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MEDIATION – WHY IS "WHY?" SO IMPORTANT

Keith R. Huntington

Mediator, Ecorate Ltd - Architect, Keith@settlement.co.nz , www.settlement.co.nz

ABSTRACT

This paper relates to the generic process of Mediation which, unlike Arbitration and Litigation, is a process the principles of which are easily transportable across widely differing Cultures and Societies without reliance on, or hinderance from, a specific country's Laws etc. Also it is particularly suited to disputes in the Construction Industry where projects do not have the luxury of being able to be put on hold as the finer points of Contract or Law are dissected.

Using a very simplistic analysis: Both Arbitration and Litigation follow a similar linear path once the Parties decide they need outside assistance to resolve their dispute. Each prepare their evidence in isolation which is then usually presented and cross-examined by professional advocates after which the Arbitrator/Judge deliver their decision, which is usually enforceable by the jurisdiction in which the matters in dispute have been heard.

On the other hand, (once Parties have decided to use the process), an effective Mediation has a beginning, and from then on it is only at the conclusion that the particular path followed can be analysed. Unlike Litigation there is no single Mediation Process although broad categories of disputes such as Family relationships do tend to have loosely defined commonalities. I find that I often use a variety of Models, as the circumstances of the moment requires, within a single mediation. The common feature of Mediation is that it is a negotiation between the Parties which is facilitated by a neutral third-Party who does not make any determinations. Also there is no compulsion to reach Agreement. I believe that Lawyers can help the meeting of minds, BUT from the background.

Because there is no outsider making 'final' judgements, and no requirement to 'agree', the Parties often reach agreement, in whole or part, through the lack of pressure to agree - the Paradox of Mediation. As in negotiation, there is no problem with Parties revising their positions and the discussions reverting to earlier stages as more information is gathered and understandings are realised.

Given the complexity of construction projects disputes are inevitable but there is also an imperative to not delay the Work. Therefore it is important and valuable to have processes that minimize disruption to the Project's progress. Mediation ideally fills this role as the process does not prevent later Arbitration or Litigation for unresolved issues, and yet matters agreed can be protected through specific contractual arrangements which ideally should include consequential clauses.

When is becomes obvious that full and final agreement on all matters will not be reached, the Mediation can revert to discussing options for resolving the outstanding matters. This is not a failed Mediation, but rather positive confirmation that there are matters which need to be determined in a Judicial Forum.

While mediation has many positive attributes the process can be manipulated for the benefit of a duplicitous Party. A principle of mediation is that all Parties will meet and discuss in good faith and not divulge the matters of the meeting. In spite of this the Mediator must be aware that a Party could be on a Phishing Expedition and therefore in the interest of Natural Justice the Mediator has an ethical responsibility to deal with this if suspected.

Mediation may be a magical process but it is not a miracle cure. It is just a Tool but with a lot of potential. Disputes need time to mature. There it a time when it is too early to begin,

but never too late to start. Once started Parties realise it could have begun much sooner – the Paradox of Mediation.

Keywords: Mediation, Construction Disputes, Conciliation, Reality-Testing, Paradox

1. INTRODUCTION

Everyone knows the definition of the noun 'Mediation' but when they begin to tell others, in any detail, of what the process involves the discussion often dissolves into confusion. Why does this happen? I expect that experienced Mediators with wide-ranging practices who are reading this will understand what I am referring to. Commercial Mediation is just a process where Parties who have a disagreement can come together with a trusted neutral third-party present to assist with the discussions. While the process is usually associated with defined disputes, it is equally valuable as a separate Tool to assist Parties in their preparation for Litigation or Arbitration

I fell into mediation, without their being any such label given to it, as I began my career as an architect. In my opinion the Construction Sector of an economy, along with some others, cannot function without the use of the principles of mediation. In Construction, activity must continue along the Critical Path – the luxury of going to Court to battle cannot be tolerated by either the Owner/Developer or the Contractor. This is why the practice of Arbitration had naturally developed over the centuries in parallel with Litigation. Of course there are disputes, both small and large, which do need to be dealt with in an adversarial manner, but when analyzed later these can be found to have a significant proportion of personal inter-relationship aspects at their foundation which would have benefited from an alternative approach. Litigation is not normally equipped to cope with these Elephants-in-the-Room.

