LAWYERS' RESISTANCE TO MEDIATION: EVOLUTION AND ADAPTATION

PROF ARCHIE ZARISKI
ASSOC PROF, LEGAL STUDIES
ATHABASCA UNIVERSITY
CANADA

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Lawyers’ Resistance to Mediation: Evolution and Adaptation

Archie Zariski, BA, LLB, LLM, C Med
Associate Professor, Athabasca University, Canada

Introduction

The grassroots of the bar, those lawyers who pursue what has been called “ordinary litigation”, have not historically been supporters of alternative dispute resolution (ADR) in general, or mediation in particular. Instead, it has been elite lawyers such as leaders of the organized bar, some judges, community activists, and legal academics who have championed mediation. Some notable examples are several Presidents of the American Bar Association, former Chief Justice of the United States Warren Burger, Judge Wayne Brazil of California, Justice Louise Otis in Canada, former judge Sir Laurence Street in Australia, and Professors Frank Sander, Carrie Menkel-Meadow, Julie Macfarlane, Laurence Boulle, and Tania Sourdin, to name a few.

The situation in Malaysia is no different. For over a decade the Malaysian Bar Council and its officers have promoted the use of mediation, and have created a mediation facility for use by litigants. High ranking members of the judiciary have extolled the virtues of mediation. Yet interest by lawyers remains low. The mediation facility is underused, and a recent survey of the Malaysian Bar on the subject of mediation conducted by Datuk William Lau and the writer gained a response rate of less than one percent.

Today, however, in some Western jurisdictions mediation has become common in ordinary litigation, and most trial lawyers engage in it. This paper will outline the evolution of mediation in some common law jurisdictions from an idea most lawyers dismissed to a practice most now use. It will highlight the attitudes and actions of lawyers as they have adjusted their practices to include mediation, and adapted mediation to suit their needs. In so doing perhaps it will provide a glimpse into the future in those jurisdictions where mediation is still struggling for acceptance, and a caution about what price might have to be paid for such success.

Evolution - Initiatives and Responses

Mediation by a third party has of course been used in conflicts since the dawn of history by princes, merchants, religions, families and friends. It is only in the twentieth century however that the practice of mediation was identified as a structured process which could be implemented within the formal legal system. The beginning was in labour relations where mediation was used to avoid disastrous strike action. Gradually the idea spread that such a process could also be beneficial in other legal fields, such as family

and criminal law. Academics developed the concept of disputing to supplement the traditional focus on litigation, and began to suggest that mediation and other alternatives to adjudication might be useful in a wide range of cases. For American lawyers, these developments were brought to a head in the "Pound Conference" of 1976, held under the auspices of the organized bar and the judiciary. There, Professor Sander revealed his vision of a "multi-door courthouse" in which mediation was a key alternative to litigation of many types.

The suggestion that disputes could be prevented from becoming lawsuits and dealt with better by mediation was not attractive to lawyers who conducted ordinary litigation. Some specialists such as family lawyers began to accept that consensual dispute resolution might be preferable, but most members of the bar dismissed the idea. Experiments were undertaken such as the creation of community mediation centres and criminal diversion programs, but for most lawyers it was business as usual.

"True believers" in ADR and mediation persisted in their efforts to educate and convince the bar, and academics began offering courses in dispute resolution to law students. As knowledge of mediation and other processes grew amongst lawyers it was suggested that they had a corresponding responsibility to inform their clients. Some jurisdictions mandated that lawyers advise clients of the existence of mediation and other alternatives. Lawyers complied, but most did nothing to encourage their clients to use them.

Judges were more easily persuaded. When they looked at their heavy caseloads and reflected on the inefficiencies of settlement "on the courthouse steps" many became convinced there must be "a better way" and that mediation might be it. One way to ensure that mediation is used more often is to order parties to try it, and many jurisdictions accordingly gave their judiciary this power. Lawyers, as well as mediation supporters, criticized what came to be called mandatory mediation. It was described as unnecessary, unproductive, and a costly addition to the normal process of litigation.

