

I would like to make the following submission and would be happy to appear at any time as required.

Back ground.

In 1986 I was the inaugural appointee to the Australian Commercial Disputes Centre in Sydney. The appointment was as Executive Officer but in reality the position required the promotion of mediation to the Australian commercial and legal sector.

This had limited success.

After three years I and two colleagues established the Bond Dispute Resolution Centre which has over the past two decades emerged as the premier dispute resolution education and accreditation body in Australia.

I currently am employed as a Assoc Professor of Law At the University of Queensland Law School where I have responsibility for the teaching of post graduate civil negotiation and mediation programmes. I undertake extensive programmes throughout Australia and off shore.

Identification of Obstacles to Improvement.

There seems to me to be a number of resilient fictions that need to be addressed if any improvement in providing access to justice is to be successful .

Fiction Number One

That lawyers are the providers of resolution services to potential litigants.

This is untrue.

Most disputants avoid the legal process with most parties avoiding or abandoning their grievances. Lawyers deal with a aberrant minority of potential parties. If all parties with a potential legal claim elected to pursue their rights the civil system would collapse.

Fiction Number Two

That lawyers are intrinsically competent negotiators.

This is untrue

.Most lawyers have average or below average competency in this area. A minority are above average.

There is no empirical evidence that demonstrates the delusion of competence although most lawyers self critique their negotiation skills as average or above average-this is delusional.

Law Schools do not require any education in the negotiation process despite this being the process that is used daily by practitioners .

Law Schools treat these procedures as electives and also fail to provide relevant education by competent negotiation and mediation practitioners.

Fiction Number Three

The current mediation model suits the litigants

This is untrue.

The current process of mediation has morphed into a evaluative process dominated by high charging ex judges. This is the system preferred by lawyers but again emphasises legal outcomes accompanied by high financial costs by lawyers looking for a judicially sanctioned haggle. The litigants are the losers.

What can be Done

Why are the Law schools requiring certain subjects as being compulsory(Criminal, family ,Civil Procedure )when the overwhelming majority of lawyers will never practice in these areas yet ignore the negotiation process that all lawyers and non lawyers use on a daily basis?

Why are moots compulsory but negotiation and mediation are not?

Why should any individual be permitted to advise clients on civil litigation without and demonstrated competency in negotiation?

My suggestion is that as a condition of practice either generally or in specific practice areas that certification as a civil and commercial negotiator be a pre requirement.

Every practitioner that currently seek recognition in a specific field is required to prove their competence so why is this not mandatory for individuals holding themselves out as competent in this area?.

There also needs to be a review of how practitioners are rewarded for effort.

Currently the time based charging process rewards the tardy, incompetent and dilatory. A reward system for early settlement that requires practitioners to realistically advise clients on earlier settlement options that accommodate interests should be considered.

Fees could be capped and refunds awarded to clients that suffer adverse financial costs due to negligent legal advice.

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