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ADR Professional: Mediation and Social Norms: A Response to Dame Hazel Genn

Charlie Irvine

University of Strathclyde

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In December 2008 I attended one of the Hamlyn Lectures, delivered in Edinburgh by Dame Hazel Genn. Her topic was 'Civil Justice and ADR' but she quickly made it clear that her main interest, or target, was mediation. I readied myself for a verbal assault, and got one, but in more trenchant terms than I expected. While there was nothing new in Professor Genn's litany of mediation's failings, I was startled and a bit stung by the rhetorical flourish with which it was uttered, particularly in the presence of distinguished members of the Scottish judiciary and legal profession. A review of civil justice is currently being conducted by Lord Gill, Scotland's second most senior judge, and it would be surprising if her remarks went unnoticed. This article is an attempt to respond, not by defending mediation, but rather by challenging mediators to re-think the way they describe what they do.

We generally listen to senior academics respectfully, ascribing a degree of dispassionate objectivity. But Professor Genn did seem to 'have it in for' mediators. It was a little surprising to hear her address the question: 'How many new professions benefit from the support of the senior judiciary?' to the very old profession that receives that support daily. However, her most striking assertion was this: 'Mediators have no interest in justice and fairness'. It was the culmination of a theme: contrasting well-meaning but ineffectual mediators, focused on relationships, with robust judges, vindicating people's rights; low demand for mediation despite attempts by government and judges to promote it; and low levels of satisfaction when it is mandated. A sorry tale indeed.

What has this to do with social norms? Well, it led me to muse on mediation rhetoric. I make the following assertion: mediation rhetoric is often out of step with mediation practice. Indifference to norms like justice and fairness may still feature in mediation rhetoric but I believe it ignores the 'facts on the ground' of daily practice. This phenomenon allows observers to seize on mediation's strengths, such as support for party self-determination, and characterise them as failings.

I add a second, related, assertion: mediators' ethical codes offer little help. As one academic puts it: 'Mediating ethically requires the constant generation of internal norms appropriate for a specific mediation and set of parties' (J MacFarlane, 'Mediating Ethically: the Limits of Codes of Conduct and the Potential of a Reflective Practice Model' (2002) 40 *Osgoode Hall Law Journal* 49 at p 52). I consider below where these norms might come from.

Finally, I link this difficulty with codes to the moment-by-moment ethical choices mediators make. If I have 'no interest in justice and fairness', what on earth am I doing when I intervene in other people's disputes? I suggest that, when faced with truly difficult dilemmas, mediators find guidance neither in models nor ethical frameworks. Rather they fall back on their core values. It is instructive to consider what these might be.

The 'norm-generating' model

To return to the question of mediation rhetoric, it is helpful to start with a typology of mediation practice set out in 1997 by Ellen Waldman. It ranks mediation models according to their treatment of social norms. Answering Carrie Menkel-Meadow's question: 'Are third parties, like mediators, ever morally responsible for the outcomes they preside over?' (C Menkel-Meadow et al, *What's Fair? Ethics for Negotiators*, (Jossey-Bass, 2004) at p xvi), the 'classic' form of mediation responds with a clear no: 'disputants are encouraged to generate the norms that will guide the resolution to their dispute' (E Waldman, 'Identifying the Role of Social Norms in Mediation: A Multiple Model Approach' (1997) 48 *Hastings Law Journal* 703-769 at p 708). While a mediator gets busy managing process and interaction, 'he does not restrain deliberations by referencing concerns extrinsic to the parties' (ibid at p 718). The norms by which choices are evaluated must come from the parties themselves: the norm-generating model.

What are social norms? They are: 'The rules that a group uses for appropriate and inappropriate values, beliefs, attitudes and behaviours' (www.changingminds.org). This definition embraces the law but is by no means limited to it. Early twentieth century judges used 'the man on the Clapham omnibus', as a kind of normative standard but social norms applicable in disputes might include 'reasonableness' and 'the way children ought to be brought up'. They could also include simple ideas like turn-taking, not interrupting and, of course, fairness.

The norm-generating model will be familiar to mediators. Most were trained in some version of it, reflected in mediation ideals like empowerment and respect. Waldman (prefiguring Professor Genn) claims:

'The leitmotif of the norm-generating model, then, is its inattention to social norms. In an effort to spur innovative problem-solving, the model situates party discussion in a normative *tabula rasa*' (ibid at p 718).

This model is particularly suitable where legal norms do not apply, or are unclear, or where mediation's primary goal is improving relationship. 'Norm-generating' mediators would not regard it as appropriate for their values, no matter how important, to supplant those of the parties.

