Mediation Cultures Are Relative: the Examples of Mediator-Lawyers, Caucus and Joint Session

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This post is in part a roundabout response to Constantin-Adi Gavrila's recent Kluwer mediation blog, in which he writes about a conversation with a friend who was convinced that all mediators need to be lawyers. The argument goes that to mediate you need to be a qualified lawyer, have legal knowledge of the disputed matter, and be able to evaluate it from a legal perspective.
To reframe this: "mediation" by non-lawyers would therefore not be mediation.

I was asked not long ago if I would mediate in a dispute in which the parties were looking for an experienced mediator-lawyer who had legal knowledge of two very different jurisdictions, specialist industry knowledge, and was not a national of either of the countries where the two companies were based. I failed to qualify on most counts. Given that the parties had defined their mediator so closely, that was certainly for the better. I would have had every chance of disappointing high expectations. This client clearly felt that their mediator must be a lawyer, and that is perfectly fine.

Last month I held a training day in intercultural awareness for mediators at the master's in mediation at the European University Viadrina in Frankfurt an der Oder. The aim of my intervention is to help trainees, many of whom have already done mediation training and have mediation practice, to reflect on some of the cultural challenges that mediation may throw at them. One thing I try to do there is not to focus only on situations where the parties bring different cultures into mediation – such as when a German mediator might be mediating with parties from China and the USA, who may have quite different approaches to conflict. In that case, trainer and trainee might typically work on identifying the "culture" of the "other," working on understanding difference. There is plenty of food for thought in considering these scenarios, but I prefer to look at their own mediation culture that my trainees have learned and ask them to challenge their own assumptions about mediation and conflict resolution. Together, we ask if the ways in which we learn to mediate are the only ways that mediation is expected to be done around the world. My premise here is: if we are able to see our own methods and mindsets as relative, then we will be more flexible when we are challenged by cultural situations that we cannot immediately interpret.

I know from my own training and experience that the German mediation model is based very much on the parties gaining new perspectives through the mediator facilitating listening. If the mediator listens actively to the parties, then they will also listen to each other, initially simply by dint of being in the same room. This focus on mutual empathy goes deep, but can it also happen if mediation takes place largely in caucus? Many mediators around the world work with caucus, which the German model barely acknowledges. In a simulation, I therefore sometimes offer caucus mediation to my trainees, and as we were preparing it this time around, one of them said rather indignantly "That is not mediation to me." This lady is an experienced judge who mediates cases that she is not adjudicating within German court mediation programmes. I asked her to explain her view of mediation. Not surprisingly, that was centred very much on improving relationships and gaining mutual understanding.

If caucus mediation is not mediation, then much of what goes on in mediation around the world is not mediation. If mediators must be lawyers, then much of what goes on in mediation around the world is not mediation. If we reduce mediation to our own experience and expectations of it – what I would call our own culture of mediation – are we limiting the scope of our own profession?

I see mediation as any process of communication in which a third party assists at least two others to attempt to resolve a dispute or conflict and in which that third party has no formalised decision-making power concerning the disputed matter. (I know that this definition can get fuzzy at the edges, and readers are welcome to take issue with the detail.) That will include mediation in joint session and mediation in caucus, mediation in which the mediator is a lawyer, and mediation conducted by non-lawyers – such as children in school-sponsored mediation programmes. They are certainly not (yet) qualified lawyers.

That last example may seem a little off-topic, but it shows that mediation can be used in many fields of society, and a view that mediation can only be conducted by lawyers fails to see the diversity of mediation. The setting envisaged by Adi and his friend is clearly mediation under the shadow of the law, or mediation that explores ways to avert court proceedings in a dispute that involves legal issues. Here too to say that the mediator has to be a lawyer is narrowing down our business. My expert witnesses here are Roger Fisher and William Ury, who write in *Getting to Yes* that the success of any negotiation can be measured by what it achieves on the substantial issues, by how efficient the process is, and by what it does to relationships. Transferring this idea to mediation, I like to think of the *what* and the *how*. *What* we do is facilitate conflict resolution. *How* we do it may depend on what process is needed and what is expected, and also on what we are trained or culturally programmed to offer. The process is flexible: sometimes a lawyer might be the best choice of mediator, sometimes caucus the best way to communicate. Other times, it might be better to choose a non-lawyer, sometimes joint session. At all times, the potential mediators themselves need to be clear on what they can offer and what they cannot – and thus when they would turn work down.

Mediators and mediator-lawyers talking to potential users or to people like Adi's friend should keep the options for mediation open, while also respecting the needs of clients for mediators with specific skill sets.