2. MEDIATION AS A TOOL

Often the public perception of mediation is as a quick and simple process by which the Parties come together with a third party, the mediator/facilitator, to negotiate a lasting Agreement for their dispute. A nice theory for the textbooks and popular press.

When people ask me how many successful mediations I have had I answer, with tongue-in-cheek, that "*if I can get the Parties into the room then that is 100% successful and everything that follows is a bonus.*". To me mediation is a Tool to be used by the Parties to assist their progress to a

resolution of their differing view of the situation they have found themselves in. Even a totally 'failed' mediation is to me a positive as it established that there is a genuine dispute which needs to be resolved in some manner. In these situations there is the potential for the mediation to then go on to discuss and negotiate other processes for settling their differences.

When used as a Tool, mediation between the Parties and their Advisors can:

- More efficiently and in less time discuss, negotiate, and agree timetables.
- Tease out issues to ensure all Parties understand what is being claimed or counter-claimed.
- Discuss and agree the range outside of which Discovery is not needed. This could be by dates, subject matter, personnel involvement, etc. This can be on the basis of if in doubt or not agreed then include it within the range.
- Identify and discuss peripheral minor issues that are being claimed or counterclaimed but are of little consequence for the other Party and so could be dropped or set aside for a separate mediated agreement. Of course this would have to be carefully controlled to ensure there are no breaches of Natural Justice or Court Rules.
- To deal with any inter-personal problems in the background of the dispute which may disrupt or prolong the arbitration or litigation. It cannot be assumed, but is easily forgotten, that all those involved have the same personalities.
- Et cetera.

Remember to 'Fit the Forum to the Fuss'

3. MY HISTORY

During my undergraduate years I obtained a scholarship from the Ministry of Works, (MoW - the government Ministry responsible for the country's infrastructure), which introduced me, as the Greenhorn, to the practical world of design and construction through listening to the experiences of Wiseheads in the various offices and professions.

After graduation, my first year was in the MoW Head Office designing a social bar in the Beehive for our politicians to relax in; and in contrast the second year was out in the field at District office where I was the project architect for the building aspects of a quarantine station on an off-shore island. Meanwhile my colleagues in private practices were designing toilet partitions in high-rise buildings. I exaggerate, but the reality was that their employers had legal liability for the actions of staff to consider. I was especially privileged to have the opportunities of diverse experiences in problem identification and solving which are not available these days.

After registration I went to Europe for my O.E. (Overseas Experience. A rite of passage for many Kiwis and Aussies in their twenties) and while there I worked in an office over the gates of Middle

Temple Lane, London. I studied for my English architectural registration and was tutored by an architect who had changed professions to become an Arbitrator between major European construction companies and their Middle East clients. After class a few students would gather at his feet in the local Pub to hear stories of the reality of international disputes, and how cross-cultural differences often complicated dispute resolution processes. On my return to New Zealand (NZ) I studied Legal Systems, Contract Law, and Law in Society at Victoria University. In my opinion life-stories are a valuable source of education for mediators; actually for everyone.

4. AN EXPERIMENT

When I became Chairperson of the local branch of the Architects Institute of NZ in the late 1980s I instigated a procedure for dealing with the first phase of any complaint raised by a member's client. I would ask the parties to come to my office to informally chat about the problem. I quickly discovered that time after time the essence of what the client wanted was to be heard, and to believe that the architect had properly listened to their concerns. Any resolution, while important, was of secondary importance to being able to tell their story. This was never labelled as mediation; just a chance to speak face to face and to have the chance to ask "Why?" of each other.

I also found an unintended consequence of having an 'outsider' present at their meeting was that it was very difficult for an individual to behave perversely in front of an outsider and so suddenly there was a table of Parties acting reasonably, even if that reasonableness might include attempts to prove that the other was unreasonable.

