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Mediation: The Process and the Issues

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Executive Summary

The alternative dispute resolution movement arose to provide more efficient and less expensive methods of settling disputes than are provided by the court system. This study focuses on one of these methods—mediation. Drawing on in-depth interviews with five mediators in both private and public practice, the author outlines the key elements of a successful mediation process, the advantages and disadvantages of mediation, and its often beneficial effect on the relationship between the parties. Very few studies have focused on evaluating the effectiveness of mediation, and this study seeks to fill that gap by describing examples of informal evaluation.

- Mediation can reduce the cost of disputes, produce quicker resolutions than litigation, and help to maintain, or even improve, the relationship between the parties.
- Agreements achieved through mediation are more likely to last, because the parties themselves play a major role in fashioning the agreement.
- Although there were some difficulties in defining the term, the mediators generally agreed that mediation can, under the right circumstances, produce win/win solutions to disputes.
- If mediation—or any other alternative dispute resolution program—is to work properly, management must be fully committed to it. Management must judge the program not only in terms of the number of disputes won and lost but also in terms of the number of disputes avoided and its relationship-preserving value.
- Objective data gathered from recent settlements in the field will show the parties the most likely range of settlement and narrow the bargaining range. If the mediator can provide this information, the process will be quicker.
- The parties may find it difficult to evaluate prospective mediators because of the diverse range of traits that make for effective mediators. Furthermore, there is currently no formal process for evaluating mediators and no formal standards for evaluating the process. The author predicts that evaluation will, consequently, become an important issue in the future and suggests some informal methods of evaluation.

Introduction

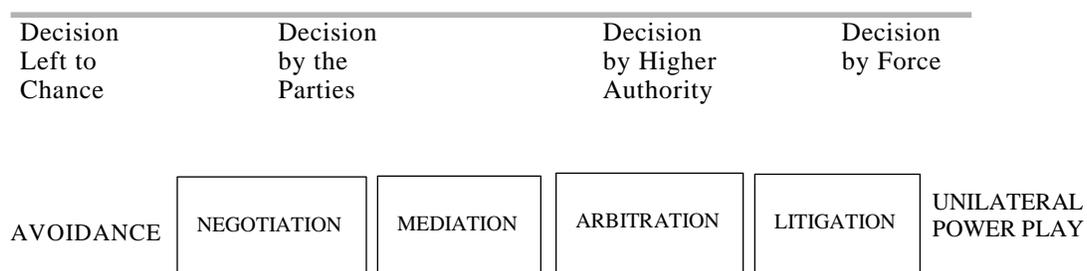
Disputes have always been a part of everyday life, and we have various mechanisms for resolving them. The most common one, of course, is provided by the formal court system. However, litigation is simply not appropriate in many cases; it takes time even to get disputes before the courts and the process is expensive. The alternative dispute resolution (ADR) movement arose to overcome some of the many disadvantages that litigation poses and to relieve the large backlog of cases that were endangering the justice system. Quicker, less cumbersome methods for resolving disputes were required. Mediation is one of these methods. It is generally quick and relatively inexpensive, and it has the added objective of maintaining a good relationship between parties. The method is being used more frequently as organizations come to appreciate its advantages.

Based on a review of the literature and a series of interviews conducted by the author, this study assesses the effectiveness of the mediation process, its advantages and disadvantages, the durability of settlements reached through mediation, and its effect on the relationship between the parties.

Alternative Dispute Resolution

The dispute resolution continuum outlined by Slaikeu (fig.1) summarizes the possible avenues for resolving conflict. Alternative dispute resolution (ADR) methods fall in the middle of the continuum, between negotiation and litigation. ADR techniques can be used for a broad range of disputes, including international, commercial, and labour disputes. They can also be used between individuals, businesses, or even countries.

Figure 1
Dispute Resolution Continuum



Source: Slaikeu (1989, 396).

ADR Methods

ADR methods can be separated into two broad categories (Carver and Vondra 1994). The first, arbitration, bears the closest resemblance to litigation. Under arbitration, the two parties agree to argue their dispute before a neutral third party, who then makes a binding decision. The second broad category of ADR includes various forms of negotiation, such as mediation, conciliation, and in-house programs like the use of an ombudsman or peer-review panels (Evans 1994; Kauffman 1992; McKay 1985). The most commonly used forms of ADR are arbitration and mediation (Overman 1992, 44).

