

# MOST LAWYERS FOUL UP MEDIATIONS

A colleague recently asked me if Collaborative Law means the end of commercial mediation as we know it. I laughed. Collaborative Law means that lawyers sign up to co-operating in finding a solution to their clients problems. And if they don't settle they withdraw and let a different lawyer take the case further (whether it be to litigation or ADR). The theory is that deals are struck before a case gets anywhere near a Mediator.

I laughed because, as a commercial mediator of some years (by that I mean some years experience, not age....although that may still be appropriate), it is still my dream to have lawyers who co-operate rather than ones who want to score points, 'win' (whatever that may mean), play hard-ball or who plainly believe that better fees are to be made by the case not settling. I acknowledge that there are a few lawyers who believe in the mediation process and who take pleasure in having a satisfied client who will bring repeat business. These blessed few allow their clients to not only speak, but to take a leading role in the mediation. They allow their clients to negotiate their own deal and to take the credit for a successful outcome. They are content to be supporters rather than leaders. But of course, in taking this role, a lawyer risks losing control, risks having an identity crisis and, though this would never be admitted, risks missing fee targets.

Litigation is all about winning. It is about building a case that gives a clients version of the truth the best chance of being believed by the judge. If the judge believes the other party's version of the truth (and that can only be because s/he got out of bed the wrong side....or out of the wrong bed the right side), they win. There is no in-between.

But life is not like that. Life is a whole spectrum of colours from black to white, where people's differing versions of the truth sit quite happily. Which is why mediation is so good for resolving disputes. It allows for the fact that people see the same facts and events through different eyes and interpret them differently. This may be due to culture, education, age, class, gender and a whole lot more. Just because their version is different it doesn't necessarily mean that it is any more right or wrong...just different. But the courts (and arbitration and any other adjudicative process) cannot cope with that...it has to be win or lose, nothing else.

That is one of the reasons why so many lawyers seem unable to grab the opportunity that mediation offers, to enable a client to understand that the other side's view of events is usually honestly held and so should be valued and understood. If they are able to understand where the other side are coming from, it becomes possible to co-operate in constructing a settlement to which each side can say 'yes'. That is one of the few rules of mediation – there is no deal unless all parties say 'yes'. The mediator is not there to give the answer, only to give everyone the best shot at doing a deal.

So what can litigation lawyers do to overcome a lifetime of habit and experience to avoid fouling up the opportunity that mediation offers and so use the process to a client's best advantage? It's tough. Becoming a pussy-cat is not a very attractive proposition to someone who would like to be seen as a lion/ess. Giving up the thrill of a fight, win or lose, is difficult when success is measured by victories and glorious defeats. But the real measure should be what the client needs. In most cases that I mediate parties want to

put an end to their dispute. The biggest prize seems to be that the dispute is over and that they can get on with 'real' life tomorrow. This does not mean settlement at any cost but they can live with a settlement that shares the pain, allows them dignity and often restores relationships. They do not relish the thought of standing in a witness box and being battered by the other side trying to discredit them. Still less do they want their case to become a precedent. They just want a way out. And good lawyers will try their best to achieve that through settlement discussion with their opposite number. No always and not always successfully and not always the best deal. Best deals are usually struck when an independent third party (like a mediator) helps the parties to negotiate effectively because that third party holds information from each side that the other side do not have. They can often help parties find extra value that conventional 'positional' negotiation does not yield. And that is a resource that enlightened lawyers can use to their client's advantage.

Lawyers can foul up mediations by hammering on about rights and relevant law rather than allowing their client's needs to be met. Relevant law might set the scene and form the basis of the argument but within an hour or two of a mediation those arguments fade away because they only lead to disagreement, not to settlement. Lawyers can foul up mediations by starting negotiations from an extreme position and giving little slowly. That invariably pisses off the opposition, and the mediator, and all possibility of co-operation disappears. Lawyers can foul up mediations by excluding the mediator from private discussions on strategy, offers and needs when that very person knows both side's of the story instead of just the one. Lawyers can foul up mediations by posturing, putting on coats, threatening to leave and being 'tough' in front of their client instead of serving the client's best interest by working even harder when negotiations become difficult. Lawyers can foul up mediations by using their power to bully the other party into a deal rather than allowing them to achieve a settlement that gives self-respect.

But despite all this, 80 – 90% of mediations settle. Due of course to the expertise, patience and perseverance of the mediator rather than (and perhaps despite) the skills of the lawyers. But then I would say that wouldn't I?

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