National Alternative Dispute Resolution Advisory Council

A Compendium of Research Papers Presented at the 2007 National ADR Research Forum in Melbourne

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Introduction

Nadja Alexander

The following collection of short papers was presented at the 3rd NADRAC Research Forum in July 2007 in Melbourne.

The papers are representative of the latest research design and findings about Australian mediation and ADR issues. The authors presented here represent the diverse disciplinary backgrounds of mediation practice and research. The research methods include case study, focus group, interview and survey-based approaches, in addition to theoretical and doctrinal approaches to mediation.

A number of papers such as Dale Bagshaw's research on mediation constructs in different cultures and Oliver Rundle's empirical research of court-connected mediation practice reflect works-in-progress. Others such as Patricia Marshall's research on mediator stressors and coping strategies, and Tania Sourdin's consumer research on mediation are short versions of report findings, and many of these can be found in extended form in the mediation literature.

Themes encountered in this eclectic research collection can be classified in very different ways. In terms of substantive areas of practice, family and workplace mediation, court-connected mediation, mediation in the context of medical disclosure requirements, and collaborative law are canvassed. Furthermore transformative and facilitative mediation models are examined in workplace conflicts.

The papers also present a variety of perspectives. Consumer and participant perspectives and needs are reflected in papers looking at consumer ADR bodies and family mediation practice. Lawyer perspectives and behaviour are analysed in the context of family law practice and the emerging collaborative law movement. Mediator views are examined in relation to job-related stressors and coping strategies. Teaching perspectives and ideas are offered in relation to negotiation.

In addition intercultural concerns are voiced in an analysis of the impact of western mediation constructs in communities of the Asia Pacific region. Finally an extension to the theoretical literature on the controversial issue on neutrality is offered to readers.

Please contact the NADRAC Secretariat if you wish to make any comments or contact the individual authors.

The Children and Families in Transition Project

Associate Professor Dale Bagshaw*

Abstract

This paper summarises the findings of a two-stage research project focused on the needs of separated families and their children in order to develop early intervention strategies to promote child-centred practices and positive, cooperative parenting. The stage 1 recommendations are result of qualitative and quantitative research. Stage 2 developed parallel parent and child education groups and a child-centred website called CHaT First.

Introduction

Children and Families in Transition (CAFIT) is a joint University of South Australia (Centre for Peace Conflict and Mediation, Hawke Research Institute) and Centacare (SA) project, funded by the Telstra Foundation. We have researched the experiences and special service needs of separated families and their children in order to develop early intervention strategies to promote child-centred practices and positive, cooperative parenting. This research has informed the development of a broad-based model of service provision, which has been piloted and tested. The research findings and the services provided will assist separating families to recognise and centralise the best interests of their children in their post-separation arrangements.

Our research has been undertaken in 2 stages. Stage 1 (2005/6) included a national and international survey of service providers, and then a phone-in with separating parents and caregivers and their children. In Stage 2 (2006/7) we developed a child-centred service model for children and families in transition, including child-inclusive mediation, parallel education groups for parents and children and the launching of an associated child-centred website – ChaT First (Children and Teens First) – with

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separate sections for children adolescents and families going through separation/divorce.

Who are we?

The Children and Families in Transition project involves professional workers from Centacare Catholic Family Services working with academic research staff from the Centre for Peace, Conflict and Mediation, Hawke Research Institute, University of South Australia, with contributions from postgraduate students from the Conflict Management programs and fourth year Bachelor of Social Work Honours and field education students.

An interdisciplinary research team was formed for the purpose of the CAFIT project at UniSA in 2005 and included people with different professional backgrounds and with different expertise. As the project is run in cooperation with Centacare Catholic Family Services, the research was also guided by the practical experience of Centacare staff.

Stage 1 (2005/6): The research

Part of Stage 1 of the CAFIT project was the national distribution of an electronic survey to various organisations that provide services to children and families who are experiencing separation and divorce. The survey used a semi-structured questionnaire with yes/no questions, scaled questions, and room provided for qualitative comments, opinions and experiences.

The next phase of our research involved a state wide (SA only) phone-in in May 2005 for children and young people, parents, step-parents and relatives of children who have experienced separation and divorce. We were particularly interested in hearing from young people, in order to more fully develop services that meet the needs of children who have experienced or are experiencing the separation and divorce of their parents.

Focus groups and individual interviews were also conducted with service providers to Aboriginal families and children to ascertain the experiences and special service needs of this population.

At the end of these two phases the researchers collated and analysed the collected qualitative and quantitative data and used this information to develop recommendations for a child-centred approach to services for children and families experiencing separation and divorce.

Our report from Stage 1 is available in hard copy or online: Children and families in transition: towards a child-centred integrated model of practice (PDF 1.6 MB).

Stage 2 (2006/7): Development and evaluation of the service model

Stage 2 of the project involved the implementation and evaluation of a child-centred service for children and families experiencing separation and divorce, including parallel child-focused education groups and a website for parents and children.

Based on the research from Stage 1 of the project, we developed parallel parent and child education groups and a child-centred website for families who are going through separation and/or divorce, with a focus on the children and teens involved. Children, young people, parents and other family members will find appropriate information about the process of separation and divorce on this site. Among other things, the site provides several activities for children to help them understand what is happening and to help them to deal with their feelings around their experience of separation. There is also a 'groovy' section for teens which includes the music of Quest, an Adelaide based group of young people who have supported the project.

The website – CHaT First (Children and Teens First - http://www.chatfirst.com.au) – was launched on 26 April 2007 by The Honourable Justice Christine Dawe. The music on the site was provided by Ashton Rudd, Den Aspy, Lou Aspy and Ben Robins, the members of Quest.

Transforming Mediation in the Asia Pacific Region

Associate Professor Dale Bagshaw

Abstract

This work in progress considers the impact of western mediation constructs in communities of the Asia-Pacific region. It aims to support western researchers, trainers and practitioners working in the region to value the way in which other cultures approach conflict and mediation. The project will explore how knowledge of customary dispute resolution practices can contribute to the development of more culturally relevant formal conflict resolution models and practices in the region.

Project aim

This project will challenge western constructs of mediation and promote mediation models and practices that incorporate the cultural values, perspectives and traditions of Asia Pacific communities.

Background and Rationale for the Project

The increasingly interdependent nature of relationships between groups and nations, especially in the highly culturally complex environment that exists in the Asia Pacific region, requires a high level of sophistication in the identification of possible conflicts, and in the development and dissemination of skills to prevent, manage, resolve and/or transform those conflicts. This project will address the tendency of dominant Western discourses on mediation and the management of conflict to ignore, marginalise or subordinate the knowledge and practices of other cultural groups within Australia and the Asia Pacific region in relation to conflict. In particular, it has arisen out of a concern that some Westerners are exporting and prescribing Western mediation models or approaches in the Asia Pacific region which are blind to the cultural context of practice, even to the extent of using the same role-plays they use at home in their training. This concern is shared by other academics and scholars in the conflict resolution field (Barnes, 2002; Honeyman & Chedlin, 2002). An increasing number of mediation and alternative dispute resolution (ADR) educators and trainers from the United States, Canada, Britain, New Zealand and Australia are working outside their own countries as so-called ‘experts’ in mediation or conflict resolution. These include university academics, private consultants, judges and experts working for Government organisations (Honeyman & Cheldelin, 2002). This is partly due to globalisation, which has altered the boundaries of our conflicts and our practices, and the domination of western ways of knowing. As Honeyman and Cheldelin point out, no matter how well meaning these ‘experts’ are they ‘may inadvertently cause harm to persons and parties for whose culture, language, or circumstances … has left them inadequately prepared’ (ibid, p.364).

Westerners’ definitions of mediation and knowledge about conflict and its causes are shaped by dominant western understandings and world views (Foucault, 1980; Haraway, 1988). Mediation is not a western construct. Though formal forms of mediation are now widely accepted in the West (Boulle, 1996; Bush & Folger, 1994; Haynes & Charlesworth, 1996; Irving & Benjamin, 2002; LeBaron & Potts, 1993; McCorkie & Reese, 2005; Moore, 2003; Winslade & Monk, 2000), informal forms of mediation have permeated all cultures to varying degrees for centuries (Moore, 2003; LeBaron 1998). In Australia the use of mediation for the resolution of native title disputes has provided an impetus for the examination of cross-cultural negotiation processes (Miles, Cliff, & Burr, 1998; Young, 1998). In the Asia Pacific region there is a long standing history of traditional conflict resolution practices involving intermediaries or third parties, often Chiefs or Elders, who make decisions after listening to many different points of view (Bagshaw, 1996).

This project will address the need for western mediation educators and trainers to value the way that Pacific Island and Asian peoples conceive and approach conflict, and will suggest ways to co-construct models of mediation which will both privilege local conflict resolution practices and also incorporate the useful aspects of western models. It is based on the assumption that when training mediators abroad, high priority needs to be given to retrieving and reclaiming local epistemologies – customary or ‘folk’ knowledge – with regard to conflict and its resolution, that is, ‘knowledge that ordinary people have about causes and ways to deal with conflict in their particular cultural setting … not just empirical observation, theoretical research, and systematic testing of methodologies, but also personal experience, intuition, and imagination' (Maiese, 2005, p. 1). In short, we will explore how knowledge of customary dispute resolution practices can contribute to the development of more culturally relevant formal conflict resolution models and practices in the region.

Our initial intention was to conduct a research project but the team met in South Australia in early August and we are now writing a book which will include case studies from the region. It will also explore the links between mediation and peace building. The book is being co-edited by Dale Bagshaw and Elisabeth Porter from the Centre for Peace, Conflict and Mediation at UniSA with contributions from a range of highly experienced academics and practitioners from the region.

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An alternative for whom? Access to ADR processes

Professor Tania Sourdin[1]

Abstract

A body of research undertaken by the writer over the past five years has revealed that there are a number of factors that impact upon the use and access to complaints and alternative dispute resolution processes by disputants. In particular, the research has suggested that many disputants who may have grievances or concerns do not access or use complaints and dispute resolution services. The research identified that complainants and disputants who tend to take action when they have a complaint or a dispute tend to be located in certain geographical areas, have a higher socio economic status, and that age and gender can be an important factor in determining whether disputants will access complaints and dispute resolution processes.

Introduction

The emergence of a wide range of industry, government and self funded dispute resolution schemes has meant that disputes which may have otherwise have been dealt with in a tribunal or court based system are now increasingly settled or resolved through alternative dispute resolution (ADR) processes and complaints handling processes that are external to the formal court-based system. Research conducted into court based schemes,[2] external dispute resolution schemes[3] as well as research into consumers' experience in resolving their credit disputes at Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT),[4] has found that disputants were often satisfied with the dispute resolution services offered by each of these schemes.

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[1] Professor of Law and Dispute Resolution La Trobe University, Professor, ACPACS, University of Queensland. The writer wishes to thank Senior Researcher Louise Thorpe for her input into this paper and notes that a co authored paper on a related topic is to be submitted to the ADRJ.

[2] See Sourdin, T. and Matruglio, T., *Evaluating mediation – New South Wales Settlement Scheme 2002*, La Trobe University, University of Western Sydney (Sydney, 2004).

[3] See Elix, J. and Sourdin. T., *Review of the Financial Industry Complaints Service 2002 – What are the issues?*, Community Solutions, La Trobe University, University of Western Sydney (Sydney, 2002).

