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Twisting arms: court referred and court linked mediation under judicial pressure

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Executive summary

This report presents evaluations of two mediation programmes in Central London County Court within the context of the changing Alternative Dispute Resolution (ADR) policy environment. ADR is an umbrella term that is generally applied to a range of techniques for resolving disputes other than by means of traditional court adjudication. The range of dispute-resolution procedures covered by the term ADR includes mediation, conciliation, early neutral evaluation, arbitration, med-arb, and ombudsmen. Mediation – one of the principal ADR methods – is a process in which a neutral person assists parties to reach a consensual solution to their dispute. The mediation programmes evaluated in the study comprise:

- an experiment in quasi-compulsory mediation (ARM) which ran in the court between April 2004 and March 2005; and
- a voluntary mediation scheme (VOL) which has been operating in the court since 1996 and was last evaluated in 1998.

The results provide lessons about the impact of automatic referral and judicial pressure on the uptake of mediation, about user experiences, and about the potential of mediation to offer savings to the justice system in administrative and judicial time.

ARM pilot

The Automatic Referral to Mediation (ARM) pilot involved early random allocation by the court of 100 defended cases per month to mediation, with an opportunity to opt out. Where objections were raised, a District Judge reviewed cases and tried to persuade the parties to agree to mediation. The ARM pilot was inspired by a successful Canadian mandatory mediation programme for civil disputes. But it coincided with a Court of Appeal ruling in May 2004, that the courts have no power to order parties to mediate, and that to do so might be an infringement of the right to a fair trial under Article 6 of the Human Rights Act 1998.

The evaluation of ARM involved: tracking the course and outcome of all cases referred to mediation; interviewing parties and representatives who had opted out of ARM and those who had attended mediations; analysis of the impact of ARM on the outcome and

length of cases and of factors predicting settlement at mediation; and estimating the cost or savings in administrative and judicial time of ARM. Data were collected as follows:

Characteristics and progress of 1,232 ARM cases from April 2004 to January 2006

- Administrative and judicial time spent on ARM based on observation and interviews, and case data on 317 ARM cases referred to mediation during 2004-2005 (160 mediated cases and a similar number (157) of cases referred in June and July 2004 which did not mediate but followed the normal litigation route).
- Objections to mediation in 249 cases (381 objecting parties).
- Information from mediator report forms about 104 ARM cases.
- Telephone interviews (214 relating to 178 cases) with objecting and mediating parties and lawyers.
- Orders made by the District Judge in ARM cases (1,794 orders relating to 954 cases).
- Multivariate analyses compared outcomes in the following disputes: 1,232 ARM cases; 1,059 cases in the VOL mediation scheme between 1999 and 2004; a control sample of 196 pre-ARM non-mediated cases; and a further control sample of 214 non-mediated cases from 2002.

Outcome of the ARM pilot

During the ARM pilot, 1,232 defended civil cases were randomly referred to mediation, of which 82% were personal injury cases. By the end of the evaluation (10 months after termination of the pilot), only 22% of ARM cases had a mediation appointment booked and 172 cases – or 14% of those originally referred to mediation – had been mediated. There was a high rate of objection to automatic referral throughout the pilot. In 81% of cases where the court received a reply, one or both parties had objected to the referral, although after the first few months there was a slight decline in the number of cases in which both parties objected. Case management conferences dealing with objections did not generally result in mediation bookings and tended to delay the progress of cases.

Defendants were more likely than claimants to object to referral in both personal injury (PI) and non-PI cases. A stark and persistent finding, consistent with the 1998 evaluation of the Central London voluntary mediation scheme, was the overwhelming tendency of personal injury cases to object to mediation. The strategy of PI cases was

to object to mediation or to settle before replying, whereas in non-PI cases objections to ARM were raised less often. In 45% of non-PI cases, no objection to the referral to mediation was raised, indicating the potential for mediation in non-PI civil disputes. The settlement rate of mediated ARM cases followed a broadly downward trend over the course of the pilot, from a high of 69% among cases referred in May 2004, to a low of about 38% for cases referred in March 2005. The settlement rate over the course of the year was 55% where neither party objected to mediation, but only 48% where the parties were persuaded to attend having both originally objected to the referral. However, the majority of cases in the ARM scheme settled out of court without ever going to mediation. Statistical analysis of mediation outcomes revealed no simple factor that predicted the likelihood of settlement. The explanation is more likely to be found in the attitude or motivation of parties, the skill of the mediator, or some mix of these factors, than in case type, complexity, value, or legal representation.

Analysis of ARM cases showed that mediation in non-PI cases significantly reduced the likelihood of trial as compared with non-mediated cases. The analysis also showed that while judicial time spent on mediated ARM cases was lower than on non-mediated cases, administrative time was higher.

