



Supreme Court
of New South Wales

DISCUSSION PAPER

Should Judges be Mediators?

Introduction

Abraham Lincoln is quoted as having once said:¹

“Discourage litigation. Persuade your neighbours to compromise wherever you can. Point out to them how the nominal winner is often the real loser in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”

Better advice could not be given today and it is perhaps just as well as many litigants putative or otherwise obviously take that advice otherwise the justice system simply could not cope.² But settlements consummated between parties by their lawyers' actions alone are simply not enough to prevent the system from being overwhelmed.

Western style litigation has a number of unique features about it which perhaps perpetuate confrontation.

¹ F T Hill, *Lincoln the Lawyer* (1905) The Century Co at 102-103, in T H Bingham, *The Business of Judging: Selected Essays and Speeches* (2000) Oxford University Press.

² Judith Resnik, “Courts: In and Out of Sight, Site and Cite” (2008) 58 *Villanova Law Review* 101.

In a paper delivered in Beijing in April 2011 the Honourable JJ Spigelman AC QC, former Chief Justice of New South Wales, commented in discussing this question that one had to identify two significant features of the judicial role in our legal system.³ The first is that our system of justice, as elsewhere in the common law world, is an adversarial system of litigation. The second distinctive aspect is that all steps and processes are directed towards a single continuous trial at which the whole evidence is to be given without interruption.

Mr Spigelman said:

“The traditional common law adversarial system means that the basic operating assumption of legal proceedings in Australia is that it is controlled and conducted by the litigants. The parties alone determine what evidence will be called. In our system it is not a function of the Judge to investigate the facts whether by way of interrogating witnesses or discovering documents or obtaining expert reports. Each party determines what evidence it will call. The opposing party determines whether or not any of that evidence will be objected to or tested by way of cross examination in court. The adversarial system puts the parties rather than the court in charge of the conduct of legal proceedings. There have been significant modifications of this adversarial system over recent decades. The court has assumed greater control of the progress and conduct of litigation that it once had. In particular widespread adoption of case management principles, at first in the context of commercial litigation but now more widely adopted, represents a significant modification of the adversarial system. Nevertheless, the basic nature of the system remains adversarial”.

There is little doubt that modern courts in most western countries face the pressures of burgeoning court lists, interminable delays and long and more complex litigation. In Australia, particularly in recent years, both in the State and Federal sphere, class actions have become very common. Their prevalence has been aided and abetted by the gentrification of litigation funders.⁴

³ J J Spigelman, “*Judicial Mediation in Australia*”, National Judicial Conference, Beijing, April 2011.

⁴ *Campbell’s Cash & Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

It has been said of the US civil justice system that it has undergone a virtual transformation so far as its processes go. In particular, the civil justice system has been largely supplanted by a system of private profit-making actors and agencies whether as arbitrators or mediators.

As Professor Peter Murray, Visiting Professor of Law, Harvard Law School, said in 2008:⁵

“Traditionally, civil justice has been considered a function of democratic government. In civil litigation private parties invoke the power of the state, dispensed by public decision makers, to compel the participation of opposing parties to actually decide the dispute according to law, and then to enforce the resulting decision by public force. Part and parcel of civil litigation is the enforcement and implementation of public norms and processes.

Although civil justice is found in many forms in the modern world, all systems have four key characteristics:

- 1) The processes of civil justice are transparent, in that the parties and the public are given access to the proceedings by which public norms are applied to issues raised by private powers;*
- 2) The public decision makers are chosen, paid, and regulated so as to insulate them from influence from parties or other private elements;*
- 3) The decision makers are expected to base their decisions on legal norms that are publicly known before the decision is made; and*
- 4) The decisions are subject to some form of oversight and control by appeals to superior courts, and this oversight can be invoked by the parties. It is safe to say all of these features are comprehended by the concept of “due process of law” as it has developed in the United States over the last 200 years.”*

It is true that civil justice has perhaps never been regarded as an option of “first resort” in terms of dispute resolution but parties have often availed themselves of the coercive power of the state in aid of the process.

⁵ P L Murray, “The Privatization of Civil Justice” (2008) 91 *Judicature* 272.

What we have witnessed in the last little while is the rapid and extraordinary growth of private dispute resolution modalities. This has led to the development of an entrepreneurial industry of private dispute resolution service providers.

Again, Professor Murray said:⁶

“In many areas of the law this development is leading to the practical disappearance of public justice decisions. Actual application of public norms to private disputes is becoming a rarity. Of equal concern is that these new providers of decision-reaching services are private economic actors, not public agencies. It is already apparent that their activities are subject to economic influences inconsistent with the standards of impartiality and independence associated with public justice and the rule of law. The privatization of public justice brings the risk that public justice as we know it is being eroded.”

It may be said in passing that the US system has been especially affected because of the significant number of civil cases heard before juries, which has the capacity to create greater delays in hearings.

