WHY JUDGES SHOULD *NOT* MEET PRIVATELY WITH PARTIES IN MEDIATION BUT *SHOULD* BE INVOLVED IN SETTLEMENT CONFERENCE WORK

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ABSTRACT

Judges support settlement discussions in civil disputes in many parts of the world. This is an important feature of judicial work in many jurisdictions. Sometimes the processes are called 'mediation' and involve judges meeting privately with one party in the absence of another. This paper considers the use of private meetings as part of a judicial process and concludes that the use of private meetings can damage the judicial institution and the integrity of the courts. Whilst judges can play an important role in settlement conferences, this work should not include private meetings and such processes should not be defined as mediation but should properly be referred to as judicial or settlement conferences.

Keywords: Judge, mediation, settlement conferences, negotiation, caucus

RÉSUMÉ

Les juges en charge des discussions de règlement dans les litiges civils dans de nombreuses parties du monde. C'est une caractéristique importante du travail judiciaire dans de nombreuses juridictions. Parfois, les processus sont appelés « médiation » et impliquent des juges réunis en privé avec une partie en l'absence d'un autre. Cet article examine l'utilisation des réunions privées dans le cadre d'une procédure judiciaire et conclut que l'utilisation de réunions privées peut endommager l'institution judiciaire et l'intégrité des tribunaux. Alors que les juges peuvent

jouer un rôle important dans les conférences de règlement, ce travail ne doit pas inclure des réunions privées et ces processus ne doivent pas être définis comme la médiation, mais devraient néanmoins être dénommés conférences judiciaires ou de règlement.

Mots-clés : Le juge, la médiation, les conférences de règlement, la négociation, le caucus

INTRODUCTION

The changing role of judges in respect of the settlement, rather than the adjudication, of disputes, and the introduction of judicial conferencing processes, have been prompted in part by a desire to support more effective dispute resolution within our society. Adjudication can be costly, time consuming and may not meet the interests of those in dispute. Judges may be well placed to make strategic interventions that are directed at the resolution of disputes. However, where judges meet privately with parties and their lawyers, in the absence of others, and outside the court room there are significant issues about how this may impact on the role of a judge, perceptions of justice and the potential for justice to be served. These issues can be more pronounced in some jurisdictions and cultures.

There are a range of matters that are relevant in the context of this changing role. First, increasingly processes where judges assist to facilitate discussion are referred to as 'mediation.' This 'catch all' definition and framing has become increasingly problematic as mediation has become professionalised and is now undertaken by both lawyers and non lawyers. Mediators who operate around the world are often very well trained, bound by standards and ethics and may (as is the case in Australia) be required to deal with and refer complaints from consumers where the mediation process that is used does not meet expectations. In some places the definition of mediation is fairly sophisticated and does not include any advice giving. Where advice is given by the mediator or some form of evaluation takes place, the term 'conciliation' or 'evaluative mediation' is used to describe the process. Where judges are involved in settlement processes, these definitional variations may not be well understood and consumers of mediation may be involved in a process led by a judge that does not meet legislative and other definitional requirements. It is suggested that at the very least a clear and distinct nomenclature should be adopted to describe the various processes that are used by judges.[1] This is explored further below.

1. Although some commentators have suggested that it is not possible to construct a concise definition of mediation, there have been increasing attempts to do so through

Second, there are particular issues where Judges meet privately with one participant in the absence of another. Judges may not have the support system, temperament, training or understanding to deal with mediation processes that often involve private meetings. Private meetings or caucus (in the absence of one party to the dispute) raise both ethical and practise issues for mediators. At a broad level, the development of protocols relating to assessment and screening, standards in relation to disputant power imbalance as well as obligations and requirements in respect of the style of disputant and representative engagement, have primarily been directed at supporting the referral to mediation processes outside the court system. This means that judicial mediation, particularly where caucus or private meetings are a part of the mediation, may not be supported by systemic arrangements and may leave judges and disputants exposed to an environment that may be unfair or even unsafe.

