

Cycle-logical mediation

What prevents parties from resolving their dispute reasonably, rationally and amicably, and how can psychology help?

BY PAUL RANDOLPH



In India on 29 March 2008, Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, said: “It is madness to incur the considerable expense of litigation – in England usually disproportionate to the amount at stake – without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory [...] Parties should be given strong encouragement to attempt mediation before resorting to litigation.”

Not only is it madness to rush into litigation, but it is commercially indefensible for commercial entities to remain in dispute with each other for any length of time. Conflict deprives them of three essential elements: energy, time and productivity. To remain in conflict with another defies rational scrutiny; to enter into or prolong a commercial dispute resists economic analysis and can rarely be in the commercial or practical interests of either party. Even in the few cases when visibility of

litigation may be important – for example, in the protection of intellectual property – it would still be more economical for the parties to collaborate in a solution.

So what is it that prevents parties from resolving their disputes reasonably, rationally and amicably? Why do we see so many hardnosed, business-orientated, profit-conscious individuals dragging themselves, their companies and their families endlessly through the courts?

The sad fact is that as a species, humans remain wholly incompetent at resolving disputes. So frequently competitive, we need not only to win, but also to see blood on the walls. Traditionally, there has been only one alternative to an amicable or negotiated settlement – war – crudely with armies on the battlefield or more sophisticatedly with cohorts of lawyers in court. However, neither is effective at truly resolving conflicts. Both end the dispute for the time being, usually leaving it to fester beneath the surface; but neither addresses the dispute’s root causes. Protracted litigation can be as socially destructive as war – destroying businesses, wrecking marriages and damaging health.

Yet conflict is ever present; we cannot eliminate it. We can, however, work with it. It is important to realise that conflict may also be constructive. Conflict well managed can, in fact, prove valuable by creating a cycle of reconciliation, which brings with it greater understanding, changes for the better, progress and advancement. Georg Wilhelm Friedrich Hegel, the 18th century German philosopher, identified the cycle of thesis, antithesis and synthesis – in which thesis represents the status quo; the antithesis is the challenge to that status quo, and the synthesis the new product resulting from the conflict.

Mediation addresses this cycle by actively facilitating reconciliation, with the mediator helping promote real and true resolution of the dispute by giving that cycle a small “nudge”.

How does the mediator achieve this? Examine four psychological elements that drive conflict: emotions, self-esteem, values and the need to be heard.

EMOTIONS

In essence, all disputes have a common theme: one party demands something the other party is unwilling to give. The demand will be driven by an element that is partly commercial,

partly emotional. Similarly, the refusal to give in to the demand will be driven by both commercial and emotional factors. Few disputes are without significant emotional content. The allegation of "fault" is highly emotive and involves considerable injury to feelings. To allege a breach of contract or an act of negligence precipitates deep feelings of hurt and anger; if that fault is then denied, it creates greater irritation and upset, by "adding insult to injury".

Thus, the first principle with which the psychologically informed mediator must grapple is that, when parties are in conflict, they do not think or behave rationally but are governed by their emotions. Frequently, they may not even recognise their own underlying emotions. They may believe that their demand for "damages in compensation" is simply seeking proper redress or recompense, whereas in fact the demand for money is driven by anger, hurt or a desire to punish or humiliate.

A recent survey by solicitors Field Fisher Waterhouse LLP shows 47 per cent of company executives and in-house lawyers admit that a personal dislike of the other side led them into expensive litigation. We need to appreciate that if those in dispute are driven by emotions and not by reason, it is wholly futile for a mediator – or the legal advisers – to try and persuade them to change their positions through logic or rational legalistic argument. This may explain our frequent exasperation with clients: "They just don't seem to be able to see sense" or "I can't seem to get through to them that [...]".

Aristotle, the Greek philosopher, outlined the "master and slave" theory whereby, in a proper world, logic should be the master and emotion the slave. Unfortunately, in conflict, the reverse proves true. Passions overwhelm logic, and the more critical the outcome, the greater the emotion and the scarcer the logic. An anatomical explanation lies in the amygdala, a small almond-shaped part of the brain that governs our "fight or flight" responses. In moments of high emotion, it takes control of the reasoning brain and prevents "paralysis through analysis". It is this "hijacking" of the rational mind that so frequently occurs in the high emotional state of a bitter dispute and creates an emotional barrier to settlement. If every conflict were approached from a purely rational, practical, pragmatic or commercial standpoint, very few disputes would continue.

SELF ESTEEM

What is it that precipitates such emotions when we are in conflict? The answer lies in our self esteem. We need to think well of ourselves and others to think well of us. We, therefore, expend considerable effort and energy in maintaining and protecting our self worth and seeking the approval of others.

There can be little more damaging to self esteem – whether individual or corporate self esteem – than to make, and deny, the types of allegation that populate pre-action correspondence and pleadings. These are accusations of failure – failure to act in a way that all other reasonable persons would act, or accusations of an outright betrayal of a previous agreement. Corporations can suffer injury to feelings as much as individuals, and corporate self esteem can be as powerful a driver as it is

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to an individual: "Who do they take us for?" "With what sort of a company do they think they are dealing?" Thus, the conduct of parties in dispute may be governed entirely by the desire for approval, to maintain their self esteem or protect it through the fear of manipulation or humiliation.

VALUES

Values are the principles by which we all live. We create them to carry us through life in some ordered manner, and they are linked to our self esteem. It is when others challenge or abuse these values that we find ourselves angered and in conflict. If, for example, one person's values consist of being honest and punctual, their values will feel abused if the other side behaves dishonestly and is consistently unpunctual. Frequently, these value systems become rigid and prevent parties from reaching a settlement: "It's a matter of principle," say our clients, seeking to justify their entrenched positions; "Principles are a costly luxury," we lamely retort. However, when our clients stand firm "on principle", we need to understand and work with these values so as to secure that vital shift of attitude necessary for settlement.

THE NEED TO BE HEARD

One of the most powerful motivators of conflict is the sentiment of not being heard. "They are not listening, so I have no alternative but to litigate." The need to be heard, interrelated with self-esteem, results from parties feeling undervalued, ignored, misunderstood, or misrepresented. However, this is readily cured by investing a little time in "active listening" and demonstrating to clients and parties, that they have been not only heard (possibly for the first time in their lives) but also understood and accepted – even if not "agreed with".

In conclusion, with some knowledge of these human traits and the part they play in creating psychological blockages to settlement, we may be better able to facilitate conflict resolution. Without such understanding of human interactions, mediators will simply find themselves scratching their heads in bewilderment at the unfathomable antics of the parties before them.

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