Kluwer Mediation Blog

A Mediation Masterclass With A Difference

Rosemary Howell (University of New South Wales) · Tuesday, May 22nd, 2018

Life as a ‘pracademic’ is a wonderful experience. I have the pleasure of teaching intensive programs in ADR at postgraduate and undergraduate level and in between I work in my own practice as a mediator, facilitator and coach. A great life!

My teaching life includes the privilege of training my university’s team for the ICC International Commercial Mediation Competition held each February in Paris.

In a previous blog I have shared some of my learnings as a coach about maximizing the impact of the coaching process.

Writing that blog prompted more reflection – not about what I had done as a coach but what I had learned from my students.

Reviewing the videos of their opening addresses, as I sat down to write this blog, I was struck by two really significant lessons my students had given me in their ‘masterclass’.

• The first lesson – mediation as a ‘client-centric’ process

Mediation has hit the mainstream in Australia where I teach and practise. Our law degrees are now required to include some ADR training and our courts and professional practice rules require lawyers to introduce clients to ADR possibilities prior to litigating.

Mediation advocacy gets a lot of airtime and there are three texts on the subject on the bookshelf behind my desk.

The outcome is that, in my jurisdiction, it seems as if lawyers have just relocated to a different forum – bringing aggression and legal argument from litigation to mediation sessions where clients may not even appear. This outcome appears to be far more widespread than Australia as other contributors to this blog have noted.

The question of whether lawyers have ‘hijacked’ mediation is far from new. It appears to have been first posed formally in 1999 in Deborah Hensler’s paper on court-connected ADR [1] and has regularly and consistently reappeared in commentaries since then.

In my view, the hijack is real and one of the most significant consequences is the absence of the client voice. Perhaps where the 'client' is a senior and experienced General Counsel the client may make a cameo appearance but otherwise silence or absence is the usual experience.

Students see it very differently.

Faced (as in the ICC competition) with a challenging commercial scenario, they immediately recognise that the client should be front and centre of the process. Instead of lengthy opening legal arguments by the lawyer, students often open with the voice of the client, framing the dispute in commercial terms rather than in technical legal ones. The strong message, from the mediation's beginning, is that this is a process focused on, and significantly directed by, the client. It never seems to occur to students to adopt language I consistently hear from practising lawyers -that their clients are 'reluctant to participate' and 'want the lawyers to speak for them'. Students assume that clients need to be visible and engaged in a dispute that is about what will happen to them and their business.

I find it thrilling to get this lesson consistently from students and, watching professionals in the competition mediating and judging, I am delighted that they are getting this lesson too. I have observed it throughout the 12 years I have been participating and feedback from the professionals suggests they see it as valuable and appropriate behaviour. As more of these students enter legal practice they will hopefully become a force in helping us to return to the client-centric approach that was mediation's initial promise.

• The second lesson – the power of the narrative

My mediation experience and my exchanges with fellow mediators and lawyers persuades me that the usual process takes an evidence based approach. The lawyers deliver the facts and their legal analysis. Not only is the client voice missing, but the client narrative is absent as well.

I have been fascinated to watch my students develop the client voice and explore the power of the client narrative. They regularly use the narrative to achieve a 'pre-emptive strike' – such as revealing confidential information appropriately and early to rebuild trust or to avoid the consequences of being 'found out' later. They manage to turn the narrative into a vehicle that works as a persuasive tool far more effectively than a recitation of the facts and a dissertation about the law. The narrative provides context and offers parties the opportunity to explore their different experiences and perceptions of a common set of events. My students from the 2018 competition recently recreated the opening narratives from this year's final to a packed house of lawyers and mediators. It was a wonderful masterclass to the audience and a showcase of the value of learning from our students.

May the learning continue!

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References[+]

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