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MEDIATION : AN EXCELLENT WAY TO RESOLVE DISPUTES

Question: What do Age Concern, Esso, The Samburu and Masai Tribespeople of Kenya, the Patent Office, British Nuclear Fuel and Alder Hey Hospital Liverpool all have in common ?

Answer: They have all had disputes settled by mediation

Mediation ? What is mediation ?

Quite simply, it is a process whereby a neutral third person helps 2 parties in a dispute to reach a negotiated settlement. It differs fundamentally from arbitration or a court or tribunal hearing in that the process is informal, non-adversarial, confidential and the role of the mediator is one of impartial facilitation rather than of judgement. In other words, the outcome and resolution of the dispute lies solely in the hands of those involved in the dispute.

Dispute ? What kind of dispute ? you may be asking.

How is this relevant to me ?

We who work in the arts generally tend to be a committed, driven bunch of people who care passionately for what we do. Often, against seemingly impossible odds, we achieve that most difficult of balancing acts - of producing quality work within strict time constraints and tight financial parameters. Just like many a business in fact. We work in one of the largest industries in the UK, generating employment, a flourishing economy and helping local regeneration - operating through a network of partner organisations and individuals that combine into a vast and intricate chain of consumer and supplier. Just like many a business in fact. We work hard and fast and we work to deadlines. So not surprisingly, we sometimes find ourselves smack bang up against problems and disputes that - at best - occupy too much time, effort and emotional energy but - at worst - can result in all of the foregoing *and* culminate in an escalating piece of seriously expensive litigation. Just like many a business in fact - and how are businesses increasingly choosing to go about resolving their differences ? Through mediation.

How does it work ?

Once those involved have agreed to mediation, they jointly select a mediator who may or may not have professional knowledge of the industry and may or may not come from a legal background. Each party then prepares its own written summary of the dispute and these summaries, along with other relevant documentation, are exchanged in advance. On the day itself, the mediation will take the form of a series of discussions - some joint, with everyone present and some private single party discussions where everything that is said remains confidential to that meeting unless permission is specifically given to disclose to the other party.

Mediation is informal and provides those involved in the dispute with the direct opportunity to personally tell it like it is - an opportunity seldom available to those who pursue settlement through the more formal routes of the courtroom or tribunal hearing where arguments are traditionally expressed through legal teams and senior management representatives.

Through the course of the mediation day - and mediations usually complete within one day - the mediator will help the parties clarify the real issues in dispute as well as help them to identify possible options for settlement. Conflict brings out strong emotions and one of the consequences of this is that it often becomes difficult for those involved to 'see the wood for the trees' and whereas the traditional, adversarial approach often reinforces positions of polarity, mediation can help distinguish between 'wants' and 'needs'. Take a typical neighbourhood dispute, where one neighbour is complaining about the loud music of another : 'I want my neighbour to stop playing music !' is what is wanted. Yet what is needed is for the neighbour not to hear the music being played. The difference is subtle yet distinct.

No matter how seemingly clear cut an argument may be, disputes are rarely black and white and by having the chance to talk directly and about the wider circumstances surrounding a dispute - in a safe and confidential environment - it is possible for those involved to test a far wider spectrum of potential solutions than would otherwise be possible. The flexibility of the process and its concentration on the future, rather than a painstaking analysis of the past, creates the opportunity for a settlement that makes commercial sense for everyone and where the relative values of what's important to each can be creatively taken into account. The mediator will also encourage careful consideration of the consequences of not settling - especially relevant when the issuing of legal proceedings are either being considered or are already underway.

All of the discussions are confidential and 'without prejudice'. In other words they cannot be referred to outside of the mediation or used as evidence in any legal proceedings. And nothing becomes binding until the settlement is recorded in writing and signed by the parties.

Why it works

Alternative Dispute Resolution (ADR) has been a feature of the legal landscape since the mid 80's/early 90's and, along with other dispute resolution techniques such as arbitration, is increasingly being used in preference to straight litigation. It was with Lord Woolf's reforms to the Civil Procedure Rules in 1999 however that mediation emerged as a clear front runner. In a pro-active attempt to reduce the backlog of litigation weighing down the courts and to in an effort to increase democratic access to a quick, affordable and fair process of dispute resolution, the Woolf Reforms crucially empowered the courts to not only direct suitable cases to mediation but also to award costs sanctions against those who unreasonably refused to mediate. Since 1999, *CEDR's number of recorded mediations has steadily increased year on year with CEDR recording a 28% increase from 01-02 to 02-03 alone. Notwithstanding this interventionist role of the courts, there has also been a marked increase in the number of voluntary mediations (50% increase 01-02 to 02-03, CEDR) with one of the highest growth areas being in the field of employment disputes. It is not difficult to see why.

