Kluwer Mediation Blog

Can we rely on judges to bring mediation into the mainstream?

Alan Limbury (Strategic Resolution) and Rosemary Howell (University of New South Wales) · Friday, July 22nd, 2022

In the beginning …

Back in the 1976 Pound Conference called "Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice", Harvard Professor Frank E.A. Sander had some wonderful ideas. He proposed what we would now call a triage process. Instead of regarding litigation as the default, disputants might be steered to the dispute resolution processes appropriate to the circumstances of their dispute. His paper, "Varieties of Dispute Processing", published in 1979, envisioned "by the year 2000, not merely a courthouse but a **Dispute Resolution Center**, where the grievant would first be channelled through a screening clerk who would then direct him to the process (or sequence of processes) most appropriate to his type of case", such as mediation, arbitration, fact finding, litigation and ombudsman.

The American Bar Association steps in

The American Bar Association (ABA) was quick to re-name Sander's idea of a **Dispute Resolution Center** as a "**Multi-door Courthouse**". The inevitable consequence has been that, in many jurisdictions, the first step towards Sander style triage – aimed at 'fitting the forum to the fuss' – takes place after litigation has commenced. It is then managed by the court, especially in jurisdictions where courts have power to order parties into mediation.

Should we be leaving triage to the courts?

The ABA's reframing of Sander's concept of a Dispute Resolution Center is another example of lawyers' limited vision of mediation. This limitation continues in the face of a number of highly

successful non-court managed triage. An excellent is described in Dr. Rosemary Howell's blogpost here.

Deferring triage until court proceedings have commenced is at odds with the general experience of mediators. We recognize that as a dispute develops, and before it is fully formed, there are multiple intervention points available to offer opportunities for early resolution. We are also aware that, once court proceedings have commenced, mediation is often not contemplated (if at all) until late in the process, after much time and expense. Lawyers and courts seem preoccupied with the idea that 'ripeness' of the dispute is a pre-requisite for mediation. A former President of the New South Wales Bar Association once asserted to a Parliamentary Committee that mediated settlement of disputes requires the informed consent of the parties, who cannot be expected to give their informed consent until the pleadings have closed; interrogatories have been administered and answered; documents have been discovered and inspected; and witness statements have been exchanged. This assertion failed to acknowledge that by this late stage of litigation the parties are deeply mired in and attached to a dispute whose chances of resolution are diminishing by the day!

The challenge of the entrenched adversarial culture

However, although mediation has enjoyed growing acceptance over the last 40 years, the public generally has little understanding of the process and still thinks the choice is between going to court and doing nothing.

The Global Pound Conference North America Report noted that "One of the biggest challenges identified was the entrenched adversarial culture in commercial DR and the litigious mindset of many seasoned lawyers. Despite an increasing shift toward a more collaborative and problem-solving approach, the 'old boys' network' is still perceived as dominating the commercial DR landscape, which continues to incentivize an adversarial culture. This mindset is sometimes shared by parties and can be perpetuated by public perceptions of litigation".

One overarching theme was that all jurisdictions across North America agreed that ADR needs to become a mandatory part of law school curricula and that there should be training available for lawyers, judges and in business schools.

The next step in judicial intervention – JDRN

Since 2019 numerous courts have collaborated to establish the **International Judicial Dispute Resolution Network (JDRN**) to promote and develop best practice for Judicial Dispute Resolution. Its inaugural meeting was held in Singapore in May this year, with judicial representatives from Australia, Canada, China, Germany, Malaysia, the Philippines, Singapore, Britain and the United States.

The aim of the Network is to promote the early, amicable, cost-effective and fair resolution of court disputes without the need for a trial, through judge-led management of cases, twinned with the employment of Court Alternative Dispute Resolution modalities such as mediation and neutral evaluation. The inaugural address was delivered by Singapore Chief Justice Sundaresh Menon.

At a meeting last week of the Mediators' New Breakfast Club , Lady Justice Asplin, Chair of the (UK) Judicial ADR Liaison Committee, noted that the courts of England and Wales are founder members of the JDRN and that she is trying to engineer a revolution in judicial thinking and training. She foreshadowed mediation becoming part of the justice system; judges trained in soft

skills engaging in judicial mediation; mediation being offered not just at the beginning but at various points as claims progress; early neutral evaluation by judges; and the need for some benchmark or standard for mediation by which the public will know what they are getting, so they may have confidence in the process and in the judicial system. Noting that, in keeping with the UK Civil Justice Council Report on Compulsory ADR that mandatory mediation is lawful, contrary (thank goodness) to Halsey v Milton Keynes [2004] 1 WLR 3002, Lady Asplin said mediation is moving towards being mainstream and is not peripheral. Hence making mediation mandatory will help mediation make the cultural shift into centre stage.

I am concerned that "the litigious mindset of many seasoned lawyers" identified in the GPC North America Report is not confined to North America and that, upon appointment as judges, seasoned lawyers with the litigious mindset may find it hard to undertake the revolution in judicial thinking and training that Lady Asplin has in mind. Nevertheless, moves by courts to educate the public generally at every level as to the advantages of and differences between various DR processes, while ordering parties into mediation in appropriate cases, may make better and faster progress towards bringing mediation centre stage than has hitherto been achieved.

So the JDRN and judicial dispute resolution are to be welcomed and supported. Let's go!

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