

Kluwer Mediation Blog

Walk a Block in My Socks, Walk a Mile in Their Shoes...

Geoff Sharp (Brick Court Chambers / Clifton Chambers) · Tuesday, July 2nd, 2013

Not so long ago I was a claiming *party* as part of a group of plaintiffs in the stead of my elderly parents in a multiparty, multimillion dollar mediation.

Now, I mediate around 120 mediations every year as a commercial mediator here in New Zealand so it was with a mix of personal apprehension and professional curiosity that I approached mediation day.

On one level my aim was to immerse myself in the party role to find out what it was truly like to be at the table with skin in the game, to have an important part of my future depending on the outcome of the mediation. I had never had such an opportunity and doubted that I ever would again. On another, it was to get the best result I could.

But focussing on the former, did the experience make me a better mediator?

Well maybe, but first some thoughts around what it *felt* like to be a party in mediation.

In some ways, I suppose it was like a doctor going into hospital for an operation - I was ridiculously apprehensive, I slept badly and was up before dawn. I just knew too much about how things could turn out to be entirely comfortable.

My overriding concern was, just like the doctor who is fascinated by the disease but couldn't care less about the patient, the process was going to be all about getting settlement without too much regard for what that might look like and how sustainable that was given what had been lost.

To that extent, and even with a decade of full-time mediation behind me, I felt an element of *powerlessness*. Partly because the defendant group included large and powerful companies and public entities but also because the option of not settling, both for my elderly parents and the plaintiff group as a whole, was horrendous with litigation likely to go on for years. That was interesting as, from the rarefied atmosphere of the mediator chair, the table always seems to be very egalitarian - a no harm space that if things don't work out you can always go to the next forum. Well yes that's true, but now I have a whole new take on mediation as THE day in court.

And do you know? I caught myself doing the unthinkable - *vilifying* the other side for

no good reason. I'd like to say it was part of plaintiff groupthink but there is no doubt I assumed a healthy distrust of the motives on the other side of the table.

At a more clinical level, as a party;

1. I was very sensitive when the mediator got some *historic matters wrong*, even when in hindsight that history was not central to the mediation. I also noticed that I went into far too much detail about the dispute - much more than I would had I been mediator. I took this to be something I see often from my mediator's chair - a strong need for parties to tell their own version of events without distinguishing the relevant from the irrelevant - frankly, it all felt relevant
2. It really is true - it sometimes is not all about the money, even in a money dispute - so I was surprised at how important *non-legal/non-money considerations* were to my thoughts about resolution. I had the spoken and unspoken (and conflicting) expectations of an extended family on my shoulders and these in the end loomed large
3. I needed *leadership* from the mediator - I was very comfortable with the mediator verging on the directive in terms of the structure or architecture of the discussion - who the mediation needed to hear from and when (experts etc) however I was very sensitive to any indication that the mediator preferred one of view over another. To me, that day and by virtue of his position, the mediator was cloaked in real authority and should have used it more
4. I would have liked the mediator to work harder to get us away from looking through a legal lens
5. I was struck at the *lack of connection* with the mediator - I would have liked to feel *something* (which if I had to guess would have meant more listening) which in turn would have meant I trusted the mediator with more information than I did
6. I felt awkward during the breaks and would have preferred the mediator not abandon the room when they happened - I did not want shared informal time with the defendants
7. I was tired - much more tired than I am as a mediator and it came on much earlier in the day

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