Kluwer Mediation Blog

Misunderstanding Mediation

Sabine Walsh (Sabine Walsh Mediation) · Wednesday, October 5th, 2011

I recently met an acquaintance of mine whom I have not seen for some time. He asked what I am doing, job wise. I replied that I am now doing mediation full time. “Oh,” he replied “do you do legal mediation or family mediation?” I smiled wearily and launched into my usual explanation of what mediation is, what I do, what status is has and so forth, but afterwards it occurred to me just how often I am asked this particular question, and how much misunderstanding there still is about mediation.

One of these misunderstandings in particular was very much reflected in my acquaintance’s question. While many people seem to understand that mediation can resolve disputes that would otherwise be sorted out in court in civil and commercial contexts, family mediation seems to be categorised differently. First of all, family mediation seems to be endlessly confused with relationship counselling or marriage therapy. I am often asked what my success rates are, that is, how many couples I get back together. The questioners are then generally perplexed when I tell them that, if couples decide to get back together, I terminate my professional relationship with them. I have also had potential clients seeking my services who firmly believed my job would be to bring them back together. Even where people recognise that mediation usually takes place in the context of a separation, in order to address the end of a relationship, is still seems to be seen as a “soft” option, one that incorporates counselling, or discussions about emotions, or does just not have the same status as mediation in other contexts. This view of family mediation seems to undermine its status as a process with legal validity.

This misapprehension strikes me as curious, since it is particularly in family mediation, in my experience, that a clear, enforceable and “legal” outcome is sought. A marriage cannot be ended, at least in Ireland, without at least a legally binding contract or deed of separation or, as is common on most cases, a court decree of separation or divorce. Even if parties are not married, custody, access and maintenance arrangements will have to be set out in legally binding format. By contrast, I have mediated other “civil” matters where the mediation has ended in an understanding that did not take any legal format.

Looking beyond just the outcome, in my family mediation practice, the parties’ legal representatives, while not usually in the room for the mediation, do take an active part in advising the parties throughout of their rights and entitlements, and what their options are. I do not let parties sign a Mediated Agreement or Memorandum of Understanding without them at least running it by a legal adviser first. Why? Because if I did, in all likelihood the legal adviser would raise questions or issues when the parties did go to them to have the agreement made legally

binding. If the parties have had advice throughout, I know they will have a good, solid agreement that a judge will have no difficulty endorsing in consent-based separation or divorce proceedings.

So why does this misunderstanding about the nature of family mediation persist? I have to admit that I am not entirely sure, and can therefore only speculate. Perhaps it is because in Ireland, in particular, family mediation was developed primarily in and by the social work / psychology sectors first. Indeed the state-run family mediation service is still administered by the Family Support Agency which is operated by the Department of Social and Family Affairs and has no links whatsoever to the Courts Service or Department of Justice. Perhaps it is because members of the legal profession traditionally did not “like” mediation as it was seen as focusing too much on emotions and also diverted once (now no longer) lucrative work away from them. I know some legal practitioners who still are not keen on participating in a family mediation, and some others who would always issue legal proceedings without even mentioning mediation to their clients.

I do feel that it is vitally important to address this confusion, however. If family mediation is not seen as a “legal” option, which results in workable, enforceable legal agreements, its uptake will continue to be lower than it should be, and too many family disputes will end up in court, which, as we mediators know, often proves to be an unsuitable forum for such disputes.

So what can we do to address this misunderstanding? My opinion? In a word, education – education of the general public, on the option of mediation and what it really is. Education of legal practitioners on the benefits of family mediation, how they can support their clients through it and why they should recommend it to their clients in appropriate cases. Education of policy makers, on options around incorporating family mediation into the legal system and to support it financially so that it can be an option for those who cannot otherwise afford it. Perhaps, if all these people were clear on the fact that family mediation is a realistic “legal” option for those in family conflict, it will take family mediation out of the realms of the misunderstood, and give the process the status it deserves. And if this education is carried out well and efficiently, perhaps mediation can be recognised as an effective, valid and enforceable dispute resolution process that is not only legal, but goes beyond legal outcomes into addressing what is really important to the parties. In the mean time, I guess I shall continue to explain what I do. At least people are asking!

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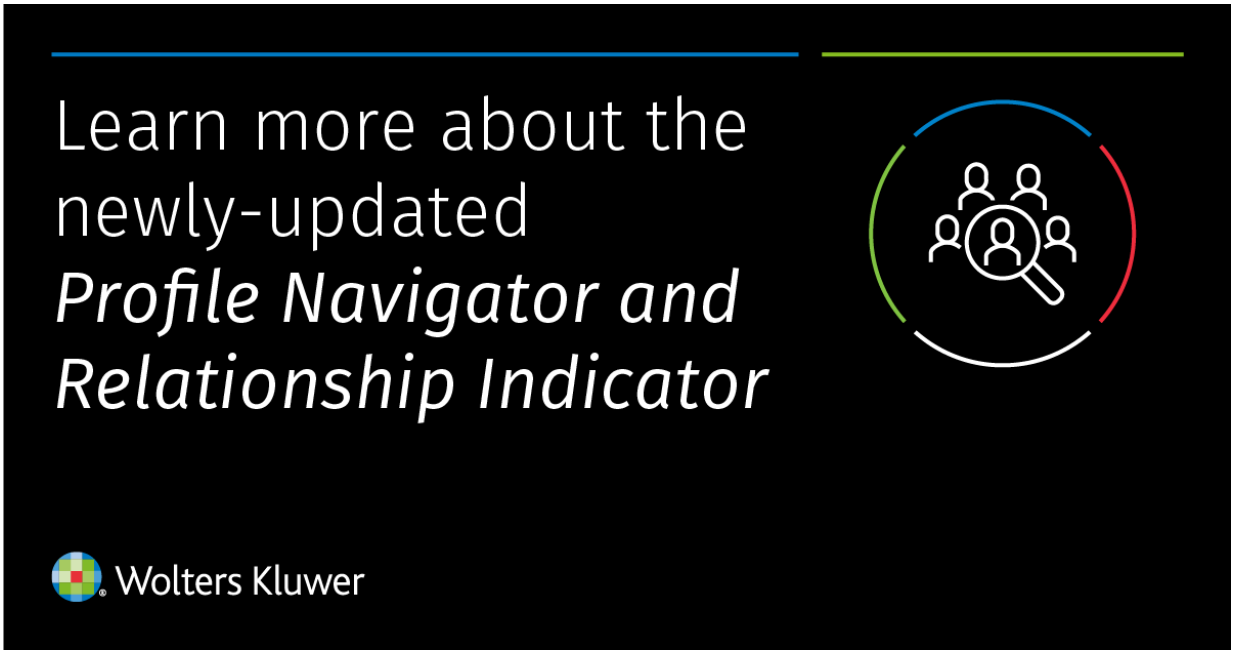

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