

Kluwer Mediation Blog

How do we consider mediation?

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This article may be helpful particularly if you consider settling a case as a party or as an advisor.

There are many perspectives that one can consider when looking at mediation. One example is that our current mediation culture is still *in development*. Therefore, sometimes, parties ask me, the mediator, to invite the other party to mediation. Actually, this is happening more than I would prefer and it may be related to the society's education, acceptance and respect towards mediation. In these cases I get to send a letter and communicate with the other party.

I was recently talking with a client's lawyer about the possibility of mediating a commercial case and he respectfully denied the invitation to mediation. In his motivation of denial, he stated that the mediation is not a solution since the parties have already met and failed to settle the case. Also, he said that now is already late for mediation since the case will be heard in front of the court of law within days. The final reason was the one that really challenged me. He said that his client's financial resources are limited and unfit for covering the mediator's fee while facing high litigation costs.

In short, the denial was based on a failed negotiation and limited resources in a context of difficult litigation. But we are aware that all these reasons should be excellent incentives towards the use of mediation. It was not the attorney's bad faith, he is a very polite and straight forward person actually; it was the education system that he went through that made him look at mediation from this perspective.

Many fundamental questions were reborn in my mind in that very moment. Why do we mediate? Why should we mediate? What benefits can the parties draw from mediation? They were all hitting against the wall of the mindset towards mediation so one question remained. It's the one that is looking at the way we think when we consider mediation. **How do we consider mediation?**

This is not aiming to provide the reader with *the way* to consider mediation, but rather to explore as many possible angles and more important to arose discussions regarding the most effective solutions in order to generate a positive change in the collective mind.

Since I'm writing this, I am in the fortunate position to go first.

Some look at this from their perspective of the mediation benefits, and that is the saving time and money one. Therefore, if one doesn't have time and money, the common approach would not favor mediation. We see that mediation is to be considered by some parties that have resources available

and that consciously invest them in order to benefit from an amicable resolution.

Others don't look at this from any perspective as mediation is generally unknown for them; therefore mediation is not to be considered.

Certain professional consultants are biased against using mediation as they are under the prejudice that the mediators competencies are overlapping with their own. For example, this is true in the case of legal and psychological consultancy. This unfortunate confusion is actually one root of the lawyer mediators / non-lawyer mediators' taxonomy.

When considering mediation I suggest that parties look first at the issues they want to resolve and evaluate the situation in order to explore the opportunities and the threats that they are facing. This should enable one to list as many, if not all, possible scenarios from the best possible one down to the worst case scenario. While the best quality scenarios can be seen as chances towards opportunities (safety routes), the worst ones can be seen as risks towards threats (unsafety routes).

If one thinks in these terms, mediation is to be considered as an instrument for **safety management**. Yet, it is up to our clients and their advisors to assess and look for the safety.

Now is your turn. How do you think that mediation should be considered?

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