

MEDIATION ETHICS Q&A

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1. What do you understand by the term 'ethics' within construction mediation?

I am of the opinion that the ethical constraints that apply to the conduct of a mediator are in no way dictated by the subject matter or discipline concerned in a dispute. The applicable ethic will be that of the dispute resolution process at hand. As such, it is important to identify precisely what one understands by the term "mediation" since that will determine what is expected of the process and draw the parameters within which the mediator must operate.

The roles of the social and commercial mediator are quite distinct. Social mediators play a far more active role in shaping outcomes and perceptions and act far more as a role model than commercial mediators. Likewise mediation is often used to embrace conciliation, where the conciliator may formulate and recommend or even impose outcomes.

However, where the mediator acts as a facilitator, the ethical constraints will be the same whether the dispute is centred on the construction industry or any other commercial activity. To act ethically in this context is

- a) to conduct oneself in an even handed manner*
- b) which respects the confidentiality of the process.*
- c) Parties enter into mediation because they have lost the ability to canvass all the options available to them without assistance. The competence of the mediator concerns the ability to enable each of the parties to give due consideration to all relevant options and to reorder their priorities and to align them with the expectations of the other party*
- d) without endorsing any particular course of action or applying undue pressure or influence over the free choices of the parties.*
- e) It is important to separate the ethics of the mediator from the ethics of the parties. Whilst a mediator should not be complicit in the proposed wrong doing of a party, it is not for the mediator to induce a party to act in an ethical manner - so the reasons underpinning the offers of a party are not the mediator's direct concerns. Termination of the process by the mediator should be based on exhaustion of the value of the process alone.*

2. The author considers the following five ethical terms are central to achieving and demonstrating an ethical and fair mediation. Please indicate alongside each of the terms what you consider to be their relative

importance, 1 – 5 (1 being the most important and 5 being the least important)

- * **Competency.** 3
- * **Impartiality / Neutrality.** 2
- * **Self Determination of the parties to settle.**
- * **Confidentiality.** 4
- * **Identification, by the mediator of when the process should be halted.** 5

3. Do you consider that an ethical code of conduct should be a compulsory requisite for UK construction mediation? If not, why not?

No. It is essential that mediators are well trained and competent but thereafter the industry must trust the mediator to act in a professional manner. Since confidentiality is key to the process, the introduction of a code of conduct would be pointless without policing which could only be instituted by penetrating the veil of confidentiality. Mediators who act in an unprofessional manner will quickly be recognised by the industry and isolated. The common law rules against bias, coercion and undue influence are all that are needed without producing some arcane and complex set of rules. Most mediation service provider organisations subscribe to a basic set of rules for the process. It is possible that the European Union may produce a uniform code for the provision of mediation services, though this is likely to be a difficult task given the wide range of methodologies involved in mediation.

Sirs, in the context of the mediated settlement of construction disputes,

a) What do you understand by the term natural justice?

Natural Justice has two distinct meanings :

- i) A legal concept and principles commonly known as "Due Process" comprising*
 - A) The right to a fair hearing – as per the Human Rights Act in the UK, etc*
 - B) Absence of bias (whether actual/real, perceived or imaginary). And*

In addition a third element that is particularly relevant to construction is

 - C) Compliance with any lawful constraints in respect of jurisdiction established by statute, contract provisions and the terms of reference.*
- ii) Vague ill defined concepts about achieving a fair / just / equitable / natural outcome.*

Note that concepts of natural justice are common to all dispute settlement situations irrespective of subject matter and hence should have no special connotation in respect of construction disputes.

b) How do you see natural justice fitting into the process of mediation?

Regarding i), since the mediator (as opposed to the binding conciliator) does not have any jurisdiction in the first place C) does not apply beyond the limitation of what disputes the parties have contractually agreed to refer to mediation and those that are consequently free to go to litigation.

In mediation A and B tend to merge. A mediation session is not a hearing, it is a third party facilitated negotiation. The mediator should deal in an even handed manner with both parties – affording them adequate (though not necessarily equal in terms of time) opportunities to air their views on difference and relevant aspects of the dispute and avenues of settlements. The mediator should not favour one party over another or put undue pressure or exercise undue influence or duress on either party to settle by abusing his position of authority and respect.

Regarding ii) mediation is often viewed as a mechanism to achieve fair, more just, equitable and or natural outcomes. The problem is defining these in any meaningful manner.

The key to mediation is that no settlement is likely to occur unless it is acceptable to both parties, though the motives for settlement of the parties can be many and varies and are not likely to coincide.

A party that accepts the terms is likely to feel that the outcome is fair, or as fair as can be achieved in the circumstances.

Whenever compromise occurs a party gives way on initial aspirations or expectations. If the party clings to a perception that they represented achieving their just deserts then “legal justice” may not to their mind be achieved, but the bargain may nonetheless appear justified for other reasons – or represent a degree of pragmatism.

Equitable solutions are closely linked to notions of fair outcomes and should not be confused with the equitable principles developed by English Law. However, it is not the job of the mediator to correct any imbalances of power between the parties, since that in itself amounts to a failure to act in an even handed manner.

To strive as a mediator to achieve a natural outcome would first require the mediator to form a view as to what amounts to the natural or normal solution that would arise between ordinary or reasonable persons. No such thing probably exists in most situations, since different people will view a situation from different

perspectives. Since Mother Nature is ex-directory it is impossible to procure an answer.

There are difficult questions that can arise during mediations, regarding conflicts of interest, problematic disclosures of bad character, bad intentions perhaps including admissions of criminality or criminal intent, absence of frankness, openness and honesty, There are an abundance of codes of ethical practice that can provide some guidance to mediators. In addition the law sets out rules on privilege, confidence and disclosure which need to be adhered to by mediators.