The Mediation from Hell – How is it to be Avoided?

Methods of Mediation

Any discussion of the topic of mediation should begin with an understanding of the nature of the models of mediation.

Professor Laurence Boulle in "Mediation - Principles, Process, Practice" (1996) described four models of mediation being settlement mediation, facilitative mediation, therapeutic mediation and evaluative mediation.

Most of you attend settlement mediation which Professor Boulle tells us is also known as compromise mediation.

The main objective is said to be to encourage incremental bargaining towards compromise, at a "central" point between the parties' positional demands. In such mediation, the dispute is said to be defined in terms of position based upon the parties' self definition of the problem.

The type of mediator recommended is a person of "high status" (barrister, manager); no necessary expertise in the process, skills and techniques of mediation."

Some years ago a well known member of the Bar and mediator Robert King Scott, presenting a paper on this subject quoted a (fortunately) unnamed fellow member of the Bar who he said had described mediation as “litigation for the feeble minded”. While King Scott went on to support the growing use of mediation the remark that he quoted is one which is still on the minds of many practitioners.

Although I am not sure that I agree with the unidentified barrister who described mediation as "litigation for the feeble-minded" it will be seen that settlement mediation is certainly not a rocket science and perhaps we would be wise to go to such mediation without high expectations.[1]

The then Chief Judge of the District Court expressed caution about the impending introduction of the mediation process when writing to other judges of the courts. He said:

> “I am conscious of two conflicting principles. The first is that our litigants should be entitled to his or her day in court, and to have a decision from a judge of the court. On the other hand, the time of the court is a public resource which is coming under increasing pressure, and it is now often said that parties have no right to use that resource unless they have made a proper attempt at settling their differences by negotiation.”

Fifteen years on the Civil Dispute Resolution Bill (currently before the Commonwealth Parliament) may introduce the obligation on litigants in the Federal Court of Australia and the Federal Magistrates Court to file a “genuine steps statement” at the time of filing the

[1] For the description of the balance of the forms that mediation might take see Professor Boulle's book at page 29.

application instituting an eligible proceeding. It is proposed that a genuine steps statement will specify:

(a) the steps that have been taken to try to resolve the issues in dispute between the applicant and the respondent in the proceedings; or

(b) the reasons why no such steps were taken, which may relate to, but are not limited to the following;

(i) the urgency of the proceedings;

(ii) whether and the extent to which, the safety or security of any person or property would have been compromised by the taking of such steps.

Section 15 of the Bill proposes that some proceedings be excluded from the operation of the Act but the Act will have far reaching consequences if it becomes law. Accordingly, it seems appropriate to assume that mediation, with all of its shortcomings is here to stay and it is important to consider how to make the best of it.

The fifteen years that have elapsed since Chief Judge Shanahan expressed the views that I have mentioned have told us that the mediation from hell still happens and that costs considerations drive many litigants to accept outcomes achieved in what is often a flawed and unsatisfactory process.

Douglas Landau an American lawyer from Herndon, Virginia summarised the benefits of the mediation process under the title "How I Learned to Relax and Love Mediation" in Trial Magazine in December 2009. The title tells us that he like me was a reluctant convert to mediation and sceptical of its benefits but he concluded with a statement delivered (with apologies to the Rolling Stones) in the following form:

> "You can't always get what you want, but if you mediate sometimes, you might find your clients get what they need."

Setting up the mediation

Two critical but frequently overlooked aspects of arranging a mediation which will proceed in a satisfactory way are mediator selection and client management.
The current situation in personal injury mediation is that generally insurers retain a mediator to visit a regional centre for a week and conduct a number of mediations each day. Frequently no more than two hours is allowed for any particular mediation.
In my experience plaintiffs often have two legitimate concerns. First, it appears to them that the relationship between the insurer and the mediator is a close one. This comes about because of the basis of the mediator's retainer without more.
I wish to discuss with you whether the system would be improved by having your mediators appointed on a case by case basis by the Registrar of the relevant court or having the mediations conducted by court officials.

Client management is critical if mediation is to have a real chance of success. So often parties come to mediation without any real idea of what a proper outcome of the mediation might be and without having had any reality testing of their own ideas.

We will examine at least one way in which this risk of an impediment to the process might be reduced.

I will seek to discuss with you the case for increased controls on the conduct of mediation and whether an increase in those control mechanisms would reduce the risk of the process failing.

The consistency one finds in papers dealing with the problems encountered in mediation is illuminating.

Some years ago Peter Ambrose SC in a paper entitled "Common Problems in Mediation" identified:

1. Lack of preparation by the parties and their representatives;
2. Failure to make relevant disclosures in a timely manner:
3. Lack of knowledge of the subject matter;
4. Inability to control the behaviour of the client;
5. Lack of trust in the mediator.

as matters commonly causing failure of mediation and requiring to be addressed. Another well known mediator, Peter Munro, in a paper presented to the Queensland Law Society Symposium in 2007 identified ten matters to be attended to if the risk of failure of mediation was to be reduced and they were:

1. Preparation
2. Decision maker not present at mediation
3. What one side does not know – the withholding of information
4. Impatience
5. False expectations
6. Influential outsiders
7. Conflicting experts
8. Other agendas
9. Inflexibility
10. Loss of focus.

