

Kluwer Mediation Blog

Contrasting mediations....richness awaits.....

John Sturrock (Core Solutions Group) · Thursday, May 29th, 2014

I write here about two contrasting experiences which have, for me, underscored the richness of the mediation process.

In one mediation, involving business partners with an ongoing management issue, one of the protagonists (A) suggested bringing in another partner (D) who was not perceived to be a part of the present problem, simply to observe, be a resource to the participants and help balance numbers as A, a more junior partner, felt outnumbered by B and C who held senior positions.

D made clear at the outset that he did not wish to say much and that he did not wish to become embroiled. However, a private meeting with him elicited much information that seemed helpful going forward. Rather than the mediator conveying the information to the others, it was agreed that D would do so himself in the presence of the mediator. As this was being done, D learned much about the dispute between his colleagues and began to see things differently.

It became clear that A, B and C were all benefiting from D's contributions to the discussions, both privately and in plenary session. After a while D felt able to summarise what he had heard from each of the others and to put it in context.

By mid-afternoon, the mediator had explicitly handed over the chairing of meetings to D. The mediator remained as observer, coach and occasional interjector. However, to his surprise, D found himself effectively mediating between his colleagues. He was very good at it, showing a natural aptitude and a quick assimilation of some of what the mediator had been doing earlier.

The outcome was that the partners now had someone, in whom they had confidence, who could help them take the process of internal discussion forward. While the mediator would remain available to help, the day not only guided parties towards a possible resolution but also built internal capacity to deal with changes and decisions going forward.

In the other mediation, the mediator was required, as a condition of the parties agreeing to mediation, to undertake to provide confirmation to one (the likely paying) party, if requested to do so, that any settlement reached was "fair and reasonable". This initially troubled the mediator who saw his role as facilitating discussions and helping parties to reach a settlement that worked for them. Whether it was "fair and reasonable" was not the point nor was it a matter on which the mediator could with any confidence offer a view anyway, given his limited knowledge of the many issues.

With a better understanding of the particular reasons for the request, an acceptable compromise wording for the mediation agreement was reached and the mediation itself proceeded. Towards its end, the paying party made what was described as a take it or leave it, final offer. The other party was not happy and felt that the paying party had not paid proper attention to, nor shown respect for, the detailed claims information it had provided. The mediation was adjourned to enable the other party to consider the offer.

During the days that followed, the mediator reflected on all that he had heard and seen. He felt that the parties were not far apart but that the recipient party would not be able to accept the offer made. He speculated about what he would say if, hypothetically, the offer was accepted and he was asked to confirm that the settlement was fair and reasonable. He realised that, applying only his limited knowledge, he would find it difficult to do so.

He drafted an analysis of the mediation, recording all of the points which were not confidential to one party only and which influenced his perception of the offer. It was a very carefully worded document which observed that, in the present circumstances and particularly having regard to the absence of a detailed response by the paying party to the detailed claims or a full explanation of the offer, and based solely on the limited information received by him from the parties in the course of the mediation, he considered that the settlement proposal currently made was “not one which he could presently assess as fair and reasonable in all the circumstances.”

Accordingly, on this limited basis, he expressed the view that the paying party would be justified in increasing its present offer. The paying party did just that and the case settled very soon thereafter.

There is a richness in the (infinite?) diversity of what mediation offers. Our job, as mediators, is to find that richness and offer it to all who can benefit from it.

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