

### **Teaching Methods**

A course in dispute resolution cannot be caught through the usual lectures and tutorials, but requires very different teaching skills. We had each participated in a range of courses taught by Australian and overseas experts. We found that this gave a wide pool of resources to draw upon and enabled us to develop our own ideas and methodology without excessive dependence upon any one source. There is some danger in Australian instructors placing too heavy a reliance upon a particular American course they have attended, without seeking input or alternative methods from other venues.

A difficulty for those teaching dispute resolution in Australia is that although there is a rapidly growing literature there is no Australian university textbook on dispute resolution in general. In the absence of an overall text, two volumes of printed materials were prepared for the students.

Teaching methods ranged from participatory such as buzz groups and brainstorming sessions to the straight lecture format. Skills components were taught through a variety of techniques, one of the most useful being role-playing. The impact of the role-play was considerable and all the issues we had planned to cover in buzz groups and brainstorming came spontaneously from the immediate discussion. Role-plays were used specifically to introduce various skills. The most extensive role-play was of a mediation, while shorter role-plays demonstrated active listening, use of body language and interviewing techniques.

Another method used in skills teaching was the presentation of videos, especially of mediations. These were carefully chosen to demonstrate the stages of a mediation and different styles of, and approaches to, mediation. Inevitably the most effective technique for teaching skills was personal participation in exercises followed by debriefing and constructive criticism from us and fellow students.

The exercises described above required an enormous amount of preparation. We wrote most of the scripts ourselves which gave us complete familiarity with the problems, but the time-consuming nature of this task means that a priority for any teacher of dispute resolution should be the collection of begged or borrowed negotiation and mediation exercises to be used, adapted or redrafted (always, of course, with due acknowledgment).

### **Co-teaching**

The entire course was co-taught, that is each class was jointly planned and we were both present at, and participated in, every session. Having two teachers was extremely beneficial in facilitating student participation. Whilst one of us was responding to questions or comments, the other could note the order in which other students were volunteering to contribute, not carefully those who had already frequently spoken, and encourage students who were usually quiet. During brainstorming sessions one of us received contributions from the class which the other recorded on the whiteboard. We alternated these functions to avoid either of us being seen as the subordinate in classroom activities.

Having two teachers was essential in organising, supervising and assessing the skills exercises. Given that the negotiation and mediation simulations and class participation were all assessable, two people were needed to ensure that all the negotiating pairs or mediating groups were observed for a sufficient period of time to enable a fair assessment of their progress to be made.

Co-teaching enabled two responses to some of the questions raised by the students, allowing different perspectives to be raised naturally in context. The fact that their teachers had different perspectives and opinions supported the development of their own individual critical and analytical views on dispute resolution and foreshadowed the evaluative component at the end of the course.

The course made us consider a number of aspects of co-teaching. It has been noted that a central point of feminist theory and methodology (to which we both subscribe) is an emphasis on co-operation and mutual support rather than on an individualised, competitive approach which may make itself felt even in the classroom. In other words, the success of our co-teaching was more than simply a matter of compatible personalities; it fed off our personal and intellectual commitment to feminism.

### **Course Assessment**

The course was assessed in accordance with assessment practices for a university course. The students' development of practical skills and their course participation was accorded 25 per cent of total marks. A further 25 per cent was awarded for a research essay. Fifty per cent of marks were awarded for an end of semester examination. Other assessment regimes will be appropriate for different courses. Attendance and participation may suffice for Mandatory Continuing Legal Education points. A different or more rigorous regime may be instituted where teaching dispute resolution is part of an accreditation process for mediators.

### **Conclusions**

Our first conclusion at the end of the course was that it had been fun for us and for the students. Our enjoyment did not detract from the fact that it had required much hard work of a different nature from that generally associated with teaching law, although just as intellectually demanding. Pedagogically we expanded our skills and experience considerably.

The way in which a course like this can be taught and its reception depends in part on the culture of the institution. The culture of Sydney Law School is that of a law school with a reputation for excellence, but for excellence in conventional black letter law teaching and researching. However, it is also an institution in the process of undergoing great change in curriculum and attitude. This climate for change engendered support for what we were doing.

We asked a great deal of the students and, despite the innovative nature of the course, they were prepared to experiment and to be tolerant of innovation. It was, however, difficult to maintain a consistent balance between innovation in material and method and traditional legal approaches.

It is hoped that this article will serve to stimulate further discussion and debate and exchange of views on the teaching of dispute resolution both in legal education and in a variety of contexts.

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## Dispute Resolution Services : Family Court of Australia

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Acting Principal Director of Court Counselling

The Family Court of Australia has provided both a traditional dispute resolution service through its Judiciary and an Alternative Dispute Resolution service through its Registrars and its Court Counselling Service for the past 15 years. This paper focuses mainly on the Court Counselling Service but it should be noted that the Registrars have a role in Alternative Dispute Resolution through their Order 24 Conferences where they assist in the negotiation of agreements between separated couples in financial matters. Family Court Conciliation Counselling on the other hand involves a process whereby families in dispute over guardianship, custody and access or any other children related issues can work toward an agreement as an alternative to litigation.

The Family Court is experiencing significant transitional changes in its development. It has separated from its parent department, the Attorney General's Department and is now responsible for its own administration. Perhaps the most significant change has been the investing of the administrative control of the Court in the office of the Chief Justice and through him to his Chief Executive Officer where previously the executive of the Court was headed by the Principal Registrar. Consistent with this the administrative arm of the Court will now be responsible for the management of the Court at all levels - national, regional and registry levels. As a result the Registrars will no longer be responsible for the administration of the Court and their role will be solely in dispute resolution either in the traditional sense through their quasi-judicial powers under Section 37A of the Family Law Act, 1975 or through alternative dispute resolution methods, that is through their Order 24 conferences as described above.

Concurrent with these changes the Court has undergone an extensive review of its structure and administration resulting in a plethora of recommendations which are about to be implemented. The Family Court Review has re-affirmed the significant aspects of the Alternative Dispute Resolution services of the Court, including early voluntary Conciliation Counselling intervention in cases before applications are filed and adherence to the existing case management guide-lines. These will be addressed in more detail below.

The questions that will be covered in this paper are:

- \* What services does the Court Counselling Service of the Family Court provide
- \* How does Family Court Conciliation Counselling differ from other Alternative Dispute Resolution Methods
- \* How does Court Counselling fit within the Case Management System of the Court
- \* How successful is Court Counselling as an Alternative Dispute Resolution method
- \* What direction will Alternative Dispute Resolution Services in the Family Court take in the 90's

### What Services does the Family Court Counselling Service provide?

The work of the Counselling Service can be divided into four major areas, three of which involve direct client contact and the fourth involves informing and educating workers in other agencies and community groups about the facilities of the Court, the effect of separation and divorce on parents and children and the value of early referral to the Court's Conciliation Counselling Service. The primary aim of the Community Education and Liaison programmes is to channel potential clients of the Court into its Alternative Dispute Resolution Services rather than have them use its Litigation Services.

The other three areas of work are Family Court Conciliation Counselling (Voluntary and Court-ordered) and Family Report work. On a national basis the majority of cases that come to the

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<sup>1</sup> The author wishes to acknowledge the assistance of Michael Geary, Counselling Casework Supervisor, Brisbane Registry.

Counselling Service come for Conciliation Counselling on a voluntary basis. These cases account for 49.3% of the total number of cases seen. A further 40.8% of cases are referred to the Counselling Service for Conciliation Counselling by the Court either through its Registrars, its Judicial Registrars or its Judges. These are ordered under Order 24 prior to the first return date at Court (15.4%) or after proceedings are under way (25.4%) under Section 62 of the Family Law Act, 1975. Only 9.9% of all cases seen by Court Counsellors are Family Report Cases ordered under Section 62A of the Act. This role is quite separate to the Conciliation Counselling role of the Court Counsellors.

Although one of the functions of the Court Counselling Service is to provide Marriage Counselling to assist parties with marriage difficulties, this work is usually referred out to one of the Marriage Counselling Agencies.

### How Does Family Court Conciliation Counselling Differ from Other Dispute Resolution Methods

Although the range of alternative dispute resolution methods (ADR) is broader than Mediation, Counselling and Family Court Conciliation Counselling it is these that will be focussed on, differences defined and comparisons drawn where they exist. It is the use of these three terms which cause the greatest confusion when trying to conceptualize the range of ADR methods purporting to offer problem solving versus therapeutic solutions to families in crisis.

There is a growing body of literature concerning mediation. Likewise there is a diversity of definitions of mediation but perhaps the most cited and most orthodox is that of Folberg and Taylor (1989) who define Mediation as "a process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual settlement that will accommodate their needs."

