doubt that the fastest and cheapest way to resolve a dispute if negotiations breakdown is through mediation. In any partnership agreement that I have entered into with fellow practitioners or businessman I have insisted on the inclusion of a mediation clause. Resort to court, is last resort.

The Process is suppossed to be confidential but is it really?

One of the ostensible benefits of mediation is confidentiality. If a matter is resolved by mediation the disputants can keep their issues of discontent “in house”. If there is any “dirty linen” it is “washed” in-house, never in public. For people in high office this is most important, reputations particularly in this day of age where communications via the internet are immediate and widespread mean that anything odorous can be seized upon and published very quickly. Furthermore once the odium is out there it can never be archived or placed in a vault that is dedicated to the scurrilous. Information that is published on the web remains there in perpetuity for all and sundry. The need for confidential resolution of disputes is therefore greater than ever and mediation is a useful although not necessarily perfect way of achieving this.

Not everyone however is convinced that a benefit of mediation is confidentiality.
“It could be said that the reality of confidentiality in mediation is in large part reliant on the goodwill of the parties. If good will breaks down, then somewhat ironically, whether confidentiality will be upheld or not depends on relatively insecure legal protections”

(Field, Rachael and Wood, Neal (2006) "Confidentiality: An ethical dilemma for marketing mediation?" Australasian Dispute Resolution Journal 17(2):pp. 79-87 at 7).
“From an ethical marketing perspective it is less than desirous to use the concept of confidentiality to promote mediation; certainly not without providing full information about the qualified nature of the concept in practice. Indeed, the accuracy and legitimacy of some of the assertions made about confidentiality in mediation can be brought into serious question”
(Field, Rachael and Wood, Neal (2006) "Confidentiality: An ethical dilemma for marketing mediation?" Australasian Dispute Resolution Journal 17(2):pp. 79-87 at 16).

As one of the perceived benefits of mediation is confidentiality, yet in actual practise as the said co-authors contend this may be an assumption in some instances rather than a fact, settlement condition “belts and braces” should be brought to bear to secure confidentiality. Where settlement via mediation is engineered the settlement agreement should have a confidentiality clause, any breach of which is actionable in a court of law. If part of the consideration in the settling of a dispute is confidentially it should be expressed as such, then a breach of confidentiality is a breach of that confidentiality provision and actionable.

A greater problem is if settlement is not effected by mediation. How confidential is information conveyed during negotiations in these circumstances? Field, Rachael and Wood have said the notion of whether information remains confidential or not may be reliant upon the good will of the parties. All well and good but of little comfort to disputants at loggerheads with one another, particularly if the mediation proves fruitless and as it can on occasion, counterproductive and a tension exacerbater.

Information gleaned under the ostensible auspices of confidentiality and frank exchange can be a very useful intelligence gathering exercise. One can find out a great deal about personalities, their fears, apprehensions and weaknesses in mediation. There are those who attend mediations with no interest in settling a matter, but are happy to go through the motions of the exercise to gather intelligence and insight into the level of resolve that another party may have.

Where one is encouraged under the ostensible protection of confidentiality to speak freely then this is not exactly “keeping one`s powder dry”. Rightly or wrongly some cases are won because of guile, the careful metering out of one`s better arguments and the element of surprise. This is not tantamount to a lack of ethics, it does not mean that a party withholds information or documentation that is prima facie discoverable, rather is litigation ringcraft. If

one is intent on out and out victory rather than a negotiated outcome the element of surprise and keeping certain scenarios in reserve is important.

To digress a little, years ago the author had a case that had been running for eighteen months or so. The case was a reasonable one, there were some good arguable points to run, but it could have gone either way. A competent junior barrister had been retained from the outset. The other side`s barrister who likewise was relatively junior seemed to be getting the better of our fellow in mediations and interlocutory matters. When the hearing date was announced the author decided to brief a queen's counsel. Unbeknownst to the opposing counsel, the QC was only briefed to do the opening day and the junior barrister was briefed to appear in the remainder of the case which was set down for 21 days.

The author was careful not to make mention to his adversaries that a QC had been briefed to do the opening. This was by no means mischievous as there is no ethical obligation to divulge the identity of anyone who is briefed to do the opening. It was thus assumed by the opponent`s camp that our junior counsel would turn up on day one to run the trial. So it came as a shock to the other side, when a queen's counsel appeared as the other side assumed that the QC would run the trial to conclusion. The opposing barrister felt overawed, lost his composure and urged his client to enter into negotiations without further ado. The matter was settled on the opening day on terms that were favourable to our client.
If the author had settled the matter at mediation when the other side's team was in "full flight" the terms of settlement would have been nowhere near as attractive as the day one of hearing scenario. As a result of being strategic, playing on an opposing advocate's ultimate insecurities and fears, the client got a very good result. Ironically the matter settled by negotiation but the mediation from our perspective was not the right forum to get the right outcome.