[4] The *Dispute Resolution Processes for Credit Consumers* was a research project conducted by the Conflict Resolution Research Centre at La Trobe University, following funding form the Consumer Credit Fund at CAV. This paper draws from material published in the report this research project, which can be downloaded at: http://www.latrobe.edu.au/cr/research/cr-consumer/.

However, findings also suggest that not all potential disputants access these services or schemes. The research shows that characteristics of those who use ADR services are not representative of the general population (using ABS data) and they may not be representative of the discreet population either.[5] In addition, a lack of background and empirical research into the reasons why disputants decide to 'give up' on resolving their dispute or which avenues disputants explore prior to lodging a complaint or dispute for resolution means that these issues have been largely unexplored or reported upon. Certainly, there are few statistics available on how effective or well received any 'self-help' advice is or whether those that 'give up' do so because they find ADR schemes or services either difficult to access or too difficult to understand and engage with.

Of particular concern are findings which indicate that those who are most 'vulnerable' are those who are least likely to pursue resolution of their dispute through accessing or using ADR services.

ADR Schemes and Access

ADR schemes and services are often designed to provide disputants with more efficient, accessible and affordable dispute resolution options than litigation, when their dispute has failed to resolve. However, the schemes have not developed in a homogenous fashion, and as a result are arguably more susceptible to systemic design defects. Perhaps one of the most troubling aspects of this is that while schemes and services may satisfy large groups of disputants they may be unaware of those disputants who fail to access them.

Most schemes are designed to consider issues relating to access, as access is usually a key requirement in any dispute resolution scheme. For example, the *Benchmarks for Industry-Based Customer Dispute Resolution in 1997* articulates six benchmarks to consider in assessing system efficacy: accessibility; independence; fairness; accountability; efficiency; and effectiveness.[6] The benchmark relating to accessibility

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[5] For Example, those accessing FICS might be expected to have certain characteristics as purchasers of financial services that would not be representative of the general Australian population.

[6] See Consumer Affairs Division, Department of Industry, Science and Tourism, *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (August 1997), Canberra also at http://www.consumersonline.gov.au/downloads/selfreg/benchmarks/BMARK1.rtf <24 January 2007>. These benchmarks were developed prior to the Standard on Dispute Resolution and draw upon the earlier standard on complaints handling.

requires that: “The scheme makes itself readily available to customers by promoting knowledge of its existence, being easy to use and having no cost barriers”.[7] This benchmark can be broken down into incorporating practices relating to awareness of the scheme, entry into the scheme and cost and other barriers within the scheme (potentially including jurisdictional issues).[8]

In 2004, an International Standard on complaints management was produced,[9] which sets out guiding principles such as visibility, accessibility, responsiveness, objectivity, charges, confidentiality, customer-focused approaches, accountability and continual improvement.[10]

Some research has been produced in relation to visibility which indicates that for some, ADR services and processes may be neither visible nor accessible. Certainly, research conducted into public awareness of the Financial Industry Complaints Service (FICS) found that, as an ADR body, FICS was not particularly well known. A research project conducted into FICS’s processes in 2000 and 2001 found that as the majority of referrals to FICS were from industry members, FICS relies on these referrals to ensure consumers have access to its dispute resolution services.[11] In 2000, FICS commissioned its own research into awareness of its services and found that 8 percent of industry members were willing to advise telephone complainants that there was no remedy available to them and 45 percent named ASIC (or their regulator) as the key body for consumer protection and recourse, instead of naming FICS.[12]

More recent research surveying Victorians’ awareness of ADR services produced encouragingly high results. Consumer awareness was determined by reading

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[7] See Consumer Affairs Division, Department of Industry, Science and Tourism, *Benchmarks for Industry-based Customer Dispute Resolution Schemes* (August 1997), Canberra – Benchmark 11 Accessibility at 11. Also at http://www.consumersonline.gov.au/downloads/selfreg/benchmarks/BMARK1.rtf <24 January 2007>.
[8] Elix, J. and Sourdin. T., *Review of the Financial Industry Complaints Service 2002 – What are the issues?*, Community solutions, La Trobe University, University of Western Sydney (Sydney, 2002) at 57.
[9] ISO 10002: 2004, Quality Management – Customer Satisfaction – Guidelines for Complaint Handling in Organizations (2004).
[10] ISO 10002: 2004, Quality Management – Customer Satisfaction – Guidelines for Complaint Handling in Organizations, (2004) at 3-4.
[11] Elix, J. and Sourdin. T., *Review of the Financial Industry Complaints Service 2002 – What are the issues?*, Community solutions, La Trobe University, University of Western Sydney (Sydney, 2002) at 58.
[12] *Financial Industry Complaint Service Bulletin*, June 2001 cited in Elix, J. and Sourdin. T., *Review of the Financial Industry Complaints Service 2002 – What are the issues?*, Community solutions, La Trobe University, University of Western Sydney (Sydney, 2002) at 58.

interviewees a list of ADR service providers and asking them to indicate "whether you have heard of any of them as a body that can help with a dispute."[13]

While members of the public may have heard of some of these ADR service providers before, the small percentages of Victorians who reported having actually contacted one of them were markedly lower. For example, while 92 percent of respondents had heard of CAV only 11 percent reported ever contacting CAV; similarly, 79 percent reported having heard of the Ombudsman Victoria but only 4 percent had ever contacted that.[14] This low contact rate is particularly concerning given the relatively high incidence of disputes reported.[15]

Conclusion

The combined findings from this research may indicate a significant gap in public awareness pertaining to the functions (and to a lesser extent the existence) of ADR service providers and highlight the potential value in promoting awareness of the range of ADR services, their differing jurisdictions and initial entry/contact points.

In addition to contributing to consumer confusion about where to lodge a complaint, a dispute resolution system with many elements which may not be sufficiently interlinked also means that each ADR scheme has its own establishment and running costs, as well as individual publicity campaigns to ensure that the public not only knows of their existence but also their terms of reference.[16] This can impact upon consumer access to schemes as consumers that are continuously referred on are less likely to follow through with their complaints, particularly if they are required to pursue a single complaint through two separate ADR schemes.[17] Moreover, the access issues resulting from a haphazard system design are likely to compound any access problems experienced by 'vulnerable' consumers.

'Vulnerable consumers' (that is, consumers who live in typically low socio-economic, geographical regions or rural areas) have been found to experience additional barriers

[13] Ipsos Australia Pty Ltd, *Dispute Resolution in Victoria: Community Survey 2007*, Department of Justice Victoria, Melbourne (2007) at 12.
[14] Ipsos Australia Pty Ltd, *Dispute Resolution in Victoria: Community Survey 2007*, Department of Justice Victoria, Melbourne (2007) at 12.
[15] Ipsos Australia Pty Ltd, *Dispute Resolution in Victoria: Community Survey 2007*, Department of Justice Victoria, Melbourne (2007) at iii.
[16] Drake, R., "Justice goes feral", *Consuming Interest*, Summer (1995) 20 at 21.
[17] Drake, R., "Justice goes feral", *Consuming Interest*, Summer (1995) 20 at 21.

to accessing ADR schemes.[18] In addition, information about other demographic indicators such as socio economic status, age and education reveals that access to financial services dispute resolution schemes may not be equitable in that consumers with certain demographic backgrounds appear to be unlikely to ever lodge complaints or pursue disputes. To address these issues, a more coherent approach to access is required by all providers and this is certainly an issue that researchers should factor into their research design.

[18] See generally: Sourdin, T., *Dispute Resolution Processes for Credit Consumers*, La Trobe University (Melbourne, 2007); Sourdin, T. and Matruglio, T., *Evaluating mediation – New South Wales Settlement Scheme 2002*, La Trobe University, University of Western Sydney (Sydney, 2004); and Elix, J. and Sourdin. T., *Review of the Financial Industry Complaints Service 2002 – What are the issues?*, Community solutions, La Trobe University, University of Western Sydney (Sydney, 2002).

The divergence of court-connected mediation practice from theoretical attributes of mediation.

Olivia Rundle[1]

Abstract

We all know that mediation takes place in the court room, but to what extent does the practical manifestation of mediation conform to its theoretical attributes? This research will attempt to explain the divergence by investigating the influence and perspective of the legal profession in court-connected mediation.

My research first sets out to demonstrate the divergence of court-connected mediation practice from mediation theory through a literature review and a case study of mediation in the Supreme Court of Tasmania ('the Court'). This paper focuses on the question that follows that description, which is why does court-connected mediation diverge from the dominant theoretical idea of what mediation is? To answer this question, my research focuses on legal participants, in particular their perceptions of the purpose of court-connected mediation and they way in which they approach it.

To obtain an understanding of the perceptions and approaches of legal participants in court-connected mediation, I have interviewed approximately 30% of the legal practitioners who practise in the Court's civil jurisdiction, interviewed the mediators and observed a small number of mediations at the Court. There are three main reasons that justify the focus on legal participants. First, court-connected mediation tends to be very lawyer driven.[2] Secondly, there are many accounts in mediation literature of inappropriate lawyer expectations or behaviour within mediation.[3]

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[2] Carrie Menkel-Meadow, `Pursuing Settlement in an Adversary Culture: A Tale of Innovative Co-opted or "the Law of ADR" (1991) 19 *Florida State University Law Review* 1.

[3] Micheline Dewdney, *Party, Mediator and Lawyer-Driven Problems and Ways of Avoiding Them* (2007) LEADR <www.leadr.com.au/articles> at 25 June 2007; Tania Sourdin, `Facilitative Judging' (2004) 22(1) Law in Context 64; Australian Law Regorm Commission, `Issues Paper 25: ADR – It's role in federal dispute resolution' (IP25, ALRC, 1998); Ronald J Gilson and Robert H Mnookin, `Disputing Through Agents: Cooperation and Conflict Between Layers in Litigation' (1994) 94 *Columbia Law Review* 509; Menkel-Meadow, above n2.

Thirdly, because court-connected mediation occurs within the legal system, legal perspectives have a significant impact on the practice of mediation in that setting.[4]

A diversity of perspectives amongst Tasmanian legal practitioners was expected. Contributions to the diversity include the absence of guidelines, the broad and non-prescriptive legislative framework and the absence of clearly articulated institutional objectives in relation to the Court's mediation program.[5] There is also little training in dispute resolution available for lawyers in Tasmania. Further contributions to diversity are the natural variations in personality, experience and practice styles within the legal profession.

Preliminary analysis of the interviews suggests that the legal profession perceives the primary purpose of court-connected mediation to be quite different from the dominant theoretical notion of the purpose of mediation. In order to establish that such a divergence exists, it is first necessary to define the dominant theoretical notion of mediation and the theoretical understandings of the purpose of mediation. For this purpose, I have referred to the ideological frameworks identified by Bush and Folger.[6]

The satisfaction purpose is the dominant mediation ideology promoted in both theory and practical training.[7] According to this ideology, the purpose of mediation is to maximise the satisfaction of individual needs and interests or to minimise suffering. It is interest based as opposed to rights based.

Satisfaction is promoted by many features of mediation, including disputant participation in the process and control of content, active listening techniques and a flexible process that can be adapted to meet the individual needs and interests of the disputants. I suggest that if satisfaction is prioritised then the style of mediation is likely to be primarily facilitative, perhaps with some use of evaluative or settlement

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[4] Michelle Lebaron and Zena D Zumeta, `Windows on Diversity: Lawyers, Culture and Mediation of Two Cities and Mandatory Court-Connected Mediation' (2002) *University of Missouri Journal of Dispute Resolution* 244; Menkel-Meadow, above n2; Gilson et al, above n3.

