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“The people you meet as a mediator”

Dr James Behrens
Barrister and Mediator

Dr James Behrens has been a professional mediator for almost 25 years. James has conducted over 100 mediations, of which roughly two-thirds are in the chancery and commercial fields, with the remainder covering a wide range of other subjects. Several cases that he has worked on have involved an international element or cultural and religious issues.

Dr. Behrens was a director of Mediation UK for three years, and for five years provided pro bono community mediation assistance to the Camden Mediation Service and in 2002 he completed a PhD in mediation.

James has extensive experience in the field of church law and was Chancellor of two Dioceses. He is the author of several books including ‘Practical Church Management’ and ‘Church Disputes Mediation’.

In this biographical piece to mark International Mediation Awareness Week 2021, Dr. Behrens shares his thoughts and experiences of mediation, and some stories about the kind of people you meet as a mediator.

First, a few introductory remarks. Mediation is a voluntary process where an independent third party, the mediator, assists two or more parties who have a dispute through a confidential series of both joint and private meetings to achieve their own solution of the dispute.

Mediation is used in a wide range of cases: commercial disputes, disciplinary cases, divorce, wills and trusts, neighbour disputes, church and religious disputes (the first mediation I handled was in a Jewish Old Peoples’ home), employment cases, environmental concerns, schools and colleges, and partnership disputes. Mediators are also brought into high-tension disputes involving hostages where peoples’ lives are at stake. You’re probably relieved to hear that I shall not be writing about hostage cases. I have also never been a mediator in a divorce case.

I want to highlight the voluntary nature of the process, its confidentiality, and the role of the mediator.

Mediation is voluntary

The process is voluntary. Any party is free to walk away at any stage in the mediation if they genuinely believe that it is not likely to be helpful in leading to a settlement. I recall hearing of a mediation where one party had been told he had to be present. When he heard of this the mediator began the opening session of the day by turning to that party and saying that he was so sorry the person had been told he had to be there, and he was entirely free to leave then and there if he wished to. Of course, the person’s attitude immediately softened, he stayed, and a settlement was reached.

Mediation is confidential

Mediation is a confidential process. Nothing said to the mediator by one party can be passed on to the other without the first party’s agreement. Nor can it be repeated in court if the mediation does not reach a

settlement. For example, a person who is mediating to help save a marriage cannot be called as a witness in divorce proceedings if the marriage isn't saved.

I came across a striking example of the confidentiality principle in a book about the late Willie Mullen (1911-1980), who was pastor of Lurgan Baptist Church in Northern Ireland. He was once asked by a husband to help save the husband's marriage. Willie replied that he would try to assist, but first the husband must be absolutely truthful as to what had gone wrong in the marriage. The husband then confessed to adultery. Willie Mullen went to see the wife. He told the wife that her husband had committed adultery but now wanted to restore relationships and the marriage. The wife replied that she wanted a divorce, that Willie had just provided her the evidence of adultery she needed, and that he would be hearing from her solicitors shortly. Willie replied that he had come there to help save the marriage not to provide evidence for divorce proceedings, and he refused to give evidence for her. In due course he received a witness summons. He attended court, but the case was adjourned before he was called to give evidence. However, another barrister who was present in court heard about Willie Mullen's dilemma, and asked Willie to accompany him to his chambers. There the barrister looked up some cases and reported to Willie that it was quite wrong that he had been summoned to give evidence, because a person who was acting as a mediator between the parties to a marriage should not be asked to give evidence of what they may have said to him while he was doing this. The barrister said that he would report this matter to the barrister acting for the wife in the divorce case,and he did so. Willie Mullen was not summoned to appear at the adjourned hearing.

The mediator is not a judge

The third point to note is that the mediator is not there to act as a judge between the parties. In practice, in many cases the mediator will carry out some questioning of each side, to help each side properly assess its prospects of success if the case fights. However, the prospects of success in many of the cases I deal with concerning wills and peoples' estates may not in the end be very relevant. Why not, you may ask? There are three reasons. First, a party's real concern may be to preserve relationships within their family. Second, a party's real concern may be to tell their story, to be heard. Third, a party's concern may be for family reputation. All these may be much more important to a party than the strict legal rights and the factual analysis of the dispute.

Circles, squares, triangles & squiggles

The title of this article is 'The people you meet as a mediator'. I think there are four types of people, and I have called them: circle people, square people, triangle people and squiggle people. The concept comes from psychology. Some people relate better to pictures than to words: I am a words person, but I know some people find a picture or illustration helpful.

