
Kluwer Mediation Blog

Don't Sit On Your Ass[ets] - Part 1: The People

Bill Marsh (Editor) (Bill Marsh Mediator) · Saturday, May 4th, 2019

This is the first in a short series of how parties and advisers can best deploy the “assets” at their disposal in a mediation. Naturally, it is written from my perspective as a mediator, and so I recognise that it may look different when you are representing one side in a mediation, rather than in the middle. Nevertheless, different vantage points throw up different perspectives, and this is how it can look through one mediator’s eyes.

This blog is also, I should confess, motivated partially by frustration. Every party in any negotiation, with or without a mediator present, has certain assets at their disposal. Yet too often I see those assets under-used or deployed in the wrong way, and an opportunity wasted.

The first, often under-employed asset is the people present. In particular, the parties.

We all know the rhetoric, of course. Mediation is a chance for the parties to take control, to come to the fore, to regain their voice in the midst of the dispute. But too often that does not translate into practice. Too often the parties can end up taking a back seat.

To the extent that this is determined by their advisers, I suspect it arises partly out of fear and control, and partly out of ignorance of how best to deploy them.

These are understandable concerns. Many professionals are fearful of their clients inadvertently prejudicing their position in a mediation. Such concerns may be well-grounded, and indeed not all clients will respond well to the environment of a mediation. But often the parties will genuinely be the best advocates of their own cause; or at least of some parts of it.

Additionally, it is not always clear how best to deploy a party, and when. This often leads to a typical “default” position being adopted, in which the lawyers dominate the early stages of a mediation, and clients gradually step forward as time goes by. This may work well, and certainly offers a cautious route in. Equally however the net result may be that the kind of impact which the parties would have on the mediation through their direct involvement is held back. And when it comes, it may be too late.

The key to understanding client participation, in my opinion, is to think of it in terms

of impact and influence. I have sat through countless joint meetings where all or most of the speaking is done by the professionals. I have watched those listening quietly disengage and glaze over, as they hear exactly what they were expecting to hear. On the occasions when parties also contribute, however, I have watched those who had previously glazed over lean forward, re-engage, and follow every word.

It is almost inevitable that people will listen more intently to someone telling their own story, than to someone else telling it on their behalf. Most obviously, this can be because what will be said is perhaps less predictable. The rehearsing of (well-worn) legal arguments can be important in a mediation, but it is unlikely to have the same impact as someone talking about the commercial or personal effect of the dispute.

In addition, this challenges the underlying assumption that people are only influenced by legal argument. They are not. It has its place, of course, but I can think of many mediations where the factors which influenced settlement did not lie only in legal points.

Sometimes, I hear or read heavily formulaic views expressed on how clients should be enabled (or occasionally “allowed”!) to participate in mediations: “I do it this way...” or “My approach is the following...”. My suggestion is that we need to move away from that, and towards a much more nuanced and flexible approach. The starting point is not “How can parties (or indeed anyone else) best participate in a mediation?” but “What influence or impact do I want to have on the other party(ies) present at the mediation?”

For example, do you want the legal arguments to be front and centre, and if so why? Do you want to influence the other side’s client in their views of your client’s good faith, or the history of how they behaved in the situation which led to the dispute? Do you want the main focus to be on the technical engineering issues involved? Do you want to use the mediation to create a better foundation for commercially-focused discussions? And so on.

The answer to *those* questions will determine whose voices should be heard, to what extent, and on what topics. That in turn will give you the answer to the best way for a party/your client to participate.

(And of course the same analysis applies to any and all who attend a mediation - be they parties, lawyers, experts, or whomever).

But this comes with a word of warning. The natural consequence of approaching the question in this way is that significant analysis and preparation is required. You cannot simply rock up to a mediation, rehearse a few well-worn points, and expect your counter-parts to be influenced in your favour. The question of how best to influence usually requires considerable thought. And its delivery can require proper preparation. Some parties will take naturally to the mediation environment, others will need help to prepare. In the end, what parties get out of mediations is at least partially determined by what they put in.

And I haven’t even started on the question of how a fuller participation may influence your *own* client’s views on settlement.....

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