

Should Judges mediate?

*A paper presented to the Centre for International Legal Studies Mediation Conference
Salzburg, Austria, June 2015*

At the outset, I wish to place on record that I have a clear bias when it comes to considering this topic. The reason is that I have been a Member of the Queensland Judiciary for over 15 years, sitting in jurisdictions which allow judicial officers to mediate matters which come before their court's jurisdiction.

Of course, it is necessary that any person undertaking mediation be a trained mediator. In my view, this should certainly apply to the members of the judiciary just as much as it should to any other mediator. For myself, I am both humbled and honoured to say that I undertook separate mediation and negotiation training at Harvard University in the late 1990s.

Since my training, I have both acted as a negotiator in highly complex mediations; conducted numerous mediations as the mediator; and conducted a number of mediation training seminars. In short, I believe that I am qualified to speak on this topic as an experienced mediator.

In preparing this paper, I started by undertaking the simple google search of "should a judge be a mediator". Although I received the usual 13,700,000 hits for my search, I needed to turn no further than the first half dozen or so of the search results in order to obtain a cross section of various views regarding whether or not Judges should be mediators.

One of the articles I viewed was from mediate.com.¹ The article is by Dan Aaron Polster and is titled "The Trial Judge as Mediator: A Rejoinder to Judge Cratsley". Thankfully, Polster provides an overview of the opinion of Justice Cratsley:

"In a recent issue of the *Ohio State Journal on Dispute Resolution*, Justice John C. Cratsley of the Massachusetts Superior Court argues forcefully for the promulgation by the American Bar Association of an ethical rule that would bar any judge who undertakes settlement or mediation actively in a case from ultimately trying that case should settlement not be reached."

I must confess that, as a Member of the Australian Judiciary, I am sadly lacking in my knowledge of the American Bar Association's ethical rules, and I do not know if the rule proposed by Justice Cratsley has been put into place or not. No doubt my American friends at the conference will be able to enlighten me!

¹ <http://www.mediate.com/articles/polsterD1.cfm>.

Polster makes a strong argument as to why a judicial officer should be allowed to mediate his or her own cases:

“While Justice Cratsley does not question the value of a judicial officer conducting mediations, he argues that the danger that the judge will consciously or subconsciously use something from the mediation in making trial rulings justifies the strict ban he proposes. I don’t think the strict rule he proposes is necessary. From my experience, the legal community is very effective in disseminating information, particularly about the strengths and weaknesses of particular judges. If a judge, even once, allows his trial rulings and/or demeanour to be affected by what happened in mediation or even create the impression that this has occurred, none of the attorneys in that district will ask that judge to mediate any other cases. In fact, I don’t believe lawyers will ask a trial judge to mediate their cases unless the judge is (1) well-qualified by experience and/or training; (2) effective; (3) courteous to the parties; (4) mindful of the fine line between firmness and coercion; and (5) able to try the case fairly if the case does not settle. So long as the process is truly voluntary, the rule proposed by Justice Cratley should not be necessary.”

Polster concludes his paper as follows:

“Again, not every trial judge has the time, ability, or inclination to engage in mediation. No judge should ever feel compelled to be a mediator, just as no attorney or party should ever feel compelled to submit to judicial mediation. But my experience over the past eight years has taught me that a skilled and trained trial judge has the potential to be the most effective mediator for his civil cases, and then can try those few cases when mediation does not produce a settlement. The rule that Justice Cratsley proposes would, in my view, substantially reduce the amount of judicial mediation. If one accepts my premise that the role of a trial judge is to resolve problems and disputes in a fair and efficient manner, this would be a big loss for our judicial system.”

The next article is to be found in Lawyers Weekly of 11 December 2012. It is written by Lancken and Taneja and is titled “Judging mediation”.² The authors reach the conclusion that judges “are not mediators even when they are conducting judicial mediation; they are judges, and the different processes of dispute resolution risk confusion”. Helpfully, before reaching this conclusion, Lancken and Taneja set out a risk/benefit analysis of judicial mediation as follows:

“RISKS of judicial mediation

1. It blurs the role of a judge. Further, the element of confidentiality and private discussions with parties puts a judge at risk of being seen as not impartial
2. If the judicial mediation does not achieve a settlement, it rules out that judge from sitting on the trial, limiting the available judges for the case. Judges are a valuable adjudicative resource and it is a waste of their skills to use their time on mediations, particularly when there are plenty of private mediators
3. It might be inconsistent with Chapter III of the Constitution

² <http://www.lawyersweekly.com.au/opinion/11179-judging-mediation>.

4. Judicial skills of identifying issues, applying law and coming to a determination are not relevant in mediation. Further, there is a risk that a judge may confuse their roles as judges and mediators and conduct evaluative mediations that mimic a trial. This tarnishes the essence of ADR as a facilitative process that puts the parties in control
5. People may feel pressured to settle given the status of a judge and may wrongly interpret statements made by a judge during mediation as authoritative
6. We may experience a 'brain drain' on the judiciary in which judges retire early to pursue careers as professional mediators, placing greater pressure on the court system
7. Parties may use it as a 'test run' for their litigation.

BENEFITS of judicial mediation

1. It avoids litigation by reaching a settlement, which saves time and money
2. It introduces a 'culture of mediation', allowing courts to embody the concept of a 'multi-door courthouse'
3. It introduces variation in the role of a judge, making the work of a judge more interesting
4. The respect that parties have for a judge enhances cooperation and allows for a faster settlement. Judicial mediation records a high settlement rate and hence is successful.