There is also a diversity of models of mediation. Irving (1987) identifies eight distinct models which all have in common interest based negotiation but vary in terms of the amount of emphasis placed on the emotions of the clients during the mediation process. A useful comparison has been made by Johnston and Campbell (1986) on a continuum between agreement focus and change focus. That is whether the goal is to change behaviour as a necessary part of the intervention process or whether the primary goal is to reach agreement. Mediation models fall to one end of this continuum and therapy and counselling fall at the other end. A bipolar classification using the outcome goal could also be used to differentiate each model in terms of whether the goal was legal or social. Again such a classification would distinguish models on the extent to which they were agreement or change oriented.

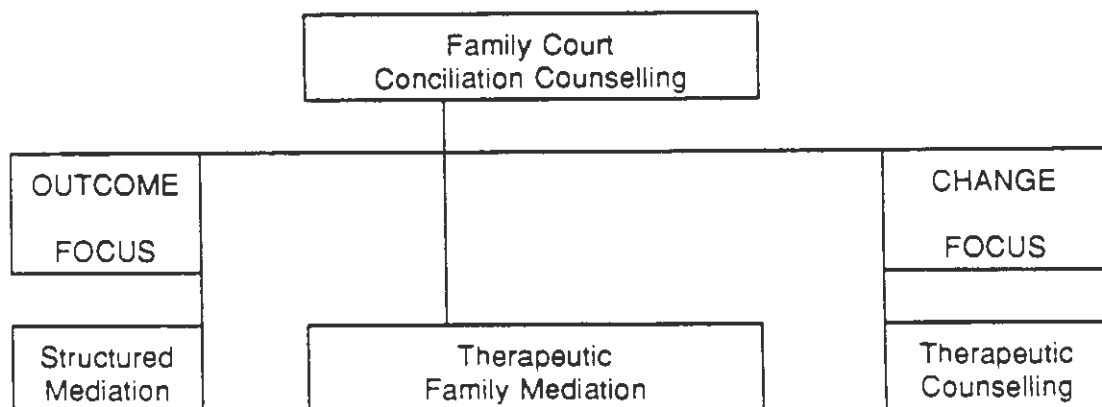


FIGURE 1: MODELS OF INTERVENTION ON THE OUTCOME CHANGE DIMENSION

On the basis of the agreement - change continuum mediation models at the extreme end can be conceived of as highly task oriented, with minimum attendance to the feeling state of the parties and focussing predominantly on a rational discussion of the issues. At this end of the continuum mediation is solely problem solving of separation issues such as custody, access, and financial matters. Dealing with complex family dynamics, emotions and meanings are regarded as the domain of therapy or counselling and avoided by adhering to the highly structured mediation process. The highly structured nature of the process is seen as enhancing the rational participation of parties in an interest - based negotiation process.

Toward the other end of the continuum would be what has ironically been called "therapeutic mediation". At this point the goal of an agreed upon settlement shares prominence with the goal of enhancing the best interests of the children and adults through improving relationships and bringing about personal change in behaviour. The work of Johnston and Campbell (1986) represents this point of the continuum and it is also at this point that the Conciliation Counselling of the Family Court can be located.

A similar goal focus and dispute resolution process has developed quite independently in the Family Court Counselling Section as in the "therapeutic mediation" model of Johnston and Campbell.

Both models have the following in common:

1. The underlying emotions of the parents are dealt with as a preliminary step to overcoming impasses in negotiation.
2. Parties are assisted to reach an agreement which takes into account the needs of both the parents and the children.
3. Follow up sessions are conducted to monitor and/or revise the agreement according to how well the agreement has worked.

At the extreme end of the outcome - change continuum are counselling and therapeutic models. If it is difficult to identify coherence within the mediation models, it becomes even more difficult when attempting to differentiate mediation from some forms of counselling. For those with a counselling background who make the transition to mediation, there is often comment upon how much what they do in mediation at any particular time often resembles what they might have been doing in counselling. Yet it is also concluded that it differs (Gold 1985; Milne, 1985).

The essence of this difference appears to follow the strong emphasis upon task focus. That is, reaching an equitable agreement achieved through what has been termed principled negotiation facilitated by the neutral role of the mediator. The best interests of all is presumed to be achieved by the accomplishment of a parenting agreement. On the other hand, the traditional counselling process aims at fundamental personal change via the development of an intensive therapeutic relationship and a long-term commitment to change. Neither of the above approaches in their purest form has been used by the Family Court's Conciliation Counselling Service. The nature of the cases and the resources are such that a crisis intervention approach has been the most appropriate method of intervention in the majority of cases. Hence the demand has been for more active, problem solving and brief methods of intervention based on Crisis Theory and Grief Theory.

For this reason Family Court Conciliation has more in common with "therapeutic family mediation" though the process is perhaps less structured and, ironically, the agreements are less formal in legal terms ie. in terms of written and signed agreements. What sets the Court's Conciliation Counselling Service apart from similar approaches is that it forms an integrated part of the management of cases within the Court system. This makes it unique.

#### **How Does Court Conciliation Counselling Fit Within the Case Management System of the Court**

Three events have occurred in the last seven years which have impacted on the role of Conciliation Counselling within the Family Court. First the Family Law Act was amended in 1983 to make it compulsory for all contested applications in children's matters to attend for Court Ordered Conciliation Counselling before proceeding to a hearing. Second, in 1985 a system of case management was introduced whereby the Court itself took responsibility for the progress of cases through a series of pre-determined steps within a given time span. This included numerous

opportunities for Conciliation Counselling both prior to and after the first appearance in Court. The case management system not only acknowledged the importance of Conciliation Counselling as an alternative to the litigation process but it was also consistent with good clinical practice. That is by ensuring that Conciliation Counselling occurred early in the dispute it meant that Counsellors were able to work with the parties at the time of the crisis before they became entrenched in litigation thus increasing the potential for resolving the dispute. The third event of significance has been the Review of the Court which has acknowledged the importance of early intervention prior to any application being made to the Court and as a result a recommendation has been accepted by the Chief Justice that a minimum standard every Registry should aim for is to have 50% of all cases come for Conciliation Counselling on a Voluntary basis. At present a number of the larger Registries fall below this standard.<sup>2</sup>

#### How Successful is Family Court Conciliation Counselling as an Alternative Dispute Resolution Method

It is difficult to measure the success rate of any type of intervention in family disputes as they are dynamic in nature and not static. Issues that may not have been considered resolved during Conciliation Counselling may later be resolved because of the process that has been commenced. However, the research that has been conducted in the Family Court indicates that between 65% and 81% of cases reach an agreement during the course of the Conciliation Counselling as Figure 3 indicates.

Registry	Agreement Rates : Percentage of Cases		
	Voluntary	Pre First Return	Post First Return Date
Adelaide	65.4%	66.7%	
Brisbane		81.0%	
Canberra		63.0%	
Melbourne	73.0%		
Newcastle	73.5%		
Perth	74.0%		
Sydney		70.0%	
Parramatta	74.0%		53.0%

FIGURE 3: OUTCOME OF VOLUNTARY, POST FILING AND POST FIRST RETURN DATE CONCILIATION CONFERENCES

A New Zealand study by Maxwell (1989) also revealed that one of the most important predictors of a successful outcome was the earliness in the dispute of the referral. In custody, access and domestic violence disputes agreement rates were 69% in those cases seen prior to any application to Court and this dropped to 39% for those cases seen after an application had been made. As can be seen from the table above this is somewhat different to the Australian data where agreements as a result of Conciliation Counselling continue to be relatively high after an application has been made but drop off to 53% once proceedings get underway, that is after the first day in court or 'First Return Date'.

<sup>2</sup> See Attachment 1 Fig. 2 (p.75) for Levels of Dispute Resolution within the Family Court of Australia

A significant point on which the Australian and New Zealand systems differ is that parties are almost always seen jointly in the first session in Australia but more likely not seen jointly in New Zealand until the third interview. Hence, agreements in Australia tend to be reached with fewer sessions. The Maxwell study found this factor - that is whether or not there had been a joint session - to be the most significant predictor of a successful outcome.

These comparisons merely reinforce the substantial achievements in Conciliation Counselling agreements that the Australian data represents as does the New Zealand data.

It is significant that of all the children's matters commenced in the Family Court of Australia only 5% to 10% reach a full contested hearing. The vast majority of cases are resolved before they reach this stage.

#### **What Direction Will ADR Services in The Family Court Take in the 90's?**

It has been said with some regularity that the cases now coming to the Court Counselling Service are more difficult. There have been two movements to respond to this change. The first involves the development of co-conferences conducted by a Counsellor, who normally deals only with children's matters, and a Registrar who normally deals only with financial matters. The second involves the development of techniques for identifying and dealing with the more complex cases. This is in its infancy but involves expanding the range of possible Court Conciliation Counselling interventions that can be tried with the family.

