Rights and Interests in Mediation

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Alternative dispute resolution processes and especially mediation have been trumpeted as the mechanisms that ensure that disputes are settled amicably and to the satisfaction of all parties. Mediation in particular is a dispute resolution process that aims to achieve a win-win result for the parties to a dispute. This is one of its major selling points. Successes and failures at mediation are classified not by the attitudes of the parties post mediation, but rather by whether or not the parties have settled at mediation.

However, for many ADR practitioners, "getting a result" takes precedence over every other consideration and accordingly the whole mediation process is orchestrated by the mediator to achieve this desired state of Nirvana. There is little thought given to the post settlement consequences as long as the dispute is settled at mediation and the mediator can "chalk up" another success. Settlement implies that the parties are happy with the end result. This however, may not be the actual position. Many parties post settlement on reflection believe that they could have achieved a "better result" through one of the judgemental processes than that achieved at mediation where they feel that they have been "ground down" by the mediator to settle the dispute on terms that are not favourable to them. This approach to mediation can and does bring the whole process into disrepute and works against parties repeating the process in future if they have another dispute.

If the ADR industry is going to make the great strides that have been anticipated for it, then practitioners need to appreciate that their responsibilities do not end at the termination of the mediation but still exist when the settlement is implemented.

There are various bodies and organisations that train mediators and other alternative dispute resolution practitioners as well as the fact that anyone can call himself an adjudicator, mediator or arbitrator, as these are not protected terms. The potential for growth is great for practitioners, but so is the potential for disillusionment amongst clients and potential users of ADR processes who rightly or wrongly believe that they will not have a "fair hearing" if they use one of the ADR processes.

There is the potential for major growth in mediation both in the United Kingdom and world wide, but the scope can be limited by people's confidence in the system, the practitioners and the training that practitioners have to do. There is disquiet with some of the approaches to mediation and mediation training with organisations "jumping on the bandwagon" and providing training and services, but there is no minimum standard or uniform approach to training. This vacuum is one that Europe is prepared to step in to rectify, but will rectification bring its own problems in that a standard approach may produce a system where the process is more important that the people who have to use the system? Time will tell! The debate on the future training of mediators needs to be expanded to take into consideration people's experiences of mediation training and using mediation and what they consider to be successes or failures not whether there has been completion of a training course or settlement of a dispute. It is only through learning from experience that mediation can be driven forward as a dispute settlement process and one the public will have confidence in using.

Parties need confidence that they will have justice if they submit themselves to mediation. The responsibility is on mediators to ensure that this is the case in practice. Mediators need to appreciate that this is an onerous task as they are the "guardians of the process" and should never forget this in their rush to "successfully settle the dispute" and keep their settlement figures high to prove that they are "masters of the process".

The mediator needs to appreciate that sometimes "getting a result"; that is, a settlement may not be as important as dealing with the parties' rights and failing to reach settlement if mediation is to become a recognised mainstream respected dispute resolution process in the United Kingdom.

Mediation can only work when the parties have confidence in the process and this confidence can only come from the mediators and how they conduct the process. Settlement of a dispute is not the ultimate seal of approval of the process or a guarantee that the parties are satisfied with the outcome. Parties have rights that need to be respected irrespective of the outcome and mediators must never forget this fact.

The importance of the concept of rights in the development of the ADR cannot be overstated. Parties need to have confidence in the process if they are going to agree to use the concept and genuinely take part if so ordered by a court. There are two recognised approaches to mediation, the interests based approach and the rights based concept of dispute settlement. These two approaches to the mediation process can and do merge into one in many cases, but in others the rights of the parties can be fundamental. Failure to explore rights and parties concepts of rights may at the time not appear important to the mediator, but the long term consequences of failing to identify the needs of the parties can and does bring the concept of mediation into disrepute. Parties not only want "justice, but they want justice to be seen to be done" in their particular case.

The differences in approach adopted by mediators and whether they adopt an interests based or a rights based approach to dispute settlement can have a profound effect on how disputes are settled. In one, the interests based approach settlement of the dispute become paramount. In the other, the rights based approach the rights of the parties are the most important consideration rather than "obtaining a result". These two approaches have fundamental differences for the mediation process and the results that may occur by mediators adopting the approaches.

The interests based approach has many proponents who argue strongly that they bring a new robust approach to settling the dispute by ensuring that the parties realise what their "best interests are" and getting them to settle along those lines. There are criticisms of this approach that are difficult to ignore when comparisons are drawn between the two types of approach to mediation. It is accepted that mediation is a facilitated negotiation process whether an interests based or rights based approach is adopted. The question must be asked, "Why do parties settle at mediation when experienced lawyers and negotiators have failed to reach settlement prior to the mediation?"

The usual answer is that the mediator has introduced a reality check and that the parties now better understand their dispute. Given the fact that the dispute may have been in existence for a good number of years and that the lawyers and the parties have been intimately involved for that length of time then this explanation may only be part of the answer not the whole answer. It is possible that the parties do become entrenched in their respective positions, but the "reality check" may introduce a new factor, the fear factor!

Once parties appreciate that they can lose the fear factor can take over. This is especially true when parties are not used to litigation and do not fully appreciate the nuances. The parties or one party may become afraid of the consequences of going to court and make concessions in a mediation that would not be contemplated in direct negotiations between the parties. The reality check has worked to produce a result because the concentration has been on the interests of the parties not the rights.

Once a settlement has been agreed and the parties have time to consider their position, they may well find that their rights have been subrogated. In many cases this may not be important, but in some situations it may well be the reason why the case was brought in the first place. Thus even though the case has been settled and the parties have agreed to the terms of the settlement, one of the parties has realised that it has made a "bad deal" and would have been better served by another method of dispute resolution.

The onus is on the mediator to guide and lead the mediation process. He is "guardian of the process" rather than "master of the process". This differentiation is important as it is incumbent on the mediator to perform his duties to the best of his abilities for the benefit of the parties rather than to maintain his high success rate.

Settlement of a dispute should not come at the expense of the rights of a party or parties. Initially their short-term interests may have been better served by settlement. However, their rights both long term and short term would have been better protected by not settling.

The ultimate goal of a mediation is not to settle, however desirable this may be, but to produce a win-win situation if at all possible for the parties. It needs to be recognised that it is not always possible to achieve this goal in a mediation. There is no shame in not settling at a mediation if the parties have honestly applied themselves and an agreement cannot be reached. This is not a failure of mediation or the mediator, but namely that the parties are so far apart that it is not possible to reach a voluntary agreement that satisfies the parties and third party resolution of the dispute may be the best option. Coercion of the parties by the

mediator is undesirable if the only goal is to reach a settlement so that the mediator can maintain his “strike rate".

We all have a duty to respect the clients and the processes and this duty should take precedence over the need to “achieve a result” so that we are a “successful ADR practitioner”. There is no point in having a high success rate when nobody has confidence in the systems and do not wish to use them even if ordered to do so by the courts. This is a responsibility that all ADR practitioners need to take seriously!