

Kluwer Mediation Blog

Relooking at Sacred Cows...

Joel Lee (National University of Singapore, Faculty of Law) · Thursday, March 14th, 2013

[Author's Note: I am grateful to Ms. Melissa Teo whose journal ruminations led me to the random thoughts that follow]

I teach mediation skills at the National University of Singapore Faculty of Law and it has always been something that I have found tremendously fulfilling. Apart from influencing generations of lawyers to consider the resolution of conflict in non-adversarial, more amicable ways, there is the occasional personal transformation on the part of the student that makes a lot of the grief (yes, there is grief) worthwhile.

As part of the process of learning, students write journals, which document their learning journey, and allow them to reflect on the issues that surface. I have spent the last 2 weeks marking the latest installment of journals and would like to explore in this blog entry an issue that was brought up.

It is trite, at least in facilitative interests-based mediation practice and training circles, that mediators should facilitate the process of negotiation between the parties and assist them to generate options that meet their needs. It is therefore not appropriate for mediators to suggest or offer solutions to parties. In fact, depending on how much of a purist one is, some may even agree that the statement "Thou Shalt Not Suggest Solutions" is somewhat of a sacred cow.

Yet, the experience of many mediators is that circumstances are such that it is not always possible to abide by this tenet. Sometimes, without some kind of input from the mediator, parties cannot even begin to generate options of their own and the mediation may not be able to progress. However, this doesn't make me feel any less guilty when I feel I have to engage in it. It's almost as if I expect the mediation practice police to jump out at me and issue a ticket for this heinous violation (or at the very least, my spine might collapse and I would go blind).

Since I am asking my students to think critically about what they are learning, I decided I was going to engage in the exercise of applying interests-based analysis to this sacred cow. If we took the statement of "Thou Shalt Not Suggest Solutions" as a statement of position and explored the interests beneath this position, I wondered if we could nonetheless provide solutions while still addressing the real concerns behind the statement.

Of the top of my head, I can think of 2 main reasons why many say "Thou Shalt Not Suggest Solutions". There may be more but it is not my intention to be comprehensive in my coverage.

First, if a mediator was to suggest a solution and that solution is perceived (regardless of whether

this perception is accurate or not) to be more in favour of one party than the other, the other party might feel that the mediator is no longer impartial and neutral. This could lead to the termination of the mediation and lead to charges of impropriety leveled against the mediator.

Secondly, it can be said that when a mediator suggests a solution, this disempowers the parties. Parties should be engaged in the creation of the solutions to their dispute so that they will own the solutions which in turn increases the likelihood of compliance with the agreement. The disempowerment can happen if parties are apathetic and latch on to the mediator's suggestion. Which at one level may be fine until remorse sets in at which time, may be used as an excuse for getting out of the agreement. An even less desirable scenario is when parties feel pressured to accept the suggestion because it comes from the mediator. This is true disempowerment and will only set the stage for a future dispute to arise.

If this interests analysis is correct, then as long as the mediator maintains his/her neutrality (or the appearance thereof; the writer will not engage in this discussion here and will perhaps save it for a future entry) and parties are engaged in the creation of their own solutions without feeling the pressure to adopt the mediator's suggestion, then it may not be such a sin to suggest solutions.

One possible way to do this is to, instead of making a single suggestion, make two. Sounds counter-intuitive but on the assumption that one is not likely to make a suggestion that is completely neutral vis a vis the parties, then it may make sense for one suggestion to favour one party and another to favour the other.

Done this way, parties cannot claim partiality. They also cannot say that they are pressured to accept one solution or the other because they have to now pick one of them or come up with alternatives. The apathetic now have to engage in the process.

Is this much ado about nothing? Is it really that useful to be able to suggest solutions? Experience and anecdotal evidence indicates that sometimes, parties have no clue when asked what solutions can resolve their dispute. It is not that they are not engaged but that they are stuck in the box of their problem and unless the well is primed, they are unable to think outside of that box (apologies for the mixed metaphor).

This is not limited to countries where there is a high power-distance index (PDI) i.e. a culture where hierarchy and authority is important but especially in these countries, the parties may have an expectation that the mediator should play a leadership role and suggest solutions. This is not to say that in high PDI countries, one should do away with the interests-based model where party autonomy and empowerment is important. It should also not be a license for mediators to pressure parties into agreement.

The point is that a mediator can suggest solutions and still respect interests, empower the parties and recognize their autonomy. The goal remains to assist parties in formulating a workable solution that they will willingly comply with.

In closing, at one level, this has been an intellectual exercise. However, at another level, it is hoped that relooking at the sacred cows of mediation will guide in the development of mediation training and practice.

So many sacred cows, so little time...

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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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