

# Kluwer Mediation Blog

## Formality and informality: mediating in the shadow of the courts

Charlie Irvine (University of Strathclyde) · Friday, May 10th, 2019



### Place matters

It's good to see authors on this blog referencing academic research – see Rick Weiler's [recent post](#) on decision-making. Similarly, a new chapter by Singapore judicial mediator Dorcas Quek Anderson (1) has got me thinking about the old chestnut of formality and informality. Anderson considers the impact on people and processes of the courtroom as a place. While many mediators work in the metaphorical shadow of the law, this impact is inevitably greater for those mediating in court buildings or even actual courts. Among the effects she lists are a “lack of intimacy in conversation”; “the ‘entrenching’ and ‘polarising’ effect”; and the potential for loss of face (2).

## How formal is formal?

I've never liked calling mediation "informal." It sounds second-rate. Old-fashioned department stores still have a section for "formal brands" (serious, businesslike, expensive) as against informal fashion (casual, relaxed, affordable). By analogy, "informal justice" may be affordable, even relaxed, but if my liberty or assets are at stake I'll take the expensive, serious variety every time (3). Furthermore, when I think of my own mediation sessions, there's a good deal of formality. People are formally introduced, they sit and speak in a certain order and it is clearly not a casual conversation. Unresolved conflict haunts the atmosphere, keeping us all alert. Relaxed it ain't.

Everything is relative, however. Step inside a court and you witness formality of an entirely different order of magnitude. Arguably this goes with the courts' function, deriving from the law's "authority over individuals' subjective preferences" (4) and their role in publicly declaring whose rights should prevail. Symbols of this formality pervade the building, from the x-ray machine at the door, to the uniformed police in the halls, to the "state crest" above the judge. And woe betide anyone who dares to speak, eat or drink once the judge (called a sheriff in Scotland) appears. Last week I sat in stultifying silence with a group of total strangers while the clerk went to fetch the sheriff. Somehow we maintained the formality even in the absence of an authority figure.

Anderson points out that court language is formalised too: in Scotland sheriffs are addressed as "Your Lordship" or "Your Ladyship." The more confident lawyers shorten this to the almost rakish "M'Lord" or "M'Lady," but unrepresented people stumble over the correct form of address, often opting to say as little as possible.

## A court mediation

Thus mediators face a practical dilemma. When mediating in a court building, how far can and should we go in humanising the conversation? On the one hand we don't want to be seen in the same light as judges: most mediators would regard that level of formality as unhelpful. On the other hand we operate at the courts' invitation, with delegated authority (at least implicitly) to do our work in ways that don't undermine the justice system. The following episode illustrates the trickiness of navigating these different communication registers.

**A colleague and I attended court as duty mediators. One of the cases appeared suitable for mediation. Before referring the case to us the sheriff took great pains both to lay out the legal framework and explain what was involved if the parties agreed to mediate. The session itself took place in the sheriff's chambers. Although the symbols of legal authority were less obvious we were clearly mediating with the court's approval and endorsement.**

**In the event one of the parties, a consumer, showed considerable hostility to the other, representing a business, and we worked hard to manage this throughout the two hour session. Though there was little warmth or cooperation between them we set the formality level fairly low – first names, lots of eye contact, calling the meeting a "conversation", and tolerating interruptions until they become unmanageable. Surprisingly, right at the end, after the two men had shaken hands on a compromise deal, the representative apologised on behalf of the company. Suddenly the atmosphere shifted and they became quite amicable and chatty.**

**We then moved back through to the court, seating ourselves around the table usually reserved for lawyers.**

When the sheriff asked the parties what had happened, it was as if the informal atmosphere had seeped back into the courtroom with us. Both spoke in a more conversational register. Then came a jolt. After answering one of the sheriff's questions the consumer clearly hadn't quite finished and interrupted the sheriff to add more. The sheriff stopped him abruptly: "This isn't a conversation. I ask the questions and you answer."

### **The clash**

This exchange seemed to give voice to the visceral clash of atmospheres. The man had let his guard drop and was probably insufficiently versed in the court's social rules to switch back into the formal register (as I suspect I've learned to do). Even the fact that the claimant was sitting rather than standing is something of a social breach. Although the sheriff had sent them to mediation, it was clearly a mistake to lower the formality level once back in the courtroom. This is an arm of the state; its behavioural norms have evolved over centuries. The man of course backed off and things were brought to an amiable close.

This is not to be critical of either person but rather to reinforce Anderson's hunch that courts are odd locations for conducting a less formal and adversarial form of dispute resolution. Just two hours earlier, before our involvement, the consumer had spoken only when addressed, soberly and respectfully. At the court's invitation, two mediators then spent time and effort gaining his trust so that he could take responsibility for negotiating his own outcome. We applied widely-held mediation values like empowerment and a belief in people's capacity for self-determination. Little surprise if the consumer took this as permission to continue conversing with the sheriff. He was behaving informally in a formal setting.

And sheriffs spend their days ensuring that the majesty of the law is upheld. Judges in Scotland invariably deal with more criminal than civil business. They possess the coercive power to remove a person's liberty. That's no laughing matter, nor an informal one. So while they may be pleased that cases are resolved "informally" they can't be expected to drop their guard.

### **Ditch "informal"**

While my resistance to the term "informal" remains, I have to concede that mediation is considerably less formal than court. Yet it's a lot more formal than unmediated conversation between adversaries. Perhaps "a wee bit formal" is technically accurate. Imagine that as a strapline.

All of this misses the point. I doubt if most mediators want to be judged by their level of formality. I don't go to work motivated by a burning desire to provide an "informal" process. What I really aspire to provide is something qualitatively different from the courts: a setting that welcomes input from those most intimately affected by the dispute. Formality may help or it may hinder. It's just not the most important thing.

Other things DO matter. Voice matters – an informal atmosphere may be useful, but sometimes it's the formality imposed by a mediator that enables the less strident voice to be heard. Legal information matters – non-lawyers can't be expected to know the norms or rules applying to their case, but it's their dispute and, once informed, they're as capable of negotiating as anyone else.

Optimism matters – legal disputes engender despair and powerlessness, and people tend to welcome a mediator who is patient, persistent and assiduous in exploring every possible avenue for resolution (including the possibility of no-resolution).

I could go on, but I hope I've made the point. In fact formality and informality matter. When the stakes are high we value the seriousness formality implies. But characterising mediation as “informal” seems irrelevant and unhelpful. It strikes me now as a rhetorical device from an era when mediation was new and possibly over-sold, designed to highlight its failings vis-a-vis the courts. Much better to find other terms to describe it. I won't put words into other mediators' mouths, but my intro certainly won't be including the word “informal.”

#### References

- 1) D. Q. Anderson, *Court-Annexed Mediations Within Singapore: A Complex Interface Between Individual Place and the Court Environment*. In Collins, P., Igreja, V., and Danaher, P. A. (eds) *The Nexus Among Place, Conflict and Communication in a Globalising World*. Singapore: Springer, 2019, 121–144.
- 2) Ibid, pp. 134-138.
- 3) A considerable literature on informal justice emerged in the 1980s, most of it highly critical. See for example R.L. Abel (ed.) *The Politics of Informal Justice. Volume 1. The American Experience*. New York: Academic Press, 1982.
- 4) Anderson 2019, p. 125.

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