

Kluwer Mediation Blog

Don't Just Sit There – Do Something!

Geoff Sharp (Brick Court Chambers / Clifton Chambers) · Wednesday, May 1st, 2013

Most mediators I know graduated from the Facilitative School of Mediation – and we could spend much ink here debating exactly what that means but to my mind we were essentially taught to own the process and butt out of the outcome.

Recently there have been a number of calls for mediators to do *more – more what* is perhaps a little unclear, but certainly the market wants *more something*.

Just last month the [IMI International Corporate Users ADR Survey](#) polled 76 in-house dispute resolution Counsel from North America and Europe with over two thirds of the responders being from corporations with 10,000 plus employees.

Responding to the injunction that “Mediators should not be purely facilitative but adopt a proactive idea generating role, including proposing solutions and settlement options” 77% of responders agreed and 15% did not.

A similar result can be seen from a 2011 Commercial Mediation Group Survey that invited responses from over 60 UK law firms and in-house counsel. Here 68% of responders agreed that mediators should be more proactive and 7% disagreed.

And most recent of all is JAMS International Matthew Rushton’s interesting piece [What Insurers Want from Mediators... And Why Distorting Reality Ain’t for Everyone](#) that came out of a week he spent talking to senior figures in the London insurance market about what they expect from mediators “... all consulted were clear that they wanted and valued the mediator’s view of their case (and this desire no doubt informs whom parties select as mediator). Practically all mediators in the UK are trained to resist giving a view – and with good reason: done at the wrong time, or to the wrong party, or put insensitively, nothing can compromise impartiality and torpedo the process faster. That said, the desire to hear the mediator’s view was so consistently expressed – and without prompting – that mediators who fail to do so will almost certainly be failing the market”

And many have answered this clarion call from the market – NZ retired judge and now commercial mediator Bob Fisher QC hit the nail on the head in his article [Is It Rude To Talk About Who Would Win?](#) saying that “... many in the mediation intelligentsia responded to these calls for pragmatism. Among facilitative exponents, in particular, there was a growing recognition that substantive abstinence by mediators was an illusion. Their substantive input had been disguised all along as reality testing, creating doubt, and reframing. Nor was substantive input from the mediator a bad thing so long as it did not threaten ultimate self-determination by the parties..”

But what does a mediator who is proactive, assertive, maybe even evaluative – or at least not purely facilitative – look like? Are they old wine in new bottles or is there a new breed of super mediator emerging as a result of tectonic forces in the mediation market?

My own rather arrogant view remains that many mediators are lazy and it's that laziness that at times passes for facilitative technique in some circles – in a different context, I said as much in [In Praise of Joint Sessions](#). Good mediators, in-demand mediators, have always broken a sweat in mediation – whether it is evaluating disguised as reality testing or out and out taking a view, they are pragmatic and they respond to the unfolding events in front of them.

But what does remain a mystery to me is *what is the something more?* Do sophisticated commercial parties with competent legal representation really want a mediator to be taking good case/bad case a view of the merits.

Ten years of mediation practice tells me not.

Matthew Rushton puts it this way –

“So what exactly do insurers mean when they say they want a mediator’s view of their case? What are their expectations? It strikes me that it’s like when your partner tries on a new outfit and asks your opinion. Clearly the safest thing to do is to head for the door fast, whistling loudly and pretending not to have heard; but it’s also cowardly, unkind, and unhelpful. Is your opinion going to veto the inevitable? Speaking personally, no. What’s required is an impressionistic view of the good and the bad, delivered supportively and tactfully. What’s not being sought is an incontrovertible and final evaluation: the value of a mediator’s opinion, like a husband’s, has limits”

For my part I’m not quite there but I’m close – an accomplished counsel who I rate and who spends as much time in a mediation room as she does in court put it to me this way –

*“Geoff, what I need you to do is not tell me whether I am right or I am wrong or whether my client’s case is good or bad, what I need you to do is find the loose threads of my client’s ball of wool and tug on those ends ever so gently at the start – and with more energy at the end if needed – I may help you or I may resist, but either way I need you putting an alternative view of the universe to us for our consideration and debate – and there is *always* an alternative”.*




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This entry was posted on Wednesday, May 1st, 2013 at 9:48 am and is filed under ‘Money-only’ Cases, Appointment of Mediators, Availability of Mediators, Commercial Mediation, Conventional wisdom, Corporate Counsel’s View, Dispute Resolution, Evaluative Mediation, Future of mediation, General, Instinct, Lawyers, Mediation Outcomes, Mediation Practice, mediation traditions, Skills,

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