The Parties have Control

Another virtue is that the disputants whilst a matter is being resolved via mediation have control and input into the process. They do not have to settle, nor do they have to compromise but if they choose to do so they can do so on terms that in all of the circumstances are the most pragmatic. The word pragmatic is used rather than happy or good terms. In any settlement one of the parties will be less satisfied than the other. The popular view that mediation is "win win" is a furphy if not a nonsense. Mediation is all about dispute containment, the dousing of the fire, the determination to keep a matter out of the courts, the tribunals or arbitration, or the arresting of legal proceedings before one ends up in trial. Mediation can augment this.

It is, however, paramount that a party to mediation, through the medium of the mediator is not cajoled into a compromise or a decision that is against his/her/its best interest. Unrepresented parties at mediations can often fall foul of being pressured into settlements they will later regret, particularly if the mediator is 'overly atavistic' for a settlement, and we usually counsel against parties representing themselves at mediations.

If one has a strong case and the respondent is financially secure and correspondingly has a weak case then the party with the strength should be ill-disposed to compromising their position. It is a bit like "gun boat" diplomacy, the party with the gun boat should not capitulate to the party with the canoe.

Anecdotally, I know of instances where mediated outcomes have occurred in circumstances where a given party gave up too much. In hindsight, more than they had to, and this leads to a fair measure of disenchantment.

Nevertheless, it has to be said that mediation has become very popular, with good reason, because settlements are better than trials and moreover as long as matters are being negotiated or mediated, parties still have control over their destiny.

Shortcomings

The key shortcoming is that with mediation there is no guarantee of outcome. Although a mediator may very quickly figure out who is in the right and who is in the wrong, he or she cannot compel the parties to settle.

A lack of accountability

"There is currently no uniform federal legislation prescribing conduct obligations for disputants and their representatives in ADR processes, and little legislation prescribing the conduct of ADR practitioners.[3] This may adversely affect the value and perceived integrity of ADR" (NADRAC, "Maintaining and Enhancing the Integrity of ADR Processes, from Principles to Practice Through People", February 2011, at page 3)

This is a serious problem, if a judge makes an error the decision can be appealed, this is also the case with arbitrators, adjudicators and tribunal decisions. Admittedly this community of judicial professionals is required to make decisions whereas a mediator is not required to make a decision. The problem however is that if a mediator does break free of his or her mandate i.e. the mandate to facilitate rather than influence settlement and in so doing if the mediator influences or forces an outcome that culminates in a material prejudice to a party then there is no redress. There is no redress because there is no decision, determination or award that is capable of being appealed.

An additional problem is that unlike judges, tribunal members or even arbitrators, mediators do not necessarily have to be in possession of any formal training. Although by and large mediators have had some training, (ordinarily a three day course) when one considers the extraordinary persuasive power that they may have, albeit by cajolement or charisma, it is troubling that there are not more robust and rigorous mediator training courses. Anyone who has a prominent office in the dispute resolution chain should be very well trained in their craft and in possession of a very serious rigour. This rigour should go beyond being a "settlement scalp hunter".

"There are no comprehensive or uniform standards applied to mediators in Australia. While it may be undesirable to impose a unitary standard of training and accreditation on the diverse forms of mediation practice, there are strong arguments to support a unified approach to legal regulation of mediation practice in its diverse forms across Australia."

(Robyn Carroll (2001), "Mediator Immunity in Australia", 23
Sydney Law Review 185 at page 186).

Immunity of Mediators -

"Possibly the most fundamental argument against immunity is that it will inevitably (if infrequently) have the effect of denying access by parties to compensation or other remedies to rectify harm".

(Robyn Carroll (2001), "Mediator Immunity in Australia", 23
Sydney Law Review 185 at page 211)

Bobette Wolski, an Associate Professor at Bond University Queensland and a mediator states the influence a mediator can have –

"In our own culture today, entry into and participation in mediation may not be voluntary. In practice, mediators exert pressure to settle and they influence outcome. They are neither completely neutral nor impartial. The assumption "that mediators are or should be merely catalysts or that they are and should be impartial or neutral is not founded on careful and detailed examination of the actual roles and behaviours of mediators".

