



## It's all about the party... But not of the cocktails and canape variety - or at least not this time.



By Rebecca Clark  
In Place of Strife LLP

**A**s the former Head of Litigation of two erstwhile banks, I attended numerous mediations as the client party. Now as a full time mediator, I make it a priority in my mediation preparation to try to speak to the client - not instead of, but in addition to the client's legal representative. Why? Put simply, because mediation is a client led process.

It is often assumed that commercial mediation is less emotive, less pressured than family or workplace mediation. Sometimes this is undoubtedly the case; but not all of the time. Parties to a commercial mediation can feel under immense strain. This may be obvious where a party has a personal investment in a dispute: a disputed invoice, professional negligence or breach of warranty claim can have a very significant impact on a sole trader or small business's reputation, cash flow and long term financial position. However, it can also apply to representatives attending mediations on behalf of very large organisations: after all they may have lived and breathed this dispute for many years. They may have investigated it, advised upon it, reported upwards and obtained mandates in relation to it and have consequences stacked up behind the outcome of a dispute. Commercial parties can and often do become very personally invested in a dispute.

One of the reasons why mediation is so effective, is that it can be very empowering for a party: particularly where there is high emotional investment. In a complex legal dispute, the vast majority of correspondence and conversation takes place between solicitors. At a trial, the conversation usually takes place between a barrister and a judge. The party may be called as a witness, but in a highly controlled environment where questions

are asked and answered, usually as shortly as possible. Mediation, on the other hand, should be a conversation between parties. It is an opportunity for parties to say what they want to say about the dispute in a without prejudice and confidential setting. Importantly, it is also an opportunity to listen to what the other party is saying directly and without any filters. The benefit of this conversation, together with the realisation that the other party is human (at least in the majority of cases), often with views as equally strong as your own, is that it allows everyone to assess risk. And in my view, this is what leads to settlement.

So why do I want to speak to the party, as well as the legal representatives? I want to put the party at ease and address any concerns that the party may have about the process, the day and the preparation. I want to get a heads up on any emotions which may arise during the day, so that I can prepare properly (and prepare the party if appropriate). It is extremely useful for a mediator to get any insights into the drivers which might impact on negotiations during the day and of course all those insights are given within a comfort blanket of confidentiality. Fundamentally, I want to put the parties in the best possible position to have those empowering conversations so that the mediation has the best possible chances of success.

My advice as a mediator and former client is to have these conversations with your mediator. My preference is to have them before the day, but if this isn't possible, have them on the day. Make the party the focus of the preparations and who knows - there may be cocktails and canapes all round after all.