Kluwer Mediation Blog

More on Mediator "Fairness" – Responding to a Provocation

Rick Weiler (Weiler ADR Inc.) · Sunday, May 6th, 2018

John Sturrock's May 1st thought-provoking blog post on mediator "fairness" styled itself a "provocation" and invited comment and response. Here's mine.

John, thank you for your thought-provoking blog post. My perspective is that of a Canadian commercial mediator with nearly 30 years experience and about 4,000 cases mediated, virtually all involving represented individual claimants and represented institutional defendants.

In your response to your participant's reflection on "fairness" your wrote, ""Fairness" is an elusive concept. What seems "fair" to one may not seem "fair"to another. How do you decide? By making a judgment based on what you know. But what do you know?"

On a case by case basis I totally agree with your response. I often tell parties, upset by the apparent lack of substantive fairness in a mediation, that, "fairness, like beauty, is in the eye of the beholder."

At the same time I do worry about the patterns of resolutions ***over large numbers of cases***. Of course we lack the hard data, but what if there was compelling evidence supporting what commercial mediators sometimes speculate on in private; that mediated outcomes of cases involving individual claimants and institutional defendants revealed a pattern of settlements falling well short of a normalized range suggested by judicial decisions?

The "Oppression Story" of Mediation

This concern echos the so-called "Oppression Story" – one of the four stories identified by Folger and Bush in **The Promise of Mediation** (Jossey-Bass Publishers, San Francisco 1994). This story, summarized here, argues that mediation is dangerous because of its informality, confidentiality and consensuality as it allows the stronger party to manipulate the weak. It also allows mediators enormous amounts of power to manipulate the outcome in the way they wish. The oppression story also charges that, since mediation does not follow precedent or necessarily concern itself with the public interest, it results in the disaggregation and privatization of class conflicts and public interest problems.

The Oppression Story essentially charges that mediation has contributed to dominant forces in society (including insurers, banks, large corporations and government) maintaining and increasing their hegemony over individual claimants.

The "Satisfaction Story"

Of course, the Oppression Story needs to be balanced with the other so-called stories of mediation identified by the authors; particularly the Satisfaction Story. Again, the linked review summarizes this story as follows: "This story says that mediation is better than adversarial dispute resolution because it uses collaborative and integrative approaches to reach win-win solutions that satisfy the needs of all parties, not just one. This story touts flexibility, informality, and consentuality as benefits of mediation. Reduction of economic and emotional costs is also seen as a benefit."

The Satisfaction Story has been the principal driver of the expansion and success of mediation internationally in recent times. A process for resolving disputes in a manner that is cheaper, quicker and more satisfying to the parties has proven irresistible to clogged Courts and cash-strapped policy makers.

"Fairness" and "Justice" in Mediation

With these two, competing stories in mind we return to the issues of "fairness" and "justice" in mediation. Is there a public interest in ensuring that substantive outcomes produced by such an important component of the justice system are, indeed, "just"? If the answer is, "yes", how is that interest to be satisfied?

Traditionally an important safeguard has been a robust plaintiffs' bar. Experienced and effective plaintiff counsel can go a long way to level the playing field but is this enough, particularly in an era when the number of self-represented litigants is on the rise?

Might a further safeguard be provided if we were to collect and publish certain non-identifying data from mediated settlements?

Consider the following hypothetical report, prepared by the mediator and submitted to a body (possibly Court or Attorney-General-connected) charged with collecting and publishing such data in a free, online, searchable database:

"Mediated outcome of motor vehicle accident case. Liability and damages both in dispute. Plaintiff claiming damages for soft-tissue injuries, chronic pain, psychological injuries, loss of earnings and future care. Mediation occurred post-discovery. Settlement: CAN$85,000, inclusive of claim, interest and costs."

Mediators, in individual cases can justify to themselves the "fairness" of settlements that appear to fall short of a normalized range on the basis that the settling plaintiff has simply monetized the various intangibles (finality, closure, certainty, etc.) on an "all things considered" basis, as they are entitled (indeed, encouraged) to do by mediation's foundational rubric of "party self-determination. Still, given mediation's ascendant role in justice systems, ought we to do more in the interests of "justice"?

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