

The commercial value of mediation to the new economy

MEDIATORS ARE NOW IN DEMAND IN THE COMMERCIAL WORLD. BY GREG ROONEY

Mediation has an identity issue – but it's not its fault. Mediators, and the profession they practise – mediation, merely sit as innocent bystanders observing how the modern collaborative interconnected economy has challenged the identity and, in some cases, the very existence of the established professions and commercial and social institutions.

We now live in a time where a world of connectivity and fluidity has replaced the 20th century Newtonian concepts that are linear, predictable and deterministic. This is a world driven by the rise of the World Wide Web in 1990, powered by the Google search engine in 1996 and the power of social networking starting with Facebook in 2004.

The world dramatically changed again in 2007 when Napster introduced the first sharing platform heralding the beginning of the collaborative sharing economy. Then came Airbnb and Uber, both in 2008. We now have transparent and open data networks that are available free of charge to anyone with an internet connection.

The latest iteration in this change is the development of the "Internet of Things" which is a network of physical devices including vehicles, home appliances and other items embedded with electronics, software, sensors, actuators and connectivity, which enables these things to connect with each other and exchange data. As an example, Uber's computers share traffic data with Google Maps' computers.

The complexity caused by this connectivity has upended the Newtonian concept that the world is ordered and measurable and that having knowledge of the past will allow a computation of the future. Many organisations and professions, including the legal profession, still rely on a fixed Newtonian view of the world and wonder why they are being disrupted to their detriment.

The biggest upheaval has been the rise in the commercial value of trust over that of competitive and adversarial behaviours. The sharing economy relies on the willingness of users to be trustworthy and to trust each other. The platforms themselves also must be trustworthy. The sharing economy is built on the human element which is inherently complex. It is therefore essential that any conflict be dealt with in a way that preserves those trusting relationships while allowing new learnings which are an essential springboard for innovation and evolutionary breakthroughs.

We therefore require a new way of thinking and operating that can work with this complexity.

This new world order accurately describes the lot of the practising mediator. Mediators around the world will go off to work tomorrow morning and engage with parties at a very human level in much the same way as they have been doing since the late 1980s. They will work with the uncertainties of the conflict they are mediating and hopefully come up with "good enough" resolutions. They will continue to deal with complexity and ambiguity daily and use their "soft/human" skills to massage impasses and blockages. These "soft/human" skills are now in high demand in the commercial world.

It is the established professions and the commercial and social institutions that are having the identity crisis. They are in a scramble to find meaning and understanding to try to fit in with this new reality.

No profession is more under threat from this new world order than the legal profession.

Since the 1980s it has moved from being a trusted profession based on the application of scale costs which moderated the profession's financial self-interest, to a commercial business model built on time costing to maximise dollar return through promoting (litigation finance) and

SNAPSHOT

- The legal profession is scrambling to find its commercial value in the complexity of the interconnected economy.
- The move by the some in legal profession to replace the word "mediation" with the term "dispute resolvers" betrays a reluctance to move beyond the evaluative litigation model.
- It is the traditional non-evaluative mediation process that is in harmony with the complexity of the modern commercial world through allowing the time and space for innovation and creativity.

extending disputes by means of the adversarial culture. The problem is not so much the high legal fees, although it is an issue, it is the pursuit of the adversarial approach to drive those extra fees. This keeps their clients stuck in the conflict zone far longer than is commercially necessary. This has turned out to be a huge self-inflicted wound.

It has left the profession exposed and unprepared for the arrival of the open sharing economy built on trust and maintained by the soft skills of managers and their advisors.

Re-badging the legal profession

In response to the challenge of trying to provide value to the new collaborative economy the legal profession has sought to rebrand itself to try to recover commercial relevance. It has looked to the trusted mediation movement as its path to restoring that lost trust. The legal profession has sought to rebadge itself by dumping the designation “Litigators” and replacing it with “Dispute Resolvers” (DR) now with lofty ideals: “Through a fidelity to the good of DR, lawyers not only contribute constructively to society but they can also achieve positive interpersonal and individual change for their clients. This positive impact has the potential to extend to healing, wholeness, harmony and optimal human functioning”.¹

It is ironic that the long-term criticism of traditional mediation by the legal profession has been that it is too “touchy-feely” and into “healing, wholeness, harmony and optimal human functioning”² the very thing that it is now trying to champion DR as.

The proponents of the DR push have gone much further than a simple rebranding exercise. They have chosen to question and diminish the intent and identity of the traditional mediation movement.

First, Boule and Field suggest that despite mediation’s versatility and diversity of applications it is not clear how mediation will respond to the challenges ahead. Second, they suggest it follows that this uncertainty for the future somehow renders mediation vulnerable to being subverted, rejected and replaced or modified beyond recognition. They then conclude that because of this uncertainty for the future we should not pine for or have nostalgic sentiment for mediation’s (presumably lost or invalid) original intent and identity.

The real intent of the Dispute Resolution movement is revealed by the assertion that: “It will be necessary to use research to ensure that if evaluative mediation becomes the normative approach, as well it might, that quality-control and



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Mediation

ethical frameworks exist to prevent rogue mediators making de facto determinations”.

The Global Pound conferences examining commercial alternative dispute resolution held in many cities throughout the world during 2016 and 2017 were essentially a public relations exercise to pursue this end. It is the promotion of evaluative mediation and allied semi-determinative processes as the pre-eminent conflict resolution process by, in part, commandeering the high value of mediation in the eyes of the community. I am not sure the commercial world is buying this makeover, particularly when it still built on an adversarial solution focused culture that is not in harmony with modern economic drivers.

