

Of Turkeys and Christmas - The Role of Lawyers in Mediation

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Our local mediator's association here in the Northwest of Ireland recently ran a public seminar on mediation and the future of alternative dispute resolution. The two keynote speakers were two very distinguished lawyers, a High Court Judge and a Senior Barrister. As I looked around the room, it struck me just how many lawyers were in attendance. For the purposes of this blog at least, I am telling myself that they weren't just there for the CPD (Continuing Professional Development) points or see and be seen, but that the tide is finally turning and the legal profession is beginning to truly embrace mediation.

For a long time, in this jurisdiction as in many others, lawyers endorsing mediation was seen as the titular turkeys voting for Christmas, handing lucrative litigation work to mediators, particularly by barristers, whose role is more or less confined to court work. This intensified for some time at the beginning of the property crash here, as the main bread and butter work of every lawyer's practice, property transactions, dried up almost overnight. Alongside this ran a scepticism about a process as "soft" as mediation, particularly when it came to tough, high value commercial cases. Talking about needs interests and - God forbid - feelings, could just about be Ok in family disputes but had no place in civil or commercial disputes.

Having just been referred a commercial dispute by two of the top litigation firms in this part of the world is, however, incontrovertible evidence (for me at least) that this trend is changing. Increasingly, cases are being referred to me by lawyers, rather than self-referrals by clients. Judges are suggesting mediation more frequently, even in advance of the legislation which is pending encouraging them to do so. And, most importantly, lawyers are taking a genuine interest in what mediation is all about, how it works, and what role they have in it.

It is this latter point that, from my day to day practice, I feel is the most important for lawyers to understand, and the one that will, hopefully, in due course lead to a fully integrated dispute resolution system. There has traditionally been, and still is to a large extent, a misconception out there that lawyers have no role in mediation, that it is an alternative to litigation and therefore outside the realm of the legal system and its key players. Clients often look at me in surprise (and irritation) when I recommend their taking legal advice, and lawyers regard me with similar sentiments when I look for their input into, for example, a family mediation.

The simple fact is that the large majority of disputes take place within a legal context, or that there is some legal aspect to the conflict. Very often, any resolution to this dispute will have to be formally legalised, by means of a court order or contract. Most importantly, when people are being asked to make decisions and construct agreements around issues which are influenced by their legal rights and obligations, they must know what these rights and obligations are, anything else could not be deemed to be informed decision making.

For this reason, lawyers are essential in the mediation process, as advisers, support persons, constructors of robust, enforceable agreements and, most importantly, supporters of integrated dispute resolution, that is, having the knowledge and professional judgment to know what process is appropriate when.

Key to this idea is of course, adequate knowledge on the part of lawyers as to when mediation is suitable and appropriate, how the process works, and most importantly what their role is in the process. A workplace mediation from some years ago always comes to mind in this regard, where the mediation got very stuck, for quite some time, until the employee's lawyer had to leave for some time and the employee admitted that she did not want to follow the course of action her lawyer was recommending. By chance or fortune, the course of action she preferred was also the preferred option for the other side, so the mediation resolved within the next hour. The lawyers was doing nothing wrong, he was advising his client correctly, but the true nature of mediation, about balancing the legal advice with his client's interests, had eluded him.

I would submit that it is up to us as mediators, therefore, to "open up" the world and practice of mediation to lawyers and to work collaboratively with them in order to maximise the outcomes for our clients. Only then will mediation really become part of an integrated approach to resolving disputes, rather than a "mere" alternative.

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