Kluwer Mediation Blog

Has a mediator ever done anyone any harm?

Nadja Alexander (Editor) (Singapore International Dispute Resolution Academy) · Saturday, October 16th, 2021

Mediation is known for its procedural flexibility, its inclusiveness in terms of who can come to the table, its cultural agility, its promise of creative outcomes that reflect what's important to those involved and affected by the dispute. It's not about fact finding, it's not just about evidence, it's not about third party decision-making. Added to this is the fact that mediation is a confidential process, so all of this typically happens behind closed doors, where the style of the mediator directly shapes the process. As a result, the ethics of the mediator and of the mediation process are inextricably linked.

Mediation simply doesn't have the same procedural checks and balances that litigation and arbitration has. This is exacerbated by the fact that many users have different ideas of what amounts to "good" mediation and "less good" mediation. Some have no idea at all.

So unless somebody complains and the matter ends up in a disciplinary process or court, how do we know what really goes on?

It was not so long ago, I listened to a senior lawyer ask the audience at an international conference whether 'all this regulation talk was really necessary' because 'after all, when had a mediator ever done anyone any harm?'

Given the private and confidential nature of the process, there is considerable scope for manipulative, coercive or otherwise inappropriate behaviour to occur. Art Hinshaw offers a disturbing analysis of the case of Gary J. Karpin, an attorney in Vermont who, after being disbarred for conduct that the Professional Conduct Board described as "so significant and wide-ranging that he is a threat to the public, the profession, the courts, and his clients" moved to Arizona and established himself as a divorce mediator. After several years and multiple complaints from clients, Karpin was eventually charged with 25 counts of theft by means of material misrepresentation (for which the jury found him guilty of 23 counts) and one count of fraudulent schemes and artifices (for which the jury found him guilty). He subsequently filed an appeal, which was dismissed. He was sentenced to 15.75 years in prison and was ordered to pay restitution to his victims, who included female clients towards whom he made inappropriate advances, in the sum of USD240,448.99. Hinshaw remarks that Karpin's exploits highlight the market's difficulty in weeding out even the most unscrupulous of mediators.

He points out that this is not a lone case. In Everett v Morgan, a child support arrears case, a consent decree was set aside when it came to light that the parties' mediator was not a mediator but a convicted felon and a friend of the ex-husband posing as a mediator. The "mediator" not only

convinced the ex-wife to discharge her attorney but also that the amount of child support due was significantly less than what she was seeking.

And then there are scattered media reports on varying mediation practices and self-declared mediators that highlight the need to set robust regulatory parameters for a fledging and still vulnerable profession. In Australia, by way of example, the mediation community reacted with bewilderment when a prominent newspaper revealed that the infamous Melbourne gangster Mick Gatto was touting himself as a mediator. On one hand, it was thought to be good news that mediation was sufficiently prominent that well-known underworld figures were claiming to sort out disputes using the process; on the other hand, there was concern about its potential impact on perceptions of the integrity and legitimacy of mediation.

These cases aside, there are also instances of alleged mediator negligence, which further fuel the fire of the ethical-regulatory debate. In applying the English law of tort to four reported judgments in common law jurisdictions on mediator negligence, Anna Koo has argued that the proof of breach was insurmountable due to the lack of clear standards against which to measure a mediator's performance and that causation of damage was hard to establish.

Cases from other jurisdictions such as Australia and Singapore confirm that standards are of practical and legal relevance. And of course the introduction in Article 5(1)(e) of the Singapore Convention of a ground of refusal linked to a breach of mediator standards has sent mediators worldwide scrambling to figure out exactly what these are and what they mean.

At this time of international focus on mediator standards, there have been calls for a global code of conduct for professional mediators. But I do wonder how meaningful a universal code could be, when there is still so much to be done at local levels. And here I don't mean establishing an institutional rule-based code of conduct because these already exist in the hundreds. The message I want to send is that there can be a big gap between ethical rules written in black and white codified form, and the realities of the mediation room. For example, what does a mediator committed to the ethic of neutrality do when confronted with a party who seems prepared to yield all the demands of the other party in what seems to be a very unfair deal? How do the ethical values of neutrality, informed consent, self-determination and fair treatment work together? Does neutrality shift if mediating with a vulnerable party, and if so how? On top of this, research tells us that that we use our gut rather than a reasoned analysis of an ethical code in any given moment. So as mediators we are also applying our own ethical and cultural values in any given moment.

The gap between the reality of the mediation room and the rhetoric of what we say we do has consequences. It silently supports the fragmenting of mediation practice; it stifles professional growth opportunities for mediators; it affects the legitimacy of the mediation profession and how mediators are perceived.

With the increase in mediation activity around the world and a new focus on standards largely due to the Singapore Convention, we have a unique opportunity as mediation stakeholders to rethink how we "do" ethics. Dan Rainey and Ana Gonclaves have suggested we start with a code of disclosure, which would effectively require mediators to articulate to parties the ethical standards by which they are bound. Others, such as Rachael Field and Jonathan Crowe suggest the mediation community needs to go further: engaging more meaningfully with how we, as mediators, actually respond to ethical moments and situations in different contexts — and using these experiences as the basis for generating "internal" standards of excellence. These are two valuable suggestions, and

there is no reason we can’t embrace them both.

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