Kluwer Mediation Blog

Keep Mediation and Arbitration Separate?

John Sturrock (Core Solutions Group) · Saturday, August 29th, 2015

My wife and I recently spent a very convivial evening at the beautiful home in Sydney of leading Australian mediator Alan Limbury and his wife, Dr. Rosemary Howell, who coaches a team from the University of New South Wales in the annual ICC mediation competition.

One topic which stimulated some forthright conversation was the use of hybrids whereby a mediator takes on the role of arbitrator if the matter does not resolve by mediation. In particular, we discussed the transition from mediator to arbitrator with the consent of the parties. It's a topic on which I recently addressed a group in Dublin too and, contrary to my regular pontification about the value of ambiguity and the need to avoid binary thinking, the more I think about it, I find myself adopting an increasingly dogmatic view.

So, here's the dogma, dressed up as provocation. Mediators should not get involved in hybrids if that means the mediator taking on any sort of adjudicative role in the matter, even if parties request it and the rules allow it. To do so compromises mediation as a hugely valuable process, and the overall risks associated with doing so outweigh any short term benefit in an individual case.

For similar reasons, I am concerned when I see mediators and arbitrators associating in the same professional body. I am concerned by a trend which seems to align the two dispute resolution methods more closely. Mediation and arbitration are so fundamentally different that, as I see it, this in-mixing carries very significant risks for both. However, I write as a mediator and it would be presumptuous to express my views from any other perspective.

Arbitration, like litigation, is an adjudicative process. It involves the presentation of argument and evidence designed to persuade a third party to evaluate and make a decision. It is of course generally a private process, governed to a greater extent than litigation by the parties' preferences. Mediation is also private and the parties have considerable control over it. But further key attributes of mediation are, or should be, that:

o The parties retain the ultimate decision-making function and responsibility for determining the outcome
o The mediator's role is to assist the parties to exercise this responsibility autonomously
o The parties may elect to withdraw at any time, for any reason
o There is an (almost) infinite flexibility in the use of the process
o Solutions can be found by exploring all aspects of relationships: personal, commercial, past, future, and all manner of issues and options may be discussed
o A critical role of the mediator is to help parties assess risk and different possibilities, including

alternatives to reaching an agreement on the presenting issues
o Such an outcome (no formal agreement) is a valid result of engaging in mediation
o The mediator will never know everything and his or her knowledge of facts, arguments and risks is necessarily limited by the nature of the process.

In the mediator's assisting role, he or she may ask challenging questions and ponder with parties a range of possible solutions, outcomes, alternatives or "settlements". It is not however the role of the mediator to pronounce a decision. Such is beyond his or her competence or capability by nature of the role and the process.

On this analysis, and in passing only, "evaluative" mediation seems to be an oxymoron, if that means the parties expect and rely on the mediator to express a view which is designed to provide them with an outcome. Any views the mediator expresses can only be provocative and provisional. Anything else assumes to the role a responsibility and the making of judgments which, I suggest, cannot validly be assumed or made.

There is a further, fundamental, factor which appears to militate against a mediator assuming a formal adjudicative role of any sort. As studies of the brain tell us, we are all victims of our unconscious minds. Perhaps to our horror, something like 90% of our thinking is unconscious. This has wide reaching implications but, for mediators, this means that the parties, and us, are affected by what we understand the process to be or what it may become. Therefore, any possibility that the mediator may express a determinative view is bound, whether we like it or not, to influence how we and the parties approach our conversations and relationships.

The value of mediation should be the pushing of boundaries in a way that is only possible because the mediator is wholly disinterested in the outcome and unencumbered by any prospect of reaching a view. In such a setting, the parties are free to explore things in a way which is quite unique. Inevitably, it seems, that would be different if the roles are – or might become – different.

It may go further. The possibility of some form of adjudication may in fact diminish the prospect of a mediated outcome being achieved by the parties exercising self-determination. We are who we are and, after a long hard day, it may suit both the parties and the mediator for the latter to express a view. We are creatures of habit. Self-determination is extraordinarily hard work. It engages the neo-cortex structure in the brain and consumes far more energy than intuitive problem-solving. Resisting the urge to offer a view as mediator can be difficult, especially if one can see a way through and one has the credibility and authority to carry it off. But, and I say this sincerely as well as provocatively, the danger is that it's a cop-out.

