Mediation – Adjudication

A view from both sides of the Bench

Central Queensland District law Association conference
Sunday 28 August 2005

INTRODUCTION.

Today I propose to firstly, give you some background to the development of ADR in Queensland and particularly mediation.

I will then recap on some of the underlying principles and concepts, and hopefully give you some tips from my experience. Although, I do not intend to speak in any depth about the micro skills of mediation.

Finally, I want to do a bit of crystal ball gazing.

In the late 80's I was the Queensland representative on the Law Council committee responsible for formulating a response on behalf of the profession nationally, to the Cost of Justice Enquiry. Coje for short. Some of you will remember that it was a particularly bad time for Lawyers as we were blamed for all the ills of the justice system. Principally long delays and high costs. It is not surprising that there was a back lash directed principally at Lawyers. Although in reality Governments and the courts and litigants themselves were also to blame for the delays and costs.

My role on the committee was to be a conduit between the Queensland profession and the Law Council. I had to travel to exotic place to each sitting of the committee and listen to the submissions of various people some of whom made the most outlandish and scurrilous accusations about the profession. I and others would then develop responses to these submissions for the consumption of the committee and more importantly the press, where necessary.

As you can imagine the Senate committee was eager to justify its existence and to promote the interests of its constituent members. Sorry, were eager to get to the truth. So sensationalism was not uncommon.

You might remember, those of you who are old enough that a former Master of our Supreme Court made a submission saying that lawyers intentionally ran cases to trial to run up billable hours at the cost of litigants and the system generally.

You have to remember that this enquiry came after one of the most fascinating times in Australia's history the 80's. This was the time of Bond and Skase and the other high flyers, big deals and even bigger money.

It was taking up to three years to get a hearing date in the Supreme Court and the cost associated with some litigation was staggering.

Regrettably the inquiry finally came to an end and duly reported. Their report filled many hundreds of pages contained in a document comprising many recommendations. It was tabled in the Federal Parliament and nothing was ever heard of it again.

However, and the point of my story is this, although the Government of the day did not move on any of the substantive recommendations contained in the report in a legislative way, I thing the enquiry did a great deal of good. For one it put the legal system at all levels under the spot light. Governments at all levels put pressure on the system. Courts looked at the way they did business as did the profession. There was I think a real mood for change. In the process there was an acceptance that there must be better ways of doing things.

A number of the innovative concepts and proposals for change ventilated in front of the committee were serious considered and in some case embraced. None more so than Alternative Dispute Resolution and in particular mediation.

It is fair to say that the ADR push was underway in Australia independently of the Coje enquiry. For instance Hilary Astor and Christine Chinkin were teaching ADR as an elective course for final year law students at Sydney University in 1986[1]. Prime Minister Hawke announced before the 1990 election his intention if elected to introduce legislation to provide a statutory framework for ADR in

[1] "Dispute Resolution in Australia", Astor and Chinkin, 1st edition at page xxiii

federal courts[2]. And the Bond people were starting up. It was the embracing of the concept by the private profession which pushed the concept along. It was after all the private profession which had to be brought along if the concept was to catch on.

The Law Society in Queensland did its bit by having a number of practitioners, with an interest attend courses at Bond University through its Conflict resolution centre taught by Professors Boulle and Wade and Ass/professor Cavanagh. This trio has taught many hundreds of Queensland practitioners since the early 1990's. I completed training in basic mediation in 1991.

Settlement week organized by Pat Cavanagh on behalf of the Bar and the Law Society was a further significant push for mediation in the Supreme Court in particular. Legal Aid also embraced the mediation model in its early intervention conference and generally. Not all practitioners were persuaded to the concept. I remember well, spending two hours on one occasion in a legal aid conference trying, to no avail, to convince a senior practitioner (now unfortunately deceased) that he and his client should take part. The conference never started.

It is interesting to note that in the early days of settlement week the committee wrote to litigants asking them to tell their Lawyers that they wanted their cases mediated. Writing to the Lawyers failed to illicit a response.

[2] ibid at page 1

The concept was further advanced when the Law Society passed a rule which requires members to advise their clients about the availability and advantages of ADR.

It should be remembered that mediation is not a recent innovation. I am currently reading the History of Sicily[3]. In it the learned authors note that Hippocrates, (not the Hippocrates, as this one was a tyrant) was persuaded to end his siege of Syracuse (the then jewel in the crown of Sicily) in favour of Kamarina (a city on the south coast of Sicily) in a mediated agreement. That was in 462 BC. The authors do not say who the mediator was, if he or she had any formal training and what style of mediator it was. Regrettably, for Hippocrates the agreement was not long lasting because he was soon back on the conquest trail and was unfortunately killed in battle.

Despite these early and humble beginnings we have now in 2005 come to a point where there is some suggestion that ADR has gone too far. The Chief Justice said recently at the symposium that mediation needed to be rained back. His concern was that not enough cases were proceeding to trial and therefore there was a lack of jurisprudence upon which litigants could base informed decisions about the prospects of their actions. Whilst with the greatest of respect I do not disagree with the Learned Chief Justice, it is clear that mediation is here to stay.

[3] "A History of Sicily" by Sir Moses Finley, Professor Emeritus of Ancient History in the university of Cambridge, Denis Mack Smith and Christopher Duggan Fellows of All Souls College, Oxford.