Requirements for Effective ADR

If the ADR process is to work properly, top management must be committed to it. Companies that are fully committed to their ADR program will evaluate its performance not simply on the basis of the number of disputes won or lost but also on the basis of things like the number of disputes avoided, the costs that were saved, and relationship-preserving moves (Carver and Vondra 1994). They will understand that they can 'win' in the long run whether or not they win each individual dispute.

Companies need to be able to refer to ADR even when they are sure they are right, but this is not easy to do. Tillson (1997, 84) found that 'more than anything, the long-standing entrenchment of the litigation mind-set is standing in the way of widespread adoption of ADR.' The true test of commitment to the dispute resolution process comes when the party is the complainant (Carver and Vondra 1994). In such cases, very few companies can forgo their urge to take matters to court.

Senior executives 'may feel that winning is the only thing that matters'; they may crave the feeling of victory in a big court case. Decision makers may also feel that 'ADR is only one alternative, not the method of choice' (Carver and Vondra 1994, 123). Or they may feel that it is not the 'safe' choice (Overman 1992), and they may therefore choose litigation instead of something new and unproven. Conversely, the parties may also feel that 'ADR isn't really all that different from litigation' (Carver and Vondra 1994, 123). Consequently, it may be necessary for management to make it clear that ADR is the preferred method and not simply the alternative for smaller, less important issues. It is important to ensure that ADR remains a distinct, viable, and more attractive alternative to litigation. When members of an organization are thoroughly educated about ADR, it's unlikely that these negative attitudes will surface.

Advantages of ADR

The most important benefit that ADR can generate and that litigation cannot is a win/win solution to a dispute (Kauffman 1992). Such a solution can be produced when the issues being negotiated are intrinsically integrative, that is, when a solution can be fashioned that meets the interests of both sides. An example is a dispute about part-time work. ADR would take the adversarial element out of the process and dissuade the sides from taking rigid positions. Management's position may be that it needs part-time workers. The union's position would likely be that part-time work takes money and jobs away from union members and is therefore undesirable. Management's *interest*, however, may be that it simply needs to have a few workers

The most important benefit that ADR can generate and that litigation cannot is a win/win solution to a dispute.

to fill in for holidays and sick days. The union's *interest* may be that it does not want the workforce to become increasingly part-time and contracted-out. Both sides' interests can be satisfied by using part-time workers on a limited basis, if management ensures that this practice will not be expanded and that there will be no contracting-out.

Unfortunately a win/win solution cannot be achieved if the issues are 'distributive,' that is if there is a fixed amount of money available, for example, and both sides are negotiating to obtain the largest portion they can. Each side's interest cannot be satisfied, in this case, with any one settlement.

Mediation

Conditions of Success

Marsh (1997a) has identified five elements of a successful mediation process. First, there needs to be 'an impartial third party facilitator' who helps the parties explore the alternatives and find a satisfactory resolution. Second, the mediator must 'protect the integrity of the proceedings' by setting ground rules that all parties must follow and protecting the confidentiality of the proceedings. Third, there must be 'good faith from the participants' or the process will soon be frustrated and fail. Fourth, those with full authority to make decisions must attend the proceedings to show true commitment to the process. If one side lacks full authority, the other side can easily become frustrated when approval from superiors must continually be obtained. Finally, the mediator must choose an appropriate neutral location, so that both sides will feel relaxed and the process will be less intimidating.

Unlike an arbitrator, the mediator has no authority to render a decision, and the mediation process is in no way binding upon the parties (Overman 1992). The mediator seeks to maintain the relationship between the parties by finding a compromise solution that meets the interests of both, even though it may not, at the same time, meet their respective positions on the contentious issues. The very presence of a mediator can signal to one of the parties that they do not see what their real interests are and this can then help both parties move forward (Marsh 1997b).