There are other issues with judges conducting mediation or 'mediation like' processes that have been articulated elsewhere and are explored in some detail in this paper.[2] One view is that public confidence in the integrity and impartiality of the courts may be reduced by judicial involvement in mediation rather than settlement discussions, particularly if parties are permitted to meet with the judge separately (see discussion below),[3] a procedure that may occur in United States and Canadian courts as well as other countries.[4] Judicial mediation when it involves

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legislation, accreditation, registration and consumer protection arrangements. In this paper mediation has been broadly defined as a confidential, participant focused process where the mediator supports party self determination by exploring interests and options through open discussions and private meetings. Importantly, the mediator does not give advice and facilitates communication between the participants to support their decision making. This distinction is important as in many jurisdictions, the mediator is not a subject matter expert . In any event, where there may be subject matter expertise, the use of private meetings may mean that any advice could be misconceived. In contrast to mediation, processes where the decision making is influenced by the views or advice of the Alternative Dispute Resolution Practitioner, and where there may be a focus on legal rights the processes may be described as conciliation, settlement conferences or evaluation processes.

2. There are some reasons why judges should not engage in settlement conference work and more specifically in mediation. These reasons have been well articulated in: National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve –Embracing ADR to Improve Access to Justice in the Federal Jurisdiction–A Report to the Attorney-General*, Commonwealth of Australia, 2009 at 104; Chief Justice Marilyn Warren, "Should Judges be Mediators?", Paper presented at the Supreme & Federal Court Judges' Conference, Canberra, 27 January 2010.
3. Sir Laurence Street, "The Courts and Mediation –A Warning" (1991) 2 *Australian Dispute Resolution Journal* 203 at 203.
4. For example, Japan.

private meetings with one or other party[5] is much more problematic than a judicial settlement conference which may occur in open court and which will not feature private meetings.

This is not to suggest that judges should not have some role in supporting settlement discussions between disputants. Basically, the notion of judges acting as 'evaluators' or chairing conventional settlement or conciliation conferences without private meetings and in open court, may be acceptable to those who consider that mediation with its particular emphasis on facilitation and private meetings is inconsistent with the judicial role. Clearly, an early and frank discussion chaired by a judge can assist in prompting settlement in some disputes. This can be desirable in many kinds of matters, provided that the judge has no further contact with the dispute and that certain standards are observed.[6]

In this regard, 'mediation' in this paper is regarded as a separate and distinctly different process from judicial settlement conferencing. This approach accords with the definition and description of mediation in the Australian National Mediator Standards, as part of the National Mediator Accreditation System ('NMAS'). In this paper, judicial settlement conferencing ('judicial conferencing') is defined as a different process to mediation where:

> A judge, who has been trained in interest based negotiation and conferencing processes, chairs a meeting of the parties and/or their representatives to discuss issues in dispute, develop options, consider alternatives and either attempt to reach an agreement or plan case management approaches or both. The process may be facilitative and advisory and the judge does not meet separately with the parties or their representatives although a judge may meet with all representatives in the absence of the parties.[7]

This definition, in keeping with variations in current judicial conferencing practice, is silent as to the location of the conference meeting. Notably, there can be significant variations in practice. For example, in some judicial conferences, a meeting may be held in open court (with or without transcript) or in a private meeting room. In addition, some judges may absent themselves from discussion relating to settlement options whilst others may not.

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5. Whilst a number of commentators have written on the topic of judicial mediation, there has been less focus on the notion and process of judicial conferencing.
6. Michael Moore, "Judges as Mediators: A Chapter III Prohibition or Accommodation?" (2003) 14 *Australian Dispute Resolution Journal* 188 at 190.
7. This definition has been developed by the author and used by her in judicial education programs conducted by the author for the Judicial College of Victoria.

The above definition is also silent as to the topic of judicial disqualification. Some judges may disqualify themselves from hearing or dealing with a matter automatically after conducting a conference, others may continue to hear a matter 'with consent' and others still (particularly if the meeting has been held in open court) may continue to have a role in hearing the matter.

Perhaps the two most important features of the definition of judicial conferencing above are, first, that the judge does *not* hold a private meeting with each of the parties and their representatives (this is, of course, a common feature of most forms of mediation) and, second, that the process is mainly facilitative but may have an advisory component (mediation under the NMAS assumes that a facilitative process will be used although there is scope in defined circumstances for a blended process).[8]

WHY JUDGES SHOULD *NOT* HOLD MEETINGS WITH ONE PARTY IN THE ABSENCE OF THE OTHER

The difficulties with private meetings and caucus approaches in any form of settlement conferencing or in mediation are significant and particularly problematic if the Alternative Dispute Resolution (ADR) practitioner is also a sitting judge and are magnified if a judge continues to hear a matter after conducting the process. It is suggested that these difficulties do not arise with most forms of judicial settlement conferencing (which do not involve private meetings) as the primary concern areas are related to private meetings in the absence of the other party and the lack of an open and transparent process.