5. MY APPOACH IN THIS PAPER

I am writing this paper from my personal experiences of using mediation since the 1980s. Also from the viewpoint of New Zealand's society where, for civil disputes, there is an adversarial Common Law litigation process with precedents to be followed. For the purpose of discussion, I am also assuming a simple two-party dispute situation. For multi-party disputes, environmental situations come to mind, it is just a matter of scaling-up. The adaptions required between the multiple Parties are in essence no different to the adjustments needed between a series of separate two-party mediations.

The application of the principles of mediation practice will differ between broad categories of disputants, such as Employment or Family relationships, or disputes regarding physical content rather than personal relationships, but this does not prevent the illustrations and thoughts I present from being translated to fit.

Most important for the reader to keep in mind is that I am writing from my limited viewpoint and experience and offer them on that basis. I have no problem with others rejecting them, all I ask is

that it is not ‘out-of-hand' but rather after giving some consideration to what I am trying to convey. We all have different experiences of the world.

I also would like to apologise to those for whom English is not their first language. I have used a few idiomatic phrases to illustrate a point. The explanation of these are easily accessible on Google or Wikipedia. ‘Idiomatic phrases‘ means “*a phrase that, when taken as a whole, has a meaning you wouldn't be able to deduce from the meanings of the individual words [www.grammarly.com]*. The phrases are a convenient way for me to covey an idea which would take many more words.

In mediation it can be dangerous for mediator to take their own meaning of a word or phrase without, when in doubt, first checking with the speaker that they have a correct understanding. This request for clarification can result in new avenues to explore, especially when the Other Party is listening in.

6. THE MEDIATION PROCESS

In my mind the most difficult part of the whole mediation process is getting the Parties to acknowledge that there is a problem between them and, later, that a low-key approach is worth a try at the beginning instead of the usual full-frontal assault of Litigation or Arbitration. Of course these may eventually be needed.

Contrary to the opinion of many, for commercial disputes I consider that a strong form of Mandatory Mediation should be included within the Disputes Section of the Contract Documents. I do not see this as a barrier as it is easily complied with by the Parties formally meeting with the Mediator and within thirty seconds agreeing that they disagree and therefore will be able to proceed to the next phase of the Dispute Clauses.

To me the beauty of the requirement is that the Parties do not have to decide and agree themselves to use mediation because the Contract ‘forces’ them into the process thereby saving-face and time. Of course there is the need for a Mediator to be in attendance so that the procedure is not a sham. He or she are likely to suggest that as the Parties and their Advisors are present they might as will use the opportunity to informally discuss possible processes to now move on to, and the broad issues in contention. Before they know it they probably are well on with the first stage of resolving their dispute. The paradox of mediation – when Parties are not forced to agree, or to accept the determination of outsiders, they find themselves further into a resolution than they ever expected.

With mediation the easy issues can be settled (even if only tentatively) as they come up. If a difficult one should cause problem then it can be put aside for later, and the Parties move onto the next. This can’t be done within the linear procedures of Litigation. As the discussions re-cycle through the list of issues the Parties often find that previously intractable points are now not so difficult.

The various forms of the Mediation Process are fully explained is textbooks and taught in lectures and seminars. The difficulty is putting them into practice. I myself began my formal education with a multi-day course given by Chris Moore of CDR Associates when he was brought to New Zealand from Boulder, Colorado, by the Arbitrators' & Mediators' Institute of New Zealand (AMINZ). Later, when I had a part-time position with the N.Z. Government's Tenancy Services I received additional education from Margaret Golten, also a founder of CDR Associates, as well as from the Conflict Management Group of Boston plus a course on Transformative Mediation given by R.Bush and J.Folger. These were first-rate in themselves but where was the experience with real parties?

These courses provide an excellent base but it is the continuously gaining of on-the-job experience, reading current journals, seminars, discussing with other mediators, observing how people deal with negative situations etc, that develop better Mediators. In my opinion Meditation is an Art not a Science as it deals with individual people rather than pre-set procedures. To be curious and to continually ask questions is my secret to mediation.

As with the role of Judges, Advocates and Arbitrators, when Mediation is at its most efficient it is not capable of being computerised, although a computer may be of some help at the edges.