[5] The legislative framework governing the Supreme Court of Tasmania's mediation practice is contained in the *Supreme Court Rules 2000* (Tas) Part 20 and *Alternative Dispute Resolution Act 2001* (Tas).

[6] Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Revised ed, 2005)

[7] Above n6, 19-20

techniques where the disputants have a need or interest in settlement.[8] This style of mediation is the style most widely promoted in mediation literature.

In order to understand the legal perspectives of court-connected mediation it is also useful to refer to another, less dominant, mediation ideology. The equality purpose is the ideological perspective from which critics of mediation assert that mediation should ensure fairness but that the structures of mediation do not protect vulnerable or less powerful disputants.[9] Conversely, some mediation ideologists assert that mediation achieves equality by delivering social justice.[10] According to this ideology, the purpose of mediation is to promote equality or to reduce inequality between individuals.[11]

There are many parallels between the mediation ideology promoting equality and the civil justice system, which tries to achieve equality by treating disputants equally. This is clearly not the only way that equality can be pursued and may be problematic, but it is one approach that can be adopted to achieve that goal. A process that promotes equality by treating disputants equally is likely to be rights based. Some external standard of fairness in process or outcomes is imposed to ensure that inequality is addressed and that equality is promoted.

Equality is promoted by many features of mediation, including the addressing of power imbalances by a mediator or competent representation, an equal opportunity to participate in the process and equal disputant control of content.

Fair outcomes can be safeguarded by ensuring accurate disputant knowledge about the alternatives to an agreed outcome (including the likely legal outcome). Fair process can be safeguarded by enforcing guidelines or standards of mediation practice that provide safeguards for fairness. I suggest that if equality is prioritised then the style of mediation is likely to be a blend of facilitative and evaluative models, perhaps

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[8] Mediation models are described in Laurence Boulle, Mediation: Principles, Process, Practice (2nd ed, 2005) 43-47; David Spencer and Tom Altobelli, Dispute Resolution in Australia: Cases, Commentary and Materials (2005) [5.45]-[5.110].
[9] Above n6, 20-21
[10] Above n6, 20-21.
[11] Above n6, 20-21.

with some settlement mediation to close the gap within the anticipated legal range.[12] This style of mediation is often practised in court-connected mediation.

From an institutional point of view, the primary purpose of mediation is often to settle disputes with minimal cost and prior to trial.[13] If institutional efficiency is prioritised then the focus on efficiency may detract from the satisfaction of rights or individual interests.

If institutional efficiency is the primary goal of court-connected mediation then settlement will be actively promoted and it is likely that the mediator will actively intervene to promote settlement. I suggest that if efficiency is prioritised then the style of mediation is likely to be primarily in accordance with the settlement model, with some use of facilitative or evaluative techniques for the purpose of promoting settlement.[14] This style of mediation is often practised in court-connected mediation.

Contrary to the dominant theoretical notion of mediation, lawyers are unlikely to perceive that the purpose of court-connected mediation is to maximise the satisfaction of their clients' individual needs and interests through creative problem-solving. They are more likely to perceive court-connected mediation as a process that can both improve the efficiency of the legal system and deliver justice by resolving disputes fairly and within the anticipated range of legal outcomes.[15] The prioritisation of these goals detracts from the dominant theoretical goal of satisfaction of individual needs and interests. There are many factors that contribute to legal perspectives of court-connected mediation. The degree of influence of those perspectives on the way that mediation is practised is also determined by a number of factors. My thesis will explore such issues.

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[12] Above n8.

[13] This conclusion is drawn from the focus of most internal evaluations of court-connected mediation programs, which is almost exclusively institutional efficiency. Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002) 70-73; Hilary Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (2001); Henry Jolson, 'Judicial Determination: Is it Becoming the Alternative Method of Dispute Resolution?' (1997) 8 *Australian Dispute Resolution Journal* 102; Wayne D Brazil, `Court ADR 25 Years After Pound: Have We Found a Better Way?' (2002) 18 *Ohio State Journal on Dispute Resolution* 93, 124.

[14] Above n8.

[15] The connection with the court can enable some benefits of procedural fairness to be delivered as well as some advantages of mediation. See Astor and Chinkin, above n13, 64.

Lawyers Post-ADR: mediation and collaborative law[*]

Associate Professor Anne Ardagh & Guy Cumes[*]

Abstract

This research examines the changing role of the lawyers with regard to alternative dispute resolution (ADR) practices and collaborative law. It investigates whether collaborative law can more effectively develop a legal culture based on the collaborative, mediative and non-adversarial principles than ADR has been able to achieve.

Introduction

Since the 1980s in Australia there has been a movement through three distinct phases in dispute resolution processes. The first was the pre-ADR period the predominance of adversarial processes in a traditional legal environment. The second was a growth of a new phase in which alternative dispute resolution methods involving non-legal processes and outcomes (as well as non-legal practitioners) were the subject of major legal reform. In the 21st century the third stage is a post ADR period where alternative dispute resolution methods have been accepted and have become institutionalised, rather than remaining alternative. Lawyers have adapted their practices to take account of changes, including mediation, and a new area of legal dispute resolution called ‘collaborative law’ is emerging.

Lawyers and ADR

Twenty thousand lawyers have undertaken mediation training since the 1980s, although few practise as mediators[**].[1] Lawyers have been urged to participate in ADR. For example Callaghan (2006: 13) exhorts lawyers to be actively working at securing their involvement in ADR: ‘To be metaphorical, ADR represents for lawyers

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[**] A comprehensive version of this research was published in the Australasian Dispute Resolution Journal, October 2007.

[1] Pollard, J. (2007) at p 72.

not just fruit on the sideboard but it is a real slice within the cake of professional work' Altobelli (2007: 121) notes the acceptance and respectability of ADR within the profession.

Undoubtedly, many lawyers make good mediators and are suited to less adversarial methods of dispute resolution. However, it has been observed that lawyers as a whole are out of their comfort zone with regards to facilitative mediation, with a preference for shuttle mediation and lawyer-representation/advocacy.[2] Mediation within legal practice is broadly defined to include processes that are more in the nature of settlement and/or evaluation rather than facilitative. (Charlton, 2007: 44)

Although legal education for the next generation is changing there is still a lack of knowledge, training and education amongst lawyers about mediation processes, philosophy and outcomes (Spegel, 1997). Australian law schools teach doctrinal principles of appellate law based on the adversarial system and very little time teaching non-adversarial alternatives (Spencer and Altobelli 2005: 28).

Lawyers may be involved in mediation in at least two different ways.[3] One role is as a mediator actually conducting a mediation session. A second is as a representative (or more strictly, advisor) of a client in a mediation session, where the session is conducted by a neutral third person/mediator.[4]

Collaborative law: a new practice

The role of the lawyer in collaborative law, which is a process that involves two lawyers with their clients negotiating together, is to assist the client in a process of shared problem solving. The lawyer has a duty to maintain the integrity of the process, including the requirements of honesty, disclosure and good faith. Collaborative law could have real benefits for parties engaged in ongoing familial or commercial relationships. It has been endorsed by the Commonwealth Attorney-General and the Chief Justice of the Family Court. Notwithstanding the benefits and promotion of collaborative law by the legal profession there are a number of factors that need to be examined.

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[2] See Charlton, R (2007) p 44.
[3] Ardagh, A & Cumes, G (1998).
[4] Alternatively a lawyer may refer a client to mediation where the lawyer representative is not actually present and therefore does not participate in the mediation session.

Collaborative law is a process that seems to have arisen in response to the competition from mediators, particularly in the family law area, and to other changing legislative demands. Collaborative family law sessions normally require four to seven sessions (Pollard, 2007: 72). The number of sessions as well as the business formality associated with them (agendas, minutes, debriefing) will have a substantial effect on the costs of the process and will undermine the goals of speedy, inexpensive and informal resolution. Moreover collaborative law could result in a two-tiered method of dealing with family law disputes. It is being promoted as an alternative or an addition to the new Family Law mediation requirements.

Collaborative law may be a way of recapturing ADR, particularly in the family law area where mediation is now mandatory under the 2006 amendments to the Family Law Act. The rise of collaborative law leaves open the suggestion that lawyers are creating another dispute resolution process which they control. According to Pollard (2007: 69) over 400 professionals (mainly lawyers) have completed two-day basic training courses in collaborative practice throughout Australia in the last two years with courses proliferating all over Australia.

The Family Law Council Report *Collaborative Practice in Family Law* (December 2006)[5] recommended to the federal Attorney-General that national guidelines for collaborative practice be developed. These are being resisted by the Collaborative Professionals NSW.[6]

Conclusion

At this early stage in the development of collaborative law in Australia it could be that its goals, principles and practice could produce a more satisfactory alternative to an ad hoc tacking on of mediation within adversarial processes. However it could be seen as a professional desire on the part of individual lawyers to maintain control of dispute resolution services whilst making minimal changes to their practices yet appearing to be at the forefront of its reform.

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[5] www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Publications
[6] Lewis, J 2007 referring to comments of the Secretary of Collaborative Professionals NSW, Lorraine Lopich.

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Stressors and Coping: what do mediators say?

Patricia Marshall*

Abstract

This mixed method research, based on the views of experienced mediators, investigated potential stressors of mediating and corresponding coping strategies employed by mediators. Discerning the demands, challenges, and stressors involved, may enable clearer delineation of the skills, attributes and competencies necessary to handle the task, and the strategies that will aid mediators to cope effectively.

Inspired by the finding of Deborah Kolb in 1994 that the mediator's task was 'inherently stressful', this research has explored the potential stressors confronting mediators, and the resources they use to cope.

The theoretical foundations of the research were threefold: the transactional theory of stress and coping involving the appraisal of a situation as a threat or challenge, and the adequacy of resources to cope; the conservation of resources theory, which proposes that individuals conserve their resources to guard against loss; and, finally, role theory, as it applies to identity, role conflict, role pressure and role strain.

The 'mixed methods' study involved 43 experienced mediators, mostly from Melbourne, of whom 23 participated in one of three focus groups, and 20 in in-depth interviews. Approximately even numbers applied to gender, and to whether they worked solely or in agencies. The majority had had some experience of co-mediation, although they mostly worked alone. Their professional backgrounds varied: the law; therapies, particularly psychology; education; business; and science, engineering and building.

The key question in each focus group was, 'If you were to design the mediation from hell, what would it look like?' The groups identified the sorts of situations which might produce role pressure or role strain. The individual interviews then explored 10

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of these scenarios, and examined individuals' experience with stress and their methods of coping.

As well, the 43 participants completed two inventories, one on their usual coping strategies and one on emotional competence. Given the emotional nature of mediating, it could be expected that productive coping strategies and emotional competence might be key resources.

Overall, role pressures appeared to evolve from the need to balance requirements. For example, there were the tensions involved in being both empathic and objective; in refraining from giving advice, yet having the professional experience to do so; in not being interventionist, yet balancing the power between the parties and controlling the meetings so that they were perceived as fair. However, as opposed to pressures, role strain was associated with the intensity of the emotions exhibited, and then dealing with these in a way which respected parties' distress, while maintaining the integrity of the process, and the mediator's own well-being.

Mediators spoke of the volatility arising from strong emotions such as anger, grief and loss; and of parties' violent or intimidating reactions, towards each other and the mediator. Mediator reactions included fear, of either the parties or of their own sense of not doing a good enough job; uncertainty, particularly when the mediator could not ascertain what was driving the dispute; frustration when one party seemed to be capitulating through being railroaded by the other; extreme sadness, and in some cases traumatisation, at the stories heard; and physical, emotional and intellectual exhaustion.

