# Diploma in Law

## Lecture 12: The Law of Mediation

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Diploma in Law (Malta)

# What is Mediation?

- Mediation is negotiation assistance; the mediator will help solve a dispute and define a relationship – it seeks to avoid litigation. In Malta we have the idea that when having a conflict, we need to go to court. Abroad there are other fora and for instance mediation is one of such instances.
- In some parts of the US, you can choose the forum so that you can trash out your difficulties, however there are other ways which can be taken up apart from mediation:

- Negotiation - this is when the lawyers meet and discuss in order to arrive at a solution, therefore this implies communication between the parties without any third party unlike mediation.

- Arbitration - both litigants agree to present the issue to this third party who decides whose fault it is, such third party must be an expert.

- Early neutral evaluation - you and I have a dispute, let us go to a retired judge to have an early opinion without prejudice, therefore he would give the valuation whose fault it is. Therefore, there is the evaluation of who is at fault and who is right. This is held not to lose time, money and others. It is a win-win situation.

- Med-Arb - start as a mediation, where there is the third part who would be helping to arrive to an agreement, if there is no agreement then there is the third party who gives an opinion, in Mediation the third party does not hand the opinion.

- Conciliation - it is a less formal type of arbitration, the conciliator proposes and determines the opinion, and the conciliator will give the opinion in order to arrive to an agreement without being formal. There are issues of impartiality and independence.

- The organisational Ombudsman - he decides dispute with regards with reorganizational manner, like the transfer of a worker and give rise to litigation.

- Dealing with conflict has three elements:

- **Domination** - the victory of one side over the other, like the court based on what is being held to him and proven to him at court;
- **Compromise** - I have to give up this to gain that, it happens in negotiation especially in family cases;
- **Integration** - the best possible way, so I am integrating your demands and you are integrating mine, this is ideal though not happen always but having both perspectives. Through dialogue you have integration.

- According to Follett the greatest of all obstacles to integration is our lack of training. The court is built in the way that we are on the other side of the situation. We are not trained for integration. ‘Mediation’ derives from the Latin word medium – somewhere in the middle. The term ‘conflict’ comes from coflictus – to strike together.
- Mediation is a process in which an impartial third-party acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction or define the contours of a relationship. It is a process which does not happen from the beginning or overnight. It is something that evolves, if you want a quick result then mediation is not good for you. It is a process where a third-party act as a catalyst.

Mediation in the civil sphere is that:

- Settlement driven;
- Not usually focused on the blame but rather on the future of how to avoid such;
- The mediator takes a more prominent position.

Mediation in the criminal sphere is that:

- The dialogue is driven aimed at the healing of both sides - for both offender and the victim the fact that they dialogue is healing and takes a prominent place;
- Most of the time, it is clear who is the offender - thus blame here could be seen;
- Usually associated with a minimal intervention from the mediator - there is a minimal intervention from the mediator's part whilst in the civil mediation there is more scrutiny from the mediator.

- Here we are referring to a civil mediation. A structure form of conflict resolution, one of the important things is structure the meeting and intervention. Mediation is sometimes an aspiration ideology. This must depend on good faith and represents the political theory about the role in society, and the importance of equality, participation self-determination. It achieves interpersonal and intra-psychic knowledge and understanding however this is utopian. This is utopian as it does not work with everybody and in all situations.

# Advantages and Disadvantages of Mediation

# Advantages

## 1. Mediation avoids expense

The cost of mediating a case is minimal compared to the costs incurred through the life of a lawsuit. During litigation, depending on the type of case, the cost could range from hundreds to several thousands of Euros. Often, the costs are not recovered at the time of settlement. Thus both parties bear their own burden of costs. Litigation generally involves two opposing lawyers running up each other's' bills, court hearings, formal discovery, more court hearings, multiple experts on the same subject, and often a trial.

- Furthermore, in mediation the costs are much more manageable and in control of the parties than in Court. Mediation involves only the mediator. Where experts are needed, the parties will often agree on using only one neutral expert.
- There are no court hearings, formal discovery, or trials. It is advisable that lawyers explain to their clients, in no uncertain terms, about the costs of mediation and whether those costs should be split with the other side or treated as ‘costs in the case’.
- Most parties split the cost of mediation with the fee for the mediator being paid up front. This allows the parties to attend mediation on an equal footing with neither adopting a position of power.

## 2. Mediation avoids Delay

- The court system is no friend of time-conscious people and disputes are resolved much faster when they are mediated. Trying to work out a conflict through litigation is an extremely slow process that can take years to reach its conclusion. Trial dates are set far in the future and there is a lengthy period of pre-trial discovery before much of anything happens in a courtroom.
- Backlogs and delays are common. While parties wait for the court system to be ready for them, they have no ability to speed things along. Trials themselves are long drawn-out affairs because of courtroom protocols and rules of evidence. Once the trial concludes, parties often must wait for a ruling.
- Litigation is not only a slow grind, but it also requires a heavy time-commitment from the parties while they are waiting. They are required to spend hours appearing at depositions, responding to document production requests, answering interrogatories and dealing with other discovery issues.
- For business people, resolving a dispute with a trial translates into substantial time away from running their companies; for individuals, it means time away from work, family and other pursuits. When people use mediation, their conflicts are resolved in a small fraction of the time that it would take to go to trial. The parties schedule their session for a convenient time and there is little waiting. All of this translates into a more efficient, streamlined process for resolving disputes.

## 3. Mediation avoids Risk

- Since it is the parties that determine what should happen, therefore they are determining their own future, they have a limited amount of risk.
- In litigation, each party emphasises their own strengths, overstates their demands, and downplays the other side's position. A judge will take into consideration whatever evidence he/she has received and the arguments made by the lawyers. The judge will also be affected by other factors including his/her impression of the parties, the evidence, and the attorneys.
- While the judge is bound by the law, in reality the parties are subjected to a great deal of uncertainty and risk as to what the judge will ultimately decide. In mediation, because the parties develop the settlement agreement between them, there are no surprises or exposure to the uncertainty and risk of what a judge may decide.

## 4. Decision Maker

- During litigation lawyers and judges make decisions for the parties and their children. Lawyers present the evidence and their arguments to a judge, who then makes the decision and enters binding orders and judgments against the parties. The parties have very limited input, except indirectly through their attorneys. Importantly, when it comes to evaluating what is best for the children, during litigation, it is the judges and experts or custody evaluators to undertake this role.
- Mediation affords participation, self-determination and one can say that it is least intrusive. Parties have a voice, there is no element of surprise or risk, and parties have a choice. During mediation the parties communicate and brainstorm in order to formulate creative solutions. The decisions and final settlement agreements are arrived at by the parties. The mediator does not make decisions for the parties or issue orders against them. The decisions of the parties are driven by their goals, interests, and sense of fairness.