General Guidelines

Since disputes age badly and time is important, problems need to be dealt with immediately before they grow, allowing emotions to frustrate the mediation process (Carver and Vondra 1994). To ensure the mediation process realizes its fullest potential, the parties need to 'separate the people from the problem' (Fisher, Ury, and Patton 1981, 17) and laying their emotions aside, concentrate on the issues at hand. It is important to 'focus on interests, not positions' (40). While positions can make it easy for sides to become entrenched, interests allow the parties a much wider range of possible solutions. The parties should also try to 'invent options for mutual gain' (56). In this step, all individuals involved in the process brainstorm ideas to resolve the current problem: the atmosphere must be one in which criticism is not allowed while ideas are gathered so that people are not afraid to speak their mind. Each side then needs to separate their wants from their needs. Finally, if the two sides truly

Elements of a Successful Process

1. **An impartial third party facilitator**
2. **Integrity of the proceedings**
3. **Good faith from the participants**
4. **True commitment from decision makers**
5. **Neutral location**

cannot reach an agreement based on their interests, they must agree to a set of objective criteria which can be used to evaluate possible solutions, including the true costs and benefits, and arrive at a settlement (81). In many cases, the parties will need to work together following the resolution of the dispute, and working for a good future relationship should be a priority during negotiations (ADR Systems 1977).

The Mediation Process

As mentioned, mediation should take place on neutral ground, in a room which ensures confidentiality. The seating arrangement should not square the parties off directly across from one another (Slaikeu 1996, 67), in order to maintain an atmosphere of cooperation. After all members of each party have been seated in the meeting room, the mediator will give an opening statement explaining why the parties are there, followed by a brief summary of how the mediation process will proceed and a call for opening statements from the parties. The mediator should ensure that each party's opening statement is fairly brief and touches only on the contentious issues and what they seek to accomplish through the mediation process. Following the opening statements, time will be given to each party for clarification of the other party's statement. No negotiation takes place at this time.

Once the parties begin to trust the mediator, they will open up and give a better idea of their true positions and resistance points on each issue. The mediator needs to know more about their interests, the important facts as the parties see them, what each party will do if the mediation fails to reach agreement, and possible integrative solutions (Slaikeu 1996, 91).

First, the parties should summarize their current position and their feelings about each outstanding issue.

The mediator then tries to bring the two sides as close to an agreement as possible. Since joint meetings can be much more productive and efficient than meeting with each party separately and shuttling between them, it is up to the mediator to decide if and when they are ready to enter back into joint meetings for negotiation. Slaikeu (1996) recommends utilizing the SOS Model (for summaries—offers—summaries). First, the parties should summarize their current position and their feelings about each outstanding issue. Next, the parties must discuss possible solutions to the problems they face: the parties generally offer trades to one another. The mediator's main role at this stage is as facilitator and coach. S/he may need to reframe the problems when the parties begin to reach an impasse or when emotions run high. The mediator then needs to summarize what the parties have agreed to and accomplished so far and what they have yet to accomplish (140). If the parties are not ready to meet face-to-face, the entire process may need to proceed through shuttle meetings with the mediator moving back and forth between the parties, summarizing the other side's views and possible movement.

Finally, if the parties reach an agreement, the mediator must keep in mind that the 'primary objective is to help the parties reach a new understanding or plan for the future to which each can say yes and then begin to immediately implement' (Slaikeu 1996, 163). The mediator needs to play devil's advocate and critically analyze what has been agreed. Does it truly meet the key interests of both sides? Is it viable when looking into the future? Will the agreement be well received with other key parties and constituents?

When finally putting the agreement into writing, the participants should strive for simplicity in the choice of words, ensure the document is positive about the solution, and use only a single copy until the agreement is signed (Slaikau 1996, 172), keeping in mind that this step may guide the future drafting of legal documents.

Advantages of Mediation

Generally, using mediation in place of litigation can lower costs and produce quicker resolutions that preserve and sometimes even improve relationships (Carver and Vondra 1994; DiCesare 1996; Overman 1992). Mediation is also more effective at reaching a settlement. A pilot project recently run by the Ontario Court (General Division) and the Ministry of the Attorney General ‘found that cases sent before mediation were twice as likely to settle and did so in half the time of those that went through the normal legal channels’ (Tillson 1997, 83).

Mediation is also a good way to encourage employee participation and increase employee/employer communication (Overman 1992). And since the decision is negotiated and not imposed, the parties are able to decide their own fate.

The Effectiveness of Mediation

Divorce Mediation

Meierding (1993) studied the effectiveness of mediation in divorce proceedings. She measured ‘the long-term satisfaction of clients and long-term durability of agreements reached through private, voluntary, and confidential mediation’ (159). Many of her findings relate to mediation generally, and they indicate overwhelmingly that mediation is much more effective than litigation. Not only were there extremely negative responses to litigation, but the adversarial nature of the court system exacerbated the conflict between the parties. Mediation, on the other hand, was given a glowing report by both the men and women involved, most of whom felt that the mediator assisted in negotiating more reasonably with the other party (164). Many also felt that the agreement was fair to them and to the other side.

