

# Kluwer Mediation Blog

## Engaging Lawyers as Partners in Mediation

Joel Lee (National University of Singapore, Faculty of Law) · Friday, June 14th, 2013

I wrote in a previous entry about [Encouraging Mediation – Recent Developments in Singapore](#). Those developments referred to court-based initiatives that made it necessary for lawyers to bring to their clients' attention the possibility of turning to ADR to resolve their matter as well as the courts taking into account the parties' conduct in relation to mediation when awarding costs.

Of course, these court-based initiatives work as a “stick” and cannot by themselves be the whole picture. Sometimes, even without this stick, lawyers are interested in considering mediation but sometimes do not know how to go about functioning in that context. Put another way, they “want to” but they do not know “how to”. What typically happens then is that lawyers “import” into the mediation context the skill sets they are most familiar with i.e. litigation, which are most times less than helpful to the mediators and indeed the parties.

This of course perpetuates the stereotype that lawyers tend to be obstacles to resolving the dispute via mediation. If we were to attribute a positive intention to the lawyers in question (and the writer accepts that this may be naïve and knows that the world is not a nice place) that they are simply doing the best they can with the resources they have to protect their clients' interests, then it becomes obvious that there is value to seeing lawyers also as partners to the mediation and equipping them with the correct skill sets appropriate for mediation.

The reality therefore is that education and training is crucial to the goal of ensuring that lawyers are collaboratively engaged in the process of mediation rather than, whether intentionally or unintentionally, being a hindrance.

Singapore has recently taken a step in this direction by running an inaugural workshop on Mediation Advocacy. The workshop was a collaborative effort between the Singapore Mediation Centre, the Primary Dispute Resolution Centre of the Subordinate Courts and the Law Society of Singapore.

While some readers may be from jurisdictions where such workshops are passé, it is important to highlight that the mediation movement in Singapore is relatively young compared to jurisdictions like North America, England and Australia. Further, to the writer's mind, it is also significant that this initiative is being collaboratively promoted by the courts, the service provider and the professional body representing lawyers.

While it is not the purpose of this entry to provide a report of the workshop, the writer would like to distill a number of learnings that the participants and trainers made in the course of the

workshop.

First, a properly trained mediation advocate prepares differently from a litigation-minded advocate. It is trite that a litigation-minded advocate will look for and filter information that is relevant to preparing a case for court. This includes facts that will build the elements of the cause of action and of course the evidence that will support the case. Matters like a client's practical concerns and ongoing relationships are simply irrelevant. Of course, it is not irrelevant from the perspective of mediation and in fact is crucial to the mediation endeavor. A mediation advocate therefore looks for information that can help his/her client resolve the dispute in many contexts. Needless to say, this will fundamentally affect how one interviews the client and how we manage the client's expectations.

Secondly, the information that we derive from the client will affect how we assess our client's case. The litigation-minded lawyer will filter information from the client so as to assess the case's success in a court of law. The mediation advocate will filter for information that will help the advocate determine which form of dispute resolution would be suitable to resolve the client's matter taking into account both legal and extra-legal considerations. Put another way, going to court may actually hurt one's client more than simply doing nothing. Stated explicitly, it seems obvious and it is constantly surprising that lawyers commit their clients to a process that sees the client getting very little out of the process and in fact being out of pocket.

Thirdly, a mediation advocate will include in pre-mediation documentation different information that a litigation-minded advocate may provide. As mediators, we have probably had the experience of receiving documents from lawyers that are very similar to, if not exactly the same as, documents submitted to the courts for litigation. This of course, stems from a non-appreciation of the differences in paradigm and process between litigation and mediation. A mediation advocate will provide information that includes practical, relational and emotional matters that may well bear upon the successful resolution of the dispute at mediation.

Finally, there is a clear difference in how a litigation-minded advocate and a mediation advocate behave in mediation. Understandably, a litigation-minded advocate will adopt a siege mentality and will seek to protect his/her client's interests, which by definition is mutually exclusive with the interests of other party. This is your typical win-lose mindset. A mediation advocate will still seek to protect his/her client's interests but his/her definition of "protecting" and "interests" will be very different. There is no mutual exclusion of interests and it is entirely possible to come to an agreement where both parties can get what they want.

These learnings are of course not comprehensive. But they seem sensible and a good start for lawyers striving to be mediation advocates in Singapore. Anecdotally, change has already happened. One of the trainers had the occasion to mediate a matter a week later and one of the advocates was one of the participants of the workshop. His report was that there was a clear difference and despite the lawyer of one party not having a clear idea of the role of a mediation advocate, having one lawyer who did have a clear idea made a tremendous difference. The future looks bright indeed.


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