Kluwer Mediation Blog

Mediating Early And Late

Bill Marsh (Editor) (Bill Marsh Mediator) · Saturday, June 6th, 2015

It's not always easy to spot trends. But one that I have noticed over the last year or two is an increase in the number of cases I am being asked to mediate in which litigation or arbitration proceedings have not yet been issued.

This produces different challenges. On the upside:

• The parties have not had years in which to entrench themselves in the unerring rightness of their cause, nor the irredeemable evil of their opponents. We have all seen the effect that many years of commitment to a particular position can have. Trying to encourage any other perspective after so long can be hard.

• The parties are generally less heavily invested in the case after a shorter time. This is certainly true financially, and so early mediation can avoid the horror of parties who have become committed to litigation simply from the need to recover their investment of costs in it. It is also true psychologically.

On the downside:

• Early on, parties are often keen to fight. They have their tails up. The sense of grievance they have is fresh and strongly held.

• The realities of being in long drawn-out litigation haven't yet impacted on them. There is a heavy cost to fighting – in litigation, in civil wars, with neighbours, wherever. The cost can be financial, commercial, personal and much else. The reality of these costs is usually less clear to parties when passions run high early on.

• It is often harder for parties to justify to themselves compromising after such a short fight – a mere skirmish, not a war. There is something in all of us that wants to be able to say that we fought hard for what matters to us, that we did not fail to meet the challenge. So the capacity of parties to allow cold judgement to rule over impassioned commitment is probably at a lower level early on.

• Less information is available. This is often the case, although not necessarily. The natural ebb and flow of litigation usually leads to a clarification of arguments, and the disclosure of information. Our natural human bias tends to assume that such further revelations (through disclosure of documents, witness statements, or however) will inevitably endorse and support our beliefs. I have lost count of the number of times people in mediation have said to me "I am certain that our

suspicions will be proved correct once we see their documents". When pressed as to the reason for their certainty, it usually morphs from conviction into mere hope!

• Hope springs eternal. I often come across a perception amongst parties that somehow their position in the negotiations will improve with time, rather than get worse. Of course this may be true, but so may the reverse. When pressed, I rarely find that a party can articulate *why* their position might improve with time.

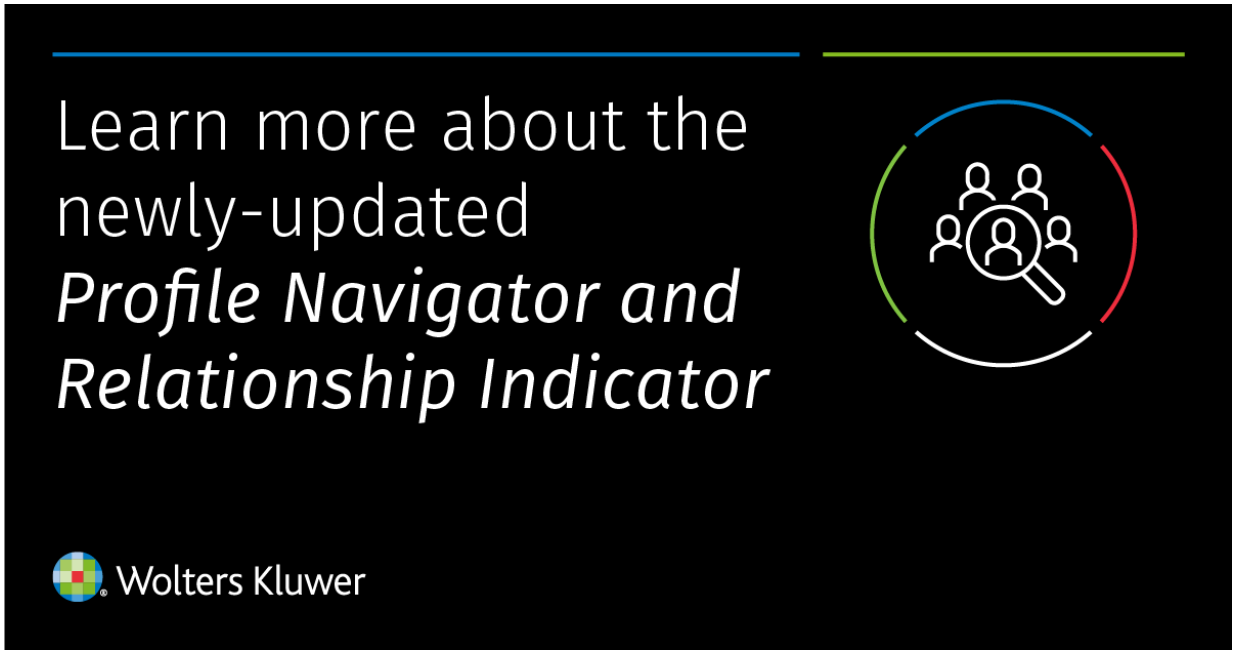
Notwithstanding the above challenges, my instincts still want to encourage parties to mediate early if there is a chance. Perhaps I am just an eternal optimist! But where I do mediate early, I have often found it important to discuss with the parties:

• The different upsides and downsides that, in my experience, they face in doing so;

• The implications which that will have for the mediation. For example, how will they deal with any information deficit? Do they have enough information to mediate at that stage? Are parties willing to "take a view" on these issues without seeing the underlying documents? And so on.

What is less clear to me is the *reason* for this apparent trend in mediating before issuing proceedings (or even whether it extends beyond my own personal experience). Mediation contract clauses drive some of it, and of course one is likely to learn of that as a mediator. The recent hefty increase in court fees in England and Wales has presumably also contributed to it – it is now an eye-watering £10,000 to issue a writ in London for a claim of £200,000 or more (rising from £1,315 before the March 2015 changes). But on a reasonable-sized claim that still shouldn't make much of a difference. So what else is driving this? Is it an increased optimism or belief in the value of mediation? Is it commercial imperative to sort the matter out early and "move on"? Or is it because parties think that the courts will (effectively) require them to mediate at some stage, so they may as well get on with it now?

I would value comments from others on whether you see this trend or not, what you think is causing it, and what impact it has on the mediations that result.



This entry was posted on Saturday, June 6th, 2015 at 9:00 am and is filed under ADR, Appointment of Mediators, Arbitration, Clients, Cognitive Bias, Commercial Mediation, Court Procedure and Litigation, Efficiency, General, Growth of the Field (Challenges, New Sectors, etc.), Instinct, Litigation, Mediation Contract Clause, Mediation Lawyering, Mediation Practice, Mediation Schemes (In Courts, etc.), Mediation Users/Clients, National Mediation Laws, Pre-arbitration Dispute Settlement Procedures
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