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MEDIATION TALK

ON BEHALF OF

THE CMA

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By Marcel Alter

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Thank you Shane for your introduction, students, staff and participants.

As a practicing dispute resolver, I am pleased to discuss with you the practicalities of what you have been learning in theory.

When I first became interested in the practice, I went looking for some books on the subject at the local library. The only reference was to Meditation. At the time I did not feel this was helpful but now I know it is what I need before and after when trying to get between the parties and when attempting to focus them on their issues and formalise options.

The practice of Law, in an adversarial environment, trains lawyers to take a side and argue the case from that point of view. Debates in Parliament and Political utterances, at all levels, are also based on the adversarial model. Whilst Judges, Commissioners, Magistrates, etc are trained to provide answers. However, in dispute resolution/negotiations there are no right answers. No definite facts, situations to be uncovered, no definite truths to be revealed, i.e. no Perry Masons. Like a Judge, a Mediator gets to hear both sides but unlike a judge the mediator has to work with both parties to achieve a resolution or a path to resolution.

Along that path, the Mediator will explore emotions, anger, the need to tell the other party that they are bastards, justifications, straight out lies and, not least, a few small exaggerations. Through it all, the Mediator has to avoid making judgment, appearing to favour one party rather than the other, whilst nurturing, prodding, keeping all the balls in the air and nudging the parties to move on.

The aim of any negotiation, mediation or court action is to enable the parties to discus the past but to then move to the future. Mediation in its theory attempts to do this in the least painful by (using that lovely word) empowering the parties to make their own

decisions. The legal profession acts as a White Knight charging to their client's rescue and defence. In Mediation we Mediators try to unleash the force within the parties to fight the Darth Vaders.

In your studies you have been given a number of definite steps to take along the path. One of the most important is the first step – "The Introduction". The parties are normally nervous, believe they are coming to a court, angry, may not have seen the party for some time and in some cases are only seeing the person behind the letter or phone for the first time. This is especially so in mediations with Insurance Companies or Banks.

The comfort of the room, the seating arrangements, and the manner of introduction are all-important icebreakers. My practice is to get the parties to face me. At least, at the early stage that allows the parties to tell me about the ills of the world and why they are in such suffering. I try to get them to re-tell their history to me but whilst they focus on me, the other party is listening, Although I often have to remind that party that their time will come to tell me "the lot with fries" Often it is the first time the parties have had to listen to the other version. Before the Mediation, they have been usually busy telling whoever will listen, including their lawyers, what their story is and their slant on life. It also gives them a chance to tell their story to the party who can actually make a difference.

The focus on the Mediator assists in the parties feeling that they are being listened to and heard.

Lawyers have a two-fold purpose at this point. Firstly, calming the situation and their client and secondly, to present their clients position in a summarised and clear manner. Although nothing beats allowing the parties to have their say. In one Mediation we all sat through the Lawyers setting out their facts for over two hours.

Following the Lawyers addresses to the court, I asked one party did they have anything to say as I had noted they were clearly agitated through the Lawyer's presentation. I was then told in no uncertain terms what this person thought of the legal system, the process and everything else. I was then told the real story without the legal bull-shit and the mumbo-jumbo (his words). The other party responded in kind. We All expected a fistfight but whilst the Lawyers sat behind their arch lever files the parties negotiated a settlement. Interestingly the settlement involved the sale of a unit in a block of flats to be built in exchange for dropping an action for failure to honour a contract. This was certainly not a solution a Judge would have imposed upon the parties or would have been argued before him. Being future based, the Lawyers had a lot of difficulty with the settlement, but time will tell. Both parties in this case at least feel that they got more than they expected when they came in.

There are two other purposes for the opening statement. The first and very important is that the Mediator sets out and states the ground rules, that is, as you have been told, the parties asked to listen, to be polite, where the toilets are, how much time they have, issues of confidentiality. This is still important even though from my experience, the parties are not really listening whilst the Lawyers are busy taking notes either for use in proceedings to use against the Mediator later, i.e. didn't explain or there was no natural justice or just because they have seen the film, "The Castle" and know that is what Lawyers do. It is still very important to set these rules out and how the Mediation is to proceed. It also allows the Mediation to confirm that he is the manager of the process and to connect with the parties.

But most important, it also allows the Mediator to settle his nerves and to see who and what he has in front of him. It does not matter how much written material or telephone contact has been made, the important function of a Mediator is to assess and then to assist the parties to move the matters forward. At the commencement of the Mediations, it is important to check that the right parties are in the room to enable

Mediation, i.e. are the decision-makers there. It is fairly difficult to mediate when the engineering firms sends an Accountant to argue a case about why their engineering works did not cause water to flow over land.

It also enables the Mediator to check the body language in a room. Body language is something, which I certainly wasn't taught when I was at Law School. Observing the parties and their advisors is essential, giving the Mediator clues as to how the Mediation will go and which parties may need to be nursed, told to be quiet, etc.

