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Mediation Services in Australia

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Comment

Four Evaluation Studies of Family Mediation Services in Australia

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Over the last century, it has been very rare for any systematic attempt to be made to evaluate customer satisfaction with lawyering or judging in Australia or elsewhere.¹ Of course a century of anecdotes abound.

By way of dramatic contrast, other groups of skilled helpers are subjected to repetitive systematic surveys which reflect customer perceptions. In Australia and elsewhere, junior, pioneering and diverse work groups known as “mediators” have been examined by numerous systematic evaluations in the short decade or two of their existence. This note will comment on four recent evaluations of family mediation services in Australia, namely:

- (1) Sophy Bordow and Janne Gibson, *Evaluation of the Family Court Mediation Service*, Family Court of Australia, Research Report, No 12, 1994 (referred to as the “1994 Family Court study”), 180 pp.
- (2) L Moloney, T Fisher, A Love and S Ferguson, *Federally Funded Family Mediation in Melbourne: Outcomes, Costs and Client Satisfaction*, AGPS, Canberra, 1995 (1995 Melbourne study), 108 pp plus 92 pages of appendices.
- (3) L Moloney, T Fisher, A Love and S Ferguson, *Managing Differences: Federally Funded Family Mediation in Sydney: Outcomes, Costs and Client Satisfaction*, AGPS, Canberra, 1996 (1996 Sydney study), 250 pp plus 200 pages of appendices.
- (4) Legal Aid and Family Services, *Research/Evaluation of Family Mediation Practice and the Issue of Violence*, AGPS, Canberra, 1996 (1996 Violence study), 159 pp.

The aims of the first three studies are reflected in the words of the 1996 Sydney study:

- to describe the clients of the program, the mediation service, the outcomes and cost;
- to determine the effectiveness of the program in terms of client satisfaction, cost and outcomes, and the durability of agreements;
- to compare the mediation services, and the quality, costs and effectiveness of models of mediation in use, in particular co-mediation and the use of sessional mediators;
- to compare the cost of mediation services with the cost of litigation in the Family Court.

Predictably, the 1996 Sydney study added a further aim:

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¹ P McDonald (ed), *Settling Up: Property and Income Distribution on Divorce in Australia*, Prentice Hall, Melbourne, 1986 (a longitudinal study of 723 clients in Melbourne indicated a high level of satisfaction with family lawyers unless and until the conflict actually entered a courtroom).

to understand the benefits and advantages of different models of mediation, and to identify existing practice and response in relation to cases identified as appropriate/inappropriate for mediation, particularly those involving domestic violence.

This addition reflects the worldwide diagnostic question - what models exist; and what models are more likely to be “effective” in particular classes of conflict?

The first three studies between 1994 and 1996 surveyed clients from four service providers all supported financially to a considerable extent (totally in the case of the Family Court) by the Federal Government. These agencies were Centacare, Relationships Australia, Unifam and the Family Court. All new clients to all agencies in a designated time period were invited to participate (1994: 149 couples; 1995: 318 couples; 1996: 144 couples) in completing an extensive written questionnaire and telephone follow-up. The writer encourages readers to read these four reports, which are impressive documents.

From the mine of information contained in the reports, a few gems are selected randomly below.

Who is currently choosing mediation?

Clients who are choosing mediation appear to be more middle class, more educated and with more children than the average divorcing population in Australia. This will continue to fuel the speculation that the problem solving or facilitative model of mediation is particularly suitable to articulate and cognitive families; and for couples who need to keep communicating for years about children's schooling, illnesses, finances and visiting schedules.

This speculation also raises the question of whether another, perhaps more evaluative model of mediation, would be more popular (if publicised and understood by referral brokers) with less educated families, and families from other cultural backgrounds.