As an addition to the usual attributes required to be an effective Mediator, the former Director of the United States Federal Mediation & Conciliation Service, William Simpkins, is said to have described the ideal qualities of a Mediator as including:

> *"The patience of Job,*
> *the wit of the Irish,*
> *the physical endurance of a marathon runner,*
> *the guile of Machiavelli,*
> *the wisdom of Solomon, and*
> *the hide of a rhinoceros."*

7. JUSTICE & BEING JUST

Around the beginning of this century New Zealand became aware of a massive systemic failure of a monolithic cladding system used on our timber framed houses which resulted in much legal action and the government setting up a Weathertight Homes Resolution Service. I was in the first batch of mediators to deal with these disputes. Claimants could also apply to use the public adjudication service as an alternative to going to Court. Many Owners with severely damaged houses 'won' their case but after legal and expert witness fees were paid there was totally inadequate finance remaining to rectify their homes. Yes the Owner got 'Justice' in the Court but was it a 'Just Result'?

As the mediator for one claim, (yes just one), to the astonishment of the Claimant and myself, the Respondent Cladding manufacturer, along with the City Council, agreed on a settlement for significantly more that the full Claim. I have no knowledge, but I expect the extra money still did not cover the repair costs. I can only speculate that the change of heart came from the manufacturer being able to see and hear directly the financial and emotional strain the whole ordeal had had on the home-owner. In my opinion this was a 'Just Result' enabled by the flexibility of mediation.

At the August 2023 Arbitrators' & Mediators' Institute of New Zealand (AMINZ) conference, 'Access to Justice', there was a paper presented by Daniel Kalderimis (Barrister), with Nina Khouri (Mediator and Legal Academic) as his discussant. These two supporting papers, '*Mediation as Access to Justice*' make for excellent reading. {I understand that these two papers have not been published, but I have checked with AMINZ and the papers are available to non-members if they contact the Institute by email at institute@aminz.org.nz .}

Nina Khouri's paper, in the footnotes to her second paragraph, refers to mediation still not being a regular tool for access to civil justice. In 2002 I was invited by the Department for Courts to be one of a small Research Advisory Committee to advise on the design, content and conduct of a research program looking at Alternative Dispute Resolution, (but not to do the research). It is now twenty years later!

8. CONFIDENTIALITY and DUPLICITY

Amongst the standard characteristics of the Mediation Process the more important ones are:

- that it is confidential,
- the Parties act in good faith,
- there is trust and,
- that there is no requirement for the Parties to reach an agreement.

The confidentiality has two primary aspects. The first is that the whole process is confidential with respect to the wider world; and the second concerns the Mediator caucusing with the Parties during the Mediation.

Caucusing is where one of the Parties meets with the Mediator during the Mediation to discuss some matters in private. In the interest of fairness there is usual a balance of time for each Party, and/or their Advisors, to meet separately with the Mediator.

Both forms of confidentiality work well when the Parties comply with the principals of the mediation process but what sanctions are there when a Party decides there is an advantage to be gained by not playing 'Fair'? Even if the offending Party immediately realizes that the anticipated gain does not eventuate it is too late to retract the broken confidence. What effective, lasting and

punishing penalty can be applied to the offending Party? These matters, as appropriate, should be discussed and recorded in the Agreement to Mediate. A common sanction is to allow the innocent Party to decide to terminate, or not, the Mediated Agreement and move to Litigation. This is fine in theory but does it always work out in practice?

Taking the public disclosure situation, a duplicitous Party can act positively towards a resolution, while being circumspect about crucial aspects of their situation, but at the last minute decide that unfortunately an agreement cannot be reached so the Mediation 'fails'. I'm sure it would not be difficult for a compliant advocate to use the information gained in the Mediation without breaking any of the confidentiality restraints. The same can occur after the agreement is signed even though Phishing was not the intention at the beginning of the Mediation.

In the case of caucusing the normal practice is to agree that everything said in caucus is confidential. Sensible as it stands, but what happens when the Party tells the Mediator something which they later reveal in open session as it is convenient at that time for them to do so? Not a problem until still later (before or after the Agreement) they have a lapse of memory and accuse the Mediator of having broken the caucus confidentiality. What can Mediators doing to protect themselves from this allegation?

