
Kluwer Mediation Blog

“What The Parties Really Want” – Interview 1 – Rebecca Clark

Bill Marsh (Editor) (Bill Marsh Mediator) · Saturday, November 4th, 2017

Like all businesses, mediation ultimately depends upon (and needs to reflect) what the users want from it. That doesn't of course mean that theirs in the *only* relevant perspective – mediators also have views on what the process can and should offer. But at the very least it's a vital part of the equation (I blogged on this question a couple of years ago in [“Who's Running The Show?”](#))

In this short series of blogs, I have set out to interview some experienced business *users* about what they really want from mediators and mediation.

And where better to start than with Rebecca Clark, now a full-time mediator, and formerly a large-scale user of mediation, in her capacity as head of litigation at UK Asset Resolution Ltd (formed to facilitate the orderly management of the closed mortgage books of both Bradford & Bingley and Northern Rock Asset Management, which included a significant asset recovery exercise).

Bill: Rebecca, you were often a client in a mediation. What did you look for from, and in, the mediator?

Rebecca: My first priority was to instruct someone clever and well prepared. Many of the cases that we mediated were legally and factually complicated and the mediator needed to be able to pick up the issues quickly and then be prepared to discuss them. It is frustrating and time consuming to spend time on the day of the mediation explaining the basics of your claim to a mediator. But in my experience, it also affects the effectiveness of the whole mediation process: if the mediator doesn't appear to understand or appreciate the issues and arguments on merit, then it is much easier to dismiss the reality testing done by that mediator. It doesn't fill you with confidence that the mediator will be putting your case across convincingly in the other room, or reality testing the other party effectively either. If confidence in the mediator is lost and you don't feel the mediator is working with you, then the whole mediation becomes much more difficult. As a team, you can quite easily disengage or feel disconnected: that you are working alone to reach settlement, rather than as part of a mediated group process.

My second consideration was mediation style. It will come as no surprise to those who know me that I would not favour a mediator with a purely passive, facilitative style! If I asked the mediator “what do we do now?”, I didn't want to hear “well, what do you want to do?”. I wanted the mediator to add value to the resolution process – to actively help us reach settlement. After all, if the process was easy and we all knew what needed to be done next to reach settlement, we wouldn't need a mediator at all.

Bill: Can you give us some insights as to how you went about the process of mediator selection?

Rebecca: The first decision was whether we needed a subject matter expert, or someone with very considerable experience in the relevant area of law. I appreciate this is a “hot potato” in the mediation world, but as a client my answer to this was invariably yes – mainly for the reasons set out above around effective reality testing and value adding. In some of the mediations we did, the mediator was instrumental in helping to design the structure of very complex settlements (without straying into the realms of being evaluative). I appreciate that some mediators would feel uncomfortable with this, but from my perspective as a client, it was truly invaluable.

Secondly, it often felt “safer” to use a mediator that we had used before, provided of course that he or she had done a good job. UKAR was a relatively unique organisation with a brief to maximise return for the UK taxpayer: ultimately all decisions came back to that requirement. It saved time and effort if the mediator had experienced this before and therefore understood our decision making process. It also made for a less stressful day if we knew that we liked the mediator and had already built up a good rapport. The flip side of this is it was very important to us that the mediator wasn’t complacent, or gave the impression of “going through the motions”. Mediations are really hard and so we wanted a mediator who was energetic, enthusiastic and inventive. We were less than impressed if we saw the mediator sitting in his or her room for long periods of time, especially if there hadn’t been good communication about what was (or was not) happening.

Finally, there was an element of considering how a particular mediator would react to or deal with certain personalities that might be present at the mediation, whether on your team or your counterparties’. Was a particular mediator robust enough to stand up to a known “bully”, or capable of dealing with strong emotions?

Bill: As a client, how much say did you want to have in the way the process unfolded? And were you able to have that say?

Rebecca: I wanted a say (again, no surprise to those who know me!) but I also wanted to feel that the mediator was in charge of the process. I was always quite conscious of being in control of the outcome (at least from our team’s perspective), but not how we were going to get there on the day.

Bill: How has your experience as a client affected the way in which you mediate now? What were the main lessons learned? And how has it helped you in relating to clients as a mediator?

Rebecca: What I understand from being a client is how much emotion is caught up in dispute resolution. This is on at least two levels. In my experience, corporations, as entities, get emotional about disputes. Some of the matters we dealt with involved allegations of fraud perpetrated on the former banks by third parties and there was very considerable strong feeling from the Board about getting a just and fair result. That emotion really impacts on preparation for the mediation, especially in terms of getting mandates and increases pressure on the people representing that company on the day.

However, there is also emotion on a more personal level. The individual clients representing companies at a mediation and their instructed solicitor(s) are emotional in their own right (albeit in different degrees depending on personality). After all, they are the people who have lived and breathed the dispute for many months, even years. They have read the letters designed to “push buttons”. They have done the disclosure, worked on the witness statements, reported up on the

chances of success and discussed and agreed any mandate: they have a considerable personal “self-esteem” investment in the outcome of the dispute. As a mediator, I try very hard to take account of that emotional component and how it might manifest itself in conversations before the mediation, or on the day itself.

As a mediator, I always try to speak to the client direct before a mediation (with any instructed solicitors’ agreement, of course). Although it might be the instructing solicitors who produce a shortlist of mediators and then engage them, it is ultimately the client who will decide what settlement he or she can live with. Any insight you can get into what the client is thinking (for example emotionally, financially or reputationally) before the mediation itself, is helpful. I have become very conscious of the need to be heard. Listening to the client’s story of the dispute before the mediation day is invaluable. What that person chooses to tell you when you ask them to “tell me about the dispute” is very instructive. Very rarely does the client focus on the legal merits. Whatever I am told makes me better prepared on the day, but also meets some instinctive need of that client to be heard. Sometimes, this results in a release of emotion before the day, enabling that person to approach the mediation in a slightly different frame of mind. As a minimum, I have built up a better rapport with that person before the day starts and we can “hit the ground running” on the day.

Bill: Finally, wearing your client and your mediator hats, what can mediators do better?

Rebecca: Two very easy things, which some mediators, but not all, do as standard.

Firstly, focus on the client as well as the instructing solicitor. Find out about the individuals who will be attending: how familiar are they with mediation? First time private mediation users need very different support to those who attend mediation weekly. It is just as frustrating to be patronised as it is to be left behind.

Secondly, it really makes a difference when the mediator manages time well – even if that’s popping into a room to say that there’s no news, but the other side are working hard on something. Mediation is such a long, hard day. Anything you can do to keep momentum going is invaluable.

Conclusion

So there you have it. My first interviewee wants (or wanted, as a party to mediation) a mediator who is well-prepared, with strong process- and people-management skills (including about timing), experience in the legal issues at hand, a recognition that commercial disputes can be no less “emotional” than other kinds, and a willingness to engage fully with parties as well as their advisers.

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