'JUDICIAL ADMINISTRATION: STEPS TO ESTABLISH A COURT MEDIATION PROCESS'

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To establish a court mediation process there are, generally, five key steps.

1. Why mediation is needed?

At the outset it is important to resolve why a court wants to go down the path of mediation.

Generally, it is because of pressures from backlogs in civil lists. The general experience is that mediation is used as a form of alternative dispute resolution in the civil jurisdictions, but there are also signs of it being used in the criminal jurisdiction. It was to address serious delays in the civil litigation process that mediation, a process that had originally been used in the context of building construction disputes in the Victorian County Court, was adopted more broadly by the Victorian courts system in the late-1980s and early-1990s.

Aside from backlogs, modern approaches to judicial administration see the court hearing, that is determination by a judge, as the last resort. Furthermore, there are pressures from governments to reduce the amount of government resources necessary for operating the modern court. More and more governments see it as desirable to shift the cost of litigation to the parties themselves. Thus, every case resolved by mediation is a cost saving for government.

There is a third reason. Usually, modern approaches dictate that it is better for parties to resolve their disputes without resort to the court. Better to walk away winning something rather than risking losing everything.

From a court perspective, the prospect of reducing backlogs is compelling. Most modern courts find now that through the use of clever ADR all cases are resolved save for about three to four per cent. It is these hard cases that end up being determined by a judge.

2. How will cases go to mediation?

On the one hand courts can force arbitration by mandatory orders. However, it is always better to do things co-operatively. Thus, if the legal profession and the bar and, desirably the community, see and understand the benefits of mediation they will support it. From the point of view of litigators, it means they have happier

clients who save costs. It also means litigators can move on to other matters. It does not involve loss of legal professional income necessarily. For the parties themselves, the benefits are twofold, firstly, a saving of costs. Secondly, minimizing risk involved in losing litigation. They need to ask themselves is there such a thing as a litigation certainty?

Then, there is the matter of the courts and judges themselves. Most modern judges are burdened by backlogs and reserved judgments. The opportunity for cases to go away without the need for hearing and delivery of judgment is irresistible for the modern judge. All around the world now judges acclaim mediation as one of their most important judicial tools.

The next sector to bring along is government itself. Setting up a proper mediation process and facility will involve modest cost. In the short term and clearly the long term, the cost saving will be considerable for government. For example, if a case has an estimated duration of say four sitting weeks plus one to two weeks judgment writing time, the cost of adequate mediation facilities taking up one to two days is a dramatic saving.

If all parties can be persuaded then it is quite easy to make orders referring matters to mediation by consent. Otherwise, courts need to make a policy stating the reasons and benefits and announcing that, for example, all commercial cases hereafter will be referred to mediation before proceeding to trial.

In Victoria, the Courts have adapted their civil procedure rules to include referral to mediation as part of the litigation process, and developed Practice Notes (notices to the profession establishing and explaining management of different aspects of the court system) stipulating that in virtually every civil matter, some form of mediation must be undergone before trial commences.

3. Who will mediate and when?

Generally the Australian experience shows that barristers are able mediators. There are members of the legal profession more widely who have these special skills. However, there has been a strong shift in Australia towards barristers and solicitors who mediate cases to undergo professional training, and it is now commonplace for members of the Bar especially to have undergone such training. There are courses available in Australia, and also overseas, such as the Pepperdine University programme for judges and the Bond University course for interested persons generally. There are also non-profit organisations such as LEADR which promote alternative dispute resolution and run training programs for mediators.

In the Supreme Court of Victoria, Associate Judges, who mostly handle the interlocutory side of litigation management on behalf of the Court also conduct mediations. This process began as a pilot program, using one or two Associate Judges with significant

previous mediation experience and was so successful that it was established as a permanent part of the way the Court operates. A majority of Associate Judges now conduct mediations. However, before doing so, they are required to undergo special tertiary level training. In a similar fashion, Victorian judges also receive training from the Judicial College of Victoria in respect of mediation so that they understand the process and are adequately equipped to refer matters to mediation at the appropriate time.

