

Mediation in London has evolved...

Like a good wine, mediation process in London has evolved. It has developed into a standard format one day experience, beginning with a joint meeting of all parties where the issues are discussed and followed up by arm's length negotiations from different rooms using the mediator as a shuttle diplomat. This briefing discusses some of the implications of this evolution of the process.

At a recent meeting of a working group consisting of lawyers from commercial and city law firms across London, lawyers spent 5 minutes each with a number of mediators, taking their views on London mediation practices. The outcome was summed up by one mediator as follows: there is now an homogenous style of mediation which London solicitors in general are coming to expect and this consists of:

1. A one day mediation.
2. A joint meeting of all parties at the beginning of the day.
3. This is followed by caucus sessions with everyone in their own rooms negotiating through, or with the help of, the mediator.

In the view of the mediators spoken to, this was how solicitors as a whole across London wanted a mediation to run and the comment from the mediators was that they were happy to fall into line with it. As a rule, mediators do not like to argue about procedure, particularly with lawyers. They would rather get on with the substance of the mediation. They also do not like to create suspicion. It makes the job harder and takes longer to address. So they will, as a rule, tend to follow what has evolved as the homogenous approach.

The downside of this trend is that, as with most things, the more time you

give to them, the more likely they are to succeed, eventually. A 2 day mediation would of course allow more time for the parties to discuss and engage and obtain a resolution. It is noticeable that, in the most complex cases with the most at stake, parties will sometimes set aside more than a day and even multiple days during which the mediation can take place. The fact that there is a lot at stake does not necessarily mean that the number of issues are greater or less than in a small value dispute. What it may suggest is that the parties' decision makers are more committed to resolving the matter through mediation, than litigation, and are prepared to devote significant time to it.

However, there seemed to be a consensus among the mediators that having 2 day mediations was a waste of time because the first day was wasted with posturing and position bargaining. A suggestion some mediators made was that, if there was to be a 2 day mediation, the second day should be 2 or 3 weeks later, allowing a window of time for the parties to reflect on their positions. The downside is that when the parties leave the negotiating table without having secured agreement, momentum is lost and it may be more difficult subsequently to build upon the negotiations.

Another approach being adopted by mediators in light of the one day mediation standard is to engage in pre-meetings in the form of telephone conversations with each side's legal team 2 to 3 days before the mediation. However, the extent to which these are useful and productive depends of course on the co-operation of the parties and their lawyers.

All parties are keen to mediate. It would not do to appear otherwise. But some are keener to reach an early resolution than others. So, what does this indicate to a party keen to reach an early resolution or, in the other camp, to a party which is less keen?

For a party keen to reach an early resolution, the implications are:

- offer the standard product of one day mediation
- make sure your lawyer has pre-meetings/calls with the mediator
- encourage the mediator to have pre-meetings/calls with the other side
- agree the mediation agreement in advance so time is not wasted on it on the day of the mediation
- insist on an early exchange of negotiating positions, before noon, so as to make full use of the day.

For a party less keen on early resolution the opposite approaches probably hold true.

Finally, there was some concern expressed by some of the mediators about popular mediators conducting mediations on a back-to-back basis, for example, conducting 5 mediations in a week. It was suggested such mediators might lack the "energy" to bring a mediation to a successful resolution. Yet, perhaps not surprisingly, it is the most popular or fashionable mediators who are likely to be placed in this position due to a glut of appointments. And often their availability can be limited, with their

diaries being booked up many weeks ahead, so that parties really have little option but to take any dates offered

To conclude, it is helpful to be able to approach the mediation process knowing there is a common understanding and expectation of the process, consisting of a one day experience beginning with a joint meeting of all parties where the issues are discussed and followed up by arm's length negotiations using the mediator as an intermediary. With the mediation concept being so flexible in scope and application it is useful for parties and their lawyers to be able to identify and insist, if necessary, on the

standard vanilla product, and no more, being provided. This is so, even though the process is flexible and, on occasion, the parties may mutually wish to depart from the standard form.

Whether this will lead to more or earlier resolutions is not clear but the existence of a standard form of process will certainly assist in managing the parties' expectations of what is likely to be involved. As with a fine wine, we can only hope the evolved process will help to throw off the sediment and bring to the fore the true flavours of mediation.



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