Kluwer Mediation Blog

To Mediate or Not To Mediate?

Sabine Walsh (Sabine Walsh Mediation) · Saturday, May 5th, 2012

There is much discussion in Ireland at the moment on a proposed new piece of legislation on Mental Capacity. A 740-page Report on submissions to the relevant legislative committee was published yesterday , and though I have yet to even get through the introduction, I find myself wondering whether it might prove to be of any assistance in the difficult task of deciding whether all parties to a mediation have the capacity to engage successfully in the process.
It strikes me, when reading Rick Weiler's Mediation Suitability Checklist (April 22) that most of the family mediations I deal with would "fail" the test spectacularly. I note that his checklist is designed more with commercial mediations in mind and that, as he says, the list is not intended to suggest that disputes that fail are not intended for mediation, but nonetheless, the hallmarks of most family disputes – high levels of hostility, lack of co-operation, high levels of emotion and lack of investment in on-going relationships, pose unique challenges for mediators in deciding whether to take on a case or not, particularly when it comes to assessing whether the parties themselves are suitable for the process.

Some of the many potential obstacles to mediation in a family context are well highlighted in literature, e.g. a history of domestic violence, power imbalances, inequality of (financial or other) bargaining power, child abuse etc. Guidelines about when to mediate exist in relation to some of these, though these vary greatly from one jurisdiction to another and one mediation organisation to another.

The most common question I find myself encountering, however, is whether the parties have the emotional and intellectual capacity to fully engage in a mediation process and how, if the process goes ahead, the mediator can support and encourage the necessary capacity without stepping outside his or her role. The first draft of the legislation (from 2008) defines capacity as "the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made". A more detailed definition then follows, which is framed negatively, that is, by reference to indicators of lack of capacity, including, for example, an inability to understand, retain or weigh information required in order to make a decision.

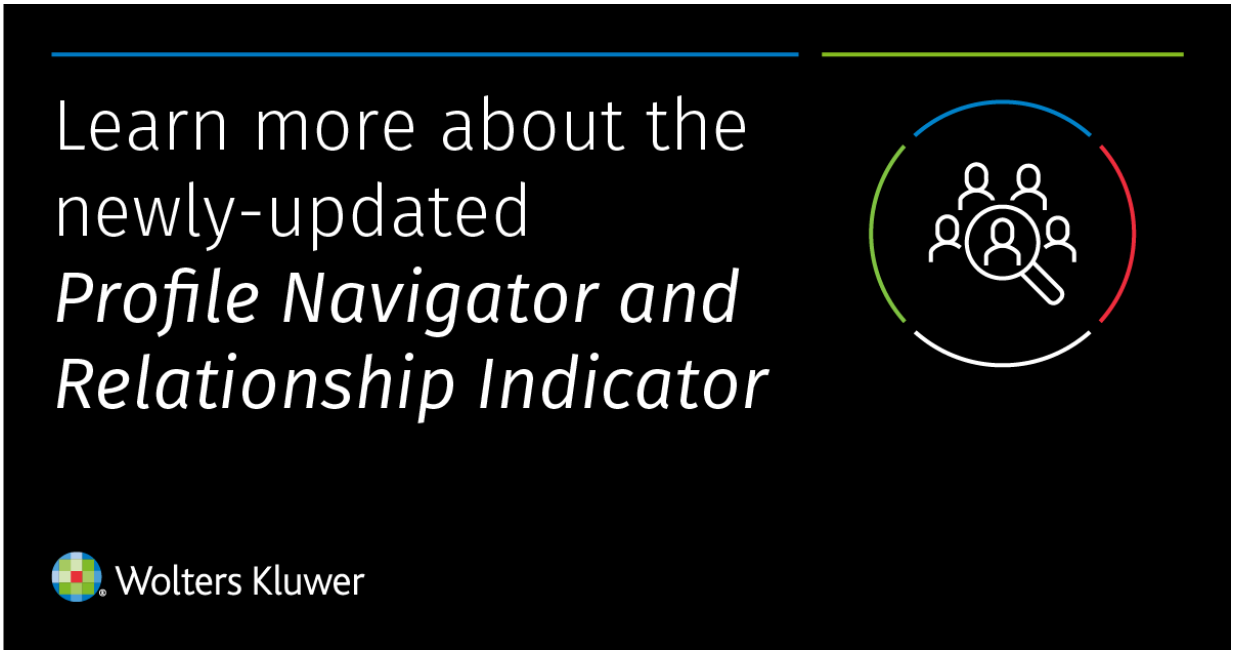
I have had a number of cases recently where conflict levels were so high, and the resulting distress and trauma for the parties were so intense, that these really did interfere with the parties ability to make choices based on information gathered in the process, and to understand the implications of such choices. Indeed, in one case the level of emotional distress was so acute that it was difficult to even gather and exchange information, as one party, in particular, could not get past the need to talk about why the relationship had gone wrong, what it had done to them and what it was

continuing to do to them. Even simple tasks around gathering financial information would remain incomplete or would be subsumed in dealing with the emotions arising from the break up. I found myself working extremely hard to explain the nature of mediation again and again and my role as not being that of a counsellor. Can one say in this case that the party had capacity to mediate?

Another case involved a party suffering from depression and receiving psychiatric treatment for it. As all family mediators know, depression and similar psychological illnesses and distress are extremely common in the aftermath of the breakdown of a relationship. In this case however the depression was chronic, rather than reactive, and the person had been treated for it for a long time. The difficulty was that both the illness itself, and the depression, impacted on the clients ability to a) understand the true nature of the process, b) understand and interpret a lot of the information involved, particularly financial and c) make considered and consistent decisions. If one were to apply the definition set out above, this person would not have had capacity, and yet they insisted, as did their doctor, that the only way to improve their mental health was by "sorting out" the separation as quickly as possible, and that going through court would be so traumatic that this would likely result in a complete breakdown.

So, in such situations, does one continue on and mediate? Does one terminate the mediation giving no reason? Or does one terminate the mediation telling the party(ies) about one's concerns in relation to capacity and potentially cause more distress to the relevant party and perhaps even skew the balance of power between them even more? One can justifiably argue that these cases should be screened out of the process at the first instance, and therefore never reach the stage entering into mediation but as we all know, it can take a few sessions before such issues can become apparent. Also, Ireland lacks a detailed procedure for assessing suitability at present, at least in the private sector, so the opportunity for a thorough screening before commencement of the process does not always arise. Interestingly, both the cases mentioned above were referred to me by the parties' legal advisers as being very suitable for mediation…

I shall be reading the discussions about the planned legislation in detail, in the hope that they might enable me to get a better grasp of where the elusive line in the grey area of capacity to mediate might lie, and what to do when I trip over it. In a process, some of the hallmarks of which are autonomy, voluntariness and informed decision making, it is critical that we as mediators know when to mediate and when not to.



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