# Kluwer Mediation Blog

## Mediation and the Right to Be Heard

Jeremy Gormly (National Alternative Dispute Resolution Advisory Council) · Friday, December 16th, 2011

Mediation has produced some surprising and unexpected outcomes. One has been its revolutionary speed of acceptance as a means of bringing a civil dispute to a conclusion without judicial determination.

Judicial determination has a lot of benefits. One is that there is a clear, authoritative statement of the legal rights of parties in opposition. Another is the public vindication of the position adopted by the successful party—to say nothing of the victory. A third is that of being heard or at least of having one's case and one's arguments heard.

An unexpected outcome of mediation relates to the need to be heard. In earlier times of mediation, parties were not necessarily encouraged to speak at an open session in mediation. The speaking was done by the lawyers of the parties. There was of course a natural reluctance of lawyers to expose their clients to the risk of making statements that may, one way or another be used against them in Court if the matter did not settle. It is after all a feature of the judicial system that statements made by lawyers and clients in opposition can be, and often are used in court by opposing parties. It makes lawyers cautious about what they say. They teach their clients to be cautious too. It is just another version of 'loose lips lose wars'.

So for a long time we did not hear as much from the mouths of clients in open or joint sessions as we do now. The past reluctance of lawyers to allow their clients to speak changed to encouraging them to speak. It has been a very substantial change and one which demonstrates the degree to which the legal profession has not only adapted to mediation but has allowed its usual methods of work to adapt to the new demands. Lawyers have seen that the impact of a statement by a client at mediation can be very beneficial for the mediation. More importantly however is that effect that allowing the party to talk has on the party.

In my experience individual parties whether claiming or defending, rarely want to speak for very long in an opening session and never regret doing so but the experience of speaking seems to be so powerful that it warrants examination and research. So far as I can tell the speaking done by a disputant in an opening session seems to be qualitatively different for the disputant from giving evidence in Court. The business of being heard (in the technical sense) in a court room is itself a technical exercise. What is heard by a Court and that about which there is a right to be heard is the evidence relevant to the cause of action and the arguments which support the cause of action. What is specifically not heard is anything irrelevant to the pleaded cause of action. If irrelevant evidence starts to emerge then it is stopped in its tracks with an objection. If the evidence does get out, it is

likely to be specifically excluded. A judge will order that the irrelevant evidence is ‘struck out’ and a line may appear through it in the transcript. The rules about irrelevant evidence are not just technical; they can be professional as well. It can be not only ‘wrong’ for a lawyer to lead out irrelevant evidence it can also be regarded as misconduct or as doing something prejudicial.

Evidence in chief whether in writing or oral is a technical affair. It is not a litigant’s narrative of what happened. If the litigant’s narrative survives the question and answer process, the thicket of demands for legally relevant evidence and the interruptions by objection, then it is because the lawyer leading it out has made an effort to do so. Perhaps it is because the witness is articulate enough or the narrative strong enough, to make it so. Whatever the reason the narrative emerges, if it does at all, it does so despite the rules of evidence and pleading.

Personally, I have no problem with this. A court does not seek out intrinsic moral merit or non-compensable consequences. A court’s function is different. It does not seek to resolve disputes by aiding parties to find their own solution. A Court will impartially impose a result by unbiased judicial determination based on findings of fact and the application of the law. That is in the nature of judicial power and its proper exercise is critical to any ordered society; but it does not allow parties to tell their own story.

At mediation something quite different from giving evidence in chief occurs. In an opening session a party may and usually does talk about things that are highly relevant in a personal sense but completely irrelevant in a legal sense. A party may often talk about the effect of some dispute not on themselves but on other family members. They will recite the comments of others or talk about the effects an aspect of the dispute may have had on themselves, their business, their relationships or their prospects. All of it may have been excluded in a court hearing. All of it forms part of the personal narrative of the disputant. The events in such a narrative may be what brought the disputant to a lawyer in the first place but the lawyer must then set about extracting from the narrative another and different thing—a cause of action supportable by evidence. That is the root of the saying ‘It is a wise and learned man who can recognize his own case in a courtroom.’

