

A revolution

Psychotherapeutic mediation can achieve great results in the most intractable disputes, says Marc Beaumont

A GOOGLE SEARCH OF THE WORD 'MEDIATION' will show you that mediation and mediators come in many shapes and sizes. However, those shapes and sizes, while packaged differently, rarely seem to offer a new product. Yet there is one mediation product which is still relatively unknown. It is psychotherapeutic mediation and it is revolutionary.

The rationale of psychotherapeutic mediation is that emotions have driven the protagonists into a completely unnatural state of confrontation. So often the lawyers fail to understand that most disputes are driven not by issues or legal rights, but by emotions. Lawyers tend to fan the flames of that emotional crisis by mounting didactic legal arguments, by grandstanding in correspondence and by posturing in negotiation. Yet if there is an underlying emotional crisis, what may appear to be, in legal terms, the 'correct' approach, may in psychological terms be completely wrong.

The lawyer's perception of the 'right' approach or the 'right' answer is a text book one, often divorced from the factors that have created the issues to which the lawyer seeks to give legal definition. The classic instance of this problem is to castigate a legally weak argument as 'misconceived', 'hopeless', 'frivolous' or 'vexatious'. But what is driving the progenitor of that legally weak argument? The lawyer might say greed, dishonesty or spite. But that is not a sufficient psychological analysis. What made that litigant greedy, dishonest or spiteful? What did the other party do to make the litigant act this way?

A psychotherapeutic mediator will explore such motivations in the process of mediation. We find that, contrary to the assumptions of many lawyers, litigants who are actuated by powerful negative emotions, very frequently do not regard the need to have their day in court as the be-all and end-all. What they seek – and often do not even realise that they seek –

is someone who will listen to their grievance, actual or perceived, legally off-beam or not.

Empathetic listening

This is why one key characteristic of psychotherapeutic mediation is empathetic listening. The mediator works in caucus session with each party to tease out primary grievances, to explore the disputant's reaction to those grievances and to try to understand the genesis of the litigant's disaffection. A psychotherapeutic mediator's training will equip him with listening skills. The mediator's usual neutrality is bolstered in psychotherapeutic mediations by the mediator's ability to listen intensely and to absorb what becomes a process of cathartic release for the disputant.

To a lawyer's strictly logical way of thinking, the questions asked may range across a number of apparently peripheral, even irrelevant issues. For like a cue ball, the question's purpose is not merely to achieve a direct pur-



pose - an answer – but also to contribute to an environment in which the disputant feels able to communicate his primary grievances.

To the psychotherapeutic mediator, there is a reverse nexus on both sides – its features are: dispute; legal stance; factual stance; blockage; underlying emotion. The aim is to remove the blockage by assisting the parties to express and so release the emotion that sustains the blockage. If he has one aim it is this. The ideal is for the most aggrieved party to feel that they have unburdened themselves to someone who has listened without judging them.

The psychotherapeutic mediator is trained to observe a turning point in the mediation when this unburdening has been achieved. Once the underlying emotions have been ventilated in the caucus session, the disputant is often far more willing to be steered towards considering forward-looking resolution rather than backward-looking recrimination.

If the psychotherapeutic mediator were able to listen in this manner for hours, nod sagely and never suggest some practical outcome, he or she would be pretty useless. This is where a psychotherapeutic mediator with a legal background can offer a unique service. By drawing upon both disciplines he is able to perform the exploratory function of the psy-

FAQs

■ Where should you mediate?

Anywhere. The venue may depend on where parties live or work. Solicitors' offices are often good venues. Some disputes, like boundary and neighbour disputes, are best conducted on site.

■ What about the end of mediation?

If the parties have managed to agree terms, the mediator will draw up a memorandum of agreement evidencing an enforceable contract of compromise.

■ When is the best time to mediate?

Now: there is no reason to delay. It is a frequent error of lawyers to assume that they need to engage in a skirmish in correspondence, or in statements of

chotherapist and the pragmatic function of the lawyer – sometimes simultaneously.

Procedure

Procedurally, psychotherapeutic mediation is indistinguishable from other mediations: position statements, joint sessions, caucuses and shuttle diplomacy all feature. The difference lies in the view that the parties' emotions are the obstacle that has thwarted settlement

case before mediating. This may well entrench positions, generate more negative emotion and increase costs.

So often parties try to impose pre-conditions by saying they will only try mediation if they can first have written answers to aggressive and intimidating questions, or if they can be served with key documents. This is a huge mistake. The mediator can always ask for this information. If there is a choice between setting up the mediation and getting bogged down in arid and expensive disputes between warring solicitors, the former is always the best option.

and that it is necessary to excoriate the emotional underpinnings of the dispute if it is ever to be resolved without further litigation.

Since psychotherapeutic mediations require intense periods of listening, they tend to last a minimum of one day.

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