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**Paper**

**“THE ROLE OF THE MEDIATOR ”**

**By**

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# THE ROLE OF THE MEDIATOR

By Corbett Haselgrove-Spurin\*

## INTRODUCTION

The original working title for this paper was “The Expert as Mediator, the Mediator as Expert” which had the great advantage of concentrating the writer’s mind on the relevance of mediation practice to those of you gathered here today. It is submitted that the role of a mediator does not differ in any significant manner, simply because the mediator is an expert, though the ability of a mediator to carry out his or her functions may well be affected by the fact that the mediator is an expert, though that may depend on whether or not the mediator is an expert on the issue in dispute. It is further submitted that whilst it is desirable, if not essential, for all mediators to possess high degrees of mediating expertise, in the absence of a dispute about the degree of expertise exhibited by a mediator during the conduct of a dispute, a mediator will have little opportunity to act as an expert in respect of the mediation process as opposed to utilizing that expertise in the conduct of the mediation. The very nature of mediation, as a private, privileged process means that opportunities to express an opinion on another mediator’s expertise will be few and far between.

Whilst it is commonly accepted that mediation expertise is essential the same cannot be said of the need for the mediator to have expertise about the issue in dispute. If no such expertise is required, a skilled mediator should be able to tackle any dispute he or she is presented with. Therefore, should anyone present today aspire to become a mediator, all that is required is the acquisition of mediating skill and the entire gamut of mediated dispute resolution will open up before you. If however expertise is required, then having acquired the skills of a mediator, you will logically be limited to dealing with disputes within the scope of your given expertise.

The common issue raised by the above is “What are the skills of a mediator ?” If there is a need for a mediator to be an expert in a given subject, “How does the mediator make use of his or her subject expertise within the mediation process ?” This paper seeks to answer these two questions. The aims and objectives of this paper are as follows :-

**Aims :** To examine :-

- i) what mediation seeks to achieve,
- ii) the mechanics of the mediation process and
- iii) the central organising role of the mediator in that process, including where relevant, the use of his or her subject expertise.

For this reason, without losing sight of the relevance of mediation to this gathering of experts, the title has been changed to “The Role of the Mediator.”

**Objectives :** The intended outcome of this paper is to put you, as experts, into a better position to act as mediators by highlighting the skills and methodology involved in the mediation process. The rest, as they say “Is up to you.”<sup>1</sup>

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<sup>1</sup> Whilst practice makes perfect, it is easy to under-estimate what is involved in mediation. Aspiring mediators are advised to follow a hands on mediation training course to gain a feeling for the process and risk free experience.

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## TERMINOLOGY AND DEFINITIONS

Fulfilling the aims and objectives of this paper would be greatly facilitated if there was a universal understanding of what mediation is, apart from the fact that it is a form of third party “**assisted negotiation process.**” However, this is not the case. Highly respected organisations and individuals hold to widely differing views as to what mediation is and what mediation should achieve. Consequently there are an even wider range of views as to how the process should be conducted, with direct implications for the role of the mediator within the process and even as to the required attributes of a mediator. It will therefore be necessary to categorise types of “assisted negotiation” process and to further categorise the different types of “assistant”.

## WHAT DOES THE ASSISTED NEGOTIATION PROCESS SEEK TO ACHIEVE ?

The assisted negotiation process, in common with all dispute resolution processes, seeks to bring disputes to an end. Unlike expert determination, adjudication, arbitration and litigation however, the various forms of assisted negotiation processes are considered to be consensual, involving the disputing parties directly in the shaping of the terms of the resolution, as opposed to having the terms of the resolution imposed by a third party. However, depending upon the model of assisted negotiation process adopted, what the parties retain control over varies considerably, ranging from the terms of the settlement to the enforceability of the settlement.

