In Practice

Coming to the table

As mediation becomes more widely embraced, the nature of mediation is becoming more sophisticated. **Stefanie Garber** reports

IN A pitched legal battle, mediation represents an opportunity for peace talks – both parties come together and try to negotiate an end to hostilities.

Increasingly over the past two decades, mediation has moved from a new and off-beat option to a key method of dispute resolution. Yet even as demand grows, the face of mediation is also rapidly changing – and today the possibilities for mediation are more varied than ever before.

Talking it out

Dispute resolution has seen a surge in popularity over the past decade, according to barrister and nationally accredited mediator Anthony Lo Surdo SC.

When Mr Lo Surdo first did his mediation training in 1993, the courts were increasingly ordering mediations but clients and lawyers were skeptical. Lawyers in particular were "concerned it might lead to a demise in their work", he remembers.

Since then, however, mediation has moved into the mainstream, driven in large part by a push from clients.

"What has really promoted it in recent times – meaning the past 10 or 15 years – is that the business community has embraced the process and forced change that may have taken a lot longer to occur," Mr Lo Surdo says.

While courts continue to send parties to mediation, even making it a prerequisite for obtaining a court date in many cases, clients are also actively seeking it out.

"The significant change has been that the community sees it as a means of bringing matters to a head a lot quicker and cheaper than would be the case if things went through the usual court determination process," he says.

As mediation becomes increasingly common, cases are also coming to mediators at an earlier stage, according to Steve Lancken, director of Negocio Resolutions.

"Clients and their lawyers are using mediation for specific purposes early on in the proceedings – much earlier on," he says. "I'm getting calls from lawyers asking, 'could you speak to our clients before we even start litigation?'"

In certain cases, including insurance matters, lawyers may get a higher hourly rate for settling earlier in the process rather than letting the case go to the courts, Mr Lancken explains.

Mr Lo Surdo, on the other hand, is not necessarily convinced that clients are seeking earlier help – and warns that early intervention can come with its own drawbacks.

"At an early stage, you're not in a position to know with any degree of certainty what all the issues are and you're may not know how it's going to pan out. [On the other hand] the benefit of settling early is that you get a cost benefit and you don't face the ongoing uncertainty of the outcome of the proceedings."

Mediations are also starting to cover a broader range of matters. Andrew Moffat from Constructive Accord Mediation has found parties are increasingly looking to settle commercial questions via mediation as much as legal ones.

"I think good lawyers have worked out we're looking more broadly at advising the client on broader business issues, obviously with a focus on the legal aspects and their core expertise," he says.

Shirli Kirschner, former lawyer and director of Resolve Advisers, has also noticed a trend towards using different types of mediation, and often for more difficult issues. From Registrar Assisted Settlement – where small claims at the courts are settled by court officers – to large-scale facilitated mediations with more than 120 parties, mediators are playing an active role in different types of claims.

Bringing in lawyers

If lawyers were initially wary of mediation, most are beginning to see the value of actively participating, Mr Lo Surdo says. He believes lawyers have been forced to embrace mediation as their clients see the value in it for their business.

According to Mr Moffat, some people question why lawyers would actively pursue mediation when litigation brings in higher fees. However, he finds that lawyers tend to take a long-term view to client relationships.

"Clearly, the best way of having those long-term bonds is having smart, cost-effective outcomes in the short term and having the client come back because you got a good result for them," he says.

Lawyers are also taking a more active role in the mediation process. Ms Kirschner has noticed clients are increasingly bringing commercial lawyers in to assist rather than litigators.

"What that means is I'm seeing a lot more lawyers who are extremely skilled negotiators," she says.

In her experience, in-house counsel are also increasingly willing to tackle a mediation without external legal support.

As familiarity with mediation grows, some lawyers are even taking on settlements without a mediator's help, Mr Lancken observes.

"Really simple cases aren't coming to me any more – they're being settled by confident lawyers, without mediators, all the time," he says.

As lawyers are more often exposed to mediation, they are also seeking to use it in more sophisticated ways. In some cases, they may use mediation specifically to better understand a single issue, to the point where Mr Lancken has even seen barristers representing opposing parties' trade briefs.

"When ADR started, lawyers would just get an order from the court and go on to mediation and not know what they're trying to achieve. Now they have specific goals when it comes to mediation," he says.

