STAIGER Attorneys-at-Law Ltd.

Talacker 41 | CH-8001 Zurich

T: +41 58 387 80 00
www.staiger.law

jennifer.duerst@staiger.law

Jung Legal Solutions

Talstrasse 39 | CH-8001 Zurich

T: +41 44 586 64 44
www.legalsolutions.law

julia.jung@legalsolutions.law

Englische Übersetzung des Artikels
"Gerüchteküche" um die Mediation, in: Anwaltsrevue 11-12/2020, S. 454 ff.

RUMORS ABOUT MEDIATION

JENNIFER DÜRST
Attorney-at-law, Mediator SBA, STAIGER Attorneys-at-Law Ltd., Zurich
Attorney-at-law & Mediator in family, inheritance and commercial law

JULIA JUNG
Attorney-at-law, LL.M., Mediator SBA, Jung Legal Solutions, Zurich
Independent Commercial Mediator and Arbitrator

Jennifer Dürst

Julia Jung

Key words: Mediation, Alternative Dispute Resolution (ADR), Conflict Prevention and Management

Mediation is a structured solution-finding process, which has become widely known in recent years. The modern mediation proceeding has its origin in the United States and is known and practiced there in all fields of law. Meanwhile, mediation is also established in Europe and Switzerland as a conflict resolution proceeding[1]. This article deals with 10 common misconceptions in connection with mediation. Numerous rumors exist – this is a practice report.

I. Why Do Conflicts Arise?

Conflicts are part of everyday life and occur for instance within companies, families or in politics. The basic reason for the existence of conflicts are different perceptions of a given situation or failed communication. Conflict situations might arise if the feedback does not correspond with the intention and expectations of the person who communicates a message (transmitter)[2]. An ongoing communication during a conflict situation could additionally be impaired by prejudices, distrust, own imagination and deceptions which could lead to misunderstandings. If the parties do no longer listen to each other and lose trust and respect for one another, a conflict could escalate[3].

People who communicate with each other act as transmitters and receivers. The transmitter intends to communicate a message while the recipient receives the message. Experience shows that the recipient only receives 30% (!) of the sent content[4]. We only perceive as true what we have seen and experienced ourselves[5].

For instance, if viewer A perceives the glass to be half full, it might be that viewer B qualifies the glass to be half empty. Hence, the question "is there still water?" could contain different messages: Either i) a simple question about the water supply or (ii) an appeal to buy water or iii) the

---

1 FCD ("Swiss Federal Supreme Court Decision", so-called "BGE") 142 III 296 E. 2.3.1: "*Sous l'influence des milieux économiques et juridiques américains et anglais, des méthodes alternatives de règlement des litiges (Alternative Dispute Resolution ou ADR) ont rencontré un très vif succès en Europe et plus particulièrement en Suisse au cours de ces dernières années. La conciliation et la médiation constituent de telles méthodes*".

2 DANIEL GIRSBERGER / JAMES T. PETER, Aussergerichtliche Konfliktlösung, Zurich/Bâle/Genf 2019, p. 22.

3 ELKE MÜLLER, Arbeitsbündnis und Themenentwicklung in der Mediation, Konstanz 2017, p. 15; UELI VOGEL-ETIENNE / ANNEGRET LAUTENBACH-KOCH, Von der Mediation zum Kooperativen Verhandeln, Zurich/Bâle/Genf 2020, p. 23; GIRSBERGER / PETER, a.a.O. p. 35 et seq.

4 VOGEL-ETIENNE / LAUTENBACH-KOCH, see above, p. 24.

5 MÜLLER, see above, p. 18.

expression of one's own desire for more water or iv) the message that the counterparty is not hospitable[6].

This said, it is a fact that conflicts are inevitable. Making use of the services of a mediator, however, could have a positive impact on the way of communication between two parties.

II. Rumors about Mediation

1. We do not need a mediator, we can talk to each other in person

Of course, conflicting parties are, in general, able to talk to each other without a mediator and, ideally, they can even negotiate efficiently. If a negotiation between the parties fails, however, or if it is on its way to impasse, a mediation proceeding should be considered. The fact that parties are still able to talk to each other is an optimal starting point – but no precondition – for the mediation proceeding.

The advantage of a mediation is that it provides a formal and protected framework outside the usual environment in which conflicts are usually dealt with, e.g. between business partners, in companies or at home. Mediation has a de-accelerating and thus de-escalating effect. The aim of a mediation proceeding is to optimize the negotiation procedure between the parties[7].

