

Kluwer Mediation Blog

Mediation Venues, Privacy and what is NOT to be seen

Jeremy Gormly (National Alternative Dispute Resolution Advisory Council) · Thursday, March 8th, 2012

Mediation doesn't require special premises. It can be conducted in any type of place. There are Native Title mediations for Indigenous Australians that can happen at least in part on the land in question, under a tree or on a hill side. Mediations in the workplace often happen in the place where the dispute originally occurred. Neighbourhood mediations can occur in the backyard. International disputes can occur on symbolic ground or neutral ground. Many usual mediations however occur in rooms custom made for mediation. While that may be convenient, it certainly isn't necessary. What exactly do they provide?

What I'd like to explore is what we aim for when we have "ideal conditions" for mediation and see how that matches up with what we usually have. Even on a very conventional basis the two things we want from good mediation conditions are firstly a place for everyone to come together and secondly, places for private meetings. We have language for these needs. We talk about the opening room or the opening session for which we need a "big" room. We also talk about break out rooms or opportunity for parties to talk privately or for the mediator to conduct private sessions. We may want to meet with our group with no mediator or other party present. There may be situations where a party wants to meet with people on their "side" or even on the other side without advisors or support persons present. In this second category of the private meetings what we are after is to be able to meet out of the presence of, in fact positively excluding, the opposing party.

The exclusion involved is not just avoiding having the other parties **hear** what we have to say within our own group. It is also usually so the party meeting with their own, cannot be **seen**. I have often wondered about that. When I mediate in slick modern offices where glass is the main medium of separation of space and parties are sound but not thoroughly sight proofed from one another, I see three things happen. Firstly, I sense a much higher rate of tension among those meeting in private—the pose of the public position is not so easily set aside in private meeting. They know they cannot be heard (despite all the usual jokes about hidden microphones etc) but they don't feel secure because they can be seen; they feel watched. Secondly, I notice interested surreptitious looks towards the other parties' rooms to "see" what's happening there, even though they cannot hear a word. It is distracting from the private task at hand. Thirdly, I see people trying to draw conclusions about what the other party are thinking or feeling judged from body language or speculation from what they see. As mediator I often know what is being thought, said and felt in the other rooms; sometimes the conclusions drawn or speculation undertaken is right and sometimes wrong. You couldn't settle a case or make a decision on the basis of limited body language without also knowing what is being said.

The point is however, that when parties to a mediation want to break out to a private place, they unquestionably need “privacy”. Privacy doesn’t mean mere restriction on flow of information—not being heard. It means full separation. Everyone is aware of partial information and tries to draw inferences from it. The same applies in reverse. If you know the other party can see you but not hear you then you have to engage in behaviours that are consistent not with retreat, contemplation, confidential discussion or relaxation let alone despair or tears. You must, even in private, look like you mean what you or someone on your behalf has just said for your side of the dispute in a joint session.

The purpose of these thoughts is not to point out that architecture can help or hinder a mediation — although that is certainly true— but to point to how much happens to a party when they are out of the “fray” and in the peace of their own camp. The ability to stop the battle for a time and be able to reflect with all that goes with it is, I suggest critical to achieving changes of position in the heart and mind of a contesting party. If you can concede with your own followers and relax into that concession with your own people at hand to support you, it is a lot easier to make that concession to the other party.

There is little doubt that our body language does change when we go into battle or when we relax into the intimate company of those we trust. We may drop the mask, slump in a chair, get agitated or tearful or even delirious and excited depending upon what is happening. When we behave like that it is a reflection of what is happening in our minds. It is our minds that are the private places in mediation and negotiation—and we don’t want our bodies giving it away. We also don’t want the opponents thinking that they can interpret some weakness in us. In any event we need to relax. So it works both ways. We don’t want our bodies to give us away. We don’t want the opponents to think they see weakness. But we also want to be able to explore the weakness in our position unimpaired by a need to use inconsistent body language—thinking one thing but acting another. That is conflicting, distracting and tiring. Mediators can usually observe much of this but recognize that it is often part of the privacy of the mediation.

Every mediation is different and has different requirements. Some mediations don’t require break outs at all. Ideal conditions therefore will differ from mediation to mediation but joint sessions and privacy are a basic requirement when needed. Good mediation rooms, custom made for the purpose usually provide those two things though modern office design often hinders mediation even if it has other benefits. Such premises often come with good coffee, diet damaging cakes and nice food for lunch but those things are no compensation for a party’s opportunity to withdraw into a private and secure camp to enable the consultation and discussion among friends or parties with common interest, that allow ultimate settlement. Mediation usually needs to allow both engagement and full withdrawal. Those things can be achieved without any special buildings or facilities useful as they can be when available. Parties just need some privacy to relax into the change they must adopt in order to resolve.


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