## 5. Contention vs Amicability

- The process during litigation is litigious and adversarial. Lawyers are notorious for prolonging litigation and running up the bill in order to “protect their client’s interests.” One attorney can make the entire process more litigious and contentions than the parties want, what is necessary, or even what is appropriate. The parties are discouraged from communicating with each other and the stage is set for future disagreements and litigation. In a word, there will always be wreckage, which is why it’s said that there are no “winners” in litigation.
- On the other hand, the process during mediation is peaceful and amicable. In Mediation, if the parties insist on being contentious, mediation will not work and they just as well pay for litigation. For those who wish to resolve their issues more quickly and less costly, the mediator can help them work with each other and avoid unnecessary contention which leads to better, more expeditious results. Communication between the parties is improved and sets the stage for joint decision making in the future without the intervention of attorneys and the legal system.

## 6. Flexibility

- Court hearings are costly and contentious. The ultimate decisions of the court are not likely to please either party. Because courts do not want to address the same issues multiple times, getting back to court to address the same issue generally requires a showing of changed circumstances. Once a party begins to abide by the court order, each party may come to realise they wish they would have requested something different at the court hearing. Changed wishes are not changed circumstances. The consequences are that they are often stuck with a bad situation.
- Mediation emphasises problem solving to create a number of potential solutions for both parties. With mediation, the parties can experiment. They can make offers, consider alternatives, and enter into short-term agreements without being forced to make final decisions until they have had an opportunity to test different decisions and arrangements. If they find that their initial plans aren't practical, these can be easily addressed at the next mediation session. They don't give up any legal rights by trying mediation.

## 7. Convenience

- Mediation is informal, that is, there is no straitjacket offered by procedure – hence it is more user- friendly. In litigation, the parties are at the mercy of the schedule of each lawyer as well as the court. Getting access to the court is becoming more limited, and hearings are generally scheduled at a particular time each day with dozens of cases scheduled at the same time.
- The parties may sit through dozens of hearings in other cases before their case is called by the court (meanwhile, the lawyers are billing for sitting there and waiting.) With all of these difficulties, scheduling at the convenience of the parties is not given much consideration. With mediation, there are normally only three people whose schedules need to coincide–the parties and the mediator.
- The mediation conferences are not limited to mornings, and there is no sitting around waiting for others to present their case before the parties begin. Moreover, there are no rules that need to be strictly followed as there are for court hearings.

## 8. Privacy and Confidentiality

- Mediation conferences are held privately and entitled to confidentiality rules. Discussions and tentative agreements are confidential. What is discussed during mediation may not be presented in court. People who aren't involved in the case will not be in a position to access details of the conflict because they will not be public.
- There is no privacy in court hearings - several cases are called at the same time, so all of those parties, their families and support people, and their attorneys will hear about the parties' family and financial situation as well as their disagreements. The hearings are also open to the public. In an age of easy internet-access to court records, parties who use the court system are almost assured of giving the general public a clear view of their conflict.

# 9. Enforceability

- Each order of the court, including the final decision is legally enforceable. The final settlement agreement reached by the parties in mediation is filed with the court and becomes a final judgement. It is legally enforceable in the same manner as a court judgement issued after a trial.
- However, having been reached through a mediation process, these judgments have a significantly higher rate of compliance without further legal proceedings.

# 10. Tempers Unrealistic Expectations

If one of the parties has inflated expectations, during mediation that party would realise that what is being asked for is quite unrealistic. This saves the expenses of going to Court. Therefore mediation is a challenge to those assumptions that are unwarranted. In fact, it is the mediator's job to show what the law can really offer in particular circumstances, and to put everything in perspective. Mediation gives parties a better idea of each other's perspectives.

## 11. Social Aspect

- If more people tried mediation, there would be less work in Court. Less work in Court would, in turn, improve the social aspect. However there is a downside to this – the degeneration of skills of lawyers. If more and more cases were to be mediated, there would be less civil cases and skills of lawyers would degenerate. This degeneration may distort not only trials but the settlement process itself. Litigators, without adequate trial experience are less able to evaluate cases accurately. The opposite argument is that if the number of adjudications were to increase, worse thinking and worse law would result.
- Exporting US-style ADR may interfere with development of the rule of law in emerging democracies. A lot of jurisdictions abroad have started copying the US in implementing ADR. This is well and good with developed countries; but in emerging democracies, exporting ADR might interfere with the ability of the law to come up with a number of issues and principles that have guided us and brought democracy to our everyday life.

## 12. Human Aspect

- Mediation works on the other interests that litigants might have. One interest would be money, the actual thing each party would want from their opponent, but there is much more to that. Behind our rights, there are interests. The real interest a litigant / client might have is not for an actual particular thing – it is more for respect, recognition, healing, connection with others, communication.
- These are things our clients would generally want, apart from the pound of flesh. For example, in criminal mediation, what we are really after is healing and connection, rather than the actual thing being given back to you. So people might feel a bit more satisfied with this kind of external dispute resolution, as would also happen in family mediation.

# 13. Tactical Aspect

- Mediation is an extensive information-gathering exercise is carried out and a number of issues would be clarified. Furthermore, there is the opportunity to make offers to the opponent, some of which are bound to be acceptable, as they constitute common ground between the parties. Through flexibility mediation gives the possibility of exploring extra-judicial chances.

# 15. The act of listening

- This helps a speaker clarify and evaluate thoughts. The behaviour of a mediator, who acts as a bridge between people in different spheres, can be absorbed by the litigant. This is something which would not be present when parties negotiate, when parties agree without having a third party neutral.

# Disadvantages

## 1. Case is Unsuitable

There may be certain situations were mediation would not work and when going to court would be the best options. In the case Halsey vs. Milton Keynes General NHS Trust 2004, the Court argued that mediation is not appropriate in the following cases: where the nature of the case involves points of law or where an injunction is necessary; a binding decision is necessary or cases with constitutional/penal sanctions.

- Mediation does not create precedents. It is not efficient in that the same type of disputes are resolved again and again. When parties meet, they have to start negotiating from square one. There is no precedent or guidance amplifying one's knowledge of the law, and the process does not create / refine and/or enforce societal norms of behaviour, but merely defines what the rights of each party are.
- When the Law Courts give a decision, it is not only beneficial to the parties alone, but it is also relevant to other people in similar circumstances. The court thus defines what my rights are and are not.
- In settlement, there is a tendency to shift the burden to a third party who is not at the table. There is no scrutiny that we are usually used to in a Court of Law.

