Kluwer Mediation Blog

Mediation Conduct Punished by Costs.

Rick Weiler (Weiler ADR Inc.) · Monday, December 23rd, 2013

Should the conduct of a party in mediation be taken into account in setting cost consequences once the dispute has been adjudicated?

An insurer has been "spanked" to the tune of $60,000 by an Ontario Court for failure to participate in a mediation in "any meaningful sense". The cost decision of Mr. Justice Ramsay in Ross v. Bacchus, 2013 ONSC 7773 (CanLII) creates the occasion to reflect on this important issue.

Briefly, the case facts are that the plaintiff, injured in a motor vehicle accident, was awarded $248,000 after a six day trial. The plaintiff then asked for $140,000 for costs, augmented by another $60,000 for the defendant's failure to comply with its obligations under the Insurance Act to settle and to participate in mediation, plus $17,000 disbursements, with HST on all these amounts.

The defendant offered to settle for $40,000 on August 25, 2011, making it clear that this was not a starting point. The offer was withdrawn on March 28, 2012. On October 28, 2013 the plaintiff offered to settle for $94,065 plus prejudgment interest and costs and requested mediation. The defendant replied on October 29, 2013 with an offer to settle for $30,001 plus prejudgment interest and costs. The plaintiff countered with an offer to settle for $79,065 plus costs and interest.

Counsel for the defendant agreed to brief mediation at limited cost but wrote, ***"[Certas] are not interested in settling this case."*** Mediation took place on November 14, but the defendant's insurer stood firm.

Justice Ramsay wrote, "*I infer that it took a six-day trial with all its attendant risk for the sake of $50,000. This is a litigation strategy that the defendant could well afford, but the plaintiff could not. I infer that the insurance company conducted itself this way in the hopes of intimidating the plaintiff and deterring other plaintiffs who have meritorious cases. It did not attempt to settle the action expeditiously as required by s.258.5 of the Insurance Act. It is clear to me that the defendant's participation in mediation was a sham. It refused to participate in any meaningful sense. It did not comply with s.258.6 of the Act. Consequences of these omissions should follow when costs are considered, as provided in subss. 258.5(5) and 258.6(2) of the Act.*"

By reason of the insurer's refusal to mediate the judge augment the cost award of $140,000 by an additional $60,000 plus HST.

From my perspective as a mediator what's interesting here is the ***reason*** for the augmented cost

award. It wasn't because the insurer refused to participate in mediation but because the judge inferred that the insurer's ***participation in the mediation was a sham***, presumably based solely on defence counsel's prior letter stating that his client was "not interested in settling this case". There is no indication in the reasons that there was any evidence before the judge regarding the defendant's actual conduct in the mediation but he came to the decision that participation was a sham.

Its a slippery slope once Courts start basing cost decisions on party conduct in mediation. This decision arguably sets the stage for the introduction of evidence regarding party conduct during mediation in the cost phase of the proceedings.

This is already the situation for mediation conducted pursuant to the Ontario Commercial Mediation Act, 2010, S) 2010, c.16, subsection 9(3) of which provides,

> ***(3) Information about the conduct of a party to the mediation or the conduct of the mediator may be disclosed after the final resolution of the dispute to which the mediation relates for the purpose of determining costs of the mediation or of proceedings taken because the mediation did not succeed. 2010, c. 16, Sched. 3, s. 9 (3).***

This is the reason that I have the parties expressly opt out of this legislation in every mediation I conduct.

The real point is that in Ontario it's not necessary. Rule 49 of the Rules of Civil Procedure already provide Courts with a wide discretion regarding costs where offers to settle have been made. Similarly, the Insurance Act (for motor vehicle cases) provides other cost incentives and consequences regarding settlement. Further, as I read s.258.6 of the Insurance Act, there is no jurisdiction provided to look into the conduct of the mediation when deciding costs.

Mediation is all about party self-determination. If an insurer, compelled to attend mediation, has decided for whatever reason that it doesn't wish to settle the case (at least at the numbers being demanded by the plaintiff) should its conduct at the mediation attract cost sanctions? I think not.

Just a concluding word to thank all readers who spent time on this blog in 2013. I particularly thank those who took the time to comment on the November post. Those insightful comments were mentioned by me during the Osgoode Hall Short Mediation Advocacy Program in December. I wish all of you the very best for the Holiday Season and much joy in 2014.

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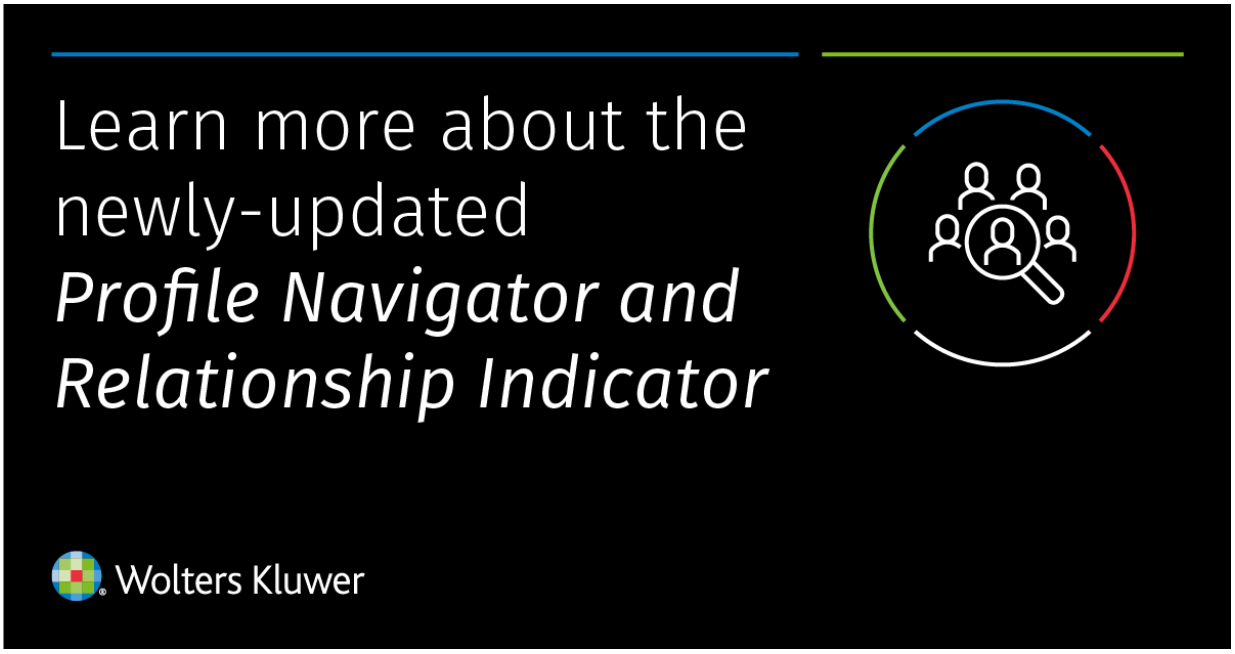

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