The terms “**MEDIATION**” and “**CONCILIATION**” are often used interchangeably. It is proposed for present purposes, to ascribe distinct meanings to each of the terms, as follows :-

- **Mediation** is the process whereby an independent third party acts as a facilitator to bring about an agreement between the disputing parties as to the terms of a settlement of the dispute. The parties negotiate the terms of a settlement agreement between themselves, with the assistance and guidance of the mediator.
- **Conciliation** is the process whereby an independent third party acts as an expert chairperson, with the objective of devising the terms of a settlement in the light of the views expressed by the parties. The parties seek to negotiate the terms of the settlement with the conciliator. However, at the end of the day, it is the conciliator who drafts the terms of the settlement and imposes it upon the parties, with or without their joint agreement. In some respects it is the equivalent of a recommendation or advice especially if the parties are at liberty to accept or reject it, but it can go further than this in some forms of conciliation.

Assisted Negotiated Dispute Settlement may be further categorised as “**Binding Mediation**”, “**Non-binding Mediation**”, “**Binding Conciliation**” and “**Non-binding Conciliation**”.

- **Binding** : The word “binding” refers to the agreement itself and not to the negotiation process. The parties cannot be forced to actively participate in the process and are free to withdraw at any time, at which point settlement becomes impossible. By contrast expert determinators, adjudicators, arbitrators and judges can proceed to a decision, award or judgement even if one of the parties attempts to withdraw from the process.

Once the parties have signed a “binding agreement”, that agreement is in the nature of an enforceable agreement. It is a settlement agreement which brings the dispute to an end. The new settlement agreement, assuming it is of an enforceable nature, is enforceable by the courts as a simple contract.

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- **Non-binding** : A “non-binding agreement” by contrast, is binding in honour only and thus cannot be enforced by the courts. There is no intention between the parties to create legal relations, even though the terms of the unenforceable agreement may well be signed by the parties. The signature merely indicates the parties approval of the terms of the agreement but without any enforceable commitment to seeing those terms fulfilled.

**Binding and non binding mediation contrasted.** The degree of control exercised by the parties is thus quite different in mediation to conciliation. The only difference between binding and non-binding mediation lies in the enforceability or otherwise of any negotiated settlement. In both cases the process and the settlement itself are entirely consensual.

- Binding mediation is the norm in commercial dispute resolution, since the parties seek certainty and the nature of the settlement is normally amenable to enforcement proceedings, usually involving the payment of monies by one party to the other.
- However, non-binding mediation is the norm in domestic and neighbour disputes. The aim is to re-establish social relations between the disputing parties. The nature of the settlement is unlikely in many cases to be amenable to enforcement proceedings since the courts would be unable to supervise the future conduct of the parties. Where it is possible for the parties to agree on a settlement the chances of them subsequently sticking to the agreement is very high, so there is value in the process.

The common factor in both forms of mediation is that the outcome is entirely consensual. The agreement of the parties is subject to some legal constraints in that where a new agreement lacks new consideration, that is to say an element of reciprocal bargain, it might be unenforceable in the absence of a device to give it the force of law.

The agreement may be made under seal to ensure its enforceability. Alternatively, if the parties had initially commenced legal action then it can be lodged as a settlement agreement with the courts.

Beyond that, the only possible way of challenging the enforceability of the agreement is on the basis of misrepresentation, by either of the parties or the mediator, or on the basis of the unlawful exercise of duress and undue influence on one of the parties by the mediator, perhaps demonstrated by proof that the mediator withheld relevant information or very forcefully expressed the opinion that the terms of the agreement were fair and satisfactory for both parties even though the mediator was aware that the agreement was unbalanced and extremely one sided. It is difficult to prove misrepresentation, duress and undue influence but not impossible as demonstrated by the US experience where the settlement agreements brokered by a number of insurance claims mediators were set aside because all the agreements unjustly favoured the underwriters.

Against this however, is the fact that the party’s legal representative should be fit enough to protect his or her client’s interests during the negotiation and the mediator and the other party should not bear responsibility for incompetent counsel. The mediation rules of some organisations require the parties to be represented whilst others do not. Where representation is required the rules may or may not mandate legal representation. There is no statutory requirement for legal representation. The mediator should be aware that there is a potentially higher standard placed upon him or her to ensure equality of bargaining information in respect of a party who is not professionally represented, and particularly where the issues at stake concern significant legal interests, rights and duties.