- **2. Power Imbalance**
- The story that underlies ADR is that terms of settlement are a product of parties' predictions of the outcome. In truth, settlement is a function of the resources available to each party to finance the litigation and those resources are distributed unequally.
- Therefore it is in reality a myth that there can be some power balances in mediation because each party knows its chances in the law court and it knows its money budget. This distribution of resources impacts the type of settlement you have in mediation. In certain cases, the issue of financial resources and the ability of one party to pass along its costs will infect the process. Therefore in real life, it is not all that fair.

- There are many ways in which lack of balance can influence the settlement:

a) A poor party would be less able to amass that information and analyse it
b) A poor party may need damages/money immediately
c) A poor party may be forced to settle because he cannot afford litigation

- An opposite argument is that power imbalances can distort judgment. Yet the judge can lessen the impact of distributional inequalities by supplementing the parties' presentations by asking questions and calling his own witnesses. So in theory, the judge should lessen the inequalities, by making questions and prompting the witnesses himself. However, not a lot of judges do this.

# 3. The process does not guarantee an end

- This is true only to a certain extent, because after mediation there is usually an agreement written down, which agreement is then published and made legal by the Notary Public Thus, it is not precise to say that there is no guarantee of an end. There might be an end, and there might not be an end. Compared to a lawsuit, there is a bigger guarantee of an end.

# 4. Informality of may be threatening for certain people

- A number of people are scared to open their mouth in mediation. It might be threatening to come face-to-face with somebody with whom you have difficulties. Sometimes people prefer to be hidden behind Court barriers, at a distance, for example.

## 5. Can entertain falsehood

- In mediation, there is no cross-examination. The mediator has to rely on the information being given to him. The mediator might ask for confirmation to support what has been claimed. He might ask for a document to support what has been presented in front of him, or ask for an affidavit. He might also ask for a judicial assistant to hear what the clients have to say. But more often than not, you are at the mercy of the good faith of your clients.
- Thus it is a system that can actually entertain falsehood, although skilled mediators would be able to tell the difference between someone who is false and someone who is genuine. Furthermore mediation can be used to delay court appearances or to secure remedies.

# 6. Not always does one get an acknowledgement of a wrong suffered

- In mediation, there is no vindication. One does not always get the pound of flesh one might wish to get. This happens in family mediation, most of the time. Some people would want the judge to condemn the opponent. This does not happen in mediation.

# 7. Lack of Training

- Mediation and ADR processes are still experiments in constitution making (as some scholars have named them). Some lawyers are not at all trained or equipped to take part in mediation. There are many lawyers that act more like guard-dogs rather than guide-dogs and in this forum we expect lawyers to give guidance.
- There is no elaboration of the law to clarify important public values. If we are going to allow 2 parties to agree without intervening by the State, there might be a ripple effect and a public value would be at risk.

# 8. The process might not have enough safeguards

- There are no safeguards against mediator prejudice and manipulation. The parties can ask the court to change the mediator however most of the time, if the prejudice is suffered, the party would not be able to see the manipulation and that might work against him.
- Trina Grillo (1991) argues that mediation particularly when it is mandated, disadvantages women. They may be more relational than men so are willing to give up more in exchange for harmony. Another argument she puts forward is that a purportedly neutral person takes the viewpoint of the party the mediator agrees with.

- Prejudice can take many forms - because of race, gender, sexual orientation, disability or class. There could also be a personal disposition to favour certain outcomes or else from a positive/negative reaction to a personality. According to the social-psychological theories of prejudice, prejudiced persons are least likely to act on their beliefs if the immediate environment confronts them with the discrepancy between their professional ideals and their personal hostilities.
- ADR is most apt to incorporate prejudice when a person of low status and power confronts a person or institution of high status and power. Dangers increase when the mediator is a member of the superior group. Risk of prejudice also arises when confrontation is direct rather than through intermediaries and also when few rules exist to constrain conduct. When settings are closed, as in mediation, it would not be clear that public values are to preponderate. Finally, the more the issue is a personal matter, the more risk of prejudice.

# 9. Manipulation

- James R Cohen (2000) thinks that tools of Trade are sometime considered manipulative. For example the plaintiff demands 100,000 dollars and this is reframed as ‘substantial compensation’. Or else a plaintiff threatens to fire a worker and this is reframed as “there will be consequences for unacceptable workplace behaviour”.
- Another form of manipulation is when for example after a caucus, the mediator enthusiastically over reports progress to encourage participant. Or else, the mediator takes a proposal to other side as his own to help save face to one of the parties.

- Christopher W. Moore (1986) - “Mediators although neutral in relations to the parties and generally impartial towards the substantive outcome, are directly involved in influencing disputants towards settlement”. However, less benign strategies of manipulation such as forcing parties to skip lunch to keep the pressure would cross the line of permissible behaviour – hence the need of Code of Ethics.

## 10.Justice Rather than Peace

- The process might not have enough safeguards for justice. Most of the things are behind closed doors, so one would not know what really happened in mediation. A judgment gives force to values embodied in texts such as the constitution and laws. Reality will be brought into accord with these values.
- Parties to a mediation process are prepared to live under the terms they bargained for. They would have settled for something, accepting less than the ideal - this is not justice. Turning to court does not mean we have some quirk in our personalities.
- Adjudication is a public good - it does not only benefit the person going to Court but it also benefits other citizens. What is unfair however is that future litigants receive the benefits of the rule for free!

# 11.Sometimes, mediation is a waste of money

- If non-conclusive mediation would be a waste of money as one would still need to go to court, so it is an added expense and a waste of time. Furthermore, mandatory mediation has also been criticised because it inflicts further costs and delay.

# 12. No Public Scrutiny

- Secret Settlements go against the principle of democratic political morality - there is no public scrutiny. There is however an opposite argument by Richard L. Abel who provides that informal justice can extend the ambit of state control. He sees mediation as being better than litigation because one resorts to arbitration /mediation instead of police prosecution; Coercion is disguised; the state controls behaviour more; penalties are milder, restitution rather than fines, and promises of behavioral change rather than imprisonment.
- Abel argues that community mediation programmers are targeted towards the poor and therefore state control increases disproportionately with respect to the already oppressed.

# 13. Forgetfulness

- Another problem with mediation is when the parties are not able to remember the past, since the context in which the issue is located would be isolated – Tina Grillo. This is the Problem of Prospectivity, and is tackled by Carrie Menkel-Meadow who opines that if the mediator does not respect the past, the mediation will continue to have a mixed reputation as well as fail to perform some of its most valuable functions, encouraging authentic encounters of human beings.