As a standard procedure I don't believe in caucusing except at the final stages where there often is horse-trading over the money, (don't forget the VAT – 20% in Turkey I understand). Of course I will always Caucus when it is actually appropriate, rather than when the tick-box says it should now be done, because it can be a powerful road-block breaker. In my Agreement to Mediate I prefer the confidentiality clause to be inverted as trust and integrity are central to the Mediation process as a whole. I believe that those matters which the Party want kept secret should be specifically discussed and recorded in some simple written manner during the caucus break-out. It is a matter of Professional Indemnity survival. Mediation can be a dangerous activity.

What can Mediators do? If phishing or similar duplicitous behaviour is suspected I consider there must be some sort of ethical and natural justice responsibility on the Mediator to deal with it. The question is "*How to?*" without negative claims of bias etc., being made by the perpetrator, especially as you have no evidence just a feeling. In Caucus there can be robust discussions, and direct questioning about the possibility. In the open session the Mediator could always tell an apocryphal story which finishes with words similar to *".. but of course this doesn't apply to anyone here."* . Is this going beyond the boundaries of ethical mediation?

To my mind the best protection against confidentiality being broken is to do such a great job at satisfying the Parties that there is no desire for them to renege. Does this Utopia, with super-human Mediators, exist anywhere?

9. COMMUNICATION

In my early days of mediation a friend gave me an art print of an alligator inside a room of a house, or I assumed it was a house as there was wallpaper and a very domestic type window behind the alligator. The animal is definitely identifiable as one of the Crocodilia Order of reptiles except that it has wings, which I understand are not usual appendages for alligators but presumably they are there to help keep the alligator aloft. I presume it was meant as a piece of surrealistic fun as the tittle is 'one of a number of allegations flying about the room' and so as a mediator I took it to be a lesson that I always should be on the lookout for unusual information coming from the Parties. A flying alligator is a good analogy for discordant information. Parties often are so tied up in their version of the dispute that it is only the Mediator, having arrived afresh and being independent, who can see the wider picture.

I would be curious to know what proportion of readers, for whom English is a second or third language, laughed as they read the above paragraph, and if these are a greater proportion of readers than those who have English as their first language. If you didn't laugh I suggest you go back and re-read the paragraph.

It is important that mediators ask "Why?", either to themselves or to the Parties, when there appears to be some form is inconsistency in the flow of the communication. By checking these out at a suitable moment misunderstandings or confusions can be rectified, or maybe new paths to full resolution are discovered. The mediator should always be on their toes.

Peter Drucker (1909-2005) the Austrian/American who is said to have laid the foundation of modern management theory and practice, once said:

> "*The most important thing in communication is hearing what isn't said*."

For mediators the words 'seeing' and 'feeling' (as in the atmosphere of the room) could replace the word 'hearing'. The mediator should look for and take any morsel offered, BUT they must continually test, not assume, the interpretation they have given to the apparent information. To "ASSUME" is to make an "Ass" of "U" and "ME".

George Bernard Shaw, Irish playwright 1856-1950, is reputed to have said:

> "*The single biggest problem with communication is the illusion it has taken place.*".

I'm sure the Reader can recall moments when this applied to others and themselves. For mediators, I consider it is most important to continually check and recheck by subtle reflecting/reframing, or by direct questioning, that they understand. The act of checking could elicit an important new avenue to be explored.

One of the first textbooks on communication that I delved into was 'Looking Out, Looking In' by Ronald B. Adler and Russell F. Proctor II, (publisher Cengage Learning, 2016), which is now in its 15th Edition. In it there was a graphic image of communication misunderstanding that has stayed with me. It is a record of a conversation between two people with their alternating statements down the centre of the page. On the lefthand side of the page is a column of drawings of the absent pet dog. Down the righthand side to a series of drawings of various pets which the other person imagines the pet might be. These become refined as the conversation proceeds. The first comment from the dog owner is "I have a new pet" and drawing of possible pets are shown on the right. The conversation proceeds to the bottom of the page where the righthand person says "why didn't you says that you have a black & white spotted dog. Sure enough, in confirmation there is a drawing of a white dog with black spots and on the other side a black dog with white spots.

