Kluwer Mediation Blog

Whither (Wither) Mediation?

Rick Weiler (Weiler ADR Inc.) · Friday, April 6th, 2018

Troubling trends observed as an Ontario commercial mediator compel me to once again take up my chiclet-keyed sabre.

That the following are indeed trends in commercial mediation in Ontario is unsupported by any reliable data – because no one keeps track. No one records. It's all anecdotal.

Still, I'm now closing in on 30 years as a mediator in this jurisdiction with about 4,000 mediations completed. My recent conversations with repeat users: lawyers, defence clients and, of course mediators, certainly suggest something like the following trends.

1. **Settlement Rates Declining** – There's a sense that fewer and fewer cases are resolving at mediation.

2. **Ossification of the Process** – Stagnation and rigidity has become the order of the day as innovation is eschewed. Joint session (if there is one) ritualistic chest beating, followed by offer exchanges (usually ridiculously outside the appropriate zone) culminating in some mediator intervention leading sometimes to resolution but more often to #fail.

3. **Fee Pressure** – Cost-conscious institutional defendants are become more aggressive as they seek to reduce the expense of participating in mediation. Tactics include: (a) defaulting to a half

day mediation as opposed to the previous standard full day; (b) insisting on the use of "Roster" mediators who's fees are a fraction of non-roster mediators; (c) warning mediators not to increase their fees or risk loosing work; and (d) negotiating "bulk rates" with mediators.

4. **Reduced Participation by Clients** – Now, most often, lawyers will either advise against or not allow their clients to speak in the mediation joint session – and sometimes not to the mediator in caucus either.

5. **Mediation Briefs: Late and Laughable** – Mediators frequently have to chase lawyers to get the Briefs, they are often delivered the day before (sometimes the morning of) the mediation and, when they do arrive the Briefs are often pathetic. Just last week, in a single case each of the two Briefs misnamed the other party – in one case, repeatedly!

6. **Retrograde Advocacy Skills** – Lawyers seem to be reverting to an advocacy approach I thought had gone out of style 20 years ago characterized by, "I'll huff and I'll puff and I'll blow your house down!"

7. **Ineffective Negotiation Skills** – Does anyone remember, "Getting to Yes"? Do lawyers pay any attention to the work of the Harvard Negotiation Project? Do they understand the difference between an "interest" and a "position"? Can they discuss the importance of "aspiring" and "anchoring"? Can they spell, BATNA?

8. **The End of Dignity & Respect** – Perhaps it's a sign of the times, modelled by political discourse, but the notion seems ascendant that better results at mediation are achieved by signaling total disrespect for the opponent and depriving the foe of any remaining vestige of dignity.

9. **Complacent Mediators** – And perhaps most distressing of all, mediators faced with the foregoing just grinning and accepting it all – reflecting, perhaps, the realities of the current market place (yes, me included).

Depressingly, this list could go on but I'm sure you get the idea by now.

These trends are a problem because they move us away from the promise of mediation. That promise, simply stated, was that reasonable people could engage in a dispute resolution process – mediation – that would, in the vast majority of cases, allow them to agree upon a mutually acceptable solution in a manner quicker, cheaper, more certain and more satisfying that the traditional litigation process.

The trends identified above, left unchecked, will lead to the opposite: more prolonged and costly litigation, fewer mediations, fewer mediators, more dissatisfied lawyers, more dissatisfied clients and a sad slide to the status quo ante-mediation.

So, what's to be done?

Steven Pinker, in his book ***Enlightenment Now: The Case for Reason, Science, Humanism and Progress***, is an uplifting read for anyone interested in these issues. He writes, "The first keystone in understanding the human condition is the concept of entropy or disorder, which emerged from 19th-century physics and was defined in its current form by the physicist Ludwig Boltzmann. The Second Law of Thermodynamics states that in an isolated system (one that is not interacting with its environment), entropy never decreases."