The mediator's task is to structure the proceeding. He/she supports the parties in getting away from the positional, maybe even emotionally driven dispute and replacing it with an interest-based, solution-oriented dialogue. Instead of fast, intuitive thinking as during situations of conflict, objective, rational thinking is applied during mediation proceedings[8]. Ultimately, this leads to overcoming impasse and enables further constructive negotiation. The mediator ensures that the entire negotiation potential will get exploited.

While in commercial mediations meetings of one or two days are usually sufficient to achieve remarkable results, workplace and family disputes can usually be resolved after a few sessions of 2-4 hours each.

---

6 VOGEL-ETIENNE / LAUTENBACH-KOCH, see above, S. 23; MÜLLER, see above, p. 15; GIRSBERGER / PETER, see above, p. 25 et seqq.

7 JÖRG RISSE, Wirtschaftsmediation, München 2003, p. 36.

8 GIRSBERGER / PETER, see above, p. 49 et seqq.

2. The party that suggests a mediation proceeding shows weakness

Sometimes parties which suggest a mediation proceeding are perceived to be "weak" and/or not determined enough to file a claim with the court.

In today's society, it is probably not the best approach to always aim for the absolute win. Doing business is characterized by constant negotiation. How often does it happen that parties (only) achieve what has been negotiated instead of achieving what either side thinks it might effectively deserve[9]? It should not be forgotten that the truth often lies somewhere in between – this thinking might then lead to an appropriate solution even for both sides.

Mediation is *not* a ready-to-eat meal. Conflicting parties need to cook, decorate and present their "meals" themselves. This requires intuition, flair, creativity, stamina, thoughtfulness and excellent negotiation skills. In a nutshell, mediation is not suitable for weak parties[10].

3. Mediation is another form of "Meditation"

The similar sound of the two terms "mediation" and "meditation" quickly creates the impression that mediation might also be some kind of spiritual practice. Mediation, however, has – indeed – nothing in common with a spiritual practice. The term "mediation" descends from the Latin word "mediare" (being in the middle). It is up to the mediator to mediate between the parties and structure the negotiation proceedings[11].

Court proceedings are about finding the "truth". In a mediation, on the other hand, it is critical to accept that one given situation can be perceived differently by different people. Moreover, in a mediation proceeding the conflicting parties are even encouraged to investigate the reasons for the different perceptions. The needs, interests and desires which the mediator helps to identify by using his mediator tools build the central part of a mediation proceeding[12]. In state court proceedings, on the other hand, needs, interests and desires of the conflicting parties, due

---

9 CHESTER L. KARRASS, The Negotiating Game, 1994, p. 3.

10 WOLFGANG LUBERT / MICHAEL TIGGERS, Mediation im Beteiligungsgeschäft, in: Venture Capital Magazin, September 16, 2015, see: https://www.vc-magazin.de/blog/2015/09/16/mediation-im-beteiligungsgeschaeft.

11 RISSE, see above, p. 5.

12 VOGEL-ETIENNE / LAUTENBACH-KOCH, see above, p. 25.

to the procedural framework, cannot be considered in the court's judgment and, thus, will not come to the surface.

In his conflict studies, SIGMUND FREUD developed the image of an iceberg the tip of which represents the *positions* ("what are we asking for?") of the conflicting parties whereas the invisible ice layer below the sea level represents the parties' *interests* ("what do we really want"?; see Figure 1). The invisible ice layer below the sea level offers potential for overlapping *common interests*. Once found, this area of c*ommon interests* enables the parties to find solutions that are acceptable to all of them – despite their different perceptions of this given specific situation.