# Concluding Remarks

- Overall, litigation is time consuming, emotionally draining, expensive, and unpredictable. Mediation is becoming a more popular method to remedy some of the shortcomings of litigation. The mediation process is as successful as the willingness of the parties to participate in good faith to reach a settlement.
- Mediation has its own pitfalls. Both mediators and lawyers can be professionally negligent to their client if they breach their duty to properly advise a client on the merits of their parties' position in mediation - Hickman v Blake Lapthorn [2006]. Preparation and proper understating of the strengths and weaknesses of the client's case are vital ingredients to achieving the best possible outcome.

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# Diploma in Law (Malta)

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# Confidentiality in Mediation

- Confidentiality is one of the important components of mediation. Confidentiality is needed to protect the profession and concept of mediation, to protect the parties, and to encourage the parties to be open. Confidentiality is not absolute.
- For instance, in the case of money-laundering, certain provisions do away with confidentiality. Confidentiality is one of the components of mediation, and lack of respect for confidentiality rips trust, which is the very fabric of mediation, as well as threatens professional integrity. In line with this the preamble to Directive 2008/52/EC on mediation, states that Confidentiality in the mediation process is important and therefore a degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration, is provided

- Article 7 of the Directive provides that given that mediation is intended to take place in a manner which respects confidentiality. Confidentially is applicable not only to the mediator but also to anyone involved in the administration of the mediation process.
- Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:
- (a) Where this is necessary for overriding considerations of public policy (best interests of children or to prevent harm to the physical or psychological integrity of a person); or
- (b) Where disclosure of the content of the agreement is necessary in order to implement or enforce that agreement.

- Proceedings are held behind closed doors in private however they may be held in public should both parties agree. Critics argue that being a private process brings doubt as to how fair a process it can be. Some argue that to protect mediation mediators should be allowed to give testimony in camera or in a restricted manner. If however, parties agree that a mediator can testify, protection should be sought for the process of mediation.

# For or Against Confidentiality

- Opponents of confidentiality argue that first the public has a right to obtain the truth, and secondly, where things are out of public scrutiny concerns about coercion, misconduct and the protection of the less powerful in mediation arise. Tina Grillo argues that in mediation, the less powerful remain less powerful and vice versa.
- Confidentiality could work against a mediator – for example – if somebody says that there was misconduct by the mediator or that he was not just – the mediator cannot defend himself and say what happen in mediation due to confidentiality. In Allen vs. Leal 1998 – the plaintiff's son was shot and died and she was seeking compensation – parties voluntarily attended mediation an agreed on an amount of $90, 000.
- She subsequently claimed that she was coerced by the mediator when it came to accepting compensation. The Court here did away with confidentiality and held that a mediator can testify to defend himself in case of an allegation of misconduct. On the other side of the argument it is argued that public good is furthered by confidentiality. People should have trust in the mediation process therefore for matters of purely public good it is argued that confidentiality should be enforced.

- Carrie Menkel-Meadow and Michael Wheeler are of the opinion that there should be exceptions to the usual presumptions in favour of confidentiality when the public may be affected. Such exceptions must apply, for example, in cases involving utility rate setting, hazardous waste sites, products liability, and class actions in securities or discrimination matters. The claims here are that the public has the right to know if products are defective and likely to hurt them, or that they live near hazardous waste sites or that the cost of consuming resources may rise.

# Which of the two opposing arguments prevails?

- Our Mediation Act defines mediation as a process in which a mediator facilitates negotiations between parties to assist them in reaching a voluntary agreement regarding their dispute – Article 2. Furthermore a mediation party is defined as a person that participates in mediation and whose agreement is necessary to resolve the dispute.
- The mediator is defined as a neutral, qualified and impartial individual who conducts mediation. Article 26 further builds upon this and states that being a neutral party the mediator must also follow a code of ethics and shall assist the mediation parties to reach a resolution that is timely, fair and cost-effective. The mediator must hold the trust of the parties at all time of the mediation process.

- Importantly Article 27 states that no evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, mediation is admissible in any proceedings, and disclosure of such evidence shall not and may not be compelled in any proceedings. There is however an exception to this, in the sense that disclosure of the content of an agreement resulting from mediation is permitted:

a) Where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or
b) Where such disclosure is necessary in order to implement or enforce that agreement.

- In Malta, the exception of confidentiality is limited to the agreement and not to the content of mediation itself.

- Importantly, all communications or settlement discussions by and between participants in the course of mediation shall remain confidential.
- A mediator may not submit to any court or adjudicatory body any evidence, report, assessment, evaluation, or finding of any kind concerning a mediation conducted by him other than a report that is mandated by the Court or adjudicatory body, and which only states whether an agreement was reached. As an exception to this, a mediator may only divulge such information to a Court or adjudicatory body as long as all parties to the mediation expressly agree in writing.
- Furthermore, Legal Notice 397 of 2003, under Article 4 (7) states that "The spouses and all other persons shall not be required to take any oath and no evidence may be adduced before any Court of anything divulged to the mediator in the conciliation or mediation procedures, of any proposal made by him or any other person during the procedures or of the reaction of either spouse to such proposals."

- Contrarily to what happens in Malta where the concept of confidentiality is embraced, in the US, where mediation has evolved very much, certain programmes regarding civil or commercial law (but not family law) work without confidentiality. It is argued that where the public might be affected (for example product liability) with any decision the public has a right know.
- The US Courts have been asked to give their opinion about whether confidentiality is a component of mediation and the US Supreme Courts have taken a case by case approach. In fact jurisprudence is not consistent on this – a 1984 case goes into detail about whether confidentiality should remain in mediation or not.

- **Seattle Time Co. vs. Rhinehart 1984 US Supreme Court** – Rhinehart was the spiritual leader of a religious group. Seattle Times had published several stories about Rhinehart and the Foundation. A damages action for alleged defamation and invasions of privacy was brought by Rhinehart and the Foundation against Seattle Times.
- During the course of extensive discovery, Rhinehart and the Foundation refused to disclose certain information, including the identity of the Foundation's donors and members. The trial court issued an order compelling the Foundation to identify all donors, pursuant to State Discovery Rules.
- The Court also required the Foundation to divulge membership information to substantiate any claims of diminished information. However, the Court also issued a protective order prohibiting Seattle Times from disseminating this information in any way. The Foundation claimed that the public release of information would adversely affect its members and income, as the protection order did not apply to information gained by means other than the discovery process.
- The Court held that discovery material can be shielded from the public eye – commonly through a protective order – but once that material is filed with the Court, any document that affects the disposition of litigation is presumptively open to public view.

- It is argued that a uniform preclusion is not justified – you cannot decide that there should always be confidentiality or there should never be confidentiality - there must be a case by case basis decision/ evaluation - it is a balance of harm. Protection needs to be consistent with a just outcome and the consensual nature of mediation.
- It is important that not only one reaches agreement but also that there be some sort of justice. And it is important that the parties taking part in mediation consent to the lack of confidentiality. The prevalent view of the US courts is that communications to the mediator and also between parties during mediation are protected, however in some limited circumstances confidentiality may be done away with.