Happily we humans are not in a closed or isolated system. We have many sources of energy to draw upon to help us fight the chaos of entropy.

And so it is for those of us who care about the future of mediation. We observe the worrying trends but we don't crumple into a fetal position. We draw on our sources of energy to fight the entropy. We ask the questions: what are the options for solving this problem? Which of those options are to be preferred? What can I do to advance the solution?

Options for improvement might include some of the following:

1. **Education** – Recognition of mediation advocacy as a core competency leading to improvement to mediation advocacy training in law school and subsequently.

2. **Community** – Enhancing a sense of community and unity within the mediation community.

3. **Regulation** – Examining what, if any, regulatory changes may be required for more effective mediation.

4. **Professionalization** – Will a move in this direction enhance the future of the mediation process?

5. **Promotion** – Enhanced promotion of the mediation process to users, courts, regulators and others.

I envision this as an ongoing conversation and one this Blog is uniquely positioned to facilitate. I look forward to your comments.

Finally, let me note that it's been 1,292 days since I last posted on the Kluwer Mediation Blog. It's good to be back and I want to thank the editors for welcoming me back with such open arms. I'm looking forward to our ongoing association.

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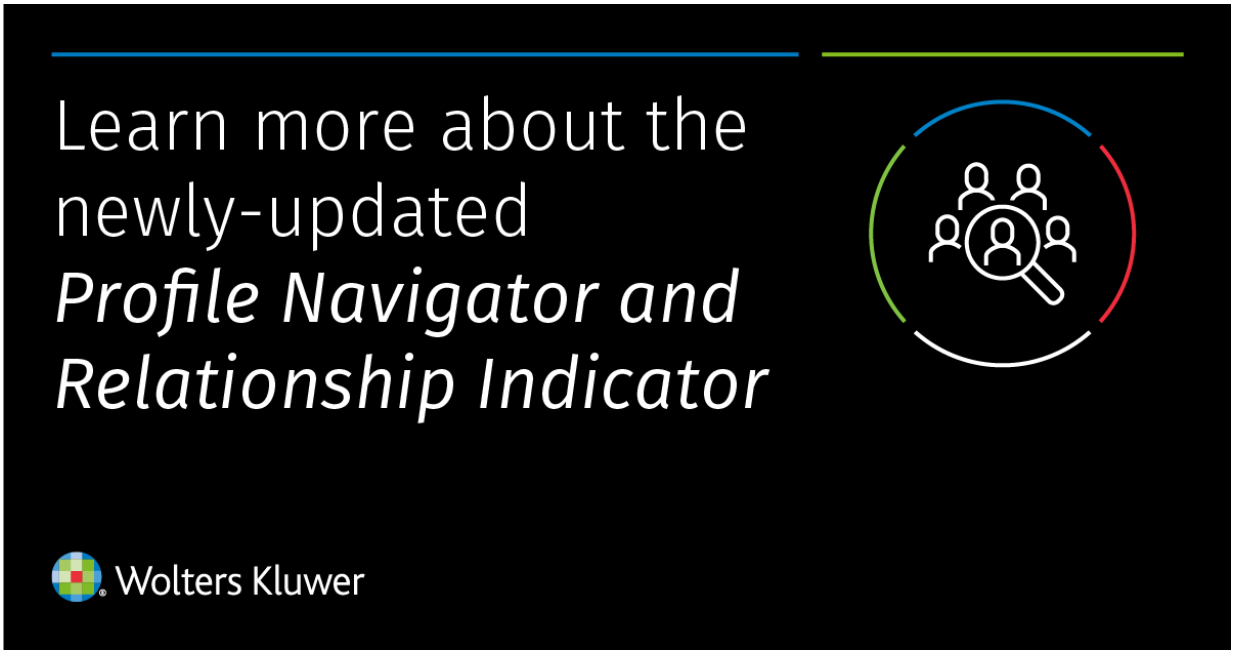

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