These difficulties can be grouped into four theme areas in the context of the potential impact on the integrity of the justice system:

1. The relationship between a judge and one party to a dispute can alter as a result of a private meeting and this may not support the integrity of the judicial system.

Whilst judges may consider that they can hold themselves apart from disputants, and some may do this with more success than others, judges remain human. A lengthy private meeting with a party where the

8. See the NMAS Practice Standards at Section 2(7). The Standards Report which includes the Standards is available at: Tania Sourdin, *Australian National Mediator Accreditation System – Report on Project* (2011) Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134622>.

intention is to create and explore options and alternatives through an empathic exchange concerning interests (as is the case in mediation) necessarily means that the meeting will be conducted in an informal and sometimes friendly manner. It is common in private meetings in mediation for people to exchange personal information about themselves and their concerns. Part of a mediators role is to listen empathically and encourage the shifting of perspectives. When judges do this work and describe themselves as 'mediating' and do so in the absence of the other party, there are many concerns that can be raised about impartiality (see below).

In addition, the disclosure of information, that is untested, that may impact upon any subsequent assessment of the credit and character of disputants. Ethical issues can also arise that are distinctly different from those that surface with private mediators. Admissions or allegations of wrongdoing, the reality that settlement arrangements may impact upon third parties who are not present, and actual criminal conduct issues may surface as a result of an exchange of information in a private session and the ethical framework that surrounds the judicial function is poorly equipped to deal with such issues particularly where the information is untested and provided within a framework of confidentiality.

However, it is the relationships that can form as a result of repeated private meetings that are perhaps most problematic. Within a court room, there are usually constraints that relate to the way communication between the bench and the bar table takes place. In mediation there are no such constraints and there is more likely to be an exchange of personal information in private meetings (particularly where repeat litigants are involved). There are also, especially in some societies, more opportunities for corrupt behaviour where relationships between judges and litigants are more informal, strengthened behind closed doors and not conducted transparently in an open court. One fear is that judicial mediation could impact negatively upon perceptions of the court and promote uncertainty, as the relationship between judges and litigants could be inappropriate and could lead to situations where allegations of undue influence might arise.

These changes in relationships and in dynamics may, on the one hand, support a closer engagement between citizens and courts. However, the risk that the relationships between courts, judges and litigants and lawyers may become overly familiar is problematic particularly if the relationships are not part of an open transparent court process. For litigants who may not have had exposure to the justice system, these relationships could suggest that a 'club' operates where judges are 'friends' with some and not with others.

2. A critical aspect of the justice system is that judges should be impartial and should not pre judge an issue.

Impartiality can be affected not only by the changed relationships referred to above but also by the dynamics of private meetings and the fact that untested information may be provided 'in confidence' to a judge. The information provided in private meetings may be untrue, untested and may suggest that those 'on the other side' should not be trusted. Whilst judges can be skilled at remaining impartial in a hearing process, in a private meeting that is oriented towards questioning the positions of each party, without opportunities to test confidential information, it may be less likely that impartiality can be maintained. If a judge goes on to hear a matter, it is unlikely that this confidential, untested and private information will be completely excluded in the judicial reasoning process.

The bias rule is focused on ensuring that decision-makers approach a dispute with a fair and unprejudiced mind. It is possible that conducting a settlement conference and then hearing a matter could raise issues of bias and allegations that there has been a denial of natural justice. However, this situation is much more likely to arise where mediation (with private sessions) has been followed by a hearing. Issues associated with a judge mediating a matter and then proceeding to hear that matter or a related dispute have been specifically considered in Australia and are very different from the issues that emerge in respect of conferencing. In *Duke Group (in Liq) v. Alamein Investments Ltd.*[9] this issue was considered by Justice Debelle, in relation to a successful application to disqualify himself from hearing a matter. The application related to a mediation conducted nine years prior to the court hearing that involved the same plaintiff and might involve similar issues in relation to fiduciary duties. His Honour had 'no memory of the details', but disqualified himself on the basis that '[a] reasonable bystander might apprehend that, in the course of meeting the directors separately, I might have received information which would cause me to have a view about the merits of the claim against the directors which might affect the exercise of my discretion...'

In considering issues relating to bias Justice Debelle noted that:

> When a judge acts as a mediator, the judge sheds, as it were, the judicial mantle for the duration of the mediation and acts in a manner inconsistent with the role of a judge by seeing the parties in private. In doing so, the judge acts in a manner contrary to the fundamental principle of natural justice that a judge must not hear representations from one party in the

9. [2003] SASC 272.

