

NSW Bar Association

2010 Alternative Dispute Resolution Workshop

28 August 2010

Westin Hotel Sydney

Welcome and Opening

Justice P A Bergin

- 1 It is my pleasure to have been invited to perform this task at this very important Workshop of the New South Wales Bar Association. Although the topic or theme for today's proceedings is "Alternative Dispute Resolution" it appears that much emphasis will be placed on mediation.

- 2 In 1996 Leonard L Riskin, the CA Leedy Professor of Law and Director of the Centre for the Study of Dispute Resolution at the University of Missouri – Columbia School of Law, wrote of his experience when a lawyer asked him to conduct a workshop for his firm and its clients on how to participate in a mediation.¹ Professor Riskin concluded that he could not talk sensibly about how, or even whether, to participate in the mediation without knowing the nature of the process a mediator would conduct. He observed:

A bewildering variety of activities fall within the broad, generally accepted definition of mediation – a process in which an impartial third party, who lacks authority to impose a solution, helps others resolve a dispute or plan a transaction.²

- 3 At the time of these observations mediation in this State was in its infancy. It has since developed and blossomed into an accepted, respected and popular method of resolving disputes at all levels in all types of cases and circumstances.
- 4 Professor Riskin's reference to impartiality is as significant today as it was 14 years ago. It must be remembered that mediation is a method of resolving disputes that developed without the safety net of an institutional structure. The impartiality of the mediator is integral to the maintenance of the integrity of the process that has been developed over the years. That integrity is in no small measure due to the commitment of those who brought the process through its infancy to its present status by the application of rigorous discipline to an otherwise amorphous concept.
- 5 In this regard we should acknowledge with gratitude the trail blazing work of Sir Laurence Street AC KCMG QC, who I am delighted to see is here today to share his wisdom and experience with you. Indeed Professor Riskin's reference to the mediator's lack of authority to impose a solution may remind you of Sir Laurence's 1992 analysis of whether ADR should be understood as *alternative* or *additional* dispute resolution because "nothing can be alternative to the sovereign authority of the court system".³
- 6 The other matter of importance in the Professor's observation is that a mediator is there to "help" the parties reach a solution. That is, the mediator provides a means towards what is needed or sought by the parties by facilitating and/or guiding the parties towards an outcome with

which they can live in lieu of having their dispute (or part of their dispute) determined by the Court.

- 7 For one reason or another clients may wish to challenge rather than come to terms with their adversaries. Quite often the family dispute has been given as an example where parties will not brook settlement until they have had their day in court. This was the experience of many lawyers and judges. However the introduction of the compulsory mediation program in the Family Provision cases in the Supreme Court of New South Wales has suggested that not as many as otherwise thought to be resistant to settlement prior to having their day in court, are so resistant. The 2009 statistics informed us that 60% of the cases in the compulsory mediation program were settling at mediation.⁴ That is a conservative figure having regard to the fact that a number of matters settled post mediation but prior to trial. I see from the Workshop program that compulsory mediation is on the agenda and I am sure there will be interesting issues that arise for discussion in that session.
- 8 Some have advocated the more drastic step of judges mediating cases. Experience has shown that where governments have introduced this system, it has impacted adversely not only on the integrity of the mediation process but more importantly on the integrity and perception of the independence of the judiciary. Sweden is a good example of the problem where there has been a growth industry in the number of cases before the ombudsman involving complaints against judges who have allegedly misconducted themselves in mediations.
- 9 It was in 1992 in *George M Evans v State of Florida*⁵ that the District Court of Appeal of Florida, Fifth District, said⁶:

[4] ... The function of a mediator and a judge are conceptually different. The function of a mediator is to encourage settlement of a dispute and a mediator uses various techniques in an attempt to achieve this

result. A mediator may separate the parties and conduct *ex parte* proceedings in which the mediator may either subtly or candidly point out weaknesses in a particular party's factual or legal position. A mediator, through training and experience, approaches different parties in different ways. Because a mediator will not be deciding the case, both the mediator and the parties are free to discuss without fear of any consequence the ramifications of settling a particular dispute as opposed to litigating it. This is one of the reasons that a mediator must generally preserve and maintain the confidentiality of all mediation proceedings. ...

[5] In contrast, the judge's role is to decide the controversy fairly and impartially, consistent with established rules of law. In this regard, to paraphrase Socrates: Four things belong to a judge; to hear courteously; to consider soberly; to decide impartially; and to answer wisely.

As a caveat, we suggest that mediation should be left to the mediators and judging to the judges.

- 10 You may think that the prospect of a judge stepping into a private room to conduct secret negotiations and strike secret deals with litigants and their lawyers who appear before the courts on a regular basis, will be recognised by those who have the power to resist it and those who have the power to advocate against it, as a distortion of the judicial role (in its present form) and an undermining of judicial independence and/or the perception of judicial independence.
- 11 The popularity of mediation is in part a result of the commitment of the legal profession to understand, refine and support this process of dispute

resolution. That is not to say that there was not initial scepticism and suspicion of the process, particularly when the power to order compulsory mediation was given to the courts. That has disappeared through experience with the process and the development of trust in the integrity of both the court annexed system of mediation and the private mediation system.

