Lawyers’ Resistance to Mediation: Evolution and Adaptation

Archie Zariski, Associate Professor of Legal Studies
Athabasca University, Canada
Argument

• Mediation has been institutionalized in many jurisdictions
• Mediation has become routine for many lawyers
• Lawyers have adapted mediation to suit their needs
• Mediation is not a threat to lawyers, but is there a threat to mediation?
Institutionalization

Example: Alberta Rules of Court 2010

4.16(1) The responsibility of the parties to manage their dispute includes good faith participation in one or more of the following dispute resolution processes with respect to all or any part of the action:

(a) a dispute resolution process in the private or government sectors involving an impartial third person;
(b) a Court annexed dispute resolution process;
(c) a judicial dispute resolution process described in rules 4.17 to 4.21 [Judicial Dispute Resolution];
(d) any program or process designated by the Court for the purpose of this rule.
Routine

- Litigation “in the shadow of mediation”
- Pursue usual discovery for settlement purposes
- Postpone settlement negotiations
- Negotiate pursuant to rule or order
- Expect “ALT” (alternative litigation termination) by settlement
Adaptation

- Choose a lawyer-mediator or a judge-mediator
- Seek assistance in managing the client
- Allow the client to participate
- Expose evidence and suggest facts
- Debate legal rules and issues
- Expect opinion on strength of case
- Welcome settlement suggestions
Mediation’s future

- Difficulty of re-reframing a litigated case as a conflict of interests
- Lack of expertise and interest of court connected mediators in interest based negotiation
- Clients satisfied with “having their say” and evaluative approaches
- Judges comfortable with settlement orientation
Concluding question

For lawyers and ADR proponents, is this evolution and adaptation a WIN/WIN or a LOSE/LOSE result?
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Thank you!

Archie Zariski