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## DEAL MEDIATION

### The value of a third party neutral in facilitating negotiations

#### Background

I write this paper from the perspective of mediating hundreds of commercial disputes, and in so doing using skills and competencies that have enabled parties in over 80% of cases to find a solution to which they can both/all say “Yes”. I also write from the perspective of having many years in business and understanding, and more recently, teaching effective commercial negotiation. In all areas – business, mediations and training courses - I have seen some appalling negotiating skills, often by people who pride themselves in ‘doing it all the time’.

It doesn't have to be like that. What Mediators do in helping parties reach a solution – their solution – is gather the true positions and needs from the parties – information which may damage their case if shared with the other side – and, being in such a unique position of knowing more than any one party, facilitate the richest outcome for both/all parties. Mediation is, after all, an assisted negotiation. Why then shouldn't these same skills and competencies be used in non-contentious negotiations? It seems to me that there is everything to gain and nothing to lose (except the cost of a modest fee) by having a skilled neutral help the negotiating parties achieve the best possible, as opposed to the merely acceptable, result where there is nothing left on the table and all possible ingredients for the richest result have been used up.

Further, whether within negotiations or not, these same skills and competencies can be used to facilitate difficult discussions, meetings and emotional situations. The Mediator spends much time helping people avoid losing face, get past deadlock and emotional blockages and so achieve a fruitful outcome.

This paper therefore deals with just two of the many potentially important uses of the Mediators skills and competencies:

- Deal Mediation
- Facilitating difficult discussions

#### Deal mediation

Deal Mediation is not new but I suspect it is not used very much. Having said that, most Deal Mediations are confidential so no-one knows about them except the parties involved. Like Mediation, it just reintroduces common sense into business negotiations. What follows is based upon my (limited) experience and must have the caveat that the process is flexible and is tailored to each deal. What follows may not be (wholly) appropriate to some negotiations, but the skills and principles are common to all.

Most people negotiate to win but usually end up either with the minimum acceptable result or with the other party feeling abused and longing for revenge. Neither result is good for the parties involved. Even with the new generation of co-operative negotiators (a generation now finding a strong voice in collaborative law) there is a natural reluctance to put everything 'on the table'. Whether cards are played close to the chest, giving little and slowly, or more openly as principled negotiators, most deals leave crumbs (if not big chunks) on the table that could have been used up in making a richer deal. The annoying thing is that nobody knew that a richer deal was possible.

So what is it that a Mediator brings to the negotiation table? An effective Mediator:

- Builds trust with all the parties. This enables sensitive information to be shared without the fear of it being used to the party's disadvantage. It also means that when the Mediator needs to get tough, challenging positions and reality-testing proposals, the parties understand that it is in the overall interest of achieving the best deal.
- Establishes the 'headline' (the purpose of the negotiation) with the parties at the start. This becomes the reference point for the rest of the negotiation.
- From the beginning, identifies the key issues to be addressed to enable a deal to be possible and ensures the necessary information is shared between the parties.
- Uses core skills of effective questioning and active listening to identify each party's needs (as opposed to their demands). In any negotiation, each party has to try to meet the other's needs if a deal is to be possible.
- Maintains confidentiality throughout (according to the parties wishes). This means that the Mediator gathers sensitive information from each party that is not known by the others and is able to use that information to help the parties to get the best deal, with everything possible included in the outcome. The strategic use of information is one of the key skills of an effective Mediator.
- Creates an environment in which co-operation is natural and where the parties work towards a mutually beneficial outcome.
- Is often able to help the parties to 'enlarge the settlement pie' by promoting creative problem-solving.
- Anticipates and avoids where possible deadlock situations and helps people avoid potential loss of face situations. This involves the positive management of emotion, reframing negative or destructive statements and coaching parties in the best way of presenting proposals.
- Manages the whole process efficiently and effectively to ensure time is not wasted and parties do not digress from the 'headline' purpose.
- Is neutral and has no interest in the outcome. This ensures a balanced and even-handed management of the process.

As mentioned earlier, the Deal Mediation process is flexible and is usually devised to suit the particular negotiation. General principles include:

- Setting an appropriate timetable

- Identifying key information/documents (to be shared by the parties and/or viewed by the Mediator alone).
- Agreeing the right people to be involved in the negotiation. This may change as the negotiation progresses.
- Having agreed the 'headline', setting an agenda, or routemap, to achieve the outcome desired by the parties.
- Chairing a series of open (all parties) and private meetings (confidentially with each party) and, where appropriate, expert/specialist meetings on specific matters.

All this may happen in a very short space of time – perhaps two separate days – or be spread over several weeks. It is tailored to suit the negotiation. What the Mediator does is to keep the parties focussed on the 'headline' and ensure that the best outcome is achieved for all the parties.

The thing to remember is that IT WORKS. No amount of writing papers and presenting at conferences is an adequate substitute for the real thing. My message is "put it to the test".

Because the skills and process are so similar I take this opportunity to mention another area of use of the skills of the Mediator:

### **Facilitating difficult discussions**

Often called "round table facilitation" this has been particularly useful in the Health sector but is now increasingly found effective in board-room and partnership situations. However, this is transferable to any difficult discussion where the intervention of a neutral third party can aid communication and understanding.

Underlying the principles of third party intervention is the knowledge that conflict is good. It can lead to understanding, valuing and stimulate co-operation. The Neutral is therefore attempting to lead parties from a negative situation of fear (which in turn leads to flight or fight) to one of appreciation and understanding.

One skill is to help parties separate the issue from the person. A person's emotional state usually clouds the issue causing the emotion. Identifying the issue and acknowledging the emotion helps parties to feel valued and moves them to a clearer state to be better able to deal with the issue. A classic example is of a new head of department having real difficulties with his senior manager. The manager became angry and obstructive and was critical of the head of department. A neutral third party was asked to intervene and it was soon established that the real issue was that the head was assuming responsibility for work which the manager had previously undertaken. The manager had taken this as implying that the head did not trust the manager and so felt personally demeaned. The real issue was (and usually is) one of communication. The head recognised and acknowledged the managers' strong feelings, was able to apologise and a clearer line of responsibility was agreed. The neutral third party did have private meetings with both parties but most of the time was spent together with the Mediator acting as an accepting, compassionate listening ear.

Many of the skills and processes covered earlier under 'Deal Mediation' are used in facilitating difficult discussions. As ever, it is a flexible process with a third party providing the environment and opportunity for the parties to find an outcome with dignity. This invariably includes helping people overcome blockages, diverting them

from situations where they may lose face, giving them time to tell their story and being non-judgemental, whatever is said. This is not counselling the parties. It is being open and accepting without necessarily agreeing.

Mediators are frequently asked to chair difficult meetings, whether they be internal or with external parties, complaints procedures or just meetings where a neutral is able to bring an impartial but empathic presence to the proceedings. How many partnership and board meetings could benefit from that!

The Mediator's skills are transferable to almost any situation, whether it be a dispute, an important negotiation or facilitating a difficult discussion. Mediators are the modern business peacemakers!

This paper was originally presented to the European Law Association in Trier in 2007 in the form of a mind-map. This text is therefore a summary of the talk