A MEDIATOR'S SECRETS REVEALED
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"Omne ignotum pro magnifico" [All things unknown seem grand]

– Arthur Conan Doyle [Sherlock Holmes]

I still recall a story shared in a mediation course I took in 2006 of a mediator who separated parties into different rooms following a rather emotional and heated exchange. Each party waited for some time, believing that the mediator was speaking with the other side, forming various impressions and a hypothesis as to the progress which was being made. In fact, the mediator was somewhere else altogether, leaving the parties alone to cool down and let their imaginations guide the process. While the story, as shared, suggested that this practice served the parties well, I could not help but consider this smoke and mirrors approach to be dishonest and manipulative - two things that I refuse to incorporate into my own mediation practice, particularly as I value people's emotions, time and money.

While a good magician does not reveal his tricks, I do not see there being any magic to mediation. Rather, I see it as a process facilitated best by those who possess a certain skillset. As I believe that I possess such skillset, I have no trouble sharing a few stories or so-called tricks of the trade and my position on them:

<u>Toying with Trust</u>

A lawyer who I worked with shared with me a negative experience she encountered last year when participating in mediation with a client. Specifically, in corresponding with opposing counsel following the conclusion of the failed mediation session, it was revealed that the mediator lied to the parties and presented a "final offer" which was not the actual final settlement option offered by one of the parties to the dispute. While prior to this revelation, the sentiment existed that a good faith attempt had been made to resolve the dispute, the surfacing of this information drew the process into question, along with the ethical integrity of the mediator. As trust is a fundamental cornerstone of the mediation process, the revelation that the mediator violated the trust of the parties is troublesome.

The ADR Institute of Canada provides professional designations for mediators, an otherwise unregulated profession. In order for one to earn such a designation, in addition to meeting the education and experience requirements, mediators must complete an ethics course. The ethical integrity of a mediator, including an acute awareness of when he/she may not be able to act in an unbiased matter, is significant both for the parties participating in the mediation process and for the reputation of mediation overall.

I believe that earning the trust of participants is something sacred and that mediators should never manipulate that trust, regardless of what kind of outcome doing so can produce.

Tip: When selecting a mediator, ask if they have completed the Practical Ethics for Working Mediators course and have a Certificate of Completion issued to them by the ADR Institute of Ontario. Also, consider having your mediator verify the Code of Ethics by which he/she practices to see if you can gain comfort as to the ethical standards of the mediator's practice.

Playing Stupid

Mediation exists to provide a safe environment for quarreling parties to share their perspectives and explore options, potentially finding a solution that is agreeable to all. All that is shared in the course of a mediation is done so on a without prejudice basis – meaning that it cannot come back to hurt the parties later on (i.e. a settlement offer made in the course of mediation which is not accepted cannot then be used in court against the party who made the offer). Accordingly, mediators are placed in a rather unique situation as information is disclosed in their presence which is not to leave the mediation.

To honour this, many mediators destroy their notes and safeguard themselves against being compelled to testify as to what took place in the course of a mediation session. Some go so far as to suggest that they have the memory of a goldfish and would be unable to recall what transpired if compelled. Rather than acknowledge that they have been trusted with confidential information, some prefer to insult their own mental capacities to shrug off responsibility. To me, this goes too far as not only do these mediators leave themselves vulnerable should they be looked to for damages but they also put themselves in an awkward position in the event something is disclosed which crosses the line, such as imminent harm to an individual. As I have witnessed some "goldfish-type" mediators recall much detail when teaching or storytelling, I believe that there is a way to honour the confidential nature of mediation without being self-deprecating or dishonest.

My experience in handling confidential information extends beyond my role as a mediator, as I do so as a condominium director, law clerk and parent… Through this experience, I have learned that the best approach to being entrusted with confidential information is not to pretend you do not know it, but rather to honour and appreciate the position you are in, the trust extended to you, and act accordingly.

Advocating

In bragging to me about his experience with mediation, a law student shared that he often finds himself advocating for the weaker party in mediations that he facilitates. There are several things fundamentally wrong with this.

First and foremost, I fear that the student confused his role as a future lawyer with that of a mediator as it is not the mediator's role to advocate for anyone. Additionally, the role of the mediator is not to pass judgment on the dispute or the parties.

I have come across this dilemma in mediation circles in the past – concern about power imbalance is important to consider to ensure that the process is appropriately carried out; however, I consider it to be a mistake for mediators to assume that they know everything about the parties or the matter. It is not for the mediator to assess who is stronger or who is weaker; in fact, I have encountered stories of mediations where a party who appeared to be weaker was empowered in ways that neither the opposing party to the conflict nor the mediator were aware of or could have possibly imagined.

Lawyer-mediators often struggle with the role of justice in mediation; I have had several interesting philosophical discussions about where exactly it fits in and what a mediator should do to ensure that "right prevails". The issue is that mediation is not about right or wrong. This is fundamental to my philosophy that the goal of mediation is not to settle the dispute but rather to generate options. It is up to each party to then weigh the various options and choose the course that is most appealing to them. It may well be that settlement is the most appealing option; however, this is not always the case.

Empowering parties to make an informed decision that will suit their best interest – settlement or otherwise – is, to me, what a mediator should do to help. The focus should not be on advocating for what is thought to be "right" but rather on what is right for the parties – and what is right for the parties is not for the mediator to determine.

This includes the mentality of a mediator "beating the parties over the head" to reach a resolution – such practice is entirely inappropriate in my view.

I have now revealed 3 "tricks" used by some mediators and have been clear as to my position in respect of them. To the extent that these revelations have raised any concerns for you, consider inquiring with prospective mediators you consider to ensure that their positions align with your expectations and comfort-level.

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Marc brings unique insight in mediating condominium conflict through the knowledge and experience he has gained as a condominium director, resident and law clerk. His mediation practice is focused on condominium disputes.

Marc sits on the Board of Directors of the Toronto & Area Chapter of the Canadian Condominium Institute and is a member of the ADR Institute of Ontario; the ADR Institute of Canada; the Toronto & Area, Golden Horseshoe, Huronia and London & Area Chapters of the Canadian Condominium Institute; the Association of Condominium Managers of Ontario and the Institute of Law Clerks of Ontario.

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