At the table

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By **Frank Hanna**

Britain should prepare for compulsory mediation, warns Frank Hanna

There is a strange irony about the perception of mediation. It is, on occasion, perceived as very serious and, conversely, sometimes trivial. The genesis of this thought process is unusual in itself.

It is serious because it is the tool of choice in the international arena when warring nations and tribes very often resolve their difference around a table under the watchful and skilled eyes of professional neutrals. You need look no farther than my native Northern Ireland where peace was brokered some years ago after the intervention of President Bill Clinton and his wonderfully talented envoy, Senator George Mitchell. There are still hurdles to cross, but they used to be mountains.

The perception sometimes is trivial because a format so powerful often fails to find favour with those who could most easily benefit from it. Let's be blunt here: I am speaking about the legal profession. Before I am dismissed as some well-intentioned crank, I should say that I practised as a litigation solicitor for many years; was a founder member of the Association of Personal Injury Lawyers (APIL) and have spent the last seven years in the US practicising as a mediator. I have also worked in private practice, for the government as a contract mediator for the Equal Employment Opportunities Commission and in the voluntary sector. I was totally taken aback by the power and versatility of the process but even more so by its flexibility and potential. My impression that mediation needed a quiet room, a table and a few chairs and a suitable amount of pomposity was dispelled almost immediately as I saw the power of talk; brilliantly practised by professional mediators.

So why does mediation, as an alternative to the traditional forms of resolving otherwise litigious issues, meet with resistance? Look at the realities and form your own conclusion. Somewhere in excess of 90 per cent of all civil legal proceedings cases are commenced, resolved and settled without troubling the courts. No surprise there. It does, however, become more curious when you consider that probably in excess of 90 per cent actually settles within 48 hours. The more cynical intellects will find that disquieting, as there are unflattering connotations.

One element, that is seldom included in the consideration of the value of mediation, is the sheer hell of trying to get God knows how many witnesses, experts, barristers and sundry others in a line for a court hearing where the judge suddenly is unavailable: and it's back to square one. The process is cumbersome and often self defeating. How many plaintiffs walked away from the court building, having been built up for the finale only to find that it was just the end of another act? How many curious ones walked away asking themselves: "I wonder who paid for all of that?"

I was prompted to these thoughts a few days ago when I was contacted by a frustrated litigant who asked me what mediation could do for him. I told him that it could, in all likelihood, resolve his case in days, but only with

the willingness of all the parties involved. I did suggest to him that he instruct his solicitor to embark on the process in the hope that progress could be made. To my surprise, he returned to me the following day saying that his solicitor said that “the case was not ready yet for mediation”. I am assured that the case was already two years old.

I know of no case that is ‘not ready’ for mediation. If a report from an expert is anticipated, there is nothing to prevent the mediation process from getting started. The creation of the right environment, goodwill and trust do not need long build-ups.

Many do not realise the sheer power of mediation when it is properly practiced. My metaphor to my students is that mediation can worthily be compared to that wonderful television programme, ‘One man and his dog’. The patience of the shepherd as he oversees his task slowly and skillfully, moving the sheep across fields and through hurdles to get them to the right arena is masterful. Yet, he gets there despite some errant sheep shooting off in different directions only to be patiently gathered back into the flock. So too with mediation: the parties are moved towards the area of agreement and assisted past barriers and difficulties by a neutral party that is skilled in the techniques required.

If you need inspiration to understand that mediation goes way beyond just sitting round a table and chatting then look no further to the wisdom of Indira Gandhi who said: “You cannot shake hands with a clenched fist.” Being able to induce the right atmosphere and control the participants as they move towards agreement is the true metier of the mediator.

Few would disagree that negotiations are often governed by the egos of the participants, after all doesn’t the word itself contain ‘ego’? Yet more often than not it is the frustration built by clashes of ego that causes cases to stumble and stutter to the door of the court. After that. there is nowhere else to go. It doesn’t need to be like that and, if the US experience is followed, which I suspect is inevitable, mediation will become compulsory.

The greatest focus henceforth should be on ensuring that the standards of mediation are constantly reviewed and increased. A bad mediator can do as much harm as a bad anything.

Postscript:

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