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ADR Bulletin

Evaluating mediation

The stamp of statistical approval

Mei-Lin Robertson

The report 'Evaluating Mediation – New South Wales Settlement Scheme 2002'[1] confirms what the legal field has instinctively believed for years – that mediation is fairer, more cost effective and more satisfying to both parties compared with other dispute resolution processes.

Professor Tania Sourdin and Tania Matruglio, both from La Trobe University, recently conducted a survey evaluating the success of the NSW Settlement Scheme 2002 (the Scheme). The criteria used were satisfaction, processes, complexity, costs, delay, fairness, participation and outcomes. The survey then compared these results with those from other dispute resolution processes such as arbitration, settlement 'between the parties' (that is, direct negotiation between the parties, or their lawyers, to reach an agreement without the presence of a third party) and judicial hearings.

The Scheme was evaluated by surveying parties and mediators, and parties in a 'control group' of 150 cases in the District Court of NSW. Data was also collected from relevant District Court files.

Mediation scored high in all areas. The Scheme was successful in resolving 69 per cent of all cases involved, which is excellent considering most of the cases were 'complex, difficult and "old" cases that were often likely to take up a considerable number of hearing days'.[2] Also, a number of matters settled after being referred to the Scheme, but without attendance at a mediation conference. This success rate is higher than that for other forms of ADR, such as conciliation and case conference, which have a settlement rate of 20-50 per cent.

Almost all parties in the mediation process considered that:

- They could participate during the process
- The process was fair
- They had control over the mediation process
- They had control over the mediation outcome
- There was enough time during the process to present information, and
- They felt comfortable during the process.[3]

Mediation was also found to produce more savings in public and private costs. Of the mediators 86.8 per cent reported that the mediation process saved the parties costs, ranging from $5,000 to $350,000.[4]

Satisfaction was measured using several different indicators. These are briefly summarised in Table 1 below.

Indicator	Mediation	Arbitration	Hearing	'Between parties' negotiation
Satisfaction with process handling	95.8	60	62.5	70
Satisfaction with dispute dealing	87.5	50	62	70
Satisfaction with dispute outcome	87	70	50	50
Satisfaction with the amount of money received	55.6	50	25	30
Parties 'felt comfortable' with process	87.5	50	12.5	42.9
Process was fair	91.7	60	57.1	71.4
Satisfaction with dispute duration	91.7	60	11.1	60
Satisfaction with level of formality	79.2	63.6	55.6	66.7

Table 1. Satisfaction indicators for dispute resolution type (% satisfied)

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The satisfaction levels for mediation were found to be significantly higher across the board in comparison with arbitration, hearing and 'between parties' negotiation. It must be noted, however, that the results also seem to indicate that whether or not a case will be successful will be greatly influenced by the type of case, and that certain cases are more suited to particular dispute resolution processes. Where mediation scored lower (albeit still comparatively higher than the other processes) it was due to the fact that the cases were older and thus resolution in these cases was already less likely. The average resolution rate was higher in District Court mediated matters (78%) compared with Supreme Court mediated matters (64%), in which the cases tended to be more than three years old.

Based on the survey, it is suggested that the optimum time for referring matters to mediation is between six and 12 months of filing in complex intractable disputes and in cases where there is a continuing relationship, or 12 months after filing in other cases.[5] The results, therefore, would seem to indicate that cases should be referred to mediation earlier. However, even if a case is older and more complex, referral to mediation may prove worthwhile, since higher satisfaction levels were reported with mediation despite the age and complexity of the majority of cases referred to mediation.

Satisfaction is linked to parties' knowledge of a process, their expectations regarding the process, and then the prospect of those expectations being reached. Many of the indicators used to determine fairness and satisfaction are based on the expectations of the parties. A party may therefore be more satisfied with a process if they believe that the process reached or exceeded their expectations. For example, the reported results suggest that 'a greater proportion of people whose expectations regarding duration [of the dispute] were met (by reality) expressed their satisfaction with duration than did those whose expectations were not met'.[6]

A higher level of satisfaction with mediation may be attributed to a higher level of understanding of mediation compared with other resolution processes and the parties thus knowing what to expect. Or perhaps parties had lower expectations of what mediation was capable of achieving. The report found that the mediation process was understood very or quite well by 95.8 per cent of all survey respondents, whereas arbitration was only understood by 54.6 per cent of parties, hearing by 66.7 per cent of parties, and 'between parties' settlement by 71.4 per cent of parties.[7]

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If a contributing factor to parties' dissatisfaction is indeed unrealistically high expectations, it is possible that more education about the other processes would lead to higher satisfaction levels in relation to those processes. It may be worthwhile investigating further how well parties understand each process and the nature of their expectations before testing their satisfaction levels. However, it must also be noted that even if a party's expectations are met, and the party is prima facie satisfied with the dispute resolution process in question, this does not mean that the process is without flaws.

Despite the good results from the report, the authors were diligent in pointing out the shortcomings of the evaluation. The small sample size at times compromised the accuracy and statistical value of the results. The total number of mediation survey responses received was 87.[8] A larger sample size and investigation into the reasons why lawyers are cautious about referring cases to mediation would be helpful. The report suggests that lawyers will reject the possibility of mediation if 'they perceive that the case is too complex or is "unsuitable"'.[9] The authors point out that it was 'difficult to statistically correlate and explore relationships between some variables due to the small number of people expressing dissatisfaction with the mediation process.'[10] While one can't really complain about a low level of dissatisfaction with mediation, it can be a little inconvenient when attempting to investigate such dissatisfaction.

Although there are some shortcomings in the report, if more extensive research were undertaken it is likely that the overall results would still be the same – that mediation is fairer, more cost effective, and more satisfying for participants. ●

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Endnotes

1. Tania Sourdin and Tania Matruglio, 'Evaluating Mediation – New South Wales Settlement Scheme 2002' Law Society of NSW accessed from <www.lawsociety.com.au/uploads/filelibrary/1083301601312_0.8981008251657467.pdf>.
2. Above note 1, p iii.
3. Above note 1, pp ii and 26.
4. Above note 1, p 47.
5. Above note 1, p 78.
6. Above note 1, p 19.
7. Above note 1, p 65.
8. Above note 1, p 13.
9. Above note 1, p iv.
10. Above note 1, p ii.