While co-conferencing with Registrars and Counsellors on the other hand is not new it is now gaining more acceptance in cases where the property and children's issues are enmeshed. Co-conferencing has been a problem in the past as there has been no common ground or common approach between the two disciplines, that is the lawyers and the Court Counsellors. However, with considerable numbers of Counsellors and Registrars being trained in mediation the situation now exists where they have a common skill to apply in the process of resolving disputes.

In addition to co-conferences, however, counsellors are faced with the challenge of overcoming the impasses that sometimes accompany separation and divorce. There are some cases where because of the history of the case, or the nature of the relationship between the parties or the dysfunctional personalities of one or both of the parties they become intractable. The crisis intervention approach that has traditionally underpinned the work of the Court Counselling Service is not necessarily effective in these complex cases. As indicated earlier, new approaches are being sought and tried.

There are two further initiatives that the Court has taken with respect to ADR. One is a joint venture with the Marriage and Family and Centacare agencies in the establishment of two mediation co-operatives. One unit offering Family Mediation was established at Westmead in June last year and a further one is being established in Canberra.

The Court itself is also about to trial two separate mediation units in its Melbourne and Parramatta Registries. These units will be staffed by trained mediators from both the legal and social science (Court Counsellor) disciplines and will offer mediation in children's and financial matters prior to and as an alternative to litigation. This will provide a comprehensive dispute resolution strategy in combined property and children's cases. It will also provide a service in property cases without the need for an application to be filed. The situation within the Court at present is that a property conference with a Registrar cannot occur before an application has been lodged. As with other Courts and agencies offering Alternative Dispute Resolution services, the Family Court is facing the future with optimism and with a renewed commitment to resolving disputes without the need for litigation.

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ATTACHMENT 1

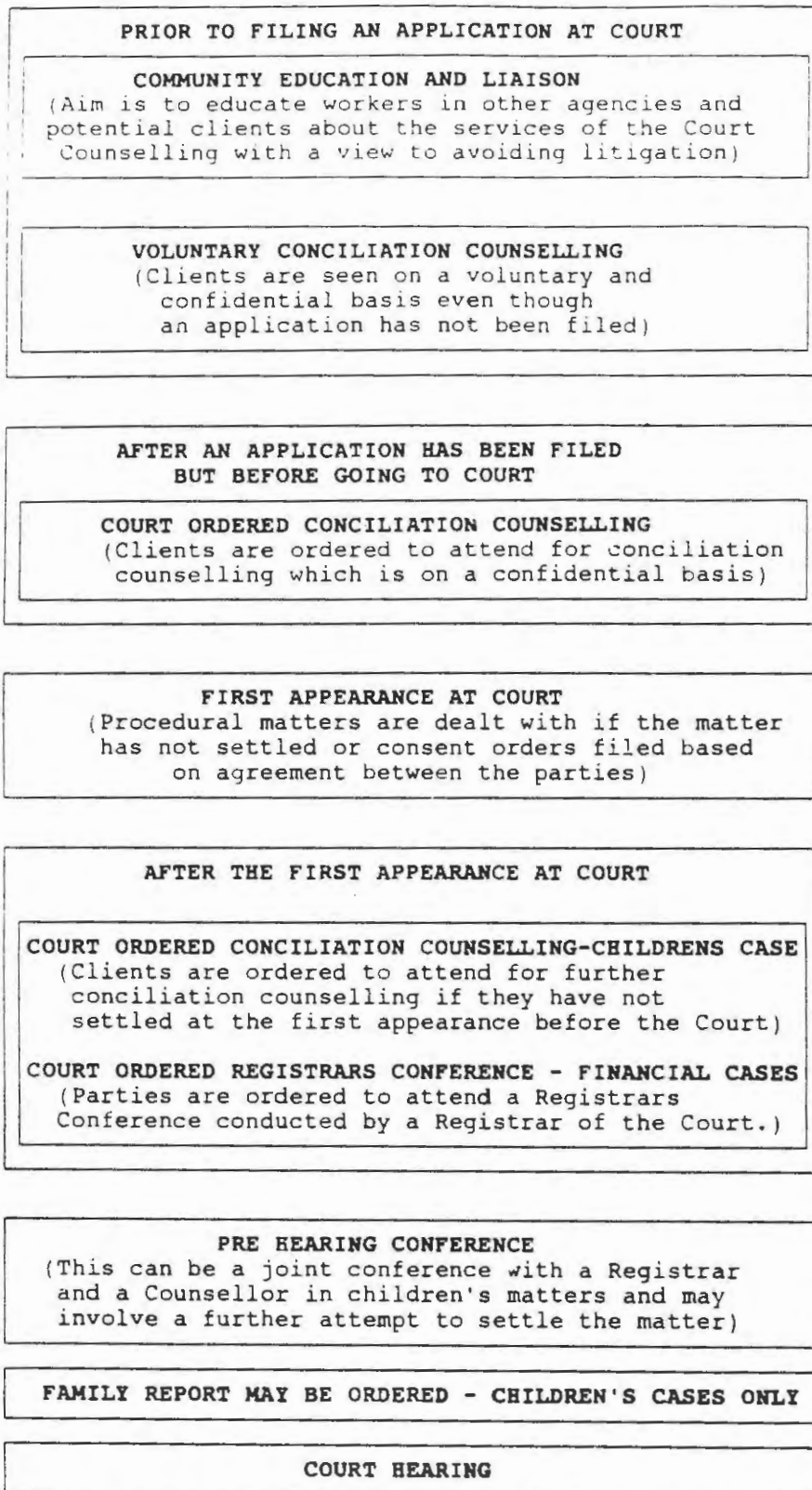


FIGURE 2 : LEVELS OF DISPUTE RESOLUTION WITHIN THE FAMILY COURT OF AUSTRALIA



## **DISPUTE RESOLUTION TECHNIQUES**

### **WORKSHOPS**

**Arbitration**

**John Muirhead**

**Mediation**

**Pat Cavanagh**

**Order 24 Conferences**

**Michael Northcote**

**Counselling**

**Nora Huppert**

**Listings & Settlement Conferences**

**Joanne Harrison**

**Mediation in the Federal Court**

**Alan Dawson**

**Mediation in Legal Private Practice**

**Barbara Coddington**

## **Report**

### **Arbitration**

Mr John Muirhead outlined Australian legislation covering arbitration in relation to commercial disputes, and the ways in which parties come to Arbitration.

Arbitration is commonly written into contracts. Alternatively, parties may opt for it.

The advantages of arbitration over litigation are speed, privacy, cost and finality. It is an adjustable process which may be very formal or informal, depending on the needs of the case. The parties pay for the services of the Arbitrator, the transcripts and for hiring premises. In cases deemed less difficult, some shortening of the process is often agreed to.

Arbitrators are generally people of standing within their own profession. Training courses are available through the Institute of Arbitrators prior to a formal examination.

Certain rules apply in relation to the conduct of arbitrations. These may be varied if agreed to, in writing, by the parties.

Some criticisms have been made about arbitration becoming too expensive, formal and time-consuming and attempts have been made to address and remedy these shortcomings.

**David Syme**, Conflict Resolution Service, Canberra

## The Fundamentals of Arbitration

John Muirhead, CPEng FIEAust: FIArbA: M.ACEA

Arbitration is a procedure for the settlement of disputes which, along with conciliation, mediation and others are known as alternative dispute resolution, ADR for short. This means simply that they are alternatives to litigation, the word used to describe action in the Courts.

In each method an independent third person (or persons) acts to bring about a conclusion of the dispute. In litigation that third person is a judge, who is a lawyer. In conciliation and arbitration it is a person skilled in the subject of the dispute. In mediation it is any independent person who has the respect of the parties.

Arbitration is distinguished from the other ADR methods in that it culminates in an award which is the decision of the arbitrator enforceable in the Courts if necessary.

It differs in another fundamental respect, namely that the other methods require both parties to have a genuine desire to reach a settlement. This is not always the case, and in these circumstances attempts by conciliation or mediation can fail, not only in their purpose but can postpone the settlement by other means.

Arbitration has been used since the earliest days of commerce. With the increasing complexity of life it was found necessary from the late 18th century to regulate it. In Australia the States had separate and differing Acts for this purpose until 1984 when they enacted the so-called Uniform Acts. There are in fact minor differences between the Acts of the various States and Territories that may need to be noted.

In New South Wales the Act has recently been amended (1990) and those contemplating arbitration as a means of settling future or current disputes should familiarise themselves with the Act or, if unskilled in the law, seek legal advice from a person experienced in this area of the law.

A knowledge of the provisions of the Act is important because the Act allows great flexibility to the parties in the ordering of the arbitration procedure so as to best suit the characteristics of the dispute.

Disputes come in all sizes in terms of the amounts in dispute, the number of matters disputed, the complexity of the technical evidence and the degree to which legal issues are involved. Accordingly it is vitally important that the arbitration should be fashioned appropriately. For highly complex matters, with difficult issues of law to be determined by the arbitrator and where very large sums of money are involved it is fitting for the parties to have legal representation, perhaps with both senior and junior Counsel, instructed by solicitors. The process resembles a court trial.

