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COSTING & VALUING THE MEDIATION PROCESS **(or how to pick up a wet piece of soap)**



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WHAT IS THE PROCESS CALLED MEDIATION

Definition . “The Mediation Process is a process of bringing parties in conflict, together with a neutral third party, to work through the conflict with the aim of assisting parties

But which Model?

- “**The Settlement Model**” the aim of which is settlement and the process encourages incremental bargaining
- “**The Facilitative Model**” focusing on the parties underlying needs and interests.
- “**The Therapeutic Model**” where the process deals with underlying causes of the parties’ problems as opposed to mere settlement of the dispute.
- “**The Evaluative Model**” where there is an expectation from the parties that the Mediator will use expertise and experience.
- Some other process e.g. The “**Transformative Model**”

Mediators Skills.

- Does it matter if the Mediator is a Lawyer, a Counselor, a Builder,
- Type of person (Aggressive, laidback)
- Type of matter
- Nominating body

Why Mediation?

- To reduce tension
- To communicate
- Mandated
- To bring matters to a head
- To Preempt
- A speedy alternative



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- The belief that it allows parties to take charge and equip parties with new skills and techniques
- The belief that it preserves relationships
- Impartial
- Confidential

MONEY and EMOTIONS

The actual cost of Mediation is usually not that high. BUT to the dollar value however, must be added intangible costs, such as -

- Emotions,
- Time away from work,
- Time spent on thinking/planning/discussing,
- Time putting the facts and issues together,
- Time spent with Advisers.
- Health
- Opportunity costs

Dr Tom Altobelli in an article called “Cost Benefits of Alternate Dispute Resolution Revisited” examined a report by the US Attorney General’s Department relating to 328 civil cases, litigated over a five-year period. The savings in time and costs to The Department as a result of successful Mediation, calculated in days and weeks. Further in the Article he notes reasons for executives going for Mediation. In order some were

1. Save money.
2. Save time.
3. Provided a satisfactory process.

This was different from the response of ‘Satisfactory Outcome’ that came in at No 8. Preserving good relations came in at No. 9.



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4. Allowing the parties to resolve disputes themselves.

Similarly, in The VCAT arena, during June 2004-June 2005, Mediators have kept figures when matters settled as to how many days have been estimated as having been saved. This is at best a guesstimate.

- In The Domestic Building Tribunal - 579 days
- In The Retail Tenancy - 92.5 days
- In Real Property - 26 days - A saving of 717.50 days

The Small Business Commissioner has also recently done a Study as to the monies it has saved Government. The Commissioner also claim impressive figures

In the Magistrate's Court, it is intended that although the Jurisdiction has increased to \$100,000.00 there is to be little or no appointments of more Magistrates. The Court clearly feels it can cope with the increased load using the Mediation Facilities.

Thus it can be seen that in monetary terms, a strong case may be made for Mediation. BUT what of Mediations that are unsuccessful

EVALUATING AGAINST ALTERNATE SYSTEMS

DO NOTHING.

"The boss is always right – if in doubt, refer to the boss". You know the consequences.

The money costs of such a system may be seen as nil. However what of the emotional cost?

Mediation allows

- an atmosphere of confidentiality



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- An opportunity to ventilate,
- An opportunity to put forward own views,
- An opportunity listen to why the other party has a different view,
- An opportunity to listen to the bigger picture,
- An opportunity to possibilities not considered,
- An opportunity to be treated as an equal,
- At the very worst have it confirmed that ones ideas and needs cannot be met at this time
- And possibly to be given some “home truths”.

The disadvantages may be

- Entrench power imbalance,
- It may bring no result,
- It may bring another layer of confusion and bring to the surface, tensions that are best left alone.

The reality of the world is that people and organisations work on dynamics of disputes, disagreements, shifting alliances.

THE BENEVOLENT DICTATOR

His word is law. The cost of such a system in monetary terms is usually whatever it takes to keep the Dictator and his “advisors Happy”.

Does mediation actually keep such a status quo?

- The arguments and the dispute are out of public view (no transparency)
- Power Imbalances and implied threats,
- Retribution can come later!



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DIRECT NEGOTIATIONS.

The dollar costs relatively small (coffee, lunch or golf involved)

However,

- Emotions run high and parties build themselves up.
- Parties are not ready to listen. They only want to tell.
- There are power-plays and -imbalance, and
- Involve a huge “ME” factor.
- It is hard to see the forest for the trees.

The involvement of a third party may require preparation, paper work, and more formal time with Advisers. So initially in dollar values, the cost of Mediation is higher.

However, when one examines the emotional side, mediation values up well -

- The parties may have their say in a controlled atmosphere.
- There is less likelihood of the other party walking out.
- A skilled Mediator can reframe.
- The anger can be directed at the third party.
- Preparation is better.
- Power plays can be contained.
- There can be “reality” testing.
- If the argument falls on deaf-ears the first time, it can be re-phrased
- If not settled, the parties can be given “home-work”



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- The parties can be given the framework for later negotiations or dealings.
- Move the emphasis away from the 'ME' to the "US".
- Negotiations kept moving

On the "BUT" side –

- What if the Mediator is a "Traffic Cop" directing the parties to where he wants them to go.
- What are the pressures to settle at any costs?
- What if the Mediator's agenda comes out over the parties' agenda?
- Mediation may entrench positions
- Mediations may be too early in the piece
- The Mediators may not be able to control the power play.
- May involve the parties having to go back to their Advisers.

CONCILIATION.

Theoretically the difference between Mediation and Conciliation is that the Conciliation Process requires the third party to become part of the Decision Making Process in either the discussions or suggesting or directing solutions

Monetary costs would seem to be virtually the same, although in many cases, Conciliators are appointed by the system and paid by the system.