- 12 The culture of mediation is now part of legal thinking with all New South Wales law schools teaching courses or parts of courses that deal with alternative dispute resolution.
- 13 Mediation has impacted on the nature of practice at the Bar. More time is now spent in chambers advising how best to settle the dispute than how best to fight it in Court. Advocates have had to adjust to the change in the way the system operates so that they now advocate strategies for settlement behind closed doors rather than utilising the forensic skills and persuasive advocacy in open court. Although the burden on the advocate in mediation is different from the burden on an advocate in a hearing before the Court, the advocate's experience, knowledge and forensic judgments are integral to the client achieving the best outcome from mediation.
- 14 As you know in England there are a number of pre-action protocols to be complied with prior to the commencement of litigation. Presently we do not have such requirements albeit that in the Equity Division, for instance in the Commercial List, litigants must specify in the Summons and the Commercial List Statement whether they have mediated and irrespective of whether they have mediated, whether they are willing to do so in the future. It is rare to see a party indicating a lack of willingness to mediate in the future. In the rare instance that I have seen, it has been based on an allegation of bad faith and/or suggested futility.

- 15 There is presently no requirement for legal practitioners to certify in court documentation that they have discussed alternative dispute resolution options with clients prior to the commencement of proceedings. That absence is because it is understood that legal practitioners would see it as their duty to advise a client of those options prior to the commencement of legal proceedings. However there will be cases in which the matter is so urgent, for instance a party seeking to depart the jurisdiction with intellectual property where an injunction is sought ex parte, that the option of a mediation is not the first thing on the lawyer's mind. However in the majority of cases the lawyer's duty will be to advise the client of the options prior to the commencement of legal proceedings. I understand that there is a plan to make statutory or regulatory amendments to include such an express duty.
- 16 It is imperative for barristers to understand the nature of the process of mediation to be in a position to advise a client whether to mediate the dispute and how to mediate a dispute.
- 17 This Workshop will certainly assist in this regard from the barrister's point of view. I see that the Workshop provides Continuing Professional Development points for not only barristers but also for mediators in the National Accreditation system. May I say that the obvious cross-pollination of ideas that this will engender between barristers and mediators is to be applauded.
- 18 The barrister must be able to identify with precision: the reasons why the parties have not settled their dispute; the client's desired outcome of mediation; the prospects of achieving the client's desired outcome in mediation; and the strategies that should be adopted at mediation generally and particularly to ensure that any disclosures to be made during mediation will not impact materially adversely on the client's case should the matter have to go to trial.

- 19 The barrister must be able to instil confidence in the client that the disclosures to be made during the mediation will not impact materially adversely on their case should it go to trial. To give that confidence to the client will provide a healthy environment in which to attempt to settle the case. It is in this important area that the application of the barrister's skills will be exquisitely delicate and difficult.
- 20 I see from today's program that you are to spend some time in obtaining tips on what annoys mediators about lawyers and what annoys lawyers about mediators. I also see that there is no similar session in relation to judges/lawyers and/or mediators. One attribute that I fear irritates judges is to be informed that the settlement was not possible because the Court referred the matter to mediation too early. The issue of the "ripe" time to refer a matter to mediation is vexed. Some matters have a better chance of a mediated settlement if referred later in the litigious process whilst others may settle earlier in the process. It will depend very much on the particular dispute. However I stress that the Court depends on the legal representatives to analyse not only the legal issues in the dispute but when it comes to picking the time for referring the matter to mediation, to also analyse the financial, motivational or emotional issues that are driving their clients. These matters, about which the Court will know little or nothing, may be pivotal to the prospect of reaching a mediated settlement.
- 21 This 'excuse' of premature referral to mediation may be seen as sensitivity in the barrister or the mediator in failing to achieve a settlement. It is important to indicate that such sensitivity is unnecessary. There are many reasons why matters may not settle at mediation. The strategies that are employed behind closed doors are complex and varied. The fact that mediation does not result in settlement does not mean that the mediator or the barrister has "failed". It means that the parties' aims have not been achieved on this occasion. It seems to me that a lack of settlement at mediation should not result in an adverse view being taken of a mediator's reputation. On the other hand a mediator who does not behave with

integrity may well find that his or her reputation is sullied by that lack of professionalism.

22 May I emphasise that the Court does not and in my view should not, choose mediators. The parties choose the mediator and it is expected that the legal representatives after being at Workshops such as this will understand the burden upon them to ensure that a mediator appropriate to the particular dispute is chosen.

23 I am sure that your knowledge and skills will be enhanced by this most interesting and thought provoking Workshop. It is my pleasure to formally open today's proceedings.

¹ *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*
Vol 1: Harvard Negotiation Law Review 7, Spring 1996

² *Ibid* at 8

³ The Hon Sir L Street AC, KCMG, QC, "The Language of Alternative Dispute Resolution" (1992)
66 Australian Law Journal 194 at 194

⁴ The Hon Justice PA Bergin, "Executors/Trustees and Mandatory Mediations" (Paper delivered at the proceedings of the Society of Trust and Estate Practitioners in the Banco Court of the Supreme Court of New South Wales, 25 November 2009)

⁵ No 91-1729, 603 So. 2d 15

⁶ at 18