At the other end of the scale, where the dispute involves simple matters, few in number, these can best be dealt with perhaps with the involvement of only the parties themselves and the arbitrator in an informal setting. It may well be possible for the arbitrator to hand down his award on the same day.

Many disputes are confined to documents so that oral evidence can be dispensed with and the arbitrator can produce an award on an agreed set of documents prepared by the parties or their representatives. This procedure can save the considerable costs of room hire, a transcript service and the time of the parties or their representatives at a hearing. They are also free to get on with their lives.

Some disputes can be dealt with partially on the basis of documents in advance and partially by a hearing of oral evidence.

The Act has provision for accommodating the full range and the parties may obtain advice by consulting their solicitor and in discussion with the arbitrator at a preliminary meeting.

Arbitration may be selected by the parties to an agreement as the method to be used in the event

of a dispute, well before any dispute has arisen. On the other hand, where there is no such agreement it may be selected by the parties as the preferred method after one has arisen.

Arbitration can be attractive to disputing parties because, in distinction from litigation, it can be initiated without the delays in existence in many Courts, hearings are held in private as opposed to public court rooms, the arbitrator can be selected by the parties for his or her knowledge of the subject matter of the dispute and because the process can be as informal as the parties and the arbitrator consider to be appropriate. It also provides finality.

By selecting an arbitrator with expertise in the subject matter of the dispute the parties may dispense with the need to call expert witnesses. At the least such an arbitrator can make a speedy and informed decision between the opinions of opposing experts. This saves both time and the cost of the witnesses. Of course the person selected should also be well versed in the procedure and practice of arbitration. This can be achieved by seeking a nomination from the lists of arbitrators who have been graded by the Institute of Arbitrators. It is a learned society which educates, examines, grades and keeps its members up to date. It is vital that the parties should receive natural justice, which essentially means a fair hearing with a proper opportunity to express their respective cases.

As mentioned above the Act provides for very great flexibility in the formality of the conduct of the arbitration. It is a consensual process so that it is open to the parties to agree either before meeting with the arbitrator or with the benefit of his or her advice on a number of matters affecting the conduct of the matter and the costs. The following are among the matters some of which will affect costs and which require the agreement to be in writing :-

1. Whether the arbitrator is to be bound by the rules of evidence;
2. Whether the issues are to be determined according to law;
3. If the arbitrator is not to make an interim award;
4. If the arbitrator is not to make an order for specific performance;
5. Whether any other dispute between the parties be included;
6. Whether the arbitrator is bound by the rules of natural justice in any conciliation attempt under section 27, as amended;
7. If the award is not to be final and binding;
8. If the award is not to be in writing, signed and with reasons;
9. If the arbitrator is not to have the power to order interest;
10. If costs are not to be at the discretion of the arbitrator.

The very important matter of whether the parties may have legal representation is one of the subjects of the recent amendments to the Act. This sets down the conditions under which the parties may be permitted representation notwithstanding any agreement between the parties. In general it is fair to say that an application by a party for representation by a legal practitioner will be granted by the arbitrator if it is likely to shorten the proceedings or reduce costs or if a party would otherwise be disadvantaged and if the amount in dispute exceeds \$20,000. It will be clear that this is a matter with great potential for affecting the formality and costs of an arbitration. The decision, where necessary, will usually be made at a preliminary meeting. The arbitrator will make his decision on submissions of the parties and the relevant facts.

Where an arbitration is pursuant to some Contract, it is usual for the section dealing with disputes to stipulate how the arbitrator is to be selected.

Commonly these agreements provide for each party to nominate a person and only in the event of disagreement, for the arbitrator to be nominated by a third party. It is clearly preferable that such a nominator should not be a member of some Industry Association of which either of the parties to the dispute also has membership. It is clearly preferable for the nominating organisation to be an independent body without allegiance from any particular profession, trade or calling. It is clearly important that the nominee is a suitably graded arbitrator.

The hearing of a major matter is usually preceded by the exchange of pleadings, prepared by the solicitors to the parties. These describe their respective cases so that each side can thoroughly prepare itself. The hearing would then follow normal court procedures with the claimant presenting its evidence through its witnesses and the documents upon which it relies. Each witness is open to

cross-examination by the other side and then re-examination. The respondent then follows with its case following the same procedure. It is usual for the hearing to conclude with submissions from the representatives of the parties, summing up their cases and dealing with legal issues.

The Arbitrator then proceeds with the preparation of the award. Unless otherwise agreed in writing by the parties before the hearing, the award has to be in writing, with reasons and including the matter of costs. It also has to be signed by the arbitrator. The requirement for reasons was introduced in the Uniform Act and it is clearly necessary so that the parties can follow the award and decide whether there are grounds for appeal within the limits of the Act.

The major merits of arbitration are that it is sufficiently flexible to be an efficient means of dealing with disputes from the simplest to the most complex, those concerning a few hundred dollars up to many millions. It brings finality to disputes.

# Report

## Commercial Mediation Workshop

### Ways of selling Commercial Mediation to the Business Community

- \* Cost effectiveness
- \* Confidentiality and competence of mediator
- \* Market to interest groups, service clubs, etc. to reach clients directly
- \* Be aware of objections and reservations that people have and be prepared to tackle them
- \* ADR processes are very appropriate for commercial disputes - ongoing relationships are important, issues fairly discrete.

It should be remembered that **negotiation techniques** are the basis of ADR processes. We need to ask ourselves if we are effective negotiators. Style may be cooperative or competitive, and the mediator may be actively involved or not, but the more competent his/her skills, the better the results.

It may be felt that some negotiation skills do not apply in mediation, e.g. the ability to persuade others. In commercial mediation, a mediator should be prepared to express a view and argue it persuasively. In any mediation, keeping the parties at the table is a persuasive skill.

### Who is a commercial negotiator?

People who are trusted by the parties, people who were previously "successful" in their mediations, very few women, only a small number of trained commercial mediators are used, those who have expertise in a particular field.

### Queensland Bar Association Model

1. Parties sign a proforma contract.
2. Where parties have agreed to use a nominated mediator, the mediator is chosen from a list of 3. Parties indicate what expertise they want and 3 possible mediators are selected. CVs are sent out to the parties, who choose from this selection. Other avenues are available for finding a mediator.
3. Preliminary meeting with lawyers, and anyone else, to establish process, costs, access to documents. A statement of issues is given to each party and to the mediator. Full disclosure is essential.
4. At the mediation session, parties or their lawyers speak to their statements of issue. Everyone asks questions, including the mediator. The mediator subsequently has separate sessions with each party.
5. It is possible to have a signed agreement before the day is out.

Some mediators keep everything confidential; others pass on instructions, agreements, etc.

### Fees

The mediator is paid a daily rate. If the Association is involved, an administration fee would be charged. Preparation time is also costed out and the fees are apportioned between the parties. Rates vary enormously.

Issues raised for discussion:

1. Confidentiality
2. Need for publicity about successful mediation processes to lift the profile of DR generally
3. Educative role of publishing resolutions, for example in the area of discrimination.

### Margaret Newton, Worthwhile Projects, NSW

## Commercial Mediation : "What Works When"

Pat Cavanagh, Associate Professor of Law, Bond University

"This ADR thing, it's a fad, I tell you. There is nothing it can get you that you can't get with a good lawsuit. And there is a lot you can lose - like a big settlement or a generous judgment for your client. Hell, what client will keep you if at the first sign of a dispute you start talking negotiation and mediation? Hard ball, hard law, that's what your clients want and what will keep us employed".

*Gabe Shawn Barges of the New York State Bar* : from the paper presented by Mr. Alan Limbury at the AIJA Ninth Annual Conference, Melbourne 18-19 August 1990.

"ADR is a remarkable phenomenon. That something founded in common sense, and relatively unassuming in vision, should have created such agitation in an intelligent profession, is intriguing. The agitation is unjustified, an overreaction, and in the end, irrelevant, if one should conclude that ADR is in the interests of disputants".

*The Hon. Mr Justice de Jersey, Judge in Charge of the Commercial List in the Supreme Court of Queensland* : from the paper presented by The Hon. Mr Justice de Jersey at the same AIJA Ninth Annual Conference.

I have started my paper this afternoon with the above two quotations because I believe that it gives a clear indication of how ADR is perceived. It is seen either as a threat, or simply an extension of common sense. I would like to cover in my paper, my ideas of what process is appropriate for what dispute, and then talk about what preparation is necessary for a commercial mediation.

My bias throughout is towards commercial mediation as that is the process with which I am most familiar. My position, both at Bond University and at the Bar Association of Queensland involves selling - the selling of ADR. All of the processes involve negotiation as a base, and directly involve the disputants. I encounter a large number of disputants and their lawyers. I have had direct involvement in over 120 negotiations-based procedures in four years.

