MUNN CONFLICT RESOLUTION SERVICES
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Shopping for Mediation: What Style is the Best Fit for Us?

When shopping for clothing you decide ahead of time what you need – casual , business, or formal and then go to stores that have the type of clothing you need. When shopping for IT services you decide first whether you need hardware, software, or web design and select your provider based on what you need. To my surprise, sometimes when I hear people talk about their selection of mediation services their process seems to skip over that analysis of need and jump straight to selection of a mediator.

Understanding the components of the three main mediation styles - Facilitative, Evaluative, and Transformative - is one part of the process of choosing the mediation services you need. The other part is to understand how the differences between the styles can help - or hinder - you in getting the results you need from your mediation experience.

The last issue of *Common Ground* described these three mediation styles. A summary of the styles is set out in the table on this page, "Mediation Styles at a Glance"

Now let's take up the challenge of comparing these three mediation styles.

If the parties need to open up communication, identify barriers, and develop creative options for a mutual agreement, a **facilitative** mediation style is the most appropriate. Facilitative mediation helps the parties take responsibility for the dispute and for the resolution of the dispute. The parties determine what objective standards they will use to assess the fairness of the resolution. Some ideas for the use of facilitative mediation include workplace conflicts, commercial contract disputes and family disputes from marriage separation to generational issues to estates.

Transformative mediation uses a wider lens and focuses on the relationship of the parties and the conflict between them rather than on a specific dispute. According to Zena D. Zumeta, in the article at www.imimediation.org, "Supporters of transformative mediation say that facilitative and evaluative mediators put too much pressure on clients to reach a resolution. They believe that the clients should decide whether they really want a resolution, not the mediator." A few examples for the use of transformative mediation include conflicts between business partners, competitors in an industry association, or merging companies.

If the parties want a more directive approach by a mediator who provides nonbinding opinions or makes comments about the facts and the law of the case they need an **evaluative** mediation style. This mediation approach grew from and continues to be similar to the approach used by judges in pretrial conferences. For that reason it is familiar to lawyers. One caution is that some lawyers may be tempted to choose a mediation style based on their own familiarity rather than the needs of their clients. Evaluative mediation is often used in lawsuits, for example between an injured person and an insurance company.

There is more risk connected with evaluative mediation because the parties are relying on the mediator's opinion about the facts and the law and that opinion may not be correct. For this reason the evaluative mediator's impartiality is especially critical. Sometimes, for example in personal injury litigation, the mediator may deal with one of the parties such as an insurance company many times creating an ongoing source of mediation business whereas the injured party may only need mediation services as a "one-of". This brings with it the risk that while the mediator may consider themselves to be neutral, even with the best of intentions in reality they may not be impartial.

Facilitative and transformative mediation styles decrease the parties' risk because they allocate more control to the parties for determination of the resolution.

Each style has detractors. Facilitative and transformative mediation styles are sometimes criticized for resulting in a longer mediation process. Evaluative mediation is sometimes criticized for putting too much pressure on the parties to reach a resolution.

In Ontario, in the cities of Toronto, Ottawa and Windsor mediation is mandatory for civil court actions. What mediation style is used by the program?

In the Ontario Mandatory Mediation Program the style of mediation is not specified. Rule 24.1.02 states, "In mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution."

The 1998 Mediator Orientation Materials provided to mediators at the launch of the Ontario Mandatory Mediation Program instructed mediators, "the type or style of mediation provided by mediators will be determined in part by two factors: the request by the parties for a particular mediation style; and the comfort level and interest of the mediator in providing that type of mediation."

("Shopping for Mediation"... cont'd next page)

Mediation Styles at a Glance:

	Facilitative	Evaluative	Transformative
Purpose	Solve the problem	Get an outside opinion	Change the conflict interaction
Role of Mediator	Facilitate negotiation	Assess merits	Support parties to understand each other and make decisions for themselves
Activities of Participants	Identify interests & assess options	Provide information	Speak fully about what is important
Mediation Meeting Format	Participants mainly meet together with mediator	Participants mainly meet separately with mediator	Participants meet together with mediator

("Shopping for Mediation"... cont'd)

Many mediators shift from one mediation style to another depending what is needed in the situation. Some mediators prefer to use only one mediation style. The mediation style which I use primarily is facilitative. I shift to evaluative or transformative mediation styles when it is helpful for the situation.

Facilitative mediation continues to be the mainstream mediation style. Most mediation training teaches the facilitative mediation style and that is the style of mediation which I teach.