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**Binding and non binding conciliation contrasted** : The difference between binding and non-binding conciliation is potentially considerable.

- **Non-binding conciliation** : Whilst the parties retain control over implementation of the non-binding settlement they merely exercise influence over the shaping of terms of the settlement. A possible variation of this is where the conciliation does not end until the parties agree to sign up to the recommended terms of the conciliator, or the parties withdraw from the process. In such a case the signed agreement of course remains non-binding and legally unenforceable. The impact of the non-binding conciliation process differs little from that of non-binding mediation. Whilst the fact that the terms of the settlement may be imposed on the parties and might result in regret and subsequent changes of heart, it has the advantage of producing an outcome in situations where the parties are simply not able to broker an agreement. If the parties respect the conciliator there is a high possibility that they will subsequently stick to the terms of the settlement.
- **Binding conciliation** : In the binding conciliation process the parties merely exercise influence over the shaping of the terms of the settlement but exercise no control whatsoever over implementation. A possible variation of the binding conciliation process involves the parties reserving the right to reject the terms. In such a situation the conciliation would become binding if the parties signed up to a binding agreement on those terms. In the light of the potential total lack of party autonomy where the parties have not reserved the right to reject the proposed settlement, it is questionable whether this form of conciliation can be truly considered to be anything other than a form of third party determination process.
  - i) If the enforced settlement is based on decisions of fact it appears on the face of it to resemble expert determination, which is subject to judicial review and the supervision of the courts.
  - ii) If the enforced settlement is based on mixed decisions of fact and law it bears a striking resemblance to arbitration and the process could arguably be subject to the Arbitration Act 1996 in England and Wales, judicial review and the supervision of the courts.

Whether or not either of these is the case is far from clear under English Law. The binding conciliation process is rarely used and the question has not been subject to direct judicial consideration. Whilst binding conciliation bears a striking resemblance to either expert determination or to adjudication and arbitration, it is quite distinct from both, since the range of options open to the conciliator in the shaping of the terms of the settlement are not necessarily limited to a decision based strictly on fact and law. Depending upon the way that the conciliation rules governing the process are drafted, the conciliator may be able to produce an “equitable” or “ex aequo bono” settlement, with a view to producing a “fair” outcome based on the interests of the parties rather on their respective legal rights and duties. Presumably however, under the **Wednesbury Rules**, judicial review would require that the settlement would have to be one which, in the circumstances of the case, a reasonable conciliator could have reached.

Expert determination and arbitration produce winners and losers whereas the ADR concept of “WIN/WIN” outcomes is available to the conciliator. None the less the settlement would have to be one that a reasonable conciliator could have arrived at in the circumstances of the case. Binding conciliation has the advantage over non-binding conciliation of producing certainty for the parties, though unlike binding mediation, there is no guarantee that both parties will be happy with the outcome and regard it as a “WIN/WIN” result.

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**Academic analysis versus reality** : The four way categorisation of negotiated dispute settlement processes outlined above is not universally recognised and adhered to. It will be seen that the various types of mediator set out below often adopt approaches to mediation which contain elements of both mediation and conciliation as outlined above. Whilst the four way categorisation clarifies the degree of party control in each model, with consequent implications for the way the ADR practitioner conducts him or herself within the process, what is and what is not appropriate behaviour for the ADR practitioner is less apparent when a mixed process is involved.

The dangers inherent in a mixed process of negotiated dispute settlement and third party determination were subject to judicial consideration by Judge Humphrey Lloyd QC at the TCC in the case of **Glencot Development & Design Co Ltd v Ben Barrett & Son (Contractors) Ltd**, with judgement delivered on the 13<sup>th</sup> February 2001. In Glencot an adjudicator switched roles and attempted a mediated settlement of the dispute but then reverted to the role of adjudicator when the mediation failed to produce a settlement. The court had to decide whether or not information acquired by the adjudicator about one of the parties during the mediation process prevented the adjudicator from finally reaching a fair and just decision in the resumed adjudication.

