

Are we asking the right questions?

Andrew Miller QC says the dominance of lawyers in mediation is linked to how it is used in dispute resolution

The theme for this year's CI Arb Mediation Symposium – to be held online on 7 December 2020 – is 'Mediation as a multidisciplinary practice'. The aim is to explore the variety of skills a mediator should ideally have and which disciplines are best placed to provide those skills. This one question raises so many more in respect of the nature of those skills and the practice of mediation in general.

As someone who practised as a barrister for over 25 years before becoming a full-time mediator, I am often asked whether it is necessary for a mediator to have been a lawyer. My response is always an unequivocal 'no'. Of course, having been a lawyer should provide a mediator with knowledge and understanding of the legal dispute resolution process. But in my view that alone is not enough to make any lawyer a good or great mediator, it is simply one skill that a mediator can draw on to perform effectively. There are many outstanding non-legal mediators.

The usual follow-up question is: "Well, if that is the case, why is it that most mediators are either lawyers or ex-lawyers?"

The reason why mediation is dominated by legal mediators is because of how it is utilised

It is a valid question and its premise is factually correct. But the reason why mediation is dominated by legal mediators is because of how it is currently utilised in the UK and indeed in many parts of the world.

AN ADJUNCT TO LITIGATION

Mediation, as we know, is described as being an ADR process. But so is arbitration. I have always found it strange that both mediation and arbitration are put into the same ADR basket. Arbitration is a genuine ADR process. Parties have agreed, usually by contract, that in the event of a dispute the matter will not be referred to litigation via the courts but will be resolved by arbitration. Mediation, however, has never been able to stand alone from either litigation or arbitration. Mediation, in the majority of cases, is attached to another dispute resolution process, either arbitration or, more commonly, traditional litigation.

Mediation may be the first or an early step in a contractual dispute resolution mechanism. Its greatest use or uptake, however, is within the litigation or court process and, as such, mediation is probably better described as an adjunct to the litigation process, as opposed to being an alternative. The fact of mediation primarily being an adjunct to the litigation process explains why such a substantial number of mediators have a legal background. When



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litigation is at the forefront of most disputes, many of those involved in the dispute (especially the lawyers) perhaps feel more comfortable with having a lawyer as mediator. Also, more often than not, mediation takes place when the parties are some way into the litigation process.

SO, WHAT DOES THIS MEAN IN REALITY?

It means that in many disputes the parties find themselves entrenched in the litigation process. The litigation process has effectively taken over as being the driver of the dispute, with the subject matter of that dispute almost taking a back seat. By the time the parties get to mediation (if they do), the dispute has moved from being an argument between two or more parties over – for example – payment for work done, the quality of goods purchased or how much time a contractor is entitled to for additional works, to being one made up of legal arguments and legal rights. The parties, guided by their lawyers, will have become positional in their approach, with their arguments being firmly based on who is right and who is wrong.

None of this is surprising. The parties will have been proceeding in what I call a determinative mode. Everything, from the pleadings to witness statements to experts' reports, has been prepared on the basis of the parties' arguments being determined by someone else – the judge or arbitrator(s). It is

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therefore not surprising that positions become polarised, and become even more polarised the longer the dispute continues. And I still have not even mentioned the issue of the legal costs, which often become the main stumbling block to any settlement and can often be the most painful part of any litigated or arbitrated dispute.

IT DOES NOT HAVE TO BE LIKE THIS

How do we create a culture where mediation is allowed to be a proper alternative to both litigation and arbitration? I believe that this will require a change of ethos on the part of mediation users and specifically a change on the part of lawyers who in most cases remain the gatekeepers to the mediation process.

The first step is the encouragement of Early Stage Mediation (ESM). This is not a new or different type of mediation: it is simply bringing about a culture where the use of mediation happens sooner rather than later. The effect of this is that the parties are better placed to consider the nature of the dispute itself. They will not have become bogged down with entrenched positions. The earlier the mediation takes place, the better chance parties have of remembering what got them to be in dispute and what it was like before the dispute; and they may have a clearer view of where they could be if they can bring their dispute to an end.

Additionally, the huge benefit of ESM is that it does not necessarily have to follow the usual 'one size fits all' of the one-day mediation. The COVID-19 pandemic has shown us the versatility of remote mediation and the ability to mediate over a period of time, as opposed to simply one day. Remote mediation is something that can be utilised to great effect in the ESM process.

Trust between parties and the mediator is a prerequisite for positive outcomes





The earlier a dispute is able to find its way to mediation, the more likely the parties are to avoid any litigation or arbitration process. A mediation will not, therefore, be connected to the litigation or arbitration process. Although it will always be a necessity to have a skilled mediator, reliance on a mediator with legal expertise may no longer be so important.

THE IMPORTANCE OF TRUST

So, let's go back to the original question. I would counter with another question as to what skill or attribute a mediator should bring into the mediation. There is, of course, no one answer to this.

I would urge any newly qualified or aspiring mediator to find that skill or ability within them that can make a difference in a mediation setting, to facilitate two or more parties to reach a settlement. What that skill is will depend on the background of the mediator and the type of dispute. It may be a sociological or psychological skill, an ability to show compassion and empathy or expertise in a specialist area. A mediation may require a mediator with knowledge of, for example, quantum physics, forensic accountancy, how a drug company brings a new drug to market, the interaction of employers and employees in large corporations, how a construction project is developed, designed and built, or international trade and how governments deal with each other in cross-border disputes. It is clear that these skills go far beyond those of a lawyer.

But there is something else. Whether you have been a lawyer or quantum physicist, your knowledge and specialism will come to nothing unless you are able to communicate with others. Communication, whether by listening or speaking or both, is the vital skill needed by any mediator. The key discipline – one that any good mediator has in their toolbox – is the ability that allows a party's position to be heard and causes a party to alter its perception of the dispute.

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Is there a name for that discipline? Probably not. But I will try to give a name to the element that lies behind that discipline, and that is trust. It is not so much a skill as something that has to be earned by the mediator in any mediation. Without gaining the trust of the parties in the process, the mediation is unlikely to succeed.

Given the success of past CI Arb Mediation Symposiums, it may be that we have an alternative name for this discipline or element by the end of the day on 7 December 2020.

It all depends on the attendees asking the right question.

LEARN MORE

The 13th Mediation Symposium will take place online on Monday 7 December 2020. The day will draw together presentations, deliberations and debates around 'multidisciplinary' and the skills and practice of mediation. Although targeted at practitioners, this flagship event will also be of interest to academics, lawyers, politicians and the judiciary, as well as business leaders with an interest in the developing world of mediation. To register, or for more details, visit ciarb.org/events/mediation-symposium-2020/

Mediation Symposium 2020: Mediation as a multidisciplinary practice

Keynote address by

George Lim SC

7 December 2020 | 9.35am - 4.35pm GMT | Online event



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Cost(s): CI Arb members – free of charge

Non-members – £25 (including VAT)

Registration: ciarb.org/events/mediation-symposium-2020/

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