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Increasing the odds of reaching agreement

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Practical steps in ADR

Increasing the odds of reaching agreement

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Diary

At 'kon gres (see (2010) 11(8) ADR) much of the discussion concerned the development of professional standards and quality in mediation, as mediation becomes increasingly central to dispute resolution systems internationally.

The authors led a workshop in the *Ideas Cafe* section of 'kon gres, seeking to identify measures mediators can take to increase parties' odds of reaching agreement in mediation.

The workshop at 'kon gres built on an earlier project. Recording observations of parties' conduct in over 200 employment mediations, the authors identified behaviours that corresponded with an increased or decreased likelihood of resolution being reached (the mediation observation project).

This observation project identified a strong relationship between the extent to which parties engage in the mediation process and the likelihood of settlement. LEADR training promotes a model of mediation as being able to be applied, with necessary adaptations, across a range of settings. It is proposed that there may similarly be principles for how to build parties' engagement in the mediation process, which may apply across jurisdictions.

Through discussions with other mediators, opinions on how engagement in mediation may be encouraged were gathered. Drawing on these discussions a checklist of strategies mediators can use to encourage engagement, and thereby maximise the chances of resolution, has been developed

The checklist (see the end of this article) is intended as a support for mediators, and as a contribution to the ongoing development of mediation practice.

The mediation observation project

Preparation for mediation is less regulated than filing proceedings in a court, and practices vary widely. For example approaches to the task of applying for mediation range from the filing and serving of detailed evidence and submissions to a short phone call or email providing no indication of the matters at issue. Reflecting this, there is a wide variety of views on what makes a difference to the mediation process and particularly to mediation outcomes, and what may simply add to the cost of the process without enhancing its effectiveness.

Mediators at the NZ Department of Labour's Auckland office put these theories to the test by recording observations of how parties prepared for and participated in mediation, and noting the outcome of the mediation. Parties' conduct in over 200 personal grievance mediations was noted, data were analysed and the results were discussed with mediators and lawyers.

The factors that indicated a significantly greater likelihood of agreement in mediation related to how parties engaged in the dispute resolution process, both before mediation and within the mediation.

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ADR RECENT DEVELOPMENTS

Increased funding for family mediation

As part of the recent budget, the Rudd government is providing increased funds for family mediation services. Government will invest an additional \$154 million over four years in legal assistance programs to improve access to justice in the community.

The Attorney-General, Robert McClelland, said that the investment would play a key role in ensuring disadvantaged Australians have the means to resolve disputes early before they escalate and become entrenched.

‘This is the largest and most significant injection of new funding into the legal assistance sector for well over a decade,’ Mr McClelland said.

The additional funding will be provided from 1 July 2010 and will include an additional:

- \$92.3 million over four years for legal aid;
- \$34.9 million over four years for Indigenous legal services; and
- \$26.8 million over four years for community legal services programs.

The investment takes the Commonwealth’s total funding for legal assistance services to over \$1.2 billion over four years.

This will help legal assistance providers to enhance and increase their services, including:

- increasing the availability of legal aid for separating families, as well as improving the availability of legally-assisted mediation;
- helping people with consumer credit and debt-related legal issues;
- meeting the rising demand for Indigenous legal aid services; and
- strengthening the capacity of community legal services to help victims of domestic violence and those at risk of homelessness.

‘Consistent with the Government’s *Strategic Framework for Access to Justice*, the funding will focus on “early intervention” and will reinforce a shift away from expensive adversarial court litigation.’

Funding for Legal Aid Commissions will be provided to the States and Territories under the National Partnership Agreement on Legal Assistance Services. ●

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Behaviours associated with greater engagement

Having identified engagement in the process as the single most important factor, the focus shifted to identifying steps that could be taken to increase parties' preparedness for mediation and likely engagement in the process.

No one factor stood out as being of marked importance in isolation from others. However, engagement was greater and settlement more likely in cases where the parties:

- (1) accurately described the nature of the issues between them in communications prior to mediation;
- (2) provided full factual information to each other ahead of the mediation event;
- (3) provided full factual information to the mediator ahead of the mediation event;
- (4) had made meaningful attempts at settlement prior to coming to mediation; and
- (5) participated directly in discussions, even where they had legal representatives present.

'kon gres discussion on building engagement

The observation project did not seek to measure cause and effect. However inferences drawn from data gathered include:

- Parties who were already committed to the mediation process will exhibit behaviours that were associated with increased likelihood of settlement.
- Encouraging parties to act in ways associated with greater engagement is likely to help create engagement. For example, a party who distils the key issues for mediation and provides relevant information to the mediator is likely to arrive at mediation prepared to articulate their view of the situation.
- Parties may help shape others' engagement in the mediation process by taking actions such as considering what information is likely to be material and providing it ahead of time. For example, a party who has received information from the other party prior to the commencement of

mediation is less likely to require an adjournment to gather information.

In their workshop at LEADR 'kongres the authors outlined key points from their observations, and encouraged participants to consider

build upon their work, to use, promote and refine the checklist. They welcome comment or inquiries, and can be contacted at:

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It cannot be assumed that parties, left to their own devices, will arrive for mediation ready and able to engage in meaningful negotiations. Identifying what can be done to improve the likelihood of resolution is an issue for all mediators ...

their own experience. Participants were asked to discuss, describe and synthesise ideas on optimal client preparation.

Issues for discussion included:

- What are the key indicators that suggest that a client is well prepared for mediation?
- What can parties do to increase the likelihood of engagement by the other party?
- How can effective preparation be promoted?
- How can engagement of decision-makers in the process of finding resolution be encouraged?

The discussion and sharing of cross-discipline mediation experience was critical to the development of the checklist.

Where to next?

It cannot be assumed that parties, left to their own devices, will arrive for mediation ready and able to engage in meaningful negotiations.

Identifying what can be done to improve the likelihood of resolution is an issue for all mediators, and is potentially of benefit to clients independent of the context of the mediation. ●

David Fleming and Wendy Kazianis are mediators at the Department of Labour in New Zealand. All views expressed in this article are those of the writers, and are not necessarily the views of the NZ Department of Labour. Wendy and David invite mediators and LEADR to

Increasing the odds of reaching agreement — a checklist

Provide clear written information to parties on how to get the best out of the process.

Ensure that parties understand the mediation process, through direct contact with them prior to the date of mediation.

Before mediation, encourage the parties to:

- (1) accurately describe the problem;
- (2) attempt to resolve the matter with the other party before coming to mediation;
- (3) exchange substantive information;
- (4) provide information to the mediator.

Encourage parties to attend mediation with:

- (1) decision-makers present;
- (2) a good knowledge of the facts;
- (3) realistic expectations;
- (4) an understanding of the purpose of mediation;
- (5) sufficient time set aside to allow the process to run its course.

At mediation:

- (1) reiterate the process;
- (2) encourage direct participation of parties;
- (3) encourage parties to be resolution-focused;
- (4) actively assist the parties to assess interests;
- (5) encourage the parties to have faith in the process, and persist with it.