Mediated agreements were also adhered to much more frequently than adjudicated ones. In 63.5 percent of the sample cases both sides followed the terms of the agreement, and in 40.5 percent of the remaining cases the agreement was altered by mutual agreement of the parties (Meierding 1993, 166, 167).

Parent-Child Mediation

Van Slyck, Stern, and Newland (1992) studied the effectiveness of mediation for resolving parent-child disputes. Both parents (74.1 percent) and adolescents (93.3 percent) responded that the mediation process was somewhat useful or very useful. Most parents and adolescents also believed the terms of the agreement were fair and most reported that their family relationships had improved somewhat since mediation. Although they found that in the long term, approximately half the families did not adhere to the agreements, the authors conclude that ‘Overall the results suggest that mediation can resolve specific disputes as well as produce a positive impact on the general quality of family relationships’ (84).

Advantages

- **Lowers cost**
- **Produces quicker resolutions**
- **Encourages employee participation**
- **Increases employee/employer communication**
- **Parties decide own fate**

Interviewing the Mediators

To study the effectiveness of mediation in general, five mediators who represent a diverse array of both public and private experience in different fields were interviewed in 1997 using a list of questions compiled to further explore the issues discussed in the literature and to fill gaps in existing research on the topic. A list of the mediators interviewed, along with information on their background and qualifications, is provided in the appendix.

Key Attributes of Mediators

The most important characteristic of an effective mediator, mentioned by all those interviewed, either directly or indirectly, is honesty and integrity. An inexperienced mediator may be dishonest in bringing about a settlement, but this behaviour simply will not be tolerated by the parties. An example was given of a new mediator who gave union and management parties two very different interpretations of the same clause in the contract they were negotiating (Kilgour, interview). The parties subsequently ran into problems when trying to interpret the same clause sometime after agreeing to the settlement and eventually determined that the mediator was at fault. As a result, the mediator had a bad reputation in the industry for some time. Manipulation and dishonesty may result in agreement in the short term, but in the long term it will result in professional suicide.

Mediators are often the targets of one or both parties' anger and frustration, which cannot be taken personally. It is good, in fact, to let the parties relieve their frustrations, and experienced mediators will be able to facilitate the release of these emotions without themselves getting emotionally involved and compromising their role.

Mediators who have expertise in the area of dispute will likely be able to speed up the process, command a greater level of credibility, and possibly bring objective information from their own experiences to the sessions (Hendler, interview).

Mediators with experience in arbitration or litigation may also have an advantage over those who do not, since they can offer their informed opinion on what they believe an arbitrator or judge would award in the circumstances (Kilgour, interview).

Mediators must also have very well-developed communication skills (Breckenridge, interview). Effective mediators are able to reframe issues when that is necessary to facilitate a settlement (Kilgour, interview). Having the ability to get the parties to talk to each other is also very important (Breckenridge, interview), as is understanding when it may be necessary to allow the parties to save face and walk away with the settlement and their pride intact (Breckenridge, interview).

Evaluating the Mediator

Evaluation of the mediator is difficult because of the diverse range of behaviours and traits that make mediators effective. Although the interviews revealed that there is no formal evaluation of the mediator(s) within the organizations represented here, informal assessments are used in most organizations. The Ontario Police

Important Mediator Characteristics

1. **Honesty and integrity**
2. **Emotional detachment**
3. **Expertise in the area of dispute**
4. **Experience in arbitration or litigation**
5. **Well-developed communication skills**

Arbitration Commission, for example, uses intensive informal evaluations (Kilgour, interview). Approximately every six months each mediator must meet with the commission to fully inform it not only about how many settlements were achieved and their status but also about the context in which they occurred, including the general labour relations environment. Only then can the evaluators get a picture of the effectiveness of the mediator.

The Ontario Education Relations Commission (ERC) made regular field visits to the mediation proceedings as part of their monitoring. They listened to the parties and then provided the mediators with feedback and debriefed them. The ERC struggled with the issue of evaluation for quite some time (Breckenridge, interview) and with the problem of determining who would do the monitoring. In the same way that good candidates for mediators are well versed in negotiations, good candidates for monitoring mediators are individuals who have had a great deal of experience with the process. Consequently, the field services officers, including the director, who perform some of the monitoring also mediate disputes.