In turn, as resort to traditional judicial decision-making decreases, there is either a slowing or potentially a retarding of the development and vitality of the law, especially the common law. This leads to a loss of potential judicial precedent. In turn, as again Professor Murray puts it, there is a “blurring and weakening of the authority of the law itself”.⁷

Unsurprisingly, with increased demands upon courts, methods of alternative dispute resolution have emerged. Notwithstanding the large number of settlements which

⁶ P L Murray, “The Privatization of Civil Justice” (2008) 91 *Judicature* 272.

⁷ *Id* at 274.

occur, whether they be mediated outcomes or not, there do not appear at least in the court in which I sit to be many, if any, free days for judges to attend to judgment writing for example. Because judges, certainly in commercial and related matters, tend these days to take a more aggressive role in case management many interlocutory hearings are now required (especially in the larger cases) in order to ensure a trial that runs smoothly. This may take the form of early determination of any pleading issues, where in open debate, if possible, issues are narrowed. If appropriate there will be initiated by the parties or perhaps the judge the determination of any separate question or questions, which may shorten and/or simplify the trial. The filing of witness statements in the form of affidavits or otherwise has become de rigeur, as has the filing of any expert evidence which must conform relatively strictly to certain protocols to ensure transparency and identification of any possible conflicts or other limitations on the expert. There is provision for the early determination of objections to evidence and this is of particular importance with any expert evidence.⁸

Discovery has become the subject of special scrutiny for example in Australia. Most jurisdictions no longer countenance general discovery as a rule but rather as an exception. In New South Wales in particular, the Equity Division will not, in the absence of exceptional circumstances, permit discovery at all prior to the filing of the parties' evidence.⁹

The Role of the Judge

⁸ *Evidence Act 1995 (NSW)* s 192; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588.

⁹ *Practice Note SC Eq 11*, introduced March 2012.

A judge swears a form of oath to the effect to “do right to all manner of people after the laws and usages of [this country] without fear of favour, affection or ill will”.

Lord Bingham has said of such an oath:¹⁰

“If one were to attempt a modern paraphrase it might perhaps be that a judge must free himself of prejudice and partiality and so conduct himself in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent and impartial judgment.”

Lord Devlin, speaking in 1981, commented:¹¹

“The social service which the judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality which he needs is impartiality and next after the appearance of impartiality. I put impartiality before the appearance of it simply because without the reality the appearance would not endure. In truth, within the context of service to the community the appearance is the more important of the two. The judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is no use at all.”

However, these days, judges strive to seek the most efficient means of determining cases before them. Case management is routinely employed by trial judges and for that matter in complex matters, appellate judges.

Lord Bingham described the judge’s role as follows:¹²

¹⁰ “*Judicial Ethics*” in T H Bingham, “The Business of Judging: Selected Essays and Speeches” (2000) Oxford University Press.

¹¹ P Devlin, “The Judge as Lawmaker” in *The Judge*, (1981) Oxford University Press.

¹² “*Judicial Ethics*” in T H Bingham, “The Business of Judging: Selected Essays and Speeches” (2000) Oxford University Press.

“The judge’s job at a civil trial, it is often said, is first of all to decide what happened (in legal jargon, ‘find the facts’), then to identify the relevant rules or principles of law, and then to apply the law to the facts as he has found them. Broadly speaking, this is true, although in some cases there is no dispute about the facts and the only argument is about the law; and sometimes (in practice, more often) there is little or no argument about the law and the real argument between the parties is about the facts; and sometimes, after the judge has decided what happened and what the applicable law provides, the real problem is what order the judge should make, how he should ‘exercise his discretion’. If a case goes to appeal the argument is normally about the correctness of the judge’s ruling on the law and much more rarely about his decision on the facts”.

The judicial role has been described by Chief Justice Gleeson (formerly Chief Justice of the High Court of Australia), in the following terms:¹³

“The function of courts at any level, is to resolve issues on the available evidence. The issues in a case are chosen by the parties within the limits of the relevant substantive and procedural law. Not only do the parties by their pleadings and their conduct of the case, define the matter or matters for decision; they also in large part control, by the evidence they choose to present, the factual information upon which the decision will be made. The adversarial process inhibits judicial creativity. Courts are not Law Reform Commissions. They do not select the questions they will decide; and in general they do not gather information extraneous to the evidence put before them. Courts do not have agendas. Generally speaking, judges must resolve the cases that come to them. They do not select the issues they decide; and they cannot avoid deciding issues that are necessary for decision.”

Justice Hayne (formerly Justice of the High Court of Australia), has expressed the matter this way:¹⁴

“First, an essential element of the organisation and government of this society is that it should be possible to submit legal disputes to independent courts for resolution according to law. The quelling of controversies by the application of the judicial power of the polity is a fundamental feature of the organisation and government of this society. Engaging this process is not to be seen as a failure. It is a defining element of the government of the society in which we live.”