Mark Wolf who is a partner in a legal firm in Mobile, Alabama writing for Trial Magazine recommended that preparation for mediation should include three steps.

(a) educating the client about your evaluation of the case and the mediation process;
(b) presenting the evidence supporting the plaintiff's case to the mediator and the defendants;
(c) creating a strategy for successful resolution and reviewing that strategy with the client.

Mark Wolf reminds us that mediation is often the first time the insurance adjustor or risk manager will be able to associate a human face with the claim that he or she has been working on. During all of that time the plaintiff is no more than a "claimant" whose identity has been associated with a claim number or case number. Insurance adjustors and risk managers are trained to factor out their emotions when evaluating a case and to counteract this training Wolf suggests that attention be paid to three good things about the claimant. While you might not change an adjustor or manager's views it might create greater respect for your client and positively affect the outcome of the mediation. Wolf gives an example which I will quote:

> "At a recent mediation the insurance company was questioning my client's veracity and motives related to his complaints of continued pain and problems from injuries he received in a head on motor vehicle collision. I started the presentation by saying,

> 'Jack has been married to the same woman for 39 years, has worked at the same company for 35 years, and served our country in the Vietnam War, where he saw extensive combat duty and received several citations for combat bravery. He is not a faker or a malingerer and I believe that when he tells the jury he is still having pain complaints and problems from this collision, they will believe him."

The power in the words is obvious. They serve to create a compelling picture of the client as a real and worthwhile person rather than a statistic or a claim number. They illustrate that there is a place for the advocate at mediation.

The Appearance of Partiality

The current Queensland practice where mediators are retained by insurers for periods of a week at a time during which week several mediations are listed on each day cannot do other than create an appearance of partiality.

While it cannot be dated that parties are free to maintain or retain mediators in such manner as they see fit, there is, in my view, a good case for requiring that in the case of mandatory mediations required as part of the pre-court process or required to be held under court rules, mediators might be appointed on a case-by-case basis by the Registrar of the relevant court.

It could not be argued that approaching a matter in that way would not result in the parties having confidence that the mediator was entirely independent as between the party and the insurer.

Another alternative worthy of consideration is mediations conducted by court officials.

Justice Steven Rares of the Federal Court in a paper entitled "Alternative Dispute Resolution in the Federal Court of Australia" tells us that registrars undertake the majority of mediations ordered by the Federal Court, although parties are able to utilise private mediators where they prefer to do so. Justice Rares says that the preponderance of mediation by registrars has developed as a result of a number of factors.

(a) The court having trained and accredited its registrars to a standard set by the National Mediator Accreditation Scheme. This has insured quality of service;

(b) Registrars having expertise in the practice and procedure of the court;

(c) The cost to the parties being generally lower than for external mediations.

(d) The availability of a Registrar and the court's facilities enabling matters to be dealt with immediately where necessary; and

(e) The growing reputation for excellence of the Registrars as effective mediators.

The use of court Registrars, it is pointed out, has great flexibility allowing Registrars to conduct mediations at short notice and that is particularly useful in applications for injunctions, urgent matters and cases where an adjournment occurs on the day a matter is fixed for hearing. Justice Rares points out that in the latter situation the parties and their lawyers are already at the court, on top of their cases, and able to discuss the possibilities for resolution.

In the Planning and Environment jurisdiction of the District Court the ADR Registrar conducts mediation in suitable matters. He is currently achieving a resolution in 80% of matters referred to mediation. In my experience this would be a significantly higher rate of resolution than is currently achieved at settlement mediation in personal injury matters.

The system would be greatly improved by the adoption of one of these measures. Parties would have greater confidence in a system where the appointment of a mediator was not controlled by one of the parties.

Preliminary Conference

Consider how the difficulties identified by Ambrose SC and Munro in the papers referred to might be reduced if a proper preliminary conference was held.

Writing in the 1990s Charles Brabazon QC (then a member of the District Court Bench) said:

> "Experience shows that it is essential to hold a careful preliminary conference in any mediation."

Sadly that does not seem to have caught on. In the absence of a properly held preliminary conference it will often be the case that the parties (and sometimes their lawyers) will not know what is expected of them at mediation.

A suggested agenda for a preliminary conference is as follows[2] :

Agenda for preliminary conference

1. What is the dispute about? What issues are to be mediated? The parties should exchange concise written statements about the issues and their views on each issue.
2. The legal representatives should prepare brief forecasts about the litigation, if there is no settlement – delays, length of trial, the total costs.
3. Will the parties also provide confidential statements to the mediator about their interest and concerns in attempting to negotiate a settlement? Will the parties discuss with the mediator the question whether those confidential statements might be exchanged?

4, Who will attend for the parties?
   (a) Who has actual authority to settle the dispute? That person must attend.
   (b) Who is required for any desirable reason – e.g. to explain some evidence or express an opinion or be examined by a doctor?

   d) Who is required to offer support or assistance to a party – e.g. a spouse or a parent?

