Kluwer Mediation Blog

Laying the table

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The recent blog entry by Matthew Rushton (23 August) is a reminder of what changes can and do happen across the diverse landscape of mediation, and of the ways in which the “classical” model of mediation is probably as much a fond memory as it is a consistent practice. In both practice and training, we’ve long operated on some assumed attributes of mediation – confidentiality, neutrality – and a loose consensus on at least the key elements of what mediation looks like, though without offending our other cherished values of pluralism, diversity, mediator autonomy, and context-sensitive design.

This blog is not an attempt to revive or revisit those conversations about what really is mediation that will, I can safely assume, continue. But I do have a question, and it’s in the same vein as the one asked by Matthew, as to whether there are some elements of practice (and indeed of training) that not so much define the “field” as shape the way in which mediators can do their best work. The question I have here concerns the role of pre-mediation steps, and the imperative – or dispensability – of pre-mediation contact with the parties.

I’m aware from most of my colleagues, across an array of practices and substantive fields, that some form of pre-mediation contact is the norm for at least two reasons: first, to introduce the parties to the mediator and some preliminary insight into his or her style of practice; and second, to allow the mediator both formal and informal access to preparatory – even if sometimes partisan, sometimes adversarial – information about the dispute. There’s a formal element to the first step as well which is now, I expect, pretty much commonplace, and that is the signing of a mediation agreement (i.e. an agreement to mediate) that will also address the tacky but necessary question of fees and the allocation of those costs.

The metaphor I like to think of in this respect comes from the days when I used to do scuba diving and one of the things drilled into us by instructors, and that we would practice as ‘buddy’ divers, is the “shore orientation”. Divers will know about this: if you’re heading out either directly from the shore or will be taking a boat, the wise move is to find a vantage point from which to survey the expected area of the dive, to watch for signs of currents, rips and tidal movements (and dorsal fins). While there will always be uncertainties once you – literally – dive in, the orientation is a way of at least gaining a sense of what you’re heading into; and it may, if wise heads prevail, lead to decisions to delay or cancel the dive.

What many mediators will also be familiar with, probably most commonly in institutional or organizational mediations, is the lack of opportunity for such preliminaries and preparation.

Indeed, I gather from conversations in several settings, that there may be organisational prohibitions on preliminary contact. These non-contact norms may reflect a variety of considerations: economic (specific funding levels allocated per mediation and per mediator); efficiency (the rapid 'processing' of what may often by a high demand for mediation services); normative (a personal or organisational principle that argues against prior contact); perceptual (avoidance of any risk of party perception that the mediator is likely to be 'captured' by the other party); convenience (the practicalities of prior contact, depending on party location and access to communication); cultural (specific knowledge concerning parties' expectations, fears, linguistic abilities etc.).

However, as I think through what we've learnt from the past few decades of experience in mediation, in domestic, commercial, international and other fields of disputes and conflicts, there remain compelling reasons not to relinquish the preparatory phases of mediation. Amongst the lessons gleaned from intense conflicts is that parties are faced with several kinds of uncertainty, of which two seem to stand out: uncertainty about information (partisan, reliable, shared, secret); and uncertainty about commitments (participation, capacity to agree etc.). While not all uncertainties can and should be dealt with prior to the mediation, the mediator may at least gain some sense of where those uncertainties lie – rather than facing them "cold" when meeting together for the first time.

There's a further uncertainty that the mediator faces: she or he knows little, if anything of the history of the parties' relationship. If it's true of intense (and often identity) conflicts that parties use their [perception of the] past to fight about their fears for the future, it's just as likely that variations of this will shape most other mediations. In fact, a recent article by Heidi and Guy Burgess, on "Applying the strategies of international peacebuilding to family conflicts: what those involved in family disputes can learn from the efforts of peacebuilders working to transform war-torn societies" [Family Court Review, Vol. 53 No. 3, July 2015 449–455] reinforces the "intelligence" that can be gleaned across diverse fields of practice.

To switch metaphors from diving to dining, what's involved in pre-mediation work – and is at risk of being lost where there is minimal or no preliminary contact – is the chance to "lay the table". Think of that metaphor for a moment, in anticipation of that special dinner party: who is going to be there; will there be (indeed, should there be) a seating plan; how will the conversation flow; what will be served; what special needs need to be taken into account; what fractious histories do we know about; who will be offended and socially disruptive if not invited; should we plan for surprise guest (the ones not invited but who turn up anyway); are there cultural and dietary requirements . . .

In sum, it seems at least these elements are important in pre-mediation work, and are at risk of being lost if preliminary contact is inhibited or avoided:

¬ Identifying credible representatives of potential parties;
¬ Establishing preliminary and constructive connections with the parties;
¬ Ensuring parties have clear connections with and mandate from constituents;
¬ Engaging in a preliminary "mediation risk assessment' with the parties;
¬ Providing some capacity in parties to work constructively; and
¬ Assessing potential for agreement to be implemented

None of this is a guarantee that the "event" might not be derailed, enhanced, or reframed during the

mediation itself, but it is at least a preliminary risk assessment.

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