

Kluwer Mediation Blog

How Little We Know

Bill Marsh (Editor) (Bill Marsh Mediator) · Saturday, February 2nd, 2013

Many of you will have read of the tragedy this week in Arizona, where a mediation ended in the death of one party, and the serious wounding of their lawyer. Details are still sketchy, but it seems that a mediation of a commercial dispute was taking place in an office in downtown Phoenix, between a call centre and Mr Harmon, a furniture manufacturer. The dispute was apparently intense and bitter. Evidently, Mr Harmon left the mediation saying that he had to go to his car. The other party and their lawyer assumed he had left the mediation completely, and so took the lift down to the exit to leave. It is alleged that Mr Harmon was waiting for them there with his gun, shot and killed the call centre executive, and critically wounded his lawyer.

Our hearts go out to those wounded and killed, and their families. The brutality and tragedy of it is shocking.

Of course, we know nothing of what happened in the mediation meetings, and it would be deeply inappropriate to speculate or comment. That is not my intention.

However, this desperately sad case reminds me how little we know as mediators, and how it is important to remember that. How little we know about the dispute, or indeed the parties. And how fleeting is our involvement.

Far from providing a full exposition of the unvarnished truth, parties in mediation tell us what they want us, and the other parties, to hear. When they talk about “the dispute”, they will almost invariably present a very partial view. This is not necessarily disingenuous – it may just be a reflection of how they see it. They may talk about their feelings and the impact of the dispute on them as individuals, or they may not – I regularly find a reluctance to in a commercial context, where such issues are often considered to be “irrelevant”.

What they tell us is probably also a product of:

1. How they see *us mediators* – For example, how much do they actually trust us? Do they fundamentally believe we are trying to “get them to compromise” (which tends to generate resistance), or that we are providing a forum in which they can make serious and informed choices? And so on.

2. How they see *the mediation process*. All parties come with their own expectations. And many with their own experiences of what “works” or “doesn’t work” in mediation. These things inform their strategies, and in particular the degree of candour they show.

But the way in which we mediators convey to them the nature of the mediation process is also critical in shaping their expectations. If we present it as a forum for “doing a deal” they will likely

focus mostly on that. We may well end up with a narrowly-focussed discussion, centring on compromise. In itself, there may be nothing wrong with that. It may be exactly what they want and need, and deliver great value. Or it may not, and it may drive out the space for a wider discussion, as a necessary pre-cursor to “doing a deal”.

Pressed for time (and aren't we always?), the temptation for us mediators is to encourage parties to focus on “the relevant issues”. But this begs the question of “what issues are relevant?”. It is so easy to prepare for a mediation, draw one's own conclusions about what is “relevant” to the discussions, and proceed to try to steer the mediation in that direction.

Part of this is the tyranny of time. Mediation (in a commercial context at least – thankfully, I don't find quite the same in a political, ethnic or religious context) both benefits and suffers from this. Busy commercial parties, paying their lawyers and mediators by the hour, want to get things done briskly and efficiently. The upside of that is that people are focussed on discussing “the issues” and making decisions. The downside is that that may be all they are focussed on. The scope for telling their stories, dealing with the emotional content, and simply allowing time for people to adjust to a different perspective, is very slim.

So my reflections on this are:

1. We will always know relatively little about the dispute, even after mediating it for some time.
2. Critically, and this is what I draw from the Arizona tragedy, we will know even less about the parties – who they are, how they will react under pressure, what is going on in their lives, the impact of the dispute on their lives and families, and so on.
3. We need to be cautious about defining what is “relevant” to mediation discussions. It may be no more than a product of our own assumptions. By and large, I find that what is “relevant” is whatever they need to discuss in order to make progress. And that may well differ even between the parties.
4. There is no substitute for listening. And then listening some more. I blogged on this in December 2011. It is the only route in.
5. In the face of all this, considerable humility is required of us.

Let me repeat – I am not for one moment suggesting that the mediator in the Arizona case could or should have done anything different. Even less am I justifying or excusing the appalling act of violence. Far from it. Rather, the incident merely reminds me of the need to realise what a small portion of the picture we are ever told, how many aspects of a party's life are not unveiled in a mediation, and how little we know about their true motivations and pressures.

I will give the last word to Tony Curtis – not the actor, but a good friend and mediator here in the UK, who sadly died some ten years ago. Tony used to carry with him into all mediations a little printed card which read “What assumptions am I making?”. Periodically, he would look at it. It was his way of reminding himself of what the Arizona tragedy, as well as some of the mistakes I have made during my time as a mediator, remind me: that the very most we will see in a mediation is a small part of the truth.


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The graphic features a black background with white text and a circular icon. The icon depicts a magnifying glass over a group of stylized human figures, representing a search or investigation process. The text is arranged in a clean, modern layout with horizontal lines above the main title.

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