¹³ Chief Justice Gleeson, “The Role of a Judge in a Representative Democracy” (2008) 9 *Judicial Review* 19 at 26.

¹⁴ Justice Hayne, “The Vanishing Trial” (2008) 9 *Judicial Review* 33 at 35.

An important and necessary adjunct to the role of the judge is the judge's behaviour or indeed perceived behaviour. In court, a judge may be obliged to recuse himself or herself from the hearing of the matter if there is a reasonable apprehension that he or she will not bring an impartial mind to bear upon the determination of the case. In Australia at least the test has been recently articulated as follows:¹⁵

"[139] It is fundamental to the administration of justice that the judge be neutral. It is for this reason that the appearance of departure from neutrality is a ground of disqualification. Because the rule is concerned with the appearance of bias, and not the actuality, it is the perception of the hypothetical observer that provides the yardstick. It is the public's perception of neutrality with which the rule is concerned. In Livesey it was recognised that the lay observer might reasonably apprehend that a judge who has found a state of affairs to exist, or who has come to a clear view about the credit of a witness, may not be inclined to depart from that view in a subsequent case. It is a recognition of human nature.

[140] Of course judges are equipped by training, experience and their oath or affirmation to decide factual contests solely on the material that is in evidence. Trial judges are frequently required to make rulings excluding irrelevant and prejudicial material from evidence. Routine rulings of this nature are unlikely to disqualify the judge from further hearing the proceeding. This is not a case of that kind. It does not raise considerations of case management and the active role of the judge in the identification of issues with which Johnson was concerned. At issue is not the incautious remark or expression of a tentative opinion but the impression reasonably conveyed to the fair-minded lay observer who knows that Judge Curtis has found that BATAS engaged in fraud and who has read his Honour's reasons for that finding. Some further reference should be made to those reasons."

The position in the United Kingdom and the United States is broadly similar:¹⁶

"Judges have to be careful what they say and what they do on all occasions never more so than when they are involved in a hearing. Ex parte communications while a case is pending with one party alone or with one party's representative alone or even with a third party, such as a witness is inappropriate. Any such conduct will give the impression that the judge is not

¹⁵ *British American Tobacco v Laurie* (2011) 242 CLR 283 at [139], [140].

¹⁶ Hammond, *Judicial Recusal: Principles Process and Problems*, (2009) Hart Publishing, at 37-40 (UK), and at 60-61 (US).

acting impartially and its capable of amounting to perceived or constructive bias. The relationship between bench and bar and other persons associated with a case is a delicate one that a judge must be extraordinarily sensitive about. It is commonplace in commercial court especially with large institutions such as banks, insurance companies and the like that practitioners both from the bar and law firms and for that matter in house regularly appear. There are many practitioners who appear before judges who are or who have been in a past life friends or colleagues from chambers or from a law firm. In general terms at least a judge should not have particularly close contact with anyone who regularly appears in his or her court. To draw the line however is often very difficult but it is essential when the judge knows the person very well as he or she happens to be appearing before the judge in the course of a case.”

Developments in Mediation

Over the last two decades or so mediation has become an established mechanism for resolving civil disputes in all Australian jurisdictions and elsewhere in the world.

There has emerged a significant number of mediators, many of whom are former judges, who offer their services on a commercial basis. There is a well established regime for training and accrediting mediators, although accreditation is not necessary for a person to practice as a mediator. Formal codes of conduct have been adopted. Mediation has been institutionalised and professionalised. It is fair to say that in Australia at least the use of an independent third party as a mediator is now well established. These persons charge on a commercial basis for their services. In most if not all jurisdictions in Australia there are mediations which are conducted at no charge to the parties by the court. These are normally conducted by registrars and in some jurisdictions as will become clearer shortly, what are called associate justices (or masters).

Mediation has become an essential part of the process of dispute resolution. Rules in New South Wales provide that a judge, when he or she considers the time appropriate, can direct the parties to mediate. The parties then have a choice of whether they use a private mediator on a commercial basis or a registrar or someone from the court.

There is an increasing trend across the world where governments have introduced regulatory schemes impacting on mediation. In some cases mandatory pre-trial mediation has been introduced.¹⁷ Legislation to this effect has been introduced in Australia.¹⁸ In many jurisdictions the process of mediation remains unregulated.

Both State and Federal legislatures in Australia have introduced legislation requiring parties to attempt mediation before commencing proceedings in certain contexts; for instance disputes concerning farm debts and retail tenancies.¹⁹

Until recently there was no statutory requirement for pre-action mediation in relation to all civil disputes. Some courts had tried to encourage parties to pursue mediation before litigation. In New South Wales, when filing an originating process, plaintiffs must indicate whether they have already attempted mediation and whether they are willing to mediate the dispute in the future.

