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ADR usage: practitioner perspectives

Family lawyers' attitudes to ADR

Tom Altobelli

A recent survey of New South Wales Accredited Specialists in Family Law has collected data about the use by this influential group of lawyers of ADR processes, as well as what they perceive to be the barriers to the greater use of ADR. The hypothesis was that lawyers were using ADR in family law with greater frequency, that they were becoming sophisticated consumers of ADR services, and that there was evidence of a cultural shift towards ADR within the legal profession. This is a preliminary analysis of the data collected.

There were 256 accredited specialists in family law in NSW, 133 (52%) of whom responded to the survey. The respondents were a highly experienced group of lawyers with 63 per cent having more than 11 years experience in family law.

The data focussed on usage of *external* ADR methods as opposed to the use of ADR (referred to as 'primary dispute resolution' in family law) facilitated through the family court system itself. This data is, therefore, particularly important for the community and private ADR sector, in view of a strong trend towards the outsourcing of the provision of these services away from government.

Respondents were asked how frequently, in the last five years, they had used certain ADR methods using providers outside the Family Court. The following chart shows the extent to which these methods were used.

Figure 1 below indicates that pre-filing counselling, post-filing counselling and mediation were the most commonly used ADR methods. By contrast, arbitration was hardly ever used.

Interestingly, and perhaps of concern, was the absence of any statistical relationship between gender, location of practice or years of experience, on the likelihood that a practitioner would use one of the above external ADR methods. Thus there is no evidence that a 'younger breed' of family lawyers, or that non-city family lawyers, were more inclined to use ADR.

Another interesting aspect of this data was the relatively large number of respondents who did not provide an answer in relation to conciliation, neutral evaluation and arbitration. These 'missing respondents' are quite significant in frequency, and this perhaps indicates a failure to understand the terminology as well as a superficial

Figure 1. Use of non-Court primary dispute resolution methods

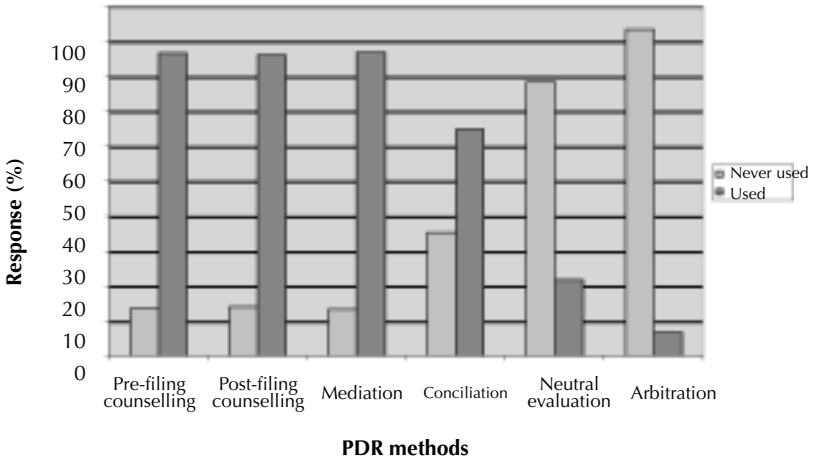

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Table 1. Interest in using private conciliation for property and financial matters

Response	*Frequency (n)*	*Percent*
No	18	13.5
Yes – sometimes	108	81.2
Yes – always	7	5.3
Total	*133*	*100.0*

Table 2. Percentage of caseload that would benefit from ADR

Response	*Frequency (n)*	*Percent*
None	7	5.3
Up to 25%	37	27.8
Up to half	41	30.8
More than half	16	12.0
75% or more	24	18.0
All of them	6	4.5
Missing	2	1.5
Total	*133*	*100.0*

Table 3. Reasons given for ADR not being used more often in family law practice

Response	*Frequency (n)*	*Percent*
Clients are not suitable	87	65.4
I settle the case anyway	62	46.6
Clients are not interested	61	45.9
Issues are not suitable	57	42.9
Other	57	42.9
Because the other party is unrepresented	30	22.6
I didn't know enough about the alternatives	5	3.8
I am unsure about what my role would be	2	1.5
I am uncomfortable about involving other people in resolving these matters	1	0.8
I object to the alternatives on principle	0	0

knowledge of the differences between substantive ADR methods.