Third party determination processes are essentially judicial processes and thus a high standard of impartiality and due process is required to ensure that justice is not only done, but also seen to be done. As discussed above, the lower standard of an absence of misrepresentation, duress and undue influence applies to assisted negotiation processes. There is the possibility that during the assisted negotiation process the assistant becomes privy to information which would not be available to the third party determinator, or if it became available it would only be after the other party had the opportunity to challenge it and comment upon it and to tender alternative views as to the relevance and import of the information. This is not to say that the third party determinator will necessarily deliberately misuse the information. The question arises firstly as to whether or not the third party determinator is able to sub-consciously as opposed to consciously avoid being influenced by that information when he or she makes the decision. Opinions on this matter are divided. That apart, a second question arises as to whether or not the parties have willingly and knowingly undertaken the risk of the third party determinator being subconsciously influenced by such information and have decided to nonetheless rely on the integrity of the decision maker to reach a fair and unbiased decision. It was this second question that Humphrey Lloyd addressed. He made it clear that it is essential that the risks are spelt out in advance to the parties and that they have then made a choice to take that risk. In Glencot this had not happened and the court refused to enforce the adjudicator's decision.

In Glencot the mediation and adjudication processes were clearly identifiable and the standards of care for each process remained distinct. Where a process merges elements of both it is far more difficult to determine precisely what standard of care is required of the dispute resolution practitioner. Whilst flexibility of process is one of the central attractions of ADR it is important that the parties to the process understand fully what is involved in the process that they engage in and the implications of so engaging. A lack of uniform definition of what the processes involve is not necessarily detrimental provided that a clear set of rules for a chosen process are provided to the parties before they engage in it. Unfortunately, this is not always the case. Institutional ADR processes are likely to be supported by guidance notes for the parties, rules for the conduct of the process and by ethical rules of conduct and practice for the ADR practitioner. Ad hoc appointments to private ADR practitioners for a mediation or conciliation process do not always provide the same degree of protection or clarity.

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## TYPES OF MEDIATOR AND TYPES OF DISPUTE

There are a wide range of categories of mediator, in terms of the way the mediator conducts the process and the factors that the mediator will seek to address in order to broker a settlement. These will often reflect the nature of the dispute that is being dealt with and it is submitted that whilst each of the mediation methods represents a valid process, each model is best suited to different types of dispute.

**Types of Dispute** : The range of disputed civil matters that can be dealt with by way of mediation are considerable. Commercial disputes formed the initial wave of ADR settlement in the US, partly because such disputes are traditionally settled by the courts. ADR rapidly expanded in the US between 1980 and the nineteen-nineties to enable the parties to retain some control over the outcome, to reduce settlement costs and because of the speed of the process, particularly since the courts overburdened with commercial claims and it could take as long at one time as six years to get a court hearing. As the success of ADR became apparent it has been adapted to social and domestic disputes and Government / Individual disputes about the allocation of state resources on social policy issues and environmental and planning issues. The ability of ADR to deal effectively with multi-party disputes has proved attractive. However, different categories of dispute need to be handled in different ways.

Whilst commercial disputes are best approached from a legal rights, duties and interests perspective, since the spectre of the court hangs over the process and will be invoked if the mediation fails, disputes with social and personal aspects are best approached from the perspective of the best social interests of all concerned. Rights based mediations will involve a high degree of risk analysis with particular reference to the costs of litigation and the likely outcome of litigation. The mediator will attempt to provide the parties with reality checks and invite the parties to consider what the court might do in given circumstances. The mediator can rely on the legal expertise of party representatives to explore such matters with both parties and is likely to do this in private sessions. By contrast, in social disputes, few if any private sessions are likely to be used. The mediator will seek to get the parties to take a look at the situation of the other party and identify matters on which it is in their best interests to cooperate in the future.