In the Federal sphere however, with the passage of the *Civil Dispute Resolution Act* 2011 (Cth) which commenced operation on 1 August 2011, the position changed. In broad terms the subject of the legislation is to require persons to take “genuine

¹⁷ In New York, the June 2012 Report of the Chief Judge’s Task Force on Commercial Litigation in the 21st Century recommended that a pilot mandatory program be established.

¹⁸ *Civil Dispute Resolution Act* 2011 (Cth)

¹⁹ *Farm Debt Mediation Act* 2011 (Vic), *Retail Shop Leases Act* 1994 (Qld).

steps” to resolve disputes before proceedings are instituted. The Act applies to all Federal courts. A failure to take such steps does not invalidate proceedings but it can be taken into account on costs. The legislation does not expressly require pre-action mediation, but obviously mediation would be regarded as a genuine step. The legislation also puts an obligation on the lawyers to inform clients of their obligations to take such steps and inform the court of all the steps taken.

There are in New South Wales provisions similar to the Federal Act introduced in late 2010, which take effect from October 2011, but they have been suspended pending a consideration of what happens in the Federal sphere. The future of the legislation is uncertain, and in any event the Supreme Court is presently excluded from the operation of the legislation.

In New South Wales, the Supreme Court provides a service whereby registrars (who have undergone mediation instruction) provide a free mediation service to parties. The parties must be responsible for their own lawyers’ fees relating to the mediation.

Judges can refer parties to mediation before a registrar or a private mediator consensually or otherwise.

There is little doubt that a successful mediation can save the parties substantial legal costs to which they would otherwise be subjected if a full scale proceeding occurred.

There are of course different kinds of mediation or its equivalent processes. There is a range of mediation techniques which involve different degrees of intervention by the mediator. It is common to identify a spectrum from a “facilitative” model at one

end, to an “evaluative” model at the other. At both ends of the spectrum the mediator’s objective is to assist the parties to understand the strengths and weaknesses of their positions and to appreciate the full range of their interests which may be enjoyed. However, the “facilitative” mediator does this by asking questions and offering assistance whereas the “evaluative” mediator does this by making proposals, assessments and predictions. In practice however mediators may frequently engage in activity which could qualify in both definitions.

In Australia though, generally the concept of “mediation” is understood to be a process in which an independent and impartial person assists two or more people who are in dispute to reach a voluntary negotiated settlement of their dispute. It is also understood that a mediator may use various skills and techniques to assist the disputants to reach a resolution of their dispute but has no power to make a decision. The decision is that of the parties.

The Judge as a Mediator

In recent years however there has been a push in some states and territories to encourage and/or permit judges to act as mediators. This practice has not been adopted in the Supreme Court of New South Wales and is unlikely to be in the foreseeable future.

In Western Australia there is a specific *Practice Direction*, given in 2009, which permits a court to direct that a mediation take place and that it be conducted by a judge “if warranted by the particular aspects of the case”. In that state, if the court orders the parties to attend a mediation conference, generally speaking the mediator

must be a person who has been approved as a mediator by the Chief Justice as well as being accredited under the national scheme. The practice followed in Western Australia is that non-accredited mediators are not approved but it does not seem that a judge needs accreditation in that state.

In the Northern Territory there is power in the court to direct that parties mediate if the judge is of the opinion that proceedings are capable of settlement or ought to be settled. The mediator may be a judge, master, registrar or a person appointed from a list of persons who in the opinion of a judge or the master are suitably qualified and willing to act as mediators.

In South Australia the relevant court rules expressly provide that a judge or a master may act as a mediator.

In Victoria, *Practice Note 2* of 2012 titled “Judicial Mediation Guidelines” governs the situation. In Victoria the court has power to refer proceedings to “appropriate dispute resolution”. The appropriate dispute resolution is defined to include a “judicial resolution conference”. A judicial resolution conference is a process presided over by a judge of the court for the purposes of negotiating a settlement to a dispute, including judicial mediation.

The Honourable Justice P A Bergin, Chief Judge in Equity in the Supreme Court of New South Wales, describes the Victorian *Practice Note* in the following terms:²⁰

²⁰ Justice P A Bergin, “The Right Balance Between Trial and Mediation: Visions, Experiences and Proposals: A Look Beyond the EU”, paper given at Aula Magna, Court of Cassation Rome, 19 October 2012.

“The Victorian Practice Note is a rare example of a court in Australia attempting to regulate the actual process of mediation. Practice Notes provide guidance in relation to court procedures and practitioners and litigants are expected to act in accordance with that guidance. The Practice Note refers to the “usual practice” for the mediator to destroy all materials connected with the mediation, after the mediation has ended. It also provides that a mediator “will not” provide legal advice to parties. It prohibits a mediator from meeting separately with a party unless there is express approval of all parties to the mediation. If a separate session is conducted with a party, the mediator must not disclose any information disclosed in the session to any other party, unless expressly authorised to do so.”