What I would like to talk about today is the type of process that is appropriate for different types of dispute, when they work and how I see the role of lawyers in either assisting or impeding these processes.

If you do not want to be involved in these processes let me help you by providing thirteen most common excuses for not using any of them., I use the term *excuses* deliberately as I do not believe that they constitute a bona fide reason for not utilising the processes that we will discuss here today.

The excuses are :-

1. No guarantee it will work;
2. We have already tried to talk;
3. No certain result;
4. It's too late/early for this;
5. No guarantee of protection of weaker party;
6. No guarantee of fairness;
7. Inequality of power/size/money;
8. It's too new, we don't do things that way;
9. I'm in favour, they are not;
10. Costs too much;
11. Too complicated
12. I'll show my hand;
13. My lawyer says no.

Each of these excuses is answerable. There is one additional excuse that is not. This is the reason given to me recently by a Brisbane solicitor engaged in a six party construction dispute. All other parties either consented to the matter being mediated or would approach their clients for instructions. This particular solicitor presented me with an unanswerable reason for not agreeing to any process or even asking for his client's instructions. His refusal was simple and blunt :

"Why should I agree to this or that other system that will settle this matter out of court. My client will definitely win this matter. Why should my client's money go anywhere except to me. I need to make budget, and this court case will ensure I do. I will not even take instructions on this mediation proposal from my client".

Such disarming honesty stopped me from expending any further effort in the matter. I hope his client shares his views.

I believe that the mediation process enjoys a high probability of success. The major caveat to this is that the bona fides of the parties must be apparent. If not, then proceed to litigation. The courts offer the most appropriate venue where the bona fides of one or more parties is in question. The courts can, and daily do, decide on matters of credibility. Any suggestion of fraud or false pretences, or the presence of a legitimate public interest that calls for a court sanctioned resolution indicates that an alternative procedure is not appropriate.

A recent example where commercial interests have arrived at a negotiated settlement include the Witanoon asbestos claims from Western Australia. It is somewhat surprising that this particular resolution took so long when a precedent for the setting up of an Asbestos Claims Facility existed in the United States. Two current examples of matters that could be settled by a similar mechanism include :

1. **Compensation Claims**

Mediation would be appropriate where a large number of claimants exist and where a cost effective and equitable remedy was sought by all parties.

2. **Financial Disputes**

Again, mediation would provide an avenue for resolution where both liability and quantum could be resolved. The Bar Association of Queensland has been particularly active in this field.

Matters that are resolved are generally commercial in nature. The quantum involved is in the area of \$2000 to \$20M. The average would be around \$100,000. In my experience disputes over smaller figures are more difficult to resolve than those involving larger figures. It would seem that where larger sums are at stake, a more commercial pragmatic approach is adopted by the parties. With smaller figures, the matter of "principle" often impedes the resolution process.

Using processes that are familiar to you, can I briefly outline the types of disputes that I have seen resolved.

**Expert Appraisal**

This can, by prior agreement, be binding or non-binding in nature. This process is popular with Government and statutory bodies. It by-passes the reluctance of these bodies to negotiate an agreement, but this reluctance is giving way to a growing trend for these bodies to negotiate agreements. This is a reflection of the greater commercial accountability current in all areas.

**Senior Executive Appraisal**

This is appropriate for larger disputes where the parties do not wish to arbitrate or litigate. It is used most frequently in Australia for the resolution of the large construction disputes.

**Mediation**

The Bar Association of Queensland operates its own dispute resolution service. The process of mediation is the most favoured process. It is used for settling disputes involving:

- \* solicitor/clients
- \* multi-partied industrial disputes
- \* personal injury matters
- \* large international disputes between foreign governments and multi-national companies.

It is the process that has been utilised by the Commonwealth and a large construction company to resolve a \$14M dispute in three weeks. It is the process that will form the basis of proposed "settlement weeks" that will occur in NSW in 1991.

### **Arbitration**

It is my perception that arbitration is not used as frequently as in the past. There are major concerns about the time and cost especially of lengthy arbitrations. There is increasing use of "fast track" or expedited arbitration.

This process appears to be used in the traditional construction matter that historically has provided the bulk of arbitrated matters. There appears to be a move away from the traditional, fully drawn-out arbitration.

"The rhetoric is that it is the system for the resolution of disputes in the industry and that it provides cheap, efficient and speedy resolution of construction industry disputes. This rhetoric continues, despite the reality, which is otherwise.

It is a reasonable perception that arbitration has broken down as a cheap and efficient means of resolving construction disputes, albeit that the cause may be the strenuously adversarial manner in which the disputants themselves pursue the arbitral process. The increasing extent of arbitrations which involve a determination of the parties' legal rights and obligations, rather than a determination of matters such as quality is an important factor in the deterioration of the efficiency of the arbitral process in the industry".

From : "*Strategies for the reduction of claims and disputes in the construction industry - a Research Report* (p.65)

### **Mini Trial**

This term appears not to be popular but the process is being used under the title "Senior Executive Appraisal". It is not used widely. To my knowledge it has only been used about half a dozen times in the last four years. Its most recent application was in NSW between a State Government Department and a large construction company. The \$10M dispute was settled over a three day period. Its use would be limited to large, complex disputes, where litigation or other processes are not deemed appropriate.

The different processes that I have described attempt to find an alternative to the commonly perceived worst features of the traditional legal system. Max Fulton in his book *Commercial Alternative Dispute Resolution* (1989 Law Book) asked representatives of the top 200 companies to describe those features. The answers indicated the following :

- 93% Delays
- 67% Cost
- 23% Adversarial nature of proceeding, leading to loss of further commercial opportunity
- 18% Complexity and cumbersome procedure
- 12% Impractical academic attitudes and commercial naivety of judges which leads to lack of understanding of real dispute
- 8.3% Drain on manager's time
- 8.3% Publicity

I believe that negotiation is a skill that should receive better attention as it is the skill that lawyers utilise on a **daily** basis. Such empirical evidence that does exist suggests that not all of us are seen as effective negotiators. The developing interest in the subject in Law Schools is to be applauded. Some universities, such as Bond University, are offering both undergraduate and post-graduate classes in the subject. I believe that the enhancement of negotiation skills with the resultant benefits to clients may reduce the negative image that many people have of lawyers.

### **Preparation for Mediation**

#### **Bona Fides**

The most important element in any mediation is what lawyers call the **bona fides** of the parties. By this I mean that the parties must genuinely want to come to an agreement. I have previously mentioned one instance where a particular solicitor would not agree to mediation and rejected it without any further reference to his client. I have seen two further examples of this. One, by a solicitor who advised me in a building dispute that his client had no legal exposure and was under no risk in litigation and could not see any advantage in mediation. He appeared to think, incorrectly, that mediation would result in his client accepting some liability. Another solicitor, in a

matrimonial matter, again informed me when refusing an offer of mediation from the other side that his client would get what he was entitled to in court and any participation in a mediation would simply mean that he would receive less. Again, I think this perception is incorrect, and again in the latter instance the solicitor indicated that he would not even discuss the prospect of mediation with his client.

### **Choosing a Mediator**

Unless the parties have agreed beforehand that they will use a nominated mediator it is my belief that one of the ADR organisations such as the Australian Commercial Dispute Centre or the Bar Association of Queensland would be the best avenue for locating an appropriate mediator. Both these organisations maintain extensive records of trained mediators who have expertise in a particular area. Most parties prefer an experienced mediator who is familiar with the mediation process and the subject matter of the dispute. An experienced mediator will save time and the less time that is spent on a dispute is directly reflected in the costs. Generally a commercial mediator will charge between \$1,000 and \$3,500 per day. Preparation time will be costed at between \$150 and \$250 per hour. These fees are apportioned between the parties. Obviously, these fees can be very cost effective when there are a large number of parties to a dispute. The parties with the assistance of the appropriate organisation can then choose from a number of potential mediators and generally the mediator will have had no prior association with the parties. If there has been a prior association this disclosure will have to be made to all parties.

### **Mediation Agreement**

In every commercial mediation all parties should sign a mediation agreement before the formal meeting occurs. Essentially the agreement will contain confirmation that the parties will share costs, keep confidential all discussions and agreements resulting from the mediation, agreeing not to introduce in any subsequent arbitration or litigation any of the views, admissions or proposals that arise during the process. Most importantly the agreement should contain an indemnity provision both to the mediator and to the organisation.

