

Kluwer Mediation Blog

Who's Running The Show?

Bill Marsh (Editor) (Bill Marsh Mediator) · Friday, January 2nd, 2015

Something is in the air at the moment. And it goes to the heart of what we mediators do.

On the one hand, noted mediation thinkers such as Robert Bush and Joseph Folger write an impassioned challenge to the profession “[Reclaiming Mediation's Future: Getting Over the Intoxication of Expertise, Re-Focusing on Party Self-Determination](#)”, arguing that mediation has shifted radically away from the party self-determination which is its essence. They maintain that the context in which many mediations take place – the court system – has over-influenced the behaviour of mediators themselves, noting that:

“We were drawn in by the culture of helping, the drug-like “high” of reaching agreements (and even “wise” agreements), the “rush” of satisfaction in cutting Gordian knots, finding creative solutions, and protecting vulnerable parties. Along the way, the theory of the “wise negotiator” penetrated the mediation field, making the problem-solver role look even more attractive. So that the subtler, finer, and ultimately higher value of party self-determination was simply overwhelmed by the intoxication of the problem-solver role”.

On top of that, my fellow Kluwer blogger and respected mediator John Sturrock writes [that](#):

“We [mediators] help them [the parties] to rediscover humanity, to understand the other, to acknowledge and apologise, to explain, to engage, to have that conversation...Perhaps most important of all, therefore, is that those with whom we deal can, with our help, regain their autonomy, their control and their dignity”.

Again, a strong focus on self-determination.

But at the same time, another good friend and respected mediator Bill Wood [notes](#) in a recent blog [an](#)

*“increasing tendency of parties (or rather their lawyers) to demand from me as the mediator more engagement with and more technical analysis of the legal issues.
Bluntly I'm being put on the spot. Recently two parties amended my mediation agreement to require me (the usual wording merely “permits” me) to express my views on the merits of their respective positions at the end of the mediation day if the case had not otherwise settled”.*

If these clips reflect anything of what is going on out there – and I believe that they do – then we need to think seriously about where we find ourselves. I'm not going to delve here into the

evaluative/facilitative debate (undoubtedly mediation's most boring and misconceived "issue"), but rather to ask a different question. Who determines what mediation in general – and any given mediation in particular – is really about, and what goes on?

Here are the main runners and riders:

1. The mediators – Here, the argument goes that it is for those who mediate to decide what the essence of the process is really about. After all, if we don't know, who else will? We are the independent ones, the neutrals, the experts in conflict. It is the mediator's experience, skills and vision which determine what process, inputs, etc is likely to be most effective. If we say that it's all about party self-determination, then it's all about party self-determination. Ironically, however, if you play this out to its logical conclusion, you may get the very opposite of party self-determination.

2. The parties – They, after all, are the people whose lives and interests are front and centre. They are also those paying for the mediation. So surely they should have a large say in determining how a given mediation will run? If we disagree with what they say they want from the process, can we mediators really say that it's not "good for them", or just not part of the mediation process? On the other hand, what if we think they are simply too close to the problem to see clearly?

3. The parties' advisers – these people are often (but by no means always) regular and sophisticated purchasers of mediation. They often know what they want from a mediation (process as well outcome), so why shouldn't they get to determine much of what is involved? What if they want the kind of input Bill Wood writes about? Who are we to tell them that they can't have it, that that is a denial of their self-determination, and not "true" mediation? And to complicate matters, let's be honest – we mediators are naturally concerned to keep in with them, because they are the ones who hire us on (we hope) a repeat basis. Sorry folks, I'm just being straight.

4. Some "regulator" – a strange irony of the legitimisation of mediation over the last twenty to thirty years has been the growth in the desire to define and control it. A plethora of bodies abound, some essentially inside the profession (ie self-regulatory), others less so. In some countries, they exercise a considerable role in asserting what can or cannot happen in a mediation. Conceptually, I can see the regulatory argument, but sometimes it results in those with little or no grasp on mediation dictating the realities of it to those at the coalface.

From somewhere amongst all these competing forces a process has to emerge which delivers.

Mediation conferences are often full of "when I mediate, I never do X" and "I only hire mediators who do Y". The on-the-ground reality, I suspect, is that all mediation processes are a heady mixture of what each of the different participants wants and can offer. A whole range of forces are in play. Of course mediators have an important contribution to make in determining what goes on – If you hire a mediator, why ignore their own perspective and experience on how the mediation can be most effectively run? Equally, it is not simply for mediators to dictate a process to parties and their advisers. The latter will have views, experience and demands to bring to bear. The hard part comes when those differ widely, either from the mediator's or from each other's.

In the end, it's all about collaboration. Everyone has a contribution to make, everyone a different view on "wisdom", everyone their own take on what "works". This breadth of variety and desire to have input is not something mediators should shy away from. In working with all these to mould an effective process, we are modelling collaboration. That in itself is a fresh contribution.

So as the New Year starts, here is something to reflect on. If you are a mediator, in what **specific** ways do you elicit or make space for the views of others (parties and advisers) on how a mediation should go? If you are a party or adviser, in what **specific** ways do you seek out the mediator's (or – more radically – **your opponent's**) wisdom on what is likely to work?

Answers below, please.


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