Opting out

ARM was not interpreted by most solicitors as compulsory and many regarded opting out as a mere bureaucratic hurdle. Considered justifications for opting out included the timing of the referral, the anticipated cost of mediation in low-value claims, the intransigence of the opponent, the subject matter of the dispute, and a belief that mediation was unnecessary because the case would settle.

Experiences of ARM

Those involved in unsettled ARM mediations were more negative in their assessments than those whose cases settled. Explanations for failure to settle focused on the intransigence of opponents and unwillingness to compromise; poor mediator skills; and time pressures. There was a general view that unsettled mediation increased legal costs by around £1,000 to £2,000. Where cases settled at mediation explanations for the outcome focused on the skill of the mediator, the opportunity to exchange views and to reassess one's own position and the willingness of opponents to negotiate and

compromise. Successful mediations were generally thought to have saved legal costs, especially where a trial had been avoided.

Mediators thought that key factors contributing to ARM settlement were the willingness of the parties to negotiate and compromise, the contribution of legal representatives, their own skill as mediators, and administrative support from the court. The significance of the parties' willingness to negotiate and compromise as an explanation both for success and for failure in mediation sits uncomfortably with the evident support shown by some mediation organisations for experimenting with compulsory mediation.

Central London voluntary mediation scheme

Demand for the voluntary (VOL) scheme at Central London increased significantly following the case of *Dunnett v Railtrack* in 2002, which confirmed the power of the court to impose costs penalties on a successful party deemed to have acted unreasonably in refusing to mediate. Since the 1998 review of the VOL scheme, the range of non-personal injury cases entering the scheme has become more varied. On the other hand, personal injury cases continue to shun the Central London VOL scheme, accounting for only 40 of over 1,000 cases mediated between 1999 and 2004. Despite the significant increase in the uptake of the VOL mediation scheme since 2002, the settlement rate at mediation has declined from the high of 62% in 1998 to below 40% in 2000 and 2003. Since 1998, the settlement rate has not exceeded 50%. This is important, given the potential cost impact of unsettled mediation.

Users' experiences of the VOL scheme

Court direction, judicial encouragement, or fear of costs penalties was given as the principal reason for mediating by one in four survey respondents involved in VOL mediations in 2003. Parties and lawyers were generally positive about their mediation experience, displaying confidence in mediators and their neutrality. Parties valued the informality of the process, the skill of the mediator, and the opportunity to be fully involved in the settlement of the dispute. The most common complaints made were failure to settle, rushed mediation, facilities at the court, and poor skills on the part of the mediator. In accounting for failure to settle at the end of mediation, survey respondents most commonly mentioned inappropriate court direction, unwillingness to compromise, the intransigence or personality of the opposing side, time constraints, and failings on

the part of the mediator. Parties and lawyers generally felt that successful mediation had saved costs and time, but about half of those involved in unsettled mediations thought that legal costs had been increased. The proportion of lawyers who reported having recommended mediation to their clients once or more than once was virtually identical to the findings of the 1998 review, suggesting no significant growth in the profession's enthusiasm for mediation.

Learning from mediation schemes

- Information from both the ARM and VOL schemes suggests that the motivation and willingness of parties to negotiate and compromise is critical to the success of mediation. Facilitation and encouragement together with selective and appropriate pressure are likely to be more effective and possibly more efficient than blanket coercion to mediate.
- Historically, the principal use of mediation in the VOL scheme at Central London (and now the ARM pilot) has concerned non-personal injury cases. Given the persistent rejection of mediation in personal injury cases, a question arises about the value of investing resources in attempting to reverse this entrenched approach. The lack of interest in mediation on the part of defendant insurance companies is intriguing, given the potential for reducing overall costs through mediation.
- While the legal profession has more knowledge and experience of mediation than was the case a decade ago, it clearly remains to be convinced that mediation is an obvious approach to dispute resolution.
- There is a policy challenge in reaching out to litigants so that consumer demand for mediation can develop and grow. Courts wanting to encourage mediation must find imaginative ways of communicating directly with disputing parties.
- The evaluation of the ARM and VOL schemes, together with recent evaluations from Birmingham and Exeter, establish the importance of efficient and dedicated administrative support to the success of court-based mediation schemes, and the need to create an environment conducive to settlement.
- Where there is no bottom-up demand for mediation, demand can be created by means of education, encouragement, facilitation, and pressure accompanied by sanctions, or incentives. The evidence of this report suggests that an effective mediation-promotion policy might combine education and encouragement

through communication of information to parties involved in litigation; facilitation through the provision of efficient administration and good quality mediation facilities; and well-targeted direction in individual and appropriate cases by trained judiciary, involving some assessment of contraindications for a positive outcome. A critical policy challenge is to identify and articulate the incentives for legal advisers to embrace mediation on behalf of their clients.