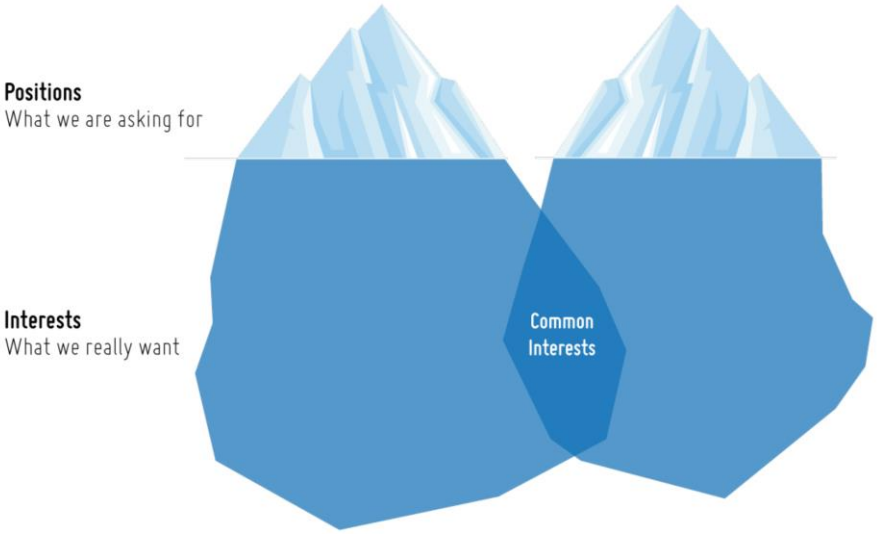

Figure 1: Image of *positions* and *interests* according to SIGMUND FREUD

This concept of mediation is based on the findings of negotiation research. Thus, as mentioned above, mediation has nothing in common with a spiritual practice.

Mediation is just another dispute resolution process which can be applied irrespective of the substantive law which is applicable to the underlying dispute. The mediation procedure itself can be modified depending on the type of dispute which is dealt with: While in family mediation proceedings, the personal feelings of the parties build a central part of the mediation, commercial mediation proceedings can be more fact and legal oriented. According to our experience which we draw from mediation proceedings in Switzerland and the USA, mediation is a successful dispute resolution mechanism in any legal field.

4. Lawyers should not participate in mediation proceedings

It is *not* true that lawyers should not take part in mediation proceedings. Particularly in commercial mediation proceedings it is common and usually recommendable that the conflicting parties are accompanied by their legal representatives. The lawyers' role is primarily the one of an advisor with regard to the legal aspects of the dispute – as the mediator does not advise the parties in legal matters. Furthermore, lawyers support their parties in setting up an overall strategy as well as the negotiation tactics. Finally, lawyers make sure that their clients are able to adequately express themselves[13]. We note and welcome the tendency that the parties are more and more represented by a lawyer not only in commercial mediations but also in family and inheritance mediation proceedings. The lawyers can either work in the background ("invisible lawyers") or actively participate in the mediation proceeding ("visible lawyer"). Generally, in order to be most effective, lawyers should be familiar with mediation proceedings and the mediator's tools[14].

In commercial mediation cases, so called pre-mediation intake meetings are held between the mediator and the lawyers and/or parties. During these meetings, the framework of the proceeding to be held is defined, e.g. the following criteria are relevant: i) Participants, ii) time frame, iii) venue, iv) costs and allocation between the parties, v) mediation agreement between the mediator and the parties, vi) expectations towards the mediation as well as vii) the potential phases of the mediation proceeding. Furthermore, there will be a discussion on the question whether viii) the attorneys intend to present the facts of the case and the relevant legal questions orally or in the form of position papers.

Position papers, usually limited to approximately ten pages, provide the mediator with an overview about the relevant facts, the essential documents and the legal positions of the parties. During the intake session it needs to be determined whether the position papers are to be exchanged amongst the parties or whether they are to be drawn up in confidence and sent exclusively to the mediator. Confidential position papers may also already contain statements on the parties' own interests, the presumed interests of the opposing party, the possible scope for concession, a party's own BATNA ("Best Alternative To a Negotiated Agreement") and/or WATNA ("Worst Alternative To a Negotiated Agreement"). Either way, the position papers are supposed

---

13 GIRSBERGER / PETER, see above, p. 168.

14 JAMES T. PETER, Der Rechtsanwalt als Parteivertreter in der Mediation, in: Anwaltsrevue 3/2013, p. 103 et seqq., p. 103.

to ensure that the party representatives as well as the mediator are prepared for the mediation, thus, saving time on the day(s) of mediation.

In family and inheritance mediation proceedings, the facts and the parties' positions are usually presented to the mediator and the counterparty during the first mediation sessions, without drafting position papers. However, it might be useful to compile the essential documents in advance.

5. Mediations with highly controversial parties are not possible

If parties are qualified as "highly controversial", there is a high degree of anger, distrust and communication difficulties as well as serious accusations[15]. It is also possible to find appropriate solutions with highly controversial parties. However, this type of procedure is certainly very challenging for the mediator, i.e. the mediator needs to be more active in his/her leadership role and he/she needs to pay particular attention to his/her facial expressions, gestures, posture and choice of words. Furthermore, the mediator needs to structure the facts of the case in more detail, deliberately slow down the process and listen more consciously to the parties[16].