So in less than twenty years we have gone full circle. We have gone from too many cases proceeding to trial to too few. I know in our court at the coast and I can only assume it is a microcosm of the Magistrates courts everywhere that on a standard day we will have 10 to 12 police matters a couple of Domestic violence matters, possibly some prosecutions under other acts such as work place health and safety and maybe one civil matter.

Is this a bad thing? That is the question. My view and I admit that before my current job I made a living from dispute resolution, so I am biased, is that it is unequivocally a good thing. My view hasn't changed in my current job either, the more cases that settle the better. There is always plenty to go on with.

So, let's look at what mediation is and how it works both in theory and in practice. There is a very big difference and I will come to that shortly.

I would be surprised if there is anyone in the room that has not had first hand experience in mediation as either a legal representative or as a mediator. In any event I propose to go over some of the basic concepts including what your clients will expect from you and what everyone expects from the mediator.

Mediation **slide 1** **Dispute resolution processes**

Slide 2	**Definitions of mediation**
Slide 3	**Benefits of mediation**
Slide 4	**Indicators of non suitability**
Slide 5	**Commonly expressed concerns about mediation**
Slide 6	**Commonly expressed concerns about mediation cont.**
Slide 7	**When to use mediation**
Slide 8	**Models of mediation**
Slide 9	**mediator's role**
Slide 10	**Preparing for the mediation**
Slide 11	**Moore's Pizza**
Slide 12	**The Mediation**
Slide 13	**Termination**

Slide 14 **Termination Cont.**

Slide 15 **Termination Cont.**

Slide 16 **The Future**

SO WHAT DOES THE FUTURE HOLD?

Here is a piece I found on the web about this new process. You will realize that it is American. I say this so that you will do understanding about the hyperbole.

Why Collaborative Law?

The Collaborative Law Center (CLC) grew out of a recognition that some litigation, like nuclear war, is unwinable.

Many lawyers and clients have been saying that the costs of litigation are out of control. This is perhaps most evident in the area of family law, where the personal and financial costs of bitter court fights are staggering. Corporation counsel and small business people say the same thing: Even when we win, we lose. The costs, when measured in lost relationships, lost productivity and fees, far too often outweigh the gains.

Despite this recognition, we still get trapped by our adversarial reflexes and in our adversarial methods. When negotiations get difficult, when frustration

and perceptions of injustice grow, lawyers and angry clients instinctively turn to the courts with demands for vindication.

Over the last decade, lawyers and litigants have been using mediation to explore options and negotiate settlements with the assistance of a neutral third party. This development in civil practice has been good. Mediators can help by buffering jabs and reframing issues to make negotiations easier. But mediation is easy to avoid and, when tensions get high, it can always be abandoned.

What is needed is an antidote to the "flight or fight" instinct -- a voluntary discipline to hold us in a good faith, non-escalating, honest search for appropriate solutions. What is needed is a way to approach one another with our perception of an injustice that does not immediately polarize and trigger obligatory denials and defenses. Collaborative law offers such a discipline and such an approach.

And as spelled out in the CLC's detailed Participation Agreement, *collaborative lawyers and their clients approach each other and their disputes with a written commitment not to sue or even threaten to sue. In signing the Participation Agreement, both lawyers and parties pledge to cooperate in a good faith effort to appraise and resolve the dispute fairly, and to voluntarily disclose relevant information. Should one of the parties insist that its lawyer behave inconsistently with these commitments the lawyer will withdraw.*

The article goes on to say,

Aggressive arguments will be less effective than attentive listening. The skills needed for the effective practice of collaborative law will not come easily or naturally to everyone. Nor should potential defendants assume this process will yield them cheap settlements of would-be lawsuits. Well-represented parties will not throw away their rights and remedies just to avoid court. What parties can realistically hope to do is trade the antagonistic feelings that result from a hard fought battle, for a genuine sense of resolution. They can hope for significant savings in the transaction costs of litigation. They can expect much greater compliance with the terms of the collaboratively reached agreement than the terms of an imposed order. And they can expect a continuing, if not improved relationship with the other party.

The following really encapsulates the concept,

The Agreement creates a significant disincentive for them to break this pledge. Under the Agreement, if any party or collaborative lawyer takes a formal legal adversarial action (with limited exceptions designed to temporarily maintain a status quo or protect some critical interest of a party) all collaborative lawyers (and their firms) are automatically disqualified from further representation of the parties and from receiving further remuneration from the case. This automatic disqualification rule is enforceable by courts. In the event of such disqualification, the collaborative lawyers will assist the parties in transferring the case to litigation counsel.

Two other rules in the Participation Agreement deserve special mention. They spell out the parties' obligations (a) to disclose crucial

information to one another and (b) to maintain the confidentiality of such disclosures.

I am very glad that I have a thorough understanding of the mediation process and that I have been involved in ADR at all levels including as mediation, Solicitor acting for a party in mediation, teaching, training and coaching mediation methods and skills. After six months on the bunch I can say that this experience has been of substantial benefit to me. Particularly in the Small claims area of which there are plenty on the Gold Coast but also in all areas of dealing with “clients” of the court.

My friends Like Laurance Boulle and John Wade say I have gone over to the dark side and to some extent I feel that I have. Another way to look at it is that I bring my experience onto the bench. On the Bench as anywhere people have to be listened to and more important they need to feel that they have been listened to.

Far from trying to rein back mediation and ADR generally it should be enhanced and promoted as an essential tool in the lawyer’s armory.