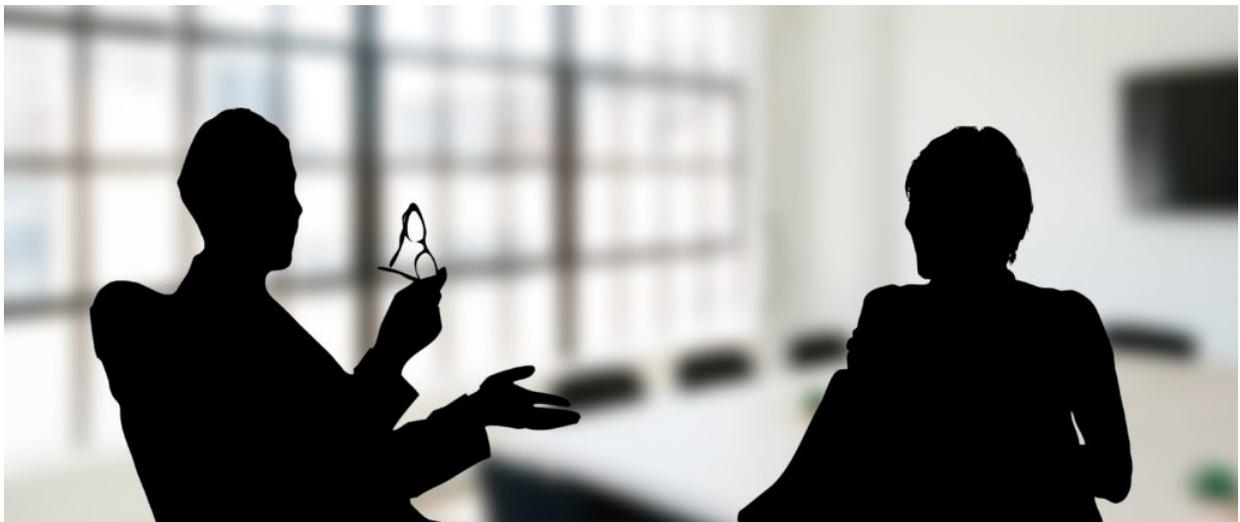


Kluwer Mediation Blog

The values of shadowing

Constantin-Adi Gavrilă (ADR Center Romania) and Greg Wood (Greg Wood) · Monday, October 14th, 2019



This post written by [Greg Wood](#) and [Constantin Adi Gavrilă](#). Is about the values of shadowing based on our shadowing experience that allowed reflections and lessons learned, we'd like to share.

Greg, a Los Angeles based mediator with special expertise in resolving intellectual property disputes, received a letter of thanks from a US District Court Judge regarding his participation as a member of the USDC ADR panel and in mediating a dispute between litigants in reaching a resolution in a patent infringement matter. While the letter was appreciated and honoring, Greg felt a slight twinge that the letter might have been just a bit premature. Here is the back story.

The day before the mediation was to begin, the Managing Attorney for Legal Services Unit asked if a mediator visiting from Romania could shadow this mediation to see how the USDC Mediation program worked. After more than ten years of mediating, this was a first for Greg, either observing or being observed. However, Greg was delighted to meet a colleague from Romania, Adi Gavrilă, who with the consent of both parties, shadowed the mediation.

During breaks, we discussed the substance of the case, the process adopted, the techniques being used and our respective mediation styles. Adi was both curious and affirming of Greg's style and talked openly about his own experience and style.

Offers were exchanged and differences narrowed until the parties reached agreement on the

essential terms reflected on a marked up hand-written yellow sheet. At that point, one of the parties offered to prepare a typed version of the agreement that would add normal settlement terms such as mutual releases, confidentiality and the like stating that it would be faster if he typed the draft first to which all agreed. About 30 minutes later, the draft was done and as review began, the other party made the following statement: *“I can’t agree to a document the other party wrote unless I have time to review it... and I don’t have time to review it now. I need at least a day to review it.”* We learned some time ago that it is critical for the parties to sign a settlement document before the mediation ended and it was equally clear that the typed version of the settlement was not going to be that document. The solution was to have the parties sign the hand-written yellow paper with the understanding the typed version would be signed shortly thereafter. That was agreeable to the parties.

After the mediation concluded, Adi made a very practical suggestion for future use – insist that counsel for both parties participate in drafting the typed version even if one party does the typing. In that way, the perception that “the other party wrote the document” would be less likely to be interposed to delay signing of the final form of the agreement.

Back to the letter from the judge – at the time Greg received the letter, a week after the settlement had been signed, the parties had still not agreed to the additional terms in the type written document giving rise to possibility that just maybe terms in the typed agreement might be deemed material and could call into question the enforceability of the signed yellow sheet agreement.

The shadowing experience was really fascinating for both of us, and the following reflections could be useful for other colleagues that may explore the possibility of either observing other mediators at work or being observed while mediating:

- **Shadowing needs agreement from parties**

Any conversation about shadowing of a certain mediation or part of it should start with the parties. While they could be absolutely fine with having observers, there could also be reasons for concern, in which case the shadowing shouldn’t be organized at least for that specific mediation. Needless to say, the confidentiality principle applies for the observer who should be invited to sign a confidentiality agreement.

- **Shadowing is a great learning opportunity**

The mediation activity is quite lonely for us as mediators. The “safe space” we’re helping the parties with, is private and confidential. Therefore, unless we’re co-mediating, we don’t benefit from reflections from peers with regard to our style and impact of our assistance as mediators. Sometimes, we do receive feedback from users and their advisors, or from experts involved in the mediation process, but not as much from colleagues that observe our mediations. Shadowing therefore provides learning opportunities for both the observer mediator and the mediator being observed. While the observer is widening his/her views with knowledge and techniques observed or lessons pointed by the mediator in the talks with the observer, the mediator being observed is increasing self-awareness just by the fact that is being observed or through reflections and discussions with the observer. Further, the shadowing could be much more productive if the mediator would meet with the observer ahead of mediation and will summarize the case and its strategic approach.

- **Shadowing can be part of a professional development track**

Imagine you in an airplane just about to take-off and in his or her welcome announcement, the

captain says, “*Good morning, dear passengers. This is your captain speaking. I would like to welcome everyone on my first flight after my training [...]*”. That will create some reactions from the passengers, one could assume. Equally, there are many professionals trained in mediation, trying to develop experience as mediators that could benefit from a systemic shadowing process that will give them enough “miles” to be comfortable with maybe co-mediation first and leading mediations on their own at some point, as well. However, this requires more openness from experienced mediators, mentors and established mediation providers in creating such systems and shadowing platforms.

- **Shadowing shouldn’t interfere with the mediation process**

The shadowing process shouldn’t interfere in any way with the mediation process. The observer should understand that a look at the screen of the phone or any communication through body language could create significant impacts that could endanger the mediation process. Not to mention verbal interventions. It is, therefore, advised that the mediator will meet with the observer before the start of the mediation, and will clarify the necessary shadowing protocol.

Feel free to add your thoughts and experiences with regard to the values of shadowing that, indeed, provides amazing learning and professional development opportunities.

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