Therefore, in Victoria, mediation can be conducted either internally, by an Associate Judge, or externally, by an accredited mediator drawn from the broader legal profession. The Court has developed informal criteria to decide when a matter will be referred to an Associate Judge rather than an external mediator. These include:

- When the parties have previously had an unsuccessful mediation with a private mediator, but the Court believes that there is a chance for the parties to settle the matter if it is referred to an Associate Judge rather than an external mediator.
- When the parties involved are not financially well off.
- When the proceeding has been listed for trial and there is a view that the costs and time involved in a trial of the proceeding are disproportionate to the subject matter of the dispute.

Mediation requires special skills. It cannot necessarily be assumed that a person can step into the role, it is quite different from judging.

4. Where will the mediation be held?

The mediation venue depends upon whether the parties will be more affected by the gravitas of the court setting or whether it is better for the parties to operate in a more informal environment. Early in the litigation process, the latter is probably preferable. In the course of a trial, or shortly before a trial, the environment of the mediation can be very important. If it is being conducted by a judicial officer then it is better that it be conducted with all the hallmarks of the court, outside the courtroom, but within the court precinct.

In Victoria, we have a special mediation centre established for this purpose. The Supreme Court Mediation Centre has two sound proof rooms with two separate 'break out' rooms attached to them. Each room is soundproofed, so that the parties can be assured that private discussions with their legal advisors remain confidential and cannot be overheard during the conduct of the mediation. The Associate Judge conducting the mediation sits at the head of a boardroom style table and the parties are able to separate as needed to discuss whatever settlement offers are made or received during the course of the mediation.

The rooms are designed to promote discussions between the parties aimed at a mutually beneficial resolution of their dispute. Official court robes are not worn by any of the participants.

5. How many times should parties undergo mediation?

In an earlier speech on the topic of alternative dispute resolution I noted that:

> Judicial experience tells us that in litigation it is a bit like picking fruit. We need to pick the "mediation peach" when it is ready – too early it will be hard to penetrate the fruit; too late it is over-ripe. The judicial art is to time the 'sweet moment'.[1]

Mediation will only be successful if it is timed appropriately and if it is suitable to the dispute in question. Mediation has become such a strong part of the Victorian legal culture that litigators voluntarily engage in some form of mediation before issuing or shortly after issuing proceedings. Once a matter is within the ambit of the court then judges will make it plain that mediation is required at an early stage. It is quite common for parties to a dispute to return to mediation more than once. It even occurs in Victorian courts, particularly in the Supreme Court, that a judge will refer a matter to mediation during the course of a trial, for example, after the plaintiff's opening is completed, after the plaintiff's first witness

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[1] Chief Justice Marilyn Warren AC , 'ADR and a different approach to litigation' (Speech delivered at the Law Institute of Victoria 'Serving up Insights' series, Melbourne, 18 March 2009). A copy of this speech may be found at < http://www.supremecourt.vic.gov.au/wps/wcm/connect/8fb3cb004056e0f5a68abee505682c73/ADR+and+a+different+approach+to+litigation_CJ.pdf?MOD=AJPERES>.

has given their evidence in chief or after expert evidence on both sides has been heard.

In referring the case to mediation, the private cost to the parties of such a referral must be born in mind by the judge. The cost of a mediation varies, but it is generally around $5000 per day.
As already mentioned, one of the criteria by which referral of a mediation to an Associate Judge is decided is the financial well being of the parties involved. In Victoria, it is not uncommon for people to represent themselves in litigation when they are unable to afford legal representation. Such people are known as 'self-represented litigants'. Nevertheless, it is considered undesirable for Associate Judges to conduct mediations in matters involving such litigations, who thereby have direct access to the judge in private caucusing. The Court has resolved this problem by referring such mediations to the Victorian Bar's Duty Barrister Scheme, which runs a program providing mediation services to this type of party pro bono. Such referrals are managed through the Supreme Court's Self-Represented Litigants Co-ordinator, a specialist within the court who manages the unique demands placed on court resources by self-represented litigants.

