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Reflecting on ADR in NZ: three takes

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Practitioner perspectives

Reflecting on ADR in NZ: three takes

From Wellington: a day in the life of a Wellington mediator

Driving through the traffic to work on a mediation day I always try to be on my best behaviour. Shaking off the after effects of road rage on the Wellington motorway does nothing for the vibe at the start of a long mediation session.

Still, there is plenty to do before we begin and the coffee must be hot and the scones fresh. My habit is to complete the agreement ready for signing the morning of the mediation as well as revisit my rambling standard mediator opening before each mediation in an effort, this time, to captivate the parties.

The day proceeds with expected, yet some unexpected, lumps and bumps (to borrow from John Wade).

We settle, we draft and we all depart back into the traffic. Success makes me mellow and there is no chance of an incident on the way home.

There is, however, the prospect of stealing an hour or more on the internet

after the kids are asleep and most probably tonight I will head over to the US and look around Hamline University's Dispute Resolution Institute at <www.hamline.edu/law/adr> or Pepperdine University's Straus Institute for Dispute Resolution at <law.pepperdine.edu/straus>. On one detour I find an audio link that, when I work out how to use it, makes two simple but good points about building a mediation practice.

First, it tells me that I should not get hung up on 'marketing' but should rather think about 'how to get known', and second, it tells me not to think in terms of selling, simply focus on 'how to get selected'. Even late at night, that seems to make sense ... get known and get selected — do that and I'll have a mediation practice.

There is no doubt that for a mediator, Wellington is an exciting place to be with our vibrant *Lord of the Rings* atmosphere and cafe scene. Much, too, seems to be happening in our small mediation community.

- Our Department for Courts is funding the first really serious ADR research in the civil/commercial area — a project that will look at alternative dispute resolution of civil cases in the courts. From it, we will find out why, how and when cases actually settle and what effect ADR currently has in that process. It's a timely inquiry with the Law Commission, in its paper *Seeking Solutions* (available at <www.lawcom.govt.nz>), looking at ADR in both the civil and criminal jurisdictions of our courts.
- The Family Court is also the subject of a Law Commission paper called *Family Court Dispute Resolution* available from the same website. It is a 207 page document that looks at the present use of mediation in the Family Court and suggests ways in which that usage can be improved and increased.
- There also seems to be a move within our government mediation groups away from management of mediators by managers, towards a system of professional leadership. The two



largest bodies of mediators in NZ, the employment mediators and tenancy mediators, have appointed, or are in the process of appointing, practising mediators to lead their mediation teams.

- We also have, in late 2002 and early 2003, established the Weathertight Homes Resolution Service (WHRS). Like Canada (British Columbia), NZ is in the grip of a 'leaky homes crisis' and the Government's response has been to set up the WHRS. Presently 15 mediators (with more to come) are contracted to WHRS, which purchases a number of mediation days from mediators each month once homeowner claims are ready for resolution. To me, this seems an exciting blend of institutionalised mediation and private mediation — probably set to obtain the best from both mediation communities.

And of course, Wellington is the home of both the Arbitrators' and Mediators' Institute of New Zealand Inc (AMINZ) and LEADR NZ who, more than ever before, are working together on a range of projects for the collective good of the ADR community in NZ.

So I'm not leaving for warmer or less windy parts just yet. ●

Geoff Sharp is a commercial mediator in Wellington. He is also the Practice Development Manager for the Tenancy Mediation Service and has recently been appointed Chief Mediator of the WHRS. Geoff can be contacted at <mediate@geoffsharp.co.nz>.

From Auckland: if it ain't broke don't fix it

After 30 years working as a commercial lawyer I discovered mediation in 1995 and have promoted it as part of my practice ever since. I advocate a flexible approach and am a 'facilitative mediator' who leaves the control of the substance of the negotiation to the parties and their advisers. I am acutely aware of and sensitive to the risks of mediator manipulation. With my commercial law background I have worked as a facilitator assisting clients to manage conflict in the workplace — especially in times of organisational change. My

following observations are based on a number of years of reflection on the use of ADR and its development.

The methods of dispute resolution collectively referred to as ADR began to appear above the horizon about 20 years ago. Since then, mediation has come to play a major role in the management and resolution of conflict in NZ.

The whole field of dispute resolution, including both traditional and newer areas, is constantly changing. There seems to be no reason to suppose that this will change. From a societal viewpoint, it seems that most of the change occurring is for the better.

The leadership provided by the many lawyers who have come to understand and use mediation has been central to the adoption of the use of mediation. Discussion of the differing aspects and values of the major dispute resolution methods (arbitration, litigation and mediation) sometimes tends to suggest that these methods are mutually exclusive or in competition with one another. No doubt some of this tendency relates to protection of turf, or lack of understanding, but the reality now is that good dispute resolution practices result in the adoption of the means most appropriate to the resolution of the particular dispute. This is well understood and acted upon by many lawyers with the consequence that disputants are able to avail themselves of a wider range of pathways to resolution than were available earlier.

In the private mediation sector the market rules. There is no regulation. There are no minimum qualifications required of mediators. What is clear is that the supply of mediation services far exceeds the demand for those services. There do not seem to be many fulltime private mediators, but there are undoubtedly large numbers of people who offer mediation as a sideline to their fulltime activity.

The mediation 'training movement' has been in the forefront in promoting awareness of mediation. Most of those who offer mediation services will have been through one or more of the ever available workshops. A byproduct of this successful training activity is that many trainees, who may never offer mediation services nor desire to do so,

have learned valuable new skills and disciplines of application to their mainstream professional activities. Clearly, there has been this significant ripple effect from the formalised teaching activity.

