

Kluwer Mediation Blog

Mediation and the Laws of Time

Bill Marsh (Editor) (Bill Marsh Mediator) · Saturday, April 4th, 2020

For once, I seem to have time. No travel, no trips out, no long walks on the hills. Some zoom mediations, granted, but still much more time. And with that, I find myself reflecting on the significance of time in mediation.

Time is a major feature in mediation. Indeed, we ourselves have promoted the process as a “time-saver”, offering faster outcomes than the full court or arbitration process. Efficiency has been rightly touted as an important component of mediation, and with that the appeal to busy executives and others. But such “efficiency” creates its own pressures and dynamics. Perhaps now is a good time to reflect on those.

First, mediators often feel the pressure of time. Even when there are only two parties, I am often conscious of those who are not with me at any given time, waiting patiently in their own room for the next chance to engage with me and/or the other party. That can be useful reflection time for some, but for others it may simply increase frustration. Multiply that many times for a multi-party dispute.

Early on, people may say things like “I have to be away by 4pm”; or “Can we skip all the to-ing and fro-ing and just get to numbers?”; or “If they haven’t made an offer by lunchtime, they are clearly not here in good faith”. These are all expressions of concern about time. And we mediators end up caught between the desire to do a good job (which frankly speaking can take time) and the desire to deliver an efficient process (and keep the clients happy – especially the repeat ones?).

How might we react? Well, the starting point is to be conscious of these pressures, so that our reaction is at least a deliberate choice rather than an unconscious default. Two areas which I suspect may suffer under the pressure of time are listening, and reflection. Russ Bleemer’s article [Listening for Mediators](#) is an important reminder of this. He cites the impact of preparation on listening – namely that well-prepared mediators may feel less need genuinely to listen, because their preparation leads them to feel that they have already grasped the issues. The same is true, in my view, of the pressure of time. We may be tempted to think that we have “got the point” more quickly than we really have. Put the other way, how often do we find that the comment “I think you are saying X, Y and Z – But have I fully understood that? Can you add anything?” will elicit some invaluable insight which we would have missed if we failed to go the extra step in listening?

The same is true of reflection. I often wonder about the extent to which parties in mediation genuinely reflect on what others are saying, or on their own situation and choices. Clearly some do. Others however seem to rush to judgment, and I am sure that the pressure of time contributes to

that.

Of course, we can't simply let mediations go on indefinitely. We have to manage time actively in mediation. There is a fine line between ring-fencing opportunities for genuine engagement with people, while also proactively enabling proper progress.

And I pause in passing to note this: Genuine engagement with people is not just about time. It is also about "presence" – in other words, giving ourselves fully to that particular conversation. The more presence we can give, the less we may find the pressure of time. Presence is about the quality of our listening, perhaps more than the quantity.

Second, time does funny things to people in mediations. For example, our perception of the speed with which time passes differs depending on whether you are with the mediator (in which case it flies by) or waiting for the mediator (when it really drags). And by the way, the concept of "two minutes" (or even five or ten) ceases to exist in mediations. Whenever a party says "Can we just have two minutes to discuss that?", it should never be taken literally. You can probably double it and add your grandmother's age for a rough indication of the reality! But it does all make the point that time in mediation requires careful thought and proactive management.

Thirdly, I have come to see the question of time in mediation very differently over the last 10-15 years or so. This has been a result of mediating in contexts which do not need, and indeed would not benefit from or even survive, a typical 1-2 day mediation model. These include dialogue in significant religious, human rights and political conflicts. Here, time is of a different order altogether. In practice, I have found that roughly two years seems to be an appropriate period for a serious dialogue process. This provides both the space for genuine engagement and a wrestling with the issues, as well as consulting with the innumerable constituents and opinion-formers outside the immediate talks, but also a time frame in which progress can be envisaged, achieved and measured. (I am not saying that two years is the "right" amount of time, merely that it has felt about right and worked well in the dialogue processes I have delivered). On the upside, the professional satisfaction at having time to engage seriously with the people and the issues is considerable. On the downside, the challenge is to engender enough momentum to create hope in a meaningful outcome. So time is still a challenge, but a different one.

I have been reflecting recently on the impact that these longer-term models could have on my commercial mediation practice, where the usual (client-led) requirement is for a highly-focused one- or two-day process aimed at a commercial agreement. The current need to mediate on line (I use zoom mainly) has provided a chance to experiment. As an example, I am currently mediating a dispute in which, at my suggestion, there is no single "day" of mediation. I have had zoom meetings with various parties, on different days, and am taking it forward at a pace which seems to fit the context. One of the huge upsides is that no one is waiting for me to finish meeting with another party. Once I have finished a discussion with one party, I arrange a time that will suit the next. My impression (though it's early days yet) is that this environment engenders greater reflection amongst the parties. There is no "rush to decide", no rush for me to get to the next meeting. I simply take it forward as and when people are ready.

Maybe there will be some downsides too. Maybe there will be less intensity and focus, and perhaps less perceived pressure to settle. But I suspect that the decisions may be wiser for being more thought-through. We shall see.

Way back when (1994, I think it was), Professor Frank Sander coined the phrase “Fitting the Forum to the Fuss” in order to highlight the need to choose a dispute resolution process which most suited the particular dispute. Back in those heady days, and since, mediation has promoted itself as a highly flexible option. And rightly so. But like so many new breaks with tradition, they can themselves become beset with their own customs, which often morph into rules. “It’s done this way”. I sense that this is really the case with mediation.

So in this time of more time, I encourage us all to do some serious thinking about mediation. Why do we do it the way we do? And what scope is there for further innovation and change?

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