Kluwer Mediation Blog

De-Fogging Mediation Laws

Michael Leathes (Corporate counsel & author) · Tuesday, March 18th, 2014

As usual, Confucius said it first: *Life is really simple but we insist on making it complicated*.

This truism is becoming increasingly applicable to mediation law. Take England & Wales for example. In just 20 years, court judgments, procedural rules, orders, cost implications, practice directions, policy statements and other reforms have mushroomed, and keep growing. For anyone without night vision goggles, it's groping in the dark.

A single source is needed that comprehensively captures the historical and political backdrop, explains the different practical and legal positions of mediators when compared to other dispute resolvers, details how procedural rules have been applied, and provides a clear guide through confusing areas like compelling or encouraging mediation, costs sanctions, contractual clauses, privilege and confidentiality, contingency fees and a host of other influences.

The case now needs to be made for mediation to be fully and officially accepted as a vital part of the civil justice system – there are still some judges, and sadly many practicing lawyers, who do not grasp this reality and see it as a fringe activity, even as a sort of homeopathy.

A book was recently published called Mediation Law and Civil Practice by Tony Allen that sets out to do all these things, comprehensively explaining the legal environment in which mediation operates in England & Wales. As an enlightening, well-written, nicely segmented contribution to mediation development in the UK, it ticks all the above boxes. There are frequent references to the EU Mediation Directive and comparative checks with the US and Australia. This book is an important source for disputing parties, the judiciary, mediators (whether lawyers or non-lawyers), litigators and civil justice policy makers.

Although the obligations of mediators to disputing parties under codes of conduct is mentioned, there is not a great deal in this particular book about how breaches of obligations, such as confidentiality, can be pursued in practice by aggrieved parties. Nor is there an explanation of the role of the Civil Mediation Council (CMC) in the UK and its Mediation Provider Accreditation Scheme, despite the excellent Foreword contributed by Sir Alan Ward, CMC Chair.

But overall, this is essential knowledge for anyone involved in mediation in England & Wales or in any country that follows or is influenced by UK practice. What is now badly needed is a similar guide in other jurisdictions, to clear the fog of mystery and incomprehension elsewhere.

For Confucius also said: *Real knowledge is to know the extent of one's ignorance*.

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