   (e) Is any other party required to be present to make an effective agreement?

5. Who will attend as legal representatives?

[2] Reproduced substantially from the work Brabazon QC

6. Should any more information or advice be obtained before the mediation is held?

7. Has the mediation agreement been signed?

8. Is there final agreement about

    (a) the amount and method of payment of the mediator's fee?

    (b) the initial and ultimate responsibility for the costs of the mediation.

9. Do the parties have any particular expectations about the privacy or confidentiality of the mediation process?

10. What procedures will be followed? Is there to be an opening statement by the mediator and summaries presented by the parties? Who will speak for each party?

11. Will discussions proceed on the basis that there will be no concluded agreement unless it is reduced to writing and signed.

12. What is agreed about?

    (a) the time and place of the mediation;
    (b) how long it is expected to last;
    (c) arrangements for refreshments and meals;
    (d) the need for any equipment – whiteboard, projector etcetera;

13. What documents will be sent to the mediator? Will confidential documents be clearly distinguished?

In court ordered mediations it might be worth also considering:

14. Is the referral order produced? Are the documents sufficient? Are the fees in order? What time is allowed?
15. In what ways should the mediator gather information?
16. Is the mediator to decide if a party can be represented?
17. Should anyone apply to the court for directions about any issue?
18. Does the mediator expect to seek independent advice?
19. Any other problems or questions.

The current practice of allowing all these matters to simply be discussed at the mediation entails a high risk that the parties will be so busy coming to grips with issues that are truly preliminary issues that the objects of the mediation will be lost.
The proper conduct of a preliminary conference should result in a drawing out of all of the issues. It further should ensure that the parties at least have a real opportunity to prepare against a background of an understanding of the issues. It may also set the boundaries for discussion.
Most importantly the proper preliminary conference may be the start of a proper process of client management to ensure that unrealistic expectations do not defeat the process.
The importance of written outlines cannot be overstated. If properly prepared the outlines should expose all issues and avoid factual misunderstandings and failures of disclosure.

The Case for Further Control over the Parties

The National Alternative Dispute Resolution Advisory Council ("NADRAC") is an independent body charged with providing advice to the Commonwealth Attorney-General on the development of an Alternative Dispute Resolution (ADR) system and was promoting the use and raising the profile of ADR.

On 28 February 2011 NADRAC provided the Attorney-General with its report entitled "Maintaining and Enhancing the Integrity of the ADR processes; from principles to practice through people."

A detailed consideration was given to conduct obligations for disputants and their representatives in mandatory ADR processes.

The committee reported:

> "*On balance there is value in prescribing conduct standards for mandatory ADR in the Federal Civil Justice System. In particular, NADRAC considers that disputants in such processes should be able to clearly identify expected standards of conduct. NADRAC observes that various forms of conduct obligation are already prescribed for many ADR processes and these have worked satisfactorily. Further, if either Federal laws or orders of Federal Courts/tribunals require disputants to undertake an ADR process, there is probably an implicit obligation to do so in good faith. NADRAC considers that the integrity of ADR is supported by these obligations, to ensure that disputants are clear about what ADR involves. Also NADRAC considers that the public interest in the administration of justice is best served by expressly recognising that participation in mandatory ADR should be undertaken in good faith."*

The report goes on to state that a consensus was not reached on the preferred foundation for a conduct obligation and that members of the Council were divided between "good faith" and "genuine effort."

It seems to me that there are two difficulties.

The first, which ever form of words is adopted, they will, of necessity, be vague and capable of varying interpretations.

Secondly, consideration would need to be given to how those obligations might be enforced and how evidence of any alleged failure to act in accordance with the prescribed standard might be brought to the notice of the court.

Would the mediator be entitled to report failures to act in accordance with the prescribed standard?

Would the parties be entitled to call evidence attempting to prove a failure to reach the required standard by another party?

In the case of reports made by mediators, would there be a process for appealing the mediator's conclusion?

The Council went on to suggest that enforcement, including a determination of sanctions should be left to the discretion of the relevant court or tribunal.

Specifically, NADRAC considered that:

- *Before any evidence is admitted for the purpose of enforcing a conduct standard, the parties seeking its admission should be required to obtain the leave of the relevant court or tribunal, and*
- *In deciding whether to grant leave to admit evidence of this kind, the court or tribunal should be required to taken into account the public interest in the confidentiality of the ADR processes, and should only make an order if satisfied that it is in the interests of the administration of justice to do so.*

As is pointed out in the report, other possibilities would be to require the court or tribunal to be satisfied that it is in the public interest to grant leave to admit the evidence or to require the court or tribunal to apply a two fold test that would allow leave to be granted only if it was both in the public interest and in the interests of the administration of justice to do so.

Do you see a whole new area of legal practice emerging?

Currently the Civil Dispute Resolution Bill remains a bill. It may be the first in a series of pieces of legislation which will seek to regulate the conduct of compulsory mediation processes.

John Baulch SC DCJ

May 2011