> absence of the other. It is for that reason that the judge will not in any respect adjudicate in that action except with the consent of the parties... The judge is disqualified because a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. ... The fair-minded observer might apprehend that the judge has been told something by one party in the absence of the other and that information may affect his reasoning.[10]

In terms of judicial settlement conferencing, where no private meetings take place, it is unlikely that similar issues in relation to bias could emerge. Even if a judge went on to hear a case after conducting a facilitative (rather than evaluative) settlement conference, bias issues are unlikely to emerge, simply because discussions do not occur in the absence of one party.

However, in terms of natural justice, issues could arise and could trigger bias allegations if more evaluative conferencing were to take place. Again, these issues will be magnified if a mediation process has been used. Natural justice requires that disputants should have a fair opportunity to put their case forward and respond to allegations made and where allegations are made 'in confidence' and in a private meeting no such testing will take place.

3. Outcomes that result from a judicial mediation process may not be 'fair' or tested or evaluated in the same way as outcomes in other processes.

Judges hold a special position in society and some supporters of judicial mediation would suggest that having a judge conduct the process may make the process seem 'more fair.' In particular, it could be suggested that outcomes may be fairer if judges do make comments on the reasonableness of any proposed settlement. From the perspective of a litigant, there may be an expectation that any settlement has the imprimatur of a judge and that therefore, distributive or substantive issues will have been considered. However in judicial mediation, the view of the judge as to the reasonableness or otherwise of a settlement can be influenced by matters raised in private and in the absence of the other party.[11] Ultimately, this can have an impact upon whether participants

10. [2003] SASC 272.
11. This approach may also impact on the integrity and efficacy of mediation processes. Those involved in a judicial mediation may be more focussed on attempting to persuade the judge (rather than each other) and may therefore not consider options that relate to improving their relationship in the same way as they might where the

consider the process to be 'fair.' Where a judicial settlement conference takes place and where no private meetings are undertaken, it is more likely that a judge will be able to comment on whether the outcome is fair partly because information has not been gathered in the absence of the other party.

4. Open and transparent proceedings are a core feature of the modern court.

There are significant issues that are linked to transparency that arise with judicial involvement in mediation. Courts provide an open forum to which citizens may come to assert or establish legal rights and to receive an enforceable determination of these rights. The process is subject to review through public scrutiny and a hierarchy of appellate courts. Courts therefore provide a medium through which law is created, explained and applied. From this perspective, Alternative Dispute Resolution (ADR) processes and proceedings can be seen as 'threatening the essential role of judges which is "not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to values embodied in authoritative texts such as the Constitution and statutes"'.[12]

In terms of judicial mediation, clearly what causes most concern is the suggestion that a judge will meet privately with a party in dispute. In this regard, judicial conferences that involve all parties (and where no 'private' session takes place) do not raise such concerns. Sir Laurence Street (a former Chief Justice of New South Wales in Australia) has stated:

> I reiterate my acknowledgment of the usefulness of the conventional settlement or pre-trial conference conducted in open court in the presence throughout of both parties. This stands on a different footing. It does not infringe basic principles nor does it involve the grave threats inherent in a court mediation.[13]

Judicial conferencing, at least in its more public forms (where meetings are held in open rather than behind closed doors) does not threaten

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mediation is more focussed on the disputants persuading each other. This may mean that the dynamics of the mediation are also altered by the involvement of judges in the process.

12. Australian Law Reform Commission, citing Owen Fiss, "Against Settlement" (1984) 93 *Yale Law Journal* 1073 at 1085.
13. Sir Laurence Street, "The Courts and Mediation – A Warning" (1991) 2 *Australian Dispute Resolution Journal* 203 at 203.

core values relating to the transparency of judicial proceedings. However judicial mediation, conducted in private, and with private meetings, does threaten these critical core values.

SUPPORTING JUDICIAL ENGAGEMENT IN ADR

There are many good reasons why judges and courts should have some engagement with ADR but this need not extend to mediation. For example, in the context of judicial settlement conferencing, additional opportunities can emerge for litigants to achieve fair outcomes at a more proportionate cost. In addition, judicial conferencing processes may offer litigants an experience of the court system that supports better understanding of the courts and also supports the future interests and relationships between disputants.