Those in Favour of Judges Performing this Role

It is relatively clear from the above that most jurisdictions in Australia favour an involvement on the part of the judge theoretically and potentially in what might be described as the mediation process, although the Victorian position involves much more specific direction both to the judge and the parties.

Many of the people who have written on this topic, unsurprisingly, are judges. Again, unsurprisingly, the Chief Justice of Victoria, the Honourable Marilyn Warren AC and the Chief Justice of Western Australia, the Honourable Wayne Martin AC, might be said to be at the forefront of the devotees. I will return to their Honours’ views later.

The concept of judges acting as mediators is by no means an idea which originated in Australia. Although alternative dispute resolution measures are well underway in Australia and although many jurisdictions have passed practice notes or rules to facilitate judges acting as mediators, it has not yet become a reality at least that judges routinely act as mediators. In most Australian jurisdictions mediations are conducted either by court annexed mediations, where registrars and the like perform

them, or alternatively they are performed by private mediators, many of whom are former judges.

The concept appears to have gained significant momentum in Canada. Quebec's voluntary judicial mediation programme was first instituted in that province in 1997. It started of all places in the Court of Appeal but has since expanded to include almost all courts and administrative tribunals. The Quebec justice system "now integrates adjudicative and mediational justice at every level and in virtually every area of law including family matters, civil and commercial law, administrative matters and recently criminal law".²¹ Madame Justice Otis (former Justice of the Quebec Court of Appeal) who designed the first system of judicial mediation in appeal and her co-author Dr Reiter of Concordia University, articulate a number of reasons why it is appropriate for judges to conduct mediations. Although the context described is the state between a decision at first instance and appeal the reasons have general application:

1. That judges are well suited for the role of a mediator because of their perception by parties and because of the specific skills possessed by judges. In particular the perception that the judiciary is impartial and independent has the effect of conferring upon a judge a degree of moral authority. Further, the judicial office and the parties' opinion of it can lend credibility to the process and keep it moving when it might otherwise stop.
2. The judge should employ the facilitative mediation model rather than the evaluative model and hence refrain from expressing any opinion on the legal merits of the case.

²¹ L Otis and E H Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351.

3. That judges have long experience in intervening between disputing parties. The judge, it is assumed, is both committed and motivated to achieve a just resolution and to dispense justice.
4. As the judge is part already of a subsidised public court system, his or her services are provided to the litigant at no cost or very little cost.
5. An important factor is the judge's knowledge of the law. It is said that judges have an understanding of legal issues that permits them cogently to focus on the issues underlying the dispute and to bring these to the fore during discussion between the parties.
6. In recognition however of the different skill sets required, judges should undergo training in mediation. The authors point out in this regard that only those judges who have undergone intensive training should undertake judicial mediation.
7. A successful mediation results in an immediate settlement rather than a reserve judgment, which saves both the judge writing a judgment and the parties further time and costs in preparing and running a trial or appeal.
8. A mediation can address the parties' conflicts "globally", resolving the principal dispute at the same time as side issues, each of which might otherwise become the subject of litigation.
9. Successful mediation in fact frees up other judges to hear other matters. If however the mediation is unsuccessful another judge is scheduled to hear the case.
10. The authors' views stem from a number of criticisms of what they describe as the "classical system". They say:²²

²² L Otis and E H Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351 at page 357

“The classical adversarial system has several principal characteristics that work towards shaping the dispute and determining how it is to be resolved. The trial (or appellate) hearing works by the polarisation of the parties’ roles (plaintiff/defendant, appellant/respondent), by the opposition of legal representatives for each side and by the exacerbation of the antagonism at the source of the conflict. In short, the adversarial system takes a conflict and makes it into a dispute in a narrowly-focussed, legally-defined event with which the court can deal.

These characteristics of the adversarial system also combine to make contradictory debate procedurally intensive and, many would say, unwieldy, since discovery, preliminary exceptions, incidental proceedings, expert reports and other procedural steps weigh it down. On a substantive level the cornerstone of contradictory justice is the judicial determination of those respective rights and obligations of the parties that are engaged by the complaint giving rise to the action. The cause and resolution of the broader conflict behind the legal dispute are at best only incidentally the object of the judicial contract; the judge can safely ignore this wider conflict as long as he or she handles the dispute as defined by the parties.”

Further, the authors point to other shortcomings of the “classical system”, including long delays occasioned in getting a matter on for hearing, the physical and psychological trauma associated with long judicial conflicts, and the inherent limits of contradictory debate for finding the best solution that would in real terms put an end to the dispute.