Circle people are those who are concerned with other people and relationships. Square people are concerned with the facts and the legal issues. Triangle people are those concerned with the bottom line. Squiggle people just want to tell their story, and to be listened to.

Circle People

With circle people, relationships are the most important feature; and the mediator's job is to enable those relationships to be transformed and indeed healed.

Square People

Square people are those who appear to be concerned with the legal and factual issues. My job here may be to reality test these issues, but I must probe deeper than that. I must look to see what the parties' real commercial interests are and see whether there are other issues below the surface which need to be addressed as well.

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Triangle People

Triangle people are concerned only with the bottom line, the final figure. I had a case back in 2004 as mediator where one party was an orthodox Jew and the other an Arab. The orthodox Jew came over as a square person. I had to spend my time analysing the facts with him. The Arab was a triangle person. He did not want to look into the merits or demerits of the dispute but wanted to go straight into negotiating figures. A mediator's job when faced with a triangle person may well be to check whether the dispute is about more than just money. He may also need to educate a triangle person to help them see things from the other party's perspective, and so to provide material to challenge the other side's perception of the case.

Squiggle People

Squiggle people are those with anger, hurt, or some other emotion, and who need to be listened to. A good illustration of this would be a picture of an angry bull about to charge. This is not 'touchy-feely' stuff: I see much more anger as a mediator than any other emotion. The mediator here needs to be a sponge – to allow the party to tell their story; to

give them, as it were, their "day in court". In one case about a will, I remember having to allow one party to tell his story at length to get it out of his system. Only when that was done did he come quickly to a settlement. Another case I did concerned a landlord whose builders really upset some of the tenants. That also settled after I had allowed the tenants to describe what it was like in the building while the work was being done. The case was settled in under three hours.

Commercial Mediation

I want to look now at different models of mediation and see how this applies to the circle, square, triangle and squiggle people I have identified. First there is the commercial mediation framework, with which I suspect many lawyers are familiar. It is the model promoted in the training course run by commercial mediation trainers. There is a short opening talk by the mediator, a period for each party to present their case for a short period – 10 minutes or so. Then there are private meetings, known as "caucuses", and there are joint sessions. And this continues until a settlement is reached.

Community Mediation

People may however be much less familiar with the community mediation framework used by community mediation services for neighbourhood disputes. I was a community mediator for the Camden mediation service for five years. These disputes are typically about noise, children, gardens, boundaries and fences, or sharing outgoings in a jointly owned property. The community mediation process begins with a private meeting with each party in turn, each lasting 30 minutes or more. Then, and only then, is there a joint meeting of two to three hours with the parties and the mediator meeting together. The joint meeting usually consists of "story telling time", the time when each party says what it feels about the dispute. After each party has had their say, the mediator seeks to identifies the issues which need to be discussed. These are then written up on a flip chart or white board, and the parties then work on these issues together until a solution is reached.

Private meetings or Caucuses are infrequent at this stage– there is no more going from one party to another as in a commercial mediation. All the negotiation is done together, collaboratively.

Group Mediation

A third model for mediation is group mediation, sometimes known as consensus-building mediation.

Typically, it is used in cases of environment disputes, planning disputes or church congregational disputes. Ihave done three congregational disputes using this model.

A group mediation framework is very different from other models. A lot of time has to be spent in designing the process, in identifying all the parties who are going to be involved – the "stakeholders", as they are known, working with the parties in collaborative problem-solving, and in implementing whatever is finally agreed.

I was a mediator in one case where half a church congregation thought the vicar could do no wrong, but the other half thought he had two horns and a tail. There were fifty people from the church at the mediation, and after four days' hard work by everyone the mediation broke down. Although I helped the congregation and the vicar resolve some of the areas in dispute, we were unable to reach an overall settlement. This was one of the very few cases where mediation failed to resolve the dispute. The matter eventually went to a tribunal, and the outcome was that the vicar had to leave the parish.