In our multicultural societies it may also be that disputants expect and appreciate judges taking on this broader role in relation to dispute resolution. In this regard, it is clear that in many countries litigation has often been combined with forms of conferencing and judges have for many years combined adjudicative, advisory and facilitative functions, in relation to societal and individual needs. The combining of functions also appears to be more readily acceptable in many European countries where inquisitorial rather than adversarial systems operate in the civil and criminal setting.[14]

In some countries the 'combining' of functions has been the subject of spirited debate that has been focused on court objectives as well as a close examination of the role of courts and judicial officers. In such countries the relationship between courts and ADR processes has undergone a significant evolution in recent years. In Australia there has also been a significant evolution with a range of ADR processes now linked in some way to every court and tribunal. Within Australia, as in Canada and many European countries, there have also been fundamental shifts in the judicial role and a small number of judges have embraced ADR as integral to the judicial function and the broader objectives of the justice system.

The debate about whether these shifts are appropriate has tended to focus on the role of the judicial function within society. For example, as

14. See, e.g., Gefördert von der Klosterkammer Hannover, *Court Annexed Mediation Project in Lower Saxony* (2002) Mediation <http://www.mediation-in-niedersachsen.de/English/english.html>. Notably, judges undertaking this work cannot offer advice at 4 "When acting as judge-mediators, the participating judges may neither adjudicate the disputes nor offer legal advice".

noted by the Australian Law Reform Commission ('ALRC') in its review of the federal system of litigation, some commentators consider that the objectives of adjudication – rule making and determination – and the more general objectives of dispute resolution (broadly defined) are not compatible.[15] Theorists who adopted this view more than two decades ago considered that the settlement of disputes and the use of dispute resolution processes other than court-based trial could weaken the foundations of judicial and social systems.[16]

At the same time, judicial conferencing may enable judges to more closely attend to litigant needs and expectations about their role – that is, the redefined judicial role may include that of a facilitator who will listen to discussion and assist parties to resolve their differences if at all possible. This redefined role may attend to and reflect societal views of an 'ideal judge'.

Integrated forms of ADR may also have an important role to play within courts in increasing litigant satisfaction and promoting a more positive cooperative culture within courts, as well as helping courts deal with their caseloads. In a similar vein, ADR approaches within courts can promote the voice of the disputant and enhance satisfaction and acceptance of courts and outcomes. Canadian commentators, Professor Andrew Pirie and the Hon Hugh Landerkin, state:

> A cultural sea-change is occurring in our court systems today. With ever-increasing court filings, the party-party controlled adversarial model of dispute resolution is losing its controlling sway. Courts everywhere now appreciate the positive influences that conflict analysis and management can have on their processes. Additionally, courts recognize what social psychologists have discovered in the recent past: the greater the voice given to disputants in court litigation, the greater the satisfaction and acceptance of the results from court systems, regardless of what the results may be.[17]

Judicial conferencing can provide disputants with a greater opportunity to speak and be heard than more conventional litigation processes

15. Australian Law Reform Commission, *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*, Issues Paper No. 20 (1997) 10.
16. Owen Fiss, "Against Settlement" (1984) 93 *Yale Law Review* 1073.
17. Judge Hugh Landerkin and Andrew Pirie, "Judicial Dispute Resolution 2001: A Space Odyssey or Modern Reality Check", Paper presented at the Asia Pacific Mediation Conference, University of South Australia, 29 November – 1 December 2001, cited in Valerie Danielson, *Judicial Dispute Resolution, An Examination of the Court of Queen's Bench Judicial Dispute Resolution Program*, Masters Thesis, Osgoode Hall Law School York University, 2007 at p. 30 footnote 93.

where more formal and less responsive conversational rules apply. Enabling disputants to participate and be heard is important in terms of whether a dispute is resolved or not and in terms of whether there is compliance with outcomes. There is some evidence that, in general, settlements that are reached as a result of ADR processes are more likely to be complied with and be 'lasting'. On this basis, and provided that the judicial conferencing process is facilitative, it may be that the outcomes that are reached as a result of the conferencing are not only more satisfying but are more likely to be 'effective' in that they will be lasting.

Some commentators have suggested that judges should conduct settlement conferences because the work that comes before courts has changed and there is a 'crisis in the authoritative judicial order, as the classical system is proving to be less ideal for, or even ill-suited to, a growing percentage of disputes brought before it.'[18] This view suggests that courts need to change and explore additional processes in order to be responsive to the forms of litigation that exist today.

In addition, it has been suggested that there is a growth in litigation and that courts need to adapt to be able to cope with this growth. It is arguable whether there has been a growth in civil litigation, although many researchers have suggested that the matters that are now litigated tend to be more complex and may involve larger numbers of parties. In this regard, judicial conferences may assist judges in dealing with these more complex disputes and enable issues to be narrowed and defined. It is also clear from research conducted in other jurisdictions that a judge's involvement in settlement discussions is likely to improve chances of resolution,[19] which may address problems of delay.