- **Foxgate Homeowners' Association vs. Bramaela California (2001)** – the Court held that there was no exception to confidentiality in mediation even if some of the parties allegedly acted in bad faith. In this case the defendant brought no experts to the mediation sessions with the intent to delaying the mediation process.
- As a result of the obstructive bad faith tactics, subsequent mediation sessions were cancelled, as the mediator concluded that it could not proceed without defence experts. A question arose as to whether the mediator could draw up a report giving an analysis of Stevenson's statements and conduct during this mediation session.

- The Court said that the exceptions to the rule of confidentiality are very narrow, and that only such information as is reasonably necessary should be put before the Court. In this case, the mediator's report included certain extraneous information which violated the neutrality expected of mediators. Therefore, the Court decided that the report could not be exhibited.

- **Dr Lakes Incorporation vs. Brandsmart USA of West Palm Beach (2002)** – the court ruled that confidentiality must yield where a party claimed that a settlement agreement contained $600,000 clerical error. The Court rejected that the mediation privilege precluded any evidence as to what occurred during mediation, thereby leaving a party unable to prove that the mediated settlement agreement contained a clerical error. If there is a finding that a mutual mistake has been made, then a party should have access to the courts to correct that mistake.

- **City of Greenville, Illinois v Syngenta Crop Protection (US) August, 2014** - a plaintiff filed exhibits in response to a motion to dismiss, but did not rely on or cite them in argument. The exhibits included internal emails concerning business deliberations that the defendant wanted to remain private.
- The district court observed that, since the plaintiff had not relied on the exhibits, the Court would not review them. Because it had ignored the documents, the district court held that they need not be disclosed to the public.
- A third party intervened, asking the Seventh Circuit to extend the presumption of public disclosure to every non-privileged document that reaches the courthouse. However, the Court refused, confirming that public access depends on whether a document “influenced or underpinned the judicial decision”.

- It is not only the mediator who must ensure confidentiality; even communications between parties are protected by confidentiality. Communications with a neutral in preparation or during mediation are protected but not subsequent negotiations between parties even though they may include information initially disclosed in mediation. To claim protection, parties should have return to the mediator.

# The Role of the Mediator

- Mediation is the involvement of an impartial third party to support and help those involved in a conflict to find a resolution. The key difference between negotiation and mediation is that in negotiation, the parties involved work out their own agreement through a structured process. In negotiated mediation, there is the added support of the third party, the mediator, to help them come to an agreement. Therefore, assisted negotiation is at the heart of mediation – mediation is a process of negotiation facilitated by a neutral. The mediator is trained to coach the parties on negotiation strategies, therefore when conflicts have gone beyond the negotiation stage, mediation is vital.

- The Negotiation phase is the point of transition in mediation from general exploration and discussion of the past to solving the problem and dealing with the future. Whilst interest-based negotiation should be adopted, mediators should avoid positional negotiation which discourages the exploration of parties' interests making it difficult to find value maximising options.
- Interest-based negotiation starts by searching for the parties' interests, needs, aims and objectives. This style of negotiation is premised on the basis that positions should be avoided.
- A position is a proposed outcome that represents merely one way amongst many that the issues might be resolved and the interests met. In this type of negotiation personality differences are ignored to the extent that the focus is on the issues, the problem and the interests.
- The parties are encouraged to consider options which might be mutual benefit, that satisfy each party's interests. Fair or objective criteria are sought to support any settlement proposals.

- In their Book Getting to Yes, William Ury and Roger Fisher (1981) focus on negotiating an agreement by determining which needs are to be fixed and which needs are negotiable. Here we are speaking not of rights but rather of needs of the parties.
- These argue that positional bargaining is distributive and not integrative and can benefit parties in the short term but not in the long term.

- Fisher and Ury have termed the word principled mitigation or negotiation on the merits (or the Harvard Method of Negotiation) and argue that:

1. People must be separated from the problem – one must not attack the person but the argument/problem

2. Interests should be focused on and not positions

3. A variety Options should be generated before a decision is taken

4. Insistence should be made on ensuring that the result be based on some objective criteria

5. Know your BATNA – Best alternatives to a negotiated agreement as well as your WATNA – the worst alternatives to a negotiated settlement.

- Lawyers should help the parties avoid mistakes such as leaving value on the table. The negotiator should not claim value (seek to acquire something) but rather create value. Value claiming tactics can produce distrust, making it less likely that information be shared and distort the parties' needs and concerns, with the result of the possibility of value creation for both the parties to be diminished.
- The rule of reciprocity should be given importance in negotiation. In negotiation you must have someone who offers something naturally without prejudice if this is done the opponent would also be ready to offer something in return. You may have two parties who are enemies but reciprocity normally overcomes how the parties feel about each other. Effective negotiation in mediation requires the use of a range of skills by the mediator to encourage forward momentum.

- A skilled mediator gives added value to a negotiation. Mediation is a science and an art. Although many mediation skills may be taught, the development of a skilled mediator requires experience in dealing with people in all conditions and under all circumstances. Although there are many intangibles in the definition of a “good” mediator, certain character traits are invaluable.
- One of the most important skills is the ability to actively listen to what a party is saying and to note what the party is not saying – what a party consciously or subconsciously leaves out. All too often we hear what we expect someone to say rather than what is actually said. It is a fundamental principle that mediators must not prejudge the case nor impose their own prejudices on the parties. Furthermore, a mediator has to be able to tune into “where the speaker is coming from” and read the “sub text” or hidden messages given out by the parties.
- The parties will have greater confidence in a mediator who actively listens. The skill of listening is fundamental to the settlement of cases at mediation - it is a “sine qua non” of successful mediation practice. Besides listening the mediator must also give feedback that is conducive to the agreement in order to show the parties that they are being listened to and also to enhance collaboration.

- A mediator must also positively reframe what is said by the parties and aim at neutralizing the situation. “The art of reframing is to maintain the conflict in all its’ richness but to help people look at it in a more open-minded and hopeful way”- Bernard Mayer. Reframing is a technique to re-word what the person has said more constructively, by restating what a party has said to capture the essence, remove negative overtones and move the process forward. This assists the person in re- evaluating their perspective, or clarifying what is important to them in the conflict. Not only does reframing help the person better understand

- Mediators use 'partialising' as a major strategy in helping the parties reach an agreement. Partialising is a process of breaking a problem into its component parts. By focusing on each part and solving it one step at a time, a total agreement can be constructed from a series of manageable problems.
- It is vital for a mediator to mutualize the problem, that is, to put the issue in a reciprocal fashion –describing the issue as an issue that concerns both litigants. Most of the time the parties would have many things in common and mutualizing the problem would present the issues as common to both of them. Because the Mediator mutualizes the problem and has parties focus on that, rather than each other, they experience not only a lack of bias, but a lack of its need. The parties start seeing a wider spectrum of possibility as together they explore possible options and problem-solve together.

