

Kluwer Mediation Blog

You are not Alone: Role of Counsels in Mediation

Florencia Gallardo (EGCP S.A.) · Monday, August 10th, 2015 · Young Mediators Initiative (YMI)

In Buenos Aires, the city where I currently practice mediation, mediation is mandatory before suing the other party. Thanks to this system, I was able to start mediating my first cases right after I was certified. After a few cases, however, I began to realize just how overwhelming it can be when parties' advocates are already focused on the lawsuit and are not convinced of the advantages of mediation. Many perceive mediation as a mere bureaucratic step. In contrast, others embrace the mediation principle. And this is exactly what I have found to be essential for the achievement of a successful mediation: that advocates give us mediators the sense that we are not alone when conducting the mediation process.

Three partners in a medium-sized business, which produced veterinary products for regional countries, had been arguing for more than a few years. Their dispute centred on how best to run the business. Mr. Innovative, as the minor stakeholder, owned 10% of the shares and was a young and enthusiastic partner willing to explore new opportunities in other markets that were indirectly related to the veterinary industry. The two major stakeholders, the Traditional Brothers, each owned 45% of the business and did not want to change the status quo, despite the existence of a new competitor making a strong entrance into the market and threatening the very survival of their company. As the most experienced partners, the Traditional Brothers were confident they would be able to weather any storm, as they had done several times before.

Seeing no other alternative, Mr. Innovative consulted a legal advisor on how to proceed and on the legal actions available to force the Traditional Brothers to listen more seriously to his suggestions and creative ideas. After studying the documents in detail and analyzing the company's bylaws, the counsellor advised him that he was unable to do much about it. The counsellor recommended his client remain calm, focus on his golf hobby and accept things as they were as no legal action was available to force the Traditional Brothers to act as he wanted. As a consequence of this advice, the conflict lingered, grew more tense and then escalated as Mr. Innovative reached a point of utter frustration. His conflict had been classed as having no judicial value and as such was ignored, completely. From this context of complete desperation, Mr. Innovative decided to throw in the towel. He sold his entire shareholding to a third party, a complete stranger who seemed to share his business ideas. Acting compulsively and out of rage, he failed to comply with 'right to first refusal' clause that was stipulated in the contract signed with the Traditional Brothers, and didn't notify them, even, about his decision to sell. The Traditional Brothers found out about their new partner directly from the new shareholder himself, whom neither of them had even met before.

The mediation session started with a lot of anger from both sides. One could sense there was real

tension in the room. However, during the process of patiently exploring the reasons for this conflict, I realized both parties' attorneys (with Mr. Innovative having changed his legal advisor) had begun actively collaborating with me, each making important contributions that allowed me to reach a global understanding of the case and to create a neutral environment in which we could move forwards more easily.

In private sessions, both advocates clearly expressed their clients' concerns without focusing exclusively on legal aspects. They chose not to use the other party's mistakes or failures to their client's advantage. Both advocates were absolutely conscious that it was better to focus on the solution, than on their client's defence. They avoided all negative comments; employing a pacific, polite tone, always with cordiality.

This may sound obvious, but in the practice of mediation you realize this is often not the case. It makes a huge difference in the course of mediation if advocates are adversarial or, on the contrary, committed to mediation. In this particular case, even before the mediation started there could have been a conflict prevention outcome, if Mr. Innovative had consulted his second legal advisor first.

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