6. Mediation is a waste of time

Mediation proceedings are generally rather short and resource-efficient. On average, they last about 2 to 6 months[17] and statistically they lead to an amicable settlement in 70% or more cases[18].

Mediation proceedings can lead to final settlements and, usually, they prevent conflicts from emerging again later on. On the contrary, particularly in family matters, several conflict issues which have not been dealt with during the court proceeding – for procedural reasons – often reappear after the conclusion of the court proceeding. This reappearance might then lead to further court and/or mediation proceedings.

---

15 HEINER KRABBE, Hochstrittige Parteien, June 2019, p. 6.

16 KRABBE, see above, p. 15 et seqq.

17 SMD-FSM, Ergebnisse der Umfrage Mediation 2014, November 2014, p. 7, see: https://www.mediation-ch.org/cms3/fileadmin/doc/umfragen/Umfrage_Mediation_2014.pdf.

18 SDM-FSM, Kurzbericht, Ergebnisse der Umfrage Mediation Schweiz 2008, Oktober 2009, S. 2, abrufbar unter: https://www.mediation-ch.org/cms3/fileadmin/doc/umfragen/Umfrage_Mediation_2008.pdf, und SDM-FSM, Ergebnisse der Umfrage Mediation 2014,, a.a.O.: 70 % der Mediationen enden in einer Vereinbarung.

In the event that a mediation does not end with a full settlement, it usually still helps streamlining the future court or arbitration proceeding. This is the case because usually at least certain aspects of the conflict have already been dealt with in mediation. Moreover, after having gone through a mediation, at least, the participants know which are the relevant aspects of their case as well as their own procedural risks.

7. Mediation is a dispute resolution procedure

Correct, mediation is an alternative dispute resolution procedure. Mediation can, however, also appear in the form of a so called "deal mediation", again a concept developed in the USA. A deal mediation is set up if the parties involved in complex contract negotiations engage a neutral third party to support them during the negotiation – although there is no conflict between the parties[19].

8. Ex parte communication does not exist in mediation proceedings

It is not a fair statement that no *ex parte* communication can happen in mediations. A key element of mediation is that the parties are able to tailor their own dispute resolution mechanism. Hence, it is also allowed for the parties to foresee the possibility that the mediator is allowed to talk to each side separately without the other party being present.

In general, mediation sessions take place at the mediator's office or – in case of commercial mediation – at external conference rooms. The mediator as well as the parties and their legal representatives (if any) attend the sessions in person. Nowadays, however, online mediations are also possible. No matter if mediation sessions are held in person or online, the parties should be provided with the possibility to use so-called "breakout rooms" in order to talk to their legal representatives and to take breaks. Again, if the parties agree, it is possible for the mediator to visit each party separately in their breakout rooms.

The so called "Shuttle Mediation" is a very specific form of mediation. It is characterized by a mediator shuttling between the parties in conflict which stay in separate rooms during the whole mediation. In these cases the mediator controls the entire communication between the parties, i.e. there is no direct communication between the parties: The mediator communicates with one party (excluding the other) and vice-versa. The aim of shuttle mediations is for the

---

19 SARAH J.K. RAUBER / NICOLA E. TOGNI, Deal Mediation – Einführung in das Verfahren drittunterstützter Vertragsverhandlungen, in: GesKR 2/2020, p. 282 et seqq.

mediator to deliver "offers" between the parties. Shuttle mediation can be the adequate form of mediation e.g. in conflicts which entail the distribution of limited resources (e.g. in classic monetary claims disputes) or in family matters in which direct confrontation shall be prevented[20].

In mediation the parties have countless options to tailor the proceeding as well as the outcome to their very specific needs. In shuttle mediations for example, direct communication between the parties is entirely replaced by *ex parte* communication.

9. The mediator makes a proposal

The so called mediator's proposal is controversially discussed. It depends on the personal mediation style of the mediator or the needs of and the active request by the parties whether the mediator is willing and shall submit a concrete proposal for a possible solution of the dispute.

In a classic "facilitative mediation" the mediator's task is "merely" to structure the proceeding and to ensure a constructive negotiation between the parties[21]. Settlement options are developed without the mediator making a concrete proposal himself/herself[22]. The parties themselves are seen to be the ones knowing their dispute as well as the surrounding framework best and, thus, being the most competent to work out their own solutions – whereas the mediator neither gives recommendations nor proposes solutions. Otherwise, there is a risk that the parties concentrate on the solution proposed by the mediator and do not engage in their own creative solution finding process[23].