However, of the 10 interview scenarios, the most commonly identified as a potential stressor was, 'Your co-mediator is cutting across your line of questions which you thought were getting somewhere'. Twelve of the 20 interviewees identified this as the most concerning, despite the fact that co-mediation was seen by all as being a valued resource when it worked well. The next most commonly identified scenario was, 'You find yourself being so irritated with one party that you start to doubt your ability to be impartial.'

Indeed, when asked to name the 'big issues' in mediation, mediators referred most commonly to the issue of impartiality. There appears to be a difference between the rhetoric and the reality of mediation. While impartiality is an ideal, in reality it is tested in almost every encounter; and the emotional effort required in maintaining it contributes significantly to the perceived level of stress. As well, while the philosophy of mediation accentuates ‘self determination’, most mediators have a sense of ‘justice’, so an agreement which does not seem fair strains this imperative.

Political pressures exist as well. For example, the new Family Law Act has changed the role of the mediator to that of an adviser, an educator, even an advocate; thus, role ambiguity exists for the mediator trained in the pure model. Then, both state and private organisations, which pay for the service, seem to equate success with agreement. But the goal espoused by these mediators is that people achieve greater understanding and clarity, not necessarily agreement.

Fortunately, coping strategies were reported. When compared with other groups in the community, for example, these mediators were more likely to report that they: focus on solving the problem and on the positive; are willing to seek professional and social support, and engage in social action and relaxing diversions, including the use of humour. They tend not to rely on unproductive strategies such as keeping the problem to oneself and self-blame. The latter are significant given that the nature of the work is mostly solitary. Debriefing was considered useful, but only if it was immediate, respectful, non-judgmental, and involved a listener who would allow an offload to occur without interrupting with solutions.

The following social and emotional competencies emerged in this order of significance: emotional self awareness; independence; interpersonal relations; empathy; and assertiveness. Further, regression analyses revealed that the use of productive coping strategies was associated with assertiveness, happiness, interpersonal relations and independence.

Finally, another significant resource was meaning – the sense of making a difference in people's lives and seeing their circumstances change for the better. But a salutary note of warning was sounded by one:

> You are not superman or superwoman; you are a mediator with certain skills, and you should not think that you can do more than you can in other people's lives. You can feel more powerful and more grandiose than you are, and the other side of that is that you can take on too much responsibility.

In sum, the research indicates both the need for balance, but also the tensions involved in maintaining that balance.

Implementing the open disclosure of adverse events in Australia through a Mediation Model

Melinda Shirley & Tina Cockburn[*]

Abstract

The management of adverse events is a high interest area for the health care industry. After canvassing the empirical research on the topic and the legal and ethical principles in relation to apologies, this paper introduces readers to the potential benefits of an early intervention/mediation disclosure model.

Adverse events happen

The practice of medicine is a risky business. The 1995 Quality in Australian Health Care Study (QAHCS)[1] indicated that 16.6% of people experienced an adverse event associated with their care. In 13.7% of these cases there was permanent disability, and 4.9% resulted in death. Fifty-one percent of the adverse events reported in the QAHCS were considered preventable. Following a comparison of methods with a similar American study, the QAHCS data was subsequently re-analysed to allow for international benchmarking which indicated an Australian adverse event rate of 10.6%[2], which is comparable with findings in the United Kingdom, United States of America, New Zealand, and Denmark[3]. The First National Report on Australian Patient Safely 2001[4] noted that re-analysis of the QAHCS study found that the

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[1] R Wilson, W Runciman, R Gibberd, B Harrison, L Newby and J Hamilton, "The Quality in Australian Health Care Study: Iatrogenic Injuries or adverse patient events in hospitalised patients" (1995) 163 (9) *Medical Journal of Australia* 458.

[2] E Thomas, D Studdert, W Runciman, RK Webb, RM Wilson et al, "A comparison of iatrogenic injury studies in Australia and the USA", (2000) 12(5) *International. Journal of Quality in Health Care* 371-378; W Runciman, R Webb, A Helps, E Thomas, E Sexton, D Studdert, T Brennan "A comparison of iatrogenic studies in Australia and the USA II: reviewer behaviour and quality of care", (2000) 12(5) *International. Journal of Quality in Health Care* 379-388.

[3] ACSQHC; http://www.safetyandquality.org/articles/Action/advrsefact.pdf. For a helpful analysis of the incidence of adverse events in Canada, United States, United Kingdom, Australia and New Zealand, see J Gilmour, 'Patient Safety, Medical Error and Tort Law: An International Comparison', Final Report prepared for the Health Policy Research Program, Health Canada (May, 2006), http://www.yorku.ca/osgoode/faculty/documents/FinalReport_Full.pdf, 12 April 2007.

[4] http://www.safetyandquality.org/articles/Publications/firstreport.pdf

Australian and US studies had a virtually identical rate of serious adverse events, totalling about 2% of cases - 1.7% leading to serious disability and 0.3% to death[5].

As a result of these statistics there is currently a high level of interest and activity in Australian health care around the management of adverse events. Ethical obligations, legal duties and practical guidelines have emerged requiring the open disclosure of adverse events to improve the quality of health care provision and to increase patient safety[6].

An 'adverse event' has been defined as 'an incident in which unintended harm resulted to a person receiving health care'[7] and open disclosure as 'the open discussion of incidents that result in harm to a patient while receiving health care'[8]. The primary goals of the open disclosure movement are to ensure that patients are made aware of medical errors (to enable proper treatment and compensation), to identify systemic problems and to minimise litigation.

Routine disclosure is inevitable

The elements of open disclosure are an expression of regret, a factual explanation of what happened, an explanation of the potential consequences and the steps being taken to manage the event and prevent recurrence[9].

In Australia, practical guidelines for the open disclosure of adverse events to patients have been in place for some time. In recent years State and Territory medical boards

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[5] For a recent international comparison see D Hindle J Braithwaite, J Travaglia, R Iedema "Patient Safety: A Comparative Analysis of Eight Inquiries in six Countries", 2006, Centre for Clinical Governance Research, Faculty of Medicine, University of NSW, Sydney

[6] For a discussion see B Madden and T Cockburn "Bundaberg and beyond: duty to disclose adverse events to patients" (2007) 14(4) May *Journal of Law and Medicine* 501-27

[7] Australian Council for Safety and Quality in Health Care (ACSQHC), *Open Disclosure Standard* (2003) http://www.safetyandquality.gov.au/internet/safety/publishing.nsf/Content/F87404B9B00D8E6CCA2571C60000F049/$File/OpenDisclosure_web.pdf, at 12 April 2007, at 3 (Key Terms) at p6. For a summary of definitions of other key terms in this field, see W Runciman, "Shared meanings: preferred terms and definitions for safety and quality concepts" (2006) 184 (10) *Medical Journal of Australia* 41, available online at http://www.mja.com.au/public/issues/184_10_150506/run11055_fm.html, 21 April 2007

[8] Australian Council for Safety and Quality in Health Care (ACSQHC), *Open Disclosure Standard* (2003) http://www.safetyandquality.gov.au/internet/safety/publishing.nsf/Content/F87404B9B00D8E6CCA2571C60000F049/$File/OpenDisclosure_web.pdf, 12 April, 2007, 1

[9] ACSQHC, National Open Disclosure Standard Fact Sheet, http://www.safetyandquality.org/internet/safety/publishing.nsf/Content/6A2AB719D72945A4CA2571C5001E5610/$File/opendisclfact.pdf, 12 April 2007

have adopted Codes of Conduct which include provisions concerning the disclosure of medical error, although the published Code of Ethics of the Australian Medical Association (AMA)[10] has not yet been modified to incorporate express disclosure obligations[11].

The law relating to disclosure of adverse events is not yet clear; while there have been cases in other jurisdictions in this area, there is a dearth of Australian authority. In particular, despite some statutory protection for apologies[12], there is no corresponding express statutory duty to disclose adverse events in Australia[13], as is the position in some parts of the United States[14].

Given that the Australian system of accident compensation is fault based and focuses on the individual responsibility of health care providers, as opposed to attributing responsibility to the system within which they operate[15], a significant barrier to compliance with requirements to report error and disclose harm to patients appears to be the fear of increased litigation, although there is little evidence to support this view.

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[10] AMA Code of Ethics 2004, editorially revised 2006, http://www.ama.com.au/web.nsf/doc/WEEN-6VL8CP, at 28 January 2007

[11] By contrast, the American Medical Association's published set of principles of medical ethics contain express disclosure obligations: E-8.12 Patient Information, www.ama-assn.org/apps/pf_new/pf_online?f_n=browse&doc=policyfiles/HnE/E-8.12.HTM&&s_t=&st_p=&nth=1&prev_pol=policyfiles/HnE/E-7.05.HTM&nxt_pol=policyfiles/HnE/E-8.01.HTM&, at 18 January 2007.

[12] The legislation is not uniform: see *Civil Liability Act 2003 (Qld)* ss68-72; *Civil Liability Act 2002 (WA)* ss5AF-5AH; *Civil Liability Act 2002 (Tas)* s7; *Civil Law (Wrongs Act) 2002 (ACT)* ss12-14; *Personal Injuries (Liabilities and Damages) Act 2003 (NT)* s13, ss11,12 cf *Wrongs Act 1958 (Vic)* s14I-14J (not admission but still admissible); *Civil Liability Act 1936 (SA)* s75 (not admission only). See P Vines "Apologising to avoid liability: cynical civility or practical morality?" (2005) 27 (3) *Sydney Law Review* 483

[13] Liability may arise for nondisclosure on the basis that silence may amount to a misrepresentation under the *Trade Practices Act 1974 (Cth)* or *Fair Trading Acts.*

[14] Eg *New Jersey Patient Safety Act* 26:2H-12.25(3)(d)N.J.S.A. 26:2H-12.23 et seq; *Pennsylvania Medical Care Availability and Reduction of Error (Mcare) Act (2002)* Act 13 of 2002 s308.

[15] This issue was considered by B Walker, Special Commissioner, 'Final Report of the Special Commission of Inquiry into Campbelltown and Camden Hospitals' July 30, 2004 online at HTUhttp://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/pages/sci_final_reportUTH (last accessed Dec. 2004). As to the question of systemic versus individual accountability, Walker SC concluded that this was a false dichotomy –and that both forms of accountability are essential and can co-exist. This issue is discussed by J Gilmour, 'Patient Safety, Medical Error and Tort Law: An International Comparison', Final Report prepared for the Health Policy Research Program, Health Canada (May, 2006), http://www.yorku.ca/osgoode/faculty/documents/FinalReport_Full.pdf, 12 April 2007.
4, 82-183

> The clash between tort law and the patient safety movement undermines efforts to improve quality. Concern about exposure to malpractice litigation diminishes interest in patient safety activities. … This reluctance is manifested in several ways, but two of the most important are underreporting to adverse event reporting systems and lack of communication with patients about errors[16].

This fear persists even though many Australian jurisdictions have enacted legislation conferring some statutory protection for those who apologize or express regret to patients following an adverse event or outcome. Unfortunately the legislation is not uniform, and, except in New South Wales and the Australian Capital Territory, there is no statutory protection for apologies which include an admission of fault.

Implementing Disclosure is difficult – a mediation model may be the way forward…

The mediation model of open disclosure is a template which encourages

> physicians, hospital administrators, and other health care providers to communicate more effectively with patients following an adverse event or medical error, learn from mistakes, respond to the needs and concerns of patients and families after an adverse event, and reach a fair and cost-effective resolution of valid claims.