- Normalising is the mediator's way of putting his clients' mind at rest by telling them that, while their experience is certainly unique to them, it is also broadly similar to that of many other families for instance. The mediator as an expert having assisted many clients in the same situation, would be perceived as sensitive to the parties' needs. In giving clients these messages, normalizing encourages the development of trust in the mediator-client relationship and reassures clients that they survive this ordeal.
- Trust is also fundamental in a mediation process – without trust the mediator would not be able to function. A mediator also gains trust by ensuring the parties that he will remain neutral, that he will be honest, and that he will observe the rules of confidentiality.

- An additional skill a mediator must use is hypothesising, where mediators would hypothesis about the same problem that is to be resolved, about the client's goals and about their negotiating behaviour. The mediator would ask questions using the word "if" and try to expand the pie and make litigants realise that there could be conditions to their agreeing or not agreeing to an issue. Through hypothesising most of the discourse would be not in the form of statements but rather in the form of questions.

- A mediator must be able to perform reality testing or risk assessment in order to check with parties how realistic their claims are – especially in the long term. Many times clients are very optimistic therefore reality testing would put them in touch with reality and would put them in a compromise position. Reality testing would also help parties move from entrenched positions to realising their interests.
- Risk assessment normally involves the mediator testing arguments, questioning perceptions that prospects are good, helping parties analyse issues more closely to understand their strengths and weaknesses better, and helping parties move towards a more sensible solution.
- As part of reality testing Mediators would also constantly remind parties that litigation and its risks are the backdrop to the mediation. Keeping firmly in their minds what the alternatives are if mediation doesn't work - the cost, time and publicity implications, that losing litigation is seriously painful.

- A mediator must also be alert and must concentrate on the information being provided by the source and be constantly evaluating the information for both value and veracity.
- An additional skill of the mediator is positive summarising or recapitulating where the mediator would try to summarise what is being said in a positive manner and would also try to summarise the positive things that were agreed upon. The mediator should aim at recapitulating the themes and assuring that everyone is being heard thus reinforcing the direction of the mediation.
- Through summarising the speaker feels valued and promotes empowerment of the speaker to be able to create better ways of responding to their situation. Summarising would help the mediation become a co-operative process through which both the speaker and the listener maximize the effectiveness of their communication and in gaining a better understanding of themselves.
- Another important skill of the mediator is the ability to use a flip chart – this ensures an additional force of figures or words being written up in large handwriting. The mediator should be able to reflect on a board/chart whatever both parties are claiming and asking for and the points of agreement that emerge. This makes it easier for the clients to visualise what is being said during the mediation process and whether the situation is balanced on otherwise.

- Brainstorming is a technique used in mediation to expand options for settlement. The process involves generating creative solutions to resolve the conflict through an open and unrestricted discussion in which everyone is encouraged to suggest as many ideas as possible to reconcile their interests. The more options considered, the greater the chance of success in reaching an agreement.
- In a brainstorming session, the parties are encouraged to think outside the box and creatively and to suggest as many possible ideas for resolving the conflict as they can conjure up, without committing to any particular idea. Postponing evaluation of every idea that's put on the table is key. Only after multiple options have been identified does the work of actually considering whether those options are realistic and have the potential of satisfying everyone's interests.

- An additional important tool for the mediator is questioning which helps create an atmosphere for changes. Questions could be of many types: open questions, if questions, strategic questions, reflective questions, circular questions, and lineal questions. Questions are important only in light of the answers they evoke. When a mediator asks a question, the party is responsible for the answer – this keeps power with the party and prepares them for making decisions.
- A powerful question challenges assumptions, changes positions, stimulates reflective thinking; is thought- provoking; generates energy and a vector to explore; channels inquiry; promises insight; is broad and enduring; touches a deeper meaning; and evokes more questions. Questioning is central to a mediator's ability to enable conflicts to become constructive and new possibilities to emerge.

- Language is the mediator's tool of the trade and metaphors are an essential part of our everyday language since when we convey ideas we resort to metaphors. In mediation language is almost all mediators have. Thus, through the use of metaphors mediators help increase the positive ways resolution can be reached and helps enhance the mediation process. Metaphors help people understand better and also help parties generate ideas. It is not a question of whether mediators should use metaphors or not – the question is which ones they should use.
- The mediator must also be skilled to realise when there is dissonance and aim at removing it. The theory of dissonance suggests that individuals act in contradictory ways. The mediator must be capable of pin-pointing that a person is saying something paradoxical to what he said before so that one would realise that he may not necessarily be in the right or rather that he/she would be over claiming and not being realistic enough.

- The mediator must also be capable of using humour especially when the parties are tense in order to calm them down and bring things in proportion. Humour, like rapport, is very important to the process.
- Humour helps create and build relationships with parties. Humour allows the mediator to relate on a human level, and to provide warmth.
- The mediator must be capable of ignoring certain negative comments and conversation.
- The mediator must ignore all the sniping and crossfire and must remain tightly focused on the problem-solving task. This task focus will usually override the unproductive method of arguing.

- An additional skill a mediator must have is that of operationalising, that is, asking the parties to specify what their goals are. If for example one of the parties says that he/she wishes that the other party is reasonable – the mediator would ask what he/she means by reasonable.
- The Mediator must be capable of acknowledging strong emotions, whilst the mediator must be objective and ensure self-control, emotions should not always be ignored. However the mediator must be objective in evaluating the information obtained, so that he would not risk unconsciously distorting the information acquired. Furthermore he must have exceptional self-control to avoid displays of genuine anger, irritation, sympathy, or weariness that may cause him to lose the initiative during questioning but be able to fake any of these emotions as necessary. He must not become emotionally involved with the party.

- Besides the main skills mentioned above the mediator must be endowed with a number of other skills connected therewith. The mediator should have knowledge and expertise in the area in which a particular case fits. A mediator must also keep in mind the importance of confidentiality, neutrality and impartiality.
- The mediator must demonstrate empathy for both sides, but at the same time must exhibit the utmost neutrality in the matter. A good mediator should also be tenacious in the pursuit of a settlement. A good mediator should know that even when things look like they are ready to stall, there are tools available to keep the parties moving forward. One of the benefits of a mediation settlement is that the parties can get creative in their settlement techniques.
- Finally a mediator must have patience and tact in creating and maintaining rapport between himself and the parties, thereby enhancing the success of the mediation process.

