

Kluwer Mediation Blog

It's Not Just About the Money and Other Food for Thought for Mediators

John Sturrock (Core Solutions Group) · Wednesday, April 10th, 2019

A number of recent mediations have reaffirmed some essentials which I share here in the hope that they might be helpful to others:

It's not all about the money. Mr A had a very substantial claim against a bank running into hundreds of thousands of pounds Sterling, most of his life savings. When I asked him, early on, what he needed from the mediation day, he replied "I'd like them to apologise". The bank's advice was that it had done everything it could and that it had no legal liability. A familiar situation. However, the bank's representatives found a way, authentically, to convey their deep regret that Mr A had experienced losses. They said they would do everything they could to ensure it would not happen again.

Mr A was very pleased with what was said. The matter settled for a modest sum overall. The Bank and Mr A conducted the final stage of the negotiations themselves, with support from advisers. Both parties left the mediation process satisfied with the outcome.

When wheels have come off, re-engage the key players. Day two of mediation was designed to build on day one several weeks earlier. However, the parties had not made the expected progress. In private initial meetings, one party expressed frustration and a feeling of lack of respect being shown by the other party – and a desire to conclude the process and proceed with litigation.

The engagement between the mediation days had been at a level below the key players. When the principals came together in a private meeting with me, they were able to hear from each other about their mutual frustration with what had happened. They agreed that they needed to oversee the process.

Much progress was then made in joint meetings in which the subordinates addressed the main issues under the watchful eye of the principals. The less senior people (including professional advisers) behaved in a different way with each other as they explored why they had not made progress, where the difficulties lay, and what needed to be done to make faster progress. The most senior people watched, asked questions, summarised, and provided guidance and leadership. The parties probably achieved more in half a day than for several months.

Get under the surface. In a long-running claim worth many tens of millions, the decision-makers appeared to have reached the end of the road. In an effort to find a way forward, we spent four

hours going through my ‘Questions for a Difficult Meeting’ questionnaire. The parties prepared privately first and then, meeting together, they alternated in giving their responses. The nature of the questions is such that they needed to dig deeper to look for answers. This opened up new levels of understanding about pressures, outside constituencies, alternative courses of action, changed realities and validation required for amounts sought. It led to a further discussion about possible settlement figures.

Ask questions. Similarly, in a difficult mediation involving very senior directors in a company, impasse had been reached. Or so it seemed. But the more questions I asked, about their own ambitions, what others would say about them, how they might have contributed, what they might change or do themselves to make a difference, what questions they needed to ask, what pressures each was under, what they might be missing, and so on, the more they could see for themselves what needed to happen. I am a great believer in party autonomy. Questions, used well, compel people to take responsibility.

Use a worked example. Many of us struggle with figures. Few of us really get to the bottom of what the numbers are telling us – or might tell us if we understood them. In a mediation involving a business partnership in which property was being divided up in a separation, the lawyers had spent several hours trying to explain what it all meant. Eventually we got the flip chart sheets up and the parties themselves began to map it all out. It wasn’t easy as there were so many variables around land valuations, compulsory purchase possibilities and development proposals. And the taxation aspects were uncertain. However, for over an hour, we worked it through.

One of the parties was moved to say: “The figures are so much easier to understand than the lawyers’ words”!! Enough said. A satisfactory deal was done.

Encourage forward-looking momentum. When the going gets tough, maintain a process and be clear what that is – and try to ensure that the parties continue to commit to it. It has been said (by Deepak Malhotra in his excellent ‘Negotiating the Impossible’): “Stay at the table even after failed negotiations – if you are not at the table, you are on the menu”.

The job of the mediator is to (a) try to offer the best possible process for the circumstances; (b) keep in touch with and support parties even when there seems to be an impasse and (c) be prepared for a window of opportunity to open up, perhaps unexpectedly. Keep looking for it. In my experience, it often does. And we rediscover that most people, whoever they are, wish to resolve their disputes by agreement.

Provide food. Continuing with the idea of eating, it is encouraging to have endorsement of the value of bringing all the participants in a mediation together to share food. I do this whenever I can, with everyone meeting for breakfast after my initial private meetings. A buffet lunch can also be useful where people can choose to linger and chat if they wish.

I find it is useful to explain why I am doing this and I can now provide academic support that it works: see ‘[Shared Plates, Shared Minds: Consuming From a Shared Plate Promotes Cooperation](#)’ by Woolley and Fishbach, Association for Psychological Science 2019.

A similar point is made [here](#) about the important role of glucose levels in decision-making.

So that will be pizzas for the early evening final push for resolution then! It is all food for thought...

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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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