

2-1-2010

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Recommended Citation

Howieson, Jill (2010) "What is it about me? What is it about mediation?," *ADR Bulletin*: Vol. 11: No. 8, Article 5.
Available at: <http://epublications.bond.edu.au/adr/vol11/iss8/5>

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**The personal and professional**

What is it about me? What is it about mediation?

Jill Howieson**Introduction**

Like it or not there are polarised views about lawyers and ADR. A central theme at the LEADR 'kon gres, held in Melbourne in September 2009, and one that echoed the National Mediation Conference (NMC) held in Perth in September 2008, was that of the compatibility of lawyers and ADR, and in particular of lawyers and mediation. At both conferences, there was also a low-level buzz about 'lawyer-bashing'.

Curious about our own experiences as lawyers involved in ADR, in our paper, 'What is it about me? What is it about mediation?' David Rogers and I set out to test some assumptions about Australian lawyers' attitudes to ADR and in particular, lawyers' attitudes to interest-based ADR processes such as mediation. Further, we aimed to present our research findings in a manner that would bring the 'lawyer-bashing' discussion out into the open, rather than have it remain as a ground-level murmur that would persist from conference to conference and from year to year.

Assumptions about lawyers and interest-based ADR

We began our presentation with an improvisational theatre technique, 'One word at a time', aimed to draw out the assumptions of the audience about lawyers' attitudes to mediation.¹ We had made our own assumptions about lawyers and interest-based ADR, and we wanted to hear whether these were the same or different from those of the participants. The participants consisted of professionals from many disciplines, including law. Assumptions that emerged, and some of our own, included:

Lawyers don't like sending their clients to mediation because:

- it reduces billing;
- their superiors don't like it;
- they don't understand it;
- it isn't in their culture; and
- it isn't in their personalities.

Lawyers do like sending their clients to mediation because:

- it helps to settle difficult disputes;
- it rids lawyers of difficult matters (someone else can deal with it); and
- it reduces workload.

After the improvisational theatre exercise, we discussed the research that we had conducted to test some of these assumptions.

Findings about lawyers and interest-based ADR**Qualitative**

First, from a small qualitative interview study of five lawyers working at the University of Western Australia and in private practice, David found that the lawyers reported:

- having a low level of knowledge of interest-based ADR principles;
 - that the firm culture influenced their use of interest-based ADR; and
 - conflicts of interest was a factor in why they did not use mediation.
- In the same study, the lawyers also reported that they:
- thought that mediation was expensive;
 - didn't realise that there were trained mediators in their firm;
 - focused on mediation as a pre-trial vehicle rather than early dispute resolution tool;
 - only used lawyers with extensive industry knowledge and experience as mediators;
 - thought the ADR movement was something from the 1990s; and
 - would only use mediation with a behavioural matter in the workplace, not to settle their legal matters.

Quantitative

In a separate quantitative empirical research study from an Australian wide survey of 240 family lawyers, and 103 clients,² I found that:

- the majority of the Australian family lawyers in the sample recommended to their clients and supported the use of interest-based ADR/FDR processes, and thought that their use benefited most family law matters;
- 33% of clients in the sample reported that their lawyers had not referred them to an interest-based ADR/FDR process. These clients were those who either reported high co-party conflict and/or high financial stakes;
- 63% of the family lawyers reported having had some form of interest-based ADR training and those lawyers with mediation training reported a:
 - significantly higher use of problem-solving negotiation behaviours; and
 - a higher conciliatory and constructive orientation.