Church disputes can have their amusing incidents. One case I handled in 2004 concerned a senior member of the clergy in Yorkshire. He was accused amongst other matters of being drunk while at work, something which the Church considers to be improper conduct. The mediation was to take place in York. On the afternoon before the mediation I went up on the train from King's Cross to York. At Peterborough the train stopped, and a man got onto the carriage I was in and sat down opposite me. I noticed he was wearing a clerical collar. Without saying a word he opened the bag he was carrying, and brought out a bottle of wine and a glass. Over the next twenty minutes he proceeded to drink his way through three quarters of the bottle of wine. At that point we introduced ourselves to each other. I realized he was the priest I was due to see the following day, and he realized that I was the mediator in his case. Perhaps the Lord wanted me to know that this clergyman might indeed have a problem with alcohol. Anyhow the mediation went well the following day, and no mention was made of what I saw on the train journey.

That mediation took place in Bishopsthorpe Palace, the office and also the home of the archbishop of York. At one point in the mediation the archbishop came to see me. I've only seen an archbishop wearing his clerical robes in church or, when not in church, wearing a suit. On this occasion, Archbishop David Hope was wearing chords and a pullover. Well, of course in his own home he can wear what he likes; but it did take me a few seconds to adjust to seeing him informally dressed when I was in a business suit.

Building A Relationship with the Parties

Once I am asked to be a mediator in a dispute I like to get involved straight away. This helps me develop a relationship with each side and with their respective advisers before the day fixed for the mediation. I often do this over the telephone, speaking both to the parties and to their legal advisers if they have any. In particular this is a valuable time to explain the process so that the parties and their advisers are prepared for the joint meeting. The contact with the parties and their advisers may be by e-mail, letters and phone calls.

Highgate Cemetery Case

A graphic example of the use of this pre-mediation meeting is a case I did in 2003. The dispute was between the trustees of a charity which ran Highgate Cemetery and a person who had purchased the use of a vault to hold a number of coffins for various members of his family. From a legal point of view, there were claims for breach of contract and for disrepair, and the amount of the claim was £25,000. I was invited by one side to have a site view. My first reaction was that as I was a mediator rather than a judge a site view was unnecessary. But then I realised that if I had the site view before the mediation it would be a wonderful opportunity to develop this relationship that is central to the mediation process. So we held the site visit in Highgate cemetery the day before the joint meeting in the solicitors' offices. At that site meeting I went first with the father who was bringing the claim to visit the vault he had bought. I remember sitting on a bench in the vault with the father quietly for 10 minutes on a bench opposite the coffins of this man's mother and his son. I said virtually nothing, but my simply being there built a bond between us. I then spent some time with one of the trustees of the charity, explaining the process for the

following day. This likewise built a good relationship with him.

The following day we all met in the offices of one of the major firms of solicitors in the City. From then on the process went very much like a standard commercial mediation. The solicitors for the charity were ‘square’ people with a thorough legal analysis of the dispute. Yet the trustees were circle people, concerned more about the relationship and the charity’s reputation than with the strict legal merits of its claim. The father was a squiggle person. He was not particularly interested in the legal merits of his claim. He wanted to tell his story. He felt he had been cheated, and that some recompense was due to him. But he was also concerned to preserve the relationship with the charity. The mediation in the solicitors’ offices lasted from 2pm until 10pm. The settlement that was reached did not involve any money passing from one party to the other, and yet it was a settlement that both parties were extremely pleased with. A few weeks after the mediation one of the trustees telephoned me. He was delighted to tell me that the father had just made a voluntary donation to the charity of several thousand pounds, an illustration if one is needed of the good relationships that had been restored.

A Camden case

I’ll end with a story of one mediation I did for the Camden Mediation Service. The dispute was typical: complaints about noise between the downstairs and upstairs flats in a house. I decided to visit the upstairs flat first, where all the noise was said to come from. When I went into the living room I was surprised to see a number of very large glass bottles, oxygen cannisters, breathing masks, and rubber tubes. The parents explained to me that their son Tom had severe breathing difficulties, and these glass bottles helped him to breathe. He was connected up to them for a couple of hours every day, and this was really starting to help. I then discussed with them the dispute with the downstairs tenants. Something prompted me to ask the parents whether the couple downstairs knew about Tom’s breathing problem. The said, no they did not. I said I would be visiting the couple downstairs shortly, and would they give me permission to mention it to them. They said I could. A few days later I went to visit the downstairs flat. While I was there I mentioned to them about young Tom’s illness and all the medical stuff he has to use every day. The downstairs family were very upset to hear this, and they said without any prompting by me that this put their concerns about noise into perspective; and they did not want to take the dispute any further. The dispute was settled there and then without the need for any joint meeting to take place at all.

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