

# Mediation

beyond law...we innovate solutions

**belden**

# Mediation

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- A Personal Choice
- A Party's Choice
- A Lawyer's Choice
- Encouraged Choice?

# Lawyering vs Mediation

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- Money
- Advocacy
- Law
- Passion
- Not My Job

# Encouraging Litigation

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- Lose-Lose All Parties
- Fees
- Expenses
- Time
- Effort
- Unpredictability
- Is it a Business ?

# Litigation Earning

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- Aggressive
- Confrontative
- Negative
- Stressful
- Win Sometimes Lose Sometimes

Are Lessons Learnt ?

# Disputes that Fester

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- Acrimony
- Anger
- Hatred
- Instability
- Negative
- Affect Others

# Do Clients Want to Litigate ?

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*“May you be involved in a law suit which you believe you are right / where you are totally right”*

*A Gypsy’s Curse*

- No Certain Right / Wrong ?
- Best Constructive Guess ?
- Justice in the Hands of Beholder

# Human v Lawyer

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- Encourage Peace & Positive Attitude
- Do not Stirrup Strife & Litigation  
[Article 43 Legal Profession (Practice & Etiquette) Rules 1978]
- We are in a Position to Do So
- Are you a Vulture / Shark ?



# Encouraging Mediation

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- In Danger of Becoming a Good Person
- Mediation = Assisted Settlement
- Creates Positive Attitude
- Money to be Earned Quicker
- Parties – None Lose / Lawyer Wins

# Why Mediation ?

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- Cheaper & Faster
- No one wins – no one Loses
- Finality – no Appeal
- Unconventional Remedies  
(other business ventures)
- No Hostility – Conciliatory
- Not Adversarial
- No Stress – Litigant & Witness

# Why Mediation ?

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- Creates long term relationships
- Important for on-going relationships
- Avoids legal language
- Free from legal procedure
- Hands-on involvement – stakeholders
- Confidentiality

# Mediation Fails

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- Delaying Tactics
- Non Bona Fide on Settlement
- Inequality of Bargaining Power
- Used as Fishing Exercise
- Over Revelation of Weakness

# Settlement

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- Conventional Negotiation
- Lawyer to Lawyer
- Facilitative Mediation
- Evaluative Mediation

# Mediation

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*“A process by which disputing parties engage the assistance of a neutral 3<sup>rd</sup> party to act as a mediator who is a facilitating intermediary to assist and encourage settlement by a constructive methodology that focuses on the best interest / best approach for the parties and who at the same time has no authority to make binding decisions”*

# Mediation

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- Voluntary
- Conciliatory Intentions
- Mediator facilitates Communication
- Mediator maintains Balance of Power
- Assistance on Resolution

# Mediation

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## Facilitative:-

- People – separated from the Problem
- Interest – focus not on Dispute
- Options – generate Variety & Encourage
- Criteria – settlement in Best Interest



## Facilitative:-

- No opinion on disputes
- Best interest based on disputes
- Not too pro-active
- Promote understanding of each others needs
- Solution from the parties
- Find common ground
- Massage solutions to form a settlement

## Evaluative:-

- Some consideration of right / wrong
- Opinion / Evaluation of Disputes
- Convince parties Evaluation is likely outcome
- Propose Solutions
- Aggressive Settlement Approach

# The Mediator

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- Neutral & Impartial
- Conflict Check
- Skilled & Trained
- Uphold Confidentiality
- Not too Commercial Minded
- Assertive on Time Frames / Meetings
- Can spare the Time

# The Mediator

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## Facilitative:-

- Negotiation Skills
- Commercially Savvy

## Evaluative:-

- Expert Knowledge & Skill  
(legal & technical)
- Dispute Area Reputation

# The Mediator

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- Ad Hoc (choice of parties)
- Institutional (choice of institution)

# Mediators Focus

Not On	But On
Consequences of the Disagreement	Issues & Common Ground
Rights	Parties' Needs, Goals, Objectives & Interests
The Past	Future Benefits of Agreement
Positions	Underlying Issues & Why the Parties Can't Negotiate Successfully Alone
Advising	Facilitating & Eliciting Agreement
Negative Behaviour	The Problem
Parties' Negative Attitudes Towards Each Other Including Blame	Encouraging the Parties to Value Each Other

# Lawyer's Creed on Mediation

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- All Disputes can be mediated
- Approach positives
- Cost & Time & Uncertainty Argument
- Understand the Mediation Process
- Explain the Mediation Process
- Help prepare the matter for Mediation
- Attend Mediation – Assist & Advise
- Help prepare the terms of Settlement

# Case Study

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Cilla is the owner of a successful modelling agency. She started out as a successful model and actress and then established the agency when she was 30. She is now 52 and has single-handedly built the business up into one of the most successful agencies in Malaysia. All the top designers ask for her models and she is very proud of what she has achieved. Her health is however not good. She is suffering from early arthritis and can no longer handle long meetings or frequent traveling. She has lost some of her grace and poise because of the stiffness in her joints and is often in pain.



# Case Study

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Ann had been her assistant for several years and two years ago, were very surprised when Cilla offered you a stake in the business. Ann paid Cilla a substantial sum of money for a 25% share in the agency although you could ill afford it. Ann thought it was a good investment at the time but lately Cilla has become very distant and sometimes hostile. Ann feels that Cilla no longer appreciates Ann. Cilla has started to make demands that you feel are unfair. Cilla seems to leave a lot of the details in the business to Ann and gets upset when things are not done to her liking. Ann has not really done anything differently from when Ann was Cilla's assistant and cannot understand why Cilla has changed. Cilla in turn has accused Ann of being ungrateful.

# Encourage Cilla

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- Advise Mediation – Quick & Cheap, Not Binding
- Ann will hear your views in structured manner
- Ann may understand & offer solutions
- Ann may explain misunderstandings
- Find a way to work together for the betterment of the business
- Partnership like a marriage, don't just throw it away

# Encourage Ann

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- Advise Mediation – quick & cheap
- Chance to hear Cilla's views & problems
- Chance to provide views & aspirations for the business & self
- Find a way to work together for the betterment of the business
- Young & need success
- Otherwise, 25% stake?

# Mediation Process

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- Mediator's terms
- Preliminary Joint Caucus – Non-Personal Disputes
- Preliminary Separate Caucus – Personal Disputes
- Separate Caucus – Focus on Best Interest
- Joint Caucus – Discuss Similar Best Interest & Formulate Agreement
- Agreement & Execution

# Cillia

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- Must Have Believed and Found Ann good at her work – otherwise why 25% stake
- Young & Energetic, Just what is needed
- Be Commercial & think of business needs
- Better to have trustworthy partner
- Especially when older & needed to travel
- If lose Ann, replacement & re-train, time & effort
- What happens to 25% stake?
- Better the devil known then unknown
- More Training For Improvement

# Ann

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- Believed it was good business, worked hard & took 25% stake
- Believed in future of business
- After all this, just going to give it up?
- Where is the future without this business?
- Understand Cilla – old & sick, worked hard & in total control – now can't
- Common problem age & control
- Must appreciate Ann because gave 25% of stake of self-made business
- Just Communication breakdown

# Mediator

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- Focus on Business & future success
- Focus on what worked for 2 years & business growth that led to 25% stake to Ann
- Focus on working together – young & energetic, old & wise
- Shared Control & clear division of control
- Create positive emotive discussions
- Training for Ann
- Cilla – health & future & need for finance
- Ann – success & business acument & financial gains



THE END...