Kluwer Mediation Blog

A new generation of mediators

Charlie Irvine (University of Strathclyde) · Monday, February 13th, 2012

I was pleased to read that this year's ICC Competition went so well. Having hosted the UK Law Student Mediation Competition in Glasgow in November I was first-hand witness to the wholehearted, thoughtful way young mediators throw themselves into this work. They appear unaffected by the scepticism of older lawyers.

All of this is very fresh in my mind. Indeed, this post will be late because I have just taken 80 law graduates through their first ever 'intensive weekend' in mediation. The course content won't be surprising to mediators: most of the time is spent 'learning by doing' through roleplay and exercises. I explain at the start that legal training focuses largely on 'declarative memory': the long-term memory for facts and data, which we can regurgitate in assignments and exams. By contrast, to become competent mediators we need to engage our 'procedural memory': our ability to recall how to do things, often unconciously or even effortlessly (for a neat explanation see http://www.human-memory.net/types_declarative.html). The best way to lay down this type of memory is to practice – and practice – and practice.

However, I don't want to write about the content of the course so much as to note the phenomenon itself. Scotland has not been quick to adopt mediation. I have written before about the wariness shown by some of our most senior judiciary, and Scottish litigators have told me they have more experience of mediation in London than in Edinburgh or Glasgow. So when Strathclyde University offered this elective to its new law graduates (on their Professional Education and Training Stage 1, or PEAT1 year) I was unsure what interest to expect. Yet fully one half of the year chose the course. It is worth speculating about why this might be.

One reason could be the title. The course is called 'Mediation and Mediation Advocacy'. The phrase 'mediation advocacy' has been borrowed from Andrew Goodman's excellent book of the same title and for me it captures an enduring truth: far more lawyers will represent people in mediation than ever act as mediators. The lawyers of the future need to understand this form of conflict resolution, not necessarily because it will be a career for them all (although it will be for some) but because it is essential to know how to use it skillfully. Good mediation advocacy is like good court advocacy: some develop a reputation for getting the most for their clients and for performing well in that arena. But the skills are different. Instead of examination and cross-examination, lawyers need to know how to select a mediator, how to contribute constructively to a collaborative process, and how to draft a mediation agreement. Much of this is new.

Another explanation for mediation's new-found popularity among the young could be to do with

the law itself. It has often been noted that law students arrive brimming with idealism about justice and fairness, ready to use the law's weaponry to right wrongs and create a more just society. By the time they leave, and more so begin working, much of that idealism has evaporated, burnt off by the twin realities of commercial practice and the law's technicality. It soon becomes clear to these intelligent young people that the business of law is business. This is just speculation, but I wonder if mediation appears to offer a setting where that sense of justice and fairness can still be the driving force. Leonard Riskin claims that mediation challenges lawyers' 'standard philosophical map'. One way that it does so is by placing the parties centre-stage in the quest for justice. It is the parties who decide, not only the outcome, but the criteria by which that outcome is judged. This is radical stuff indeed.

And what did I learn? Well, a new phrase for a start. One student suggested to the parties that mediation allows for a 'healthy conversation'. This went down well and, when I checked it out with the parties, made immediate sense.

I witnessed the 'four stages for learning any new skill' (originated by Gordon Training – see http://www.gordontraining.com/free-workplace-articles/learning-a-new-skill-is-easier-said-than-done/) This model is beloved of mediation trainers and remains as resonant as ever – we begin with unconscious incompetence (we don't know what we don't know); as we learn about the new skill we become consciously incompetent (we now know what we don't know); after some practice we are capable of conscious competence (we know how to do it, with effort); after a great deal of practice we become unconciously competent (we don't need to think about it any more). It is always hard to watch new mediators hit stage 2, where they say things like 'It's not as easy as it looks.' But it is equally rewarding as they move through the second day to see a growing mastery, a sense of where they are and what they ought to be doing. To go back to procedural memory, it seems to me that mediation engages our muscle memory, so that it is only by being in the mediator's chair that we know what it feels like. Next time it is that bit easier.

An observation from the students: in one exercise five people took a turn as mediator while rotating the parts of client and lawyer. They noticed that, as more and more of them took their turn, 'the lawyers started behaving like mediators.' Is this a good or bad thing? It does highlight the challenge for lawyers in their day-job of zealous advocacy. If they learn the skills and mindset of a collaborative approach, will their clients welcome this? They may get the best deals, but if they don't appear aggressive and forceful is there a risk that clients will think them weak?

These are the challenges for all of us in the mediation field. I am personally optimistic, bouyed by this weekend. It seems to me that the next generation of mediators will be less hung-up on proving what mediation is NOT, and more relaxed about seeing it as 'business as usual': a useful, humane and just way of resolving disputes.

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