Norm-educating

Moving along Waldman's taxonomy, we come next to the 'norm-educating' model, portrayed as a result of mediation's expansion into new, more legal areas and to criticism that the norm-generating approach fails to uphold standards of fairness and justice. The mediator exercises a more forceful role, adding to her standard repertoire of facilitative techniques the option of 'educating' the parties about the norms that may apply to their situation. S/he may not, however, tell the parties what to do -- the choice to apply these norms remains with them:

'Contrary to the norm-generating model, where discussion of societal standards is thought to impede autonomy and distract parties from their true needs, this model's consideration of social norms is thought to enhance autonomy by enabling parties to make the most informed decisions possible' (ibid at p 732).

The archetypal norm-educating process is family mediation. Family mediators refer to a number of social norms. Chief of these is the welfare of children, which spawns others on topics like patterns of contact, the importance of a relationship with both parents and the place of children's views. As well as these child-oriented norms, mediators may invoke legal rules. All Issues Mediation seems further along this

continuum, with reference made to legislation, particularly by lawyer mediators (J Lewis, *The Role of Mediation in Family Disputes*, Scottish Office Central Research Unit, 1999). Waldman is not the only one to notice this: Robert Dingwall and David Greatbatch assert that mediators have: 'Some sense of an acceptable bracket of outcomes, "the parameters of the permissible", to the case which they are dealing with and will seek to manage the process to ensure that any eventual agreement falls within this bracket' (R Dingwall and D Greatbatch, 'The Mediation Process' in G Davis et al, *Monitoring Publicly Funded Family Mediation*, (Legal Services Commission, 2000) at p 251).

The norm-educating style seems prevalent in other fields, including court-annexed mediation and mediation in the construction industry (S Belhorn, 'Settling Beyond the Shadow of the Law: How Mediation Can Make the Most of Social Norms' (2005) 20 *Ohio State Journal on Dispute Resolution* 981-1026). It boasts the capacity to protect weaker or less articulate parties because the normative framework provides a backstop to ensure fairness. However, all this educating does not mean that parties have to do what the mediator says: party self-determination remains a driving value and they may still choose to ignore the mediator's normative guidance.

Norm advocating

Waldman posits a third model. Here, the mediator not only informs the parties about norms, but ensures they are observed. Her example involves a 'bioethics mediator' facilitating an intensive care team's discussion about a patient's decision to terminate treatment (thus ensuring her death). In this end-of-life mediation, the mediator uses some standard mediation techniques like agenda setting and option exploration. However:

'The mediator not only educated the parties about the relevant legal and ethical norms, but also insisted on their incorporation into the agreement. In this sense, her role extended beyond that of an educator; she became, to some degree, a safeguarder of social norms and values' (Waldman, at p 745, above).

While some of her examples -- zoning, environmental and bioethical disputes -- may be unfamiliar in the UK, I believe we see a form of norm-advocating in disability discrimination mediation: 'It enables people to exercise the same rights as they would in court but through a less rigid and more widely focussed approach. We describe this as rights-based conciliation.' (www.dcs-gb.net)

Mediation rhetoric

My point is a simple one: mediation rhetoric still, by and large, features the norm-generating model while, in practice, much UK mediation has become norm-educating or even norm-advocating. Dingwall and Greatbatch are not alone in claiming that family mediators are now quite sophisticated in highlighting legal and societal norms. In 1999, Jane Lewis identified 'guidance from mediators' as among the benefits identified by Scottish mediation parties (Lewis, at p 58, above). One mediator said 'If they are flying against the principles of law then I would see my role as just reminding them again how the law looks at the matter' (Lewis, p 59, above). But if we turn to rhetoric, the Family Mediation Helpline website, for example, is quite categorical:

'Sometimes the mediator will suggest a way of solving a problem to help them to reach an agreement acceptable to both, but they will never tell either party what to do' (www.familymediationhelpline.co.uk).

Although the mediator may have a problem-solving input, there is no hint of normative guidance --

'acceptability' is the sole criterion for outcomes. The Relationships Scotland website is clearer: 'Mediators avoid taking sides, making judgements or giving guidance' (www.relationships-scotland.org.uk). Interestingly, the same words are used to describe court annexed mediation: 'Mediators avoid taking sides, making judgements or giving guidance.' (www.nationalmediationhelpline.com).

So, the role of social norms in mediation is under-acknowledged, yet crucial to the moment-by-moment choices mediators make. If mediators do care about fairness and justice, and if we bring these and other norms to our clients' attention, why do we not say so? On the face of our publicity, we take little responsibility for ensuring that agreements conform to social norms. And yet, at the same time, a widespread critique has evolved, highlighting mediator pressure to reach particular results, (Greatbatch and Dingwall, above; T Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale Law Review* pp 1545-1610) -- almost the opposite phenomenon. This conundrum illustrates the trickiness at the heart of mediation. Do we influence people, or do we not? Do mediation outcomes need to be fair, or is that 'a very subjective matter' (J Folger, *Seminar on Transformative Mediation*, unpublished, Institute of Family Therapy, London, 2006)? These are ethical questions, and we might expect to find answers to them in our codes of professional ethics.

