MANAGING MEDIATORS

"If mediation is such a worthwhile ADR mechanism, why do we need an awareness week?"

By Paul Newman[1]

It may enter on a wave of indifference and depart in like manner. However, the Department for Constitutional Affairs is pledged to the holding of its second National Mediation Awareness Week (NMAW) from 9 October 2006. Teams of mediators (civil and family) throughout England and Wales will bang the drum and inform lawyers (*if they still need informing*), the public and businesses of the benefits of mediation. Perhaps the DCA's enthusiasm for mediation is less the psychotherapeutic benefits it may bring disputants, rather than the fiscal advantages, which its widespread use might bring to the Treasury.

For the cynical, the need to resort to an '***awareness week***' is perhaps indicative of mediation's slow development to date. Some providers, such as CEDR and the ADR Group, have been promoting their services since the early 1990s, but all the mediation providers remain curiously reluctant to shout loudly and clearly to the public how the number of referrals is soaring. There has been no absence of endeavour on the part of certain parts of the judiciary to promote mediation. Mr Justice Coleman from the Commercial Court has been an assiduous supporter of mediation and various judges, including Court of Appeal ones, have barked at litigants, stating that it is a very serious failure not to consider ADR/mediation. The 41st Amendment to the CPR (April 2006) reinforces that message. All may not be gloom in the mediation community. NMAW may be a tacit acceptance that mediation has reached the stage of being a reasonably healthy primary school child but has to enter successfully its teenage years before becoming a well developed adult.

Agreed-upon solutions : For many people, mediation remains instinctively anathema. Some years ago Scott Donahey writing in *Arbitration* (the journal of the Chartered Institute of Arbitrators) said: *"In various Asian countries, there is a profound societal philosophical preference for agreed-upon solutions. Rather than a cultural bias towards 'equality' in relationships, there exists an intellectual and social predisposition towards a natural hierarchy which governs conduct in interpersonal relations. Asian cultures frequently seek a 'harmonious' solution, one which tends to preserve the relationship, rather than one which, while arguably factually and legally 'correct', may severely damage the relationship of the parties involved."*

Lawyers are taught to fight and many may shy away from compromise (especially if they feel they have half an argument to advance). Even when lawyers seek to be consensual, their grey suits, diction, caution, body language and choice of words can (without care) create an aura of pomposity, which is inimical to the message that they want to get things done and are 'nice' people. However, to litigate over-vigorously is akin to playing with someone else's money. For a client to engage a lawyer is in part an exercise in trust, i.e., the lawyer will act sensibly and prudently, a broader concept than simply avoiding professional negligence. Some years ago, *The Times* newspaper reported a litigation conference hosted by a major law firm. In perhaps the Blair-Bush moment, not knowing that others were eavesdropping, a senior litigation partner asked a cluster of litigation lawyers to put up their hands if they would litigate on their own behalf. Fidgeting, the audience sat on their hands and tittered nervously. They all knew the havoc litigation could bring.

Identity crisis? What the DCA must recognise is that the mediation community is still striving to define what mediation really is, being a process heavily influenced by the temperament of the particular mediator, rather than any 'rule' book. Most lawyers know the mechanical processes and these do not benefit from repetition. In addition, many lawyers have assisted clients in a range of mediations with different mediators. Comments suggest that some lawyers have found the behaviour of certain mediators alarming. Mediation is not counselling; the mediator is there to get a result and move on to the next case. In their initial analysis of the case papers, mediators decide where the appropriate pressure points lie and which of the parties to target in order to start the process of settlement. On occasions, clients and lawyers are disconcerted. Some mediators come on instantly 'strong' or evaluative. *"I see that this is a PI case, but I very much doubt that I can take the indemnity insurers over 50 per cent. You must decide or consider with your lawyer what you would reasonably settle for."*

[1] This paper is based on an article of the 6th October 2006 in the Solicitor's Journal. Paul Newman is a barrister specialising in construction law and mediation. He is the DCA NMAW co-ordinator for South Wales .

Other mediators feel the need initially to reassure and will try to engage the lay party, potentially setting a finite period of time in which in truth to go round the houses with them before addressing the need to progress towards settlement. Take the following example. The franchisee enters into a franchise agreement, but then stops paying the rentals. The franchisor sues for accrued liquidated damages. The franchisee counterclaims for the franchisor's allegedly shoddy performance. The mediator could choose immediately to focus on the merits – the validity of the liquidated damages' clause, asking, for instance, if it is it a penalty or a genuine pre-estimate of loss or has the franchisor complied with any conditions precedent? Going round the houses and listening to the franchisee's complaints may reveal the truth that whatever the validity of the liquidated damages' clause the underlying reality is that the franchisee is almost bankrupt and cannot pay. That would allow both parties to focus on a realistic solution.