Despite the outcry, mandatory mediation in judge selected cases persisted and proliferated in common law jurisdictions. The most recent development has been to make mediation (or at least some ADR process) a default step in litigation with exemption available only upon a judge's order. Mediation has finally become completely institutionalized within the legal system in many jurisdictions.

Throughout the modern history of mediation sketched above, lawyers have predominantly been opposed to it. Next I will try to analyse this resistance as a mediator might, by reflecting on the interests and concerns that may motivate lawyers' hostility to the idea and practice of mediation.

Role and Identity Concerns

Lawyers are the recognized experts in litigation, among other legal pursuits. In this role they have traditionally developed paternalistic relationships with their clients – guiding them by virtue of lawyers' superior knowledge of the law and the legal process. When the concept of disputing became current lawyers were pressed to define and defend their role within a wider sphere of conflict than traditional litigation. In response lawyers emphasised their knowledge and skills as strategists and negotiators. They claimed to be experts in dispute resolution by which they meant not only the trial of lawsuits, but their

settlement also. This new role as dispute resolvers entailed a new type of relationship with clients, envisaged more as a partnership with a "client centred" focus. Lawyers who promote themselves as expert negotiators often disdain mediation, considering it unnecessary and wasteful for clients. They point to the undoubted fact that the great majority of lawsuits are settled, with or without mediation. This, they assert, shows that lawyers can resolve disputes in their client's interests without outside assistance.

Lawyers have also often been described as the gatekeepers to justice. This aspect of lawyers' identity gives them great prominence in societies that pride themselves on being just. To the extent that mediation embodies a different conception of justice, and a different path to achieve it, lawyers' public esteem is lowered, or at least rivalled by mediators. One vision of mediation offers the hope of consensual justice achieved through empathy and understanding, rather than by the application of law. Some lawyers may be animated by the worry that they are no longer considered by the public to be the sole guardians of justice.

The emphasis in mediation on cooperation and consensus may be troubling to some lawyers because it is at odds with their self-conception as aggressive litigators. Legal education persists in teaching law students that common law litigation is the essence of lawyering, and that winning at trial is the highest professional achievement. It is no wonder that the egos of so many lawyers are bound up with competitive behaviour and besting the adversary. The world of mediation seems a pale imitation of life to these litigators. The self-image of many lawyers is thus incompatible with the cooperative approach required in mediation. Aggressive litigators are also concerned to make sure their colleagues don't think them "soft" by engaging in mediation.

Lawyers may also see mediators as challenging lawyers' traditional role as the dominant party in relationships with clients. In mediation lawyers may fear "losing control" of their client, or at least having to share that control with the mediator. Some mediators have adopted the practice of meeting privately with parties without their lawyers, which fuels this concern. On the other hand, lawyers who find they cannot control the excessive demands of their clients may welcome the moderating influence of a mediator.

Finally, it should be noted that the corollary to many of the above remarks also applies to some lawyers. Those who have embraced ADR find participating in it, or acting as a mediator, to be satisfying and congruent with their self-conception as problem solvers or healers. This group of lawyers is probably, however, still a minority in the profession.

Pecuniary Interests

The "multi-door courthouse" concept involving mediation represented a clear risk to lawyers' incomes. Disputes that were diverted away from litigation would never generate legal fees. No doubt this pecuniary interest in maintaining their livelihood motivated many lawyers to shun that vision of a justice system.

Plaintiffs' lawyers with contingency fee arrangements find that settlement is preferable to trial and are often more amenable to alternatives. The other side of the coin is that defendant lawyers who bill based on hourly rates do not welcome an early end to litigation.

Most lawyers have accepted mediation in situations where it does not entail loss of business. Thus, "minor disputes" that did not justify legal services may be taken to community mediation services. Similarly for other cases lawyers consider uneconomic or unpalatable such as inmate actions over prison conditions, minor criminal offences, and landlord and tenant disputes. For such cases, mediation is a fine alternative.

