Kluwer Mediation Blog

Court-Referred ADR: The View From The Bench

Alan Limbury (Strategic Resolution) · Sunday, April 22nd, 2018

In Australia we have long experience of compulsory mediation prior to litigation in cases where a presumed power imbalance exists – such as retail tenancy and farm debt disputes.

However, compulsory mediation by order of a court has been a controversial topic, particularly amongst judges, most of whom do not have actual mediation experience and may fail to appreciate the late (and loved) Professor Frank E. A. Sander's wise advice: "there is a difference between coercion into mediation and coercion in mediation".

Professor Kathy Macks's well thought out research undertaken in 2003 discovered (to the surprise of its many critics) that generally settlement rates in mandatory mediation mirror those for voluntary mediation. In 1994 legislation empowered the Supreme Court of New South Wales to refer a matter to mediation if it considered the circumstances appropriate and if the parties consented to the referral and agreed to the mediator. In 2000 the Court's power was extended to order mediation despite the absence of consent by one or all of the parties. This power now operates Australia-wide.

The Australasian Institute of Judicial Administration (AIJA) has recently published a study it commissioned to explore judges' perceptions of court-referred ADR. Authors Dr. Nicky McWilliam of the University of Technology, Sydney and Dr. Alexandra Grey of Macquarie University Law School polled 104 judges from various jurisdictions on the extent to which they turned their mind to and actively encouraged ADR in cases that came before them – this included suggesting ADR by 'nudging' and referring parties to ADR with or without their consent; the availability and use of ADR in assisting court proceedings; whether or not there were prerequisites to ADR referral, in particular judge's awareness of parties' interests as well as knowledge of the process itself; and the subjective assessments of judges on ADR's ability to achieve unique results and positively impact workload and judicial satisfaction.

Interesting differences emerged in judicial perception and behaviour.

Local Court magistrates found court-referred ADR useful, even in criminal matters, in promoting efficient workload management, whereas District Court judges, (who also have a heavy criminal law workload), appeared reluctant to refer criminal cases to ADR without consent. In the Supreme Court, most judges consider ADR 'A lot' when conducting a case, while many consider ADR 'Not at all', possibly because the scope for considering ADR is thought to be much less in the Court of Appeal than in the court's original jurisdiction.

Mediation is my preferred form of ADR and from my experience, spanning more than 30 years as a mediator, the type of case (criminal, civil, appellate, whatever) is a poor guide to whether a dispute is amenable to resolution by mediation, whether court-ordered or not. This is because how the parties see things (which may never be shared with judges) is a critical factor. A case of the same type that settled by mediation yesterday might be fought to the highest court in the land tomorrow depending on the parties' interests. During a long period as a defamation lawyer I remember regarding a newspaper publisher as utterly unreasonable in insisting on aggressively defending a case in which an innocent person had clearly been defamed, until some years later I realised the publisher's interest was in sending a message to the world: "don't even think about it"!

The recent study found that most judges believe that referring matters to ADR processes requires an understanding of ADR and that, in addition to the nature of the case, the jurisdiction and the tier of court involved, they should account for parties' needs and interests in deciding whether to refer them to ADR. Further, most Supreme Court judges in the Equity and Common Law Civil Divisions are motivated to consider referral to ADR by their overriding purpose of "facilitating the just, quick and cheap resolution of the real issues in the proceedings".

Judges also see the timing of court referral as important. Many Supreme Court judges are wary of referring cases to ADR "too early", believing it important to ensure that the issues have been sufficiently identified to allow some form of negotiation to take place – worrying that if settlement is attempted too early, one side's case may yet be unclear and that even a position paper may not cure that sufficiently.

I have a couple thoughts on this.

First, it's hardly ever too early. As that great English author and satirist Malcolm Muggeridge used to say: "No dispute is ever about….what it's about". The disputants know what their interests are (what it's really about) long before they start litigating and long before the pleadings are closed.

Second, mediation can go far beyond settlement to achieve a genuine resolution. Making the focus of mediation a protracted argument about the legal merits is the least productive and valuable form of mediation. This is not to deny the utility of the mediator, in financial claims, prompting parties in caucus to consider the 'net present value' to them of disputes, which their lawyers can usually be persuaded to address if the mediator persists. This can help them move on with their lives and terminate or re-establish relationships.

The AIDC study revealed that 75 per cent of the responding judges had not had any ADR training despite the majority having been appointed to the bench since court-referred ADR had been legislated and during a period when ADR was relatively common. As the authors comment:

> "While it may be argued that judges appointed in an age where ADR is common do not need training, that surely underrates the contribution training can make: not everything can be, or is best left to be, learnt by osmosis."

The authors delicately suggest that increased training may be useful to provide guidance on weighing up the many factors which the study shows affect judicial perceptions of whether or not court-referred ADR is appropriate and to share experiences of how court-referred ADR is being considered and used by other judges.

To my mind, the increasing numbers of today's law graduates who have studied ADR as part of their law course will eventually influence the perception of lawyers and judges.

This will be a great outcome.

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This entry was posted on Sunday, April 22nd, 2018 at 6:00 am and is filed under ADR, Dispute Resolution, Domestic Courts, Mandatory mediation, National Mediation Laws, Promoting Mediation, Research, Surveys
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