Pioneered by Leibman and Hyman, this model of disclosure was introduced in a New York hospital shortly after Pennsylvania became the first state to impose a duty on hospitals to notify patients in writing of a 'serious event' in 2002.

Their recommendations following the study were:

1) that physicians and other health care professionals develop an awareness of the communication skills most likely to be useful during disclosure conversations;

2) that hospitals develop in-house process experts available as consultants to aid in planning, conducting and debriefing disclosure conversations;

3) that hospitals encourage physicians, patient safety officers and risk managers to spend time planning before conducting disclosure conversations;

[16] D Studdert, M Mello and T Brennan "Medical Malpractice" (2004) 350 (3) *New England Journal of Medicine* 283 at 287

4) that physicians, hospital leaders and other health care providers offer an appropriate apology after an adverse event or error;

5) that hospitals and senior physicians provide opportunities for debriefing and support for health care professionals after an error; and

6) that hospitals use mediation as soon as practicable after an adverse event to settle potential claims.

In addition they commented that whilst doctors have experience in delivering bad news and discussing hard choices with patients, these skills need to be supplemented with active listening and conflict resolution skills in the disclosure conversation.

Mediation theory suggests that the advantages of a mediation model of disclosure in this context should include:

- the promotion of interest based solutions to meet the immediate needs of the affected patient and their family;
- the sharing of information at an early stage to promote discovery of systemic problems and to prevent recurrence;
- reduced anger and punishment behaviour[17];
- reduced litigation; and
- maintenance and protection of the physician-patient relationship after an adverse event.

The full version of this paper will discuss the ethical and legal foundations for disclosure of adverse events in Australia, the current status of the law governing apologies and their impact on the litigation of these cases, the potential benefits of an early intervention/mediation disclosure model and recommendations in relation to the way it should be implemented by health professionals in Australia.

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[17] An explanation (emphasizing that the cause of negative behaviour was external or uncontrollable) reduces anger and punishment behaviour see: RJ Bies,and DL Shapiro,"Interactional Fairness Judgments: The Influence of Causal Accounts" *Social Justice Research*, 1987, *1*, 1992, 18.

Family law: the lawyer-client relationship, procedural justice and the course of the dispute resolution process

Jill Howieson*

Abstract

Based on author's PhD research project into family law dispute resolution in Western Australia, this paper addresses the conflicting constructs of family lawyers as adversarial gladiators or collaborative, on one hand, and supportive deal makers, on the other. The author uses the theoretical construct of procedural justice as a basis for a study which investigates the dynamics of lawyer-client relationships and their impact on lawyer behaviour in dispute resolution.

Introduction

Background

Family lawyers are charged with exacerbating family law disputes and making them adversarial and embittered. Indeed, the various reports that have informed the recent Family Law reforms consistently cite anecdotal evidence that suggests that "the animosity that adversarial legal proceedings create between separated parents" is created in the main by the "adversarial behaviour of lawyers working in the system."[1] Yet, nowhere in these reports, or anywhere else, is there empirical research evidence that confirms the veracity of these claims; rather there is strong qualitative evidence to suggest that family lawyers are constructive and conciliatory in their approach to resolving family law disputes. The qualitative evidence suggests that as well as negotiating a resolution to their clients' disputes, family lawyers provide support and reassurance to their clients, help reduce the tension and stress involved in family disputes by providing an effective channel of communication for them with their former partners or even third parties, and guide, support and educate their clients

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[1] Family Law Council, A New Approach to the Family Law System: Implementation of Reforms, Discussion Paper (10 November 2004); Standing Committee on Family and Community Affairs, Parliament of the Commonwealth of Australia, *Every Picture Tells a Story: Report on the inquiry into child custody arrangements in the event of family separation* (December 2003) 60.

through the divorce transition process. Further, and most importantly, the evidence suggests that family lawyers emphasise settlement.[2]

So where do these claims of the adversarial lawyer originate (aside from the fact that our legal system is adversarial in nature and rights based)?[3] And doesn't the client have some influence over how his or her family law dispute is resolved? What happens when the client walks into the lawyer's office? Does the client bow down to the adversarial lawyer's contentious and argumentative, highly competitive and must win at all costs mentality? Does the client choose litigation as a matter of course and fight for his or her legal rights in the Family Court? Or does the client want to pursue an interest-based facilitative type of dispute resolution process such as mediation, or FDR as it is now known?[4]

It is hard to see that the charge of exacerbating conflicts and making the dispute aggressively adversarial should fall solely on the shoulders of the lawyers. What happens if an angry client, not yet accepting of the separation or divorce, with a highly competitive and dominating style of conflict resolution meets a constructive and conciliatory lawyer? Does the conciliatory lawyer adjust his or her lawyering style to fit the needs of the client, or does the conciliatory lawyer take the angry client down a problem-solving route of dispute resolution to no avail? These questions and more need to be answered.

Family law dispute resolution involves an interaction. Family lawyers don't work in isolation from their clients, however there is no research that untangles the complexities of the lawyer-client relationship and demonstrates how the dispute resolution orientations and strategies of the lawyer might interact with those of the client, and how this interaction might in turn influence the course of the resolution of the dispute.

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2 Rosemary Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30 *Journal of Law and Society* 156 at 159, 160.

3 Our judicial system is based on the notion that disputes can be resolved best by relying on individual legal rights and disputes are played out in an adversarial system where each side presents the strongest case with little or no regard for the opposition. In the end, one side wins and one side loses. Carla Hotel and Joan Brockman, 'The Conciliatory-Adversarial Continuum in Family Law Practice' (1994) 12 *Canadian Journal of Family Law* 11,17.

4 Family dispute resolution (FDR) "is a process (other than a judicial process) in which a family dispute resolution practitioner helps the parties who are affected by the separation or divorce to resolve some or all of their disputes with each other. The family dispute resolution practitioner is independent of all of the parties involved in the process.": *Family Law Act 1975* (Cth) s 10F.

Lawyers and clients

Conciliatory or adversarial lawyers

The literature is unclear on what exactly an 'adversarial' lawyer looks like, and similarly it is unclear on what characterises a "conciliatory and constructive" lawyer.[5] There is no single construct that adequately characterises the two different approaches to family law dispute resolution. Nor are the two approaches truly dichotomous. A survey of Canadian family lawyers in Vancouver, clearly identifies that family lawyers work along a conciliatory-adversarial continuum and that there are varying degrees between family lawyers advocating a conciliatory approach to the practice of family law which focuses on the clients' needs and interests, and others who take a more adversarial approach and focus on the duty to their clients' "rights".[6] Understanding how family lawyers work and what approach they take to the dispute resolution task, is the first step in appreciating how the interaction with the family law client influences the dispute resolution choices that are made and the course that the family law dispute resolution process takes.

Interpersonal conflict resolution styles of the client

The next step toward this understanding of the lawyer-client relationship is to attain a picture of the family law client. It is well documented in the literature that people have different ways of responding to social or interpersonal conflict and five specific styles of handling conflict: avoiding, obliging, dominating, compromising and integrating, have been identified. [7] A client's predisposition to a particular style might reasonably affect how the client will try to resolve his or her family law dispute. Further, and possibly more importantly, the client's interpersonal conflict resolution style will almost certainly influence how the client perceives the lawyer who is helping him or her to resolve the dispute.

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[5] Despite the Family Law Council's, Best Practice Guidelines for Lawyers doing Family Law Work (March 2004), the meaning of conciliatory and constructive is not clear.
[6] Hotel and Brockman, above n3, p. 18
[7] M. Afzalur Rahim, 'A Measure of Styles of Handling Interpersonal Conflict' (1983) 26(2) *The Academy of Management Journal* 368.

Emotional response to the divorce

How the client is emotionally responding to the separation/divorce might also reasonably influence how the client might choose to deal with his or her family law matter and how he or she responds to his or her lawyer. Studies have shown that the clients' adjustment to the divorce process, in terms of their affect and initiator status, relates to the clients' conflict resolution behaviours.[8] It is therefore reasonable to assume that the clients' emotional response to the divorce will also affect their choice of dispute resolution process, their behaviour within that process and their perceptions of their lawyers.

Procedural justice

The interactions between lawyer and client are complex in nature and any thorough investigation of the relationships should be made through a robust theoretical model. A framework that would serve these types of investigations and would provide a lens for any study is the theoretical construct of *procedural justice*. Procedural justice is an apt frame because, regardless of the rhetoric surrounding family law dispute resolution, the purpose of any legal dispute resolution process is that it must be seen to be fair and just and it is clear from the research that one powerful indicator of whether a client feels that fairness and justice has prevailed, is the perception of procedural justice.

Procedural justice research shows that "people's reactions to conflict resolution decisions are powerfully shaped by their views about the procedure that generated those outcomes."[9] Further, the research shows that parties are more likely be satisfied with the outcome of a dispute resolution procedure and be more likely to view the overall experience as just, if it was generated by a fair procedure. Arguably then, if the client perceives that the lawyer has arrived at decisions regarding how to resolve his or her matter fairly, then the client will be more likely to accept and follow the lawyer's advice. Conversely, if the client perceives that there was a level of procedural unfairness in the advice of the lawyer, then he or she might turn to another

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[8] Andrew Bickerdike, *Conflict resolution in divorce mediation: The impact of the divorce adjustment process and negotiation behaviour on mediation outcome* (D Phil Thesis, La Trobe University, 1998), 2.
[9] Tom R Tyler, *Procedural Justice* (2005), *xiii*.

procedure as a means of ensuring fairness, for instance, the Family Court. Therefore, exploring how a client's procedural justice perceptions might influence the nature of the dispute resolution decisions that the client makes and how those perceptions might influence the route that the client takes through family law dispute resolution process is of major importance, and an essential requirement of any study into the lawyer-client interaction.

Required study

The parameters of a comprehensive study into family lawyers and their clients are multifaceted. There needs to be firstly, an investigation into the profiles of family lawyers in terms of their adversarial or conciliatory orientation. Secondly, there needs to be an investigation into the profiles of family law clients in terms of their interpersonal conflict resolution styles and their emotional reactions to the divorce process. Next, an exploration of what happens when lawyers with particular conflict resolution orientations come together with clients with individual conflict resolution styles and emotional responses to the divorce process, is required, targeting the following factors: what type of dispute resolution decisions are made; what procedural justice perceptions are produced; how do those perceptions influence the course of the family dispute resolution; and what outcomes are produced?

Research of this nature, grounded in procedural justice theory, has commenced in Western Australia, and it is hoped that the results of the study will illuminate, in part, the complexities of the lawyer-client relationship and show how that relationship influences the course of family law dispute resolution.

Transformative and Facilitative Mediation Case Studies: Improving Relationships and Providing Solutions to Interpersonal Workplace Conflict

Carolyn M. Manning[1]

Abstract

Case studies by the author were used to examine the efficacy of transformative and facilitative mediation to address workplace conflict. This approach provided participants with an opportunity to reframe their negative perceptions of each other and to shift their interpersonal dynamics into more favourable territory. In the majority of cases, anecdotal feedback suggests that both the participants and their respective employers were satisfied with the outcomes generated via mediation.

Introduction

This paper examines the efficacy of a combined transformative and facilitative approach to mediation in resolving workplace disputes. All of the agreements achieved were negotiated between the participants themselves. Third parties such as legal representatives were not involved in this process.