The process is quick and cost effective. According to CEDR's 02-03 statistics, @ 78% of all mediations settle and of those that settle, 95% settle on the day. And feedback indicates that many of those mediations that don't settle on the day do often settle shortly thereafter. Mediation need not mean relinquishing all legal support and advice and parties to commercial disputes often bring their legal advisers with them to the mediation. These advisers have often helped prepare the mediation documentation and they can play an important role throughout, not least by way of helping their clients assess the relative risks of pursuing an alternative settlement through the courts. Their role however is essentially advisory and parties retain ultimate control of what is and is not agreed.

Mediation helps restore relationships that have broken down - be it consumer/supplier, or employee/manager. It creates a safe, confidential environment where, for example, apologies and acknowledgements can be offered without any admission of liability. Where feelings can be acknowledged and expressed whilst attention focuses on finding solutions to the problem; and where a blame culture is replaced with constructive, joint thinking.

Contrary to some people's perception, mediation is NOT a soft option. In fact, the very opposite is true in that those involved in the dispute are those directly responsible for finding its solution. The mediation day itself can be very long with mediations lasting 12 hours or more not uncommon. There is no possibility here of not engaging and simply letting others solve the problem. But because those involved in the dispute are those that find the solution, they are quite simply more likely to stick with it.

By focusing on what makes commercial sense rather than on establishing the legal rights and wrongs of a case, mediation establishes a positive framework for discussion with sufficient scope for imaginative solutions that otherwise simply wouldn't be possible. The alternative? Pursuing a route whereby one party becomes the winner, the other the loser and where those involved have relatively little control over how the decision gets made. Mediation eliminates risk, assumes the parties know best and that ultimately they are the most likely authors of their own successful settlement.

Mediation is particularly effective the earlier it is introduced into a dispute but equally, it is seldom too late. In that mediation discussions are confidential and without prejudice, it is possible for mediation to co-exist alongside other methods of dispute resolution, including litigation. It can be as effective in multi-million pound disputes as in disputes where the sum at stake is relatively insignificant except to the parties in question. My first mediation settled in 4 hours for a small 4 figure sum and an apology. Those involved, a local authority and one of its former employees, had been in acrimonious dispute for over 2 years.

All of the above illustrates why anyone should give serious consideration to mediation immediately disputes arise. Those in the arts perhaps have added reason to take this route. The maintenance of good relations with those with whom we deal is crucial to the ongoing operational effectiveness of the industry. We work in a highly specialised field where the usual laws of supply and demand indicate that we alienate those we need to work with at our peril.

We operate within extremely tight financial constraints and can seldom afford the ongoing disruption that unresolved disputes provoke, or the expense that

follows from pursuing litigation as the sole means of resolving them. Perhaps most importantly, mediation helps normalise disputes. We work in an industry where passion and commitment abounds and few need persuading of the link between passion, conflict and creativity. And as a creative industry, shouldn't we be pursuing means of resolving disputes that allow us to capitalise on that very creativity ?

The message is already beginning to register. The Musicians Union and the Music Managers Forum have linked together to provide a music industry mediation service; the BBC has recently committed itself to using mediation to resolve disputes between the corporation and the independent producers it commissions and, perhaps most notably, the long-standing copyright dispute between the Association of British Concert Promoters and the Performing Rights Society was successfully resolved at mediation in December last year after almost 3 years of unresolved conflict.

In summary ?

Conflict is normal. Conflict may even be necessary. Conflict can be constructive. So when you come across it, remember the 6 C's of mediation :

It's

COMMERCIAL

CONFIDENTIAL

CREATIVE

COST EFFECTIVE

CONVENIENT

and you keep

CONTROL

- CEDR, the Centre for Effective Dispute Resolution, is an independent non-profit organisation, launched in 1990 with the support of The Confederation of British Industry. Works in partnership with business, governments and the judiciary, both in the UK and internationally, at encouraging and developing mediation and other cost-effective dispute resolution practice

There is not yet any centralised system of accreditation



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