

May 15th, 9:00 AM - May 17th, 5:00 PM

## Commentary on Kominar

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Bickenbach, Jerome, "Commentary on Kominar" (1997). *OSSA Conference Archive*. 69.  
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# COMMENTS ON: "RHETORIC OR ARGUMENT?: THE RATIONAL CULTURE OF ALTERNATIVE DISPUTE RESOLUTION"

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Kominar welcomes the recent development in Ontario requiring litigants in most civil actions to attempt mediation before proceeding to trial. He suggests that James Boyd White's aspiration that the law become "a culture of argument, perpetually remade by its participants" might more likely become true for the alternative dispute resolution technique of mediation. What is needed first, though, is to empower litigants to conduct rational argument and negotiation so that they can achieve "settlements of integrity". Empowerment comes from learning critical thinking, and eschewing rhetoric. And settlements of integrity are to be helped along by mediators acting as "a kind of critical thinking coach".

As a co-author of a recently published critical thinking textbook, I certainly endorse the proposal to empower potential litigants by making critical thinking courses available to them (perhaps the Government of Ontario could reinvest some of the money it has saved from hospital closures toward this end). But I remain somewhat sceptical of Kominar's optimism about mediation over adjudication, and particularly why we should think Bush and Folger's notion of 'transformational mediation' is a likely prospect. I readily admit that I can only voice qualms and quibbles; I have no counter proposal or definitive counterexamples. At best, my concerns, as John Wisdom once put it, will be like legs of a table rather than links of a chain.

First, as *The Globe and Mail* is found of saying, some reality checks. Ontario is experimenting with mediation because the Ministry of the AG wants to control costs. Nothing more rational is involved. At the same time, what is truly irrational and unfair about civil litigation is that success is far more a function of one's ability to pay than anything else. The Conrad Blacks of the world, unless they are suing each other, can prevent litigation or win favourable settlements simply by threatening to extend the pre-trial period indefinitely by means of discovery, motions and other procedural devices. At the same time, mediation is a complete non-starter without the back-up of binding arbitration or the courtroom. And in any event it would be flatly unconstitutional to deny anyone her or his day in court. So, requirement of mediation or not, the wealthy litigant can stonewall and demand a trial, if that is to his or her advantage.

As many have pointed out, there is a systemic unfairness to a system which allows the inequality of power of the litigants to determine outcome. But would this unfairness not resurface in the mediation room — since the background inequality of power remains? Is it because Ontario plans to set up 'true mediation', undominated by lawyers, a kind of assisted negotiation in which the issue does not have to be transformed into a "legal dispute", and where mediators do not have to declare winners or order the parties to do anything but act as critical thinking coaches to assist both parties into reaching a mutually satisfactory solution? In my view, none of these features of mediation, if true, bears on the question of abuse of power at all.

But perhaps the claim Kominar is gesturing towards does not have to do with the situation we have, and how mediation would fare in it, but rather the potential of mediation to change things. But I am not convinced about

this either.

The hope seems to be this: Without the intermediary of professions—whose aim, admittedly, is to create the complexities that ensure that they will continue to be needed — and without the procedural and substantive limits placed on dispute resolution by the law, ordinary folks educated to reason critically could push mediation toward the transformative model described by Bush and Folger.

But a closer look at their somewhat idyllic description of mediation as transformative indicates that what moves things along is mutual understanding and respect ("...mediation can provide disputants a nonthreatening opportunity to explain and humanize themselves to one another...parties often discover that they can feel and express some degree of understanding and concern for one another despite their disagreement.") And mutual understanding and respect is supposed to occur only because mediation is not fettered by procedural or substantive legal rules, and the disputants are versed in critical thinking and assisted by the critical thinking coach.

But why should we think that? No doubt there are many virtues to an unthreatening and unstructured arena of dispute resolution. "Talking it out" we often come down off of our high horses and see the world the way our opponent does. Ratcheting down the level of adversarial combat, we might find the calm and self-assurance to question our own motives and swallow our pride and look for a compromise. I don't deny any of this, but the fact remains that inasmuch as mediation is intended to apply to matters such as breach of contract, nuisance, trespass to property, non-criminal conversion—in a word, disputes over money or property — a person with more resources will always be in a better position from which to bargain, even if that means holding out and threatening to go to court because the mediation has broken down. Understanding the world from our neighbour's perspective presumes more equality—of resources, of respect, of basic citizenship — than our current political culture seems to be willing to allow us. Mediation in the face of inequality need not lead to understanding.

One of my colleagues at Queen's calls himself 'an armed liberal'. Giving him the benefit of the doubt, what he means is that he is unwilling to fully let down his guard or to otherwise open himself up to threat, even though his basic temperament is one of tolerance, respect for others, and understanding of others. Mediation for armed liberals might be able to tap into the liberal which, one can only hope, remains alive in even the most rabid member of the New Right; but can it ever convince us that we do not need to be armed? At least armed with a good lawyer?

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