Much of the empirical evidence evaluating the success of mediation has focused on measuring the satisfaction levels of the participants.[2] A study conducted by the Indiana Conflict Resolution Institute in 1999 found that postal workers who

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I gratefully acknowledge the significant contribution of Ms. Jenny Kozlovski for her editorial guidance.

[2] For examples: J Daniel, *Assessment of the Mediation Program of the US District Court for the District of Columbia*, Administrative Conference of the United States, 1995 <http://www.crinfo.org/action/search-profile.jsp?key=14982&type=print> at 21 June 2006; C Depner, K Cannata, I Ricci, ‘Client Evaluations of Mediation Services: The Impact of Case Characteristics and Mediation Service Model’, (1994) *Family and Conciliation Courts Review*, 32 (3) 306 – 325 at <http://www.crinfo.org/action/search-profile.jsp?key=13978&type=print> at 21 June 2006; L Bingham, *The National Redress Evaluation Project Annual Update: Is Mediation Transforming Workplace Conflict at the United States Postal Service?* Unpublished paper, Indiana University, cited in J Rendon and J Dougherty, ‘Going Postal: A New Definition and Model for Employment ADR’, (2000) *The Houston Lawyer*, <http://www.txtmediator.org/toolkit/Going%20Postal.htm>at 15 May 2006

participated in mediation were generally more satisfied with the process, the mediator and the outcome when transformative mediation was used by an external mediator, as opposed to when a directive/problem-solving model was used by an internal mediator.[3]

Transformative mediation has been described by Bush and Folger[4] as a means of offering opportunities for personal growth and recognition between parties in conflict. They are critical of the problem-solving or settlement based approach to mediation, which they argue fails to address the origins of conflict between parties. Bush and Folger assert that the key ingredients of transformative mediation are 'empowerment' of the individual and the ability to relate to others beyond oneself, which they describe as 'recognition.'[5] It can be argued that the transformative component of mediation originates from the parties' willingness to reappraise and reinterpret the intentions or behaviour of the 'other', in a less malevolent manner. This re-evaluation can facilitate an attitudinal shift into positive territory. It can be argued that the settlement based model of incremental bargaining mitigates against opportunities for this type of outcome, as the focus is on problem solving.

Definition of Mediation

Many conventional definitions of mediation do not tend to accommodate the personal growth objectives of transformative mediation, as discussed above by Bush and Folger. For example, mediation has been defined as a process whereby 'participants, together with the assistance of a neutral third party(s) systematically consider alternatives and reach a consensual settlement that accommodates their needs'.[6] The transformative model with its emphasis on recognition and achieving shifts in perspectives between the parties is less well served by this definition. Transformative mediation is defined as an approach or intervention that focuses on addressing the underlying source of tension between the parties and improving the relationship.[7] Facilitative mediation seeks to address the needs and interests of the parties[8] and the

[3] Rendon and Dougherty, above n1
[4] R Bush and J Folger, 'Transformative Mediation and Third - Party Intervention: Ten Hallmarks of a Transformative Approach to Practice (1996) 13 (4) *Mediation Quarterly*, 277
[5] Ibid, 266
[6] R Altamore, 'Alternative Dispute Resolution and People with Disabilities', (2005) 24 (2) *The Arbitrator and Mediator*, 41-52
[7] Boulle, above n 6, 29
[8] Ibid, 29

mediator assists with the formulation of an agreement by 'asking questions, validating and normalising their points of view'.[9]

Definition of Successful Mediation Outcome

This study defined a mediated outcome as a written agreement or verbal undertaking concluded as a result of mediation. In this study, with one exception, all agreements were concluded in writing. A successful mediation outcome was defined as an agreement concluded at the end of the mediation process which incorporated either transformative or practical outcomes. Data was also gathered about the durability of the mediated agreements.

A transformative outcome was defined as a commitment by the parties to improve their communication and relationship with each other. An example of a transformative component incorporated into a mediated agreement was a commitment by the parties to regularly meet in an effort to rebuild their relationship. Not all of the transformative shifts that occurred during mediation were necessarily incorporated into the agreement outcomes. Although the mediator observed these shifts they were not systematically recorded, which was a limitation of this study.

For example during one of the mediations there was an acknowledgement of an apology which arose from one participant's recognition that her behaviour had a negative emotional impact on the other party, yet this was not included in the formal agreement.

A practical outcome was defined as a mediated component which was largely functional in nature which did not predominantly focus on shifting the interpersonal interactions between the parties. For example, in one of the cases cited in this study, an agreement was reached whereby a supervisor agreed not to give instructions to staff whilst serving customers (which they reported was both distracting and irritating) and instead, agreed to give this feedback at other times.

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[9] Z Zumeta, 'Styles of Mediation: Facilitative, Evaluative and Transformative Mediation', (1998), *Journal of the Du Page County Bar Association*, <http://www.dbca.org/brief/sepissue/1998/art20998.htm> at 15 May 2006

Method

This study consisted of 20 cases (some of which involved single and multiple complainants) which were referred to Carolyn Manning Consulting Services for mediation. The mediations all involved interpersonal conflict between individuals within the workplace. The results of this study were based on outcomes documented in the written or verbal agreements that were concluded following mediation and these were assessed for their content in regard to practical or transformative outcomes.

Results

Of the 20 cases, 17 resulted in an agreement formulated at the time of mediation. In the remaining three cases, the mediation was not completed.

Of the 17 agreements, 82% included transformative components, and 88% included practical components. Examples of transformative outcomes in the agreements included the following:

- A commitment to work respectfully with each other.
- Communicate effectively with each other and make time to hear each other.
- To build a good relationship and put the past behind them.
- A commitment to rebuild the trust and rapport enjoyed in the past.
- A shared understanding that personal happiness in the workplace was important and both parties agreed to work towards this goal.

There was no systematic follow up process to determine the durability of the mediated agreements, however, limited data was available for 15 of the 17 cases. Feedback was obtained from either the employer or the participants in the mediation. Of the 15 cases, all of the agreements were in place and operational after a minimum of two weeks. One month later, 12 of these agreements were still operational and all but one of these included transformative components in the agreement. In three of the cases where follow up occurred after 12 months, all of the agreements were still in place and all had transformative components in the agreements.

Discussion

In this study, mediation presented participants with an opportunity to shift their perceptions of each other in a way that enhanced their relationships within the workplace. This outcome was achieved in many of the cases but not all. A total 82% of the agreements included transformative components and 70% had a combination of transformative and practical components.

Although it may be desirable for relationships to be ‘re-examined and realigned,’[10] this form of resolution is not always practicable if the goal of the parties is expressed as a demand for punitive solutions to be delivered via management. Although separating the parties in conflict may be an appealing short term solution for many employers, tensions and differences are likely to flare up again in future contexts such as at meetings, lunch rooms, corridor interactions, functions, etc.

In conclusion, this study has demonstrated the efficacy of using a combined transformative and facilitative mediation model to resolve workplace conflict. However, the model alone is not necessarily sufficient to generate transformative or facilitative outcomes – rather, it is the interaction and interventions of the mediator and those which occur between the parties themselves within this framework that creates transformative opportunities.

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J Daniel, *Assessment of the Mediation Program of the US District Court for the District of Columbia*, Administrative Conference of the United States, 1995

[10] Burton (1986) cited in A Tidwell, *Conflict Resolved,* Great Britain: Biddles Ltd, 1998, 9

<http://www.crinfo.org/action/search-profile.jsp?key=14982&type=print> at 21 June 2006.

C Depner, K Cannata, I Ricci, ‘Client Evaluations of Mediation Services: The Impact of Case Characteristics and Mediation Service Model’, (1994) *Family and Conciliation Courts Review*, 32 (3) 306 – 325 at <http://www.crinfo.org/action/search-profile.jsp?key=13978&type=print> at 21 June 2006.

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Z Zumeta, ‘Styles of Mediation: Facilitative, Evaluative and Transformative Mediation’, (1998), *Journal of the Du Page County Bar Association*, <http://www.dbca.org/brief/sepissue/1998/art20998.htm> at 15 May 2006.

Nine Lessons for Teaching Negotiation Skills*

Melissa Conley Tyler[1] & Naomi Cukier

Abstract

This paper outlines research that is showing new and innovative ways of teaching negotiation skills. While best practice is still evolving, there are a number of clear insights from work to date. Based on the authors' studies, nine practical suggestions for class activities are offered, including hints for activities involving expert observation, emotional intelligence and analogical reasoning.

Short Version of Paper

Negotiation is a key skill for legal practice and one that offers a rich theoretical literature as well as opportunities for experiential learning. However it can be a challenging skill to teach both in the law school and law firm environment. Many teachers have limited time and resources and may be tempted to fall back on a fairly basic model for teaching negotiation skills.

The authors draw on their experience teaching negotiation skills both to students and practitioners. Their experience is varied, ranging from groups of 5 to 180, and includes both law school, law firm, government, corporate and non-profit clients in Australia, New Zealand, South Africa and the U.S.A. In particular, the authors draw on experiences with small group and on-line negotiation teaching with law students at the University of Melbourne and Monash University.

The authors also looked to other studies to explore the diversity of negotiation training and attempt to identify those practices that best promote learning.[2] Some of the best work in this area includes studies on:

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[2] One notable example was the Hewlett Conference on negotiation teaching and related articles and reports. See S Cobb, *Hewlett Pedagogy Survey Report on Negotiation Teaching in Law Schools, at the Hewlett Conference 2000* (Harvard University 2000); B Fuller and L Susskind, *Hewlett Pedagogy Survey Report on Negotiation Teaching in Law Schools, at the Hewlett Conference 2000* (Harvard

- the role of theoretical material (traditional prescriptive lectures)[3]
- the role of simulations and role plays[4]
- the role of feedback, including self-review, video review and interviews[5]
- the importance of teaching self-reflection and emotional intelligence skills[6]
- the importance of analogical reasoning[7]

University 2000); R C Bordone and B Mnookin, *Hewlett Pedagogy Survey Report on Negotiation Teaching in Law Schools, at the Hewlett Conference 2000* (Harvard University 2000); R S Fortgang, Taking Stock: An Analysis of Negotiation Pedagogy Across Four Professional Fields (2000) 16 *Negotiation Journal* 325

[3] See particularly J Nadler, L Thompson and L Van Boven, Learning Negotiation Skills: Four Models of Knowledge Creation and Transfer (2003) 49 *Management Science* 4; K M O'Connor and A A Adams, Research Report: What Novices Think About Negotiation: A Content Analysis of Scripts (1999) 15 *Negotiation Journal* 135. This draws on earlier work including: D Gentner, M J Ratterman, K D Forbus, The Roles of Similarity in Transfer: Separating Retrievability and Inferential Soundness (1993) 25 *Cognitive Psychology* 4 ; B H Ross, Remindings and Their Effects in Learning and Cognitive Skill (1987) 16 *Cognitive Psychology* 3; B H Ross, Distinguishing Types of Superficial Similarities: Different Effects on the Access and Use of Earlier Problems 15 *Journal of Experimental Psychology*; B H Ross and M C Kilbane, Effects of Principle Explanation and Superficial Similarity on Analogical Mapping and Problem Solving (1997) 23 *Journal of Experimental Psychology* 2; L R Novick, Analogical Transfer Problem Similarity and Expertise (1998) 14 *Journal of Experimental Psychology* 3; B H Ross and M C Kilbane, Effects of Principle Expectation and Superficial Similarity on Analogical Mapping and Problem Solving (1997) 23 *Journal of Experimental Psychology* 2; M A Neale and G B Northcraft, Behavioral Negotiation Theory: A Framework for Conceptualizing Dyadic Negotiation in L L Cummings and B Staw eds, *Research in Organizational Behavior* (Greenwich: JAI Press, 1990); M L Gick and K J Holyoak, Schema Education and Analogical Transfer (1983) 15 *Cognitive Psychology* 1-38

[4] J Loewenstein and L Thompson, The Challenge of Learning, (2000) 16 *Negotiation Journal* 399; P Reilly, Teaching Law Students How to Feel (2005) 21 *Negotiation Journal* 2; K Mack, G Mullins, J Sidford, D Bramford, Developing Student Self Reflection Skills Through Interviewing and Negotiation Exercises in Legal Education (2003) 13 *Legal Education Review*.