This I learnt early at Mediation between two cousins, who were formerly partners, but now rivals in the same industry. The two so-called main parties were on edge throughout proceedings, continually squaring-off. Even in private session, little progress was made and the matter continued on as a dispute as to principle. The situation changed dramatically when the wives went to pick up the children and whilst the parties' Lawyers were settling on the procedure for the future, e.g. discovery, further and better particulars, the cousins began reminiscing about their parents and how they had built the business. The main parties visibly relaxed and whilst their Lawyers were talking about the next step, the discussions between them resulted, whilst not on a settlement, in a path to co-operate and maybe resolve the issues without further dispute. A further Mediation was scheduled; however, the Lawyer rang and cancelled as the parties were working the matters out satisfactorily. Happily I haven't heard that the matter went any further.

Family Law fights about Inheritance are matters where body language and the dynamics of the group are important. It is amazing what a change in 'who is in the room' can make. In a dispute over Mum's Will, we were getting nowhere fast until Dad, who had basically said nothing, left and the two daughters began to speak about their concern for him.

Advisers in any Mediation are important, including legal advisers, but a Mediator needs to be careful that the Lawyer does not become an extension of the parties' anger and, on the other hand, is not fuelling the anger or giving unreal expectations. Unfortunately sometimes advisers cannot backtrack from advice given, even in the face of new facts and factors that require a re-thinking.

In one case matters became quite heated, between the legal adviser and the tenant adviser. It was only after a coffee break was called and we were able to have a discussion with the tenancy adviser and provide him with a different way to address the issue with his client, that the matter moved to settlement. It was very important to his face that he not be seen as being wrong.

Being aware of who was in the room assisted me in a tenancy dispute between an angry Chinese tenants, upset about the state of his shop. An angrier Greek landlord that he was not being paid, and an Italian estate agent. The Chinese tenant had his twelve year old son in school uniform translating. Part-way through the agent's opening, I had the opportunity of commenting to the son, that when I was his age, I had done the same for my parents. The landlord then noted that he had been in the same position and when the agent also noted the same, reason and multi-culturalism triumphed.

On the flip side, I have found that some of my most difficult Mediations are between different cultures. Language is an obvious problem especially where the interpreter are friends or aides and are often frustrated Lawyers.

However, the biggest problem is that different cultures have different ways of negotiating. Logic and argument can fall flat when what is required is tact and face-saving. Settlements can have nothing to do with the facts as I found out with my Mediation with the two cousins. Mediators have to be careful not to let their value

judgment and the way they would negotiate a matter or how they would accept a settlement get in the way of their understanding of the parties before them. Telling someone the logic of the argument, the facts of the argument, the persuasive nature of same and the cost of proceeding will do little if that person believes that their only way to negotiate is through being stubborn or that they would lose too much face. They may prefer that a judge in high authority tell them.

Settlements can have nothing to do with the facts. A common problem is that Mediators get paper work, facts and legal opinions before the case. Whilst it is essential to have a background and an understanding of the issues, getting the parties to express themselves and re-put the case, hopefully in their own way or at least summarising in part, is essential. No amount of arch levers can tell you the true position.

However, this view of mine has recently been challenged in two recent Mediations where I was in fact involved for the parties. One was a family and one a commercial. In both cases, the Barrister Mediator advised the party they had read the papers, summarised their conclusion and then asked the parties if this was correct. This was done while I was silently yelling……. but what about the fore-play. In the Family Law case, whilst settlement resulted, neither party came out of the matter feeling positive nor both felt that settlement was at duress. My client felt that she had not been to say a lot of things that she would have liked to have told her ex-husband. On the other hand, the commercial matter did not settle, although in that case, I think there was much more argument for the approach given that both parties and their advisors were Liquidation Specialists and very used to the court process. They were obviously intent on having a required court sanction decision. In many ways they were there to test the system and to test each other's resolve.

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One of the real traps of Mediation is the need or wish to bring the matter to a conclusion. No matter which of the models of Mediation is used, it is essential in the early stages to get the parties to basically "let it all hang out" to get as many of the facts and/or issues out on to the table before going to the negotiation stage. I forgot this lesson to my peril recently when I was mediating a dispute between two former parties as to how a certain sum of money was lost. I quickly thought I had got to the stage of negotiation but at that point was continually bogged down in the blame game. It was only after two separate sessions and basically re-starting the Mediation and concentrating on what appeared in the first instance to be side issues that the matter could be moved on.

In the Naked City of Mediation, there are a million stories. Practice between Mediators, between issues, between groups will differ radically. However, the framework, which you are studying, doesn't change and if any matter is analysed all practices fit in. What a Mediator must remember that whilst using the framework, there is need to be flexible to meet the issues, people and circumstances. As I was told when I studied Economics, at this august Institution, in the very first economics lecture. The KEYSIAN economic model perfectly every time. There are only two problems – People and Governments – they screw it.

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