“What The Parties Really Want” – Interview 2 – Mike McIlwrath

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This is the second in a short series of blogs interviewing regular users of mediation about what they really want from mediators and from mediation. We kicked off last month with Rebecca Clark.
This month, I have the pleasure of interviewing Michael McIlwrath, who has been the head of litigation for GE Oil & Gas since 1999, a company that in July 2017 merged into Baker Hughes, a GE Company (BHGE). Mediation has played an important role for Mike’s company in resolving disputes around the world for this technology giant, in all kinds of claims, and in all kinds of places. Mike is also a member (and past president) of the board of directors of the International Mediation Institute, and in 2016-17 may have been visible to many readers as the chair of the Global Pound Conference.

Bill: How do you make the best use of any opening joint meeting in mediation?

Mike: I try not to make any openings, so may I rephrase your question to “what’s the best I’ve seen”? That would be about 10 years ago by Gavin Slessor, an employee of ours in Aberdeen, Scotland. It was one of those “impossible to settle” cases. Gavin had lost an arm and leg in an industrial accident some years before we acquired his company, and the litigation was already pending at the time of the acquisition. Gavin sent a letter directly to the CEO of my company, against the advice of his lawyer. I consider that letter a form of opening statement, because it started the ball rolling towards mediation and set the tone of everything that came after.

At the mediation, Gavin gave the most heartfelt opening that I’ve ever seen in a mediation or in courtroom, about his injury and his life during the pendency of the litigation. The mediator was Tony Allen of CEDR, and he stayed engaged for weeks after the day of mediation, until we eventually settled. Gavin is today a happy, respected, and productive employee. I’m not the only one who says we would not have been able to settle without his courageous letter and opening statement; Gavin himself says that he could not have settled without having been able to “say his piece” at the mediation. As I’ve learned from Gavin, an opening can be very effective if it is sincere and from the party.

Bill: Mike, what do in-house counsel want from providers of dispute resolution services?

Mike: Thanks for letting me answer a question you had not posed, and my apologies for breaking down the fourth wall of your interview. As an in-house counsel you hear this often, and I can appreciate why it is asked. But if we flipped it and instead asked about what mediators think of in-house counsel, most likely you would point out that there are many types of mediators and they will have different opinions based on their different experiences.

Similarly, in-house counsel like me come from different backgrounds and we work for all kinds of companies that evaluate us differently. Myself, I’m a specialist in dispute resolution for an industrial and technology company in the oil and gas sector. There is a lot packed into that sentence. Take just the first phrase, “specialist in disputes”. That’s a role only companies a certain size can afford.. I’m measured on my contribution to productivity, i.e, margin and operating profit, and as a result I tend to see disputes as presenting opportunities. Contrast this with the single lawyer of small company who only has one or two significant cases among many responsibilities. She may see disputes as representing risks that can only get worse.

Bill: You have appointed and used many mediators. What are the key attributes, approaches or mind-sets you look for in a mediator?

Mike: Short answer, no case is the same. An ideal mediator would know how to adapt the process and their approach to the dispute and the parties.

Longer answer takes into account that the hardest part of mediation, especially for international cases, is just getting there in the first place. So we will want someone we can trust who will be trusted by the other side.

For example, we had a large case with a German company. Their general counsel suggested mediation even though he himself had never been in a mediation; he had just heard it could be useful. To help him, we proposed a well-known German mediator we knew from past experience to be versatile in his approach. The GC, by being able to speak informally with the mediator in advance, was comfortable at the mediation and it went well. He later told me he is now a convert… his company will mediate all their cases from now on.

After that there are some preferences as to style. Personally, I have never had good experiences with evaluative mediation, even in North America where it is more practiced. I try to avoid mediators who are known to pressure parties with their views of the merits.

Bill: How do you go about selecting mediators?

Mike: I’m increasingly comfortable leaving appointments to institutions. In most cases, they can better match mediator and dispute than if we try to agree with the other side. We do specify the things that matter to us: certification, training, and relevant experience.

A frequent problem when trying to agree names is quality, which is not something to be taken for granted. There are still many lawyers or arbitrators in the world who believe they can act as mediators without any training or understanding of what it entails. I have seen this do real damage in cases, fanning the flames of litigation rather than promoting settlement.

In fact, GE joined IMI because we believe there is a need for international standards of quality. Even for a large international company like ours, where we can ask each other for recommendations, quality is still a challenge. And, of course, it helps to be part of a larger organization like General Electric, where we can bounce around names. You can believe someone is a great mediator when colleagues say, “she/he’s a great mediator!”

Bill: What do you do when your counter-party suggests a mediator who seems to you to be unsuitable?

Mike: We might respond diplomatically, asking why they have suggested that person. And then we might propose some names for them to consider that we think we both might like. Actually, Bill, you were appointed in at least one case where this happened! We gave the other side a list of IMI-certified mediators and said we are happy with any of these, or they should feel free to propose other candidates from the IMI database. They chose you (from our list). Responding with options and flexibility usually works.

Bill: What do you think mediators are most prone to misunderstanding about what parties really want from a mediation and a mediator?

Mike: I don’t want to be guilty of assuming all mediators are the same or even prone to make the same mistakes! That said, there are some common pitfalls. One is not doing enough to ensure the parties come to the mediation with a realistic goal. I do not think this is laziness on the part of the mediator, but that they give us parties too much credit for knowing what we want.

Another pitfall is doing the next mediation like you did the last one (or the last 200). For example, a mediator in a complex or international case who tells the parties, “I will not hold any joint session because I think it is a waste of time to let the lawyers pontificate” or “I will not have any separate caucuses absent a very special need for one”. These are extreme examples, but I’ve encountered both in mediators who are well-regarded . Their self-imposed rules blinded them to the needs of the dispute.

Bill: Finally, raise your magic wand and make one change to the way mediation is practiced around the world. What is it?

Mike: More frequently!

Seriously, I’m a strong believer in mandatory mediation. I’ve seen time and again how a contractual requirement often drags a party kicking to a mediation, but they still end up settling. The few arguments against mandatory mediation of commercial/civil cases are neither convincing nor based on the empirical evidence, which, to the contrary, shows that it can be very effective.

So **in conclusion**, it seems that Mike is primarily after mediators whom both he and his counterparts can trust – which to him primarily means certification, training and experience. It clearly – and unsurprisingly – helps to be able to “bounce around” names amongst those who have already used particular mediators, something which I know many law firms do as well.

On the flip side, he is looking to avoid mediators who:
– fail to encourage parties to come to the table adequately prepared and with a realistic goal in mind; and
– treat all mediations the same.

Reflecting on this last point, let me issue this challenge to all mediators, especially busy ones. How much are we stuck in the rut of doing things the way we always do them?