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But in Conciliation whose agenda? If one believes outcomes are important, then Conciliation has a lot going for it. If the parties believe that the party's creativity and ownership are important Mediation may be the way.

FACILITATION.

Facilitation is seen as a process before a Court action and where the parties may believe there is no "so-called" dispute but do require assistance in moving to the future. As such, it is a term that Accountants in the Commercial World are more comfortable with.

The costs again in dollar terms would usually be the same except the Facilitator may be viewed by the parties as being the Expert, the Resolver and the Facilitator rolled into one.

The advantage

- In emotional terms may be that the battle lines are not drawn so rigidly.
- The Facilitator is not as bound to the issues before him but may be able to conduct their own investigation

The disadvantage

- Become part of the solution
- Have a vested interest in the solution.
- Involved in implementing the solution



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ADJUDICATION. The Judge or Decider.

The dollar cost to actually go the Court is minor. The State pays the Judge and provides the facility. There may be an Issuing Fee.

The cost in dollars is the process .Our Judicial System is justice based on a Adversarial Process. The basic assumption is that judgment cannot be made until all the facts and all the evidence are on the table. The parties test each other out in the field of battle, putting their arguments forward, attempting to reduce the other party's arguments. The process is presided over a Judge who then decides who is right and who is wrong based on evidence provided and tested. His decision theoretically is enforceable.

The Court System needs details and so the system comes up with, interrogatories, discovery, motions. There is also a lack of appointed Judges.

The advantages–

- The aim of Just outcome,
- The finality of judgment that can be enforced –

BUT what of Appeals –

- Vindication. BUT at what costs?
- Justice BUT who is the better story-teller; a good liar or the poor teller of the truth,
- Transparency, there for everyone to see, against, confidentiality. From societies point of view mediations advantage may in fact be a disadvantage.



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BUT does it all come out!

- Precedent – but what of a wrong precedent or becoming hide-bound.
- An eye to the “greater good” as a Judge is the upholder of justice in society. BUT the fact is he can only decide the case on the case’s merits

On the other hand

- Mediation is not interested in justice. It is not about who is right and who is wrong, or who has the greater claim and moral right.
- The influences on Mediation are unknown and uncertain. The transcript of a Court is open for all to see.
- Mediation may proceed on very little evidence or advice. Again, the transcript of a Court Hearing is there for all to see and the processes of interrogatories, discovery are designed to ensure that all evidence is out.
- No natural justice. There is no testing of the evidence
- Mediation has no Judge’s reasons for the logic of settlement
- No permanent structure, which has to be fed,
- Matters can come on quickly
- Parties once they have a say feel they have had their day in Court

Which resolution holds up best, court imposed or party settled?



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Do matters settle for no better reason than the cost of actually proceeding further is horrific in money and emotional terms?

The cost disadvantage in dollar terms is that there may be another layer to the Court Process, but Mediation can be a dry run and all the arguments and all the materials prepared for Mediation are what would be prepared for the Hearing.

An argument against Mediation is that if the matter fails the parties are more embedded in their positions. But. Now virtually all cases in The Supreme Court and County Court and now in the Magistrate's Court will at some stage have Mediation ordered. This has come about basically not from any altruistic attitude of the Court but the fact that delays and costs are not justice. Further the Courts recognise they only want to hear cases after all avenues exhausted.

The question of whether Mediation should be pre-issue or at some point during the process is a different debate. As is mediating during a trial

A DECISION-MAKER OTHER THAN A JUDGE

In the Work Place this may be a so-called boss. The interest of the boss is in harmony, or so-called harmony. His interest is his own or the firm's. It is not always the same as the parties.

ARBITRATION.

Arbitration, judgment by a so-called Expert in the field, called on, ad hoc, to decide

- Fast



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- Expert
- To the point
- System designed by and for the parties.

BUT as the process ends in an enforceable judgment, the process is overseen by Courts, therefore mirrored in the image of the Justice System.

The Arbitrator must have an eye to justice, evidence, appeals and the facts.

The Mediator concentrates on the parties, their needs,

“MED-ARB” MODELS OR “MED-CONCILIATION” MODELS.

EXPERT EVALUATION.

Advantage is that does own investigation and does not rely on the party's arguments.

Disadvantage

- Only used for technical expertise
- Parties may feel can not put their case
- It is the Evaluator's decision,
- Limited to the brief given



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OTHER SYSTEMS.

- i. Limited Presentation Time,
- ii. Paper trial
- iii. Story-telling rather than adversary,
- iv. Limited cross examination,
- v. A fact-finding tribunal, rather than an adversarial argument,
- vi. A strict timetable.

SUMMARY.

A that the Process brings parties who are in some dynamics with each other together to re-state, to listen and to work with an experienced third party Mediator/Facilitator, learn to communicate and move forward with each other into the future, and continue in dynamics.

How does one measure the contribution to society or to the parties of such a Process – truly priceless

So why is there not more Mediation in the Community?

- Is it because people do not understand it?
- Is it because it is not seen as the real thing?
- Is it because people do not believe they need a the intervention of a powerless third party
- Is it seen as sham Justice?



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- Is it because the Legal System does not have a real interest in it succeeding?
Just as the Oil Companies seek alternate energy.
- Is it because in people's minds, it is just there to keep them quiet?
- Is it too expensive, or too cheap!
- Does the Government only really give it lip service, i.e. try Mediating, taxation or car fines?
- Is it because of the quality of Mediators, i.e. is Accreditation the answer
- Is it because there are too many layers, or maybe not enough?
- Is it the fear of meeting the other side?
- Is it a fear of having to explain and negotiate rather than presenting a case?

Mediation is not just a process, it is a philosophy.

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