

## **Mediation - what it is - how it works - opportunities for experts**

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Anger - an emotion that is most often at the root of legal battles. Nowadays we are positively encouraged to vent our anger instead of bottling it up. It is said to be good to let it all out, and thus avoid stress.

However, think for a moment about the last time you were angry - and outwardly expressed it towards whatever and whoever has been the cause. Did you feel better afterwards, or did you do as most of us do - later spending hours and hours going over in our minds how we could have done it better - going over and over imaginary scenarios where new and better responses are made to an imaginary dialogue with the object of our anger. Nothing very stress releasing about that - in fact, quite the opposite. No, anger requires 'closure'. It is this desire for closure that drives us to go over and over our imaginary scenarios after the event - or even to instruct lawyers to sue the swine who got us into this state in the first place.

Now let us go forward in time to the court or arbitration hearing. One of those parties is going to come out the jubilant winner - the other, the embittered loser. They will probably never speak to each other again - let alone do business together. One thing IS most likely, they will BOTH be the poorer for their experience.

Mediation is a method of gaining closure to anger - amongst other good things - by allowing all parties to gain closure to their dispute. Not by having an imposed solution, but by making an environment conducive to the parties so they formulate their own solutions.

It is not intended that the parties will all leave the mediation feeling thoroughly happy. That would be unrealistic. The intention is that the parties will be assisted and guided towards a solution that they can all live with. They might not LIKE it, but they can LIVE with it.

So, what is mediation and what are the skills of the mediator?

Mediation is a non-legal, non-binding, facilitated negotiation. The mediator is there to act as a guide, a conduit and a catalyst for imaginative thinking. The mediator's job is to listen, empathise, play devil's advocate and challenge the parties' positions in an effort to a much needed air of reality to the proceedings. It is the skill of the mediator to know which stance to take at any particular time. The mediator is not a councillor, though counselling may be one of the tools in the box. At other times the mediator may confront, argue, disagree and be downright awkward with the parties if that is what is needed.

Litigation and arbitration are both, basically, history lessons. They spend vast resources with judges, lawyers, witnesses and experts going over and over the various (disputed) scenarios that they allege resulted in this situation - sounds familiar? Mediation, on the other hand, starts with the basic truthful concept 'we are where we are - now what can we do to minimise the damage and move forward'.

Civil courts have just one remedy - the redistribution of money. Not only that, but it is not done on a 'you can afford to pay so much' basis - nor is it done with a 'what will happen to your business if you have to pay all this out now' consideration. The needs and wants of the parties do not form any part of a judge's or arbitrator's priorities. It is an imposed solution that takes no account of what is feasible, affordable or desirable for those parties who appear before them.

Does a mediator have such constraints - of course not! The only constraints are the limits of the mediator's imagination - remembering that a solution will always work better if it is in each case perceived to be the 'brain child' of the parties - even if the seeds were sown by the mediator (which they will almost certainly have to be).

The ultimate solution is to find something of low value to one side that, when offered, is perceived to be of high value to the other. This is not likely to involve money.

How is this achieved? One thing a mediator never says - "I think that....." The mediator does not express their own thoughts. They are always careful to use a third party as their foil - "What do you think a judge would say about that?" "How do you think you will prove that to the satisfaction of the court?", or "What would your response be if the other side were to offer XXX in settlement?"

The mediator has other tools in his box. Tiredness, hunger, plain exhaustion can all be exploited by the mediator if used in the right way at the right time - and there is no prescribed right way or right time - each mediation is different. Likewise the parties exhaustive business or social timetables can also provide the break point in a mediation. For instance, the desire to attend an evening football match, or even just a drink and a meal can pave the way for a speedy conclusion to a mediation on a sticking point that had formed the basis for objection all day.

The one area that is of the utmost importance, and yet one of the easiest of rules to break - confidentiality - the watchword of the mediator. The bedrock foundation for any mediation is to uphold the strictest standards of confidentiality. This only comes after making repeated gaffes during training mediations, and the embarrassment of having those gaffes exposed to the parties!

So, what are the opportunities for experts in the field of commercial mediation?

Firstly, disputes are always evident in all forms of business life. I am an expert in fire, and yet I have only been called upon once to mediate in a dispute that was even remotely associated with my area of expertise. In fact, quite the opposite - often the best mediator will be someone who knows nothing about the area that is in dispute. In discovering what the dispute relates to, the mediator can often guide the parties to a settlement simply by asking open ended questions that were only intended to inform.

So, the first opportunity is to work in the arena of dispute resolution that is not confined to your area of experience.

The second opportunity is to assist in the identification of real world solutions to real world companies - few of you are lawyers and mediation is a non-legal service.

The third opportunity is unique. Payment in full for a service before it is provided. This is a critical aspect of mediation. The mediator must be paid up front, so that if the parties decide to walk out, you will not have difficulties getting paid later. The fact that the parties have paid for the service before the mediation helps to focus their minds on outcome related solutions. If they had not paid, they would be far more likely to spend a frivolous few hours trying to bait their opposite numbers, then storm off in a huff when the same treatment was meted out to them. Try getting your invoice paid later in that situation!

Once the terms of the dispute are settled, it only remains for the mediator to sort out the paperwork. This usually involves allowing the parties to decide how they want the settlement to be recorded, and dealing with it in the way that the parties elect. At one extreme, this could be on a hand-shake, at the other, the mediator can be appointed an arbitrator for the purpose of recording an arbitration award. The resolution for the dispute then becomes binding, but only if that is the way the parties want it to be concluded. This just goes to emphasise the peculiarity of human nature. Few people would go into mediation if the result was binding - yet few people want to leave the mediation table if the result is not binding!

For me, the most wonderful thing about being a mediator is that there are no reports afterwards. In fact, you tear up the notes that you have made in front of the parties at the conclusion of the mediation. Now you can't say fairer than that!

The only thing you need is training. This is a very different way of thinking, and sensible people working in the sphere of the expert advisor or witness can quickly tune their skills into mediation with great effect. BUT, training is the key. To understand the need for equity, independence and non-judgmental mediation takes significant training and pupillage. Once attained, the skills of mediation will not only provide a unique way of earning a living, they will also provide the tools to reduce anger in your life, and for those around you that you care about.

### **Summary**

Mediation is a non-legal, non-binding method for dispute resolution.

The mediator does not require legal skills, though does need to have a basic understanding of law.

Mediation requires the parties to the dispute to devise their own solution under the guidance of the mediator.

The mediator's skills are based around achieving closure for the anger of the parties; listening skills; dealing with peripheral issues; lowering the expectations of the parties, and acting as a conduit for communication.

Because of the way the resolution is reached, the parties are often able to resume a business relationship after the mediation. A win-win situation if ever there was one.

There are no reports to produce - only the agreement.