(P H Gulliver, Disputes and Negotiations: A Cross-cultural Perspective, Academic Press, San Diego, 1979, p 216.)

Bobette Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1996) 15 Aust Bar Rev 213 at page 4.Mediators "[s]eek to influence the course and outcome of negotiations for a variety of reasons

related to their own interests and values (P H Gulliver, Disputes and Negotiations: A Cross-cultural Perspective, Academic Press, San Diego, 1979, p 203) They become parties to the negotiations into which they enter and to some extent encourage outcomes consistent with their own ideas and interests"

(Bobette Wolski, 'Voluntariness and Consensuality: Defining Characteristics of Mediation?' (1996) 15 Aust Bar Rev 213 at page 5).

It may not be correct to contend that mediators are neither completely neutral nor impartial. This does not mesh with the experience of the author or his colleagues whom collectively would have attended hundreds of mediations over the last 20 years.

Where mediations are remunerated on a fifty/fifty basis there is little reason or likelihood of any conscious leaning towards a given party. Likewise if a mediator is appointed by a court or a tribunal there would be no reason for a mediator to prefer one or other of the parties. So the contention that mediators' lack impartiality doesn't really "wash".

The contention that mediators try to shape outcomes that are consistent with their own ideas and interests also is interesting. The experience of the author and his colleagues who collectively have attended hundreds of mediations is that mediators are not ideological and they don't push any ideology or philosophical preference. Our reservations are that some mediators drive too hard at settlement and on occasion have been known to terrify parties into settlement. Furthermore there are some who overstep the line and comment on the merits of a case or worst, undermine the solicitor client relationship by championing the worst case scenario rather than the likely or best case scenario.

There is little doubt that some mediators try to pressure participants into settlement and there should be an absence of pressure. At the time of writing this material one of the author`s partners after having spent a very long day at a mediation recounted that a mediator had lost his temper with a client and shouted at her.
The contention that mediators do exert influence to settle this sadly is insightful. Partners Lovegrove, Cotton and a previous partner of Lovegrove Solicitors John Perry who combined have over fifty years of experience would in some instances agree. All of the above have attended mediations where mediators have through force of personality and sometimes vociferous aggression, done their very best to compel parties to settle.

The standard intimidation line is "have your lawyers told you how much your case will cost if it goes to trial?" Invariably the answer will be "yes many times". Another line will be "there are no guarantees of victory", although a pithy axiomatic line, the line is at odds with the fact that in some cases there is an overwhelming likelihood of victory. The latter fact is never found in mediator parlance. There are many good litigants with very good cases but mediators are loathe to volunteer that prudent practise suggests that strong cases should be run and not compromised.

An additional shortcoming of mediation is that there is no relief for a dissatisfied party who subsequently forms the view that a settlement was engineered through forceful persuasiveness, that was brought to bear by the mediator. The author recalls that in one matter the mediator was recommending a course of action that was fraught with financial downside. If the author had endorsed that recommendation to his own client the endorsement of that recommendation would have been negligent. The author said as much to the mediator and told his client to refuse to accede to the recommendation. Furthermore the author said to the mediator "if I were to endorse your recommendation and commend it to my client, then I may as well ring up the solicitor's liability committee, right away and give notification of a circumstance that may give rise to a claim, because it would be negligent for me to give an imprimatur to that recommendation". The mediator was none too happy about these churlish comments. But if it were not for the resilience of the author, the client`s interests would have been compromised in no uncertain fashion.

Needless to say the mediator in question was not as troubled about the ramifications of the disquieting recommendation. Mediators unlike most professionals, be they lawyers, doctors or building practitioners do not owe well defined duties; be they fiduciary or otherwise, to one's clients and are in the luxurious position of not being at risk of placing themselves in harm's way. When as a result of any misconceived advice or recommendation, a loss or harm is occasioned; mediators can in theory be sued. Yet if through their ability to steer an outcome in a certain direction they do so in a culpable fashion, it seems to be very difficult to be able to seek redress against a mediator and even harder to sue.

Interestingly the National Dispute Resolution Advisory Council has recommended that there should be no immunity bestowed upon mediators. See clause 5.9.1 and 5.9.2 from their report titled 'Maintaining and Enhancing the Integrity of ADR processes: From Principles to Practice Through People', released in early 2011.
5.9.1 ADR practitioners conducting private ADR processes should not have the benefit of statutory immunity.
5.9.2 Private ADR practitioners conducting court-ordered ADR should not have the benefit of statutory immunity.
(National Alternative Dispute Resolution Advisory Council (NADRAC), Attorney General's Office, 'Maintaining and Enhancing the Integrity of ADR Processes: From Principles *to Practice Through People*' (18 March 2011).
Can Mediators be Sued?

