Kluwer Mediation Blog

Commercial Mediation and Good Decisions

Rick Weiler (Weiler ADR Inc.) · Monday, May 6th, 2019

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Does the currently predominant model of commercial mediation – a single session of 3 or 6 hours – support good decision-making by litigants? Some doubt is cast by recent Canadian scholarship dealing with the psychological costs of litigation.

In their 2017 paper, Anticipating and Managing the Psychological Costs of Civil Litigation, authors Michaela Keet, Heather Heavin and Shawna Sparrow summarize the health and psychological literature to present a picture of the impact that litigation can have on litigants' health, state of mind, life goals and social relationships.

The paper cites research (1) claiming that litigation is always stressful for the parties involved, and certain emotional injuries from litigation itself, termed '***critogenic***' (law-caused (2)) harms, can be identified to aid attorneys in recognizing them. Critogenic harms include delay, adversarialization, retraumatization, violation of boundaries, loss of privacy, and arrested healing.

The paper goes on to examine the concept of "litigation stress" and suggests it is experienced most acutely in the following types of claims:

- Claims Involving People with Cognitive, Mental or Emotional Vulnerabilities
- Pain-Related Litigation
- Litigation Involving Sexual Assault and Sexual Harassment
- Divorcing Clients
- Claims Involving Professional Negligence and Malpractice

Litigation stress interferes with an individual's daily mental, emotional and physical life It also strains the litigant's relationships, causing the support systems of the litigant to "burn out". In some cases, the impact of the litigation stress spreads beyond the individual's experience to the community level.

Notably, of interest to mediators, litigation stress can also impede decision-making about how or whether to proceed with litigation.

In this regard the paper makes reference to Chris Guthrie's paper, Better Settle than Sorry: The Regret Aversion Theory of Litigation Behavior. The following is a quote from the abstract:

> "**Regret Aversion Theory of Litigation Behaviour** views litigants as both calculating and emotional creatures (emphasis added). With roots in economics, cognitive psychology, and social psychology, the Regret Aversion Theory predicts that individuals will seek to make decisions that minimize the likelihood they will experience post-decision regret. Because regret is most likely to arise when individuals discover that they would have obtained better outcomes if they had decided differently, the Regret Aversion Theory predicts that people will make decisions that shield them from this knowledge. Using an experimental survey methodology, Guthrie tests this theory in the litigation context and finds that litigants, when choosing between settlement and trial, systematically prefer settlement because it minimizes the likelihood that they will experience regret."

Mediators know that the quality of decisions decreases when individuals are feeling mentally depleted.

> "Brain functioning is said to require twenty percent of the body's total energy consumption, a much higher proportion of the body's energy resources as compared to other organs. The brain naturally shifts to an "autopilot", or sub-rational mode to conserve energy. This is especially likely to happen when a client is chronically emotionally and mentally exhausted. In the midst of this, cognitive "blind spots" are sure to affect decisions about whether to continue litigation or not."(3)

The paper reminds us that neither lawyers nor clients tend to be aware of how stress can contribute to clouded cognitive processes, and impaired decision-making during the litigation experience. Supporting this is U.S. research comparing settlement offers to trial outcomes, showing significant rates of decision error.(4)

The paper helpfully suggests some things lawyers can do to mitigate the negative impacts of litigation stress, including:

- Open, authentic, client-centered communications

- Considering alternative processes
- Monitoring for stress and decision fatigue
- Advance planning and collaboration with other professionals

We are also reminded that lawyers (not to mention mediators) need to be mindful of the stress they themselves experience.

> "Although compassion fatigue is usually associated with social welfare and mental health professions, lawyers can be more susceptible to its effects. The legal profession is characterized by conditions that are inherently stressful. The lack of education and training providing protective factors from the adversarial nature of litigation is also a factor. While collaboration is encouraged in medical and mental health education, law schools tend to involve a more competitive model of instruction. The lack of consultation and cooperation can create a climate of isolation as lawyers are pressured to become self-reliant."

So what is the relation of all this to the single session model of commercial mediation? The authors state,

> "Because stress and fatigue tend to result in more conservative choices it is necessary to allow clients sufficient time for important decisions. It is especially important to slow down the thinking process for clients when their understanding of legal concepts is limited. Therefore, scheduling multiple negotiation meetings is preferable to one single long meeting because the client will have time to reflect on various options. Breaking up important processes is also an effective way to prevent regret. Clients often regret rushed decisions. When clients can move gradually in the direction of agreement they can better endorse what they are signing."

The current commercial mediation model handed down over the past 30 years is working just fine for lawyers and mediators (not to mention the court system). A settlement is the goal at the mediation without much emphasis on the quality of that settlement. Is this approach to mediation truly meeting the interests of the clients? If not, what changes might be made? Is it time for commercial mediators to offer a more client-centered process involving multiple sessions?(5) Should mediators be better trained in the available tools clients can use for making a good decision (including decision-tree analysis)? Should the ethicality of mediator impasse-breaking techniques (of which there are many) be more closely considered?

Commercial mediators wanting to avoid allegations of causing "*mesitogenic"* harm *(*again, from the Greek, "*mesites"*, mediator and "*genic"*, sprung from") should seriously consider the implications of this paper for their practices.

Footnotes

(1) Thomas G Gutheil et al, "Preventing 'critogenic' harms: minimizing emotional injury from civil litigation" (2000) 28 J Psychiatry & L 5 at 6.

(2) The Program in Psychiatry and Law uses the adjective "critogenic" (to convey "law-caused") and the corresponding noun "critogenesis." The terms are analogously based on Greek roots: crites, judge (compare English "critic") and genic, sprung from.

(3) Nora Rock, "Putting Your Best Brain Forward: How neuroscience awareness and evolutionary psychology can help lawyers avoid claims and offer better client service" (2017) 16 LawPRO Mag

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(4) Randall L Kiser, Martin A Asher & Blakeley B McShane, "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations" (2008) 5:3 J Empirical Leg Stud 551

(5) It is my understanding that in Canada, the multiple session model is the norm for family law mediations.

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