

Mediation Prey

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I've got to admit that the John Sandford "Prey" crime novels, featuring the complex detective Lucas Davenport, are a guilty pleasure of mine, both in text and particularly audiobook formats. I can usually get through an unabridged audiobook during one of my frequent return car trips between Ottawa, where I live, and Toronto, where I now mediate about 80% of my cases.

The concept of "prey" (in the sense of "take advantage of; exploit or injure; cause constant trouble or distress to") comes to mind as I read and re-read two recent thought-provoking posts on this blog: Jeff Krivis' June 16th post, "[Settlement Drift](#)" and Michael Landrum's post, exactly a month later, "[Top Ten Miscellaneous Observations Regarding the Decline of the Joint Session in Mediation](#)". Both Jeff and Michael are old colleagues of mine from our days together in the [International Academy of Mediators](#). They are both leaders in commercial mediation in the United States and theirs can be taken as the voices of wisdom and experience.

As I read these two posts (and I urge readers to go back and read them again, carefully) the canary in the coal mine theme I perceive is that mediation and mediators are being **preyed** upon. Preyed upon by bored, self interested lawyers, by penny-pinching and uncaring insurance companies, by overburdened and buck-passing Court systems and by avaristic ADR service providers.

While this framing is to be acknowledged and respected, it seems to me that we, in the trench (or, at the coal face") commercial mediators must constantly remind ourselves that we can, indeed, must choose to see things differently. For example, rather than focus on how we and our process are be victimized by the said predatory behaviours, we can chose to be genuinely and respectfully curious about the interests and structures underlying them. Rather than seeing ourselves locked in a game - a triangulated process of deception and counter-deception - with lawyers and clients we can chose to have high expectations for everyone involved in a mediation and manifest those high expectations with authentic and respectful communication. For me, most importantly, rather than lick my wounds after a failed mediation blaming the chicanery and *mala fides* of others, I can chose to focus on the need to learn from the failure with a view to being of greater service to others in the future. In this regard, I am reminded of the possibly apocryphal story about Pablo Casals. Pablo Casals was one of the great cellists of all time. Even at age ninety, the master continued practicing the cello four to five hours a day. "Why, at your age, do you keep working the fundamentals?" inquired a friend. Pablo Casals replied, "Because I think I'm making some progress."

Jeff and Michael are highly experienced mediators working in mature U.S. markets which, as I observe things, are usually 3 - 5 years ahead of developments in commercial mediation here in Ontario. I and others working in similar markets owe them a sincere vote of thanks for raising these concerns and providing us with the occasion to reflect on our own practices.

Now, as I'm in the middle of my summer vacation, it's back to "Prey" of another sort.