Once it was recognized that mediation would not go away, some lawyers took steps to make it part of their business. In many jurisdictions it was suggested that mediators should always be lawyers because acting as a mediator was engaging in the practice of law, particularly when agreements were drafted. Some legal steps were taken against mediators based on the doctrine of "unauthorized practice of law".

Lawyers in big firms with large corporate clients found that these important sources of revenue were becoming ADR friendly. Corporations such as insurers are frequent litigators, and they recognized the value in disposing of litigation in a less costly and time consuming way. The American Center for Public Resources strongly promoted the use of ADR amongst major corporations and law firms. In response, law firms created dispute resolution departments and provided "settlement counsel" to complement their litigation services.

Finally, it should be recognized that a sizable group of lawyers are now engaged in the business of mediation as mediators. These lawyers often serve business sectors in which they have recognized expertise.

Concerns for the Rule of Law

Concern for the rule of law contributed to the growth of mediation, and has also led to attacks on it. In America in the 1970s there was a perception of a litigation explosion, accompanied by great delays in disposing of cases by trial. Many were concerned that the public, accepting that "justice delayed is justice denied" would lose faith in the courts and the entire legal system. It was imperative to reduce the caseload of courts and speed up the resolution of lawsuits. Mediation seemed appropriate for this task. A desire for more efficiency in the legal system thus animated many early supporters of mediation. As mediation has become institutionalized the expected benefits in reduced cost and time have remained elusive. Nevertheless, it does seem that alternatives such as mediation may have contributed to the continuing decline in the number of trials, thus reducing courts' caseloads. Today few supporters of mediation mention efficiency as one of its virtues.

The rule of law has also been used in several ways in arguments against mediation. Practicing lawyers often conflate it with the adversary system of justice exemplified by trial and adjudication. For these critics, a trial with a jury is the only way to ensure that truth and justice prevail. We should recognize that this critique is not intended as a justification for the excesses of civil litigation procedure such as interminable and abusive discovery, but rather as positive support for the unique institution of a public trial. Many litigators lament the road to trial but maintain the value of finally arriving there. Any alternative such as mediation that makes the road longer, or offers a detour is to be avoided.

A slightly different critique based on the rule of law is made by those with a more philosophical bent. For them, a public trial and adjudication by a judge is a cornerstone of the justice system and anything that supplants it is wrong in principle. According to this view it is essential that justice be done in public for the public to have knowledge and confidence in law. It is also important for the common law as an evolving body of doctrine to have new precedents established that help to shape society, and keep law in touch with changing social needs and mores. Private settlements cannot accomplish these tasks of adjudication.

Associated with the rule of law is the right to openness of facts of public interest. Some lawyers suggest that settlement via mediation may allow the concealment of information the public should know, such as the existence of hazardous products or business operations.

Finally, legal critics of mediation are concerned about the lack of due process in mediation proceedings. They suggest that disadvantaged parties such as divorcing women, minorities, or consumers suing large corporations may be taken advantage of in mediation by reason of its informality. Coercion to reach a one-sided settlement may occur without the levelling intervention of a judge. There is some evidence that women in divorce mediations receive less monetary value than those going to trial, which seems to substantiate such concerns. The privacy of mediation settlements makes testing this critique difficult.

Adaptation - Expectations and Routine

Now that mediation has become fully institutionalized in many jurisdictions we can start to answer two important questions: "Will lawyers change their litigation practices?" and, "Will mediation change when integrated into litigation?" Based on the research to date the answer to the first question seems to be "yes" and to the second, "no". For supporters of mediation this appears to be a welcome result, but "the devil is in the details."

Mediation has become part of the routine of lawyers conducting ordinary litigation. However there is growing evidence that it has displaced other settlement efforts by lawyers, resulting in less overall settlement activity. Lawyers let mediators do the settling. This change in practice may result in some cases being settled later than they would have been without mediation. Early mediation has been resisted by lawyers, and this is connected to the type of mediation they expect. We'll examine the evidence on that aspect as part of the discussion on how mediation has been affected by institutionalization.

