

MATA

Mediation and Training Alternatives

ONE IN THREE CLIENTS TRY TO BY-PASS LAWYERS IN MEDIATION.

At a recent gathering of top commercial mediators, a significant number reckoned that on average one in three parties at some stage ask the mediator to help them by-pass their lawyer during the mediation. This is a remarkable statement considering the lawyer is there to support the client and help them achieve a settlement.

There remaining two thirds were not necessarily succeeding in their role; rather the perception was that they were not obstructing the process. The general feeling amongst mediators is that, even after twelve or more years of commercial mediation in this country, few lawyers use mediation well.

This begs the questions “why should some clients feel the need to by-pass their (paid) advisors?” and “why, with mediation having been around for so long in the UK, are so few lawyers good at it?”. “It” being using mediation effectively.

Why should some clients feel the need to by-pass their advisors?

The most common reason for a party calling in a mediator is that they are being prevented by their lawyer, intentionally or not, from having commercial discussions with the other side(s). By then the parties are aware of the legal merits of their case and have carried out their risk analysis, and they want to thrash out a deal. Their deal. Often they will give the mediator figures quite different to those being presented by the lawyers, so the mediator gets involved in two negotiations at the same time – the ‘public’ one and the ‘private’ one.

Why should this be so? Why can’t there be just one bottom line – the secret one made public? This usually happens because the lawyers are still in adversarial state, often fuelled by the need to win, at a time when their clients need a supporter who is positive, encouraging, and gives them space to do the deal.

There is another possible reason for the lawyer’s reluctance to promote a deal; fee targets. Helping a client sign up to a mediated deal that would otherwise have attracted big legal fees poses quite a dilemma.

Why are so few lawyers good at it?

In the end, most mediations become commercial negotiations. Indeed, mediation is described as an 'assisted negotiation'. Generally, lawyers consider themselves good negotiators, so mediation seems an ideal forum for their talents. Yet the sad fact is that most find it difficult to:

- be a supporter of their client, rather than leading them, and to
- leave the adversarial approach to negotiation behind them and become co-operative with the other side.

Many find it difficult to step outside of the familiar territory of legal arguments and, thus inhibiting commercial discussions. Like it or not, legal arguments fall away as a mediation progresses.

A skilled mediator should still be able to bring the mediation to a successful conclusion regardless of the role played by the lawyer(s), but it would be so much better if it were because of the legal representatives rather than despite them.

Sometimes clients want to by-pass their lawyer because they simply don't seem to understand the mediation process. Typically they can appear ignorant to -

- mediation and the different opportunities that it brings.
- negotiation tactics and misjudging the time to be co-operative.
- principle-based negotiation (as opposed to adversarial).

Sometimes ego (bettering the other side) is a major obstacle, but most often the lawyer truly believes that their stance is for the benefit of their client.

What do the good lawyers do?

There is an increasing number of lawyers who are getting good at it, although most mediators would say it is still a minority. These few have adapted the new skills well and have enjoyed the benefits of a satisfied client (who may well produce repeat business). But it takes different skills to be an effective lawyer in mediation.

Effective lawyers:

- give their clients freedom to do **their** deal (having briefed them, coached them, carried out risk analysis and agreed the 'walk away' point).
- avoid scoring points off their opponents, or bullying, or haranguing them. They recognize that the best deals come from building co-operation, not winning fights.

- use idle time (while the mediator is in private meeting with another party) creatively, seeing the issues through others' eyes, seeking ways of meeting the others' (as well as their own clients') needs, crafting solutions that a Court could not possibly offer.
- have a chilled bottle in the refrigerator so that the eventual deal can be properly celebrated.

Mediation is a different process needing different skills. Those lawyers who recognize and practice this invariably have a good outcome with satisfied clients.

What should be done?

There are three ways for a lawyer to become effective at representing clients in mediation:

- do more of it. There is nothing like experience to give confidence and find out the most effective techniques
- train for it. take a course in effective strategies and principle-based negotiation skills
- have post-mortems. Debrief every mediation with colleagues about what worked and what didn't. Get comments from the mediator.

And be prepared to take risks by being open and co-operative. After all, no-one is committed to anything until a deal is set out in writing and signed.

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