6. What are the key issues in establishing a mediation system?

Reflecting on the why, how, who where and when of mediation in Victoria, it is clear that a number of key issues have arisen and

had to be addressed in order to ensure the successful integration of this form of non-adversarial justice into our existing adversarial, common law system over the last twenty or so years.

First, the support of the legal profession has been essential to the success of mediation in Victoria. Liaison with the profession as well as the provision of training to those who wished to become involved in mediation ensured that mediation was both understood and utilised by the legal community as it was introduced.

Secondly, successful integration of mediation into the court processes has required the adoption of new civil procedure rules and the modernisation of the existing civil procedure process to allow matters to be referred to mediation, and the publication of practice notes to advise the profession about how and when this would be done. This included deciding what matters should be referred to mediation. In Victoria, only civil matters are referred to mediation, however, there are some jurisdictions who have extended the process to criminal matters. It also included deciding at what stage and how often mediation should form part of the litigation process.

Thirdly, a determination had to be made by the court about who would mediate, and over time, that determination was modified to include internal mediation by the court through Associate Judges. It was then necessary to adjust the workload of these judges accordingly, to recognise the additional demands placed on their

time by mediation. Other jurisdictions have adopted a hybrid internal/external system by establishing a panel of court-annexed mediators. It was also necessary to adopt a special procedure, and devote resources to self represented litigants who were unable to afford external mediation, but who could not be the subject of internal mediation.

Fourth, as mediation was integrated into the legal system, it was essential that it was appropriately resourced, with adequate facilities and staff, to ensure that the process ran smoothly and was successful enough to be attractive to those who use the court system as both litigants and practitioners.

Fifthly, such a radical chance cannot happen overnight. Change can often be accompanied by resistance, especially if that change challenges existing orthodoxies. It is necessary that mediation is integrated into the court system gradually, and that appropriate levels of education, training and liaison accompany that process, and that such liaison occurs at all levels, with the profession, with government and with the community more generally

7. Conclusion

In Victoria, mediation has become an integral part of the litigation process. Without it, the courts would be hamstrung by an enormous backlog of cases that would require an exponential increase in judicial and court resources to meet. Mediation has

been a success story. However, mediation is only successful because it forms part of a larger justice process at the apex of which sits the judge, ready and able to decide cases if alternative dispute resolutions fails. Mediation is not a substitute for the traditional court process and what it represents. It is rather an excellent adjunct to that process and a superb means by which the limited court resources at our disposal are reserved for the hard nub of difficult cases, whilst the remainder are concluded through alternative dispute resolution.

Further Reading:

- Lawrence Boulle, *Mediation: Principles, process, practice* (1st ed, 2005).
- Lawrence Boulle, Michael Colatrella Jr. Anthont P. Picchioni, *Mediation: Skills and techniques* (1st ed, 2008)

- The Supreme Court of Victoria mediation page can be found at < http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/Home/Support+Services/Mediation/>.
- The Department of Justice's mediation page can be found at < http://www.justice.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/the+justice+system/disputes/mediation/justice+-+mediation+-+home>.

- The civil procedural aspects of the Victorian, court ordered mediation process are detailed in *Supreme Court of Victoria, Practice Note 1 of 2010* ss 2.4.3, 7.15.2, 8.7.7, 10.3, 10.4, 10.5, Schedule 6. A copy of this Practice Note can be found at < http://www.commercialcourt.com.au/PDF/Practice%20Note/Green%20Book%202.pdf>.
- The LEADR website can be found at < http://www.leadr.com.au/>.
- The Australian Institute of Arbitrators and Mediators website can be found at < http://www.iama.org.au/>.