

Kluwer Mediation Blog

What kind of magic can a mediator do?

Constantin-Adi Gavrilă (ADR Center Romania) · Monday, September 14th, 2020

“Adi, I will be honest with you. When my lawyer suggested to try and mediate this case, I had no idea what she was talking about. At the time, I was blinded by fury and all I wanted to do was to teach my wife a lesson, given all the pain she caused me. I was reluctant about the idea of mediation initially because it looked to me at the time that the law was not on my side, although I knew I was right. Most of all, I had absolutely no idea about the mediator’s trade. We did have our lawyers and they were not able to help us resolve this amicably, so what kind of magic could a mediator do in order to help in those circumstances that we were both trying to hurt us with anything we did and it felt like the time and opportunities for peace were long overdue. Oh boy, I was wrong. It’s clear to me now that without mediation, we were aligned for a long and painful war, and our children would have paid the bills.”

This was feedback received from one of the spouses at the conclusion of a recent family mediation with properties, two lovely children, tensions rising all the way, lawyers in the room and the whole nine yards. The case settled with a creative solution, although, apparently, they were blocked in a no exit situation, with him having to move out and asking for “his rights” while she wanted to keep the children and the house, but had limited financial possibilities in the process to settle the deal and be able to realistically manage everything in the long run.

His feedback reinforced the reality according to which the awareness with respect to the roles of the mediator is far from the levels necessary for mediation to reach its potential in any jurisdiction. Thankfully, although the previous negotiation attempts were not successful, their attorneys were able to really see their opportunity to keep on trying to settle and use mediation to do so. They were equally instrumental in preparing to settle, a totally different process than preparing to win in court, preparation that reflected in the mediation room by their significant contribution to the outcome. Perhaps we can focus on these things in a future post.

So, back to my client, I thought about following up on his comment and to try to unpack it a little bit to better understand his perceptions about the value we, as co-mediators, added to the process. The brief conversation that followed and that inspired this post started with my question, “*Thanks [...], can I ask you how exactly do you see now our contribution to the resolution of the case?*”

His reflections were very interesting. First, he mentioned that having a sustainable framework provided by the mediators was essential to help them engage initially. This included the neutral physical space (our office), the ground rules for the process, including the confidentiality and so on. As an example, he mentioned that the previous negotiation attempts at home were usually

ending with a huge argument, and the ones facilitated by and with their lawyers were always very, very short, ending with the same intense argument. But having rules agreed beforehand and neutral facilitators ready to enforce the rules and to build trust with the parties was essential to get them started.

Second, my client spoke about the explanations we provided to help the parties really understand how to use the mediation process at its highest potential. He didn't only refer to capacity building around the abstract principles for interest-based negotiation, he spoke about the benefits of spending time with each party in the preparation stage and then delivering a simple and effective summary in the opening joint meeting with practical examples and continued opportunities to discuss this further and answer questions throughout the process. Having been informed about the rules and the instruments related to mediation, the parties could take the time and avoid the risk of rushing to the stage of proposals.

Third, interestingly, he submitted that the most important contribution of the mediators to the success of the process was their ability to build trust, to ask the hard questions in a gentle but straight manner, to help parties outline the "walls" (his word exactly) that confined them initially, and to align them to the goal of breaking the wall. In short, he referred to it as the mediators' "courage and informality".

So, if we bring them together, we're looking at three important skills, providing a sustainable framework, building capacity effectively and not shying away from asking the real questions, diving in the substance in a gentle, honest and open manner. So, my final question to him was "Any of these seem magical to you?". My client smiled while replying "Adi, yes and no, yes and no!".

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