# The Role of the Lawyer

- Thorough and effective preparation for mediation is essential to ensure that the best use is made of the mediation opportunity. Preparation involves recognition of the mind-set required by clients and lawyers to get most from the mediation process. The functions of lawyers in mediation are different from those in a court of law, where the lawyer must act as a guard dog as opposed to a guide dog.
- Tom Arnold in his journal, Alternatives to the High Cost of litigation of 1995, notes how lawyers who are unaccustomed to being mediation advocates often miss important opportunities to resolve cases. He discusses several common errors in the mediation process and suggests ways to correct them.

# The Functions of a Lawyer before Mediation

- The lawyer has a number of functions before the mediation sessions start. The lawyer must educate the client about mediation and the procedure. Clients should be given a general idea as to how many sessions they would have.
- The lawyer must also prepare the clients for participation in the process. The lawyer must assure
- them and put their mind at rest as to what will happen during mediation and must encourage them to approach mediation broadly, flexibly and with an open mind. They should also be aware that unlike in ordinary court cases, they will be given the opportunity to voice their opinions.
- Lawyers should also encourage their clients to actively listen to all parties and to stand in the opponents' shoes to see the problem from other perspectives, thereby increasing their understanding of the problem and of what will be required to reach resolution. The lawyer must also ensure that clients are aware that they must be dressed appropriately during the sessions.

- One common error mentioned by Tom Arnold is the lawyers' omission of client preparation. Lawyers need to educate their clients about the mediation process. Furthermore the client should be encouraged to assess proposals received at mediation according to their BATNA, WATNA and MLATNA (best, works, and most likely alternatives to reaching settlement in mediation) – terms coined by William Ury and Roger Fisher.
- A party should be advised to accept offers better than his perceived BATNA and reject offers worse than his perceived WATNA. So the BATNAs and the WATNAs are critical frames of reference for accepting offers and for determining what offers to propose to the other parties. A weak or false understanding of their party's BATNA or WATNA obstructs settlements and begets bad settlements.
- This general preparation will also need to be tempered by much more specific preparation, for example, the kinds of questions the client should expect form the mediator, and how the lawyer and client should co-ordinate throughout the mediation.

- A problem pointed out by Arnold is that lawyers sometimes fail to identify perceptions and motivations of other side. Arnold suggests brainstorming prior to mediation to determine the other party's motivations and perceptions. He goes so far as to suggest preparing a chart summarizing how your adversary sees the issues and emphasizes that part of preparing for mediation is to understand your adversary's perceptions and motivations.
- A skill of lawyers within mediation is to assist the client to identify needs, interests and issues. The temptation is for lawyers to assume that those needs and interests correlate with the legal analysis of the case. A lawyer must avoid dwelling on issues, like how is right or wrong.
- Lawyers should discuss with their clients the difference between interests and their legal positions. And clients should recognise the importance of being apologetic and emphatic. Clients are usually over optimistic and they entrench themselves in positions that could be harmful to them in the long run therefore lawyers should help their clients think about their interests and not an entrenchment of a position. Clients should be made aware of the variety of options that might settle the case, the strengths and weaknesses of their case and the objective independent standards of evaluation.

- The lawyer must prepare or help prepare necessary documents, which normally include estimates of properties, pay slips, and other essential contracts.
- Tom Arnold points this out as a common error for lawyers - failure to prepare materials to support claims. Arnold suggests preparing materials for maximum persuasive impact including exhibits, charts and copies of relevant cases or contracts with key phrases highlighted. Video showing key parts of depositions if straightforward and to the point along with a readable-size copy of an important document with relevant language underlined.

- Lawyers sometimes fail to ensure proper time for mediation. One shouldn't spend exorbitant time is in discovery and trial preparation before seeking mediation. Mediation can identify what's truly necessary discovery and avoid unnecessary discovery.
- The lawyer must give clients information about expenses and other costs of mediation and other processes and refer to best and worst case scenarios.
- Clients must be aware that court-annexed mediation is free of charge if the court appoints the mediator himself. Additionally if the mediator is chosen upon agreement by the parties, they should be aware that they would have to pay a minor fee. Private mediation would also be subject to certain fees – but compared to court litigation such fees are limited. Clients should also be made aware as to how costly it would be should the mediation sessions fail and should court litigation be initiated.

- Finally the lawyer must advise clients about legal issues involved including any agreement presented to clients. The lawyer must advise the clients as to what the memorandum of understanding is.
- At the end of the mediation process a memorandum of understanding is drawn up which is an informal document showing the items that the parties have agreed upon. The memorandum of understanding can be changed at any time as it is not set in stone. For this document to be legally binding it must be signed in front of a notary giving it therefore legal weight and transforming it into a contract.

- Tom Arnold points out four additional problems that must be avoided and if necessary corrected before mediation sessions commence:

**1. The First problem is having the wrong client in the room:**

- CEOs are more suitable to settle cases because they don't need to worry about criticism back at the office. Any lesser agent, even with explicit 'authority', typically must please a constituency which was not a participant in the give and take of the mediation. That makes it hard to settle cases. A client's personality can also be a factor. A person who is aggressive, critical, unforgiving, or self- righteous doesn't tend to be conciliatory. The best peace-makers show creativity and tolerance for the mistakes of others. Of course, it also helps to know the subject.

## 2. The Second problem is having the wrong lawyer in the room:

- Many capable trail lawyers are so confident that they can persuade a jury of anything, that they discount the importance of preserving relationships as well as the exorbitant costs and emotional drain of litigation. They can smell a ‘win’ in the court room and so approach mediation with a measure of ambivalence.
- Transaction lawyers, in contrast, tend to be better mediation counsel. As a minimum, parties should look for sensitive, flexible, understanding people who will do their homework, no matter their job experience. Good preparation by lawyers makes for more and better settlements.

## 3. The Third problem is having the wrong mediator in the room:

- Some mediators bring nothing to the table and sometimes determine their view of the case and urge the parties to accept that view without exploring likely win-win alternatives. The best mediators can work within a range of styles and as Leonard Riskin explained these styles range from being totally facilitative, to offering an evaluation of the case.
- Ideally mediation should fit the mediation style to the case and the parties before them, often moving from style to style as a mediation progresses. It may not always be possible to know and evaluate a mediator and fit the choice of mediator to your case. But the wrong mediator may fail to get a settlement another mediator might have finessed.

## 4. The fourth problem is having the wrong case:

- Almost every type of case is a likely candidate for mediation. Occasionally, cases don't fit the mould, not because of the substance of the dispute, but because one or both parties want to set a precedent. For example, a franchisor that needs a legal precedent construing a key clause that is found in 3,000 franchise agreements might not want to submit the case to mediation.
- Likewise, an infringement suit early in the lift of an uncertain patient might be better resolved in court getting the Federal Circuit stamp of validity could generate industry respect not obtainable from ADR.