Agreement rate

The first three studies found that the mediation process used led to the full agreement between 44 per cent to 71 per cent of cases, and partial agreement in 11 per cent to 39 per cent of cases, between 17 per cent to 18 per cent failed to reach any agreement at the mediation meetings. Generally, higher percentages of full agreements occurred in disputes over children, as compared to disputes over finances. In the 1995 Melbourne study, there is a moving chapter which records narrative impressions of mediation (both positive and negative) from 12 of the clients.²

Satisfaction levels

What is the meaning of “success” when any professional provides a service to a customer? Obviously, there are many possible criteria, including:

- Would you refer a friend to that service?

² 1995 Melbourne study, Part II, Section I, “Personal Experiences of Mediation: Narratives from a Sub-sample”, pp 1-25.

- Would you use the service again?
- Were you listened to?
- Did you have a chance to say everything you wanted to say?
- Was the substantive outcome within the range of outcomes achievable in a court?
- Did the agreement endure? For how long (compared to agreements reached by other methods)?
- Was the service cost effective (compared to other services) etc?

These studies all demonstrated a customer satisfaction level of these particular mediation services which would be the envy of most personal service providers.

It is important to note that the *substantive* outcomes were rarely different from predicted outcomes in court. However, nearly three quarters of users would use the process again; and liked the *process*, even if some did not like the substantive outcome. Early mediation propaganda suggested that an additional benefit of the process would be that disputants would require future problem-solving skills. The couples in these studies however rarely agreed that the short mediation intervention had caused changes to their long term problem-solving skills.

The enthusiastic endorsement of these agencies by their customers provides food for thought for policy planners who are both trying to cut costs and instill respect for government-funded conflict management systems. However, it should be emphasised that this high customer satisfaction rate was attached to a particular high quality, low cost to customer, problem-solving model of mediation which is not replicated by all service providers.

To balance any diagnostic naiveté, or professional euphoria, a few in each study said that the mediation process had made things worse, not better. There was a correlation as those who began the mediation with low expectations of assistance, also tended to have lower levels of satisfaction. This outcome provides a diagnostic and ethical dilemma for mediation intake officers should those with low expectations be screened out?

Alterations to agreements

These studies showed clearly from follow-up phone calls to participants that altering family agreements is a “normal” event. Within one year of settlement at mediation, about one third (only 14 per cent in the 1994 study) found it necessary to change the terms of the agreement. Importantly, these changes were made without the agreement “breaking down” or “being abandoned”.

This finding may be common sense for anyone living in an intact, flexible and adapting family, however, it has vital implications for all conflict managers whether counsellors, mediators or lawyers. For example:

- a file never closes;
- clients should be educated to understand that alterations are “normal”;
- clients should be encouraged to negotiate about by what process future changes should be discussed.

Disclosure

The studies confirmed what all experienced negotiators know - the couples were able to work together in negotiation even though frequently there was a belief that full and frank disclosure had not been made.

Cost of mediation

Three of the studies attempted to calculate the average cost of *providing a* complete mediation process to a couple in conflict. The costs of *delivery* between the four different providers ranged between \$35-54 per hour. The average cost of delivery per case ranged between \$831 and \$3686. Measuring cost of provision is obviously an extremely sensitive and difficult task particularly:

- When comparing four government supported mediation agencies. The obvious unsophisticated implication might be that the government will continue to fund the “cheapest” agency.
- When there is no standard method between agencies of measuring cost of facilities, support staff, telephones, paper, etc.
- When there is a lingering concern that different agencies may receive “bunches” of clients with different levels of conflict - particularly if referred to different agencies by the state Legal Aid Commissions.
- When the provider's cost of mediation cannot be compared accurately to other conflict management services such as Legal Aid Conferencing, lawyer conducted negotiation, or judicially imposed outcomes. This is particularly when these other services have:
 - (i) Some costs are covered by the user, not the provider (for example, court filing fees and advocates).
 - (ii) There are no comparable measures *of outcomes, such* as durability and respect. There is no point measuring money in, if there is no balancing measure *of quality out*.

