

The Mediation Explosion

Mediation seems to have burst into the consciousness in recent times. I don't remember it being an option a few years ago but now it seems to be everywhere. Friends with marital disputes are going to mediation, the papers report workplace and commercial disputes solved by mediation and the TV news last week reported that the US and Iran are in mediation over their nuclear programme.

So what is Mediation?

Forgetting international disputes for the moment and focussing on the sort of dispute we might be involved in that traditionally might "go to court" or be resolved by a workplace enquiry or other process, it may be easiest to explain what mediation is by asking this question: *"If there were two methods of resolving a dispute, which would be preferable?"*

Method 1. The parties come together with an independent person who has no interest in the dispute (the mediator) whose role is to conduct the process and facilitate discussion between the parties. In the mediation the parties work with the mediator to identify both parties' interests and to find the best solution to their dispute. It may not be perfect for either party but it will be the best solution they can achieve taking all issues into account. Once they have worked out the best possible solution, it becomes the way the dispute is resolved.

Method 2. The parties in dispute each engage an advocate (or lawyer) and go before an independent person (e.g. judge, arbitrator etc) The advocate speaking on behalf of each party outlines their position and why they are right and the other party is wrong.

The judge considers the stories (evidence) and determines within the context of established law, who is right, and therefore who is wrong, and imposes a decision on the parties, which becomes the resolution of the dispute.

It is unusual for people to choose Option 2 if Option 1 is available and of course option one is a very simple explanation of mediation.

Historically "going to court" has been the primary process for parties to settle disputes in Australia despite the shortcomings of it being expensive, often inflexible and focussed on establishing guilt, which inevitably further damages, the relationship of the parties in dispute.

Mediation on the other hand has significant advantages in that unlike court, it is inexpensive, informal, non-adversarial and the resolution lies in the hands of the parties in dispute.

As the courts have become clogged with cases and long delays in getting a case to hearing have become commonplace, it is not surprising to have seen rapid growth of mediation, often referred to as an Alternative Dispute Resolution or ADR. The use of the word "alternative" in the title is unfortunate, as it tends to indicate a process that is outside the mainstream.

It is interesting to contemplate if the doctor who stopped using leeches in his everyday practice was considered to be practising alternative medicine, or the first parents who decided to set up a communal school and have their children taught outside the home were considered to be practising alternative education. The label "alternative" tends to suggest something that is somehow less socially acceptable. As examples think of the title attached to hairstyles, lifestyles, or music.

In many fields mediation has become the preferred method of settling disputes. Increasingly courts and tribunals refuse to list cases unless the parties have first tried to resolve differences through mediation, many commercial contracts now include a standard clause that commits the parties to mediation as the first attempt to resolve future disputes, and a growing number of workplaces have mediation as an established process for resolving disputes.

Wherever there is ongoing human interaction some level of dispute is inevitable; how disputes are handled determines whether they become healthy disagreements or destructive in terms of both relationships and productivity. Common workplace disputes over things such as bullying, discrimination, inappropriate behaviour, performance issues, resource scarcity, management style and just plain

personality clashes need to be addressed early to prevent them spiralling into a destructive phase that can disrupt and often divide the workplace.

Many major corporates and government departments are devoting more and more resources to ensuring the workplace is as harmonious an environment as possible. This can be in the form of up skilling employees with in-house training or by engaging external consultants. One large federal government department recently provided workshops to all their human resource managers on “conducting difficult conversations” aimed at enabling early identification and appropriate intervention and support to staff to prevent workplace disagreements escalating to the point where they become destructive and disruptive to productivity.

The practice of workplace mediation in Australia generally follows a process of interest-based negotiation developed at the Harvard Law School. It provides a strong framework in which the mediator works with the parties to identify and fully understand the issues and the perspectives and then provides guidance in discussion and negotiation towards settlement.

With no decision-making role, the mediator needs to have a highly developed skill-set to cope with what can be highly-charged discussions where parties often express strong opinions and expose raw and difficult emotions. The mediator needs to be a talented listener and observer, able to create trust in each of the parties while maintaining complete neutrality. The ability to maintain equilibrium when parties are in the furnace of conflict often venting long standing animosity, to have the dexterity to cope with crises and surprises, hidden agendas and startling revelations and to deal with power imbalances are some of the skills required.

Given what appear to be significant hurdles, it may come as a surprise to learn that workplace mediation is successful in resolving disputes in over seventy-five percent of cases.

The fact that the process is confidential and non-adversarial means that relationships are likely to be preserved, an important consideration where people have to work together and a resolution agreement designed by the parties is far more likely to be lasting than an outcome imposed by the court or another process.

Little wonder then that, far from being “alternative”, mediation appears to have become the mainstream method of resolving a broad range of disputes.

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Some useful mediation links :

The author's website - www.pacificmediation.com.au
Victorian Association of Dispute Resolution – www.vadr.asn.au
LEADR – National Association of Dispute Resolvers – www.leadr.com.au
Large US website – www.mediate.com