

ADR process design: Consideration for ADR practitioners and party advisors

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Dispute resolution practitioners and party advisors each play an important role in dispute resolution (DR) processes. To be effective, it is essential that practitioners and party advisors are perceptive, adaptable and flexible, to develop processes specifically designed for the parties and circumstances of a particular dispute. Deciding which process or processes are most appropriate for a particular dispute can be one of the most challenging aspects of working in DR. The key question to consider in making this decision is: what will best satisfy the needs and interests of the parties?

Understanding and evaluating particular features of conflict and DR methods can help practitioners match particular disputes to the most suitable process for effective resolution. Once a process is selected, there are many design elements which can be varied to further ensure the process is suited to party needs and the circumstances of a conflict.

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CONFLICT ANALYSIS: IDENTIFYING PARTY GOALS AND DISPUTE FEATURES

There are various approaches to conflict analysis, yet all require unearthing as much information as possible about the parties' goals, the features of the dispute and any impediments to settlement.² Practitioners and party advisors must consider these features to identify the most suitable process for the dispute, and provide the best chance for parties to reach an agreeable outcome.

Party goals may include: speed; maintaining privacy; public vindication; receiving an impartial opinion; minimising costs; maintaining or improving relationships; setting a precedent; creating new solutions; having control over the process or outcome; shifting responsibility for a decision; court compulsion; transformation of the parties; being satisfied with the process; or improving understandings of the dispute. These goals may change over time, as conditions and feelings change.³

Features of the dispute may include: party dynamics; power imbalances; whether a party requires a support person; party willingness to participate; eagerness to settle; ability of parties to problem solve; whether the specific practitioner expertise is required; involvement of representatives or other parties; geographical locations; the number and complexity of issues; whether there is a combination of legal and non-legal issues; and whether there is a novel legal question to be answered.⁴

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² Tillett G and French B, *Resolving Conflict* (4th ed, Oxford University Press, 2010), 8-14; Sander F and Goldberg S, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' (1994) 10 *Negotiation Journal* 49-51; Sander F and Rozdeiczer L, 'Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach' (2006) 11 *Harvard Negotiation Law Review* 1-2.

³ Sander and Goldberg, n 2, 36, 52.

⁴ See, for example, Sander and Rozdeiczer, n 2, 20-21.

Impediments to settlement may include: poor communication; a party's need to express emotions; different views of facts or law; constituent pressure; links to other disputes; any important principles involved; different advisor-client interests; jackpot syndrome (holding out on settlement in hope of 'winning big'); overconfidence in a beneficial court decision; loss aversion; anticipated regret; or the wish to use certain strategies and tactics.⁵ Practitioners and party advisors may ease impediments created by a party's attitude or belief about a dispute by 'reality testing' party positions.

PROCESS DESIGN VARIABLES

There is no single approach to designing a DR process, and there a number of elements that can be varied to ensure the process is suited to a particular dispute. Parties can be involved in the design, as this can strengthen their commitment to the process. The role of the DR practitioner is to ensure party involvement is appropriate. The role of party advisors is to ensure their clients understand the process, and assess whether it is appropriate for their client's needs and interests. Findings and developments over the course of implementation may see the process evolve. Some of the important process design variables, explored further in the full article, include:

Initial steps – The intake process is designed to gather information; prepare parties; assess attitudes, negotiation styles and power dynamics; and confirm authority to participate and settle. How intake is performed may vary depending on the dispute and parties; it may be done, for example, through a phone call with each party, individual face-to-face meetings, or a pre-mediation workshop.⁶

Timing – It is important to consider timing as parties and advisors must have a 'willingness and commitment to engage constructively in the conflict'.⁷ Where a party is in shock or denial, or has uncontrollable anger, the timing will unlikely be appropriate for DR process.⁸ Advisors must also be fully engaged and prepared, or even a well-constructed process may achieve little.

The DR practitioner – Selecting a practitioner who understands the culture and communication styles of parties is essential for an effective process.⁹ Other important factors to consider include the practitioner's experience, approach and skills in DR; whether the parties will perceive them to be impartial; and their gender and age.¹⁰

Participants – The parties to a dispute are usually easily identifiable. However, in large scale disputes with multiple parties, it may not be clear who should be involved. A practitioner should not usually decide who participates, though they may help parties decide who should be present and when. Practitioners and advisors may also need to manage requests to have friends, witnesses or other secondary parties present at meetings.¹¹

⁵ Sander and Goldberg, n 2, 55; Barendrecht M and de Vries B, 'Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?' (2005) 7 *Cardozo Journal of Conflict Resolution* 83, 95, 102-103.

⁶ Boule L and Alexander N, *Mediation – A How to Guide* (Lexis Nexis, 2014), 27-28. 105-106.

⁷ Coleman P et al. 'Reconstructing ripeness II: Models and methods for fostering constructive stakeholder engagement across protracted divides' (2008) 26:1 *Conflict Resolution Quarterly* 43.

⁸ Coleman P et al. 'Reconstructing ripeness I: A study of constructive engagement in protracted social conflicts' (2008) 26:1 *Conflict Resolution Quarterly* 3, 19-20.

⁹ Kirschner S and Moore D, "What's the Problem: Choosing an Optimal ADR Process for Resolution of Conflict", in *The Future of Dispute Resolution*, Michael Legg (ed.) (Lexis Nexis, 2013), 97; Behrendt and Kelly, n 51.

¹⁰ Claremont R and Davies L, *Collaborative Conflict Management* (Lansdowne Publishing, 2005), 62-63; Kirschner and Moore, n 9, 101-104; Moore C, *The Mediation Process – Practical Strategies for Resolving Conflict*, (3rd ed, Jossey-Bass, 2003), 57-58.

¹¹ Moore, n 10, 147-149.

Mode of communication – Depending on the location, resources and relationship between parties, practitioners should consider whether processes should be conducted face-to-face, by shuttle, phone, or through a combination. A wide range of online formats are also now available for DR processes, including email, instant messaging and video conferencing.

Ground rules – Guidelines may need to be established which ‘detail how parties will act toward each other and how the parties will handle particular problems that arise in the course of negotiations’. If required, behavioural guidelines should be set with input from the parties and may include rules around: speaking order, interruptions and when to initiate private meetings.¹²

CONCLUSION

To be an effective DR practitioner, it is essential to approach each party and set of circumstances with a view to developing a process specifically designed for them. DR practitioners must be adaptable, sensitive to frequent changes and able to deal with the unexpected.¹³ Continual monitoring throughout the resolution process, building in feedback, and reviewing and revising expectations of parties are essential in ensuring the process remains appropriate.¹⁴ This applies equally to the party advisors, who must take instructions from their client while maintaining an understanding of the processes which may be available and appropriate for their clients’ needs.

¹² *Ibid*, 161-162.

¹³ Tillet and French, n 2, 17.

¹⁴ Boule and Alexander, n 6, 107.