

Kluwer Mediation Blog

F=T(Q+I)

Michael Leathes (Corporate counsel & author) · Monday, February 2nd, 2015

whereby F=The Future, T=Trust, Q=Quality and I=Information

The **F**uture of mediation hangs on several factors. Probably the most important is **T**rust.

If mediation is not widely trusted by users, it has a mediocre future. This is simply because mediation depends on the parties, who usually do not trust each other, fully trusting the mediator and the mediation process. Unfortunately, mediation appears to stand some way down the trust stakes.

Low trust can be traced to the belief that mediation is considered a legal process dominated by lawyers who are advocates and mediators. Sadly, there is strong empirical evidence that, worldwide, lawyers are not highly trusted. Mediators and the mediation user community need to overcome this vicariously applied impediment. To do so, they need to collectively forge mediation as a free-standing profession, based on quality and information, which are the core ingredients of trust and respect. An inhibiting factor that surfaced at last year's Convention on *Shaping the Future of Dispute Resolution*,^[1] was lack of familiarity with mediation. If trust can be reinforced by users recognizing that mediation is an independent profession, mediation use will likely increase exponentially.

GfK Verein^[2] is a German non-profit market research think tank established in the 1930s that is internationally renowned for promoting the integrity and importance of market research. In May 2014, GfK published the results of a global study^[3] on the extent to which 32 professions are trusted in 25 countries in all continents, based on 28,000 interviews. The results of this serious research are disturbing and relevant to mediation. Healthcare professions and teachers scooped four of the top five trust rankings. Although mediation was not one of the professions whose trust quotient was measured – hardly surprising as mediation is not widely recognised as a profession – lawyers were. Lawyers were ranked in the bottom quartile, in 27th place, far behind public transport drivers (13th) and bankers (16th). Judges fared better than lawyers, in 15th place, but only one rung above the bankers. In the US, Brazil, Kenya and Nigeria, lawyers were ranked four from the bottom, in 29th place (politicians came bottom almost everywhere). In no country were lawyers even close to the upper quartile.

Mediation is a branch of negotiation, not law. Most mediators do not need to be lawyers.

Nonetheless, because modern mediation developed in a legal context, a very high percentage of mediators are, inevitably, lawyers. There are no exact figures, and the proportion of lawyer mediators to non-lawyer mediators will differ from one field or practice to another. But when such a large international survey indicates such an abysmally low level of trust in lawyers, mediation will inevitably be tarred by the lawyers' brush. In the absence of more data, we do not know how bad the situation is. But few should be surprised if new research proves the point.

Most mediators, including most lawyer-mediators, will be dismayed at the situation, and rightly so. But the mediation field should not just shrug and muddle along, sleepwalking into an unexciting future, assuming that nothing can be done. Mediation needs to present itself as a separate, credible profession. This can be done very quickly, and at low cost, by collectively focusing on two connected areas: **Quality** and **Information**.

A separate profession

The late, great Harold L. Wilensky was Professor of Political Science at US Berkeley. In *The Professionalization of Everyone?*^[4] in 1964 he wrote:

Any occupation wishing to exercise authority must find a technical basis for it, assert an exclusive jurisdiction, link both skill and jurisdiction to standards of training, and convince the public that its services are uniquely **trustworthy** and tied to a set of professional norms.

Mediation can do all these things if the players in the mediation market organize themselves to take collective action. The skills can be taught – in fact must be taught. Sophisticated high-level training criteria are now well-developed, enabling a reliable and objective determination about whether a person will make a competent mediator. Quality can be asserted by credentialing people who meet the required criteria after independent assessment. The trust factor can be communicated to users by promoting how quality can be assured, and by enabling users to have transparency through properly-organised user feedback summaries. Better information can be given to users about how mediation works and why it is so successful. But none of this happens by accident or default. The concept needs vision, leadership, organization and determined effort.

Quality

High quality delivery of services is a central imperative in the growth of any profession. Few users can have confidence in any professional service if they are unable to trust its quality – knowing that high standards are established and applied via credentialing and that there is a tough and visible Code of Professional Conduct that is rigorously enforced.

Some mediators disagree. The main argument in favour of having no quality standards is that users will quickly sort the good mediators from the bad, just like any other service. Some say that mediation is not a science but an art that negates the relevance of standards and credentials. These views are often expressed by successful mediators who are not particularly concerned about the growth of mediation since they have plenty of work for themselves. But their influence has, up to now, inhibited mediation progressing as an independent profession. These views also put infrequent users of mediation at a disadvantage because they do not have access to the collective

experience of others. As a result, in almost all countries, anyone can still set up as a “mediator”. This needs to change, quickly, preferably by the field taking control of itself rather than by being subjected to Government regulation.

Users are likely to react negatively when they have a bad mediation experience. They often bad-mouth the process and may not use mediation again. Users need and deserve better quality assurance if they are to trust the process and use it repeatedly.

Supporters of quality standards argue that mediation happens behind closed doors, the mediators are usually sole practitioners, and word of mouth, gossip and innuendo are highly unreliable quality indicators. Moreover, they say that although larger law firms may know (or think they know) who’s who and what’s what in the mediation world, such knowledge often does not reside with disputants and advisers who rarely get engaged in mediation. And the general public, who may not be legally represented, are even more in the dark and are therefore sceptical and untrusting of both mediation and its practitioners.

Information

Mediation practice is also poorly understood. Some people have a vague notion of *how* it works, but often not *why* it works. The user is confused by as many definitions of the term *mediation* as there are institutions and practitioners offering their services. The mediation market is not homogeneous; in fact it is highly fragmented, often so balkanized by the severity of competition that many service providers rarely talk to one another.

Users need more and better, and above all consistent and objective information about mediation and mediators. They need tools to help them assess their own problems and consider the spectrum of dispute resolution options, of which mediation is a key part.

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The **F**uture depends on the degree to which the **T**rust of users can be generated, in mediators and in mediation, which in turn hinges on **Q**uality (professionalization, credentialing and transparency) and **I**nformation.

The mediation field in each country needs to collaborate to apply this formula if mediation is to have a future worth striving for.

Michael Leathes and Deborah Masucci
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Authors’ Note

The International Mediation Institute (IMI)^[5] is a global non-profit body that was established in 2007 to implement the **F=T(Q+I)** formula. IMI is funded entirely by donations, including professional dues paid by IMI Certified Mediators. The authors are both directors of IMI and can be reached at: <https://imimediation.org/contact-imi>.

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