If you are drafting a mediation clause in a contract to be used in the event of a dispute somewhere in the future life of the contract, the mediation clause could include the parties' expectation of the mediation style to be used. For example if the parties are concerned about the length of time used for mediation or about the potential cost of mediation, the mediation clause might state that the mediator will be asked to give a nonbinding recommendation if the parties do not reach a resolution after a certain duration of mediation. In my experience the risk with this is that when they get to the mediation the parties may focus more on trying to persuade the mediator about that nonbinding recommendation than on trying to reach a resolution with the other party.

In the process of selecting a mediator it is helpful if the parties identify the mediation style or styles most appropriate for their situation and then develop a short-list of mediators based on what they need. The parties can then discuss their needs for mediation styles with the mediators on the short list.

Munn-thly Memo

Q. I'm involved in a dispute with my neighbours. How do I talk to them about using mediation to settle our dispute without appearing to be weak?

A. This is a frequently asked question in the mediation business. There is a common perception that initiating the idea of a mediated discussion indicates that your other alternatives are not strong.

People seem to find the conversation about mediation easier if the dispute is in a context where there is a culture supporting resolution. For example some workplaces may have an informal culture or even a formal policy encouraging resolution of conflict between employees.

Another example of a culture supporting resolution is the legal system. In Ontario it is a rule of professional conduct that lawyers "shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings." The rule goes on to say that the lawyer is required to consider the use of alternative dispute resolution (ADR) for every dispute (my emphasis) and if appropriate to inform the client of the ADR options and if so instructed by the client to "take steps to pursue those options".

This means that in any kind of dispute which could be brought to a lawyer for advice or for court action, such as a dispute between neighbours, each party will be encouraged by their lawyer to settle the dispute and to consider alternative dispute resolution which includes mediation if appropriate. Even if you have not yet contacted a lawyer, it helps to know that the lawyer will be required to discuss this with you.

Since your dispute is within such a context you could approach the person with whom you are having the dispute and initiate the conversation by acknowledging that the two of you will be expected to consider how you will resolve the dispute and to invite the other person to consider options for this including the option of mediation. There may be savings of money or time or there may be other positive outcomes which could motivate both of you to work towards a resolution with the assistance of a mediator.

Even if your dispute were not within a culture supporting resolution, consider your approach for the conversation. Keeping the situation unresolved may benefit one of you and since you are asking the question, the status quo may be benefiting them more than you. Think about that old marketing idea – "wiifm", "what's in it for me" from their point of view. What is it that they could stand to gain from a resolution of the dispute – or lose from the continuation of the dispute? And once you clear that hurdle, are the two of you able to speak directly with each other to negotiate the resolution of the dispute or do you need the help of a mediator?

If you decide that you are not comfortable talking with them directly about how to resolve the dispute, that is the time to involve an outside person such as a lawyer, a neutral neighbour, friend or family member or in a workplace dispute, your manager or human resources department.

Mark Your Calendar

Upcoming Training Events Presented by Kathryn Munn

Fundamentals of Mediation

Intensive 40 hour program
March 23, 24, 25, April 4, and 5, 2011
8:30 AM to 5:30 PM each day
Course location: London, Ontario
This course is approved by the ADR Institute of Ontario.
Registration form available at www.munncrs.com
Please call 519-660-1242 (toll-free 1-888-216-3202) or email kmunn@munncrs.com for more information.

Mediation Beyond the Basics

Advanced 21 hour program
For graduates of Fundamentals of Mediation or equivalent 40-hour mediation program
May 9, 10, and 11, 2011
Deadline for early registration discount: April 8, 2011
9:00 AM to 5:00 PM each day
Course location: London, Ontario
Registration form available at www.munncrs.com
Please call 519-660-1242 (toll-free 1-888-216-3202) or email kmunn@munncrs.com for more information.

Advanced Mediation

Advanced 21 hour program
For graduates of Fundamentals of Mediation and Mediation Beyond the Basics
November 23, 24, and 25, 2011
Deadline for early registration discount: October 21, 2011
9:00 AM to 5:00 PM each day
Course location: London, Ontario
Registration form available at www.munncrs.com
Please call 519-660-1242 (toll-free 1-888-216-3202) or email kmunn@munncrs.com for more information.

Power of Persuasion

April 12, 2011
9:00 AM to 11:00 AM – panel presentation
London Chamber of Commerce, London, Ontario
For more details and registration: www.londonchamber.com

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