A question that is often asked in both the legal fraternity and commercial and is can mediators be sued?
"In Australia there are no known cases in which a mediator has been successfully sued".
(Robyn Carroll (2001), "Mediator Immunity in Australia", 23 Sydney Law Review 185 at page 192)

Mr Michael Moffitt makes the very poignant observation that there are few formal structures for assuring the quality of mediation services.

"Mediation operates with few, if any, formal structures for assuring the quality of mediation services. In the absence of formal quality control mechanisms, private lawsuits offer a theoretical vehicle for controlling mediators' practices. In reality, however, it is extraordinarily difficult to sue a mediator successfully for her mediation conduct." (Michael Moffitt "Suing Mediators" Boston University Law Review, Vol. 83:147 at page148)

“Reported cases in U.S. federal courts, 3 in U.S. state courts, 4 and in the court systems of Canada, 5 Britain, 6 Australia7 and New Zealand8 include only one case in which a mediator was found liable to a party for mediation conduct.”(Michael Moffitt “Suing Mediators” Boston University Law Review, Vol. 83:147 at page 150)

The difficulty in suing mediators is probably because it is a new addition to the dispute resolution repertoire, somewhat of a dark and evolving art. As canvassed previously mediators are not supposed to make decisions and although a mediator never makes a decision, the errant mediator in making a recommendation or proffering an opinion that affects a settlement is influencing the decision to settle. If the decision is settled and compromised on the basis of a misconceived mediator`s expressed inclination, the conduct of the mediator should be actionable at law.

Yet actionable on what basis? The duty of the mediator in not codified or regulated rather it is ill-defined and speculative As some mediators are not remunerated by the parties does their duty to the party differ to circumstances where the mediator is remunerated by the parties, (presumably on a fifty- fifty basis)?
Interestingly the ACT proclaimed a Mediation Act in 1997 and this Act affords mediators an immunity of sorts in that section 12 provides that a “mediator, has in the exercise of good faith of his or her functions as a mediator, the same immunity as a judge of the Supreme Court”.

Unlike lawyers who are required to enter into cost agreements with their clients that are regulated by solicitor conduct acts, mediators do not explicitly contract with clients to dispense impartiality, ethical reverence or detachment. So in the absence of any contractual obligation for one to sue a mediator, one would have to imply certain duties, duties that are to reiterate ill-defined and opaque.

For the above reasons it is not surprising that mediators apparently have not been sued to date. Although a party in the absence of any mediator immunity would be at liberty to sue a mediator, success could prove elusive. There would have to be compelling evidence that the mediator, very forcefully recommended a course of action, based upon flawed rationale or pretext, resulting in a settlement that materially prejudiced a party`s interests.
Furthermore if the aggrieved was represented by lawyers it would be even more difficult to sue the mediator, because the question would be asked “Why did your lawyer not advise you to refuse to accede to the mediator’s recommendation?”

The disquieting consideration for lawyers, is that the lawyer must be ever vigilant and bold if need be, in ensuring that a bad deal that is put to the client is described as such in no uncertain terms, least the lawyer be implicated in a questionable outcome. The last thing the lawyer would want to become is a client “safety net” for a compromised settlement in circumstances where a forceful or vociferous mediator extolled the virtues of settlement and the lawyer meekly acquiesced or endorsed in that facilitation. For to do so could mean that the lawyer would be sued for a failure to emphatically reject the mediator`s recommended course of action.

As an aside the author can attest to his disappointment with respect to some of his experiences at mediation, albeit a minority of experiences. One case concerned a multimillion dollar dispute where the author was retained by an insurance company and the author’s client flew an insurance instructor from one jurisdiction to the jurisdiction where the mediation occurred. The mediator was a fairly relaxed sort of character but the amount that he charged being $6,000 per day certainly did not relax the disputants. It was observed on a number of occasions that when there were “breakout” caucuses, the mediator used his downtime to read the newspapers in the public reception area that someone very kindly left in the reception of the office.

In another matter, again an insurance dispute, one team flew from one jurisdiction to another, at great cost. The mediation was getting traction but because the mediator and some other members of one of the adversary fraternity had to attend a religious festival, the mediation was cut short. The author, a religious man himself, considered that it would have been a far better idea for the mediator to arrange a date that did not conflict with

either his or one of the other party's religious commitments. Particularity when the mediator was charging in excess of $5,000 per day and the combined legal spend for the day would have been $12,000. Needless to say that the team lacking the same religious affiliation was in a word; disappointed.