The authors explain their position as follows:²³

“The act of judging proceeds from reflexive analysis and a maturation of juridical thought; this process which necessarily takes a great deal of time both runs on and generates positive law, debate and argument. Of course, for practical reasons, it is essential that the course of a judicial dispute, which will end in final judgment, be subject to procedural and, by necessary implication, temporal restraints. But while these efficiency measures may indeed restrict frivolous or dilatory actions, they can never be allowed to constrain the act of judging,

²³ L Otis and E H Reiter, “Mediation by Judges: A New Phenomenon in the Transformation of Justice” (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351 at 361.

which is introspective and cautious by nature. In short, the very qualities of discernment, reason, and wisdom that give traditional adjudication its authority also prevent it from changing so as to meet the demands of an increasing volume of litigation.”

The authors make the obvious point that the adversarial system can often be described as a rather blunt instrument as opposed to perhaps a mediated settlement. One of the savings in costs which the authors discuss is the elimination of the preparation of court documents, briefs, transcriptions and the like. Because of the informality of the process it can be arranged, according to the authors, very quickly and usually within thirty days of a request to hold such a process. In the appellate sphere at least the authors quote a figure of a 75% settlement rate as a result of judicial mediation.

The position in Quebec is implemented elsewhere in Canada, for example in Alberta, where all means of alternative dispute resolution are employed including judge-led mediation. The Honourable Robert A Graesser, Judge of the Alberta Court of Queens Bench, has expressed the view that in Alberta “time has arguably come to describe the civil process as the alternative dispute resolution process...

Settlements are the norm – at least 98% of disputes – while trials are the exception.”²⁴ However, the trend in Alberta, given the popularity of the judge led mediation process, appears to be that parties are waiting longer for a mediation date than a trial. Nonetheless, they are choosing mediation and there is increasing pressure for judges who make themselves available for mediation. Apparently not

²⁴ The Honourable Robert A Graesser, “Judicial Dispute Resolution” (October 2011) prepared for the Alberta Civil Trial Lawyers’ Association, at page 1.

all judges in Alberta mediate, but there are a select few who appear to specialise in the issue.²⁵

In 2010 the Chief Justice of Ontario, the Honourable Warren K Winkler, commented that judicial mediation was now to be considered as a most essential service of that province's civil justice system.²⁶ In Ontario there are no set rules, and judicial mediation remains informal and somewhat ad hoc.

The other provinces of Canada are involved in varying degrees of judicial dispute resolution.

Writing in 1986, Marc Galanter, Professor of Law at the University of Wisconsin, commented that cases that would once have been settled by negotiations between opposing counsel were being settled with a greater degree of frequency with the participation of the judge.

As mentioned a little earlier, two supporters of judicial mediation in Australia, namely the Honourable Marilyn Warren AC, former Chief Justice of Victoria, and the Honourable Wayne Martin AC, Chief Justice of Western Australia, have both written on the topic.

In a paper delivered at Supreme and Federal Court Judges' Conference in January 2010, former Chief Justice Warren presented arguments for and against judges

²⁵ Jacqueline Iny, "Judicial Mediation: Transformation or Transgression?", 22 December 2011, at page 12.

²⁶ Chief Justice K Winkler, "Some Reflections on Judicial Mediation: Reality or Fantasy?" (2010) *The Advocates' Journal*, at pages 3-5.

involving themselves in mediation. She concluded somewhat cautiously by saying:²⁷

“If judges are to mediate then great care needs to be taken with the management of the judicial presence. It would be prudent for judges to conduct mediations only with a court officer such as a registrar and a judge’s associate present. It would also be wise to record the proceedings in the mediation. That said, it would be essential in my view for judges only to meet with parties in a mediation whilst their lawyers are present.”

To date, in Victoria, there are a few if any examples of judge led mediations being conducted. In September 2012, Chief Justice Martin from Western Australia delivered a paper discussing changes in the justice system.²⁸

Like Chief Justice Warren, Chief Justice Martin highlighted arguments in favour of judicial mediators, saying that there would appear to be an increased likelihood of settlement because of the beneficial effect of the gravitas of the judge in dealing not only with the parties but also with their lawyers. Further, he said that judges as mediators have a greater capacity to reduce the likelihood of inequality in the bargaining position of the parties resulting in an oppressive or unfair settlement. Chief Justice Martin pointed out that the judge had a capacity to immediately make binding orders giving effect to a settlement at the conclusion of a mediation, reducing the risk that parties might change their minds before orders are made. He says quite explicitly that he favours judges acting as mediators. His response to pressure on limited judicial resources is that judges should only act in exceptional cases where the benefits to the parties and the court from the settlement are likely to be the greatest because of the length and complexity of the case.

²⁷ The Honourable Warren AC, “Should Judges be Mediators?”, paper delivered at the Supreme and Federal Judges’ Conference, Canberra, 27 January 2010, at page 18.

²⁸ Honourable Wayne Martin AC, “Managing Change in the Justice System”, paper delivered in Brisbane on 14 September 2012.

