MEDIATION BEYOND SETTLEMENT

Jim Cyngler, OAM, Jim Cyngler Consulting

In this paper I will talk about the impact the National Mediator standards have on traditional and current mediation practices especially relating to court annexed and pre-litigation mediations. What happens to people and organisations in conflict and how that differs from a settlement focused framework. I will briefly talk about what lies beyond settlement and the opportunities available through mediation.

THE NMAS

1 January 2008 saw a watershed within the world of court annexed and pre-litigation mediation in Australia. This was the day the Australian National Mediator Practice Standards ("The Practice Standards") for all mediators operating under the National Mediator Accreditation System, (NMAS) commenced operation. The NMAS is an industry based scheme which establishes mediator organisations that agree to accredit mediators in accordance with the requisite standards. These organisations are referred to as Recognised Mediator Accreditation Bodies (RMABs).

The scheme establishes an independent industry body known as the Mediator Standards Board (MSB) which is responsible for developing and maintaining the NMAS. Each of the Law Council Of Australia, Law Institute of Victoria, the Law Societies of New South Wales, South Australia, West Australia and Queensland, the New South Wales and Queensland Bar Societies and The Victorian Bar is a member of the MSB.

Traditionally court annexed and pre-litigation mediations have been conducted with little face to face contact between the parties. They have been characterised by a high level of shuttling by the mediator between the respective participants and particularly with the participants'

practitioners. They have often been accompanied by mediator evaluation of the prospects of success or the likely outcome should the matter proceed to hearing.

The National Alternative Dispute Resolution Advisory Council (NADRAC) which was established in 1995 is an independent body charged with providing policy advice to the Australian Attorney-General on the development of ADR. NADRAC describes this process as Conciliation. It is also sometimes referred to as advisory mediation, or evaluative mediation. NADRAC defines conciliation in the following way:

> "Conciliation is usually considered to be a process in which the participants to a dispute, with the assistance of a third person (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has an advisory role, but not a determinative one. The conciliator is often legally qualified or has experience with, or professional or technical qualifications in, the subject area of the dispute that they are conciliating. The conciliator may suggest and/or give expert advice on possible options for resolving the issues in dispute and may actively encourage the participants to reach an agreement. The conciliator will be responsible for managing the dispute resolution process, including setting the ground rules, managing any apparent power imbalances between the participants and ensuring the participants conduct themselves appropriately.
>
> In conciliation processes the parties are often accompanied by expert advisers, including legal advisers." (www.nadrac.gov.au)

Since 1 January 2008 a significant change has taken place in the definition and practice of mediation. Under the Practice Standards qualify the use of the conciliation process, making it now the exception to the rule, rather than the rule. Thus, under Section 7 of Standard 2 a "mediator may provide expert information **provided** that it is given in a manner that enhances the principle of self determination and **provided** the participants request such advice be provided". Further, mediators who provide expert advice are required to have appropriate

expertise (see Approval Standards at Section 5(4)) and to obtain the consent of the participants prior to providing any advisory process. This means that the Practice Standard now raises party choice and self determination above that of the mediator expert view of the dispute.

The Practice Standards make it clear that the purpose of a mediation process is to maximise participants' decision making. The "principle of self determination" described in the Practice Standards requires that mediation processes be non-directive as to content (Section 2(5) Practice Standards). The goal of the mediation process is agreed upon by the participants with the assistance of the mediator (Section 2(3) Practice Standards). It is understood that the range of goals identified by the participants may or may not include resolution of the dispute.

The mediation process may:

a) assist the participants to define and clarify the issues under consideration;
b) assist participants to communicate and exchange relevant information;
c) invite the clarification of issues and disputes to increase the range of options;
d) provide opportunities for understanding;
e) facilitate an awareness of mutual and individual interests;
f) help the participants generate and evaluate various options; and
g) promote a focus on the interests and needs of those who may be subject to, or affected by, the situation and proposed options (see Sectiion2(4) Practice Standards).

The mediation process can include any or all of the above but is not limited to this list.

DOES THE MEDIATION PROCESS MATTER?