One of the questions sought to ascertain the views of respondents to the use of private conciliation services in family law, conducted outside of the courts at the client's expense by qualified private lawyers. Conciliation is a form of evaluative mediation where the conciliator, who is almost always a lawyer, attempts to facilitate a settlement between the parties but may also offer an opinion as to likely outcomes in court should the matter not settle. Conciliation within the Family Court, and provided by Court Registrars, has been mandatory in financial matters for many years. Table 1 above indicates high levels of interest in this service, and points to a future market for ADR providers in family law. One of the growth areas in family law ADR will be in the provision of expert facilitative dispute resolution services with an evaluative component.

Another question sought to explore the perceptions of the respondents as to what percentage of their current caseload would benefit from either mediation, conciliation, neutral evaluation or arbitration. The responses are summarised in Table 2 above.

It is clear that the great majority of the respondents believe that at least some proportion of their current caseload would benefit from mediation, conciliation, neutral evaluation or arbitration. Within this group of respondents, at least one third believed that more than half of their caseloads would benefit from the use of these ADR methods. In short, family law specialists do seem to appreciate that primary dispute resolution processes have the potential to benefit a not insubstantial part of their caseloads. Arguably, however, this is not actually reflected in usage of these services in

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diary and happenings

- **IAMA 30th Anniversary Conference: Celebrating ADR** 27–29 May 2005 Canberra. Join Australia's leading professional ADR organisation in celebrating 30 years' commitment to the development, training, promotion and practice of alternative dispute resolution. Special guest speakers include William Slate II, President of the American Arbitration Association, the Australian Attorney General the Hon Philip Ruddock MP, Sir Laurence Street KCMG QC, John Dorter (Allens Arthur Robinson), Professor Michael Pryles, Professor Laurence Boulle, Frank Costigan QC, the Hon Tony Fitzgerald QC, the Hon Trevor Morling QC and other leading practitioners. **A conference not to be missed**. Visit our website for registration details <www.iama.org.au>.