Possible methods by which private-practice mediators might evaluate their own performance include tracking the number of clients, the number of new clients, the number of referrals, the number of settlements, and the mediator's own satisfaction with the settlements obtained (Osler, interview). The private-practice mediator might also assess the acceptance by the parties of the mediator's role (Kilgour, interview). It is difficult to assess the various methods, however, and there may be attempts in the future to construct formal evaluation methods for mediators.

The Process of Mediation

The unanimous view of each person interviewed was that the dispute is ultimately in the hands of the parties. As one mediator put it,

The settlement should be whatever the parties want. It is their dispute, and they have the ultimate control over where the settlement will be. (Osler, interview)

In any dispute, each party, first of all, will likely think that they have a strong position, and they will want to beat the other side (Kilgour, interview). Second, each party will also want to get the matter settled, for the dispute gives rise to uncertainty and a judge or arbitrator might not find in their favor (Kilgour, interview). The mediator must guide the process to nullify the first element and emphasize the second.

As mentioned, the mediator usually meets with the parties in person in one or a number of sessions. However, one mediator sometimes never actually meets the parties and does most of his mediating by phone and fax (Osler, interview). It is unclear which method is the best. If the parties never meet the mediator, some of the stereotypes surrounding people's appearance may be avoided. On the other hand, the mediator may be able to build trust and credibility through actually meeting with the parties. Both approaches are prevalent in the field today.

Because the parties themselves must take ownership of the dispute, one mediator said his strategy is to 'make the parties do the work' (Kilgour, interview). All the interviewees agreed that many inexperienced mediators will spend a lot of energy in trying

The parties have the ultimate control over where the settlement will be.

to get a settlement, instead of demanding that the parties come to grips with the reality of their disputes and trying to facilitate the process of reaching an agreement.

The mediators interviewed for this study were reluctant to describe what process they employ when mediating disputes, simply because the process must be adapted to the needs of the particular situation. They did, however, agree with the outline given earlier in this study of how the process generally proceeds. While each used some of the guidelines described by Fisher, Ury, and Patton and some of the elements described by Marsh (1997a, b, c) at different times, they did not employ them at all times. The interviewees did, however, give some general tips on how the process should unfold.

Third-Party Acceptance

The difference between reaching an agreement and not doing so may depend on whether or not the parties accept the mediator as a truly neutral third party. If the mediator has good credentials and is either well respected in the field or has good references from others, then s/he will likely be more easily accepted from the beginning. Mediators who have practiced for a number of years and have built up a good reputation have an advantage over others. The Education Relations Commission (ERC), which was formed in 1975, spent their first five years investing in the training and development of their mediators and allowing the necessary time to pass so that they would gain the trust of the parties and be accepted as third-party neutrals (Breckenridge, interview).

One mediator in private practice states that he is normally selected by one party. As a result, sometimes the other side will not accept him as neutral (Osler, interview 1997). If he is not accepted, he simply walks away. This is an appropriate response, since, as we have seen, the parties are ultimately in control of the mediation process. Another mediator interviewed, on the other hand, is normally hired after a mutual decision by the parties (Hendler, interview). Consequently, he is virtually always accepted as a neutral third party.

Objective Information

Objective data gathered from recent settlements in the field of the dispute can be used to show the parties the most likely range of settlement, sometimes called the 'range of reasonableness' (Breckenridge, interview). When the mediator brings this kind of information to the proceedings, the parties can speed up the process, for they now have a much narrower bargaining range to work with (Breckenridge, interview). Surprisingly, however, very few mediators use such objective information, partly because it would take a great deal of time and energy for the mediator to collect the required information for each case. The Education Relations Commission was an exception, however, and kept data for over twenty years: it was probably the only organization in North America that had a mandate to collect such data (Breckenridge, interview). As a result of having access to this objective data before meeting with the parties, the mediators had gained greater acceptance.

Objective data neutralize some of the emotion involved in contentious disputes if the mediator simply insists that the parties deal with the specific, factual data pro-

Objective data gathered from recent settlements in the field of the dispute can be used to show the parties the 'range of reasonableness.'

vided (Kilgour, interview). The problem with most mediations is that each party provides a brief to the mediator that includes all the arguments which serve their own interests (Hendler, interview). The mediator must then sort through both sides' arguments, and, along with any knowledge s/he may have, then estimate the range of settlement. This is a much more difficult process and is more prone to error.

