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## International trends in dispute resolution a US perspective

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# A The Rulletin

The monthly newsletter on dispute esolution

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#### **Mediation: Past and Promise**

# International trends in dispute resolution — a US perspective

#### Sharon Press

This is an edited transcript of the key note address by Sharon Press, Director, Dispute Resolution Centre, Tallahassie, Florida (DRC) and President of the International Society of Professionals in Dispute Resolution (SPIDR) given at the 5th National Conference on Mediation given at Brisbane on Thursday 18 May 2000.

My conference talk (and this article) will focus on some broad themes — trends and expectations based on my vantage point both as President of SPIDR and as director of an ADR program for the State court system of Florida . If you are from the land 'down under', my perspective could be thought of as 'up over' — in some ways a bird's eye view of the field of ADR, but in particular, mediation.

We have the great fortune of living in some very interesting and exciting times. Some of us have been involved in ADR type or mediation specific activities for nearly two decades or more, while others are more recent converts to the movement — but none of us can disagree that there have never been more opportunities and challenges to our chosen field than ever before. In the last issue of the Bulletin, Professor Boulle recounted the Australian mediation story and advised us 'to mind the gaps' (see 2000 3(1) ADR 3). I ask that you keep his themes in mind as you read my article.

I will begin by identifying six trends

which I have observed in the field of mediation, then discuss some implications of these trends and give some personal thoughts.

The six trends are:

- (1) institutionalisation;
- (2) regulation or codification;
- (3) legalisation:
- (4) innovation;
- (5) internationalisation; and
- (6) co-ordination.

#### Institutionalisation

I'll begin with what I consider to be the largest trend of recent years. It speaks to the success of the field in that we have achieved a great deal of institutionalisation. When I use the term institutionalisation, I mean not only an organised use of mediation but also a familiarity by the general public with the term and use by the general public of mediation as its own institution.

In the United States, as in Australia, organised mediation programs have their roots in community based centres. The initial cases were minor quasi-criminal disputes of the 'neighborhood type'. The notion of party and community empowerment were key components and goals of these programs, as was the hope that resolution of these disputes would be at an early stage in the process, thus alleviating continuing problems which could fester and grow into major >



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➤ disputes (rather than the minor ones they were initially).

The early successes with these programs led to greater institutionalisation — among court systems (both State and federal), businesses, universities and agencies, to name a few. For example, I have had the privilege of running the Florida State court mediation (and arbitration) program for nearly 12 years. I believe that the experience in Florida is a microcosm of a trend which is happening in many different venues. For example, within Florida, mediation is used within the State courts (overseen by the DRC), the public policy arena (overseen by the Conflict Resolution Consortium), schools (through peer mediators), federal courts and businesses (in internal systems).

There are some very cogent reasons why mediation has become more institutionalised. For one, the process works. People like mediation. The parties, be they individuals, corporations, insurance companies or whoever, like it because they are given a voice and an opportunity to actively participate in the process, or because their situation can be kept private, or because they won't spend as much resolving it. But these advantages only apply after the parties know about mediation. Many parties would not know about mediation but for the strides we have made in institutionalisation, which gives individuals the opportunity to experience what they may not have thought to ask for themselves.

Lawyers like mediation because it is a low risk way for them to explore settlement; but again, there is a stigma which often attaches to suggesting a negotiation strategy. This too can be overcome by institutionalisation: creation of a norm in resolving disputes, or mandating use of mediation.

Judges like mediation because cases disappear from their dockets earlier than they used to and do not reappear as appeals.

As mediators, we have sought institutionalisation in order to help spread the word and make it easier for people to learn of mediation and, more importantly, to use it.

#### Regulation or codification

In order for ADR to be used appropriately and effectively, there is a need for

parameters, definitions, codes of conduct and so on to be adopted. Thus we see the next major trend — that of increased regulation surrounding mediation.

A few quick examples. In Florida, I administer a State court program which, if not the 'best', is certainly one of the 'most'. I say that because of the vast infrastructure which has been created to support this program. Specifically, there is currently a governing statute, court rules of procedure, a certification scheme for mediators, a code of conduct for mediators, a grievance procedure for complaints against those certified mediators, mediation training program standards and a grievance body for complaints against them, and now continuing mediator education requirements. All of that has developed within the last 12 years — starting with institutionalisation via State legislation.

Another example: over the past two years an interlocking committee of the American Bar Association (ABA) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) has been working to develop a uniform mediation Act. These drafters are trying to create a single Act which would cover all types of mediation (in all types of fora) in order to provide predictability for disputants and uniformity in application. A primary focus has been the area of confidentiality. In their research, the reporters for this Act turned up over 2500 statutes in the United States alone which contain legal rules affecting mediation! On confidentiality alone, there are over 250 different State statutes.

