Evaluation or guidance? What do small claimants want from mediators?

Kluwer Mediation Blog
August 10, 2018

Charlie Irvine (University of Strathclyde)

Please refer to this post as: Charlie Irvine, 'Evaluation or guidance? What do small claimants want from mediators?', Kluwer Mediation Blog, August 10 2018, http://mediationblog.kluwerarbitration.com/2018/08/10/evaluation-or-guidance-what-do-small-claimants-want-from-mediators/

(This post is being republished because of technical problems when it was first published.)
One of the key debates among mediators centres on the word 'evaluation'. I've written about this before – see Has the evaluative label outlived its usefulness? I'm sure many readers are familiar, even bored, with the claimed polarity between facilitative and evaluative mediation. Yet I still hear the term, especially from newer mediators. In this blog I consider the perspective of those who actually use mediation, our consumers, in small claims where most have no legal representation.

I finished the earlier blog with some questions mediators might want to ask their clients: *"Would you like me to contribute my knowledge of social [I'd now add legal] norms to the discussion? Would you prefer if I left that to you? Or are you happy that I ensure compliance with some particularly important norms?"* Since that time I've been lucky enough to come into contact with a lot more small claimants: first because, thanks to a rule change (see And finally some good news from Scotland), Strathclyde's Mediation Clinic now provides free mediation for half a dozen local courts; second because I started interviewing mediation users as part of my PhD. That's on a different topic and it's too early to start drawing conclusions. These conversations have, however, shone fresh light on the facilitative/evaluative debate.

Small claimants
One point about "small claimants": they're extremely diverse. It would be foolish to think that low monetary value makes these cases less important. This is not just because diminishing marginal utility means that a claim of, say, £1,000 has a great deal more practical impact on a poor family than on a national utility. £1,000 may also mean a great deal to a builder with wages to pay; but substandard work and disruption can weigh equally heavily on well-off customers. One individual spent many hours in an unsuccessful mediation and subsequent court hearing over an amount that was considerably less than his hourly rate. Some people are new to the court; others are "repeat players" (Galanter. M., 1974. Why the " Haves " Come Out Ahead : Speculations on the Limits of Legal Change by. *Law & Society Review*, vol. 9, no. 1, pp. 165–230) benefiting from familiarity and, perhaps, legal representation.

Claims too vary wildly. Repayment of a personal loan can seem simple enough till it turns out that the parties are former partners with ongoing legal battles over children. UK consumer protection legislation covers used cars but is little help when parties can't agree when exactly the vehicle stopped working. And how exactly would a judge determine the functionality of a bespoke website?

What do mediators do?
So when courts nudge or cajole these folk to mediation we are entitled to ask what mediators do to assist. When pushed most participants were positive. Yet they rarely mentioned the mediators unprompted. In almost all interviews I had to ask "Did the mediators do anything to help?" before they became visible. Most respondents described the process as if it were a simple two-way negotiation: I said this, she said that, I offered this, she offered that. At the level of process it's clear that parties welcomed mediators' courtesy and quiet authority. These qualities rendered the conversation less daunting and more productive. They often complimented the mediators on their professionalism.

Things are more interesting at the level of substance. When asked if mediators provided any input about the law parties tended to respond with a definite no, saying mediators are not supposed to voice their opinion because they're neutral. For these small claimants neutral = impassive. Some surmised that mediators had decided opinions but were too professional to express them.

But when asked if they would have liked some input on the law, some **"guidance"**, most gave a clear yes. Raising or defending a small claim is daunting, complex, even humiliating. Help is greatly appreciated. One respondent said that if the mediators had told them their claim was a lot of nonsense they would have accepted it. That would save them from holding out for something they weren't due. Others interpreted mediators' silence on legal matters as signifying that mediation has nothing to do with the law. Rather it is about morality, or persuasion, or who has the strongest personality or creates the best impression. It turns out that neutral also equals indifference to the law.

