Kluwer Mediation Blog

Lawyers of the future on mediation: threat or a promise?

Charlie Irvine (University of Strathclyde) · Sunday, June 14th, 2015

We have just reached the end of the annual marking season (grading for North Americans). The verbal joust of examinations is almost over. Students get their blows in first; teachers' strike back with marks and comments. It's a familiar ritual with its own rhythm and reasoning. It can be viewed as arduous by both sides but markers get a certain satisfaction from novel insights and perspectives; and a salutary reminder of what people actually remember.

For a mediator teaching in a law school there is an additional challenge. Students are being inducted into the great tradition of legal reasoning which sifts 'irrelevant' from 'relevant' matters in the march towards court. Ideas like 'resolution', 'problem-solving', 'collaboration' and 'conflict' can appear odd, even unwelcome. It can't be easy for learners to hear about an alternative to a system they are only just grasping.

I am grateful to the 180 first-year Legal Process students who answered this year's mediation question. My task was leavened by some striking observations, a few of which I've quoted below. They provide a useful glimpse of the way Scotland's next generation of lawyers think. They also raise wider issues about lawyers and mediation. As the teacher, of course, responsibility for any haziness with the facts must be entirely mine.

On negotiation
Fisher, Ury and Patton's classic 'Getting to Yes' has spawned some interesting variants:
"There are two main forms of negotiation – tough and principled"
"Focus on the people, not their powers"
"Focus on outcomes, not facts"
"People, not power"

On mediation
"Mediation is seen by many as a form of second-hand justice"
The legal capture of mediation is gathering pace: *"mediation is the introduction of a trained, neutral solicitor"*
But it needs to know its place *"to assist the resolution of a matter that would simply be too trivial for any court to manage"*

Some useful history:
"Following the African tribes mediation has been around since the 18th Century"
"The term 'ADR' was first coined by US Legal scholar Frank Sander in 1976 when he was describing solutions to America's revolving door courthouses"

"Community neighbour disputes have been very popular in Scotland since 1995"

Others found the concept troubling:
"A negotiation between two or more ill-advised parties"
"Many say it's too binary in the sense that no-one actually has an idea of what is going on"

Professions have always sought to draw a bright line between 'us' (qualified, expert, trusted) and 'them' (uninformed, lay, in need of help):
"One of the major drawbacks of mediation is that lay people are in control of justice"
"Lay people are being trusted to come to a constitutional decision".
This is vexing because: *"Sometimes lay people cannot be trusted to make good decisions"*
Or even: *"Lay individuals are not capable of concluding rationally justified outcomes"*

One remark revealed an anxiety about mediation's famed informality: *"With both parties not being represented it can lead to relative chaos in the mediator's office"*

No only that, but: *"as ADR produces faster outcomes, there exists the possibility that lawyers may go long durations without cases"*. There's something disarming about this first-year articulating a concern rarely admitted by more senior lawyers – ADR as 'Alarming Drop in Revenue'.

While all quite entertaining these quotes have alerted me to two connected phenomena. One is the gap between what I say and what they hear. The other is known as 'déformation professionnelle'.

On the first: I say mediation has a number of potential benefits, including a future focus, creativity, procedural justice, the preservation of relationships and high rates of compliance; they hear that it's quick and cheap. I say mediation has been critiqued on the grounds of its informality, its alleged pursuit of 'harmony', its potential to oppress those with less power and its impact on precedent (the 'loss of law' argument); they hear that mediation deprives people of their legal rights and is only suitable for those with an ongoing relationship.

This connects to déformation professionnelle – "the tendency to look at things according to the conventions of one's own profession, forgetting any broader point of view" (http://rationalwiki.org/wiki/List_of_cognitive_biases) It is a nice pun on the French term 'formation professionnelle', meaning professional training. It certainly seems to be working: even newly-cast legal professionals see the world in a particular way. Especially revealing were the concerns expressed above of 'allowing' or 'permitting' ordinary people to participate in matters of justice. While the worry about the impact on legal employment is understandable (if a little exaggerated in this jurisdiction) the instinctive negativity about non-lawyers and justice must surely have deeper roots. Ian MacDuff made a similar observation some months ago on this blog – http://kluwermediationblog.com/2014/10/27/spreading-the-word/

I'm a little wary of speculating about explanations. Perhaps others can assist. For what it's worth, one hypothesis goes like this: a significant driver for studying law is an urge to correct injustice; at a particular stage in life (which for some of us never ends – see Robert Kegan's *The Evolving Self: Problem and Process in Human Development* Cambridge, MT: Harvard University Press, 1982) we have to see the world in binary terms, wrong and right, bad and good; the courts are the places where wrongs are righted and bad people punished; anything perceived as undermining this key edifice is a loss rather than a gain.

I appreciate this is rather simplified but it's an attempt to account for a phenomenon that appears

more intuitive than articulated. Add to the line of reasoning above the thought of entrusting justice to those without the arduous training on which young lawyers are about to engage. No wonder all that self-determination is a worry. The fact that in real-world lawyering the bulk of their clients' contractual affairs will never trouble the courts is lost on these young minds. Why should they know? Core legal subject are taught on the basis of the tiny minority of cases that have progressed all the way to the top of the court hierarchy (for more on this see John Lande and Jean R Sternlight 'The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering', (2009) *25 Ohio State Journal on Dispute Resolution*, 247-298).

So, where does this leave us? Not for the first time I find myself calling on my fellow mediators to leave alone the efficiency arguments for our work. Let the market discover that for itself. Rather, let us stress the justice dimension. Ordinary and not-so-ordinary people are provided with the opportunity to negotiate both the outcomes to their disputes and the basis on which those outcomes are judged. This is not anarchic. Mediators are not passive. They can contribute both procedural and normative guidance. To paraphrase a recent critic of mediation, it is not just about settlement, it is all about justice. Our clients care deeply about the justice or fairness of their outcomes; they will voice severe criticism of the courts if they don't think they got this right; and they will settle or agree only when they are ready to. This process needs to be embraced by the legal system as a way of expanding its legitimacy by de-professionalising justice and bringing 'lay' voices into play.

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