The hybrid form of alternative dispute resolution in which judges play a role, especially in Victoria, is often called a “settlement conference”. Tania Sourdin, Dean of Newcastle Law School in Australia, advocates such a hybrid approach.²⁹ A settlement conference, Professor Sourdin makes abundantly plain, is a separate and distinct process from mediation. The conference would be a meeting of parties and/or their representatives, chaired by a judge, for the purposes of discussing issues in dispute, developing options and considering alternatives either in an attempt to reach an agreement or a planned case management approach. Unlike mediation, the approach is essentially facilitative and advisory, where the judge would not meet separately with the parties or their representatives, although the judge may meet all the representatives in the absence of the parties.

Those in Opposition

Many serving judges are against the notion of judges acting as mediators, and many have said so.³⁰ The opponents voice a number of concerns:

1. Mediation which is reliant upon the moral authority, gravitas or the apparent imprimatur of a judge is an inappropriate application of judicial authority.
2. As a result of involvement in a mediation process, public confidence in the integrity and the impartiality of the court and the judge may be threatened.

²⁹ T Sourdin, “Five Reasons why Judges should Conduct Settlement Conferences” (2011) 37 *Monash University Law Review* 145.

³⁰ See, for eg, Justice P A Bergin, “The Right Balance Between Trial and Mediation: Visions, Experiences and Proposals: A Look Beyond the EU”, paper given at Aula Magna, Court of Cassation Rome, 19 October 2012.

3. A judge might express an opinion on the likely outcome possibly inconsistent with the principles of mediation and the role of a court.
4. Persons presently selected for judicial office will have varying experience of the mediation process. Some may have become accredited whilst private practitioners and others may have not. There is little doubt that the skill set of a mediator is very different to that of a judge and it is therefore necessary for a judge to undertake specialist training in order to fulfil the role of a mediator.
5. The more unsuccessful mediations undertaken by a judge, the greater the number of cases he or she will have to avoid hearing. This will in turn place greater pressure on existing judges who either mediate less or not at all.
6. Although timetabling and programming for the efficient use of court time is not insurmountable, it is likely, over time, as not all judges will be inclined to undertake mediation, to place a significant burden on a smaller number of judges.
7. Dissatisfaction with judicial conduct of a mediation reflects negatively upon the judiciary, in particular a court or division as a whole. If the agreement reached at the mediation is sought to be set aside then, depending upon the ground, the judge may well become a material witness in proceedings which would have to be determined in his or her division or court.

Discussion

The proponents of judge led mediation emphasise really two main advantages, namely the moral authority or gravitas of the judge and the cost of proceedings to the public by reason of not having to use private mediators, whether they be former judges or practitioners.

The difficulty with these propositions is (leaving other considerations aside) the lack of supporting empirical material.

I am not aware of any material supporting the proposition that a judge led mediation delivers better results. There is the anecdotal material from Justice Otis in Quebec, which, however, only relates to appeals.³¹

In any event there is no empirical data which seeks to take into account the effect on resources, and hence any costs, in having what may become a smaller pool of judges available to hear those cases that do not settle and which have to be heard anyway.

The results of two studies were published in 2009,³² the first of which was based on responses from attorneys to questions about reasons for success of mediators with and without prior judicial experience. The most important factor was the capacity of the mediator to obtain the confidence of the disputants, whether the mediator was a former judge or not. Although process skills were important, the capacity to provide useful case evaluations was significantly more important for former judges than for non-judges. Both studies highlighted the importance of the mediator (whether former judge or not) gaining the confidence of the parties.

³¹ L Otis and E H Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351 at 369.

³² S Goldberg, M Shaw, J Brett, "Research Reports: What Difference Does a Robe Make? Comparing Mediators with and without Prior Judicial Experience" (2009) 25 *Negotiation Journal* 277.

As a matter of logic, it is a little difficult to imagine why parties would prefer a serving judge as opposed to one who had recently retired and why it should make any difference. There is, as I have said, no study done on that issue.

The other feature of the Goldberg study is that the ability of the former judge to give a useful case evaluation was regarded, unsurprisingly, as of significance. Some of the proponents of judge led mediation emphasised the need for the judge not to use the evaluative approach. Many of the rules of court expressly forbid the judge from evaluating issues.³³

No such restriction could apply to a former judge or practitioner while conducting a mediation. One would have thought parties expect, unsurprisingly, to get some idea of how their case might be perceived. They will of course have had advice from their own lawyer. The quality of that advice may vary considerably. In my experience, it often takes more than a discussion of costs, and that is the economics of a fully contested hearing, to persuade a party to compromise. Part of any litigant's considerations of a compromise must directly or indirectly relate to how they think the litigation may turn out. To appreciate the economic risks there must first be some understanding and evaluation of the risks in pressing on. Notwithstanding advice from their own lawyers, some evaluation from the mediator as an independent third party is clearly what is likely in many cases to make the difference.