One of the greatest risks with mediations is that successful mediations in the author`s experience often go well into the night. In these circumstances many mediators instead of adjourning over to the following day put pressure on the parties to expedite the "wrapping up" of a settlement. In such circumstances mistakes can be made particularly in regards to the drafting of terms of settlement. This makes one hark back to Michael Moffitt's observation that the lack of formal structuring can compromise the quality of mediation services.

There are some jurisdictions where mediation proves to be impotent some jurisdictions are not well suited to mediation. The planning jurisdiction is one such jurisdiction where mediation has its limitations.

Tribunal or court planning divisions often provide that before a matter is set down for hearing it must be referred to mediation. Ordinarily the disputants will comprise a developer or property owner who is content on getting a planning permit through the system. On the other side may be a council planner who having had regard to the constituent's objectives proposes the planning permit application. Objectors also tend to attend mediations. So the typical cast of attendees at a planning mediation will comprise the property owner and his or her legal counsel and planning advocates, a municipal officer and the objectors.

In most planning jurisdictions costs can only be visited upon objectors who lodge objections that are prima facie misconceived or vexatious. Save for these circumstances it is very rare for costs to be visited upon an objector, regardless of whether the objection succeeds or fails.
The above being the case there is very little pressure on the objector to resolve a rejection at mediation. The property owner on the other hand is very interested in the earliest possible resolution on account of the significant holding costs that are associated with delayed outcome.

As objectors do not in the main have to fear any or financial prejudice that will flow from a failed mediation there is no powerful incentive for them to compromise. In many instances they are better advised to "change their arm" and have their day in court.

In the authors experience he has found very little mileage in attending mediations in a planning jurisdiction because the parties to the dispute are motivated by different drivers. On the one side the drivers are more often than not commercial. On the other side the drivers are more often or not to do with the compromising of ascetics or amenity. For a matter to resolve itself at mediation invariably the property owner/applicant must be prepared to make a significant compromise to a planning proposal, the net effect of which will be the sustaining of financial prejudice.

Compare this with a typical litigation where one party is suing for money and another party is armed with arguments designed to justify a refusal to pay such money. It is not an argument about commerce verses ascetics, or commerce and ideology; it is an argument about one thing, money. To this extent the later party's interests are aligned and they are playing in the same game the maximisation or minimisation of revenue flow.

Cost impacts
Mediation is relatively cheap and in tribunals such as the VCAT and the NZ WHT it is free. Court nominated mediators however are not free and when the courts, compel the parties to mediate the parties have to engage and pay for recognized and reputable mediators. This can cost anywhere between $1,500 and $10,000 a day but is money well spent if the matter is resolved quickly by mediation.
The most cost effective deployment of a mediator is at the outset of the dispute, at a time that precedes the initiation of legal proceedings.

Time Impacts

An actual mediation rarely takes more than a day or so. The critical thing is to ensure that the mediation occurs close to the beginning of the dispute rather than on the eve of trial.

On point, the author was engaged by the Law Reform Commission and the Law Institute of Victoria in the early 90's to co-author a plain English building contract with Jude Wallace (Jude worked with the Victorian Law Reform Commission). We decided to make mediation the first "port of call" in the dispute resolution process whereby it was a term of contract that no party could issue proceedings in any jurisdiction unless they had at first instance attended mediation. The contract also provided that the parties remunerated the mediator on a 50/50 basis, regardless of outcome.

It is critical, for fear of labouring the point that mediation occurs at the outset. Ideally, a mediator should be engaged before a matter goes to court, arbitration or a tribunal but this requires a contractual condition that binds the parties to this course of action.

Commercial Impacts

A mediated outcome at the earliest possible time can indeed arrest the deterioration of a commercial relationship. Mediated outcomes can also be positive, they can turn the tide from discord to accord and where this occurs the relationship can be strengthened.

Adversaries can also learn more about one another, a constructive mediation can enable both parties to better understand the other party's point of view. As Sir Laurence Street, the prominent Australian mediator and a past NSW Supreme Court Chief Justice likes to say. "If you look at a coin, the coin has a head and a tail. In any given dispute one party sees the tail, the other can only see the head, yet they are both looking at the same coin".
When adversaries can appreciate that in every dispute each side sees the same dispute differently, then this lack of egocentricity will auger well. One can always see things differently if one takes on board the other party`s point of view. If a mediated outcome is conducive to this mutuality of enlightenment then businesses that have afforded one another patronage in the past will be able to afford each other patronage in the future.