

HAVE LAWYERS HIJACKED THE PROMISE OF MEDIATION?

Max Kimber SC
18 May 2017 at Australian Disputes Centre

On 18 May 2017, the Australian Disputes Centre ('ADC') had the pleasure of hearing a seminar run by Max Kimber SC, Barrister at State Chambers. With more than 30 years dispute resolution experience in work-related matters, the Alternate Dispute Resolution ('ADR') specialist discussed the crucial role of lawyers in the education and facilitation of mediation. In criticising the adversarial approach adopted too often by lawyers in mediation processes, he notes that the promise of mediation given to clients falls regrettably short.

The essence of his seminar is encapsulated in a detailed written piece published online by Mr Kimber, *'Have Lawyers Hijacked The Promise of Mediation?'*. The article challenges the current culture of ADR and provokes a thoughtful discussion concerning the interplay between mediators, lawyers and clients. What promises of mediation have lawyers give to their clients? How have lawyers 'hijack' the mediation process? Have a further read [here](#).

The article provides extensive insight into the contemporary approaches lawyers take when representing their clients in ADR processes, particularly mediation. With reference to numerous like-minded scholars, Mr Kimber not only identifies the central tenets of mediation that uphold it as an effective tool of communication and efficient resolution of disputes, but goes further to critique the current attitudes and behaviours of legal professionals that impede such practice.

His in-depth analysis of the current trends and practices, so common amongst legal practitioners in mediation, captured the attention of online readers and seemed to resonate largely with those well acquainted with the ADR process. With a large supportive audience from Canada and the United States denoting Kimber's article to be a 'well written' and 'thought-provoking' piece, it is clear that the issues that the author describes to impede effective mediation are not unique to the Australian legal context. As such, the author's list of unhelpful conduct that lawyers engage in during the mediation process seems to illustrate the current common practices in mediations worldwide.

From a legal perspective, practitioners specialising in diverse areas of law such as banking and finance, government, corporate and commercial, and family, equally validated Kimber's description of lawyers' poor engagement with their clients in mediation and voiced their opinions that lawyers should consider professional development in this area. More significantly, however, Kimber's truthful writing received the praise of a large number of mediators, dispute resolution specialists, conflict resolution consultants and mediation coaches. Each holding an average of 8-10 years of professional experience working in different forms of ADR, the article not only engages more of an audience from this background, but provokes an interactive discussion amongst these ADR experts.

As trained mediators, many of the commenters reinforced the human element that resides within the transformational 'promise of mediation' - a crucial notion that Mr Kimber describes to have been overlooked by lawyers in their client representation during recent ADR practices. Further in accordance with Mr Kimber, a number of ADR specialists distinguished the process of mediation from civil litigation (and even alluded to the role of mediators to be akin to the Courts of Equity), in order to highlight the importance of empathic listening skills and the recognition of different points of views in facilitating the effective resolution of conflict.

The article evidently enabled mediators from around the globe to share their own experiences about working with adversarial lawyers who hinder the quick and efficient resolution of disputes by, for example, utilising mediation as an avenue for discovery or 'position shopping' without any intention of concluding a settlement or mediation.

Though the article provided an effective platform for discussion amongst ADR specialists, the overall engagement and response from the legal community, by comparison, was quite low. Considering that the article sought to re-visit the role of lawyers in the process of mediation and in doing so

exposed the contribution of lawyers to mediation dysfunction, a greater interaction from legal practitioners could be said to have been expected. The lack of response arguably makes it difficult to grasp the positive and negative opinions of the article's intended audience. It leaves open the question as to whether legal practitioners are currently aware of their misleading attitudes in ADR procedures that Kimber so clearly identified in his article. Moreover, it cannot be determined whether lawyers, in coming to this realisation and objectively evaluating its ramifications towards the effective resolution of disputes, will in turn truly endeavour to change their mentality and approach in the fair representation of their clients.

Finally, it is worthwhile to mention a particularly interesting perspective offered by a client who was personally involved in a family law mediation process. In response to the article, she shared her experience in hiring a lawyer who had portrayed themselves as a mediator prior to the mediation, but in fact had acted in a completely opposing adversarial manner throughout the entire process. Another commenter writes, in the lawyer's defence, that practitioners' often approach mediation in this manner with efficiency in mind. Despite the possible inherent nature of legal practitioners, however, it is clear from the client's experience that lawyers - as Mr Kimber puts it - 'lack the skills to engage in collaborative problem solving.'

A brief analysis of the diverse responses from Max Kimber's article illustrates the very need for professional development and further legal education in the area of ADR processes. As the author denotes, it is only by first identifying conduct that hinders effective mediation that legal representatives and their clients respectively can then come to a valuable win-win outcome in the mediation process.

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