Mediation Deserves Consideration in Justice Week and in Legal Education

Publication One: The place for mediation and negotiation in postgraduate and undergraduate curricula

Justice Week seeks to boost the profile of justice and the rule of law. Lord Neuberger has made clear his view that the right of access to courts is 'an absolutely fundamental ingredient of the rule of law' and that mediation 'must not be invoked and promoted as if it was always an improved substitute for litigation'. However, he also observes 'ordinary people, average citizens, and ordinary businesses' would likely experience problems obtaining access to justice, and mediation might be particularly suitable for their legal disputes.' It is on this basis that, in this series of four publications, Catherine Shephard, Senior Lecturer at Manchester Metropolitan University, seeks to put mediation in the spotlight this week.

This previous publication, in the Solicitors Journal, identified the growing trend in our legal system towards encouraging parties to mediate, the judges who are advocating its use, and the evidence suggesting a high level of client satisfaction with the mediation process. It explored reasons why, despite this, the market in lawyers undertaking mediation is not growing as rapidly as anticipated. It concluded by identifying a need for the legal profession to do more to promote mediation, and championed the education of student lawyers in mediation skills as a key step to achieve this.

This publication, and the two which follow, develop the analysis of how to implement this step in legal education, to stimulate debate in Justice Week within the community that can make it happen.

First, dealing with postgraduate professional legal education, it has been argued that this carried a litigation bias, focussing on adversarial, advocacy skills over those skills required for transactional and non-contentious work, such as problem solving and negotiation. Times change, and there has been a significant shift since then to problem-based learning and incorporating wider skills teaching into professional legal education. Yet, these postgraduates blanch initially when introduced to the notion that, despite having a legal solution through the courts available to them, often due to time and cost issues (which might be described at a theoretical level as barriers to the access to justice) clients might choose to do nothing or seek to negotiate an alternative solution. Negotiation skills remain something of an outlier on the legal skills curriculum, although there are some positive signs on the horizon to bring them into the fold. Mediation however, despite the trend noted above, is conspicuous by its absence.

Second, considering undergraduate legal education, the response of graduate students noted above suggests that the reality of the client experience, of barriers to accessing justice in the courts, is one that might be being overlooked while studying for a law degree. We might consider, for example, how many contract law lectures feature turning the pages of an actual contract, particular one where there is an imbalance of negotiating position like, say, student car insurance. It is possible that students of the law of tort are not encouraged as much as they might be to conclude that while the party has the right to sue, the cost would outweigh the benefit, and ruin a good relationship, and so the real answer lies in an alternative to litigation. Skills education, of course, has now widely been introduced at undergraduate level. However, it may be that students compartmentalise their learning. It

may also be that the key alternatives, negotiation and mediation, actually do not feature enough or at all on the undergraduate skills syllabus.

So, what can be done to fill this gap?

One solution, clearly, is to change the curriculum to include more of the skills used in non-contentious work, particularly mediation and negotiation, in both undergraduate and professional legal education programmes. This article, therefore, concludes by encouraging those with responsibility for those curricula, including the Solicitors Regulatory Authority and others who design law programmes in our universities, to consider this as a mid-to-long term solution.

There appears already to have been some movement in this direction, with negotiation referred to as included in Stage 2 of the new Solicitors Qualifying Examination in 2020, for students seeking to qualify as solicitors. However, the working title, 'advocacy/persuasive oral communication' is interesting. As both advocacy and negotiation might both be described as persuasive oral communication, why include specifically 'advocacy' and exclude 'negotiation'? Does this reflect an intention to continue to emphasise the non-contentious side, is it a hangover from the previous bias, or is negotiation to form a smaller part of other persuasive oral skills? Similarly, 'Advocacy and communication skills' are on the syllabus of the Professional Skills Course. Neither title suggests any move towards the teaching and learning of mediation skills, so far. Further thought might also be given to the value of devoting as much time to prepare students for negotiation competitions, like the excellent National Student Negotiation Competition, to develop non-contentious skills, as has been done traditionally with mooting, to develop advocacy skills.

In the meantime, a further publication for Justice Week, to be published [ ], will explore a short-term solution: how experiential learning of mediation through university law clinics could offer a valuable opportunity to fill a skills gap and prepare lawyers of the future for what judges are saying that clients need now.