Kluwer Mediation Blog

Has the evaluative label outlived its usefulness?

Charlie Irvine (University of Strathclyde) · Monday, August 12th, 2013

Recently I have noticed mediators using a label to describe other people's practice. It is rarely a compliment. That label is "evaluative"; as in "she takes rather an evaluative approach" or "his background as a lawyer leads him to be evaluative." More subtly, "We are firmly committed to the facilitative model" (and, by implication, not the evaluative). Some question their own practice: "was I being a little evaluative there?" A colleague recently confessed that she had been asked for evaluative mediation and wondered if this was OK. What is going on? I describe the origins of these terms before asking whether they are still fit for purpose.

In 1996 Leonard Riskin published his influential article: "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" (Harvard Negotiation Law Review, Vol.1, 1996, 7-51). This beautifully written piece has the ring of an "apologia": a personal summary of years of study and practice. He provides a framework for understanding the "bewildering variety of activities" (p.8) comprising mediation, and for reducing the resultant confusion. This confusion "is especially pernicious because many people do not recognise it; they describe one form of mediation and ignore other forms, or they claim that such forms do not truly constitute mediation" (p.12).

So Riskin offered his "grid for the perplexed." It is elegantly simple and yet one of its core ideas is frequently forgotten. Its two axes intersect at 90 degrees, each describing a continuum of practice. The axis that seems to have lodged in the public imagination runs from "facilitative" to "evaluative": strategies and techniques "that facilitate the parties' negotiation" through to those "intended to evaluate matters that are important to the mediation" (p.17).

In fact Riskin began with the other axis, presumably because he saw it as more fundamental. It describes the goals of mediation, running from "broad" to "narrow". Narrow could be "how much one party should pay the other"; broad, something like "how to improve the conditions in a given community or industry" (p.17).

I have no quarrel with either axis. Riskin gives examples of all four quadrants (e.g. evaluative/broad) and acknowledges that mediators may switch styles (although there may be risks in this: see Wall and Chan-Serafin, "Do Mediators Walk Their Talk in Civil Cases?" Conflict Resolution Quarterly, Vol 28, No.1, 2012, suggesting that settlement was less likely when mediators switched styles). It seems, however, that while the evaluative/facilitative debate rages on, the broad/narrow continuum has been almost forgotten. I can't recall a mediator saying "She adopts a narrow problem definition" or "we see ourselves on the broad end of things." We seem to

have lost the richness of Riskin's analysis. This is doubly sad because it leads us to a mindset that we often encounter in deeply entrenched conflict: a binary view of the world. Others are seen as good or bad, right or wrong. Similarly, when I hear mediators talking about facilitative or evaluative it seems to invite me into opposition or support.

Perhaps it is time to find other ways of describing what we do. One of Riskin's most important insights is this: "almost every conversation about mediation suffers from ambiguity: the confusion of the 'is' and the 'ought'" (p.9). It seems clear that he was trying to describe rather than prescribe, even if his model has provided ammunition for the latter. Rather than review the rich literature inspired by his grid I want to flag up an alternative scheme, provided by Ellen Waldman in her article "Identifying the Role of Social Norms in Mediation: A Multiple Model Approach" (Hastings Law Journal, Vol.48, 1997, 703-769). It has three things going for it: 1) it addresses a core issue for our clients and critics; 2) it is can be traced to mediation's historical development; 3) it is NOT binary, its threefold scale allowing mediators to locate their practice without implying that others are wrong.

Waldman begins by recognising the importance of social norms in mediation. What are social norms? This question goes to the heart of mediation. Unnervingly for many of our clients, its commitment to self-determination means that they are given responsibility not only to choose the outcome to their dispute but to choose the criteria by which that outcome is judged. So, if I have a dispute with a builder over the construction of a foundation, it is trite to say that any proposed settlement has to be satisfactory to me. But that doesn't take me very far. How do I know that the foundation is safe? I need to rely on norms provided by the industry or local authority. How do I know the cost is fair? Here I am probably left to the market. How do I know it has been competently built? Here I may need expert advice, and the courts too may rely on an expert witness. And if I wish to contest the contract terms the courts will apply the relevant legal norms.

To fail to recognise the importance of norms, both legal and social, is to play into the hands of those critics who accuse mediators of having no interest in justice. As one English researcher put it "mediation is not about just settlement, it is just about settlement" (Hazel Genn, Judging Civil Justice: The Hamlyn Lectures 2008 Cambridge: Cambridge University Press, 2010, p. 117.) Waldman suggests that social norms do matter to mediators. She proposed three approaches: "norm generating", "norm educating", and "norm advocating". A norm-generating mediator, while not dismissing the importance of social norms, looks to the clients to provide them. If they agree that a reasonable neighbour stops playing music at 10pm, that is their choice and can form the basis of an acceptable resolution.