[5] R E Fells, Teaching a subject like negotiation: How might we encourage deep learning? in A Herrmann and M M Kulski eds, *Expanding Horizons in Teaching and Learning.* Proceedings of the 10th Annual Teaching Learning Forum, 7-9 February 2001 (Perth: Curtin University of Technology, 2001) http://lsn.curtin.edu.au/tlf/tlf2001/fells.html. Earlier work includes K Thomas, Conflict and Conflict Management in M D Dunnette ed, *The Handbook of Industrial and Organizational Psychology* (Chicago: Rand McNally, 1975); C Argyris, *On Organizational Learning* (Cambridge: Blackwell, 1993); J Decety, J Grezes, N Costes, D Perani, M Jeannerod, E Procyk, R Grassi, F Fazio, Brain Activity During Observation of Actions: Influence of Action Content and Subject's Strategy (1997) 120 *Brain* 10; M A Neale, G B Northcraft, Behavioral Negotiation Theory: A Framework for Conceptualizing Dyadic Negotiation in L L Cummings B Staw eds., *Research in Organizational Behavior* (Greenwich: JAI Press, 1990); L R Novick, Analogical Transfer Problem Similarity and Expertise (1988) 14 *Journal of Experimental Psychology* 3; L Thompson, The Influence of Experience on Negotiation Performance (1990) 26 *Journal of Experimental Psychology* 6

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[7] JJ Gillespie, L Thompson, J Loewenstein and D Gentner, Lessons from Analogical Reasoning in the Teaching of Negotiation (1999) 15 *Negotiation Journal* 363. This draws on earlier work including D

- the potential of service learning[8]
- culture, gender and negotiation training[9]
- the potential of technology-assisted training.[10]

A survey of these findings revealed nine key lessons for negotiation teaching. The implications of these findings for teachers and trainers of negotiation are significant and may require adaptations to practice. Practical suggestions for classroom activities are offered for each of the nine lessons below.

1. Students won't learn just from experience
   - Use role plays predominantly for consolidating and practicing learning
   - Incorporate theoretical material both before and after negotiation role plays
   - Leave at least as long for debrief and review of role plays as for the role play itself.

Gentner, Structure Mapping: A Theoretical Framework for Analogy (1983) *Cognitive Science* 7; D Gentner and A B Markman, Similarity is Like Analogy: Structural Alignment in Comparison, in C Cacciari ed, *Similarity in Language, Thought and Perception* (Brussels: BREPOLS, 1995); L Thompson, The Influence of Experience on Negotiation Performance (1990) 26 *Journal of Experimental Social Psychology* 6; J Loewenstein, L Thompson, D Gentner, Analogical Encoding Facilitates Transfer in Negotiation (1999) 6 *Psychonomic Bulletin Review* 4; D Gentner, Structure Mapping: A Theoretical Framework for Comparison (1993) 7 *Cognitive Science* 155; L Novick, Analogical Transfer, Problem Similarity and Expertise (1988) 14 *Journal of Experimental Psychology* 3;

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[10] R B McKersie and N O Fonstad, Teaching Ideals: Teaching Negotiation Theory and Skills Over the Internet (1997) 13 *Negotiation Journal* 363; S R Peppet, Teaching Negotiation Using Web Based Streaming Video (2002) 18 *Negotiation Journal* 271

1. Students won't learn just from theory

- Wherever possible, present theoretical material in context using examples that are similar to students' own real-life situations
- Incorporate theoretical material both before and after negotiation role plays
- Use theoretical material to enhance student understanding of preparing for negotiation

2. Role plays need to be credible, relevant and contextual

- Incorporate a role play which explicitly describes contextual, bureaucratic and politically based influencing factors into classroom learning
- Include at least one relational (relationship based) and one transactional negotiation role play into classroom activities
- Write/use role plays which feature personalities and circumstances, different from those the students' are likely to have experience with
- Give adequate facts and figures to ensure there are no gaps which may distract students from management of the process of their negotiation
- Allow adequate preparation time before negotiations (possibly allow students to prepare in groups "by side"), ensuring students fully understand their party's interests, goals and limitations in the negotiation

4. Students need a rich review of negotiation experience

- Incorporate at least one deep learning question in debriefing students' negotiation experience
- Explicitly mention deep learning as one of the aims of negotiation training
- Explicitly promote self-reflection as a key skill of experienced negotiators
- Consider how assessment tasks can promote self-reflection and deep learning
- Use journals and video taping to elicit self reflection and rich review

5. Students learn best through analogical reasoning

- Ask students to compare and contrast two or more negotiation cases
- Explicitly ask students to access negotiation skills from past cases and apply them to new and novel situations
- Provide multiple examples to illustrate a single principle
- Ask students to come up with multiple examples that they feel illustrate one principle

6. Observation is one of the most effective learning techniques

    - Invite expert guests to negotiate "live" in front of students, including question time and interactive discussion
    - Create a video-tape of expert guests, for example negotiating a role play that students also complete
    - Use videotape extracts from movies and other readily available material to illustrate good negotiation techniques
    - Use group role plays (such as where students take turns to play a role in a "rotating fishbowl" exercise) where students can observe each others' behaviour

7. Real world placements can be an effective training tool

    - Select placements that offer contextual complexity and a variety of planned and unplanned negotiations
    - Be aware of the need to resource placements through liability coverage, placement contracts and support
    - Use placements in combination with other instructive methods of teaching including theoretical material and review

8. Emotional intelligence and interpersonal skills assist negotiation learning

    - Explicitly mention the interpersonal skills required to enhance negotiation performance
    - Ask students to reflect on an interpersonal skill they feel under-confident using – which might also help to improve their negotiation skills
    - Provide students with role plays which explicitly detail the emotion and sensitivities surrounding a negotiation – and ask the student to imagine how the various parties in the scenario "feel" whilst role playing
    - Provide extensive opportunities for self reflection after negotiation activities

9. Technology can enhance negotiation learning.

    - Use videotaping to assist review, reflection and assessment
    - Use discussion boards and other techniques to assist reflection and class discussion
    - Conduct one or more negotiation simulations online

Overall, what they suggest is the need for multi-faceted negotiation training that makes use of a variety of teaching techniques.

Addressing the Neutrality Dilemma Through Ethics for a Mediation 'Profession'

Rachael Field*

Abstract

This paper argues that a constructive approach to the neutrality dilemma lies within the framework of a mediation 'profession', one that includes enforceable professional ethics for mediators. This approach is grounded in the argument that the true legitimacy of mediation rests on a strong ethical paradigm, rather than on a false and unworkable concept such as mediator neutrality.

Introduction

The literature on the concept of neutrality in mediation acknowledges that neutrality remains a core concept to the mediation process,[1] and yet also a controversially flawed theoretical notion.[2] An accurate conception of neutrality in mediation has been impossible to achieve, and proposals to address what is both a dilemma of theory and practice, have failed to hit the mark.[3] Neutrality is an unsatisfactory concept but sits in the 'too hard basket'.

This paper argues that a constructive approach to the neutrality dilemma lies within the framework of a mediation 'profession', one that includes enforceable professional ethics for mediators. This approach is grounded in the argument that the true legitimacy of mediation rests on a strong ethical paradigm, rather than on a false and unworkable concept such as mediator neutrality.

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1 For example, H Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part I' (2000) 11 Australian Dispute Resolution Journal 73; H Astor, 'Rethinking Neutrality: A Theory to Inform Practice – Part II' (2000) 11 *Australasian Dispute Resolution Journal* 145-154; H Astor and C Chinkin, *Dispute Resolution in Australia*, Sydney: Butterworths (2nd ed, 2002); and H Astor, "Mediator Neutrality: Making Sense of Theory and Practice" (2007) 16(2) *Social and Legal Studies* 221-239

2 L Boulle, *Mediation: Principles, Process, Practice*, Australia: Butterworths (1996) at 18.

3 Hilary Astor's most recent work provides the most comprehensive and practical way to date for mediators to conceive of neutrality: Astor, above n 1.

1. The current state of neutrality in mediation

The persistent importance of neutrality in the mediation context is illustrated by the fact that definitions of mediation continue to include statements to the effect that 'the mediator is a neutral intervener in the parties' dispute'.[4] In addition, most current codes or standards of mediator conduct refer to mediators as third party neutrals of some sort, or 'neutrals'.[5]

The importance of neutrality to definitions of mediation means that it plays a significant 'legitimising function for mediation'.[6] That is, neutrality makes mediation credible, [7] because parties are potentially drawn to the process on the basis that the mediator will be neutral. Neutrality also connects mediation with the authority and legitimacy of formal legal adjudicative processes through comparisons with the ideology of judicial impartiality.[8]

Whilst neutrality is a foundational concept for mediation, and critical to definitions of the process, it is not, itself, a term that has a clear or precise meaning.[9] In fact, 'neutrality' is manifestly under-defined.[10] Wilson suggests that this is because there

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[4] See, for example, Boulle above n 2 at 18. See, for example, J Folberg and A Taylor, *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation*, San Francisco: Jossey-Bass (1984) at 7-8; CW Moore, *The Mediation Process*, San Francisco: Jossey-Bass (2nd ed., 1996); ME Laflin, 'Preserving the Integrity of Mediation Through the Adoption of Ethical Rules for Lawyer-Mediators' (2000) 14(1) *Notre Dame Journal of Law, Ethics and Public Policy* 479, KK Kovach and LP Love, 'Mapping Mediation: The Risks of Riskin's Grid' (1998) 3 *Harvard Negotiation Law Review* 71.

[5] However, Boulle has commented that this results in such standards overlooking 'the multiple dimensions of neutrality': Boulle above n 2 at 19. See also, Law Council of Australia's 'Ethical Standards for Mediators', Updated February 2006, www.lawcouncil.asn.au (accessed 23 September 2007).

[6] Boulle above n 2 at 18-19. See also Astor above n 1 at 74 referring to S Cobb and J Rifkin, 'Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation' (1991) 11 *Studies in Law and Politics* 69 and C Harrington and S Engle Merry, 'Ideological Production: The Making of Community Mediation' (1998) 22 *Law and Society Review* 709 .

[7] B Mayer 'The Dynamics of Power in Mediation and Negotiation' (1987) 16 *Mediation Quarterly* 75 at 83.

[8] Boulle above n 2 at 18-19.

[9] As MacKay comments: 'It is easy enough to say that the mediator should be a neutral facilitator, but what does that mean?': RB McKay 'Ethical Considerations in Alternative Dispute Resolution' (1989) 45 *Arbitration Journal* 15 at 21.

