

Kongres Ideas Café Handout 1

Lawyers Acting as Mediators: Ethical Dilemmas in the Shift from Advocacy to Impartiality

Whilst a lawyer's traditional role as counsellor, advocate and advisor have been defined in one dimension, namely acting in their clients best interests, the role of the third party facilitator imposes a new set of ethical dilemmas and obligations on lawyers which encompass standards for impartiality, fee payment, conflict, confidentiality, professional conduct and fairness.

As expected, this poses many new challenges for professionals who are legally trained, when they transition from an advocate for a single party, to neutral process manager (in facilitative mediation) for sometimes polarised counterparts. In this new role, parties rely on the lawyer, *as a mediator* to guide them impartially toward resolution.

Despite the various ethical guidelines and rules which exist to address this paradigm shift that the lawyer must undergo, problems still arise, which may see the lawyer professionally liable for breaching rules surrounding conflicts and resulting in professional malpractice. This is further complicated by their interest in attracting repeat business and how this aspiration may influence their role as a mediator.

As the regulation of mediators in Australia has gained momentum and has ultimately become mandated (1 January 2008) it is possible that further attention will be focused on this group of professionals, who traditionally "serve one master" (the client) as they increasingly adopt the role of third party neutral in the course of their professional roles.

Model Rules and Guidelines

There are rules and guidelines which apply to mediation practitioners. The most prominent of them are the National Mediation Accreditation Standards which a mediation practitioner must comply with in order to be recognised as an accredited mediator. Other various frameworks are enforceable to different extents and have application in diverse and often restricted jurisdictions, countries and areas of practice. For example, there are different rules and guidelines for family mediation practitioners. Despite this diversity, it is possible to generalise about their goal. That is, they are all designed to highlight the ethical requirements that must be considered when practicing ADR.

The following general headings are featured in almost all of the guidelines offered.

- Diligence
- Competence
- Conflict of Interests
- Neutrality and Impartiality
- Fairness and Integrity: Parties, Third Parties and the Public Interest
- Protecting the public interest
- Confidentiality
- Fees
- Promotion of services

Implications: What Else Should be Considered in Addressing the Paradigm Shift?

The established rules highlight the already identified concerns which are paramount to the integrity of alternative dispute resolution processes, specifically mediation.

Here are some other suggested attributes which might be considered by a lawyer who shifts to the role of third party neutral:

- Independence
- Preparation
- Listening
- Fact finding
- Skills – process management
- Managing innate philosophies/values
- Fairness and integrity: parties, third parties and the public interest

Conclusion

It is clear that lawyers who shift from the role of advocate to ADR practitioner need to be highly self aware and possess enormous amounts of discipline in order to achieve the required mindset of a neutral facilitator. They need to be mindful of their own mindsets, values, instincts, experiences and education and assess which attributes they need to change and which they need to intensify - in order to facilitate ADR effectively. It is clear that rules, guidelines and recommendations alone will only go so far in assisting this paradigm shift which that lawyer must actuate when “changing hats”. It is also important for them to consider the appropriateness of the ADR process for any given dispute. ADR can only work to its potential when other options such as judicial processes, courts and lawyers are considered and where they are utilised effectively and appropriately. If the features of effective dispute settlement are: independence of process; fairness, appropriateness of preparation, provision of a forum for listening and understanding, effective process management and an awareness of philosophies and values, then all processes (including litigation or other such adjudicative processes) must be canvassed and considered on their merits, alongside ADR processes.

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Kongres Ideas Café Handout 2

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Definitions

We propose the following working definitions for the purposes of our session.

ADR (alternative dispute resolution) is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them. ADR is commonly used as an abbreviation for alternative dispute resolution, but can also be used to mean assisted or appropriate dispute resolution. Some also use the term ADR to include approaches that enable participants to prevent or manage their own disputes without outside assistance.¹

Facilitative dispute resolution processes are processes in which a *dispute resolution practitioner* assists the participants to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute. Examples of facilitative processes are *mediation, facilitation* and *facilitated negotiation*.²

Third party neutral is the facilitator of the facilitative dispute resolution process who assists participants to a dispute to identify the disputed issues, and progress through the dispute resolution process without influencing or intervening in content and with a non biased approach to the parties.

Neutrality is defined as equidistance, which focuses on the idea that mediators should try to give equal consideration to each side.³

Impartiality might be defined as the mediator being free of bias and setting aside his or her opinions, feelings, and agendas.

Competencies have been defined, for the purposes of this research, as the areas in which the mediation requires the quality of being adequately or well qualified physically and intellectually to undertake facilitation of a mediation.

"New Tools" have been defined, for the purposes of this research, to mean the extra mechanisms (ie not provided in established guidelines to date) which might be employed to address the challenges which might arise in mediations, making it difficult for the mediator to achieve the competency required of them in the context.

¹http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_GlossaryofADRTerms_GlossaryofADRTerms

²http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_GlossaryofADRTerms_GlossaryofADRTerms

³ Kevin Gibson, Leigh Thompson, and Max Bazerman (1996)