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Procedural justice in mediation: an empirical study and a practical example

Jill Howieson

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Procedural justice in mediation: an empirical study and a practical example

Jill Howieson

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In mediation there is often tension between achieving a fair outcome and maintaining a fair procedure. In court connected mediation procedures the focus is often more on the outcome of the mediation in terms of whether or not a settlement is achieved. However, recent research shows that mediators should not view the fairness of the procedure as a secondary concern. This is because it has been shown that in third party dispute resolution procedures the use of a fair procedure can increase the satisfaction of all concerned and can enhance disputants' perceptions of overall fairness and acceptance of the decision, regardless of the outcome.¹

Procedural justice

This capacity of the use of a fair procedure to enhance the fairness and satisfaction judgments of those who encounter the procedures is termed *procedural justice*. In simpler terms, procedural justice means the perception of the fairness of the procedure.

Procedural justice is to be distinguished from *distributive justice*, which refers to the perception that there has been a fair apportionment of outcomes, or the perception of the fairness of the outcome. What the researchers have found is that if disputants perceive that the procedure was fair, they are more likely to be satisfied with the dispute resolution experience, to consider that the overall resolution of their case was fair, and to accept the outcome of their case, regardless of how they perceive the outcome in terms of its fairness and favourableness.²

Relationship with the third party

The research has also shown that it is the disputant's evaluation of the relational and interpersonal aspects of the dispute resolution procedure that primarily determines the disputant's perception of the fairness of the procedure.

The perception of a fair procedure is strongly related to whether the disputants believed that they had had a say in the proceedings and their views had been listened to and considered by the third party ('voice').³ Later research has also shown the interpersonal aspects of the third party/disputant relationship and the perceived fairness of the third party who is conducting the procedure also strongly influence the disputant's perception of procedural justice.⁴

The interpersonal and relationship variables that are so strongly related to procedural justice judgments are status recognition, neutrality and trust.⁵

Status recognition

Status recognition refers to people's perceptions of their status within a group. When the third party treats the disputing person with politeness, dignity and



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respect, it gives the disputant a feeling of positive social status and thus enhances his or her perception that the procedure is fair.

Neutrality

Neutrality refers to the extent that the third party creates a 'level playing field'.⁶ If the third party acts dishonestly or with bias, the disputant may sense discrimination and thereby perceive the procedure as unjust.

Trust

Trust refers to beliefs about the intentions of the third party — whether one can trust that the third party will behave fairly. If the disputant believes he or she can trust the third party, this will enhance the perception that future interactions with the group, or with a similar third party, will be fair.⁷ This in turn fosters the perception of procedural justice.

Empirical study

While most of this line of research had been conducted into legal dispute resolution procedures where there is a third party adjudicator, very little research into procedural justice concerned ADR procedures such as mediation. In order to test the theory of procedural justice in ADR settings, two studies into the pre-trial conference procedure in the Local Court of Western Australia were conducted in 2000 and 2001.⁸

One hundred and three self-represented litigants, 34 legally represented litigants and 52 lawyers who participated in a pre-trial conference were surveyed on their perceptions of the fairness of the pre-trial conference and on aspects of their relationship with the Clerk of the Court, who acted as the mediator or facilitator.⁹

Satisfaction

The results of the survey showed that both procedural and distributive justice were highly correlated with participant satisfaction; namely, the higher the participants rated the procedural justice and the higher they rated the distributive justice of the pre-trial conference, the higher they rated their overall satisfaction with the experience.

Voice and status recognition

The results also showed that the voice and status recognition variables were most strongly correlated with the participants' perceptions of procedural justice and were also correlated with their perceptions of the distributive justice of the conference. The higher the litigants and lawyers rated the *voice* variable and the variable of *status recognition*, the higher they rated the procedural and distributive justice of the pre-trial conference. The variables of *trust* and *neutrality* were also correlated with the participants' perception of procedural justice but to a lesser extent than the variables of status recognition and 'voice'.

This means that those participants who viewed the conference as taking place within a polite, respectful and dignified atmosphere (status recognition), and who thought the mediator gave them the opportunity to say what they wanted to say and considered their views ('voice'), were more likely to perceive the conference as fair and were more likely to be satisfied with the conference than those who did not view the mediation conference in this way.

Settlement

Another clear result of the study was that self-represented litigants, legally represented litigants and lawyers all desired settlement. Altogether, out of the entire sample across the two studies of 189 litigants and lawyers, only 18 participants said they would have preferred to go to trial. Thus more than 90 per cent of the entire sample wanted a settlement to their cases: a clear result in favour of settlement.

Practical implications

The practical implications of these results are that court mediators and facilitators must attend to the procedural aspects of mediation conferences, such as 'voice' and status recognition, while at the same time promoting settlement. This means that the court mediators and facilitators must ensure that having a 'successful' (in terms of settlement) mediation conference does not occur at the expense of a mediation conference that is not perceived as fair.