And from a small online survey of 30 Australian civil lawyers,³ I found that:

- 72% of civil lawyers reported that they had some form of interest-based ADR training;
- 53% of the lawyers reported that they referred their clients mostly to a legally trained mediator;
- 17% reported that they had made no referral to an interest-based ADR process in the past six months;
- the majority said that they would recommend mediation to all their clients and thought that it benefited most cases;
- 83% reported that they were comfortable with mediation; and
- of those who reported that they were not comfortable with mediation, their reasons included:



- ‘mediators sometimes bully my clients into settlement’;
- ‘the cost involved and often the mediator is more focused on forcing a settlement there and then’;
- ‘costs/other side’s unwillingness to participate fully’;
- ‘it is difficult to find a creative solution in judicial review matters’; and
- ‘I do not believe that mediation works’.

Surprises and confirmations

So, there were some confirmations and some surprises from the research! For us, the surprises were that lawyers thought that mediation was expensive and that they didn’t realise that there were trained mediators working in their firms. The confirmations included that the lawyers thought that the culture of their firm and the conflicts of interests between firms and lawyers influenced how often the lawyers accessed mediation as a dispute resolution tool.

That the research findings confirmed or challenged our assumptions illustrates the beauty of matching both qualitative and quantitative research. Qualitative research alerts us to what may be going on, and quantitative research can test the assumptions and, using multivariate analyses, can tease out the relationships between variables, including causal relationships. For instance, another particularly surprising result that emerged from the quantitative (multivariate) work was that lawyers with an adversarial approach *and* lawyers with a conciliatory and constructive approach preferred out-of-court settlements.⁴ This result leads to the next question, ‘if both types of lawyers prefer settling their matters out of court, why is it that many matters still end up in court and involve many protracted court hearings?’

We need to know more about lawyers

One can conjecture that lawyers with an adversarial approach prefer the positional strategies of negotiation while lawyers with a conciliatory approach prefer the more interest-based methods, and further, that these two types of approaches do not necessarily work well together.

Future research could investigate this interesting finding, not in the least because, this may be what people are talking about when they refer to lawyers and their incompatibility with interest-based ADR. Perhaps it is as simple as that when those with an adversarial mindset (and because lawyers are working in an adversarial process we think of them as having an adversarial mindset) meet those with an interest-based mindset the match is not particularly comfortable.

This makes conceptual sense but it is not sufficient. We know that interest-based ADR education and training can make a difference to how lawyers

What we do know is that we don’t know much about lawyers and mediation. Lawyers appear to be a significantly understudied population and it is not easy for researchers to obtain robust empirical research from them. For instance, in my quantitative study the data collection (n=240) included spending four days at a family law conference physically handing out questionnaires to the lawyers; spending many days in the family court doing the same; enlisting family law associations for support, and so on. The simpler online survey that was sent to civil lawyers resulted in only 30 replies from a potential data set of hundreds, or possibly thousands, of lawyers. And to match the lawyer surveys with the client surveys to crosscheck that what lawyers report that they are doing correlates with what the clients perceive them as doing ... well, the logistics ... it’s not easy.

Anyway, I digress. If we think that lawyers don’t understand something

My view is that not all of us (and not just lawyers) know why mediation works. We have our theories about why it works ... But do we really know?

approach the resolution of disputes. We know that those lawyers with interest-based training show significantly higher use of problem-solving negotiation behaviours, and a higher conciliatory and constructive (as distinct from an adversarial) orientation. We know that there are individual differences in people and not all lawyers will behave in a certain way. We know that currently there is an unprecedented movement towards using mediation in the Courts. However, we also know, or at least we think we know, that paradoxically the mediation movement among lawyers seems to have stalled since the 1990s.⁵

about mediation and don’t marry well with interest-based ADR processes, what is it that we think lawyers don’t understand? Surely, it is not the process. Lawyers learn about process early on in their careers. What is it then if it is not process?

So why does mediation work?

