Kluwer Mediation Blog

The wisdom of uncertainty: on grey zones in mediation

Ian Macduff (NZ Centre for ICT Law & School of Law, Auckland University) · Sunday, February 26th, 2017

This is not a blog about the novel and films that might have captured the "grey" zone in public imagination. Rather, it's about uncertainty, both within and about mediation. These notes also owe much to conversations with mediation colleagues at the ICC's mediation competition in Paris in early February, over coffees and the occasional glass of wine; and to more recent conversations with my mediation colleagues back in New Zealand, at a meeting just a few days ago designed to bring together a small group of mediation academics, practitioners and researchers. As the second of these sources – our meeting in Wellington – was subject to Chatham House rules, I've chosen to unpack the themes on mediation research discussed, and to bring them under this heading of the "grey questions".

The basic question is this: what are the areas of doubt and uncertainty that we have? I draw this question from the Public Conversations Project (PCP) in the US, which was developed initially to respond to intense public conflict over issues such as abortion, immigration and community solidarity. At the heart of the original process were questions designed to elicit – from parties often separated by wide gulfs of ideology, faith, identity – what it was that was important to them in the way they saw the issues at stake. The questions were not aimed at inviting people to defend or relinquish those foundational values. The final question in the process – what are your areas of doubt and uncertainty? – is the one most likely to draw out reflection, engagement, mutual understanding and, perhaps, movement, and is the one that suggests that in all of our actions and dealings there are likely to be areas of uncertainty and doubt – the grey areas. Having ensured, through a closely facilitated process, that the parties do not see this as a challenge to their values and interests, this question becomes an invitation to reflect on the fringes of our vision. There are, of course, those public figures of recent notoriety who seem never to be wracked with a moment's doubt even as the facts are invented and reinvented, but that's another topic.

I have two reasons for referring to this powerful question: first, it's a really valuable question for mediators to have in their tool kits – not to toss in too early in the process as it will probably be perceived as a challenge rather than invitation. If, however, parties in a mediation have reached the point of knowing that they've been heard, that their counterparts have heard them, and that the mediator has ensured sufficient respect for the narratives across the table, there may be an opening to invite a more reflective stance towards the information that the parties have offered. But, in the same way that you – as mediator – would not want to rush the parties towards solutions before you're reasonably confident that the stories have been told, you will also hold off offering questions of doubt and uncertainty until you're sure of the parties' confidence in you and the

process.

The second setting for this question – "what are your areas of doubt?" – is for mediators' reflections about our work. Having had rich conversations with my colleagues in Paris in Wellington, it seemed to me that there is an essential balance between our enthusiasm for and questions about this line of work. The difficulty often is that the practitioners and critics too readily take up opposing stances – especially, I'd suggest, in the debates over "private justice" that have accompanied the development of practice for the past 40 years. In research terms, the interesting questions are often the ones that live at the edges of practice (and typically don't arise in the course of mediation practice). Consider, for example:

• the relationship between mediation and civil justice: what happens to public norms, and to the protections offered by law and human rights, when dispute resolution goes private;
• in the world of increasingly professionalised mediation, what's happened to the ideals of low cost and easy access;
• what happens to the original ideals of modern mediation as it becomes steadily more institutionalised and formalised;
• how do we maintain the balance – or it is tension? – between a field that may show signs of fragmentation on the one hand, and a push towards conventionalism and uniformity (and standards) on the other;
• in the increasingly cross-border world of trade and communication, how do we deal with two core questions of jurisdiction and enforcement;
• what, at its simplest and also most challenging, do we mean by "justice" when we're dealing with private, informal, non-adjudicative, party-driven processes;
• what happens to precedent and the kind of collective memory that continuous and – usually – public processes of dispute resolution contribute to;
• what risk is there of excluding the wisdom and experience of indigenous, minority, migrant or other voices if that expertise doesn't fit the criteria of mediator accreditation;
• what, as always, do we include in or exclude from our definitions of mediation (purists and eclecticists abound);
• in the digital spaces of online dispute resolution, social media, and our inevitable uses of digital media, what changes do we need to make to practice and participation, rather than simply assuming we can shift our "land-based" practices online?

This is, you'll see, not so far removed from the well-established principles of reflective practice but, rather than directing the reflection in this second case to a review of one's own practice, the questions – what are your questions of doubt, or even, what are the interesting and challenging questions about mediation? – are intended to invite reflection on the things that might, and probably ought to, trouble us about mediation. This of course is in no way designed to undermine mediation; rather, it's an exercise in strengthening our engagement not just with the day to day details of practice but also with what that practice means. This may also all seem perfectly obvious, but I must say that in the recent conversations, once we got beyond the usual discussions of process, mediator style, timing of interventions, challenges of confidentialtiy and so on, things got interesting when we moved into that liminal zone that accompanies social practices. As the PCP model – and their Essential Partners successors – make clear, this is about encouraging both conversation and curiosity.
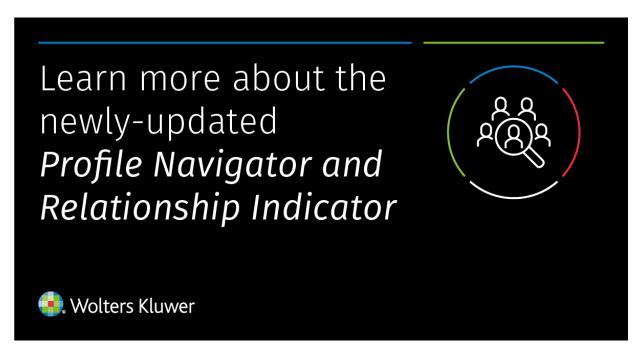
So, what are your grey areas, your questions of doubt and of interest?

_____

To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please subscribe here.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

This entry was posted on Sunday, February 26th, 2017 at 1:54 am and is filed under Communication, Conventional wisdom, Developing the Field, General, mediation process, Online Dispute Resolution (ODR)
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.