In recent years, mandating or providing mediation has become very much an activity of the State — much through courts and tribunals and in other specialised areas. A recent and noteworthy example of this is in the provision of employment mediation services.

Two apparent consequences of the increasing adoption of mediation by the state sector are that first, the pool of work otherwise available to private mediators is thereby reduced, and second, because of the difficulties of maintaining a fulltime and economic private practice, there is a steady flow of better qualified mediators from private practice into government employment.

It seems unarguable that there is a significant societal value in the reduction of conflict through improved understanding in the community about how to avoid conflicts and how to handle them more effectively when they do arise. Mediation differs from litigation and arbitration in that in mediation the parties have a direct and primary involvement in the resolution process. In litigation and arbitration the parties' involvement is less direct and they are usually dependent upon movement towards resolution led by the activities of their advisers; and ultimately resolution depends upon the decisions of third parties.

Due to the participatory nature of mediation the parties have the opportunity to learn about dispute resolution and conflict avoidance. Obviously this does not hold with all disputants, but it must apply in many cases. This effect is certainly observed by mediators.

The developments referred to above register very well for societal good. They have all occurred despite the divergent practices observable in the mediation arena and the lack of recognised standards for and qualification of mediators. It is to be hoped that our national penchant for regulation overlooks the developing

field of dispute resolution and, in particular, mediation. It may be trite, but 'if it ain't broke don't fix it'. ●

Peter Doogue is an Auckland mediator and lawyer. He can be contacted at <peter@doogue.co.nz>.

From the Wairarapa: mediation issues for provincial areas

When I first became interested in becoming a mediator rather than practicing solely as a lawyer, I was based in the city and there was a small group of enthusiastic (mellowed out) lawyers also interested in this field. It was generally accepted that mediation made good sense. In larger areas, one is more likely to come across others who have similar interests and enthusiasm and so one is encouraged to keep on promoting the merits of the mediation process.

On moving to a provincial area, other dynamics which affected the effectiveness of mediation became evident.

- There are different perspectives as to what mediation means — some people, including lawyers, expect that the mediator would have an overriding ability to make the decision for the parties, and so confuse mediation with arbitration.
- Disputes in a provincial area such as the one in which I live do not always involve large sums of money — however, they involve the use of community resources and they often involve emotional issues which affect the wellbeing not only of adults but also their children and ultimately the community.
- The parties may need to seek assistance to pay for legal fees through the Legal Services Agency — it is often difficult to acquire the additional funding for mediation and, indeed, it seems to be decided on quite an arbitrary basis.
- Access to a mediator depends on the knowledge of the lawyers involved in the dispute. Often the resources of agencies such as AMINZ and LEADR NZ are engaged to assist, but again that relies on the knowledge and experience of individual lawyers.
- The Family Court already provides a range of services which are free once

proceedings have been filed — these include counselling at various stages of the process and mediation conferences usually led by the judge or, in some cases, counsel. (It is my experience that these conferences are often very helpful but they are not mediation. They are settlement conferences.)

- Many parties need to have their sense of entitlement to be heard satisfied. This encourages a litigious approach.
- Parties or lawyers often do not know how to access a mediator — where to find one, how to negotiate cost, how to find the cost in the first place. The fact that Family Court processes are free is an impediment to the use of alternatives.

These factors are not limited to provincial areas but are possibly more focused because of the smaller scale. The result is that mediation as a dispute resolution mechanism is not accessed as often as it might be.

However, it is my experience that, despite these barriers, one can use mediation skills to bring about effective resolutions in various guises. Examples are set out below.

- I am engaged by the Court as Counsel for the Child and have used mediation skills in that capacity, in identifying issues, assisting parties to reframe issues so that the other party is more receptive to their ideas, coaching as to how those issues might be put to the other party in a way which is heard, and encouraging them to reach agreement that they can both live with (as long as it enhances the best interests of the children). There are obvious issues in respect to impartiality but generally parties respond to working together for the sake of the children.
- As counsel for a party in a dispute one can suggest to counsel for the other party that a meeting between parties and their lawyers may be effective. That meeting will need a format and both parties need to be clear about the guidelines around courtesy and listening to each other's point of view, as well as confidentiality, in order to be worthwhile. It does not work when one lawyer uses it as an opportunity to cross-examine the other party, and

not to listen. Both lawyers need to have an understanding of the purpose of such a meeting if it is to be effective.

- Mediation conferences through the court system — judge led mediation — depend very much on the attributes of a particular judge. Again, counsel can assist parties to reach agreement more readily if they have knowledge and understanding of the mediation process, and may be able to assist the process and maximise the benefits.
- Parties may access counselling through the Family Court, and counsellors are often skilled in mediation. However, there may be benefits in ensuring that all legal interests are met during this process and this is not always possible as lawyers are not involved, and counsellors are not always legally trained. In my view, there is a need for both counselling parties to assist in coming to terms with the end of relationships, for example, as well as to mediate on the legal issues.
- The family group conference process, which deals with either care or protection issues in respect of children and their families or youth offending, could be utilised as an ADR process in other areas, such as the care for the elderly.

To make these processes effective there needs to be a collectivity of spirit to make it work for the benefit of clients. This is an ongoing challenge in the absence of clear systems and common understanding among professionals, but the successes of processes using mediation skills gives one heart to keep working with this as a focus. It is also important that while the process may be used in a diversity of situations, one must not lose sight of its integrity and underlying purpose — that is, to assist parties reach agreement between themselves and therefore reach a resolution which is more likely to be effective into the future. ●

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