Kluwer Mediation Blog

Successful Negotiators Smoke

Bill Marsh (Editor) (Bill Marsh Mediator) · Wednesday, July 10th, 2013

Here is a confession. I have a theory (in the best traditions of Monty Python). It is totally untested. I am pretty certain that it would not survive rigorous, double-blind trials. It may, however, contain some seeds of insight.

My theory – wait for it – is that mediations where one or more of the senior negotiators smoke (and I mean tobacco, not other substances) are more likely to result in settlement.

I shall call it “Bill’s Law” – to rank alongside “Sod’s Law”, “Murphy’s Law” and “Parkinson’s Law”.

Now hold that thought, suspend judgement, and travel with me back to 1999-2002. The venue is the UN in New York and Vienna. I travelled to those venues twice a year during that three year period to represent the UK in a UN negotiation process. OK, it wasn’t the most cutting-edge, high-drama political situation. The substance of the talks was the text of the UNCITRAL model law on international commercial conciliation. But some 50-60 countries were involved and the whole process took 3 years, leading to the formal UNCITRAL Model Law which many countries have since used as the basis for their own mediation legislation.

What struck me most about the UN process, other than its inordinate length, was the balance between what was achieved in the full sessions, and what was achieved elsewhere. Each day was comprised of:
– a series of 90 minutes formal sessions, which were inevitably somewhat constrained – countries are called by the chair to speak, contributions have to follow a certain format, and so on;
– followed by 40 minutes of “consultations” – which is UN-speak for a coffee break.

For the latter, delegations pile out of the General Assembly chamber and queue up for institutionally-bland hot drinks, while those who wish to soothe themselves with nicotine. Of course, the inevitable then happens. Discussion ensues about the substantive negotiations. Sticking points, compromises, alliances and ways forward are thrashed through, and deals struck. The formal session then reconvenes and – surprise, surprise – deadlocks in the formally-adopted positions melt away.

This is nothing new to mediators, of course. We live our professional lives in both environments – the formality of the positions people choose to present to each other, and the informality of the opportunities for more genuine dialogue which we try to carve out for them. Both have their place.

Surprisingly (to me), I was struck by the value of the formal sessions at the UN. They are used to set out positions, to enable delegations to speak to, and for, their various constituencies, and to articulate some sophisticated and important principles. The very formality requires careful and clear articulation, and so complex points were on the whole well made.

Equally, it is blindingly obvious that progress requires more than just that format. And so the informal "consultations" which follow take the debate forward from the formal positions. Deniable conversations take place, enabling people step into uncharted territory. The serious work gets done and substantive progress is made.

From my own experience as a mediator, I relate strongly to the different levels of formality which attach to discussions. Meetings at which parties can articulate their case – even with a degree of formality – are frequently under-valued by parties and advisers, usually accompanied by statements like "We know each other's cases, and just want to get down to doing a deal". Yet conducted well, such meetings can have real value in bringing clarity on the points which are being made. I don't mind if parties disagree, but I very much mind if they don't understand why they disagree, or the reasoning behind the arguments being traded.
But to be honest, I probably relate more instinctively to the informal discussions in mediation, and of these there are many different levels. Most obviously, there are the private meetings with each side, usually with all the participants from that side – parties, lawyers, experts, whoever. Generating an effective discussion in those is generally key to progress, and many of us do a lot of our work there. That is not my focus here, however.

Beyond that, there are other levels. There is a joint meeting of parties only (eg the lead negotiator for each side). I use this quite frequently, for so many reasons. There is a different level of ownership by parties which occurs. There is also the inevitably greater degree of exposure to one another's humanity which is so critical to progress. And there is the freedom for negotiators to speak without the constraints (or support, it has to be said) of their team being present. I tried this just last week after the bulk of a day's mediating in which relatively little progress had occurred. Although initially very uncomfortable for the parties (hence their resistance to it for most of the day), the meeting slowly thawed and in the end was highly productive. A new concept emerged, and a deal was done. I can say with certainty that the discussion which took place was of an entirely different quality and nature to the other "formats" we had tried that day.

Then there is a meeting with only one party's negotiator – often just a one to one between the meditator and that person. These meetings are different again. There's no doubt that people behave differently away from their teams of colleagues and advisers, and away from the other side. I often find a willingness to discuss the challenges they face as leaders in that context, bearing ultimate responsibility for the settlement decision. The relatively intimate nature of such a discussion changes things. Only recently a lead negotiator confided in me in just such a meeting that he felt he had handled the situation really badly, thus contributing to the escalation of the dispute. He would never have said that in the presence of his team.

Finally, beyond that still, is the casual and sometimes accidental meeting – usually on another pretext. This is the "smoker's meeting" (see Bill's Law above), where one person (ideally a lead negotiator) announces that they are going for a cigarette, and I say "I'll keep you company, but without the cigarette". It is in the nature of such chance meetings that they tend to engender a different perspective – a willingness to stand back from the coalface, a broader conversation about "where this is all going" and so on. The change of context seems often to bring a greater candour.

It is different to relate to someone standing on the street or fire-escape, waiting at a frothing coffee machine, grabbing two minutes of a football match on a tv in the reception area, or even standing at a urinal. I can report that I have settled or made real progress in mediations in all those environments – though I will spare you the details here!

More seriously, for me this gives rise to two key questions for mediators:
1. How many different formats of meetings do you typically use? Should you think about more and different ones? Are you willing to experiment with different ones?
2. How can you "engineer" the informal or even accidental meetings which so often generate a very different kind of conversation?

I like this concept of "engineered informality" (you heard it here first). It may sound paradoxical, but for me it underlines the very essence of what we do, which is to create environments in which previously unacceptable conversations become possible. Think about it and post your thoughts.

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