Are Mediated Settlements Win/Win?

As we saw earlier, a goal of both negotiations and mediation is to achieve win/win solutions. The interviewees defined the term slightly differently. One mediator believed that very, very few mediated settlements can be truly described as win/win (Kilgour, interview). He indicated that ideally the parties should each walk away feeling they have reached the best possible settlement and strengthened their continuing relationship; however, usually this does not happen. Often the parties will settle because they have been persuaded that it is better than proceeding to litigation or arbitration, but they will still walk away with some residual resentment toward one another.

Another interviewee did feel that most cases were win/win in the sense that they were not win/lose or lose/lose. He also believed that if the parties agree to settle then the solution can be considered win/win (Hendler, interview). This response raises an important issue regarding win/win solutions. The agenda of the mediation and the process can be thought of separately. The agenda includes individual issues which are either intrinsically distributive or intrinsically integrative, to use the terminology introduced earlier in this study, and can be bargained as such. The process can also be approached integratively or distributively. If an integrative approach is used, both sides can generally reach a fair settlement and walk away with little resentment. The distributive approach, on the other hand, can result in one side gaining more on the substantive issues and one or both sides leaving the table with animosity towards the other. The mediator needs to address both the agenda and the process to achieve a true win/win agreement. As the interviewee indicated, a win/win situation can be thought of as one in which no side loses.

Two other mediators felt that most of their mediated settlements were win/win; one answered that they were so 'by definition . . . or they wouldn't have ratified' (Breckenridge, interview). He also indicated that there may have been problems with the settlements, but the parties could obviously live with them for the term of the agreement. This fits with the broad definition of win/win. Another mediator stated that there are times when the settlements are the best that can be obtained in the circumstances and, ultimately, the parties are satisfied at that point in time (Waterhouse, interview). In this context, she believed those settlements are win/win. In fact, the majority of the mediators interviewed believed their settlements were win/win, but—to repeat—each mediator may have been interpreting the term in a different way, since no definition of 'win-win' was given during the interview.

Inappropriate Settlements

The mediators were asked whether the parties had ever come to an agreement that they (the mediators) did not feel was the best agreement in the circumstances. The consensus was that since, once again, the parties are in ultimate control, the mediator

The mediator needs to address both the agenda and the process to achieve a true win/win agreement.

should not intervene even if one party has more bargaining power than the other. Often the playing field is not level (Waterhouse, interview), but the mediator is there to facilitate what the parties are prepared to negotiate and not to tell them what the morally correct course of action is (Kilgour, interview). As one mediator put it,

If they're [the parties] sitting there arguing that black is white, those are their facts. Don't get in the way. Otherwise you'll get into trouble. (Breckenridge, interview)

Duration of Mediation

Many mediated disputes are resolved in a matter of days, but the time required for mediation can be anywhere from one day to a number of months, depending on the circumstances and the type of dispute. Nevertheless, mediation is still preferable when compared with the long periods it can take to arbitrate and litigate. At the very least, mediation should be explored before proceeding to binding methods of dispute resolution; it will likely save time.

Advantages of Mediation

The mediation process has played a very positive role in averting strikes (Waterhouse, interview), ensuring fair settlements, and achieving better settlements (Osler, interview). One mediator stated emphatically that 'formalized mediation is probably one of the most positive and forceful methods of settlement, and [of] empowering people to [settle]' (Breckenridge, interview). First, its increased use has generally resulted from its practical basis (Kilgour, interview): it is relatively easy to use and get used to, and access to mediators is increasing as more people enter the field. Also, each major field normally has its own dispute resolution body, for example, the police in Ontario have access to the Police Arbitration Commission. In agreement with the literature, one mediator interviewed found the mediation process much more efficient than the courts, where it can take two or three years to resolve a dispute (Kilgour, interview). Another agreed that mediation could save clients a great deal of money by avoiding litigation (Osler, interview).

There are two vivid examples of how effective mediation can be; one in the teaching profession, and one in the police. Because of the mediation services of the Education Relations Commission, very few grievances in teaching in Ontario make it through all stages of the procedure. In fact, in a province with 130,000 teachers, only 600 grievances have done so in twenty-three years (Breckenridge, interview). Similarly, the Police Arbitration Commission resolves half their disputes at the conciliation level, very few of the rest make it to arbitration (Kilgour, interview).

