
Kluwer Mediation Blog

Why Mediation is Not Boring

Charlie Irvine (University of Strathclyde) · Tuesday, December 13th, 2011

This blog is inspired by a page from Monty Python's 'Big Red Book' entitled 'Why Accountancy is Not Boring.' (Apologies to those who have not come across the Pythons' rather English form of humour - for the original piece see <http://arago4.tnw.utwente.nl/stonedead/publications/sketches/accountancy.html>) Apologies too to accountants everywhere who, in the 1970's, were probably as easy a target as mediators are now. However, my serious point is this - we mediators appear to have a bit of an image problem. While we usually find this work fascinating and absorbing, when we try to put it in words it seems prosaic, even dull.

For example, the standard definition says something like this: 'Mediation is a process in which disputing parties seek to build agreement and/or improve understanding with the assistance of a trained mediator acting as an impartial third party.' This is from the Scottish Mediation Network Code of Practice: a scan of mediation organisations around the English-speaking world reveals similar efforts. They are technically accurate, but not very exciting. I prefer the French definition - 'processus amiable de résolution des conflits' - which translates roughly as 'an amicable process for resolving conflict.' (Definition from Centre de Mediation et d'Arbitrage - <http://www.cmap.fr/Les-solutions-du-cmap/La-mediation/Mediation-inter-entreprises/Definition-86-fr.html>)

Actually, the great alternative to mediation, litigation, fares little better: 'a process for resolving public and private legal disputes on civil matters through negotiation or through the courts.' (Law Society of England and Wales). But you don't need a definition of litigation. It belongs to the public realm, one of the key rituals that explain what a culture is. Litigation is embedded and reinforced in our imagination by movies, plays, articles and books. Who can forget Atticus Finch shaming an entire courtroom into sullen silence with his oratory? The idea of the heroic advocate speaking up for the little person runs very deep indeed. In the UK we had Rumpole of the Bailey, an irreverent, iconoclastic barrister who, over the course of 27 books and 44 TV shows, always managed to get the better of incompetent prosecutors.

I'm sure most cultures have their stories of the courts. It matters little that they usually concern criminal rather than civil law. The courtroom is a place of drama and high stakes, played out before the most authoritative representative of the State. Not for nothing do lawyers recognise that their clients want their 'day in court'. It is hardly

surprising that litigation remains the default response to disputes.

Why is this a problem? Well, when legal advisors neglect an option that is simple, speedy, cheap and humane, it becomes a problem. A case decided in Scotland's Court of Session last week illustrates this well. A developer had planned 27 residential units at the height of Edinburgh's property boom in 2007, but found himself thwarted by a requirement to build a ventilation duct on a nearby chip shop. The shop's owner demanded £75,000 to allow the work. That demand may seem unreasonable, but at this point the case sounded eminently suitable for mediation (or negotiation).

Is that what happened? Not at all. On the advice of his lawyers the developer raised a court action. However, subsequent advice suggested his chances of success were slim and he ended up paying £324,000 for the right to fit the duct. Worse still, the delay caused by the court case meant that, by the time the properties went on sale, the market had plummeted, leading to large losses. The developer then sued his lawyers and last week was awarded £1,135,000 in damages. I would be surprised if either 'side' was happy with this result, from a dispute almost entirely generated by the urge to litigate.

It is unfair, in a way, to single out these particular lawyers, when most firms in Scotland would take a similar approach. While many would prefer negotiation to litigation, mediation just doesn't seem to occur to them. So what can we do?

Maybe it's time for mediation to move beyond description to stories. I like the approach taken by John Forester in his 2009 book 'Dealing with Differences', which has the appealing sub-title: 'Dramas of Mediating Public Disputes.' Forester tells of leading environmental mediators and their work. At times a bit breathless, the book is nonetheless to be praised for its emphasis on narrative: 'Stories have to be told in order for reconciliation to happen.' (Forester, 2009, p.64). He casts mediators as 'canaries in the mine', a tonic to 'seductive cynicism' (pp.38/9). At the end of its broad sweep I was left with the impression of these mediators as skillful, modest, wary people who have seen a lot but keep their optimism intact.

It is not a novel however: so I issue a challenge. Where are the mediation novelists, playwrights or poets? Why are depictions of our work so prosaic? The reality is quite the opposite. Since I started writing this post I have had the privilege of conducting a mediation between two colleagues. Of course confidentiality forbids me to go into details, but when it was over and I walked out into the driving rain I felt the same sort of emotions I would have experienced during the most gripping piece of theatre. There was drama aplenty. So here's an excerpt from my imaginary novel:

'During the break the mediator took a pee. He glanced in the mirror and wondered if he'd missed anything, his mind scanning back over the previous hour in a desperate search for inspiration. All he could picture was the puckered face of A as he tried to speak to B, and B's utter inscrutability. He recalled one of his 'moves' backfiring, when he asked B to say what A did well. He could have cringed as B struggled to think of something, each second's hesitation confirming A's belief: "This man is my enemy and hasn't a good thing to say about me."

Suddenly it came to him. Apology. Of course; he had forgotten to bring it up. Before speaking to A, the mediator nipped back in to see B: “I hope you don’t mind me asking this, but do you think you have anything to apologise for?” B looked as uncomfortable as ever, but finally responded, “Aye, I didn’t know the half of what I’ve heard today, and I certainly didnae mean to hurt him.” Like manna from heaven this concession settled over the room, the clock ticking gently while the two men sat in silence.’

I’m sure you get the idea. It’s time for mediators to get under the skin of our work, to reveal the intensity and surprise of peacemaking. And, perhaps, people with a dispute will default to us. And, just perhaps, we will get beyond being seen as ‘worthy but dull.’

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This entry was posted on Tuesday, December 13th, 2011 at 5:15 pm and is filed under Apologies, Clients, Developing the Field, General, Language, Mediation Practice, Mediators’ Conduct, War Stories

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