To help to ensure that participants view both the procedure and the outcome as fair, it is imperative that the courts provide for ADR procedures that do not detract from the participants' perceptions of their social status and their ability to speak out. This is because, as the research shows, an outcome or settlement may in objective terms appear fair and just, but if the disputant perceives that the elements of procedural justice are missing, it is possible that the disputant will subjectively view the settlement as unjust and unsatisfying and will not be willing to accept the outcome, regardless of how favourable the outcome is.

A practical example

In the recent WA Supreme Court decision of *Pittorino v Meynert*¹⁰ before Justice Scott, an agreement reached at a mediation conference came under challenge. Not only is the case of interest because it was the first time a mediation agreement had been challenged in WA, but also for its illustration of the theory of procedural justice as outlined.

At this point I must acknowledge that, not having been present at the *Pittorino* mediation, my analysis of the psychological aspects of the mediation is conjectural. However, having read the judgment I believe it appears that some aspects of procedural justice theory may have been at play.

The plaintiff in the action challenged the mediation agreement on many different grounds, although under the terms of the agreement the plaintiff had received an exceedingly favourable settlement outcome. Most of the grounds of objection centred on the treatment of the plaintiff by the mediator and the other legal actors involved, including that:

- the mediator was aware of the plaintiff's loss of confidence in her solicitors yet did not adjourn the mediation or address the problem;
- the agreement was unconscionable;
- the mediator did not adjourn the mediation knowing that the plaintiff was ill;
- the mediator (and several of the legal representatives) had made inappropriate comments to the plaintiff in regard to the conduct of

the plaintiff and to her behaviour in terms of accepting or rejecting the settlement offer; and

- some of the other legal representatives had made inappropriate noises and gestures, indicating their animosity and acrimony toward the plaintiff.

The plaintiff's objections seem to indicate that she perceived she was treated impolitely, with a lack of respect and a lack of dignity, and without a voice in the proceedings. Despite the fact that the mediation agreement was, in objective terms, exceedingly favourable to the plaintiff, her decision to challenge the agreement on the basis that it was 'unfair' and unconscionable seems to have derived from this perception of a lack of procedural justice.

Conclusion

The *Pittorino* case seems to indicate that the objective benefits received from a mediation agreement are not necessarily all that determines whether the disputant will be satisfied with the mediation, will view it as fair and will ultimately accept the settlement agreement no matter how favourable it is. It is imperative that the disputant also perceives that the procedure was fair.

This in turn will depend on how the disputant perceives he or she was treated by the third party conducting the procedure (and possibly by the other legal actors involved). Whether the disputant is given a 'voice' in the proceedings, and is treated politely and with dignity and respect, may ultimately be the major determinant of how willing the disputant is to accept the outcome and how satisfied the disputant is with the entire dispute resolution experience.

In the Local Court of WA it appears that the Clerks of the Court are attending to these issues. The litigants and lawyers who participated in the study rated the status recognition and the procedural justice of the pre-trial mediation conference as high.¹¹ There may be differences, however, in the way that the non-legally trained Clerks of the Local Court, compared to the legally trained Registrars of the Supreme Court, treat litigants. The Supreme Court was approached to participate in the study and although they did not respond it seems that future research into this area of study could prove quite interesting.

There are procedural differences between a Local Court pre-trial conference and a Supreme Court mediation; however, the research seems to suggest that third parties in *any* dispute resolution procedure should never underestimate the importance of procedural justice elements. This means that the third parties must always ensure that in their relationship with the disputants there is trust and neutrality, but perhaps more importantly that there is 'voice', politeness, dignity and respect. ●

Jill Howieson is a solicitor at Mallesons Stephen Jaques, Perth. She can be contacted at jill.howieson@mallesons.com.

Endnotes

1. Lind E A and Tyler T *The Social Psychology of Procedural Justice* Plenum Press New York 1988.
2. Tyler T 'Psychological models of the justice motive: antecedents of distributive and procedural justice' (1994) 67(5) *Journal of Personality and Social Psychology* 850.
3. Thibaut J and Walker L S *Procedural Justice: A Psychological Analysis* Erlbaum Hillsdale NJ 1975.
4. Tyler T and Lind E A 'A relational model of authority in groups' (1992) 25 *Advances in Experimental Social Psychology* 115 at 150-62.
5. Above note 4.
6. Above note 4.
7. Tyler T 'The psychology of procedural justice: a test of the group-value model' (1989) 57(5) *Journal of Personality and Social Psychology* 830.
8. Howieson J A 'Perceptions of procedural justice and legitimacy in local court mediation' (2002) 9(2) *E Law, Murdoch University Electronic Journal of Law*.
9. With the self-represented litigants, the process resembled mediation as it is outlined in much of the literature. For the legally represented litigants, however, the process was more akin to an assisted negotiation.
10. *Pittorino v Meynert (as Executrix of the Wills of Guiseppa Pittorino (dec) and Guiseppina Pittorino (dec))* [2002] WASC 76 (12 April 2002); BC200201810.
11. Above note 8.