- LEADR is holding its **8th International Mediation Conference** on 31 August–2 September 2005 at the International College of Tourism and Hotel Management, Sydney. For more information, or to express interest, visit <www.leadr.com.au>.
- The **Australian Commercial Disputes Centre** has released the dates for its forthcoming training courses up to June 2005. Training courses to help ADR professionals to develop their skills through a series of stages are available, as well as a number of one-day options including two new one-day courses – '**Mediation/Conciliation: Advanced Negotiation Techniques**' and '**Concilio-Arbitration and how do you do it**'. Visit <www.acdcltd.com.au> for more information.
- **The Trillium Group** is conducting 4-day ADR Certificate Workshops (Level 1) and Advanced ADR Certificate Workshops (Level 2) in Sydney, Melbourne, Canberra and Townsville throughout 2005. For more information call 1-800-636-869 toll free or 02 9036-0333 or visit <www.thetrilliumgroup.com.au>.
- **LEADR** is holding various training workshops throughout 2005 in Sydney, Melbourne, Brisbane, Canberra, Adelaide, Perth, and Darwin. Available workshops include a **4 Day Introduction to Mediation, a 2 Day Advanced Workshop, and an Effective Complaints Handling Workshop**. Visit <www.leadr.com.au/training.html> for more information.
- **Creative Facilitation: A Manual for Group Leadership and Conflict Management** is an essential resource for managers, mediators, human resources officers, teachers and all those who regularly work in groups. It provides new ways of analysing and managing conflict as well as working with resistance. The author, Peter Condliffe, is a Barrister (Victoria), specialist mediator and facilitator, and Director of Mediate and Facilitate Australia. RRP is $75 (GST and postage included). Contact the author at pcmediate@bigpond.com or 03 9225 6888 to order your copy.
- **The Association of Family and Conciliation Courts** are holding their 42nd Annual Conference entitled '**Solving the Family Court Puzzle: Integrating Research, Policy and Practice**' on 18-21 May 2005 at the Sheraton, Seattle. The conference will feature a full-day instituted on advance mediation skills in addition to numerous workshops on mediation, collaborative divorce, interviewing children, research, domestic violence and more. Visit <www.afccnet.org> to register or for more information.
- Pepperdine University School of Law and the Straus Institute for Dispute Resolution present **Pepperdine's 18th Annual Professional Skills Program in Dispute Resolution** on 16-18 June 2005 in Malibu, CA. There are 12 workshops offered including Advanced Mediation: Skills and Techniques, Specialised Mediation: Handling Challenging Employment, Medical Malpractice and PI, and Cultural and Gender Issues in Dispute Resolution. Visit <www.law.pepperdine.edu/straus/conferences> or email lori.rushford@pepperdine.edu to register or for more information.
- CEDR is holding its **10th International Summer School** on 21-27 August 2005 at Lake Maggiore, near Milan, Italy. The course will provide mediator skills training leading to assessment for CEDR Mediator Accreditation. Places are limited. Visit <www.cedr.co.uk/index.php?location=/training/programmes/summerschool.htm> or email training@cedr.co.uk to register or for more information.
- The **World Mediation Forum V Conference**, jointly hosted by the Institut Universitaire Kurt Bösch and World Mediation Forum, is being held on 9-11 September 2005 at the Congress Centre "Le Regent", Crans Montana, Switzerland. The Conference, entitled '**Mediation: A New Culture of Change**', will bring together mediators, academics, lawyers, psychologists and all who support mediation to resolve conflicts, including former Eastern Europe, Asia-Pacific countries, Africa and South America. The English language program is available in PDF Format at <www.mediate.com/world /flyer+grand+anglais20041125c.pdf>. For additional information and online registration, see <mediation.qualilearning. org> and <www.mediate.com/world>.
- **Mediation and Training Alternatives** is holding **The International Advanced Mediator Training Course** on 25 September–1 October 2005 at San Pietro in Valle, Umbria, Italy. The course is designed to develop and deepen the skills of mediators who already have experience in mediating commercial disputes. The programme includes analysis of cross-cultural and complex cases, mediator dilemmas and challenges, and the development of bespoke processes. Visit <www.mata.org.uk> or email david@mata.org.uk to register or for more information.

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the private and community ADR sector. Is there evidence of a chasm between perceived benefits of ADR and actual usage of ADR?

Perhaps the most interesting data relates to the respondent's perceptions as to *why* they believe the alternatives to formal court adjudication are not used more often in family law practice. These responses are set out in Table 3 above.

The most common response to this question, given by 65.4 per cent of respondents, was that clients are not suitable. Very few lawyers attributed their lack of use of PDR to personal reasons, such as being unsure about their role. No lawyer indicated that they objected to PDR on principle. However, there was a strong belief amongst specialist family lawyers that the biggest barrier to greater use of PDR is the fact that clients are not suitable. The next major reason is that lawyers settle cases anyway, and that the clients are not interested in the process, or that the issues are not suitable.

The 'other' reasons given were captured in open-ended responses, and a study of these revealed five themes:

- disadvantages of ADR
- issues relating to clients
- issues relating to other lawyers
- advantages of court
- the nature of family law matters.

Clearly, there needs to be much more analysis of the data but even on a superficial level it is apparent that family lawyers claim to use external ADR services quite substantially, are attracted to external private conciliation, can see the benefits to their caseloads of using ADR, and have quite high selection thresholds before their matters are regarded as being 'suitable' for ADR.

Even at this preliminary and superficial level of analysis it is clear that lawyers would benefit from greater education and training about when matters are unsuitable for ADR. There is the potential for far greater use by this group of ADR. Making the use of ADR mandatory will probably go a long way towards bridging the chasm between perceived benefit and actual use of ADR. ●

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contributions

Contributions to the **ADR Bulletin** for 2005 are welcome

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