The costs of longitudinal studies of comparative costs and quality of conflict management services, make it inevitable that power, fashion, educated guesswork and anecdote will govern policy decision making in the future, in relation to public funding of the range of competitive conflict management services.

The mediation model

All three studies (1994, 1995, 1996) concluded that the model of mediation used at each agency should be retained. However, it should be repeated that the models surveyed were sophisticated. Elements included:

- co-mediation with mediators of different gender and professional background;
- facilitative or problem solving process;

- negotiation on all problems raised, not just selected areas of conflict;
- extensive intake procedures and documents;
- debriefing and frequent training of mediators;
- co-operative involvement of lawyers;
- mediators familiar with family law, and the dynamics of separation;
- protocols and expertise in relation to allegations of violence and various other imbalances of power;
- heavily subsidized by the government to reduce user costs.

Many mediation services do not have the expertise, tradition or resources to emulate this model.

Inevitably, cost-cutting accountants and politicians perceive this model to be expensive. (Since the surveys have been completed, Family Court mediation services have been substantially curtailed.)

However, these studies again demonstrate the old adage that “quality in leads to quality out”. It is not clear for how long budget or “accelerated” models of mediation can produce agreements, durable agreements and client satisfaction, particularly in the convoluted dynamics of family separation.

Family violence

There is a substantial body of literature which discusses whether any model of mediation is suitable where there has been occasional violence ranging up to systematic violence between the disputants. A few early writers suggested a prohibition on any form of mediation where any violence was discovered during intake or the actual mediation meetings. These four studies conclude otherwise, though with many recommended safeguards in place.

For example, the 1996 Violence study surveyed 12 mediation service agencies around Australia. Thirty-one per cent of the women who took part in the survey stated that “I had experienced physical violence from my partner”.³ Almost three quarters of the women surveyed acknowledged some degree of fear about going to the mediation and/or some historical abuse by their partner. This is yet another finding which indicates that the incidence of fear and violence in families in Australia is remarkably high.

The 1996 Violence survey summarised as follows:

The research indicated that there was generally less pre-mediation anxiety, more positive experience of the mediation process and a higher level of satisfaction with agreements where women:

- reported that they had been subject to emotional abuse or one off physical abuse or threats only;
- had been separated from their ex-partners for a considerable time;
- had received personal counselling (as opposed to *relationship* counselling) to deal

³ 1996 Violence study, p 210.

specifically with the abuse;

- reported that they no longer felt intimidated by their ex-partner;
- felt confident in their legal advice and knew what they could reasonably expect from a settlement;

and where *mediators*:

- asked specific questions about domestic violence or abuse, including non-physical types of abuse or harassment;
- offered women specific guidance in considering the possible impact of violence or abuse on the mediation process;
- offered women separate time with the mediator to disclose or discuss any concerns before, during and after mediation sessions; worked as a gender balanced co-mediation team;
- demonstrated that they understood the woman's concerns both in and outside the mediation session by implementing specific strategies to deal with those concerns;
- demonstrated that they could control abusive behaviour in the session and/or assist the woman to deal with it.

Where women had experienced more substantial or ongoing abuse, had only recently left the relationship and were in a state of crisis, the mediation experience was generally less satisfactory. It also appears that in some cases mediators may seriously have misjudged the appropriateness of the case for the mediation at all, based on the level and currency of abuse later reported to the researchers. The appropriateness of mediating on issues of *child access and custody* in cases with a history of abuse may need particular review.⁴

Conclusion

These four impressive Australian studies are further evidence of the social science foundations of mediation services. They also provide further systematic and qualified support to the many claims of “success” of certain types of family mediation. Such studies offer a challenge to other conflict resolvers such as lawyers and judges, to develop equivalent systematic studies into the behaviours and patterns of “success” of lawyering and judging.

⁴ 1996 Violence study, pp 122-3.