Kluwer Mediation Blog

Innovative practice with lessons for us all: the Scottish Legal Complaints Commission

Charlie Irvine (University of Strathclyde) · Tuesday, November 13th, 2012

Mediation is often portrayed as a useful vehicle for disputes between equals, where parties can be expected to speak for themselves and neither has significant power over the other. Critics, and even supporters, become more sceptical when it comes to less symmetrical situations. Complaints against professionals are one such category. The professional is seen to have power, status, authority and, usually, cash while complainers lack the substantive knowledge to hold professionals to account: they don't know what they don't know.

And yet one of the more interesting innovations in Scotland has been the embedding in legislation of just such a scheme. The Legal Profession and Legal Aid (Scotland) Act 2007 set up the Scottish Legal Complaints Commission (SLCC) to deal with complaints against legal practitioners. S.8 (4) states: *"Where the commission considers it appropriate to do so , it may, by notice in writing to the complainer and the practitioner, offer to mediate in relation to the complaint."* The new provisions came into force on 1 October 2008, so we are now four years into the scheme. It is useful to reflect on what has been learned.

The scheme has some peculiarities. Complaints are separated into two kinds: "service" and "conduct". Conduct complaints are the more serious, and may not be mediated. Interestingly (and, to some, ironically) these are referred for investigation to Scotland's two professional bodies: the Law Society of Scotland and the Faculty of Advocates. The logic was that these bodies have the power to judge their peers and to decide on an appropriate sanction.

Service complaints concern the standard of service provided by a legal practitioner. These include delays, errors, poor advice and discourteous treatment. The Commission has the power to award up to £20,000 in compensation, though it has never done so and the average award is under £1,000. Once the Gateway Team has established basic eligibility, both parties are offered the option of mediation. The SLCC guidance explains it as follows: *"Mediation is a confidential process which gives the complainer and the practitioner (the parties) the opportunity to meet together with an independent third-party so they can both decide how to sort out the complaint. The neutral person (the mediator) helps them talk through the problem to see if they can agree a fair and reasonable solution."* This depiction betrays a kind of common-

sense approach: e.g. terms like “sort out” and “fair and reasonable solution.”

Mediation is voluntary. If either party refuses, the matter continues on to investigation and, ultimately, determination. In common with many schemes, this voluntariness led to a slow start. Initially rather few practitioners agreed to participate. Some of us have speculated that this was due to unfamiliarity, or wariness towards an untried process. However, referrals have picked up, and between July 2010 and June 2011 57 cases were resolved at mediation, as against 42 resolved by investigation. (88 cases went to the final stage in the SLCC’s process, determination, but 61 of these were not upheld.) When asked about the reasons for the scheme’s growing acceptance, the SLCC’s Mediation Manager attributed it to three causes:
1) word of mouth among professionals
2) her own role as coordinator, *“conveying the values of mediation”*
3) genuine goodwill on the part of lawyers: *“they don’t want an unhappy client”.* (see Irvine et al, “Alternative Mechanisms for Resolving Disputes: a literature review” available from http://www.hpc-uk.org/publications/research/index.asp?id=462)

The mediators (including the current writer) are independent practitioners and may not be practising lawyers. We provide mediation on an ad hoc basis and the scheme is cunningly designed so that we have to submit our written reflections before our invoices will be paid, a good example of a “nudge” to encourage virtuous behaviour!

So what have we learned? A number of things. First of all, the notion of the powerful lawyer and powerless client has been rather dispelled. As with all mediations, the confessional atmosphere of the private sessions draws out poignant stories. Clients are often just puzzled and sad that their lawyers have let them down. Some seek simple compensation. On occasion it appears that their anger and frustration at a bad situation (such as a divorce) has swept all before it, and a minor legal oversight gets amplified into the source of all woes. But on the other side, legal professionals express vulnerability, puzzlement and frustration. They often feel misunderstood by clients who cannot see (why should they?) the systemic pressures on modern lawyers to process cases speedily. And if they have made a mistake, they face a major crisis: how to continue in a high-stakes activity without the confidence that you do it well?

Another phenomenon has emerged on several occasions. Litigators spend their working lives using the language of the courts. This type of communication is forceful and adversarial; it has little need for empathy. It can be difficult to set aside such a carefully wrought style and speak to clients as equals. So I have witnessed a lawyer attempting to explain things as clearly and professionally as he can, only to find that the client, in private, judges him as arrogant. I have seen other lawyers who were able to step out of their customary role and speak person to person. As in any mediation, people are constantly making and re-evaluating judgements about each other, and these judgements play a critical role in their overall sense of fairness. They can make the difference between settlement and a continued investigation. It strikes me that there are wider lessons for the legal profession here, in terms of the way lawyers communicate with their clients.

Equally and oppositely some of the hardest cases have been those where the lawyer appears to have decided that the client is “at it.” Once someone makes that judgement

about another person it tends to taint the whole conversation. Nothing is seen as genuine: rather as an attempt to extract cash. When mediation operates against a background of such profound mistrust it is almost impossible for it to do its job.

Having said all this, most cases do settle. The simple idea that some complaints could be sorted out by having a civilised conversation appears to have been borne out. Legal pracitioners can offer a reduction in fees, an apology and/or compensation. Sometimes more creative solutions emerge, involving the lawyer undertaking future work to remedy the situation or put the client back into the position they would have been in. And I would echo the Mediation Manager's perception: most professionals want satisfied clients, not just because that is good business, but also because it is the right thing to do.

That is a good reminder of the curious mixture of principle and pragmatism at the heart of mediation practice. Dealing with complaints against legal professionals challenges our model and our values, but no more than any other mediation. The SLCC scheme is a fascinating innovation and illustrates the way that mediation approaches increasingly show a tendency to breach the boundaries of our precious models.

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