### **Preliminary Meeting**

The preliminary meeting is essentially a directions hearing and is usually attended only by the lawyers. The matters that need to be decided at such a meeting include the following :

1. When the hearing will occur
2. What documents should be provided both to the mediator and the other parties and when.
3. When a statement of issues can be provided to the mediator and the other parties.
4. Who will represent the parties.
5. Who will attend for each party with the authority to negotiate and conclude an agreement.
6. Whether there will be any limits on any party's authority to negotiate.
7. Whether any other parties will be required to attend before settlement is finalised.
8. The possible length of the hearing together with its location and hours.
9. A general explanation of the mediation process for those parties who are unfamiliar with ADR processes.

Having opened this paper with two quotes, may I finish by quoting a recent American author on one commercial operator's views?

"Attorneys are trained to break deals. Like Pavlov's dogs they are conditioned to salivate when hearing the bell of bad news. This is not slur; it is just fact. Negative attitudes of lawyers is as much a natural law of commerce as parental love for children is a natural law of biology. I cast no blame. They can't help it. Attorneys, you see, don't profit from deals that get done.

Listening to lawyers can turn optimists into pessimists, pollyannas into cynics. There are problems behind every deal point; there is no issue without peril. No deal, it can seem, should ever be made".

*Dealmaker "All the Negotiating Skills and Secrets you Need" : 1988, Investment Bankers Corporate Strategist.*

I believe that the competent legal practitioner in the ADR field can prove the lie to this view.

## Report

### Counselling

The presentation from Nora Huppert was both interesting and well-presented, covering the development of counselling, family therapy and professional issues for counsellors.

Ms. Huppert gave a comprehensive history of counselling outlining the development of the discipline from its conception in the United Kingdom with families and the effects of war on the community, to the establishment and growth of counselling in Australia to the present day.

Although several counselling approaches were acknowledged, the common model in Family Therapy was detailed. It was explained that for any model to be effective it required belief in what one is doing; determining the correct interventions; and a requirement of long training.

The key factors which should be part of the training course include self-understanding, goal establishment, empowering clients, educator role, individual therapy.

In counselling, it is useful to identify the effect of the individual on the relationship and the effect of the relationship on the individual. It was explained that all life cycle transitions were stressful and that stress should be received as a challenge. Another tip for a counsellor is to have a clear model of what a normal relationship is, and work to change the situation to make it more normative.

Change and coping with change, making adjustments, taking risks and coping with outcomes were identified as important factors for everyone coping with living and trying to reach stability.

The differences between mediators and counsellors were outlined with a recognition of the value of all agencies providing a variety of services to meet the increasing needs of clients.

Additional knowledge identified as useful to the counsellor were:

communication skills	personality development
child development	parenting
drug & alcohol abuse	family stress
employment loss	separation and divorce
single parenting	changing job stress
death	bereavement

The session finished with a video of a real-life counselling session which provided a useful and illustrative conclusion to the session.

**Jayne Power, Community Justice Programme, Queensland**

## Counselling : One way of Resolving Conflict

Nora Huppert, Marriage & Family Counsellor

**Aim :** To promote change in the relationship.  
Counselling is a process whereby a trained person engages with the clients and their relationship - at various stages of their lives - in order to promote change through growth and harmony in their daily family lives with all its many changing forms which exist in our society today.

The Attorney General's Department's Clarification of Definitions states :

**Marriage Counselling :** is operationally defined as a process where a third party, focusing on the emotional dynamics of the relationships and the stability of marriage within a family unit, assists parties to deal with the stresses they encounter as they move into, live within, or move out of the family unit.

**Family Mediation :** is operationally defined as a process where a neutral third party assists parties to resolve specific disputes which may otherwise result in litigation through the family court.

I have worked as a marriage counsellor and I see many similarities between the development of the family mediation movement in Australia and the development of the marriage counselling and family therapy field which I have been closely involved with since the early 1960s. A brief historic overview of the marriage guidance movement goes back no further than post World War II in both the United Kingdom and the United States of America. Initially Australia, like Great Britain, had married servicemen who spent much time apart from their wives and when reunited after the war were faced with relationship - marital - problems they did not understand. Nor did they know where to turn for help. David Mace, a Methodist minister in England, together with his wife, Vera, were keenly aware of the need for helping these post-war couples. They began to train people from the local community in simple listening, reflecting and empathising skills - Rogerian counselling style. In Sydney and Melbourne by 1948. Methodist clergy also initiated similar moves by selecting people "with the right personality" and training them in Rogerian skills. In the USA, matters were approached a little differently : medically trained psychiatrists returning from the war found their traditional methods of psychiatric therapy could not cope with the sheer numbers of people needing help, and they began to experiment with seeing couples and families, noting that their interactions were often reinforcing their presenting problems. From the start it was a professional service in America, while in Britain and Australia, Marriage Guidance Counselling was a volunteer service for the first 25 years. By the 1970s, speakers and trainers from overseas were increasingly wanting to run workshops here and counsellors soon realised the need to professionalise. A.A.M.F.C. (Australian Association of Marriage and Family Counsellors) was formed in 1975 - Australian & New Zealand Family Therapy Association a few years later. Both run excellent workshops and have their own journals and Newsletters and Chapters in all States.

In my opinion, the development of Family Mediation as a profession is happening much more rapidly. This also is a service which has developed out of community need, initially with volunteers drawn from the community, with little training and much on-the-job learning; it has to become streamlined, standards developed and set by the workers.

Marriage counselling in the early days was called a "practice without a theory". Today there is a wide range of theoretical models, all existing and drawing from one another, from the earlier mentioned Rogerian model, to Transactional Analysis, Behaviour Modification, Neurolinguistic Programming or traditional psychoanalytic models. This is to mention but a few. All require long training: including self-understanding and the fundamental goal of promoting change in the way clients interact. Individual therapy may come into this - the focus is on the relationship and how the individuals impinge on this. The process of counselling to promote change is more important than the specific topics clients bring to their counsellor or therapist.

Marriage counsellors seek to empower their clients, looking for their strengths, as opposed to thinking of them as "sick individuals" needing to be cured of this or that. Most counsellors would have a clear model in mind of functioning relationships, hence will be able to identify a malfunction (e.g. in communication) as well as the underlying cause (such as earlier adjustment to some

situation which is now no longer valid). Counsellors place great value and considerable time on engaging with their clients, getting to know them as people, as opposed to getting to them as "that problem"; they develop together with their client an action plan for clients to achieve more satisfying relationships. This may or may not be to reconcile their relationship. A competent marriage and family counsellor or therapist today needs a sound knowledge and understanding of personality development, child development, relationship developmental stages, stress management, separation stages and traumas, parenting skills, etc. I could go on - I have not mentioned sex counselling or step-parenting, unemployment. Let me stress, there is no quick fix. Counselling is not an instant, one-session remedy for people who have carried relationship pain or discomfort for a considerable time.

In conclusion, I will show you a short video of how I work with a couple and their relationship. The story is very typical - a husband has been to a mediator with his ex-wife and they have worked out a very satisfactory agreement regarding their children. The man remarries and some time later the new wife asks him to come to a counsellor with her. He can "see no problem", yet he loves her dearly and so he agrees to go with her to show he "really cares". By the end of the session the couple have clarified they have vastly different ideas and expectations regarding how the children are expected to behave, what to do or not do and so on, on the regular access visits to their father and stepmother. This has led to the wife/stepmother feeling excluded and incompetent, and the husband/father feeling overly responsible for maintaining a "happy family atmosphere at all costs" whenever the children came. The session seeks to demonstrate how clarification of these differences was achieved, and how this new understanding of one another can, hopefully, lead to the couple's developing new skills in joint parenting of the children on access visits.

As to the future : it is well to remember that **discomfort is a normal part of life**, a reality we find difficult to accept in our striving for ever more comfort etc. I see at present a proliferation of self-help literature and the quest of the quick, single-fix solution, be this re-birthing, aromatherapy and many others. The recent festival at Darling Harbour - "Mind, Body, Spirit" illustrated this well. At the same time I see increasing specialisation and formation of associations, evaluation of what is being done as the community becomes better-informed and educated, and more selective about the sort of help they seek. Hence a wide range of competent counsellors, therapists, mediators and lawyers will all play their part; they need perhaps to clarify their roles more sharply and be selective about the clients they wish to serve.

This National Conference would seem to me to be part of this process, and I thank you for your interest and attention.

## Report

### Issues and Listings Conferences

Presented by Joanne Harrison, Supreme Court of New South Wales

Joanne Harrison began her workshop by informing participants that the scheme for Pre-Trial and Settlement or Listing Conferences was introduced by the Delay Committee in February 1989. The purpose of this scheme is

1. to settle matters and
2. to ensure that matters are ready for hearings.

The most common issues involved are work accidents and debts.

Parties come to the conferences seeking a hearing date: however, plaintiffs must satisfy the Court in respect of their claims, with medical evidence and definition of issues for the hearing.

At the conferences, 30% of matters are resolved; others are resolved before the hearing.