Mediation has never been a homogenous field with a shared vision, accepted conceptual structure or consistent terminology. There have always been multiple orientations towards mediation, various models of the mediation process, and different mediator styles. A settlement orientation, "shuttle" process, and an "evaluative" or "pressing" style of mediation practice have been present from the beginning of the modern era of ADR. Accumulating evidence leads to the conclusion that these are what litigating lawyers expect from mediation, and most courts agree with them. In one sense mediation has not changed by its association with the courts. It is just that one vision of mediation has been preferred by lawyers and judges. Today the most frequently practiced form of mediation is probably the settlement oriented evaluative type due to the large number of lawsuits in which it occurs.

If court connected mediation is expected to be evaluative, then it is argued that there must be a basis of fact to evaluate. A rational approach to weighing legal claims considers the provable facts in conjunction with the law to be applied to them. Thus, lawyers have made the case that at least “critical discovery” must be allowed before settlement is attempted. In practice, it appears that the usual discovery is most often completed before mediation occurs. Judges, accustomed to dealing with legally relevant facts, have tended to agree.

Once a client’s complaint has been expertly reframed by a lawyer into a legal claim it has proven exceedingly difficult to re-reframe it as a problem to be solved taking into account the client’s needs and interests. Most lawyer-mediators probably lack the skill and inclination to even attempt that task. If interest based mediation has not flourished through institutionalization, a transformative approach had even less chance of succeeding in the hands of lawyers. This result should prompt us to reconsider the conceptual categories of conflict, dispute, and legal claim, and what responses are appropriate to each.

The latest development has seen judges and court officers becoming more actively involved in formal settlement processes within the courts. Using public officials has the attraction of not adding additional cost to the litigation process through hiring independent mediators. In some jurisdictions this development has been called judicial settlement conferencing, in others, judicial dispute resolution, and in yet others judge led mediation. It seems inevitable that the type of mediation used in these processes will also usually be evaluative. With the active involvement of judges, however, has come increased scrutiny of the due process aspects of mediation, and the ethics of mediators. These and other issues surrounding judicial dispute resolution are being investigated by an international group of researchers that includes the author.

ADR has been adapted by lawyers to become what might be called ALT – alternative litigation termination, an alternative to trial. Within the traditional legal system it suits lawyers’ needs and interests, but the question remains whether it is also best for their clients, or the general public.

Conclusions

Some conclusions may now be drawn based upon the evolution and adaptation described above:

1. Ordinary litigation in many jurisdictions is now practiced in the shadow of mediation. Settlement is certain in most cases. However, litigation procedures, notably discovery, have not changed.

   This may be the worst possible result for society as a whole which continues to suffer from long and expensive pre-trial procedures which do not culminate in a public display of justice or contribute to the development of the law.

2. There is an evolving understanding of due process in court connected mediation. A mediator’s active engagement with the substance of the dispute is an accepted part of the process. Indeed, without that engagement the process may be considered flawed.

The fact that court connected mediations are generally well received by litigants who participate in them shows that the process embodies important elements of procedural justice, at least from the lay perspective. These strengths should be institutionalized.

3. Proponents of mediation as consensual problem solving based on needs and interests, or as a process of personal transformation, should reconsider the project of institutionalizing mediation in the legal system. It seems inevitable that court connected mediation will always be settlement oriented and evaluative in practice.

   Instead, these "true believers" should take up the more difficult task of creating a mediation practice and profession that is independent of the legal system and capable of attracting the disputing public directly. In the writer's view this alternative project requires much more research and an academic grounding equal to the law.

4. The "multi-door courthouse" has reverted to a single door leading to a mediation conference room which is more and more often occupied by a judge. Some may well ask whether this structure should still be called a courthouse.

   However, if court connected mediation is expected to be evaluative, who better to do that than a sitting judge? We should examine the strengths of judicial dispute resolution and combine it with a revitalized process for bringing appropriate cases to trial.

Let us look for more ways in which mediation in all its many forms may contribute to the betterment of society.

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