

Should Commercial Mediators Resolve Business Disputes as Well as Reconcile Personal Conflicts?

BY NEIL CARMICHAEL

At a recent conference I attended, I was asked to take one side in a debate about whether mediators are responsible for resolving only the dispute presented or both the dispute and any attendant personal conflicts. The issue as framed assumed that there is a difference between a dispute and a conflict. Whether there is a difference or not, opinions surely vary, but after considering the issue off and on now for several years, I have come to believe the two terms are markedly different. The definitions of these terms suggest that disputes involve material issues and conflicts involve personal relationships and emotions.

Many commercial mediators take the view that they are solely engaged by parties to resolve the presenting business dispute. But does such a view blind mediators—to the parties' detriment—to the presence of personal conflict that may have more to do with achieving a settlement than the business issue? This article looks at whether mediators should pursue the twin outcomes of resolution and reconciliation to achieve truly satisfactory outcomes in commercial mediations.

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Disputes and Conflicts Defined

Dictionaries define the word “dispute” with terms such as “debate,” “oppose,” “argue,” and “difference of opinion”—all of which can exist in situations where the general relationship of the parties may be quite harmonious. By contrast, they define the term “conflict” using such terms as “discord,” “incompatibility,” and “strife”—all of which imply a fractured relationship.

Another way of expressing the distinction is to say that disputes involve impersonal rights or responsibilities under a contract or law, while conflicts involve personal issues between people.¹

Carrying this thesis one step further, it could be said that the word “resolution” refers to the successful outcome of a legal or contractual dispute, since it has been defined as a “solution,” “accommodation,” or “settlement of a problem or controversy.”² Similarly, the word “reconciliation” could be said to refer to the successful outcome of a personal conflict since it has been defined as “the restoration of friendship and fellowship after estrangement.”³ If this thesis were correct, it would appear that reconciliation comes about when harmony is restored to a broken personal relationship.

Let’s look at the elements of a commercial relationship and what happens when it breaks down.

Emotional Issues and Mediator Practice

The subject of personal conflict and the emotional baggage associated with it are difficult for commercial mediators to deal with. For one thing, parties to business disputes are almost always resistant to looking at the emotional content of their controversy. They may say something defensive or aggressive:

- “You’re not my therapist!”
- “This is too touchy-feely!”
- “Emotions have nothing to do with this!”
- “I didn’t come here to sing folk songs around a freaking campfire!”

Mediators will have to decide how to respond to this resistance. Should they accept it? Try to overcome it, or ignore it?

A factor that could influence the decision is that mediators are highly sensitive to their sources of business. As a result, they may be concerned about what referring lawyers who are resistant to exploring emotional content are going to think about reconciling personal issues, which invariably involve emotional content.

Elements of a Commercial Relationship

Most commercial relationships are based on a written contract. The word “contract” is both a noun and a verb. When used as a noun it refers to a written or verbal document or agreement. When used as a verb, it means the act of “entering into” an agreement of some kind. This “entering into,” by its very nature, establishes a two-part relationship between the parties—the business relationship and the personal relationship. The latter develops during the negotiation process and evolves as the parties carry out their agreement.

The contract describes the rights, responsibilities, representations, warranties, guarantees and other promises of the parties, which infuses the business relationship with certain business expectations. These necessarily become bound up with the parties’ personal relationship, particularly their expectations of each other.

When a Commercial Relationship Breaks Down

When one party fails to carry out a material term of the contract, the other party will try to find out what is going on. First and foremost, the business expectations of the non-breaching party are not being met and he or she wants to know why. Did the breach occur because of insolvency as a result of the current economic downturn? Was it intentional? Did the breaching party enter into a similar contract with someone else?

An intentional breach can trigger strong emotions—such as feelings of disappointment or anger—that personal expectations for the relationship have been cavalierly tossed aside.

Thus, when a business controversy is mediated (I use the term “controversy” to refer to both the material dispute and the personal conflict), the parties do not check their personal conflicts at the door. Some bring up the conflict by acknowledging their feelings. They may say, “I was wronged.” “I was cheated.” “I was misled.” “I feel taken advantage of.”