Seven conferences are carried out per day. Forty-five minutes are allocated for each - 30 minutes to settle, 15 minutes to write the report. It is hoped that next year the time will be extended to one hour per conference.

Conference rooms are not located at the Court, but at premises nearby.

Mediation and conciliation are combined, to encourage parties to reach agreement. However, parties are assisted and it is suggested that they settle. The parties are encouraged to free expression and assistance is always available if needed; on rare occasions, clients represent themselves. In some instances parties may wander onto general issues but they are always encouraged to stay with the specific issues. This shortens the time needed to achieve settlement.

Before a listing or hearing date is given, the Court must be satisfied that discussion of elements of liability and evidence, e.g. medical certificates etc., have taken place in order to settle.

Joanne said that it is of great advantage to be familiar with the files and to have the authority to make decisions. She added that people are now coming to the conferences with trust and faith in the system, believing that they are getting a "fair deal".

Joanne finished by saying that she sees herself as a mediator/conciliator with authority to be directive and the power to award costs.

**Silvana Gruber, Interviewing Officer, Community Justice Centre, Bankstown**

## Report

### Mediation in the Federal Court

Presented by Alan Dawson, Federal Court of Australia

Before studying law, Alan Dawson worked as a qualified electrician and, after obtaining an economics degree, as a personnel officer. He was District Registrar of the Federal Court of Australia for five years before his recent appointment as acting Deputy Registrar. In 1986 in his capacity as a Federal Court Registrar he attended a training course in alternative dispute resolution in the United States. He has also attended a course at the Australian Commercial Disputes Centre. The following is a summary of the workshop he presented and materials he distributed.

Deane J commented in *re Queensland Electricity Commission* (72 Aust. Law Rep. 1 at 12) :

There is much to be said for the view that the processes of the ordinary courts of law and equity are open to legitimate criticism on the ground that they place insufficient emphasis upon the element of conciliation.

The Federal Court of Australia is endeavouring to meet this criticism with its program of Assisted Dispute Resolution.

Assisted Dispute Resolution was first used in a pilot program in the Sydney Registry of the Federal Court in September 1987. It was extended to the other states. Under this program a judge could refer cases to the Registrar for mediation or to identify the issues of a case.

In December 1988 the New South Wales District Registrar issued a note to practitioners advising them that in a Part V *Trade Practices Act* case after four directions hearings, the matter will be referred to the Registrar to identify the real issues and matters not seriously in dispute and, if appropriate, to mediate the whole or part of the dispute.

On 20th March 1990 the Prime Minister, Mr Robert Hawke announced that the Government would "legislate to expand alternatives to court proceedings as a means of resolving disputes". He recognised that informal processes were being used, but considered that a statutory framework was necessary and that issues, such as time limited to lodge documents and basic procedures, should be regulated.

Following this announcement a Practice Note was issued on 7th May 1990 as follows :

The Federal Court offers litigants a system of Court annexed mediation, Assisted Dispute Resolution (ADR), should they wish to avail themselves of it. Parties may request mediation or the Judge may suggest it at the directions hearing. The Federal Court's system of ADR consists of reference to a Registrar of the Court who sits as a mediator in a confidential conference with the parties. In some circumstances, it may be appropriate for the Judge to conduct the conference. If mediation is successful, the parties may then have their agreement embodied in a consent judgment.

Parties do not lose their hearing priority should they choose the process of mediation. Those conducting the mediation are able to give any directions necessary to ensure this priority is maintained.

Subsequently, by an amendment commencing on 4th June 1990, a paragraph was inserted in Rule 1 of Order 10 of the Federal Court Rules allowing the Court to:

order that the parties attend before a Registrar or a Judge in confidential conference with a view to reaching a mediated resolution of the proceedings or an issue therein or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter or otherwise to shorten the time taken in preparation for and at the trial.

Mr Dawson described the Assisted Dispute Resolution program as an adjunct to the work of the court rather than as alternative to it. The Registrars' powers are delegated from the Judges. The powers are to mediate and (if unsuccessful) to give directions to prepare the matter for hearing, for example, to order discovery.

In a recent case, *Harris v Caldine* (which has gone to the High Court on appeal) a Registrar signed a consent order at a settlement conference. One party had a change of heart and attacked the

order. The Federal Court held that it could only be challenged if the Registrar was in the same position as a Judge. This case may have implications for the powers of the Registrar exercised in Assisted Dispute Resolution, although at present the parties bring the terms of settlement reached at this process to the Judge for approval.

The Registrars attended the Australian Commercial Disputes Centre training course and received several days practical training. One Judge attended a course at Harvard.

The first users of the program were parties in trade practices cases, because, in 1987 the *Trade Practices Act* was amended by the insertion of section 86A which enabled judges to transfer these cases to other courts. The parties preferred to try to reach a settlement rather than wait for a hearing in another inferior, slower court. Recently about ten oil company disputes have been settled by Assisted Dispute Resolution and two bankruptcy disputes have used the process but have not settled.

The program has a 70% success rate. Many of these may have settled before hearing without third party assistance. Of the remaining 30% some settle before hearing.

The proceedings are confidential. They are "without prejudice" and cannot be referred to in court. The Registrar makes no report. There is nothing in writing, unless the Registrar makes directions orders. The Registrar is neutral. The parties are usually seen separately. The sessions may last as long as six hours and there may be more than one session. Any agreement reached may take the form of a consent order, that is the parties file their written consent to the making of an order, which is then brought before the Judge and if approved, has the effect of an order of the Judge.

One objective of the process is for the parties to reach an agreed facts basis. Liability or the quantum of damages may be also agreed so that only some issues remain to be resolved. The Registrar can find out what the parties are fighting about and then send the case back to the Judge. The pleadings do not disclose the real issues. They may disclose the parties' positions, but the Registrar ascertains each party's interests and discloses them to the other party. It is often the first time the parties have been aware of each other's interests.

Mr Dawson's style of Assisted Dispute Resolution is to create an "ulcer syndrome". The Registrar may point out the undesirability of publicity, problems of proof and the expense should the case proceed to a (lengthy) trial. In many trade practices cases where the dispute concerns an oral agreement, Mr Dawson points out to the parties that they are relying on the skill of their counsel, the predilection of the particular judge and the evidence of witnesses (which may vary according to their feelings on the day). Where the oral agreement was made over a year before the hearing, he recommends mediation. He also recommends that where parties cannot quantify their damages they should not litigate because they are asking the Judge to make a value judgement about a matter which they should be able to work out themselves with the help of a mediator. He warns the parties that in Court one side will lose. There is always a risk, but it is never too late to mediate, and then the result will be certain.

Once settlement offers are disclosed (usually to the Registrar in private, at least in the first instance) parties know how far apart they are and the Registrar can assist them to be more realistic and move closer together. Mr Dawson considers that the mediator should make suggestions. He gave examples of cases where he had suggested to one party that it may be able to give the other party something, like free advertising or a place on a tenders list, rather than a monetary settlement.

The practice of Assisted Dispute Resolution in the Federal Court will vary according to the Registrar of Judge acting as third party neutral. Mr Dawson requested feedback on his approach. He sees himself as an agent of reality, a neutral acting in a strong way to achieve settlements where everyone can be a winner.

**Anne Duffield, Sydney University Law School**

## Report

### Mediation in Legal Private practice

Barbara Coddington spoke of the practicalities and problems in her two roles as Family Law solicitor and mediator. The "two hats" that Barbara wears are :

**firstly**, as lawyer acting for a client in a dispute. She uses her ADR skills in this instance to effect a suitable settlement for her client. This also involves preparing her clients for mediations conducted by the Family Court pursuant to Order 24 of the Rules. Barbara will advise her clients on options and possible terms of settlement so they can be fully informed; and

**secondly**, Barbara is an independent mediator for parties who are not her own clients. In these cases, Barbara does not give legal advice to the parties. Once again, information is extremely important and Barbara has the parties exchange as much information as possible prior to the Mediation session so that parties can fully address issues of what has happened and what will happen in the future.

One common question is whether the matter is suitable for Mediation. The factors which help answer this question are the financial resources of the parties, the time spent in litigation, whether there is a hidden agenda which is blocking resolution and, perhaps not surprisingly, whether the solicitor on the other side is willing to allow his/her client to try mediation. This leads to Barbara's comment that in her experience only about 5% of practitioners that she deals with know about mediation and some of them do not know the differences between mediation and arbitration. Consequently, Barbara spends a lot of time educating colleagues. In spite of the gloomy picture indicated above, Barbara is inspiring in her commitment to using ADR in her practice. Her primary concern is to get her clients back on their feet and into the community, and she puts her clients' needs first.

It is to be hoped that she is having some effect on educating the legal profession as there is an obvious need for more lawyers to act in this manner.

**Liz Wing, Solicitor : Kaplan, Reeves & Co.**

## Mediation in Legal Private Practice

Barbara Coddington, Henry Davis York

It only takes a glance at the newspapers and at the evening news to know that the 90s do not look much like a bed of roses.