Whilst continuing business relationships may be a relevant factor for commercial disputes, ongoing relationships and public image are central to the settling of social and policy disputes.

The concepts of “a day in court” and “getting things off one’s chest” are likewise very important in social disputes but play a much lesser role in commercial disputes.

The structure of a mediation will therefore reflect these differences and the communication skills of the mediator have to adapted to take account of the type of outcome that is desired and the degree to which personality factors will impact upon the conduct of the process.

As experts in given fields of commercial practice, the commercial model of mediation is most likely to be relevant to those present today. It is further submitted that commercial disputes are best mediated by experts in the relevant field. However, this is not sufficient. The rights based mediator needs to have a working understanding of the law applicable to the dispute and of how the courts would approach the matter. Finally, the mediator must be skilled in the practice of mediation. The skill is acquirable but it is specialist and must be acquired.

A model of how such a mediation process might be conducted and what each part of the process seeks to achieve is set out later in this paper. The model is not prescriptive. Different ADR service providing organisations propose variations on the theme and it may be necessary to vary the process in the light of the needs and expectations of the parties to a given dispute.

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**Disputes not amenable to mediation** : Mediation cannot be used as a substitute for the settlement of issues in which the state has an interest and for which settlement is the sole preserve of the courts as instruments of the state. Thus mediation cannot be a substitute for a criminal trial or a divorce petition in England and Wales. Mediation is thus reserved for civil disputes which the parties have the right to settle privately.

Since mediation is essentially a refined and assisted form of negotiation, it is essential, as with all negotiations that the parties are both willing and able to engage in the process and have something to negotiate, which in crude terms means they are prepared to compromise their initial negotiating positions or to search for an alternative solution to their problem. It is preferable, but not strictly necessary, that a degree of compromise also be in both parties interests.

Where a party to a dispute has a clear cut right, or at least expectation, whether realistic or not, that they have a clearly enforceable right, there may be no willingness to compromise and no obvious interest for them in so doing. The most obvious example is where there is no dispute about the quality of goods or services provided by one party to another and the problem revolves around a mere failure by one party to pay the other. It is questionable whether an action for the enforcement of a debt is in fact a dispute at all. This poses difficulties for the mediator. Where the debtor is willing but unable to pay, perhaps due to cash flow problems, there may be scope to facilitate a settlement based on rescheduling the debt and perhaps finding alternative consideration for the creditor. If the debtor has the means to pay but is simply unwilling to do so, there is no reason why the creditor should compromise. Enforcement of a debt before the courts, assuming the debtor has the means to pay, is relatively quick and straightforward in England and Wales. It is unlikely that in such a case a creditor would be prepared to engage in the mediation process let alone compromise his or her legal rights to full recovery.

However, if the relationship between the parties is governed by a mediation agreement and non-payment of debt is considered to be a dispute, there would be a contractual requirement to engage in the mediation process. This is a problem because if the courts advise mediation in fulfilment of the agreement and stay legal action pending engagement in the legal process, it merely forces the parties to waste time and energy on a process doomed to failure. Hopefully, in such circumstances the courts will recognise that mediation has little to offer and will not order a stay of action. Likewise, whilst the courts of England and Wales have the power under the Civil Procedure Rules 1998 to recommend mediation, they would not do so in respect of actions for recovery of debts.

**Types of Mediator** : Academics have identified in excess of twenty eight models of mediation but these can be grouped into four basic models.

**The Rescuer** : The Rescuer believes and states that, 'court is the worst place for people to be'. He tries to keep parties out of court and away from lawyers at all costs. Often found in "community mediation centres". The Rescuer usually follows a style that does not allow or severely restricts the use of private sessions with the parties. This greatly reduces their effectiveness. The Rescuer Model is commonly adopted by social workers, psychologists, counsellors or other people without legal or claims training. The Rescuer rarely has the knowledge, education, mediation training or expertise to mediate serious commercial, personal injury or insurance cases. Often times the Rescuer Model is excellent for small cases such as neighbourhood disputes involving for instance a dispute about a dog barking and for juvenile restitution matters. The Rescuer is frequently very critical of the courts, attorneys and insurance companies and often engages in "court bashing" or "lawyer bashing".