Striking the balance between facilitation and evaluation is a tricky one. Some mediators quake when one of the parties asks: ***"What do you think of my case?"*** The facilitative mediator patiently explains that he is not there to give advice or comment – his role is to assist the parties in finding their own solution. As construction law barrister and legal pundit, Tony Bingham, wrote in a recent edition of construction industry journal, ***Building,*** part of engineering a settlement sometimes lies in giving a steer. *"When asked by one party what I think of their position, I tell them… Giving an opinion in private to X and Y separately really does push things towards a settlement."* Bingham also refers to the tug of war in the mediation camp between the two types. For facilitative mediators, evaluative mediators are *'muscle mediators', 'Rambo mediators', 'Attila mediators'.* In similarly pejorative terms; facilitative mediators are 'tree huggers', 'touchy feely', 'potted plant' mediators; in short, the type of people who make an environmental statement in the purchase of certain hybrid motor vehicles.

A role for lawyers : Some lawyers wonder what role they can possibly play at a mediation. They know the mediator will concentrate on the lay client and points of law are rarely argued if the mediator has his way. It is only at the end of the process, with a done deal, that the parties reach for the lawyers, by now heavily dosed on caffeine and biscuits, to structure the settlement terms in a legally binding agreement. However, the proactive lawyer can play an effective role throughout the process. Reading the mediator is an important skill with which lawyers can assist clients in mediation. Focus on his body language and words. Is he trying to undermine your client's confidence? Some mediators demand very close attention, as they can switch deftly between the facilitative and the evaluative modes. If the mediator tries to marginalise the lawyer in order to prise a settlement or concession out of the client, an adept lawyer can assist in correcting this exploitation of power. If any mediator is coming on strong, hassling your client, feel free to take the client to the metaphorical balcony by asking for time out to review options. However, do not overreact to mediator blunders by reaching for the door handle, forgetting the need to adapt to your client's weak points and work for a solution.

Many mediators, unsure of the initial ground or where the balance of weakness lies, start in facilitative mode. *"How do you feel the joint opening session went?" "Did you learn anything?"* Moving to case analysis, rather than, say, the mediator's instinct that a party is on weak ground on certain points, the mediator may suggest: *"I would like to explore…in greater detail…"; "I do not fully follow…"*; or *"…might benefit from further exploration".* The mediator hopes that, if the case is strong, he will learn more about the good points and, if the case is weak, the party will work this out for himself through the mediator's combination of questions. Lawyers may find the mediator is culpable, not grasping the situation, which ultimately may work to their client's detriment. If the mediator is not making the right point, feel free to interject, rephrasing the mediator's question in a more suitable way to produce a comment that may lead to progress being made. Do not sit dumbly while a mediator makes a hash of things. It is a very simple mistake. Assisting the mediator out of his culde- sac may ultimately help your client too.

Reconciling facilitation and evaluation : Even the most doggedly facilitative mediator must sometimes resort to an evaluative approach because, as George Bernard Shaw remarked: *"All progress depends on the unreasonable man."* The mediator's switch of tempo can disconcert, and when it occurs lawyers must decide how far to permit the mediator to go. Watch out for the following: *"Of course, this mediation is running in tandem with the litigation. If you do not conclude the mediation successfully today, then you will be back in court. As*

your lawyers have indicated (I am sure) to you the purpose of the court is to test evidence. You make a number of statements in your position statement. Are you confident that you will be able to back these up at trial? Do you have the witnesses available?"

The essence of such comments is reasonable. All litigators should have considered the evidence and assessed witness quality and availability with the client. Similarly, a party may boast to the mediator that he has received a favourable counsel's opinion. If the opinion offers the client a 70 per cent chance of success at trial, the mediator may ask how the party feels about the 30 per cent risk factor.

The mediator desperate for a *'result'* may become more strident and you might get real psychological pressure: *"I thought you came here in good faith to negotiate and we seem to be getting nowhere. It's time to table your bottom line position."* At that stage you can either up sticks and walk out, or think of some creative way forward. By contrast, the more cautious mediator may emphasise that it is the parties' decision whether to move forward or not. "*If you have hit a blockage, we can either adjourn the mediation to allow you all to think about things, or simply call it a day and let the judge decide."* Once again you are on the spot, but placed there less aggressively. The onus remains on you how to move forward.

So let us return to National Mediation Awareness Week. True, mediation does attract Bingham's tree-huggers, who dwell on the cathartic release mediation may bring, but in civil and commercial disputes think of the potential strong arm of the Treasury lurking behind the DCA's mediation enthusiasm. Where cash is king, the future lies with those mediators who get results and so who in truth blend facilitation with generous dollops of evaluation.