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What happens when you are a mediator and you start another mediation day? A short introduction to a much longer story...

A mediation story: The Mediator's Log

John Sturrock QC

0845: The mediator arrives at the venue, the office of one of the solicitors. These days, few parties seem to mind where the mediation is held, even if the location is that of the other side's lawyer. More important is that the environment is comfortable and that the catering is good.

0846: The mediator's assistant is already here. She is able to brief the mediator on the room allocations and inform him that one of the parties has arrived. More importantly, they reflect on the late arrival of an expert report from one party the night before, wondering how that will affect attitudes in the other room. They speculate a little on how long the mediation may take, but quickly remind themselves that mediation is like the proverbial piece of string... and that it is impossible to predict the outcome or the timescale. The mediator reminds his assistant that the more they focus on the process and the less they worry about the outcome, the more likely it is that a satisfactory resolution will ensue. Easy said...

0901: In the corridor en route to the first private meeting with the claiming party, the mediator pauses and glances at the agreement to mediate to remind himself of the names of those attending. Remembering names is crucial and he often draws a mind-map of the players as an aid. But, occasionally, even that fails and he mixes up the names just at the wrong moment. An occupational hazard in a fast-moving day, where little things can make a big difference.

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0902: Knocks on the door and enters. The atmosphere is slightly tense. That late report has had an impact on the lawyers in particular. The mediator looks around the room, finds the client and extends a hand. She is anxious and the mediator knows that his first task is to reassure. Building what the experts call "rapport" is the foundation for any mediator. If the client trusts the mediator and his or her ability to handle the day's discussions effectively, the whole process has a greater prospect of a successful outcome. The mediator introduces himself and his assistant to others in the room. He discusses briefly the late arrival of the report with the solicitor in charge of the case, a fairly senior litigation partner. His objective is both to recognise the inconvenience caused and to encourage a positive view of the fact that the position is now clearer. But there is no doubt that, as the latest in what is perceived as a series of impediments, this has not helped. The lawyer is concerned about whether he can properly advise his client. The mediator suggests an early meeting with the solicitor for the other party.

0909: The main conversation in this initial meeting is with the client. She is keen to explain her circumstances and the impact on her life, job and future of the events on the day in question. The mediator listens intently. He says little at this stage and uses the conversation to reaffirm the confidentiality of any discussions in that room, knowing that this will have been covered already by the solicitor, who has considerable experience in mediation. When pressed for a comment on the behaviour of the other party's chief executive, the mediator reminds the group that his role is not to judge, pass judgment or offer a view. The client is clearly upset, not just by the events of the past but by the uncertainties of the day and the strangeness of the situation. The mediator explains how the day may unfold and makes clear that the client does not need to do or agree to anything with which she is not happy.

> *"The mediator encourages the lawyers... to begin thinking about what might be included in any resolution agreement"*

0924: There are some formalities to cover. This includes the question of decision-making when it comes to the crunch later in the day, as almost inevitably it will. Is there anyone else with whom the client needs to speak? If so, who, and how will they be contacted? They discuss timing and whether anyone has any time pressure later in the day. The financial expert has a flight to catch at 6.30. Hopefully, his presence will not be required by then anyway, though as they have often invested a lot of time in the client's case, many experts like to be there until the end. That is not always a good thing if their influence is disproportionate. Everyone else is able to stay for as long as it takes. The mediator encourages the lawyers in the room to begin thinking about what might be included in any resolution agreement. He reminds them that there is nothing worse than starting drafting from scratch after agreement is reached.

0927: That other document, the agreement to mediate, needs to be signed. It has been circulated, revised and checked in advance by all concerned and the senior solicitor confirms that all those in the room can sign. The mediator thanks everyone, checks whether the client has any other questions and leaves, heading for the next room...

1003: Time for the gathering of all participants. The mediator's practice is to bring everyone together in one room for an informal meeting, some food, mingling and scene-setting. The mediator chats to his assistant and reflects on the purpose: humanising the process is important for people who may not have met before, or who may have formed views about their counterparts on "the other side". For clients, it can be a difficult moment (and can never be forced), which can lead to a sense of relief, acknowledgment or at least recognition. The last time the clients met before today's mediation was highly stressful for both.

1011: The mediator taps a glass and begins what he customarily describes as his "carefully prepared, spontaneous, improvised comments". "First, thank you all for coming... This is not an easy matter... if it was, we wouldn't be here... The important thing today is that, for this to work, you need to help each other... The paradox is that it only works for *you* if it also works for *you*" – he directs his remarks to the clients particularly. "This is a great opportunity... Later in the day, you will have choices to make; ultimately, it will be entirely up to you... I encourage you to make only one assumption today: that everyone is trying their best." He knows that this is a bit of a set piece. He also knows that it is a useful way to mark the transition from the opening stage to the next series of more in-depth meetings.

1017: Time for a break: first though, the mediator has asked the clients to stay behind and meet privately with him. This is one of those occasions when the lawyers are content for this to happen, judging that the clients can handle this without support. The clients sit, rather awkwardly at first, side by side. The mediator gestures with a hand and the "defender" client begins: "I am glad we are here. I really want this to get sorted today. This should never have happened. I wish we had had this conversation a year ago... but, when you did *that* to us...". The atmosphere changes... ■

Follow the next part of this mediation story on Core's new website, www.core-solutions.com. Release date: 17 June.

And, if you'd like to learn more about what it is like to be a mediator, try our flagship course. Register on our website.

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