Attempting to impose on a judge by way of a restriction the mediation methodology he or she can employ creates a degree of artificiality and is clear recognition on the part of the proponents that it would be seen as entirely inappropriate for one judge to

³³ Supreme Court of Victoria, *Practice Note 2* of 2012, Judicial Mediation Guidelines, paragraph 17.

in effect prognosticate how one of his or her colleagues or for that matter the appeals court is likely to view the legal and/or factual merits of the case.

The first study undertaken by Goldberg and others,³⁴ exposed that one of the most frequently cited reasons for mediator success was the mediator was intelligent, well prepared and/or familiar with “the relevant contract or law”.³⁵

Personality, aptitude and training to one side, in the sanctionless environment of a mediation, flexibility in technique and methodology, constrained only by integrity and honesty, is essential for a mediator. The ability of a mediator to, at the very least, ask pointed questions of the parties’ lawyers about aspects of their client’s case could well, depending on context and content, be interpreted as resorting to an evaluative methodology and hence transgress the protocol governing a judge’s behaviour at a mediation. But to forbid a judge, if he or she is embroiled in a discussion in an open or private session, from even hinting at an outcome is frankly absurd, especially when that outcome may appear a very likely outcome.

To advance an argument that the gravitas or moral authority of the judge is an important consideration in predicting a successful mediation but prevent the judge from resorting to an evaluative approach if he or she considers that might be helpful, is to confront the very reason why a judge as a mediator is so inappropriate.

³⁴ S Goldberg, M Shaw, “The Secrets of Successful (and unsuccessful) Mediators Contractual: Studies Two and Three” (2007) 23(4) *Negotiation Journal* 393.

³⁵ *Id* at 400.

Even in an evaluative environment, most mediators generally are careful to avoid being seen to express firm views as to the outcome, but may do so, especially if the point seems clear.

Many judges, in all manner of cases, in open court and in case management hearings, in varying degrees, challenge practitioners about the substance or validity of pleaded arguments, often in a robust fashion. This approach itself often leads to a narrowing of issues and sometimes a settlement. As I have said, whilst it might be argued that merely questioning would qualify as an evaluative approach, reasonable minds may differ.

Apart from the use of the judge's status, the question of cost savings is put forward in support of judges conducting mediation. However the practical reality is that mediation costs are shared most often between the parties, however many there may be. The costs of the lawyers present at the mediation will be included anyway. Sometimes a court will order that one party or the other should pay the costs. This can occur obviously where one party is impecunious and the other party is a large institution such as a bank or insurer. The premises where the mediation is conducted is often supplied free to the parties or at a minimal cost. The fee of the private mediator varies, but it is part of the shared costs and is usually, at most, the daily or market rate of a practitioner of similar experience and/or seniority, but in my experience nowhere near the top of that range for such persons. The fee/cost would be deductible in any event.

If one is considering costs as a whole, one cannot ignore such costs as will be associated with a disruption to court timetabling both as a result of a judge not being

available to hear a case in the short-term because he or she is conducting a mediation or in the longer-term because of the need to excuse himself or herself from the ultimate hearing in those instances where the mediation is unsuccessful. Delay will, as it currently does, inevitably arise, because not all judges are undertaking mediations or some (as is the case with private mediators) are seen and perceived as having a better success rate or are simply more congenial to deal with. This has been the experience in Alberta for example.³⁶

If a judge conducts a mediation and the matter does not settle, that judge should have no further involvement with the matter. All materials relating to the mediation and all communications at the mediation are to be kept confidential and not communicated to the trial judge. Indeed the Victorian *Practice Note 2* requires the judge to destroy all materials whether the mediation is successful or not. These are mechanical issues that arise as a result of the process. The obligation on the part of the judge to observe the confidences imparted, especially if they have been communicated by a party (even with his or her lawyer) in private session (where the judge meets with only one side), is of such a nature that it creates a personal relationship between the judge and the litigant. The judge owes a duty of confidence not to disclose such matters unless authorised by the party. This is clearly multiplied out according to the number of mediations. What may be imparted may be highly prejudicial to that party or his or her opponent. The information may never be capable of being made the subject of admissible evidence in proceedings, and it is antithetical to every notion of open justice.

³⁶ Jacqueline Iny, "Judicial Mediation: Transformation or Transgression?", 22 December 2011, at page 12.

The transformation which has occurred in Canada and elsewhere and which has started but perhaps embryonic in Australia in judge led mediations, can be described as a “radical reorientation of how justice is rendered”.³⁷

Its justification, in my view, is somewhat dubious. The core propositions said to support this transformation, in my view, do not withstand scrutiny.

Without a clear public benefit capable of empirical support, judges run a risk of being seen as engaging in political and administrative pragmatism where what is no doubt intended to serve the community so threatens or weakens the institution as to be positively disadvantageous.

³⁷ Jacqueline Iny, “Judicial Mediation: Transformation or Transgression?”, 22 December 2011, at page 10.