Disadvantages of Mediation

As we saw earlier, one disadvantage of mediation is that there are no standards for the process. As one interviewee put it, basically anyone can hang out a sign and practice mediation (Kilgour, interview). He also mentioned that it can hurt the field when inexperienced and possibly unprofessional mediators resolve disputes inadequately or proceed with mediation when it is not the appropriate method for resolving the dispute. Another problem experienced by some mediators in the public sec-

tor is the lack of funding from the government: the agencies that use mediation may alter the process as a result of budget cuts, for example, by using fewer mediators for a shorter period of time, forcing the mediators to speed up the process, which could have a negative effect on the proceedings. Lastly, mediation is ineffective if a precedent for deciding future disputes is required. A decision handed down by the courts, and even by an arbitrator to some extent, is applied to similar future disputes. For such specific circumstances, it may actually be a disadvantage to use mediation.

The Durability of Settlements

It was difficult to assess the durability of mediated agreements. Virtually all the agreements resolved by the mediators interviewed involved some type of contract and hence, could essentially not break down. One mediator said that once a deal is ratified and signed, that is the end of his involvement (Breckenridge, interview). There may subsequently have been problems with the agreement, but those interviewed would not necessarily be aware of them. In most circumstances, the matter would either be resolved between the parties or possibly by a different mediator. As a result, no real tracking was done of the situation between the parties after the mediation. One mediator said that most of the disputes he resolves involve money, and once it has changed hands, the matter is closed (Hendler, interview).

Nevertheless, the interviewees felt that most agreements achieved through mediation last, and while there may be complications, more often than not they can be resolved. One mediator indicated that he uses a proactive approach to problems. When fashioning the agreement, he tries to foresee problems and ensures the parties have a mutual understanding of the settlement. Most good mediators will do this to avoid future problems (Osler, interview). Furthermore, one can assume that because a mediated agreement is essentially a negotiated one and the parties control the result, it is much more likely that they will be able to live with the agreement than with one that is enforced upon them.

The Relationship between the Parties

The relationship between the parties is an important focus of the mediation process (Osler, interview). The mediator tries not only to get the parties to a settlement but also to help them improve or maintain their relationship (Waterhouse, interview). However, if the parties do not have an ongoing relationship or if they do not place any value on gaining or keeping a good relationship, the mediator has a much more difficult job. The mediator will either have to spend more time reducing animosity, or, in intractable situations, s/he can simply walk away.

The Future of Mediation

Because of the many advantages of mediation which have been revealed in this study, the process ‘has limitless potential’ (Breckenridge, interview), and its growth is a certainty. Every person encountered during the research for this study had the highest praise for the mediation process. However, one mediator did issue a warning. He believed the field to be at a critical juncture and that the reputation of

Because of the many advantages of mediation revealed in this study, the process ‘has limitless potential.’

mediation could be harmed by those not truly qualified to practice it (Breckenridge, interview). It is unlikely this will happen, however, because there are many highly qualified and effective mediators available, and an increasing number of organizations are using the process.

Conclusions

Many issues surround the mediation process. The literature on the topic highlights most of these but does not raise them all. Very few studies have focused on assessing the effectiveness of mediation. This paper sought to fill in some of these gaps by describing examples of informal evaluation. The evaluation of mediators will probably become an important issue in the future. Although one study (Marsh 1997c) has concluded that the quality of the mediator is not important, the mediators interviewed for this study all unanimously agreed that the quality of mediators was important for the effectiveness of the process. A number of the interviewees were concerned that an unqualified person could claim to be a mediator and damage the reputation of the field. This point was backed up in the available literature. The interviews also revealed that objective information is a valuable tool that could improve the process of mediation if it were used more widely.

Although much of the literature states that the mediator has more control over the process than the disputants, the mediators interviewed could not stress enough that the parties are ultimately in control of the process and the settlement. However, it is unclear whether this is simply rhetoric for the benefit of the parties. Connecting the literature with the results of this study, it would seem that the mediator controls the process and guides the parties to settlement, while the parties are ultimately in control of the settlement itself. The interviewees in this study emphasized that the parties play a very important role.

