HMCS MEDIATION WEEK : ROUND TWO
Court Annexed Mediation in the UK

The aim of this paper is to examine the ways that court annexed mediation has developed to date in the U.K. and to speculate on how court based mediation might develop over the next few years as Her Majesties Court Service (HMCS), which is tasked with rationalising the court service, takes an ever more active interest / role in court based mediation provision.

Introduction

From the early beginnings of court annexed mediation in the Central London Court, successive courts have established their own distinct mediation services, drawing on broad principles from what had gone before but without emulating prior practice, tailoring services to perceived local needs, shaped by the knowledge and experiences of local enthusiasts in the vanguard of the movement. Whilst the movement was very slow to spread out from London at the outset, gradually as more and more courts developed their own in house services, momentum started to gather pace.

When HMCS decided to take an active role in promoting and developing court based mediation its initial response was to gather together as many of those actively engaged in court based mediation, both practitioners and court officials alike, together with likeminded persons interested in establishing new court schemes, for a brain storming session in Birmingham in June 2005, to mount a mediation promotion campaign in the courts, entitled ***"Mediation Awareness Week".***

At that time HMCS expressed no preference for the model that should be operated through the courts, though they let it be known that HMCS would be providing central support from London via an online Mediation Help Desk that they were in the process of developing. Whilst HMCS needed to determine the shape of its own provision through the Help Line, it made sense for HMCS to build upon pre-existing services in the regions, particularly since the HMCS budget was very limited. It was not part of HMCS's stated agenda to displace and replace what was in existence, but rather, the objective was proclaimed to be to promote ADR as a mutually beneficial new service for court users. It was far from clear at that time how the Help Line would dovetail into local provision and to what extent it would be compatible with regional services.

The diversity of services in operation at that time became apparent at the Birmingham session as representatives from around the country extolled the virtues of their home grown schemes. The inevitable question is whether this flexible approach is desirable, or whether or not it would be better to adopt a universal model throughout the UK. It is a question that needs to be addressed since whilst it is not yet clear whether or not HMCS will ultimately seek to impose a uniform model, given its rationalisation role in court service provision, it would be logical if they were to do so. Whether or not such a development would be welcomed by the various providers is, of course, quite another matter. If HMCS were to go down that route, the next question is what form should that model take?

First, is such a development likely? HMCS set a target in 2005 to establish a mediation officer in each of the 220 courts that fall within its remit. Mediation Awareness Week went a long way towards achieving that target with court based mediation promotion programs taking place in over 86 courts around the UK last October. It is now clear that these courts will be represented on a regional, not an individual, basis for Mediation Week 2006. This is just one small step towards rationalisation and centralisation. The Civil Mediation Council (CMC), closely supported by HMCS is holding a conference at the National Motorcycle Museum in Birmingham on the 3rd October 2006. A central theme is the direction of mediation, standardisation of training, accreditation and service provision. The Academic Committee of the CMC has also devoted much attention to these matters. Whilst some committee members have expressed the view that CMC should become the standards gatekeeper for mediation in the UK, this does not appear to be something that CMC aspires to. HMCS might well decide to step into the breach, at least in respect of court based mediation services.

Variable factors in mediation services.

There are no set mediation procedures, practice standards or pricing scale. There are no uniform qualifications or training for the accreditation of mediators. There is no uniform guide to the appointment of mediators, with diverse mechanisms for appointment, ranging from court lists of mediators, to approved nominating bodies. HMCS also provides a central service. There is no set time scale for mediation. Sometimes court facilities will be provided for the mediation, at other times not.

Mediation procedures

Is there a right or a wrong way to mediate or is it a matter of "***different strokes for different folks***"? If the latter, how will clients know what they are getting themselves into?

Joint sessions or caucus **: S**omewhat like the traditional model of conciliation, some mediators conduct all the proceedings in a single joint session. There are advantages to doing so. There are no issues about exchanges of information. Everything that occurs is open and perforce above board. The mediator is somewhat like the chairman of a meeting. Only one room is needed, so accommodation issues are minimised. The drawback is that it can be difficult to overcome an impasse / gridlock in a joint session. By contrast, other mediators will use a mixture of joint and private sessions. The advantage is that a mediator can brainstorm avenues and grounds for settlement in a free exchange with a party that could prejudice the proceedings if carried out in an open forum. The danger is first a risk of collusion. Since the mediator assumes the role of information corridor there is the potential for both misinformation and disinformation as the mediator priorities that which appears conducive to settlement

Evaluation or interests based mediation **:** The question here is the extent to which a mediator could and should take the initiative in developing/imposing avenues for the resolution of a dispute, of providing advice and even evaluating the case. For some mediators some or all of the above are absolutely no go areas, but for others they are standard procedure. Some users would welcome a mediator's evaluation, others would resent it as a threat to party autonomy.

Duration of mediation : The half hour, quick fire mediation is a feature of some low cost / low value mediations. Whilst this is seen as perfectly standard and appropriate to some, other mediators would not even start to know how to mediate under such tight time constraints, which would not leave them sufficient time to go through their standard opening, development and closure routines. Two to three hours is pretty standard in court mediation. Some court schemes have the facility to extend time, some do not, whilst others have a completely open attitude to time, according the process as much time as is needed or desired by the parties. Deadlines are very useful to concentrate the mind but can equally act as artificial constraints on the ability to give complex matters sufficient consideration.

Costs in mediation – fees and appointments : Mediator fees are highly variable. At the lowest possible end of the scale is the pro-bono / free mediation. There are a number of fixed price mediation services. A number of schemes operate a graduated fee structure linked to the value of the dispute, with little regard to the complexity of the dispute, legal or factual or the personalities involved. At the top of the range, the sky is the limit.

The appointment process is free in some schemes but involves appointment fees to the court or to a nominating body in others.

Training, accreditation & quality assurance : Training ranges in the private sector from a couple of days of presentations, to extended hands on role play training, with or without written examinations and skills testing. Completion of the course is sufficient for accreditation by some nomination bodies, whilst others mandate and provide apprenticeship, sometimes followed by a panel interview. Clients on the other hand will sometimes self select a mediator on the basis of reputation, which might not include any mediation training or experience whatsoever. Quality assurance is closely linked to the next item.

Appointment processes and administration : Some courts operate an appointment process. The court may maintain a list of mediators (and is thus able to set down criteria to be on the list and perhaps even to monitor performance and remove mediators from the list) or alternatively avails itself of the services of one or more nominating bodies, relying on the nominating bodies to establish their own listing criteria, and quality assurance mechanisms. The court maintains control over the nominating body and can stipulate some minimum requirements such as professional insurance cover. Some courts leave it to the parties to find their own mediator.

Mediation venue : Whilst much court annexed mediation takes place on court premises, not all courts have the spare rooming capacity to make such provision. A major drawback to using court facilities is that often there is limited space, unsuited to mediation and the buildings often close early.

Conclusion

How much, if any of the above it would be possible, financially or professionally, for anyone to regulate is hard to say. Any changes to mediation practice are likely to be stoutly resisted by those holding grandfather rights. Nonetheless, it seems that change is in the air! C.H.Spurin