[10] For example, Laue commented of the 1987 SPIDR ethical standards that 'by my count, [the word neutrality] appears more than 35 times in the standards without any definition or description': J Laue in Society of Professionals in Dispute Resolution (SPIDR) (1987) 'SPIDR's Ethical Standards for Professional Conduct' *Forum*, Newsletter of the National institute for Dispute Resolution, March at 12.

is 'an underlying assumption that an explanation is unnecessary.'[11] Indeed, within the mediation community, there is no agreement about what the term means in practice,[12] or how the real functioning of neutrality can be explained.[13]

Neutrality, and its practice, is therefore somewhat of a mystery.[14] Neutrality is an elusive, idealistic concept.[15] And yet it is relied on, variously, to indicate that the mediator: has no interest in the outcome of a dispute,[16] is not biased, makes no judgment about the parties and their dispute, and is fair and even-handed.[17]

Neutrality is more than a mysterious, ill-defined umbrella concept, however. It has the potential to be positively dangerous. This is because its ambiguous nature makes it a false and misleading notion. Certainly, 'pure neutrality is very difficult to achieve and sustain',[18] because a mediator's actions and decisions will always be influenced by their 'own knowledge, experiences, and values.'[19] In addition, realistically, mediators are truly powerful; they are not 'passive participants in a process shaped by forces they have not deployed'.[20] Greatbatch and Dingwall have shown, for example,

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[11] B Wilson, 'Mediation and Morality' (2000) *Family Law*, 853 at 853. See also, RM Fuller, WD Kimsey, BC McKinney (1992) 'Mediator Neutrality and Storytelling Order' 10(2) *Mediation Quarterly* 187 at 187; and LM Cooks and CL Hale 'The Construction of Ethics in Mediation' (1994) 12(1) *Mediation Quarterly* 55 at 63.

[12] Taylor refers to the lack of a shared vocabulary in mediation practice: A Taylor, 'Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence and Transformative Process' (1997) 14 *Mediation Quarterly* 215 at 217. Astor comments that neutrality is 'a highly contested term for mediators' and has been 'subjected to constant analysis, debate and redefinition.': above n 1 at 74.

[13] J Rifkin, J Millen and S Cobb 'Toward a New Discourse for Mediation: A Critique of Neutrality' (1991) 9(2) *Mediation Quarterly* 151 at 152.

[14] Rifkin, Millen and Cobb above n 13 at 152. Boulle, for example, referring to the work of Tillet and Kurien, concedes that neutrality can be considered as 'the most pervasive and misleading myth about mediation.' Boulle above n 2 at 19. See G Tillet (1991) *Resolving Conflict – A Practical Approach*, Sydney: Sydney University Press; G Tillet (1991) *The Myths of Mediation*, The Centre for Conflict Resolution, Macquarie University and G Kurien, "Critique of Myths of Mediation" (1995) 6 *Australian Dispute Resolution Journal* 43 at 52.

[15] H Gadlin and EW Pino 'Neutrality: A Guide for the Organisation Ombudsperson' (1997) 13 *Negotiation Journal* 17 at 17.

[16] GB Walker 'Training Mediators: Teaching about Ethical Concerns and Obligations' (1988) 19 *Mediation Quarterly* 33.

[17] See for example, Astor and Chinkin (2002) above n 1.

[18] SE Bernard, JP Folger, HR Weingarten and ZR Zumeta 'The Neutral Mediator: Value Dilemmas in Divorce Mediation' (1984) 4 *Mediation Quarterly* 61 at 72.

[19] O Cohen, N Dattner, and A Luxenburg "The Limits of the Mediator's Neutrality" (1999) 16(4) *Mediation Quarterly* 341at 342.

[20] S Silbey 'Mediation Mythology' (1993) 9(4) *Negotiation Journal* 349 at 352.

that mediator values and judgments can, and often do, enter the process and influence outcomes.[21]

2. Suggestions to Address the Neutrality Dilemma

Suggestions have been made to overcome these neutrality dilemmas in mediation. For example, neutrality should be abandoned;[22] neutrality should be re-contextualised to give it meaning;[23] neutrality should be re-conceptualised to be more relevant to practical issues and realities.[24] Certain models of mediation offer approaches where mediator neutrality is not considered fundamental to the legitimacy of the process.[25] Further, it has been suggested that mediators must choose between claiming neutrality and using non-neutral interventions that seek, for example, to redress power imbalances.[26]

Importantly, Hilary Astor has recently suggested an integrated approach aimed at addressing the unsatisfactory state of neutrality in mediation by providing mediators with a real and workable system of practice.[27] This work draws on Astor's previous recommendations that a situated, contextual approach can move us from a binary construct of neutrality, that is, as something that is either existent or non-existent, to a broader concept of legitimizing mediation through focusing on notions of consensuality and "maximizing party control."[28] The five key elements of Astor's approach include: an acknowledgement on the part of mediators of their own

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21 R Dingwall and D Greatbatch "Who is in Charge? Rhetoric and Evidence in the Study of Mediation" (1993) *Journal of Social Welfare and Family Law* 365, and D Greatbatch and R Dingwall "Selective Facilitation: Some Observations on a Strategy Use by Divorce Mediators" (1989) 23 *Law and Society Review* 613. See also Mayer above n 7 and Silbey above n 20 at 352.

22 D Gorrie "Mediator Neutrality: High Ideal or Sacred Cow?". In L Fisher (ed), *Conference Proceedings, Famcon '95*, Third national Family Mediation Conference, Sydney (1995) at 30.

23 D Bryson and D Winset, "A New Conciliation Model: Mediating Within the Law" in T Fisher (ed) *Proceedings of the 4th National Mediation Conference* La Trobe University: Melbourne (1998) at 275 – 279.

24 Taylor above n 12.

25 See for example, M Sauve, "Mediation: Towards an Aboriginal Conceptualisation" (1996) 3 *Aboriginal Law Bulletin* 10 and L Behrendt, *Aboriginal Dispute Resolution* Sydney: Federation Press (1995).

26 R Field, "Neutrality and Power: Myths and Reality" (2000) 3(1) *ADR Bulletin* 16.

27 Astor above n 1 (2007).

28 Astor above n 1. See also on the importance of consensuality: B Wolski, "Voluntariness and Consensuality: Defining Characteristics of Mediation?" (1997) 15 *Australian Bar Review* 213.

perspective (self-reflexivity);[29] an openness on the part of mediators to see other perspectives;[30] a valuing of multiple vantage points;[31] maximising party control;[32] and dealing with power.[33]

3. An Australian Mediation 'Profession' as a Framework for Ethics

Whilst Astor's position is compelling, particularly if we are to retain a reliance on neutrality in mediation, my argument is that professional ethical standards and practice provide a stronger basis for the legitimacy of mediation than neutrality. It follows, then, that the existence and efficacy of appropriate professional ethics in mediation can give credibility to the process, and ensure that mediator conduct is appropriate and fair.[34] The mediation community must therefore be considered a 'professional group.'[35]

In Australia, however, the current, dominant view is that mediation cannot yet satisfy the requirements of a profession in its own right.[36] Opportunities for addressing the neutrality dilemma through ethics associated with a mediation profession are curtailed if this perspective is accepted.

The basis for this perspective is that mediation fails to satisfy, or at least can only establish a limited claim to, three of the key characteristics that define traditional professions.[37] These characteristics are: first, 'a sustainable claim to exclusive technical competence in a field'; second, 'a service ideal to distinguish them from

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29 Astor above n 1 (2007) at 230 referring to Dale Bagshaw, "The Three Ms: Mediation, Postmodernism and the New Millennium" (2002) 18 *Mediation Quarterly* 205-220, and Dale Bagshaw, "Language, Power and Mediation" (2003) 14 *Australasian Dispute Resolution Journal* 130-141.

30 Astor above n 1 (2007) at 231.

31 Ibid at 232.

32 Ibid at 234.

33 Ibid at 235.

34 Compare JB Thomas, *Judicial Ethics in Australia*, 2nd ed, (LBC Information Services Sydney, 1997) at 9, and see C Menkel-Meadow, 'Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities' (1997) 38(2) *South Texas Law Review* 407 at 419.

35 Thomas above n 29 at 9.

36 L Boulle, *Mediation: Principles Process, Practice* (Butterworths Australia, 2005) at 328.

37 Ibid at 326-327. For other perspectives on what constitutes a profession see, for example, J Scimecca, 'Conflict Resolution in the United States: An Emerging Profession?'. In K Avruch, P Black, and J Scimecca (eds) *Conflict Resolution: Cross-Cultural Perspectives* (Greenwood Press New York, 1991).

business or commercial activities';[38] and third, 'a sense of community.'[39] It is also fair to say that there is probably insufficient public recognition of mediation as a profession at this stage; and also, critically, a reluctance amongst mediators themselves to claim that they belong to a 'profession'. As Alexander has noted, mediation practice in Australia has been regulated more by 'the forces of a free market' than as a profession.[40]

My argument, however, is that there is an alternative way to conceptualise a 'profession' that allows us to recognise mediation as a *nascent* profession. Sophisticated professional ethics, that are enforceable, become possible as a result, and offer a way forward from the neutrality dilemma.

My position is that mediation can be said to constitute a *nascent* profession on the basis that it satisfies four key attributes.[41] First, that mediators hold a 'fidelity to a particular good';[42] namely, the principle of self-determination. Second, that mediation can be considered a 'public office'.[43] And third, that Australia's new accreditation system will establish 'fitness for practice'.[44] In addition, ethical codes and standards of practice already currently exist.

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[38] See also SF Barker, 'What is a Profession?' (1992) 1 (1 and 2) *Professional Ethics* 73 and A Tidwell, 'It's the Process that Counts: Professionalising Mediation in NSW' (1999) 6(2) *Murdoch University E-Law Journal* 21 at para 20.

[39] Boulle above n 31 at 326 citing H Wilensky, 'The Professionalisation of Everyone?' (1964) *The American Journal of Sociology* 137, J Sammons, *Lawyer Professionalism* (Carolina Academic Press Durham N.C, 1988) at 3-12, and D Weisbrot, *Australian Lawyers* (Longman Cheshire Melbourne, 1990) at 4.

[40] N Alexander, 'What's Law Got to Do With It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions' (2001) 13 *Bond Law Review* 335 at 349.

[41] These criteria are adapted from FC De Coste, 'Towards A Comprehensive Theory of Professional Responsibility' (2001) 50 *University of New Brunswick Law Journal* 109.

[42] Ibid at 114 referring to D Koehn, *The Ground of Professional Ethics* (Routledge London, 1994) at 178.

[43] De Coste above n 36 at 117 referring to M Walzer, *Spheres of Justice* (Basic Books New York, 1983) at Chapter 5 – 'Office'.

[44] Note NADRAC's 2004 Discussion Paper *Who Says You're a Mediator? Towards a National System for Accrediting Mediators* recommended the development of a national accreditation system for mediators: available at www.nadrac.gov.au. For the draft system see NADRAC See also, for example, CW Moore, 'Training Mediators for Family Dispute Resolution' (1983) 2 *Mediation Quarterly* 79.

Conclusion

The practice of mediation in Australia is facing a moment of truth.[45] The mediation community must squarely address the standing of its process, along with the role of its practitioners, and their professional responsibilities and obligations.[46] In recognising mediation as a developing profession, mediation practitioners will lay claim to the good of that which they profess – upholding the fundamental principle of self-determination in dispute resolution. This in turn will provide the foundation for a more comprehensive and satisfactory approach to mediation ethics, which will remove the need for any continuing reliance on the unsatisfactory concept of neutrality.

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45 This phrase was adapted from SM Linowitz, 'Moment of Truth for the Legal Profession' (1997) *Wisconsin Law Review* 1221.

46 McKay above n 9 at 21.