Sure this is a simple illustration but how often in disputes does it finally transpire that an equivalent situation has occurred. On a much more serious note, the early edition I had of the book has a panel on the cross-cultural misinterpretations of language which lead to the dropping of the atomic bomb.

10. CROSS-CULTURAL

The Cross-Cultural aspects of mediation are a Conference in themselves, let alone a paper such as this. I visited China in 1987, 1998 & 2018 and while the 'Culture' was the same the 'Culture' was so different across those years. Even in one's own country the Culture can be interpreted and mis-interpreted in so many ways by the Locals.

In the context of mediation I am of the view that the Mediator has to also be conscious of a different sort of Cross-Cultural factor which can have a significant adverse affect on the progress of the mediation if not recognized. This is not defined by ethnicity or nationality, but rather by the social and economic group the Parties move in. Even so, in the end it is the individual personalities of the people around the table, and how they interact, who determine how the mediation progresses, helped by the Mediator of course.

11. THE MEDIATION SETTING

Through these writings I have referred to the Parties and Mediator being 'around the table' without any definition of the table. Above, at the AN EXPERIMENT (section 4), I referred to there being ".. a table of Parties…" without any description of the table. It was actually circular, being the most suitable shape for the firm's use where meetings were co-operative, and it was easy to consult sets of drawings. Would there have been different outcomes if the table was rectangular?

Being an architect I have, since the beginning of my practice as a mediator, had an interest in the physical form and layout of the mediation room. I suggest that when the Reader is next attending

a meeting they spend a moment to survey the room. Are any windows distracting or calming; how does the sun change during the day; are there noise intrusions, or not enough, from the exterior and adjacent rooms; does the furniture and its arrangement help or hinder the progress of the meeting; is the ceiling too high or low; what about the air-conditioning or must windows be opened; and so on.

This assumes a room will be used. There is no reason why other types of venue should not be considered. As this is a conference of construction people an on-site mediation would be appropriate in some circumstances. Would it be sitting in the Contractor's shed with little privacy, or require standing amongst the construction? What are the implications?

As a Mediator, the first critical item for me are swivel chairs so that the Parties can begin facing me if they wish but as time passes they can, without being conscious of the change, turn to face the Other Party. I see this as a weather-vane of progress, or not, of the whole and of each individual as described in THE APOLOGY (section 12) below. The second preferred item is a clock within the line of my sight over the Parties so that I can check the time without them noticing. How do you observe the behaviour of the Parties when you have your back to the group as you write on the white board?

I prefer to be seated closest to the door so that if a Party should decide to make a dramatic exit I can stand up and stretch my arms as I suggest it is time for a tea/coffee break. All this before they can make it out of the room. Once outside how can an individual come back in without feeling they have lost-face?

I consider it is important to dress for the Parties, not yourself. Anything to reduce the tension which inevitably will be in the room at the start.

12. THE APOLOGY

The possibility or appropriateness of an apology is a matter for the final stage of a mediation and there can be no rules for their inclusion other than it is up to the Parties to request, discuss, and agree either way. No one can be forced to make an apology, nor to listen if given. Even so the discussion of the Parties around the possibility of an apology is fertile ground for the Mediator to gain more understanding of the deeper attitudes of the Parties.

In a case where I was an expert witness in a dispute between neighbours a Judicial Conference was held at the Courthouse. After a few question, presumably to establish my credibility, I was not called upon again so was able to observe the progress of the 'mediation'. In the later stages the Respondent was offered the chance to give an apology which they gave with very genuine feeling. I found it fascinating to observe that while the Claimant wife listened carefully and appeared to full accept it the Claimant husband refused absolutely even to the extent of turning away from the

Respondent speaker. This movement included turning the chair so as to be more remote. The Mediator Judge got the message and the conference finished soon afterwards.