# The Functions of a Lawyer during Mediation

- During mediation the lawyer must play a more passive role as an adviser rather than as an advocate.He must actively listen, react appropriately and must be mindful throughout the mediation of the objective, to explore potential resolution with opponents, as opposed to arguing the best legal case.
- During mediation lawyers must be patient, perseverant, and open-minded. The lawyer must allow the mediator to do his job and support the mediator where appropriate, without putting on a show for the client or trying to highjack the process.
- Some lawyers impose their presence in mediation and the mediator is left not able to do his job - this is not very helpful. Sometimes when this problem crops up clients would probably be better off changing their lawyer.

- Tom Arnold points out two a common error of lawyers is not letting a client open for herself, and addressing the mediator rather than the other side/ the opponent.
- Most lawyers open mediation with a statement directed at the mediator, comparable to opening statements to a judge. Highly adversarial in tone, it overlooks the interests of the other side. The lawyer must aim at making the other side sympathetic – an adversarial or offensive approach wouldn't work. The lawyer must demonstrate his clients' humanity, respect, and sense of apology.
- Furthermore letting the properly coached client do most, or even all, of the opening and tell the story in her own words works much better than lengthy openings by the lawyer.

- The lawyer must encourage the clients to participate in good faith without prejudicing the process. Active and effective participation by the client in mediation requires thorough preparation of the client by the lawyer ahead of mediation.
- A Lawyer must explain to his clients that his role is not to speak in their stead, but rather to support them and help them explore methods on how they can realise their rights in a reasonable manner.
- Lawyers should rehearse with their clients, answers to questions which the client would probably face during mediation.
- Lawyers should not make the mistake of being the centre of the process. Unless the client is highly unappealing or inarticulate, the client should be the centre of the process and should himself explain the reasons behind his claims.
- Although lawyers tend to be keen to control the process, the mediator will need to be given the power to control and structure the mediation. The mediator will guide the parties through the various procedural aspects of the mediation.

- Of vital importance is assisting the clients to focus on their personal or commercial interests and rather their rights at law. The lawyer will need to be comfortable with different styles of negotiation as the mediator is likely to encourage more interest-based approaches rather than the more traditional lawyer positional negotiation style.
- Furthermore a lawyer must assist clients to communicate accurately and comprehensively and negotiate productively. A distinction should be made between interests and rights, or rather between interests and positions. It is also the mediator's role to shift an entrenched position of a particular party and help him realise that primarily other people have rights and secondly that they can negotiate an agreement and meet their interests even if not through the position they initially had. Clients should be able to look at the long term goals – the whole picture – sometimes it would be better to give up something small to get something bigger in the long run. Clients should be advised to negotiate productively.

- The lawyer must give advice on rights and duties of both the parties – any position a client may have needs to be substantiated by rights and duties. Lawyers however need to avoid cross-examining other lawyers' clients in mediation since it is not an adversarial process.
- Anything that will make an opponent angry or defensive will inhibit settlement and may also destroy the lawyers' credibility. Trust and rapport will need to be built in the mediation by the lawyer not only with the mediator but also with the opponents.
- Any behaviour that sets ultimatums or is hurtful, humiliating, threatening or commanding towards the adversary is another mistake. Arnold admonishes not to poison the well from which you must drink to get a settlement. You can be strong on what your evidence will be and still be a decent human being. All settlements are based upon trust to some degree. If you anger the other side, they won't trust you. This inhibits settlement.

- Tom Arnold points out additional errors made by lawyers during the mediation process. One of the common errors Arnold emphasises is how lawyers and clients are incapable of listening to the other side and of giving open-minded attention to what the other side is saying - Failure to listen can cost a settlement. Additional errors include failure to understand the conflict and lack of patience and perseverance – at mediation the negotiation process is described as a “dance” which takes time.
- Good mediation advocates, according the Arnold, have patience and perseverance. As there will considerable ‘down time’ during a mediation, when the mediator is in caucus with the opponents, the lawyers will need to be prepared for this time. The lawyer will be reacting to new information in the mediation, as well as responding to specific tasks set by the mediator. It may be necessary to manage the client’s expectations, to discuss matters, to help save face and to come up with appropriate offers and counteroffers.

- Closing too fast to the bottom line ‘the dance’ can be an additional error. Mediation is a process - closing too fast is another problem which should be avoided as one may risk losing communication and consequently losing the settlement.
- Furthermore a lawyer needs to assist the clients on drafting agreements and the formalisation of the mediation agreement. When drafting the settlement reached in mediation the lawyers’ role is pivotal. Arnold points out that a problem of lawyers is the backward step. A reduction in offer without a good reason endangers bad feelings from other side, it is a powerful tool for those who are expert negotiators only - you walk away without yet walking.
- The backward step involves a situation where you give an offer and suddenly you go back on your word and no longer give the offer or reduce the offer. This may lead to an additional problem - failure to truly close the deal. Failure to close that is get a written agreement is problematic. Very often, when left to think overnight, parties get new ideas that delay or prevent closing – a balance should be struck.

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- Failure to listen can cost a settlement. Additional errors include failure to understand the conflict and lack of patience and perseverance – at mediation the negotiation process is described as a “dance” which takes time.
- Good mediation advocates, according the Arnold, have patience and perseverance. Finally, having too many people can also be a problem as it may disrupt and delay the mediation process immeasurably.

# The Functions of a lawyer after Mediation

- After mediation, the lawyer must undertake activities regarding the formalisation of the mediation agreement which would also involve him liaising with other professionals such as notaries.
- Secondly, the lawyer must reassure clients on problems of implementation an inform them that if the solution reached during mediation is not being follow, he/she can return to mediation.
- As Tom Arnold argues, after mediation the lawyer must be careful not to breach confidentiality in Court. Lawyers sometimes mistakenly breach confidentiality in court – when information is sensitive it should be kept confidential. Sometimes parties to mediation unthinkingly, or irresponsibly, disclose in open court information revealed confidentially in mediation

# Conclusion

- Jean R. Sternlight (2000) argues that attorneys and clients view the world differently – clients do not act objectively. People tend to be overoptimistic on their chances of success and are more willing to gamble regarding perceived losses than perceived gains – prefer settlements that appear to be just.
- Lawyers must therefore help clients be more objective, less optimistic and more willing to take some risks when it comes to perceived gains. Lawyers should not focus on the bottom line dollar, as sometimes parties are more interested in non-monetary outcomes such as apologies, venting or vengeance. Ultimately, preparation is a key component for mediation success and lack of preparation is a key component of mediation failure. As Arnold states a dispute is a problem to be solved together, not a combat to be won.

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# Diploma in Law (Malta)