My view is that not all of us (and not just lawyers) know why mediation works. We have our theories about why it works — it’s the communication; it’s the procedural justice; it’s the empowerment and recognition; it’s the self-determination; it’s the unearthing of interests; it’s the



narrative; it's the therapeutic nature; it's the power of the BATNA (or lack thereof); it's the evolutionary nature of human beings; it's the postmodern dynamic ... and so on ... But do we really know? And if those of us who

create the 'magical shift' in the parties from adversaries to collaborators. I think that the reflective functioning (also known as mentalising) of the parties and the mediator is crucial. I think that the parties' ability to

court or community mediation will diminish. Perhaps, by softening the debates, we will become united in our search for balance in our attitudes towards interest-based ADR, and in our practice.

What is it that we do, what works for the parties and more importantly — why?

have been teaching, theorising, researching and mediating for years don't really know, how can we expect lawyers new to the movement to know?

What is it that transcends the process to make mediation work and what is it that stands in the way of it working? Ask ourselves, not what is it about us (whether we are lawyers or other professionals), but what is it about mediation? What happens in mediation that makes it work or what happens when it does not work?

To answer this question, we need go back to the theoretical drawing board and we need to conduct theoretically grounded research. Further, let us look not just at ourselves as mediators but also at the parties. What is it that they are experiencing (and not just in terms of outcome)? Our research of what is happening for the parties during the process of mediation is almost as scant as is our research about lawyers.

From my own research and reading (and experience), I have my own theories about what is happening in mediation. The research points to the importance of the lawyer–client interaction and the importance of lawyers maintaining a balance of adversarial and constructive lawyering techniques aimed at addressing the circumstances of the particular client. It also points to the central importance of procedural justice to providing fair and satisfying dispute resolution procedures.⁶

But I also have some other ideas about what happens in mediation to

understand their own and the other parties' mental states is fundamental and I think that what skilled mediators do is promote reflective functioning in the parties and maintain it in themselves. These are just my thoughts at this stage — albeit theoretically grounded thoughts.⁷

The mentalising concept has its roots in psychotherapy, attachment theory, developmental psychology and philosophy; comes from a framework of attachment and is bolstered by neuroscience, so its theoretical credentials stack up. It is certainly something that warrants further research and a current research project in Western Australia is designed to investigate this concept as it applies to mediation in a family law context.

Conclusion

If we can bring the theoretical discourse back to mediation and to interest-based ADR, and provide some strong theoretically grounded research results, then perhaps we can soften the current, polarising debates (for example, lawyers versus non-lawyers, facilitative versus evaluative, courts versus community). If we can give ourselves theoretical touchstones that help us all to achieve that 'long soft sustained note'⁸ then perhaps the unspoken splintering of lawyers and non-lawyers, the curious holding pattern of the mediation movement/business/industry/profession/ (or perhaps racket),⁹ and the bickering over evaluative, facilitative, settlement or therapeutic,

We have spent a lot of time on perfecting processes and a lot of time in the old questions. We now need to spend time on developing theoretical signposts for what makes mediation work in all contexts and what prevents it from working. In my view, to do this we need to:

- revitalise the theoretical discourse of mediation;
- pare back our research to see what happens in the mediation room (what questions do mediators ask, what questions do the parties ask, what effect do the questions have and so on);
- have open and collegiate conversations about what happens to make mediation work or not work — and these conversations need to be more than mediator-centric — they need to involve asking the parties what they think and they need to be reflexive — and honest. What do I/we really know about mediation?

Peter Adler says, 'that [he] doesn't use the word mediation unless [he is] talking to lawyers' — how curious? If we do not mediate then what is it that we do? This is an interesting question and one that could lead us to the sweet note between lawyers and others (if we discover what it is that we do, then possibly we can all learn to do it cohesively).

What is it that we do and what does this do to the parties? How does it help them with their difficulties? How does it help them to make a decision? How does it hinder them — their current problem and their future personal development?¹⁰ What is it that we do, what works for the parties and more importantly — *why*?

We should ask these questions from conference to conference and from year to year. We should ask these questions to assist us to hit the long soft and sustained notes of effective dispute resolution. And following from our



improvisational theatre technique, we can look for these answers *one step at a time* as we aim to build a strong theoretical base to describe and sustain what it is that we do. ●

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Endnotes

1. This involves participants in groups of four or five, saying one word at a time as they develop a story that describes their assumptions about lawyers and mediation.