Limitations of ethical codes

Canadian academic Julie MacFarlane has considered the difficulty of applying ethical codes to mediation. She contrasts mediators with adjudicators, who are constrained by both substantive and procedural rules. In the absence of such normative guidelines, 'the mediator must pay attention to every aspect of party interaction in the course of their negotiations, and assumes a very broad responsibility for the ... process that unfolds' (MacFarlane, at p 51, above). Because of the complexity of this activity MacFarlane argues that 'bright-line' standards like impartiality are unwieldy and inappropriate. Instead, she claims that: 'implicit in each decision is a balancing of alternate courses of action and an appraisal of how far each advances the goals and the mediator's understanding of the underlying values of the mediation process' (MacFarlane, at p 57, above). This requires mediator discretion. These 'on-the-spot judgments' (MacFarlane, at p 53, above) are not only invisible to the parties: mediators themselves may not recognise the moral reasoning that led them to make to one choice over another. To ensure that mediators exercise their discretion in ethical ways, MacFarlane suggests that 'reflective practice' (D Schon, *The Reflective Practitioner: How Professionals Think in Action* New York, Basic Books, 1983) is more useful than ethical codes.

Her criticism of codes of conduct goes further. First, their focus on process 'obscures the dynamic relationship between the process and content of dialogue in mediation' (ibid at p 61). Key ethical issues like fairness and justice seem to concern content -- the 'substantive justice' of outcomes -- more than process. Second, a right-wrong paradigm ignores the reality of discretion. For example, the idea of ensuring that the less powerful party is not disadvantaged assumes that 'powerful' and 'powerless' are fixed and immutable states. In my experience, the balance of power shifts constantly throughout a session, and mediator responses are sophisticated, intuitive decisions, made in the moment. And finally, ethical codes offer little guidance in the face of competing principles, such as party self-determination and the protection of vulnerable parties from undue pressure.

All of this underlines the inadequacy of these codes to address the nuances of conflict resolution. It seems unrealistic, MacFarlane claims, 'to imagine that the personal awareness of mediators who are slow to recognise the signs of intimidation and domination will be affected by a standard in a code of conduct' (MacFarlane, at p 71, above).

Mediation's values

This critique affirms my own instinct, that while ethical codes need to exist (they seem to reassure people) what is much more relevant in the moment-by-moment choices that mediators have to make are their values. By values I mean something deeper and broader than rules: rather, explanatory principles that allow a range

of subsidiary choices to be made almost automatically (saving time and brain power). A simple example is politeness: if I hold this value, I do not need a list when I leave the house saying: 'Don't barge in front of people; give your seat up to the elderly; allow others to speak first' etc. I have sufficient guidance for most of the micro-choices I need to make. In the same way, I contend that mediation's values would be both descriptive and prescriptive. They would tell us how mediators are likely to behave while also telling mediators how they ought to behave.

It is beyond the scope of this article to set out what mediation's values might be (C Irvine, *Mediation's Values: An Examination of the Values Behind Five Mediation Texts*, Unpublished Masters Dissertation, Birkbeck College, University of London, 2007). My point is simply that it is these, often unarticulated, drivers that affect mediators' moment-by-moment choices. I therefore suggest it is the duty of anyone who dares to intervene in other people's conflict to examine their own values. And I challenge mediators to reflect: what is mediation for? Do we care about justice and fairness? Or is empowerment more important? If there is a contradiction between values such as these, how do we resolve it?

Other questions could be asked: is mediation concerned with social justice? If so, how is this ensured, and will such attempts clash with other mediation values, like autonomy and self-determination? Is mediation a child of the Enlightenment, relying on human rationality, individualism and moral neutrality? Is personal choice the value that trumps all others in mediation? If not, how should we modify our rhetoric to warn clients that we may attempt to limit that choice?

Conclusion

To return to Professor Genn, she is in a way doing mediators a favour. By presenting us in our most feeble light, she shocks us into re-thinking what we say about ourselves. If we can bring our rhetoric more closely into line with practice, that must be more honourable and better for clients. If we are 'norm-educating' or even 'norm-advocating' practitioners, let us say so, and even go further and spell out what these norms are. By owning our considerable moral authority, and accepting that by and large we use it for good, we also address the equal and opposite critique of mediators exercising their power unseen and unacknowledged.

We cannot expect to rebut critics by relying on our ethical codes. We have to develop a reflective practice that enables us to learn from the myriad critical moments in mediation, and develop theories that are grounded in that reality. We owe it to our clients not only to know what to do, but why we do it, so that our choices are motivated by more than intuition or expediency.

Reflective practice will in turn enable us to work out what are our values: the fundamental principles that guide our particular mediation 'moves'. We are a long way from a definitive list, but I suspect respect will be there, along with non-violence and a commitment to giving people 'voice'. The attempt to articulate a more comprehensive set of values will surely improve both the standard and the reputation of mediation.