
Kluwer Mediation Blog

If it looks like mediation? And other ramblings....

John Sturrock (Core Solutions Group) · Thursday, November 28th, 2019

What to write about this month? There is a lot on the go: General Election in the UK, Citizens Assembly in Scotland, Climate Change reports predicting the worst.

What about mediation? That is an interesting question. I have been asked recently to act as an independent third party in two significant matters where the parties (including public sector agencies) have specifically said they do not wish to call me mediator or for the process to be one of mediation. They wish to describe me as a “facilitator”. Everything else feels broadly the same, looks broadly the same and requires nearly the same approach. But without formal “position papers”, without recognising there is a “dispute” of the litigious sort, and perhaps without the expectation that I shall rigorously test the parties on their positions. It’s been interesting and, in some ways, seems to free the parties up to be more experimental, less adversarial.

I can’t say more for reasons of confidentiality but wonder if anyone else has this experience? It does not matter much in my jurisdiction where there is no developed jurisprudence or legislation covering “mediation” but what if there was? Does the language matter? Just because we decide to call it “facilitation”, does that disapply any legal rules that may be applicable to mediation? Mind you, I often call myself a “facilitator” in workplace/management disputes already; it seems more comfortable for the parties and seems to reduce a fear of formality that even our informal process of mediation can create.

To move on, I recently acted as a mediator in a difficult case where one party (an experienced professional) refused to meet with the other party (a lay person) because the former did not want to “humanise” the latter. His explanation was coherent from his perspective and given his role and objective. For me, the nature of the dispute made a meeting obvious and, from a mediator’s perspective, even necessary. It would have helped the lay person enormously. Paradoxically, it would also, in my view, have assisted the professional party. But this was one of those rare instances where to insist on a meeting (not that one could) would have been counter-productive on the day.

Ironically, in another very similar matter, against his instincts, another professional party did meet the lay person. He explained to the lay person (who was accompanied by a lawyer) why the lay person’s defence would not work. The lay person explained that s/he needed to hear that explanation, from the horse’s mouth as it were, in order to move on and accept certain consequences. The professional party’s lawyer was moved to say to me afterwards that this one of the most powerful meetings he had ever experienced in a mediation. It was a game-changer. It

could only have happened in mediation, in a confidential setting where sufficient trust had been built in the process, if not between the parties.

Trust: that essential ingredient in human affairs. As we look towards the election here in Britain, trust seems to have evaporated in a sea of deceit and fake news. Suppose we believe that the biggest concern is how we do politics rather than any particular policy? Suppose we wish to see reform of public discourse and a return of civility in the public square? Suppose we see our politicians as bell-weepers of how society discusses important matters? Suppose how our political leaders act sets the tone for others? Suppose we think that civil discourse in Parliament is the essential precondition of a necessary, mature consideration of what really matters, such as climate change, automation of jobs and mass migration?

What sort of people do we wish to see and hear considering these and other difficult matters? How would we wish them to conduct themselves, and behave towards each other and others, including us, the electorate? We probably know the answers to these questions. Might the answers give us some relevant benchmarks for deciding who to vote for this time round? Can/should we mediators/facilitators encourage people to think this way?

Finally, I suggested last time that I might comment this time on Scotland's new Citizens Assembly. I can do no better than refer to a report of its first weekend. It makes for fascinating reading for those interested in this progressive initiative: https://www.citizensassembly.scot/sites/default/files/inline-files/Weekend1_Report_Final_for_web.pdf

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