Mediation can often help lawyers identify the issues that are holding back settlement, Mr Lo Surdo says. While clients may on the surface be arguing about a legal point, the actual dispute may go much deeper.

"That's why it's all about trying to work out what is really driving and motivating the dispute. The sooner that's out in the open, the better," he says, adding a warning that such issues are difficult to resolve.

Professional showdown

In recent years, there has been an influx of meditators from commercial, rather than legal, backgrounds. Mr Lancken – himself a non-lawyer – believes clients are seeking out mediators with demonstrated negotiation skills over legal qualifications.

While lawyers may understand the issues, he believes in many cases it's just as important to facilitate difficult conversations around relationships. He also warns that while many barristers are experts, others only infrequently mediate. "That's the reality of my profession. They're not always professional mediators who do it every day of the week," he says.

Mr Lo Surdo, on the other hand, believes there is value in having a legal expert in the room.

"Practising lawyers – in particular those who have a practice beyond mediation – can actually bring something to the process that others can't," he says.

A lawyer can offer an insight into how a case is likely to pan out. While the mediator's role is not to give advice, giving a third-party perspective can be valuable, Mr Lo Surdo suggests.

"It assists the parties in being able to change or amend their expectations, and that might then drive the parties closer together," he adds.

Lawyers also have insight into the pressures involved in running a case in court, and the potential downsides of proceeding with litigation, while a legal pedigree can lend the mediator gravitas in the parties' eyes, Mr Lo Surdo says.

In complex legal cases, Mr Lancken overcomes the question of legal expertise by bringing in a subject matter expert – either a senior barrister or even a retired judge, to provide insight into legal questions while he facilitates the mediation.

He and Mr Lo Surdo do agree that clients are looking for broader engagement from their mediator than pure facilitation.

"If you look at the classic model of mediator as a facilitator, they shouldn't really be getting involved in the fray and float about the process. Especially in commercial matters but also in other endeavours, people demand more of the mediators," Mr Lo Surdo says.

Whether barrister or facilitator, all the mediators agreed that mediators must be able to bring a commercial perspective to the negotiation.

"If you have lawyers thinking broadly against a broad range of backgrounds, it's important for the mediator to also think like that," Mr Moffat says. "It would be unhelpful to have parties to the disputes and the lawyers wanting to address a broad range of risks – commercial and otherwise – and that dialogue getting narrowed down by the mediator."

He adds""The mediators who are successful and regularly chosen are people who are comfortable across all the range of disputes that underlie issues, not just the legal ones."

Tom Pritchards
Solutions Consultant
Law In Order

TAR on our shores

Australian firms not using technology during the course of discovery run the risk of being left behind

THE USE of Technology Assisted Review (TAR) has become so widely accepted that it is considered black letter law in the US, according to US District Court Judge and TAR pioneer, Justice Andrew Peck. With courts in Ireland, and most recently in Britain, approving the use of TAR, it is only a matter of time before courts in Australia follow suit.

With many large Australian firms already using this data analysis technology during the course of their discovery review process, there is a risk that the rest of the legal community will be left behind. The leap required for an Australian court to endorse the use of this technology is not as great as you may think. In February this year, the UK case *Pyrrho Investments v MWB Property* endorsed the use of TAR and was based upon US and Ireland case law.

kCura Corporation, creators of the industry leading e-discovery software Relativity, recently purchased data analytics company Content Analyst to better integrate the use of analytics and TAR into standard document review workflows. This purchase was due in part to the exponential growth in the use of data analytics, which according to kCura is up 1,500 per cent since 2011. These strategic advances are seen as particularly important to the legal technology community.

"In the future, we believe all e-discovery matters will use some form of text analytics because of the advantages it provides at every stage of the process," said Andrew Sieja, kCura President and CEO.

Law In Order has been providing delivery of TAR and data analytics to its clients through the use of Relativity since 2009 and has seen significant growth in the use of data analytics in the Australian market in this time. In a recent case study, Law In Order used TAR with such great success, they estimate to have saved more than 5,000 hours of legal review. With these advances in technology the challenge for law firms is to keep pace with an ever-changing technological landscape.

For more information, please contact sales@lawinorder.com.au or visit www.lawinorder.com.au/tar

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