

# Kluwer Mediation Blog

## What's Happening In The Other Room(s)?

Bill Marsh (Editor) (Bill Marsh Mediator) · Monday, May 4th, 2020



Mediation can be an intense experience for parties and their advisers. Often there is a lot on the line. In the substance there may be money, control, reputation, pride. In the process, there are challenges such as influencing other parties, getting the best deal possible, making well-informed judgment calls about risk, developing effective offers, and much more beyond.

To retain clear thinking in that context is a serious challenge. Very understandably, there is a tendency to get caught up in the bubble of one's **own** thinking and strategizing. An early casualty of this can be a loss of perspective. Everything gets viewed from the single perspective of how it looks in that room, by those people, under those conditions, at that time.

I see this most obviously in two areas where parties make choices in mediations.

The first of these is joint meetings. One side may indicate that they do not wish to

have any joint meetings, perhaps early on, or even at all. No doubt they will have their reasons, and they may be perfectly sound ones. However, rarely in the rationale do I find a serious analysis of the impact that such a move may or may not have on the **other** side.

The second area is offers. Particularly first, or early, offers. The choice of what offer to make often appears to me to be a product mainly of that party's assessment of its **own** case/risks, in the light of where it wishes to try to get to in the mediation. I have no difficulty with that. Indeed, I would expect that to form a serious part of the analysis. But I would **ALSO** expect the analysis to include an assessment of (or at least some thinking about) the impact the offer will have in the other room(s). This is not because, in keeping with many mediators, I have spent many hours coaxing the receiving party off the ceiling (or back into their room) in the wake of a challenging first offer. That is all part of a mediator's job. Rather it is because, in order to be well-judged, offers need to have the right effect **on both the making and the receiving parties**. The desired effect on the receiving party does not necessarily need to be outright joy(!), but it should at least motivate them to engage as seriously as possible with the settlement process.

So when considering a move in a mediation - whether it be in relation to process (such as whether or not to meet with another party, etc) or to substance (such as the content of an offer) - I would encourage thinking not only about how it fits with that party's own analysis, ambitions and strategy, but also how it is likely to be received, and what impact that may have on the discussions going forward. Some helpful questions which parties and advisers can ask themselves might include:

- How will this move look to the other parties?
- How are they likely to react? How might it influence their response? Is that the influence we wish to engender?
- How would it look to a notional bystander, watching these negotiations?
- What would my long-time friend/adviser (not involved in the mediation) think of it?
- How does it look to the mediator? What reaction does the mediator think that move will produce, knowing as he/she does more about what is happening in the other rooms than we do?
- If we don't want (eg) a joint meeting, might the other party want one? Why might they? Might we learn something from that? How might we try to ensure that we learn something? Might they gain something from it which they need in order to enable them to think about settlement, in which case why would we want to deprive them of that?

These simple questions are merely ways of benchmarking one's own thinking against the potential reaction of others. They are, if you like, proxies for objectivity. And that, in both my opinion and my experience, makes them very important. If parties want to make good judgment calls in a mediation process, then there is nothing to fear from seeking to benchmark their decisions against other yardsticks.

Much of the above depends on mindset, and so I end with a final thought about mindset. I have often thought that the isolated immersion in their own perspective which parties often experience in mediation is borne of the assumption that there is

nothing more to learn about the dispute. Dispute-weary protagonists have been around that particular carousel (of arguments, facts, risk analysis, etc) so many times, for so many years, that they cannot believe there is anything new which might emerge. This itself engenders a closing-in of views and perspectives, an assumption that the known position is all that there is, and hence there is nothing further to be learned. Parties with this mindset will often attend mediations wanting to **inform** the other parties - of the strength of their arguments and position - and with the underlying assumption that there is nothing more about which they could **be informed**.

Or, as my good friend and Canadian mediator colleague Cliff Hendler put it, we turn up wanting to “teach rather than to learn”.

And that, I suggest, may be the most dangerous mindset of all.

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