WHEN TO CONDUCT ADR IN A LITIGATION WORLD.

Thank you for attending to discover "When is the best and most opportune time to conduct ADR in the Litigation or potentially Litigation System". Well, the answer I have for you is "5"! If that makes you stop and think, it should, because ADR should be considered before issuing and, if that is not possible, early in the piece before costs and positions become inflexible.

Whatever the definition of ADR, this concept is most aptly described as Appropriate Dispute Resolution and is virtually any process that does not need a Judge to hear and make a decision binding on the parties.

We live in a complex interdependent world, but people are people, each individual with needs, expectations, different heritage, education and ages. We also live in a world of scarce resources and competition of these resources.

It is remarkable that there are not more disputes!

Disputes can be loosely defined as any situation that has two or more parties disagreeing with each other. The simplest resolution matter is to take it to the village headman aside "Tell it to the Judge". But even Moses realized that this took up all his time and energy and made him unpopular.

The idea of Litigation is simple.
One party issues
the other party defends and counter-issues.
The party defends the counter issues.
There are then questions (interrogatories and Further and better particulars) to clarify what has been put down.
Then there is discovery to ensure all documents are on the table.
Then there is the great debate.
Then the Judge decides.

Then there is the Appeal, and,
Then there is the Appeal from the Appeal.

So when should ADR be conducted?
The answer is at the very earliest opportunity but, and this is a BIG BUT, it will still depend on the matters and the parties.
It is a bit like Chicken Soup – it may not do any good, but generally does little harm.

ADR is all about Psychology not Law. The Parties are in dispute, they desire different outcomes, and the outcomes will affect their future. So it makes sense to bring the parties together at an early stage, or before the costs become an issue and the battle lines are trenches from which the parties cannot immerge and with reality becoming distorted. Especially in the First World War we hear of the great sacrifices of trench warfare but I am still not sure what the war was about.

Coming back to "5". Five of the arguments against early ADR are –

1. **<u>How can the parties make an informed decision if not all the facts and figures are on the table</u>? This will be true in many cases, but it must be remembered that ADR is not about "Truth", the rightness or wrongness of the case but is about the parties negotiating a settlement, which is in their interests. My experience at The Victorian Small Business Commissioner and at VCAT, Mediations are held either before or early after issuing is that the parties do know their own case. What they are really looking for is the ability to articulate and have their day in Court. The parties want somebody to hear their story of the past, to tell of their current pain, and then to move to resolution and the future. ADR is about people not the facts, to the nth degree.**

   Even when the facts need to be put in great details, appropriate ADR allows for the parties to get the bull shit out of the way and to design a process to bring the matter on. If that brings on a full-blown Court case, so be it. At least the parties have had input.

Often it is the Advisors that are the problem. Solicitors and other experts should not see their roles as White Knights leading a charge for their client's rights and can also to take a role as the Dark Knight who takes the time to understand client's case, and get the facts first, and then do a reality test.

Justice is not about which high-priced Advisor can twist and present arguments, it is about the parties.

Given all that, in the case of crime, principle or of a point to be approved going to the very essence of the Law, early Mediation may not be the solution. But even there I submit, an early ADR process can at least clear the airway and bring structure so that the real issues can be narrowed and brought before the Judge.

In my role as a Solicitor, I have become a little cynical about Judges always getting it right. Especially after each decision against a client the first thing that we do is to sit down and decide on an Appeal.

Is a client's interest really being served by finding out what a Judge thinks or what an Appeal Judge thinks.

2. ***Costs.*** **These do blow out if ADR is unsuccessful. However, the cheapest time to save costs, save time and importantly to save the health of the party is early on in the war. That is before these become the issue and not the case**

   The fact is we live in an unequal world so the party with money has an advantage which they will use if the matter proceeds all the way.

   Even if ADR is unsuccessful, costs in preparing for ADR are costs in the process and are offset by time efficiency and knowledge gained from ADR, Even if it is only how the other party will proceed.