I would argue that the traditional non-evaluative “process” approach to mediation is far more in tune with the modern collaborative economy. It is an experiential approach which gives the parties the time and space to step back and allow patterns to emerge. The mediator can sense and respond to these patterns. This creates the potential for new opportunities to emerge out of the interaction that can lead to innovation and creativity. It can help repair disrupted trust which is the central foundation of the modern economy. It is mediating for the emergence of the new rather than providing an evaluation of the parties’ respective positions in order to close the gap.

The core facilitative skills that mediators acquire through the practice of sensing and responding to the immediacy of the moment equip them with the exact soft skills that the commercial world needs to manage in this complex environment. This is reflected in the fact that most MBA courses run throughout Australia have now been redesigned to incorporate soft skills as a core component of their coursework. Further, the big four accounting firms have created legal departments based on a collaborative non-litigious approach to providing legal expertise.

Sir Isaac Newton has passed

There is much of the Newtonian thinking underpinning those promoting the dispute resolution product. This can be seen in Boulle and Field where they connect measurement with understanding, a classic Newtonian concept. For example, Boulle and Field propose that it is only by evaluation and measurement

that the legitimacy and credibility of mediation can be assessed. This is based on the Newtonian concept that the world is ordered and that if enough research is done and a full understanding of a situation is achieved then the future can then be predicted.

The challenge to this Newtonian view of the world can be seen in the replication movement in which many of the significant social science experiments of the past are being repeated with vastly different results from the original conclusions.³ This is because nothing is repeatable in a complex environment. It has thrown into doubt the validity of much of the so-called evidence-based research and observational case studies carried out in the social science field. This has become a significant problem for academia.

The Newtonian view of the world has been superseded by modern physics; particularly, the laws of thermodynamics and the emerging awareness of quantum physics. These offer far better explanations of what is happening and more importantly why the world has changed so much.

The laws of thermodynamics hold the best scientific explanation of the disruptive world we live in. Thermodynamics is a branch of physics that is the study of systems. The first law of thermodynamics is that nothing is created or destroyed; it simply changes form. The second law of thermodynamics asserts that this change is always in the direction of decay and that all natural processes lead to an overall increase in disorder. It is why human beings, and nature in general, cannot reverse the ageing process.

As this change occurs nothing is lost or destroyed. It is simply reconstituted in another form which then becomes the new paradigm, before it too starts to decay. Disruption is therefore a normal part of reality rather than the ordered Newtonian view of the world that existed pre-2007.

The emerging understanding of quantum physics also impacts on our understanding of the complex world we now inhabit. It is a branch of physics which is highly uncertain and interconnected and where change occurs depending on the position of the observer. It breaks down the Newtonian link between cause and effect.

The answer to what will happen in the future in a complex environment cannot be found through analytical thinking. Outcomes cannot be predicted because in a complex environment every element is interconnected and constantly

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co-constrain each other. It evolves in random by constant modification never in the same way twice. Therefore we can only understand what is happening in retrospect. Because no two contexts are the same it is impossible to forecast or predict what will happen. Joining the dots in advance is an illusion.

This is a significant challenge for academia and theorists.

Conclusion

So, tomorrow morning the traditional “process” (non-evaluative) mediators will again go off to work where they will try to remain totally in the moment to observe the dynamics of the interaction between the parties. They will probe first and then sense and respond to the reaction and they will try and suspend any attachment to their memories, desires and the need to understand what is happening and will try and not be deterred by blockages and impasses. They will allow their intuition to guide them through the session rather than letting the mechanical side of their brain be the master.⁴

These are the same soft/human skills that leaders and managers in the commercial world need to use to manage the flow of networks between people in the way that allows for the safe space for minority views, diverging opinions, conflict and internal disruption to emerge. They require a higher state of alertness and the ability to provide a real-time response to emerging patterns and behaviours. This is the best pathway to creating strategic surprises and opportunities.

For the legal community in general and the DR in particular, the answer to restoring value for the legal product in the new economy is not to push aside or try to diminish the traditional mediation movement but to embrace it, and welcome it as the path to acquire the necessary soft/human skills to constructively engage with the fluidity, ambiguity and complexity of the new age.

I therefore suggest that rumours of the death of mediation and the significant role of the traditional process mediator are greatly exaggerated. ■

Greg Rooney has been a mediator in private practice in Australia for 27 years and has taught mediation and allied ADR subjects in universities and private institutions in Australia and internationally since 1995. Over the last 14 years, he has mediated more than 200 face-to-face meetings between religious leaders and individual victims of sexual abuse within Christian religious institutions in Australia as well as in the Australian Defence Force and the South Australian Police Force.

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1. L Boulle and R Field, *Mediation in Australia*, 2018, LexisNexis referred to in “Future mediation: A flexible bundle of knowledge, skills, attitudes and ethical attributes”, posted 24/08/2018 by Dr Rachael Field, <https://adresearch.net/2018/08/24/future-mediation-a-flexible-bundle-of-knowledge-skills-attitudes-and-ethical-attributes/>.
2. Note 1 above.
3. www.nature.com/articles/d41586-018-06075-z.
4. I Mc Gilchrist, *The Master and His Emissary*, 2009, Yale University Press.



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