ADR OPTIONS OUTSIDE COURTS

There is also a significant question raised about why judges would need to do mediation work rather than judicial settlement conferencing if there are private mediators or state funded mediators who can do this work without raising these critical concerns issues? This paper suggests that it is possible to have judicial ADR in the form of judicial settlement

18. Louise Otis and Eric H Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6(3) *Pepperdine Dispute Resolution Law Journal* 351.
19. Valerie Danielson, *Judicial Dispute Resolution, An Examination of the Court of Queen's Bench Judicial Dispute Resolution Program*, Masters Thesis, Osgoode Hall Law School York University, 2007 at p. 68 footnote 238, citing James A. Wall Jr. and Dale E. Rude, "The Judge's Role in Settlement: Opinions From Missouri Judges and Attorneys" (1988) *Journal of Dispute Resolution* 163 at 164-165.

conferences that does not raise the same concerns and yet promote benefits for courts and litigants without embracing the difficulties involved in judicial mediation.

Whilst some argue that judicial time should be reserved for adjudicative work because judges are, on the whole, a scarce resource, whilst private mediators (some of whom are former judges) are often available to do ADR work without delay (and without public cost) there are good reasons why judges should undertake some forms of ADR. In this regard, judicial settlement conferences may be viewed more favourably than mediation as they may not cost litigants as much as private mediation (though they may still need to pay for their legal representatives) nor take as long as it may tend to be more focused on legal rights and interests and therefore may not impact upon judicial time in the same way that mediation work may (interest exploration may take longer than rights exploration). It seems clear that conferences may save judicial and litigant time and costs by assisting courts to respond to the changing nature of litigation within our courts and by enabling judges to assist unrepresented litigants as well as disputants in complex matters to identify, narrow and discuss issues.

Justice Bruce Debelle has suggested that courts may become redundant and if they do not 'equip themselves with techniques to resolve disputes by means in addition to litigation ... there is a risk that courts, not external mediators, will be seen as alternative dispute resolvers.'[20] This perspective draws upon the very different ADR environment that exists within Australia where ADR is prevalent outside the courts and is used to resolve a significantly greater number of disputes than those that proceed to a hearing. This concern is related to a fear that in the absence of integrated ADR processes such as judicial conferencing, the central role of the courts will be eroded and the civil justice system will become a second class system as wealthier litigants use private adjudication and external ADR rather than slower public adjudication. These issues have generally been discussed in the context of ADR processes that include and focus upon private adjudication (or 'rent-a-judge') processes.

Each of these views assumes that courts need to adapt and use innovative processes such as judicial conferencing to ensure that judges and courts remain relevant to and responsive to the needs of disputants

20. Justice Bruce Debelle, "Should Judges Act as Mediators", Paper presented at the Institute of Arbitrators and Mediators Australia Conference, Adelaide, 1-3 June 2007, citing Henry Jolson, "Judicial Determination: Is it Becoming the Alternative Method of Dispute Resolution?" (1997) 8 *Australian Dispute Resolution Journal* 103 at 104.

and society. Other commentators have suggested that more integrated court-based ADR work is essentially compatible with the changing nature of our society and recognises that disputants from different cultures may have different expectations of court-based processes and the judicial role.

However, these benefits may be lost where judicial mediation rather than judicial conferencing takes place. This is partly because of the issues raised previously but also because the 'private' mediation market, which is well established in many jurisdictions, articulates core competencies and approaches in mediation. There may be no such articulation of competencies in respect of an independent judiciary. For example, in the United States, the discomfort with the combining of judicial and mediator functions has arisen in response to the style of mediation adopted by some judges. 'Muscle', 'rhino' or 'rambo' mediation styles that involve a judge '...seeking to extract settlement offers that mirror the judge's analytical perception of the dispute'[21] sit uncomfortably with facilitative and other models of mediation that are focused on party self-determination and empowerment.

These concerns may be linked to other variations in the judicial role. For example, some judges may use 'settlement techniques' which may range from assertive 'arm twisting' to gentle suggestions in mediation processes. Whilst these concerns may also arise in relation to judicial conferencing, a number of factors suggest that these concerns may not be as problematic as would be the case in mediation. In judicial conferencing for example, judges undertaking conferencing training are normally required to consider the power that they may bring into the conferencing environment, the ethical issues that arise, and to use a model of conferencing that allows facilitative rather than evaluative processes. In addition, where conferences are conducted in an open court environment, these concerns may be alleviated by the capacity to make complaints about judicial conduct or to apply to set aside a settlement that has resulted from a conference.