The uncertainties, economic and otherwise, can only lead to an increase in disputes in the community which, although unavoidable, means more stress on the community in general; and even if you do want your "day in court", the cost in time, money and effort may not be worth it.

Lawyers are slowly, far too slowly, coming to realise the benefits to their clients as well as to their own practices in doing something more than negotiating. The increased number of articles in magazines, speakers at legal conferences, training programs in Universities and elsewhere where lawyers are learning a new craft, bears witness to that. Some lawyers in private practice are now working as mediators as well as lawyers, although the numbers are very small.

Lawyers are constantly giving advice, assessing the opposition, negotiating, and if that doesn't settle the matter, litigating. If lawyers are to add mediation to this mix, they must look at the various roles which can and need to be played by them, and the problems that may arise.

- (a) A lawyer acts for a party in the conflict, advises them and prepares them for a mediation.
- (b) A lawyer acts as the mediator - and the parties **know** he/she is a lawyer.
- (c) A lawyer acts as a mediator, e.g. at the CJC, and the parties do not know she/he is a lawyer.

The following discussion raises some of the problems and difficulties which can occur :-

**(a) A lawyer acts for a party in the conflict, advises them and prepares them for a mediation**

One must first of all remember that as the lawyer acting for the party, one is hearing one side of the story only. Some matters clearly are more suitable for mediation than others.

The Centre for Alternate Dispute Resolution in the US has set down the following factors to consider in screening cases for mediation :

**Mediation is more likely to succeed if ...**

- \* a speedy resolution appears to be in the interests of both sides;
- \* the dispute seems to hinge on highly technical factual or legal issues;
- \* trial preparations will probably be protracted and/or costly and could result in either side prevailing at the trial;
- \* a commercial, community or personal relationship could continue or be resumed if the case were settled amicably;
- \* one or both sides probably wants to avoid an adverse precedent or negative publicity;
- \* the case involves hostilities or strong emotions;
- \* neither side really wants to litigate, the parties seem to have been swept into litigation through threats and counter-threats; and/or
- \* moderated discussions and case evaluations could break a stalemate or promote meaningful settlement negotiations.

**Mediation is less likely to succeed if ...**

- \* the case involves a constitutional question or a new text of the law;
- \* one or both sides probably wants a judicial decision for its precedential value in other cases;
- \* the advantages of delay probably run in favour of one side;
- \* one side's case is probably without merit;
- \* the case can probably be disposed of by the Court on a motion for summary judgment;
- \* one or both sides has a high emotional investment in being vindicated or an expectation of a large judgment;

- \* one or both sides may be dishonest in their representations; and or
- \* one side would be unfairly disadvantaged in negotiations.

In the area of law involving the family (married and de facto) where I spend most of my time, there are several other types of disputes which may succeed at mediation, and these include :

- \* Matters where parties have settled almost all between themselves and there is only a minor matter remaining;
- \* Cases where there are apparently low anger levels;
- \* Where there are limited resources and the parties should not be wasting their money going to court;
- \* Where there appears to be a solution but there is some illogical reason for not settling;
- \* Family Law matters where both parties are in the same separation zones or at least not too far away;
- \* Where the resources and the anger levels may be higher but both parties are in equivalent or roughly equivalent areas of income independence.

There are of course other problems and one might consider the following :

- \* Is the other side legally represented?
- \* If not, do you suggest mediation yourself, and how do you do it? Do you get someone else to suggest it, and if so, who?
- \* If the other party is legally represented, how do you negotiate with the other lawyer? and what sort of lawyer are you up against? If the lawyer is mediation-minded, that's fine, but if not, how do you persuade a litigious lawyer? Can you persuade such a lawyer?
- \* How quickly in any event do you need to suggest the process? At the beginning of the process before positions become entrenched?
- \* Do you send the parties to a lawyer/mediator or do you send them to the CJC or to Unifam? How complex is the matter? If it is complex the lawyer/mediator will almost certainly have more knowledge for the reality testing which must be done than CJC or Unifam.

A lawyer needs to prepare the client, not only for the mediation, but so that the client understands what the mediator is trying to do. In a family law matter, the lawyer might not be present; if that is the case, one needs to discuss in addition to the above, some of the following :

- \* What, for example, does the client do if the other side is not properly prepared?
- \* If the other side has not produced/prepared a statement and your client feels some information is missing, they should know that they can call a halt to the mediation until that information is available.
- \* Your client needs to be very clear on her or his BATNA and WATNA. It is always difficult in family law to advise a client accurately in, for example, a property matter. It is not unusual to have a 20% range for property settlement; this can put terrific pressure on a nervous client going into a mediation on her or his own.
- \* You need to be on call if you are not going to be at the session.
- \* Should you insist on seeing the other party's intake document prior to the commencement of the mediation? That would probably depend initially on the complexity of the matter but if your client's BATNA and WATNA are to be as accurate as possible, you should insist on seeing the document.

The above are just some of the matters which should be addressed when one is a lawyer advising and/or preparing a client for a mediation.

**(b) Where a lawyer acts as a mediator and the parties know one is a lawyer**

When the parties know you are a lawyer they hopefully will not be perturbed by a very thorough intake document, which they will probably complete with the assistance of their lawyers. This document will not necessarily flush out all, or even any, of the hidden agendas in addition to the know information, but the questions do try to bring them to the surface.

It should be mandatory that the parties have enough time to inspect the other's intake document so that if there are any queries neither party (nor the mediator) is caught with too little information or

what may appear to be mis-information. The parties can be sent away to do their homework quickly, and then they can get the whole story on the table as quickly as possible.

If the mediation is successful, it should be possible to end up with an agreement which is fairly detailed though in non-legal language, and each party then has full knowledge of the procedures (for example in property matters) which will be followed (e.g. to sell the matrimonial home, to dismantle a family trust or trust involvements). Agreement in principle will need some refining when complex transactions have to take place. Matters, for example, involving access should be very specific. Here, too, the experience of the family lawyer/mediator is going to be of assistance in raising the "what ifs" in access arrangements.

You will need to be very careful to ensure that the agreement the parties reach does not become a legal document just because you are doing the writing. You will need to remember that it is the parties' agreement and it is the lawyer's responsibility to draft the final document.

As far as the Family Court and mediation is concerned, a new approach has been proposed which is being piloted at some of the Registries. This proposal uses mediation in Order 24 Conferences. Where there is a matter containing both property/maintenance and access/custody issues, there is a joint conference/mediation with a Registrar and a Counsellor co-mediating.

Regarding this scheme, the first issue to be resolved is : would that conference be voluntary or Court-ordered? If it is Court-ordered, the purists would say it is not mediation. I would be inclined to agree.

Whilst I can only applaud any proposal to settle matters without expensive litigation it seems that the Attorney General is not prepared to put any funds into this proposal. Given the current time constraints, let alone staffing constraints on the Court, I have difficulty in seeing how such a project is going to adequately get off the ground, particularly where Order 24 conferences have a two-hour time slot on almost every occasion.

I have often found that at the end of a two to three hour Order 24 conference there are a lot of untidy ends still to be settled and the lawyers and the clients end up doing this, often in a hurry, on the spot. So often the clients feel some dissatisfaction with that rushed approach. Will there be enough time and money available to fund proper mediations? I would like to think so.

The last issue I would like to address is this: is it worth while for a lawyer working in private practice to train as a mediator? Certainly at the moment there are very few lawyers in the area of family law who have completed what might be considered appropriate training and are working as mediators in private practice. Many more lawyers are now aware of what a mediation actually is about, but they are still somewhat shy about sending their client through the portals of another legal firm. We have a long way to go before we are doing anything like the number of mediations as do our United States colleagues, or even the number undertaken by Canadian family law lawyers. The figures for the US show that lawyer/mediators in practice in the US spend 10% of their time working as mediators and in Canada the percentage is much lower, more like 5%.

It seems to me that we have two major hurdles to overcome :

**firstly**, teaching our colleagues the advantages of mediation, and **secondly**, solving the problem of the real worry that lawyers have about their clients going to another law firm.

The first problem can only be soived by constant publicity and talking about the advantages of mediation so that it is not only lawyer-driven, but also client-driven. Perhaps the solution to the second problem is as follows :

1. All mediations are undertaken in a neutral setting, for example the Law Society, to solve the problem of "walking into" the rival firm's domain; and
2. There should be an absolute prohibition on you as former mediator - or your firm - subsequently acting for one of the parties, maybe for a period of one to two years.

Lawyers working in private practice who also want to work as mediators have to keep their skills honed as well as taking every opportunity to publicise and promote the advantages of mediation.

This paper raises more questions than answers. The answers will need to be thought through by lawyers and others in the near future, as mediation becomes a tool for settlement to a much greater degree than at present.