These existing statutory provisions vary not only from State to State within the US but also within any given State. As mediators' practices spread across subject matter and boundaries, it is increasingly more common that a mediator needs to be aware of numerous different provisions so that he or she can appropriately explain clearly to the parties the legal constraints of mediation (for example as it relates to the confidentiality of the session and the enforceability of the agreement). With mediations conducted over the internet where everyone is in a different place, it may not even be clear as to which laws and rules apply. So the decision was made to try to develop a uniform Act  $\rightarrow$ 

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rightharpoonup one which could be adopted by all States and provide not only uniformity, but also predictability.

Personally, I find this trend very perplexing. While I understand and appreciate why there has been increased attention given to development of rules, procedures and uniformity, I worry about the impact on what we in the field have loved — this flexible process called mediation. I believe that each addition to mediation in Florida was a necessary step to add, and I have struggled to preserve flexibility and program differences while still maintaining the integrity of the courts. The courts need to guarantee some uniformity of service and provide some assistance to the parties whom the court orders (or refers) to mediation. In fact, I would argue that if one sets up an institution — particularly if there is some mandating of use of the system then certain obligations and responsibilities attach. And thus the need for and obligation to create rules, procedures and protections for the public.

Personally, I worry about the creation of a 'uniform' Act to govern all different types of mediation. Over time, I have become increasingly convinced that there is less and less that is uniform about this process. Even in a place like Florida, which has a lot of regulation, we have recognised the differences even within the single domain of the courts, where we have different procedural rules, training and qualifications for county court, family, dependency and circuit mediators.

#### Legalisation

Another aspect of the trend towards increased regulation is the tendency or trend to think of mediation in more legalistic terms, which I would call the third major trend in mediation. The following are just a few examples.

- 1. There is an increased amount of case law developing around mediation. This is in and of itself an interesting phenomenon, because some of the initial support for mediation grew out of a dissatisfaction with traditional court processes and a desire to avoid the courts. Now it is spawning its own case law.
  - 2. There is a trend towards taking

mediation in an evaluative direction. Personally, I have difficulty with the term 'evaluative mediation' since by its very nature and definition, mediation is not an evaluative process. Some would say this trend is linked to the advent of lawyers becoming more involved in the process of mediation and in fact becoming mediators, but in many ways the reason for the trend is less important than the fact that it exists.

3. My final example of this legalistic trend is in the area of 'unauthorised practice of law' or UPL. While there have only been very few cases so far in the US, it does appear to be on the increase. For the most part, the UPL cases have arisen against family mediators, specifically in the area of writing agreements.

Interestingly, both SPIDR and the ABA Section on Dispute Resolution have each seen fit to organise committees to look into this issue. I will return to this trend in my conclusion.

#### Innovation

At the same time we have seen the developments/trends towards institutionalisation, regulation and legalisation, we have also seen increased experimentation or innovation in different areas — the paradoxical trend I mentioned earlier. One reason is that there has been increased awareness that the traditional criminal justice system is not working. The idea of building more prisons as a way to handle the problem just isn't effective, and there is now increased attention being paid to theories of restorative justice and mediation activities in the criminal area — ideas and concepts which I understand that Australia is not only very familiar with but with which this country has a great deal of experience. The more recent move in organised mediation had been in the civil area in which most of the institutionalisation took place.

But even more significantly, I believe that the expansion in different areas can be traced to the fact that mediation, by its very nature, will continue to move in new areas in innovative ways — to constantly push the envelope. By definition, mediation will defy complete codification. Its inherent flexibility and strengths will continue to grow and >

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'... I believe that the expansion in different areas can be traced to the fact that mediation, by its very nature, will continue to move in new areas in innovative ways — to constantly push

the envelope."

➤ applications will be discovered in new areas. This same quality of mediation can also be traced as the source of a resurgence in community based mediation programs and even 'transformative mediation'. In many ways, the old adage 'if you wait 20 years, all ideas become new again' describes this trend most aptly.

In addition, the world is becoming smaller — we now have incredible ability to communicate with each other, learn from each other and spread ideas across time zones and boundaries. I was struck, in preparing for this visit, how much the internet and email have changed our lives. To start with, I was contacted via email about my potential interest in presenting at this conference. I sent all of my materials for this conference, including my picture, which was a digital one, via email. I was able to communicate fairly regularly with a number of people here. My husband and I regularly checked the weather and read up on sites about things to see and do while we were here. My point is that information readily flows across borders — innovations in one place in the world quickly spread to others. Add to this the number of professional associations and the plethora of conferences one can attend — it is mind boggling. Just looking at the wonderful variety of conference sessions here will give a sense of what I am talking about.

The intellectual property — the newsletters, magazines and scholarly journals of this field — is also expanding by leaps and bounds; so fast, that it is almost impossible to keep up with it. In fact, many journals and conferences are placing items on the internet rather than dealing with hard copies which are expensive to print and are not subject to an easy word search.

With all of this, it is easy to see how, as experimentation and new ideas emerge, these ideas are read about via the internet or heard and discussed at a conference and then spawn creative thinking. Soon there is another permutation as appropriate modifications are made to make an idea work in another place, another context, another arena and the information circulates again. Thus there are paradoxical dual trends of the increased desire for institutionalisation leading to the increased

need for regulation and, at the same time, the increased development of innovations.