A different form of an apology not working was when I was the Mediator for a house construction dispute held in another city. We met in the morning and after the Respondent, (the principal of the architectural firm), had delivered his opening response he advised the Mediation that he was going back to this office and the project architect would handle matters. I attempted to have him stay, but a Party cannot be forced to attend and so we proceeded through the afternoon and into the evening with meal breaks. In the early evening the architect principal returned and the mediation continued towards a conclusion. In Caucus I asked the Claimant if an apology might help. In no uncertain terms he told me that he had sat in the Mediation all day, and had lukewarm pizza as an evening meal. Meanwhile the Respondent did a day's work and had an evening meal with his family. A perfect example of a non-apology was given but not accepted. The matters settled near midnight but only because the next layer of insurance required consultation with Europe and the court hearing was set for the coming Monday. Apparently the Respondent became liable for two hefty insurance excesses. All he had needed to do was stay for the day and a more satisfactory result probably would have followed.

13. THE AGREEMENT

Just as a Mediation can be begun and conducted in a multitude of ways it can equally be concluded in a wide variety of manners from just petering out, to full blown very formal signing ceremonies. The agreement will need to be in the format required by the engagement documentation otherwise it is up to the Parties to decide. There is more than ample literature on mediation agreements, and maybe requirements from the Mediator's Professional Body, which can be consulted for guidance.

Of course it is up to the Parties to ultimately decide how their mediation will end, be it amicable or acrimonious, or just through becoming tired of the whole thing. Because there is no requirement to 'agree' within the process, a Party who feels that they are being pressured has the ultimate power of saying "No". Such a realisation by the Other Party can revitalise a mediation.

Does an 'Agreement to Disagree' amount to a failed mediation?

I have two points I would like to emphasis, especially where the Parties and their advisors are less experienced with the mediation process. The first is that the completion agreement should be clear in recording what has actually been agreed (but not the mediation proceedings) and should include appropriate details of how each Party is to comply with the Agreement. Secondly, in my opinion, there must be two addition clauses (which in some cases may need to be extensive). These set out for each Party what they agree will happen if they <u>do not comply</u> – Consequential Clauses. In my

non-legal view this can converted from a record of a nice chat between the Parties into a legally binding Contract, if written correctly.

Of course a Party may object to the Consequential Clause, as they may feel it questions their honour and trustworthiness, to which I simply ask if they are not intending to comply with the Agreement. If the answer is that they will then the consequential clause can't be activated, provided the Agreement is suitable worded. If there is silence then the real Mediation can now start.

Afterwards there has to be trust that the Parties will keep to the Agreement. To me the most effective means of enforcement is to have the Parties sufficiently satisfied at the end that they have no desire to renege.

14. A FINAL BRIEF STORY.

Some readers may wonder why this paper has the title: MEDIATION – WHY IS "WHY?" SO IMPORTANT. Perhaps it can be best demonstrated by describing a simple scenario.

> There were two acquaintances, Chris and Steve, who were near to coming to blows over who had the greater right to an orange, (the fruit), which they both laid claim to.
>
> As they were arguing a common friend, who was an Arbitrator, passed by so they asked him to decide who should have the fruit. Although it was not his normal practice, in this case he realised that the best solution would be to cut it in half so that they each had an equal share as a temporary solution until they would be able to buy another the next day and then divide it into two.
>
> Both Chris and Steve were satisfied with this and each proceeded to peel their half of the orange. Chris began eating his portion when Steve asked if he could borrow the knife. Reluctantly Chris gave it but hurriedly consumed his piece in case there should be a violent takeover.
>
> Steve didn't seem to be interested in eating at that time as he was busily cutting the peel into small pieces and then asked Chris if he could have the other peel and proceeded to cut that also.
>
> Chris was intrigued with this behavior so asked Steve **Why** he was cutting and not eating, Steve replied that he had to make a jar of marmalade to his Grandmother's secret recipe before the weekend otherwise he would be disinherited. He then passed the uneaten half to Jack with a request as to **Why** he had been so insistent. The reply was that the doctor had prescribed the juice from one orange every two days.

If either Chris or Steve had at the beginning of their argument taken the moment necessary to ask the other **why** the fruit was required they would have quickly realized that there was actual two ‘oranges’ and so no need to quarrel.

In any magnitude of dispute the simple act of asking the other Party **why** they are making their claim or counter-claim can significantly alter assumptions, even if only at the periphery of the dispute, and so make for more efficient resolution. Of course if the explanation is not to the liking of the inquirer then there is the simple all-powerful response of “No” and the determination processes return to continue as before.

K. R. Huntington

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