Mediators' perspective
There's another view on this: from mediators. I'm also a teacher and supervisor and here again it seems that neutral = impassive. When asked, in similar cases, if some legal input from them might have been useful, most practitioners look surprised: *"I thought we weren't allowed to do that."* Further probing reveals a familiar concern, that revealing their views or even sharing their knowledge would breach the principle of neutrality. Some refer to evaluation, as in *"wouldn't that be evaluative?"* The evaluative/facilitative debate continues to make its mark, inhibiting practitioners from doing what may seem helpful.

We need to re-think this conundrum. 'Neutral' has shades of meaning. One component is absence of bias, undoubtedly a good thing. No-one wants a mediator who sides with the other party. But neutrality can also imply passivity and indifference: "having no strongly marked or positive characteristics or features". Is this what we want? Small claimants are often adrift in a legal sea without help. Who are we serving by keeping information to ourselves?

Many mediators are lawyers; they know, or ought to, what a contract looks like, when it's been breached and what are the consequences. They can provide guidance without providing an evaluation. Evaluation implies prediction: "The making of a judgement about the amount, number, or value of something". Sharing information is not the same thing. If I tell someone that the Sheriff will place the onus on the claimant to prove their case, will apply the civil standard of proof (the balance of probabilities) and generally prefer an expert to speak to the condition of a car/kitchen/sofa/website, that is not an evaluation.

I realise none of this is new. In higher value cases commercial mediators are quite relaxed about sharing insights and concerns and asking ticklish questions. Many see this as part of the 'value added' mediation brings to legal disputes. Some, if invited, will provide an actual evaluation: a prediction about the likely outcome of the case should it be litigated. But most are clear that sharing legal insights is NOT evaluation. Now, if these largely well-resourced, legally represented business people can benefit from mediator guidance, why not small claimants?

Mediation's ideology
I suspect the answer lies in mediation's multiple ideologies. I was trained as a family mediator, captivated by the appealing vision of empowering parents to make choices about their own children. Community mediators, too, are animated by empowerment, this time of neighbours and neighbourhoods. And while some workplace mediation takes place in the shadow of the law, many workers neither need nor welcome an outsider's opinion about their conflict.

Small claims seem to create a peculiar intersection between different mediator styles. Most are carried out pro bono and have much in common with, and may actually be community, family or workplace disputes. Yet at the same time, like it or not, these people have wound up in court. They ARE mediating in the shadow of the law (Mnookin. R.H. and Kornhauser. L., 1979. Bargaining in the Shadow of the Law : The Case of Divorce. *Yale Law Journal*, vol. 88, , pp. 950–997.) Mediators may be the sole source of legal information for unrepresented parties; even where people have sought legal advice, few afford to have solicitors present during the mediation.

What now?
I call for two changes. First, let's think carefully about the terms "neutral" and "neutrality". In researching for this blog I took a look at our Mediation Clinic's leaflet and there's a definition of mediation that includes "neutral, trained mediator". Ah well. It's clearly time for a review. If mediators want to say we won't take sides, perhaps we should say that. Perhaps the term "impartial" does the job. There may be other ways of expressing the idea and I'd welcome suggestions.

Second, let's use the term "evaluation" openly and correctly. If some mediators feel themselves qualified to provide an evaluation, let them offer it. Parties are quite at liberty to take it or leave it. But if those from a facilitative tradition choose to share knowledge and information, the mediation community should not portray this as evaluation, still less use the term "evaluative" to imply poor practice. I prefer to think of it as being helpful. One strand of thought sees this as ensuring that agreements benefit from "informed consent" (Colatrella. M.T., 2014. Informed consent in mediation: promoting pro se parties' informed settlement choice while honoring the mediator's ethical duties. *Cardozo Journal of Conflict Resolution*, vol. 15, no. 3, pp. 705–775.)

I'll finish with a quote from Robert Benjamin who, for over thirty years, has trodden his own distinctive path on these matters. He argues that mediators inevitably strike a fine balance between competing roles of advice giver and facilitator: *"In a very real way, the mediator forms a conspiracy with the parties in conflict and says, in effect, here is what the law may be, what do you people want to do?"* (Robert Benjamin, Mediation as a Subversive Activity, https://www.mediate.com//articles/subvert.cfm