Let’s consider the following case between a caterer, Jill, and a wedding planner, Trish, where the material dispute is the \$12,500 Trish refuses to pay Jill for a recent wedding reception. Trish’s clients pay her for full-service wedding planning. Trish, in turn, pays all the vendors with whom she contracts. Trish’s refusal to pay Jill is based on the bride’s complaint that the food was not of the quality she expected. The bride had been difficult to work with. Now, add the following facts: Trish has used Jill to cater dozens of weddings over the last five years and has hired her to cater 18 more weddings over the next six

months. Their relationship has grown into a friendship. They baby-sit for one another, attend the same church, and occasionally vacation together. Jill's response to hearing of the bride's complaint was that there was nothing wrong with the food. Trish took the bride's side and accused Jill of using lower-quality food in order to increase her profit margin. Jill was incensed at this accusation and, feeling betrayed, accused Trish of putting the unwarranted complaint of a "spoiled brat" ahead of their friendship. A heated and very personal exchange ensued, prompting Jill to sue Trish.

An intentional breach of contract can trigger feelings of disappointment or anger that personal expectations for the relationship have been cavalierly tossed aside.

This controversy has both a material dispute and a personal conflict. Can a mediator possibly navigate the parties toward a satisfactory outcome without addressing both elements?

The Mediator's Role

A threshold question for all commercial mediators is whether the controversy they have been asked to deal with involves both a business dispute and a personal conflict. If both elements are determined to be in play, the question then becomes whether commercial mediators are responsible for resolving the business dispute and reconciling the personal conflict. My answer, in general, is yes, because reconciling the conflict could hold the key to resolving the business dispute. And even if it does not, reconciliation of the personal conflict may repair the parties' relationship and result in a more satisfactory and lasting outcome.

Thus, from the moment of appointment by the parties, commercial mediators should be constantly on the lookout for the key to the proverbial Gordian knot that will unravel the parties' controversy. This requires an understanding of human behavior, particularly how people handle and are affected by conflict, as well as the ability to discern the presence of a personal conflict in the dispute at hand. This task can be very challenging if the non-breaching party does not recognize that there is a personal conflict and subsumes personal issues under business issues.

How should a skilled mediator proceed after determining that a controversy involves both a business dispute and a personal conflict? The first step is to confirm this conclusion with the parties. For example, the mediator could say in a

joint session, "Based on what I've heard, it seems to me that this matter has two elements, one business, one personal. Am I correct?" (Alternatively, the mediator could ask this of each party separately in a private caucus.)

If both parties say yes, the next step is for the mediator to express willingness to address both elements of the controversy in the mediation if the parties are agreeable. Then the mediator should ask them point blank what they would like to do. If they agree to address both the business dispute and the personal conflict, then depending on the specific circumstances, the mediator could

tackle them one at a time, or alternate between the two, or perhaps deal with them simultaneously.

If the parties do not agree to address the personal and business issues in the mediation, which is probably more common, the mediator could safely suggest that the parties mediate the business dispute that brought them to the mediation. It would probably also be prudent to caution them that doing so will likely provide only temporary relief if the personal issues are not also reconciled.

Conclusion

A commercial mediator who focuses only on the business dispute when a significant personal conflict is also in play resembles a physician who treats only a patient's symptoms and ignores the cause. Treating symptoms alone works fine in the short term to relieve pain or discomfort, but if the cause is not addressed, the patient will surely be back and may be in worse shape than before. For this reason, I believe that mediators should pursue the twin outcomes of resolution and reconciliation in order for the parties to achieve a truly satisfactory result with regard to both the material and personal elements of the controversy. ■

ENDNOTES

¹ Ken Sande, *The Peacemaker* 81 (Baker Books 2004).

² Dictionary.com unabridged, definition 8, at <http://dictionary.reference.com/browse/resolution> (based on the *Random House Dictionary*).

³ Robert Moeller, *Love in Action: Healing Conflict in Your Church* 132 (Multnomah Books 1994).