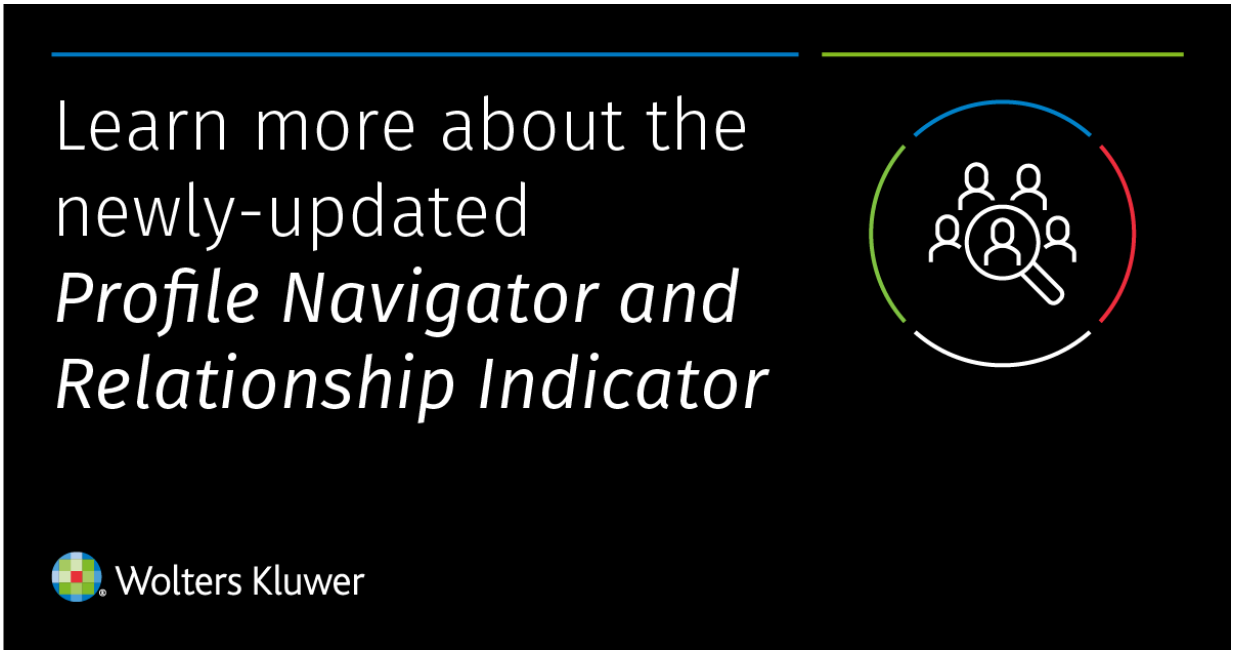
Waldman recognises that, for some, delegating the selection of norms to parties themselves may be dangerous or careless: for example where one party has coercive power over the other, or where the law has been hard fought and contested. She asserts that "disputes surrounding issues where the norms are clear and compelling may still be mediated" but what actually occurs is "a norm-based process utilizing mediative techniques" (Waldman, p.727.) This she describes as the "norm-educating" approach. Here the mediator is not shy in informing the parties about the relevant social or legal norms. At the same time, she does not insist on their incorporation into the outcome: once educated about social norms, the parties are free to ignore them. For Waldman the archetypal norm-educating arena is divorce mediation.

There is a third point on the continuum: the "norm-advocating" approach. Here the mediator not only educates the parties about relevant norms but insists that they be honoured in any outcome,

becoming “to some degree, a safeguarder of social norms and values” (p.745). She claims to find this style in bioethical, environmental, zoning and discrimination disputes (p.746).

While not as snappy as “evaluative” the idea of being a “norm-educating” or “norm-generating” mediator seems more accurately to reflect the demands of particular contexts. In a workplace mediation, for example, where two colleagues are not getting along, it seems proper for the mediator to leave the choice of norms to them. In contrast, a commercial mediator working on a construction dispute may refer to recognised standards in the industry. Rather than caricaturing this as “evaluative”, “norm-educating” seems more accurate: she or he may not wish or need to provide an evaluation (which brings the mediator uncomfortably close to the judge), but be quite prepared to discuss the applicable norms. And a disability discrimination mediator may well adopt the norm-advocating approach, insisting that any agreement complies with relevant legislation. Waldman’s key insight is that all three approaches make use of the same range of mediator techniques: it is the role of social norms that distinguishes them.

This brief blog is struggling to do justice to two major schema in our field. Both have merit. But as the evaluative/facilitative debate begins to polarise more than it illuminates it may be time to turn to an alternative way of conceptualising our work. My fear is that the rhetoric of mediation, especially in our publicity and ethical codes, implies a norm-generating approach, when the reality of most mediation practice comes closer to norm-educating or norm-advocating. Better, surely, to be more honest with our clients and the wider society. Perhaps we should offer clients the choice: would you like me to contribute my knowledge of social 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? As things stand these conversations seem to take place inside the practitioner’s mind: Waldman’s scheme may provide us with the vocabulary for a more transparent approach.



This entry was posted on Monday, August 12th, 2013 at 10:00 pm and is filed under Commercial Mediation, Conventional wisdom, Evaluative Mediation, Future of mediation, Growth of the Field (Challenges, New Sectors, etc.), mediation models, Mediation Practice
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.