3. **When a party is not ready. Much of the early literature in Mediation was about Mediating, only when the parties were ready. However, practice shows that getting the parties together, and given a chance to articulate their case, there is movement.**

   Certainly in much of the matrimonial literature, there is discussion that parties are at different levels of emotional control and needs. In all disputes,

there is one party that has moved on, one in denial, one with guilt, one is angry, one who is depressed, one who wants to move on and one who wants to hold back. That is reality. Meeting and having to discuss the issues is also reality. Being given the opportunity to bring or being forced to face reality is reality and let's bring it on.

4. ***Similarly, parties who are of different strengths, one may be forced to settle because of this.***

Be they a large corporation or small "David", English articulate or Mono-syllable, the headman or the worker, rich or poor, the skills of an ADR Practitioner is to try to bring a level playing field into the room and allow the parties to have a chance of articulating and understanding the reality of it all. Yes, parties do settle, even if they have the case to go to Court and sometimes the parties may feel that they have been rail-roaded into a settlement.

Our system of Justice is based on precedent and natural justice. ADR works differently. Precedent is only a part and often the decision to settle or not is after argument in closed rooms with evidence not being tested.

That is all true, but against that is the fact that the precedent cases are the unusual ones anyway and these cases will probably find their way through the system to a full Hearing. But even in these cases, ADR can assist in setting out what actually needs to be decided.

5. ***According to many cynics, ADR is only a fishing expedition or a chance for a bullying exercise and*****,**

Yes, some Practitioners do ADR for these reasons.

In my experience, this is not usually the case. Although sometime early in the piece, you may feel that way. As the Mediation continues, people will open up. Again in my experience, the greater problem is that parties come to Mediation unprepared because they are o told it is only a Mediation.

The Courts keep explaining that Legal Practitioners have a duty to the Court but many see their duty only as a duty to the client.

Again, in my experience, having the parties, even with an overbearing Lawyer, it will initiate discussions.

It is also again a reality check of what the parties can expect in a Court.

My experience is that most Practitioners will co-operate and will assist the Mediator in attempting to resolve the issues.

ADR is not cheap and is not simple, but it recognizes that disputes involve people with a past, living in the present and having to move on to the future.

So, how do we get to make early ADR the norm?

Both the Victorian State Government and at the Federal Level, the Governments are committed to ADR and are committed to change mentality and culture.

In Victoria, the passing of the *CIVIL PROCEDURE BILL*. has a stated aim of cultural change in Litigation Practice.

The aim is to ensure that before proceedings are issued, the parties and their Practitioner will need to certify that ADR, in some form, or other has been tried. Whether this will be just lip-service is for the future.

What is meant by ADR is also very wide and it will be up to the Practitioner.

In all of this, the intention must be not necessarily be settlement, but that before the parties request the Court for an Adjudication, they have in fact attempted to resolve the issues and tested the real issues between the parties.

This will involve the parties in a shift of focus and a cultural shift by advisors. It will require partnership with the Court to enforce the attitude possibly with Costs Orders or fast-track Proceedings.

And just because an early Mediation failed, it should not preclude the parties from pursuing ADR throughout the process and the Court open to ordering it when it believes appropriate.

Currently ADR practice has evolved very much because the Courts especially the higher Courts, made Mediation part of the process in setting time tables for the matter to go to trial. This has changed the focus as the parties at least know that one step in the process will be that they will have to meet and that meeting will be before the doorstep of the Court.

My own feeling is that to be able to issue, the parties must show the Court that jointly they confirm that Mediation has been attempted or, if not attempted, the party issuing may set out why not,

In the Retail Tenancy Area at VCAT, in order to proceed, The Small Business Commissioner must give a Certificate as to the fact that ADR has

been attempted but the parties may commence injunction proceedings without one, but even there, after the initial Hearing ADR is the norm, either as the next step or after the parties have issued their Defence.

The advantage of early ADR far outweighs the disadvantages and should be pursued.

The appropriateness of ADR in the end is for the parties who must be readily available at any stage of the process.

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