Kluwer Mediation Blog

New ADR Guidelines for Scottish Lawyers: a constructive step

Charlie Irvine (University of Strathclyde) · Thursday, February 13th, 2014

I have written before in this blog about Scotland's slow pace of change (http://kluwermediationblog.com/2012/05/12/mediation-in-scotland-some-practical-questions-and-a-nudge-in-the-right-direction/). A naturally cautious nation, our 'old world' response to new ideas has generally been 'what's wrong with the old ones?' I was comforted by Constantin-Adi Gavrila's recent post on this blog which underlined that Scotland is not the only European nation whose legal profession is lukewarm about mediation.

So it is pleasing to be able to report a small but important sign of progress from this jurisdiction. In November 2013, the Law Society of Scotland published new guidance (Dispute Resolution, Guidance related to Rule B1.9). It begins:

"Solicitors should have a sufficient understanding of commonly available alternative dispute resolution options to allow proper consideration and communication of options to a client in considering the client's interests and objectives." This chimes with the role of lawyers as dispute resolution advisers: not just getting you to court, but getting you to a solution by the most effective means. When you visit your GP with an ailment, you don't expect her/him to automatically refer you for surgery: you want the most appropriate treatment.

As if to reinforce this the second paragraph states: *"A solicitor providing advice on dispute resolution procedures should be able to discuss and explain available options, including the advantages and disadvantages of each, to a client in such a way as to enable the client to make an informed decision as to the course of action and procedure he or she should pursue to best meet their needs and objectives, and to instruct the solicitor accordingly."* This suggests lawyers having a practical, working knowledge of different dispute resolution options: litigation, arbitration, adjudication, collaborative law and mediation.

The guidance adds an important caveat: *"A solicitor providing advice on dispute resolution procedures is also expected to be able to identify where alternative methods of dispute resolution may not be in the best interests of the client. For example, this may be a particular consideration*

for mediation or arbitration in the context of family disputes or other situations where one party may be at risk of violence or intimidation by the other." So lawyers need to start screening their cases for domestic abuse or the risk of intimate partner violence – no bad thing if it leads to greater care being taken over these questions. It would be good if judges were given the same guidance.

So where does this take us? As Guiseppe de Palo and others point out in their recent report to the European Parliament, "Re-booting the Mediation Directive" there have been numerous attempts politely to encourage the greater use of mediation, with little impact. This may be one more, and change is unlikely to be rapid. However, it does have one important effect for those of us involved in teaching lawyers. It places an obligation on the legal profession to have a working understanding of ADR. This means that, rather than being confined to electives or special classes, mediation ought to be taught as a mainstream element in legal education. That is for the future, but in 2014 three Scottish universities will offer electives in mediation as part of their Diploma in Legal Practice (the pre-qualifying year): Strathclyde, Edinburgh and Aberdeen.

Mediation has a strange quality: people tend to like it better after they have tried it than before. One by-product of these new guidelines will be that more of the lawyers of the future will have experienced mediation, helping to overcome the natural resistance of litigators to something counter-intuitive, non-binary, lacking authority and seemingly 'soft'. I am often amazed at the journey students go on in the course of a 20 hour module in mediation. So I will finish this blog with some quotes from their reflective journals. They illustrate that, as if we didn't know, mediation is best learned by doing; that it is far harder and more complex than people imagine; that it forces law students to apply philosophical, emotional and psychological frames to disputes; and that students are much smarter than they look!

Here are a few choice quotes:

"As a law student, it is natural to try to force the parties to settle in the most appropriate way. Instead, as a mediator, I must sit back and draw out the appropriate information from the parties so that they can decide on the best solution for them."

"Today our guest lecturer raised the issue of people thinking that proposing mediation is a sign of weakness. I must admit that I did think this. I think this is because of my 5 years of legal studies telling me that if you have a good case, you go to court, if you think you are not going to win, you want to settle. However, going to mediation is not a sign of weakness, it's the exact opposite, if you have a weak case you wouldn't do mediation as it'd show up these weaknesses."

"I had got the impression that a positional bargaining method may be one that we, as lawyers, should be using in negotiations in the best interests of our client. I had not given the drawbacks of such an approach much thought."

"The class also helped me to appreciate that a mediation is not simply a place for a lawyer to present his case to the opposition in front of a third party. The mediator is and must remain impartial, it is pointless trying to bring them round to your viewpoint."

"I think as lawyers we are programmed into the adversarial mode of dispute resolution and discussing the benefits of mediation really highlighted to me that there are plenty of other options."

"It is extremely difficult – I did not envision the role being as challenging as it was."

"I entered into the mediation course assuming that mediation focussed on legal issues only.

However, to my surprise, mediation encompasses a lot more and can offer real emotional settlement where a 'win/win' situation really can be created."

I dedicate this blog to these students, who will be the 'mediation advocates' of the future.

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