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**The Third Party Negotiator** : Sometimes used in the UK. The Third Party Negotiator is the original “shuttle diplomat”. After the first joint session, this mediator separates the parties and keeps them apart. He carries the parties’ positions back and forth, filtering and interpreting them the way he thinks best to achieve a settlement. This is an older style of mediation. This style has a problem with parties’ perceptions of his neutrality. Parties often begin to mistrust this type of mediator because he is constantly presenting or arguing the other side’s position to them. This model of mediation is popular in International Public Mediations and was employed in the Camp David Israeli / Palestinian Negotiations.

**The Deal Maker** : Often used in the UK. The Deal Maker also follows a “shuttle diplomat” style and intentionally keeps the parties apart. The Deal Maker is extremely manipulative and may even deceive one or all parties in order to achieve a settlement. He will formulate his own solution to the dispute and then pushes very hard to sell it to the parties. He may attempt to browbeat, intimidate, or coerce a party into accepting that deal. The Deal Maker believes that he knows what is best and most appropriate for the parties. This is the oldest form of mediation and originates out of the labour field. This type of mediator has the greatest problem with the parties’ perception of him. He is usually mistrusted by all the parties. Many parties will only use him once. The Deal Maker operates on the basis that the “end justifies the means”. This type of mediator confuses mediation with arbitration or acts as a settlement judge. It is popular with lawyers and ex-judges turned mediators.

**The Orchestrator** : This is the most modern mediation style. The Orchestrator : Asks many questions about the facts, evidence and jurisprudence in the case : Uses his questions to probe the parties’ positions and perceptions : Tries to conciliate : Focuses primarily on the process : Gets the parties talking about liability, damages, costs, verdicts in the area, risks, high-low-average values for the case, perceptions of the community, e.g. motorcycles and alcohol use : Employs multiple joint sessions and assists and encourages the parties to communicate directly! The Orchestrator does NOT use coercion or “arm twisting” to force settlements. He is the “Guardian of the Process”. If he can not mediate a settlement, he will mediate the process so you always obtain some results from the mediation.

### A Typical Commercial Mediation Process

**Arrival and Registration.** The parties will normally register their arrival at a reception desk and be directed to a private waiting room. Once everyone is assembled the parties will be escorted to the main mediation conference room. The mediator will invite everyone present to take a place at the mediation table, introduce himself and invite everyone else present to introduce themselves.

**The Opening Joint Session.** The first joint session will then commence. Whilst each mediator will have his own particular style, the mediation will then proceed as follows, though not necessarily in the order described below.

The mediator will invite each of the parties and their representatives (if any) in turn to briefly set out their position and how they view the events leading up to the mediation. This provided parties with an opportunity to exchange documents and provides the mediator with a copy of anything disclosed or exchanged at that time which he has not already received. It is essential at this stage that the parties accord due respect to each of those present, listen to what is said and do not interrupt. There are plenty of opportunities later for comment on anything said during the opening joint session.

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The mediator may choose to briefly summarise each party's submissions at this stage, following which he will explain how the mediation will proceed establishing ground rules for the conduct of the mediation and providing the parties with any information about the facilities available, such as smoking areas, use of mobile phones and refreshments.

**Witnesses** (if any). If the parties have chosen to call witnesses this is likely to be the time when they will be invited to give evidence and an opportunity provided for the other party to ask the witness questions.

