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Comment

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In a previous issue of the Bulletin (vol 1, no 10), David Bryson, writing on the experience of Workcover conciliations in Melbourne, made suggestions for ways in which ADR practitioners could manage the multiple roles sometimes required of them. There are many other examples of medarb being practised in Australia. Here Bernadette Rogers responds to the Bryson article in the light of the ADR practices conducted by Legal Aid Queensland.

' … those of us who grew up practising in a medarb model … were not aware that there was anything objectionable about medarb until those schooled in the era of orthodox mediation principles and practice assured us that this was the case.'

For those of us who grew up practising in a medarb model, Kressell and Pruitt (*Mediation Research: the process and effectiveness of third party intervention*, Jossey-Bass, San Francisco 1994) were stating the obvious in highlighting the value of mediator power in dispute resolution. We were not aware that there was anything objectionable about medarb until those schooled in the era of orthodox mediation principles and practice assured us that this was the case.

Legal Aid Queensland has conducted a conferencing program based on medarb principles since 1989. The experience of practitioners in that program is consistent with the observations made in relation to the Workcover experience.

At Legal Aid Queensland applicants for aid in the area of family law are, with few exceptions, required to attend a Legal Aid conference before they are granted aid to institute proceedings in the Family Court.

- The conferences are conducted by one conference chairperson drawn from a panel comprising Legal Aid officers, private solicitors and social workers. On rare occasions two chairpersons are used.
- The conferences normally last about two hours, but can be extended to three, or even four.
- The conferences are compulsory for Legal Aid applicants but are not compulsory for non-funded participants. It is common for both parties to a dispute to be applicants for Legal Aid and therefore compulsory attendees.
- Legal Aid provides funding for the applicant(s) to be represented by a solicitor at the conference.
- The conferences are usually conducted face to face but may be conducted by telephone when necessary as a result of geographical distance, domestic violence or issues of security.
- The objective of the conference is to assist the parties to reach an agreement in relation to residence and contact which can be prepared as consent orders by the solicitors and filed in the Family Court.

Where no agreement is reached, the conference chairperson is required to make a recommendation to Legal Aid about granting or continuing aid to the Legal Aid applicant. This is not the same as making a determination on the substantive issues in dispute. The parties can still proceed to Court to have their issues judicially determined. In practice, however, where a party does not continue to receive aid, their options are to source funds to pay for a private solicitor (usually from other family members) or to represent themselves. Where neither option is practicable, the administrative decision relating to funding will determine whether or not the party can proceed to Court.

While the advice from the conference chairperson is termed a recommendation only, it is rare for grants officers to overturn the recommendations of the conference chairperson.

There will always be a risk in a process of this nature that the conference chairperson will rely on the 'big stick' of the power to make a recommendation, rather than on facilitative skills. The settlement rate in conferences is extremely high and recent statistics indicate that 88 per cent of conferences arrive at an agreed ➢

➢ outcome. It is hoped that an evaluation of the conference process can be made in the near future which will study the satisfaction rates of participants and the durability of the agreements.

The guidelines identified by Bryson to manage the combination of roles are fully applicable in the Legal Aid situation and provide an excellent framework for all practitioners of a medarb model.

A further issue for discussion is the attitude of the facilitator in a medarb process. It is submitted that as a general rule the amount of coercion exercised by the facilitator in the mediation component should be in inverse proportion to the power vested in the facilitator and the extent to which participation in the process is voluntary for the participants.

In other words, where parties are required to attend an ADR process they should not be pressured into reaching an agreement by the interventions or strategies employed by the facilitator. The arbitration power that is vested in the facilitator is more than enough pressure for the parties to be exposed to. If it becomes necessary to exercise a power to make a decision, then that is preferable to the parties feeling compelled to reach an agreement which is supposed to be voluntary but has only been reached out of fear of what the facilitator in a decision-making role might choose to do.

It is therefore argued that practitioners in medarb models need to be extremely skilled to avoid the possibility that the forum will become an abusive process. The satisfaction rate indicated by Workcover would certainly suggest this is not the case in that program. However, in any medarb program there needs to be ongoing monitoring and evaluation to ensure the standards established by the program are being met for the protection of clients. ●

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5th National Mediation Conference 17-19 May 2000: call for abstracts

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Presentations are encouraged in any of the following modes: as papers, panel presentations, posters, workshops and group facilitation sessions.

With the conference perspective in mind — past achievement and future promise — the committee encourages abstracts on:

- native title and indigenous models of disputing
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- practice issues

Authors and organisations wishing to submit a paper or poster to be considered for inclusion in the program should provide two copies of a typed abstract of the paper (approx 200 words) on A4 paper, with the title of the paper and name, position, organisation and contact details of the author and the presenter clearly marked.

The acceptance of papers will be at the discretion of the committee, with successful applicants to be notified in writing by Conference Organisers Pty Ltd. All accepted papers will be included in the conference proceedings and distributed to delegates. Abstracts should be sent to:

5th National Mediation Conference
PO Box 1127
Sandringham Victoria 3191
Tel: (03) 9521 8881
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Deadline for abstracts: 17 September 1999.