There is also the possibility of judges adopting 'blended' dispute resolution processes that incorporate elements of ADR and conventional adjudication. In the changing litigation system, for example, judges may actively facilitate certain aspects of a dispute through 'in court' public conferencing processes and adjudicate other aspects of the dispute. That process (which involves shifting from an adversarial approach to a

21. Edward Brunet, "Symposium: Perspectives on Dispute Resolution in the Twenty-First Century: Judicial Mediation and Signaling" (2003) 3 *Nevada Law Journal* 232 at 234.

more facilitative approach) could be used in a less blended form and could also support a decision-maker sifting through documentation as well as enhance their understanding about specific expert issues and content, prior to any actual process of 'hearing' the dispute. The preparation and level of detail required by the decision-maker and the capacity to utilise facilitative processes will vary greatly and depend upon factors such as the legislative framework, the party expectations and the review processes (if any) that are available.

During a hearing, the processes used can vary according to the circumstances and could involve a decision-maker adopting a facilitative stance and using many of the techniques of introduction, understanding and questioning more commonly regarded as conferencing techniques. Such an approach must also be balanced with natural justice requirements.[22] The rules in relation to natural justice impact upon the way in which material can be presented to a decision-maker and also impact upon the nature and communication of decisions. Facilitative process training often focuses on how questions can be asked and developed so that substantive issues are fully explored. During a hearing, the capacity to shift to public conferencing processes may enable decision-makers to more thoroughly 'test' the issues with parties and adopt approaches that could support the development of settlement options.

Judges can also support effective conferencing processes that have an evaluative component because of the reasoning and analytical skills they possess. Research in Canada suggests that judges can have a significant impact upon participants and settlement because of the way that they conduct the conferencing process. Danielson has noted that a study of lawyers in Vancouver and work by Judge Wayne Brazil in the United States, explored the judicial behaviours and statements that promoted settlement in conferences.[23] According to Danielson the study of Vancouver lawyers by Epp found a 'carefully analytical, coolly logical approach' by a judge to be the most effective in assisting parties to reach a settlement, but that the approach needed to be low key.[24] Danielson

22. For judicial pronouncements on the rule against bias, see *R. v. Watson*; *Ex parte Armstrong* (1976), 136 C.L.R. 248; *Livesey v. New South Wales Bar Association* (1983), 151 C.L.R. 288; *Vakauta v. Kelly* (1989), 167 C.L.R. 568.
23. Valerie Danielson, *Judicial Dispute Resolution, An Examination of the Court of Queen's Bench Judicial Dispute Resolution Program*, Masters Thesis, Osgoode Hall Law School York University, 2007 at 68, citing Wayne D. Brazil, "Hosting Settlement Conferences: Effectiveness in the Judicial Role" (1987) 3(1) *Ohio State Journal on Dispute Resolution* 1.
24. Ibid Danielson citing John A. Epp, "The Role of the Judiciary in the Settlement of Civil Actions: A Survey of Vancouver Lawyers" (1996) 15 *Windsor Yearbook of Access to Justice* 82.

noted that lawyers want and expect the judge to come '...well prepared, having a thorough understanding of the facts and relevant law. They want carefully considered input: both opinions and creative alternatives. They want an active, persistent judge.'[25] Danielson also stated that a judge who suggested parties 'simply split the difference was useless'.[26] The Epp Vancouver study also found that lawyers considered judges to be useful in 'highlighting evidence or law that the lawyers have misunderstood or overlooked.'[27]

However, there is little information available about how litigants (rather than their lawyers) perceive judges undertaking this work. At present there is a concern that is essentially related to whether a judicial officer has the 'right' temperament and adequate skills to undertake a non-advisory process. In essence there is a fear that any judge will automatically revert to an advisory (rather than a facilitative) role when conducting a conferencing process and will do so regardless of stated process objectives.[28] This fear was apparent in consultations conducted for the development of the final version of the National Mediation Accreditation Scheme ('NMAS') in 2007.[29] In one consultation, involving a number of mediators, about basic training requirements, it was suggested that retired judges should be required to attend an extra day of mediation training for each year that they had sat on the bench.