**Private Sessions / Caucus.** At the end of the opening joint session the mediator will usually invite one of the parties to accompany him to a second private mediation conference room. The mediator will then meet each of the parties in turn for private sessions or what is known as a caucus. (If the mediator considers that the best way to proceed is by round table discussions between the parties everyone will remain in the same room and the joint session will continue.) The mediator will use his discretion to decide which party to commence the private session with. There is likely to be a series of these private sessions with the mediator commuting between the parties.

The mediator will exercise his discretion and judgement to decide how much time is needed in any particular session to take the negotiations forward and at the end of each session with you he will try to give you an indication of how long he is likely to spend with the other party at the next session.

The purpose of private sessions is to afford the parties the opportunity to explore the situation freely with the mediator without prejudice to your position. The mediator will discuss with each party in turn the reasonableness of their position and as and when appropriate, in the light of information he/she has gathered from the other party, give the parties an indication of whether or not their position is acceptable to the other party. The mediator may well suggest potential avenues for settlement that the parties might wish to explore. Private sessions are confidential. The mediator will convey information and documentary evidence to the other party that he has been authorised to disclose. The mediator will not disclose anything to the other party without consent and is likely to summarise what has been offered in a session and confirm that he has authority to disclose / convey that information to the other party at the end of a private session. The mediator will use his discretion to decide if as and when to disclose such information to the other party and may well choose not to do so if an offer, for instance, is likely to be regarded as totally unacceptable by the other party and disclosure at that stage might harm the mediation process.

**Final Joint Session.** If, as and when the mediator considers that an agreement can be concluded he will reconvene the joint session for a final time so that the parties can finalise and sign the agreement. The mediator will draft the agreement with the assistance of the parties and have it reproduced in a presentable form for the parties to sign and witness.

**Interim Joint Sessions.** On occasions, the mediator may decide that it is necessary to interrupt the private sessions and convene one or more joint sessions in order to either conclude agreements on particular aspects of the dispute or to break stalemate situations, following which, private sessions will resume. The mediation will normally continue in session for as long as it takes to broker a settlement. A settlement can usually be reached in one day. If it becomes apparent to the mediator that a settlement is not possible the mediation will end. Either party may choose to end the mediation session at any time without concluding an agreement. Attendance at and participation in the mediation process is entirely voluntary. There is no obligation to conclude an agreement and particularly, there is no obligation to conclude an agreement that is totally unacceptable to you.

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**Continuation Sessions.** Often even when the parties fail to reach an agreement, the parties having had time to reflect on the process, agree to return some time later and continue the mediation at which time a settlement is usually reached.

**Time Scales :** It is often possible to conclude a commercial mediation in a half or full day session. Tight deadlines tend to concentrate the mind and produce better and speedier results. It is often a mistake to schedule a commercial mediation over several days, since it allows the parties to harden their positions and makes it more difficult to broker a settlement.

### **Contrast Conciliation and Social Mediation**

The social mediation is likely to keep private sessions to a minimum. Furthermore, because the parties often have to reconcile themselves to new social arrangements, time may be an important healing process. Social mediation may therefore advantageously be spread over a number of short session, spaced out to give the parties time to come to terms with how they must conduct their affairs in the future.

### **Conclusion**

It is important to know which method of mediation is most appropriate for any given dispute. This poses problems where a mediation service provider holds itself out as being in a position to handle diverse forms of dispute. Provided the body nominates a type of mediator and a type of process appropriate to the dispute this is not a problem. However, it is submitted that it is a mistake to imagine that the skills of a mediator are adaptable to all forms of dispute. A highly skilled commercial mediator may make a total hash of a social dispute and likewise, a family and social dispute mediator could find him or herself urging parties to compromise legal rights in a commercial dispute without laying the ground work to justify the need for such a compromise. Whilst ending a dispute is always a worthwhile objective, it is essential to carry the parties with you. If, in the cold light of day, a party re-evaluates the outcome and regrets being “forced” into a corner and badgered into a settlement, there is a likelihood that the agreement will not be fulfilled and the mediator might even find him or herself exposed to legal action on the basis of misrepresentation, duress or undue influence. At the very least the mediation process is brought into disrepute.