This facilitative form of mediation which is probably the one most frequently practiced in Switzerland differs significantly from conciliations according to the Swiss Civil Procedure Code as well as court assisted settlement negotiations in which the justice of the peace or the court usually submit a provisional assessment and/or propose a solution to the parties.

In particular in the USA, however, many former judges (so-called "retired judges") act as mediators. Parties who are about to go to court often choose retired judges as their mediators due to their evaluative mediation style. In this type of mediation it is the parties' expectation that

---

20 GIRSBERGER / PETER, see above, p. 156 et seq.
21 GIRSBERGER / PETER, see above, p. 150.
22 ELKE MÜLLER, Lösungen und Vereinbarung, Konstanz 2017, p. 13 et seq.
23 MÜLLER, a.a.O., S. 13; VOGEL-ETIENNE / LAUTENBACH-KOCH, a.a.O., p. 36.

the mediator comments on the relevant legal questions and the respective litigation risks. Generally, however, in the USA a top mediator is considered to be able to adapt his/her mediation style to the needs of the parties.

To sum up, the rumor that mediators usually make proposals as to the possible solution of the dispute is probably not true for mediators here in Switzerland. It is, however, certainly not impossible that mediators make proposals at a certain stage in the mediation proceeding.

10. The "law" has no stake in a mediation

The question which role the law plays in a mediation is controversially discussed. At least, the law offers "guidelines" which also set certain limits. It provides the parties with options and sets a standard which the parties can orientate themselves by. Also, the law offers a reliable alternative in the event that the mediation fails[24]. In commercial settings, a mediated settlement regularly needs to be justified vis-à-vis a wide range of stakeholders. In view of this, it is clear that the legal situation and the litigation risk, which was avoided by the mediated settlement, play a major role[25].

In our opinion, the law needs to be integrated into a mediation proceeding, thus, it is part of a mediation. The mediator should, however, ensure that law does not "control" the proceeding or is used as a means of pressure. The mediator shall always make sure that the parties negotiate according to their interests and needs and not "only" according to what they legally might be "entitled" to[26].

It is up to the legal representatives of the parties to bring the legal aspects into the mediation proceeding. Depending on the complexity of the conflict issues, it might also be helpful for the parties in family and inheritance mediation proceedings to seek for legal counsel.

In our opinion, the mediator himself/herself does not need to be an expert with regard to the specific substantive law in dispute as he/she does not advise the parties on legal issues and, depending on his/her style, is likely not to propose solutions. It is much more important that the mediator is trained and experienced with regard to the specificities of the mediation process.

---

24 MÜLLER, see above, p. 7.
25 RISSE, see above, p. 33.
26 Vgl. auch MÜLLER, a.a.O., p. 8.

Nevertheless, the mediator must certainly be able to meaningfully engage in discussions with the parties' representatives in order to conduct the mediation proceeding efficiently. Also, in commercial mediations, it is essential that the mediator speaks the "language" of the parties themselves.

III. Conclusion

An evaluation of the 10 most frequent rumors about mediation leads to the following result:

1) We do not need a mediator, we can talk to each other in person

   If the potential for negotiation seems to be exhausted and the direct negotiation between the parties is failing, a mediation is useful because it can create a completely new basis for further negotiations.

2) The party that suggests a mediation proceeding shows weakness

   Wrong, mediation proceedings are not made for weak parties.

3) Mediation is another form of "Meditation"

   Mediation and Meditation have nothing in common. Mediation is also an appropriate dispute resolution mechanism in commercial settings.

4) Lawyers should not participate in mediation proceedings

   On the contrary, lawyers are needed in mediation proceedings.

5) Mediations with highly controversial parties are not possible

   On the contrary: Highly controversial parties can also be mediated.

6) Mediation is a waste of time

   Statistically speaking, the risk that a mediation ends without an agreement is low (success rate of about 70 %). Furthermore, the time invested in a mediation proceeding is also useful in case of a non- or partial-agreement. Therefore, mediation is not a waste of time.

7) Mediation is a dispute resolution procedure

   Mediation is also a dispute resolution procedure, but not only.

8) *Ex parte* communication does not exist in mediation proceedings

Wrong, the parties are free in structuring their own mediation procedure.

9) The mediator makes a proposal

Upon request of the parties, it is not excluded that mediators' proposals are made. In general, however, the mediator empowers the parties to find a solution themselves.

10) The "law" has no stake in a mediation

The law is a constant companion in mediation. Nevertheless, there is also room for other criteria such as the interests and needs of the parties.