We have all experienced those days when all seems lost. When, despite best efforts, no solution can be found. This is the hard case when it would be easy to bow to the adjudicative way out. But, have we also not all seen cases where, because there is no alternative, the parties have nevertheless reached agreement in such circumstances? With the guidance of really excellent mediators, it is arguable that nearly all impasses can be overcome. That is true mediation in action. If not, after all the hard work, a pause may be preferable to a third party decision.

This may all seem rather purist. "Get real", I hear you say. "We need to be more pragmatic". I have no objection to people engaging in activity that has mixed components, but just don't do it within a process where one individual is expected to play both roles and to inter-mingle the two radically different approaches. Mediation has huge potential as we move from hierarchical, top-down

decision making to flatter, more participatory models generally. Our collective future probably depends on the success of these innovations. As an example, mediation can (and already does) expand into many areas of human activity. But it is still not well understood by the wider public, including policy makers. It is still too often confused with arbitration. One of the reasons for mediation's relative lack of use may indeed be that misperception. I argue that we compound the problem if, within our emerging profession, we add to the confusion by mixing up the two roles.

Wouldn't it be ironic if, while trying to meet the needs we perceive (and indeed are told) that clients have, we mediators in fact damage what is very special about what we do? The baby could still go out with the bathwater…..

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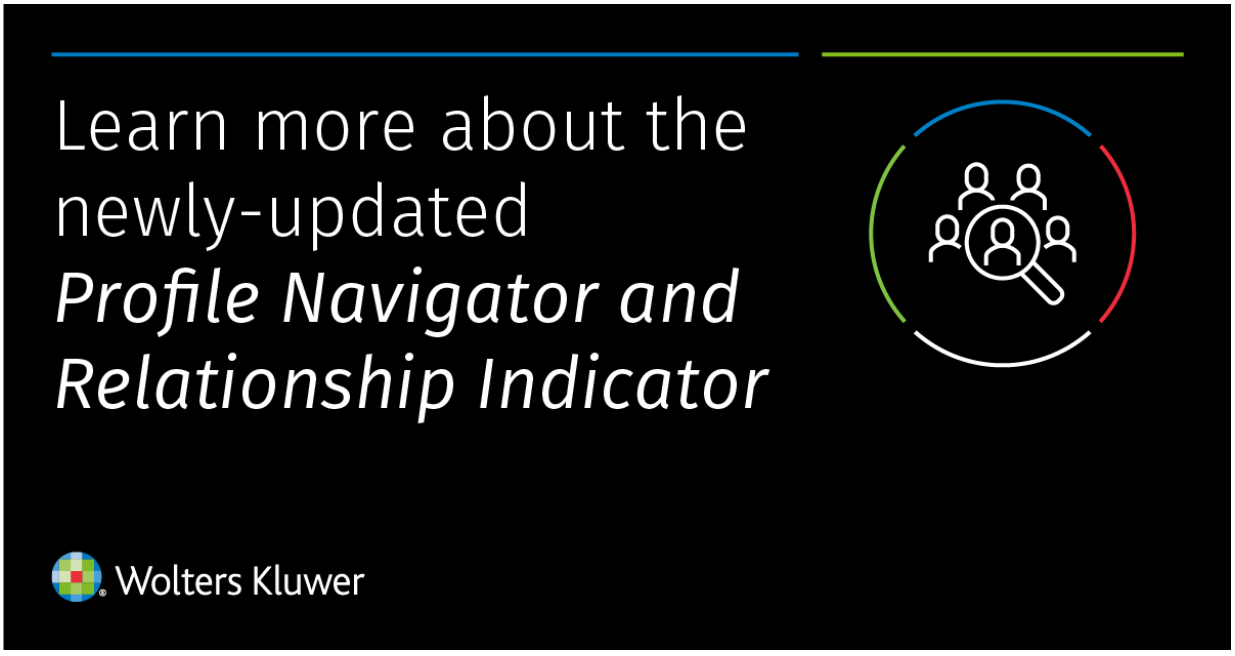

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