It is clear that judicial conferencing training must be undertaken and must incorporate reference to the different ethical issues faced by judges and conferencing participants, as well as specific facilitative skills

25. *Ibid*. at p. 68 referring to John A. Epp at 92 and 112. Danielson at p. 63 notes that: "The Vancouver lawyer survey [Epp] asked the question: Does involvement by judges in the settlement process significantly increase the likelihood that settlements will be fair to all concerned? The results were mixed, with 40% agreeing, 27% not agreeing and 33% were unsure. The same question was posed in the 1982 Brazil Study of nearly two thousand American litigation lawyers, and the results ran in a ratio of 2-1 that a judicial presence would significantly impact the fairness of settlement."
26. *Ibid*. Danielson at p. 68 referring to Epp at p. 92.
27. *Ibid*.
28. See Stacy Burns, "Think Your Blackest Thoughts and Darken Them: Judicial Mediation of Large Money Damage Disputes" (2001) 24(3) *Human Studies* 227.
29. Tania Sourdin, Accrediting Mediators – the New National Mediation Accreditation Scheme, Final Report (2007) available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134622> describes the reporting process. The commentary on the Approval Standards highlights the issues involved in setting threshold training and educational requirements – see Tania Sourdin, *Commentary on the NMAS*, available at <http://www.wadra.law.ecu.edu.au/accreditation.html>. The comments were made in the confidential consultations process described in the Report and attended by individuals and representatives around Australia.

training.[30] Whether judges do have the appropriate skill set or can be trained to be good facilitators will doubtless continue to be the subject of debate. The debate also appears more heated when the issue involves retired judges and where there are concerns that mediation work that can be conducted by the broader legal profession is reserved for 'private judges'. With current and future sitting judges however, the topic is worth considering, not just in terms of training (and exclusion of judges who recognise that conferencing is not an area that they wish to pursue) but also in the context of future judicial appointments. If judges are to be engaged in such work should appointment criteria reflect a broader skill base? There are also significant issues about whether a person with strong skills in terms of decision-making is also able to have a high tolerance for ambiguity – a requirement in more facilitative, non directive processes.

CONCLUSIONS

It seems clear that judges can be effectively involved in settlement activities without necessarily 'mediating'. Although it is acknowledged that there is no universal definition of mediation, two features that are common in mediation are problematic when combined with the judicial function – specifically – confidentiality and private meetings with a judge. Each of these features can challenge values and notions about the justice system and the importance of procedural fairness, bias, and transparency when linked to the judicial role and function. These issues may be more problematic in some jurisdictions than others.

The evolving nature of the relationship between courts and Alternative Dispute Resolution (ADR) and more specifically the nature of the judicial function and its relationship with ADR, suggests that judges should logically be involved in judicial settlement conferences which do not have the problematic features of mediation.

The differing relationship between courts, policy-makers, ADR and practitioners and the philosophical approaches to ADR, vary greatly and produced a range of different justice integration strategies (which may appear in combination in some courts and tribunals):

1. Pre-litigation or pre-filing ADR – either supervised or unsupervised by courts and tribunals, sometimes falling within the 'shadow of the court.'

30. Landerkin and Pirie, above note 13.

2. Self referred litigation related ADR – where courts and tribunals are not involved and may be unaware that parties are using external ADR.

3. Court connected ADR – involving referral to ADR which might be conducted by external or internal practitioners.

4. Court integrated ADR – involving judicial and quasi judicial officers within courts and tribunals using ADR processes to resolve and manage disputes (processes may include settlement conferences, mediation or concurrent evidence approaches).

The different strategies have led to the development of different approaches to judicial ADR work. Arguably, where there is a thriving private ADR market, there will be less need for judges to mediate although there will still be a need for their engagement and involvement in settlement activities. Judicial involvement in standalone ADR processes has now been developed, extended and trialled in a range of countries around the world. Within Australia, it has been suggested that a tentative ADR approach be adopted that involves supporting judicial conferencing but limiting the role of judges in processes such as judicial mediation which may involve private meetings with the parties. It is clear that this shifting view of the judicial role and function will have a number of consequences. For example, the insertion of facilitative and advisory processes into the court system may influence judicial adjudicative processes. In turn, changes to the judicial culture may impact upon the development and delivery of facilitative and advisory ADR services as judges come to better understand and engage with ADR service delivery. These shifts may also promote a more accessible and efficient justice system that is more responsive to the needs of litigants and more effective in terms of promoting acceptable outcomes within a reasonable time frame and cost – and without damaging the integrity of courts or the judicial function.