#### Internationalisation

The fifth and related trend is that of the internationalisation and computerisation of the field. As I mentioned previously, the world continues to get smaller and smaller as our means of communication get faster and easier. One result of this is that disputes are no longer confined by national boundaries and more and more mediation is seen as an appropriate way to resolve those disputes. This makes sense because of mediation's ability to create norms and rules, rather than traditional processes of dispute resolution for which one would first need to agree on the law to be applied.

The other aspect of this is the growing use of technology. Some of the ADR advances are in technology and not mediation processes. There are in fact mediations conducted where the parties never are face to face and all discussions are done via email or real time communciations via the internet. E-bay, one of the largest internet auction sites, has contracted with a group called square trade to mediate all of the disputes which arise — and that is just one example.

#### Co-ordination

The sixth and final trend I wish to identify is that of co-ordination.

The first 25-30 years of organised (institutionalised) activity within the dispute resolution field led to a proliferation of mediation and dispute resolution professional associations and organisations in the US, many purporting to be international. I mention these to you to give a sense of the sheer numbers which now exist. Based on this, I am sure you can understand why a few years ago, many of the organisations began discussions on a few different fronts based on a few different imperatives (one being the urging of a major funder of several of the organisations).

At this point, SPIDR, the Academy of Family Mediators (AFM) and Conflict Resolution Education Network (CREnet) are in the final stages of a negotiation to lead to merger, a negotiation I have had the

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➤ privilege to participate in. I say privilege despite the tremendous amount of work involved because I believe that we have conducted ourselves showing the best 'walking of our talk' by listening to the needs, interests and concerns of our colleagues and working together to address them.

I believe that the consolidation of these organisations presents a very exciting opportunity for the field and it is through this activity that I wish to tie together the trends I have identified.

In the US we have a saying: 'be careful what you wish for', the implication being it just might come true. I would add the addendum that you then have some responsibility to ensure that what you wished for is in fact what you wanted.

Many of the trends I have identified are connected and are in fact outgrowths of our wishes as mediators for greater use and acceptance of our trade — greater institutionalisation has achieved that. This has led to greater regulation and the greater attention has led to increased legalisation.

The good news is that mediation has continued to try to move in innovative ways supported by the improvements in technology and to return to its core — that of providing opportunities for people in dispute to connect with each other, to share their concerns and their needs and to figure out for themselves what to do about their problems.

But I submit to you that in order for mediation to survive and thrive it will take vigilance on our part.

In fact, as a profession (which is also an interesting topic by itself) we can only protect mediation by protecting the public. I believe we protect the public by being clear and direct on what mediation is — and more importantly, what it is not.

Despite the strides we have made towards acceptance and use of mediation, we still have a way to go. It is not acceptable for people to use the term mediation if in fact the services being offered are *not* mediation. As mediators, we do not help the situation when we use confusing terms such as 'evaluative mediation' or endorse the concept that evaluative processes are mediation at all.

I believe that the more we allow the blurring of the process, the more difficulty we will have in all kinds of ways. To me, this is more than a matter of semantics. I acknowledge the advisability and usefulness of the more evaluative processes at times, but it seems to me that the consequences of accepting them as 'mediation' have some inherent problems.

Taken to its logical extreme, if you subscribe to the theory that anything goes so long as you call it mediation, suppose an unsophisticated party attends and participates in a 'mediation' in which the mediator evaluates their case and tells this party what to do. Being unsophisticated, the person believes this is what they must do even though they didn't want to and it didn't meet their needs. They tell their friends that the process of mediation is terrible, not that they didn't like their mediator — why should they, because anything goes?

I also believe that the special protections that have been afforded mediation, for example the high level of confidentiality, only make sense if the process is really mediation — otherwise people could be harmed in the process without any recourse. This has implications for the uniform mediation Act under development, which in turn has implications outside the US, because other countries are watching this effort and waiting to adopt the work.

On the UPL issue: I believe some of the evaluative processes may be the practice of law. If one accepts that process as a mediation then you arrive at the unfortunate conclusion that only lawyers can be mediators. I think that it is the wrong direction for this field to be heading. Some may say that 'the toothpaste is out of the tube' or some other description indicating that it is too late to do anything about this, but I do not believe we should give up this early.

We must reclaim the term mediation and set standards to protect it; we must do more to inform the public of their options and provide them with the opportunity to exercise selfdetermination in an informed way; and we

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must do so as a mediation profession for ourselves.

Never have we seen so many wonderful opportunities and never have we been in a more critical defining time.

As is my nature, I am optimistic that the http://epublications.bond.edu.au/adr/vol3/iss2/1 fultire is bright and promising, but that will

only be the case with our collective vigilance. I look forward to embarking on this quest with you. lacktriangle

Sharon Press, Director, Dispute Resolution Centre, Tallahassie, Florida and President of the International Society of Professionals in Dispute Resolution (SPIDR).