The literature and the results of this study indicate the effectiveness of mediation and the high rate of settlement that it can achieve. In addition, mediation tends to preserve the relationship between the parties, which is not a priority of other methods. Objective measures of the effectiveness of mediation are difficult to devise. The number of settlements is often used as the main criteria. However, maintaining the relationship of the parties is also important and more difficult to measure. The interviews show that mediation is truly effective under both criteria.

Whether or not mediation resolves disputes in a win/win fashion was left undetermined. It was not possible to appropriately interpret the responses of the mediators interviewed because the interviewees interpreted the term 'win/win' in different ways. However, it was noted that in order to achieve a win/win solution, the nature of the issue(s) involved in the dispute must be taken into account. A resolution must fulfill each side's interests with respect to the intrinsically integrative issues and obtain a fair division with respect to the intrinsically distributive issues.

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Appendix

Interviewees

Jim Kilgour

Jim is currently on contract with the Ontario Police Arbitration Commission as a mediator and is president of Kilgour, Goodman Inc., where he practices private mediation and arbitration. He worked for nine years with the Education Relations Commission and for another three years with the Ontario Labour Relations Board. Jim is a registered mediator and arbitrator with the American Arbitration Association.

Brian Osler

Brian is a practicing lawyer and operates his own private practice called Mediation Services. He is also Executive Director and Counsel for the North American Automobile Trade Association. Most of the disputes Brian handles are commercial disputes, but he also accepts clients with family disputes.

Jim Breckenridge

Jim was the Acting Director of Field Services at the Ontario Education Relations Commission. From time to time he mediated disputes falling under the jurisdiction of the commission. Jim also appointed mediators to resolve disputes handled by the ERC. Jim's background is in teaching, with experience in teacher/school board bargaining.

Kathleen Waterhouse

Kathleen was a Field Services Officer at the Ontario Education Relations Commission. She mediated some disputes for the commission, but generally oversaw the process of dispute resolution in disputes for which she was responsible. Her background is in labour relations.

Cliff Hendler

Cliff currently practices mediation privately through Dispute Resolution Services. His practice handles a broad array of disputes from construction to civil suits, but primarily disputes in the insurance industry. Cliff's background is in the insurance industry, where he worked as an adjuster for twenty years.

References

- ADR Systems. 1997. Mediation not litigation! Internet Site (<http://www.adrsystems.com>). San Francisco: ADR Systems.
- Carver, Todd B., and Albert A. Vondra. 1994. Alternative dispute resolution: Why it doesn't work and why it does. *Harvard Business Review* 72(May-June):120-30. DiCesare, Constance B. 1996. The law at work. *Monthly Labor Review* 119(1-2):79-80. Evans, Sybil. 1994. Doing mediation to avoid litigation. *HR Magazine* 39 (March):48-51.
- Fisher, Roger, William Ury, and Bruce Patton. 1981. *Getting to yes*. New York: Penguin Books.
- Kauffman, Nancy. 1992. Expedited arbitration and other innovations in alternative dispute resolution. *Labor Law Journal* 43:382-87.
- Marsh, Stephen R. 1997a. What is mediation? Internet Site (<http://members.aol.com/ethesis/mw1/adrl/essay1.htm>).
- . 1997b. Expanded use of institutional mediation. Internet Site (<http://members.aol.com/ethesis/mw1/adrl/essay1.htm>).
- . 1997c. The effective truths behind mediation. Internet Site (<http://members.aol.com/ethesis/mw1/adrl/other> doc).
- McKay, Robert. 1985. The many uses of alternative dispute resolution. *The Arbitration Journal* 40(3):12-16.
- Meierding, Nina R. 1993. Does mediation work? A survey of long-term satisfaction and durability rates of privately mediated agreements. *Mediation Quarterly* 11(2):157-70.
- Overman, Stephanie. 1992. Resolve disputes without costly suits. *HR Magazine* 37(July):44-5.
- Slaikue, Karl A. 1989. Designing dispute resolution systems in the health care industry. *Negotiation Journal* 5:395-400.
- . 1996. *When push comes to shove*. San Francisco: Jossey-Bass.
- Tillson, Tamsen. 1997. Common sense resolution. *Canadian Business* 70(March):83-4.
- Van Slyck, Michael R., Marilyn Stern, and Lori Moore Newland. 1992. Parent-child mediation: An empirical assessment. *Mediation Quarterly* 10(1):75-87