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# Kluwer Mediation Blog

## Don't Let Frustration and Impatience Ruin The Prospects of a Settlement

Christopher Cox (Borneo Martell Turner Coulston LLP Solicitors) · Monday, October 31st, 2016

Tackling the cause of a dispute requires attention to detail. Often the real problem is lost in translation. Turning the fall out into legal definitions is the first step but it most certainly is not the most important as the law is only a component in a dispute and rarely provides an answer to it.

There is a tendency to avoid problems and not make an issue out of them. Many problems mercifully are resolved with give and take. But when matters have gone beyond that because of some breach of trust, the need is to grasp the nettle and “stand up for your rights”.

The range of help mediators offer will vary. Just engaging one is in itself a welcome and positive relief to parties and their legal advisers. Both now have an ally they can work with in common cause, to get a settlement.

Often the tone of voice from the mediator or the quizzical expression and doubting glance says it all...”are you sure you are reading this correctly...” A mediator can deliver very simple messages and provide the parties with a secure and structured process to deal with the problem methodically. Most importantly to help the parties to be careful with each other.

The mediator will start with an expression of reassurance and confidence before leading to a challenge. The mediator will warn that to solve the problem will require a deep resolve. The mediator will invite each side privately to review and objectively re-examine and reassess choices they have and their consequences.

There is always big pressure if it's your dispute to “solve the problem”, to “wipe the slate clean”, to “turn over a new leaf”, to “call it a day”, to “turn the other cheek”, to “let bygones be bygones” or “to get even” and to “sue them”. The dispute takes over your life; you begin to see everything in terms of the dispute.

Your wife says “you are becoming obsessed”. You on the other hand tell your lawyer that “remember, he's a sociopath, whatever he wants, you do the opposite” and “if his lips are moving, he's lying!”

It takes a great deal of self-reflection and discipline to engage in an objective discussion with your advisers. “What if we said or did that? Would it make matters better or worse and what if they will not speak to us? What is the best way of ending all of this? The mediator will stimulate us to think like this.

Regrettably, in extreme cases, it is not until after a party has tried every move to get its way and failed that they realise how a prolonged impasse is corrosive. We are in most cases persuaded to try and settle.

No amount of time is ever wasted in trying to reach an amicable settlement and now it is time to talk. During the talking, impatience and frustration are the enemy. The mediator knows that progress takes time and patience. The mediation process of honestly grappling with the issues should continue until he or she says it has run its course.

A “u” turn in a negotiation is infuriating. It’s tempting to rant and rave when in reality it’s just an indicator of the difficulty of contemplating a change and to accept that a compromise looks unlike the one you want. Practically it means that more time is needed to contemplate that change beyond the day of the settlement meeting or mediation.

So the next question becomes, “Do you see any value in keeping the mediator engaged if we cannot reach a deal today?” It may be too difficult to go through all of the information and reflection about what a compromise might be in one day of mediation. Sometimes the options only come about as a consequence of the mediator helping each side to reflect on what they need as opposed to want. These can be taken away for further thought if settlement cannot be concluded on the day. Then the parties have an ongoing commitment to a negotiated outcome and the day has been useful but the process is not over.

Mediation, like any other form of negotiation, means coping with the possibility that on a Monday a party will agree one issue but by Tuesday morning that has completely changed. But how you react to the “u” turn is critical to keeping the negotiation process alive. Comments such as “a complete waste of everyone’s time” or “a day in my life I will never get back” are not a view of what is actually taking place.

As the mediator leaves it (the impasse issue) with you as its your problem not his, your lawyer may revert to legal advice and reinforce what you have already been told; it takes pots of cash to succeed at law and the chances of that are 40% against you and you can’t afford the gamble.

It is distressing to experience a “u” turn or an impasse but don’t make the mistake of comparing it with ongoing litigation or a trial and the ramping up of costs from experts and counsel. So be careful and reflect with your advisers and the mediator because “u” turns and impasses are progress moments not “dead ends.”

Most settlements get mixed reviews; one side pays more and the other takes less and when you get home your other half says “My, you look so much happier” and you might say to your lawyer “I hope we were not too ghastly as clients... What a difficult job you do!” and nobody remembers what the mediator did.

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The graphic features a black background with white text and a circular icon. The icon depicts a magnifying glass over a group of stylized human figures, representing a search or investigation process. The text is arranged in a clean, modern layout with a horizontal line above the main heading.

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