

# Kluwer Mediation Blog

## Mediation as Sustainable Development?

John Sturrock (Core Solutions Group) · Sunday, March 1st, 2015

A recent survey at a conference in London pointed to very significant differences between users (generally favourable to mediation) and their advisers (whether in house or lawyers in firms, who appeared far more resistant to using mediation). The reasons are no doubt complex and the article published in the Southern California Law Review, *How Lawyers' Intuitions Prolong Litigation*, offers some explanations. I have commented on that in the past...<http://www.core-solutions.com/blog/cognitive-illusions-hamper-litigation-choice-s/>

In a parallel setting, I have been reading Naomi Klein's expansive work *This Changes Everything: Capitalism v The Climate*. She explains that climate change deniers and sceptics are often very aware of what is happening. In fact, they are so aware that they understand that, in order to prevent the now widely accepted predicted consequences of climate change, there would need to be a radical change in our present economic structures. Climate change deniers and sceptics are generally associated with a certain political viewpoint and stand to lose most if the necessary changes are implemented (see also <http://theconversation.com/why-ill-talk-politics-with-climate-change-deniers-but-not-science-34949>). Therefore, they do their best to create doubt and resistance to change. Consequently, short term benefits for a relatively small group would prevail over longer term disaster for much of the planet. A provocative thought....

This has caused me to wonder if, at least sub-consciously, something like this is happening with some lawyers in their response to mediation...? If so, that deserves our understanding and not our ridicule. As with responding to climate change sceptics, we will need to employ all of our awareness of neuro-science, behavioural psychology and cognitive biases to address the situation (see the brilliant book by George Marshall: *Don't Even Think About It, Why Our Brains Are Wired To Ignore Climate Change*). It may also require us to step out of what Klein calls "the fetish of centrism", ie "reasonableness, splitting the difference, and generally not getting overly excited about anything." In other words, contrary to our instincts, mediators may need to go on the offensive... but in a careful and thoughtful way. It is, however, a battle of sorts.

Funnily enough, an official in charge of climate change policy in our Scottish

Government recently challenged me with these words: “Could you lead the way on low carbon mediation ....? What would climate friendly mediation look like in practice? What could be done with technology? With building local capacity?”

My reply was this:

“Mediation is a great example of sustainable and low carbon activity. In one day, we help people resolve disputes that otherwise will cost hundreds, thousands or hundreds of thousands or more, saving not just money but use of resources (courts, lawyers etc) and witness time and travel, to name a few benefits. It goes on. Relationships are preserved, staff turnover reduced, morale enhanced, business decisions can be made with certainty, energy can be focussed on making more with less...”

“While in mediation face to face meetings are ideal, we skype or conference call whenever we can for preparation meetings, and online mediation is already happening.” [And see the recent report by the Civil Justice Council of England and Wales on this topic: <http://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>]

I pondered “.....could the Scottish Government (indeed, any government?) see this angle to mediation, perhaps in connection with justice reform, and find a way for the Justice Department to unite with other departments under the collective umbrella of sustainability....?”

Encouraging all of this (and real climate change conversations) would be a fascinating exercise in multi-party, multi-issue mediation...and could also lead to commercial mediators doing what Doug Noll exhorts us to do in *Elusive Peace*.....use our skills to get involved with the big issues.

But, more simply, perhaps we need to accept the parallels between the changes which facing up to climate change will bring, and the natural reaction of those with most to lose, and what mediation means for traditional and resource-intensive dispute resolution and those who depend on it?

As with climate change, many of us mediators have stakes in the current system too - and standing out and apart from it takes real courage. We stand to lose as well. But we can see the bigger picture and that some sacrifice may be necessary. Don't we?

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