2. Howieson, J (2008) *Family Law Dispute Resolution: Procedural Justice*

and the Lawyer-Client Interaction (Unpublished Doctor of Philosophy Thesis, University of Western Australia).

3. Legal Dispute Resolution Project. Further details of this research project are available from the author at <jill.howieson@uwa.edu.au>.

4. For these typologies see Howieson, above note 2.

5. Although anecdotal, this finding from the qualitative research seems to be sound, but of course, we would need to verify this from research that is more robust.

6. Howieson, above note 2.

7. Jon G Allen, Peter Fonagy and Anthony W Bateman, *Mentalizing in Clinical Practice* (2008) 43.

8. Peter S Adler: keynote address at

LEADR 'kon gres, September 2010, 'How mediators and facilitators can apply their skills to the challenge of 'sustainability' <www.leadr.com.au/kongres2009/workshops/peter-adler.htm>.

9. Peter S Adler 'The end of mediation: A ramble on why the field will fail and mediators will thrive over the next two decades!' <http://www.mediate.com/articles/adlerTheEnd.cfm> at 25.

10. See Joanna Kalowski's paper presented at the LEADR 'kong res, Melbourne, 10 September 2009, 'Training for Mediators' Brains: What is worth doing in the name of continuing education' asking 'What do we know about--ur processes and our approaches and how they might impact on the parties' [brains] in the mediations we conduct?'

ADR RECENT DEVELOPMENTS

Sydney set to share in booming market in international dispute resolution

Sydney is set to share in the booming market in commercial dispute resolution with the announcement today that the first dedicated international dispute resolution centre will be established in the CBD later this year.

Commonwealth Attorney General Robert McClelland and NSW Attorney General John Hatzistergos today unveiled plans to fit out Australia's first dedicated international dispute resolution centre in Sydney.

'Australia is well placed to capitalise on the booming global market for cross border dispute resolution, particularly in the Asia Pacific region,' Mr McClelland said.

'We enjoy very close ties to Asia and Europe, we have stable and robust economic, political and legal environments and we boast some of the best legal practitioners in the world.'

NSW Attorney General John

Hatzistergos said a prime location has been selected for the Australian International Disputes Centre with the fit out to begin this month and the centre expected to open mid-year.

'This will be a world class seat in a prime CBD location close to existing legal services that will position Sydney as the new regional hub for international dispute resolution,' he said.

The \$600,000 facility will feature world class communication, audiovisual and video conferencing facilities, tribunal facilities, conference rooms and access to translation and transcription services.

The Centre, jointly funded by the Commonwealth and NSW Governments, the Australian Centre for International Commercial Arbitration (ACICA) and the Australian Commercial Disputes Centre, will strengthen capacity for corporations to resolve disputes without the need for court action.

Director of ACICA, Professor Doug Jones, estimated the direct and indirect economic benefits of the

centre are 'likely to run into tens of millions of dollars each year'.

'As well as the legal fees flowing to the centre and the legal services sector, there will be enormous flow-on for the professional services, hospitality, tourism and support sectors,' he said.

'The fact is that international arbitration is emerging as the preferred choice for resolving commercial disputes, particularly by Asian business.

'The explosion in arbitration is largely due to the fact that international investors want to avoid the uncertainty of litigation in a foreign court system with the associated lack of familiarity over processes.'

Mr McClelland said ongoing reforms to arbitration laws, at both a State and Federal level, will create an international best practice legal framework for arbitration in Australia.

'These reforms provide the local framework for our highly skilled and internationally experienced Australian arbitrators to resolve disputes on Australian territory, under Australian arbitration law,' he said.

'Australia will be the place to come to when businesses want their problems fixed, and fixed fast and fairly.' ●