What is then effect then on a disputant? No-one comes out of mediation opening statement defeated or damaged by a cross examination. To able to speak about the dispute as the disputant wishes, uninterrupted by objections, seems to be cathartic. It also seems to enable a disputant to drain away some of the toxic juices that can prevent resolution. The same occurs when a disputant hears perhaps for the first time, the other parties’ stories. Finally, it seems to allow the disputant to acquire a determinative role in the dispute. Sometimes these things are subtle. Mostly they are fairly obvious. Admittedly, they sometimes backfire but then the damage repair by a good mediator can lead to unexpected openings of opportunity to say things or pass on statements between disputants. In mediation at least being able to speak is part of being heard.

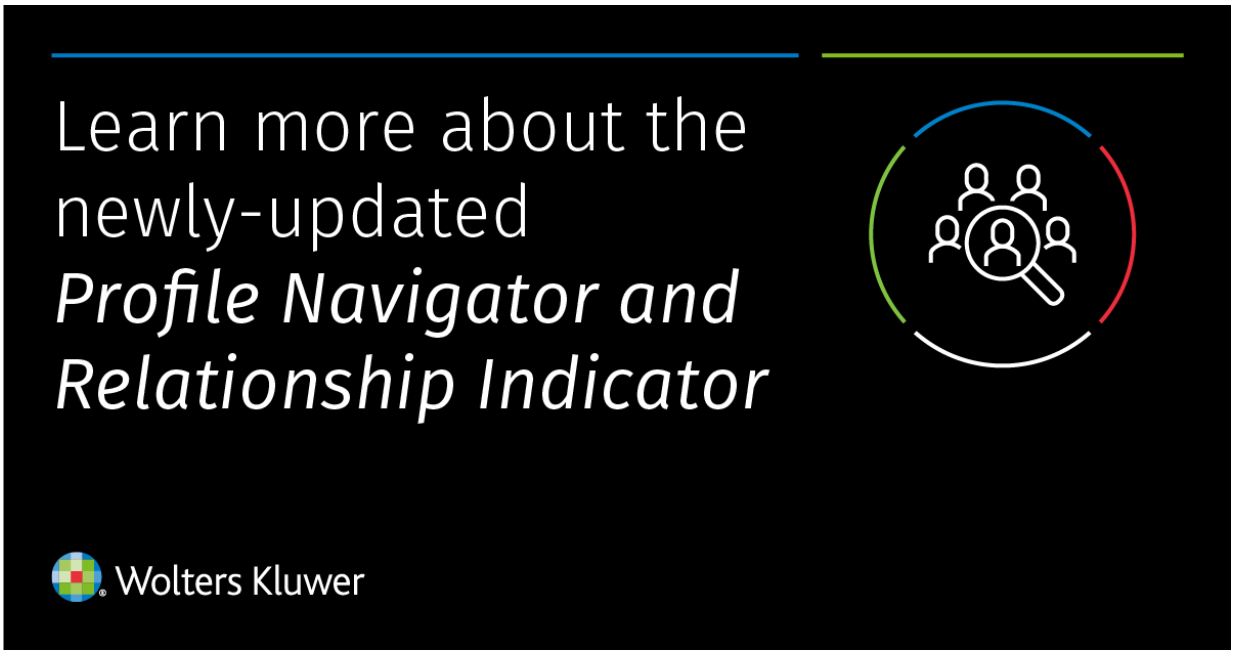
A Court will enforce the right of a case to be heard by a judge. Mediation allows a disputant to be heard by the opponent. It is not the same thing.

---

*subscribe here.*

**Profile Navigator and Relationship Indicator**
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.




This entry was posted on Friday, December 16th, 2011 at 8:53 am and is filed under Growth of the Field (Challenges, New Sectors, etc.)
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.