So does it fundamentally matter what process is used or how mediations are conducted? Why has the mediation process been redefined to introduce the primary objective of participant self determination? If the dispute is concluded does it really matter how it was achieved? Does it

matter how the participants experience the mediation or how they feel after it? Recently the CEO of a major corporation in Australia spoke to me about his dismay regarding the traditional approach to mediation. A person used to making multi-million and billion dollar decisions, the CEO said any time he is required to attend a mediation he knows he needs to bring his favourite novel along because he will be an observer rather than a participant in a process in which he is vitally interested. He has found that he is unlikely to be invited to discuss the issues with the other party or even the mediator. Does his experience matter?

Conflict, as many of you would be aware, is dealt with by society in a variety of ways. Prior to the development of our current system of jurisprudence conflicts were generally determined by force or power. The use of Champions, noble warriors, was widespread and the victor in the physical battle was entitled to claim rights at law. The introduction of a court based system shifted the focus in resolution of disputes from power to rights. There were of course many benefits in this change however issues other than those which are capable of rights determination are not able to be considered by the courts.

Mediation was first brought into play in the modern era in the late 1950's and early 1960's in the United States in the industrial sector. This sector was unregulated and hence disputes over industrial agreements often led to long and acrimonious conflicts which sometimes lasted in excess of a year and caused substantial economic and social harm to the parties. Industry experts were brought in. Their task was firstly to try to stop the fighting which often was physical and brutal. Having achieved that, they were to try and get an agreement signed as quickly as possible. This often meant a difficult and usually shuttle negotiation conducted by the mediator that involved compromise of a log of claims by the workers and the company's demands to achieve an end to the fighting. Negotiations were generally framed around the material demands of both parties. Little or no trust was engendered and each party waited for the next negotiating period where they could try to redress the perceived and actual injustices of the negotiation and the relationship. The conciliation framework, described by NADRAC

above, has close parallels to this process. Stop the fighting assist parties to compromise their demands based on the expert mediator's understanding of rights.

The concept of principled negotiation was developed in 1981 by Roger Fisher and William Ury members of the Harvard Negotiation Project. This is also known as the Harvard mediation model, published in the seminal work Getting to Yes. They identified severe limitations with the compromise model. While both parties could live with having their orange cut in half, neither felt their needs or interests in the dispute were actually met by half an orange. Fisher and Ury developed key principles of negotiation:

1. Separate the people from the problem
2. Focus on interests, not positions
3. Invent options for mutual gain
4. Insist on using objective criteria

These principles have been incorporated into the Practice Standards.

BEYOND SETTLEMENT

Principled negotiation assists parties to settle the material issues between them focusing on their underlying needs and interests rather than on compromise. However it does not address the nature of the conflict interaction between them. Parties might achieve a resolution which settles the material issues in dispute but still feel disempowered and resentful.

How do parties feel in conflict? They feel weak and confused. They feel disempowered. They feel the other party is their enemy. They feel misunderstood and have little or no understanding of the other party. This is an emotional response to conflict. Unless it is addressed during the mediation parties will feel hostile and unheard even when the dispute is settled. Critical to changing the conflict dynamic is addressing parties' need to be heard and acknowledged. In this regard, a mediator can support parties in their decision making by focusing on self determination. The Practice Standards assist in creating a framework which supports this process.

Robert Baruch Bush and Joseph Folger wrote the Promise of Mediation in 1994. Both were highly experienced mediators who discovered through their work that in order to change the quality of the conflict interaction between the disputants so that it could be positive and constructive it was essential to use a nondirective process and support the parties in the various decision points faced by them in the mediation. The capacity to do this enhances the parties ability to not only meet their interests and needs as described by Fisher and Ury but also enable the parties to move into more reflective conversation creating a more positive human interaction and a change to the conflict interaction itself.

Kenneth Cloke is a mediator, arbitrator and judge who has written extensively on mediation and conflict. Cloke has identified that the use of a non directive process using empathy openness and honesty can provide the basis for a resolution process that not only changes the conflict interactions constructively, it can also enable the rebuilding of trust and letting go of and transcending the conflict itself (see inter alia Mediating Dangerously, The Frontiers of Conflict Resolution 2001 and the Crossroads of Conflict, A Journey into the Heart of Dispute Resolution 2006).

The National Practice Standards are minimum standards. Mediators are free to develop additional standards beyond the prescribed minima. We are only now beginning to understand what individuals and organisations experience during conflict. I have experienced in my own practice that mediation makes it possible to for parties in conflict not only to achieve settlement but to move through and past the conflict whilst rebuilding trust. With their focus on self determination the National Mediation Standards support the opportunity to move mediation beyond settlement.

JAMES CYNGLER