The benefits described in points [1] and [2] are benefits of mediation in general, can be achieved by private ADR providers and are not specific to the practice of judicial mediation.”

Another fascinating paper on judicial mediation is to be found on the Kluwer Mediation Blog by Nadja Alexander.³ Alexander had this to say:

“In England the Woolf (1995) and Jackson Reports (2009) made the case for courts to play an active role in providing information about, and encouraging, mediation and other forms of ADR. Judicial mediation and other non-determinative judicial processes are redefining the traditional concept of judges as disinterested decision-makers. These processes are referred to collectively as judicial dispute resolution or JDR.

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Worldwide there are four primary JDR practice models, all of which engage the mediation process or mediative techniques to some extent:

1. Judicial settlement. The judicial settlement function occurs in court and is conducted by the judge who will also hear the matter if no settlement is reached – that is, the trial judge. Thus the same judge plays a role in both consensus-based and determinative processes in relation to the same matter. The judicial settlement function has a tradition in many countries with civil law traditions, for example, Germany and China.
2. Judicial mediation. Here a trial judge typically refers the case to another judge who acts as a judicial mediator. Should the case not settle, the judicial mediator is excluded from participating in the further adjudication of the matter and the case returns to the original

³ <http://kluwermediationblog.com/2011/12/09/judges-mediate-and-do-other-things>.

trial judge. A strict separation of roles of judges between their function as judges and their function as judicial mediators is enforced. Judicial mediation models are popular in Europe, for example in Germany and Scandinavia and generally are considered a form of mediation. The distinction between judicial settlement and judicial mediation is recognised by two cross-border legal instruments – the European Directive on Mediation in Civil and Commercial Matters (recital 12, article 3) and the Uniform Mediation Act (2001 in the United States (s 3(b)(3))).

3. Judicial moderation. Judicial moderation is known by a number of labels including conferencing and the term JDR itself. It comprises a wider range of techniques than is encountered in judicial settlement and mediation. These include investigative, directive, advisory, managerial, settlement and facilitative interventions. Judicial moderators are not restricted to one process or set of rules; they choose their intervention on the basis of what they perceive to be the needs of the parties. For examples of judicial moderation I refer readers to conferencing at the Australian Administrative Appeals Tribunal, the Güterichter in Germany, and to JDR practices in courts in Calgary, Canada.

4. Facilitative judging. Facilitative judging refers to the conscious integration of communication and facilitation skills into judicial adjudication. Facilitative techniques such as active listening can help calm down anxious witnesses or parties and can increase their perception of procedural justice. Emotional intelligence and communication skills can help judges convey their decisions in a sensitive and appropriate manner, which, in turn, may increase the acceptance of and compliance with, their decisions by the parties. Illustrations of facilitative judging can be found in Australia, Canada and the United States and include initiatives such as therapeutic justice, problem-solving courts, and courts that integrate elements of indigenous dispute resolution such as the Murri courts in Australia. The classification of JDR models, and whether they are defined as mediation or not, is more than an academic exercise. It can have legal consequences for parties such as which laws and statutes apply in relation to issues such as confidentiality, enforceability of outcomes and duties of the ‘mediator’.”

Finally, I turn to the off quoted paper by Her Honour Chief Justice Warren presented to the Supreme and Federal Court Judges’ Conference in Australia in 2010. The article is to be found at (2010) 21 ADRJ 77. After carefully analysing the role of a judge and the rise of judicial mediation, and then discussing the factors in favour of judicial mediation, Chief Justice Warren then puts forward three primary arguments against judges acting as mediators:

“First, mediation involves an abuse of the judicial function. Judges should judge and avoid engaging in political and administrative pragmatism. Fundamentally, the judicial role is a pure one; it should not be diluted. Furthermore, there is no shortage of highly skilled mediators at the Bars, in practice, and, not to be overlooked, amongst the senior retired judiciary, a group who have been extraordinarily successful in settling some of the most difficult and contentious civil litigation in the country. Secondly, it is improper for judges to engage in closed and private justice by participating in mediations. Judges are intended to conduct their work publicly. They are required to be transparent in what they do and to account for their decisions through their statements in court and their reasons for judgment. If judges participate in mediations behind closed doors, justice is closed and the community is ignorant of judicial activities.

Thirdly, participating in mediation involves relocating a precious judicial resource – judges – away from trials and appeals. In all jurisdictions there is too much work to do. However, that is not to say judges do not perform quasi ADR tasks repeatedly. When we go onto the Bench in trials and appeals, we persistently scrutinise what is said in court, the documents provided, what is happening and ask the question urged by Justice Hayne: ‘Why?’ Of itself, these are part of the modern judicial technique.

Judicial case conferencing (the facilitative form of judicial mediation) provides the proper model. Whilst the law, courts and judges must necessarily be adaptive and evolve, they must do so within the constraints of the common law and statute, as well as legal and constitutional principles.

I suggest a better approach to the question posed at the start of this article is the pursuit of direct judicial involvement in ADR other than mediation. For example, judicial case or settlement conferences, judicial early neutral evaluations and summary trials. 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. There are always things judges can do and techniques that may be applied. We should not forget the effectiveness of the pre-action protocols being rolled out across the country. Ultimately, one thing judges can do is increase the barriers to achieving a trial or appeal hearing, that is, ensure that parties exhaust every possible alternative to a court hearing before they have time before the judge.”

So where do I stand in this debate? Applying the categories of judicial mediation as espoused by Kluwer, I would rate myself as somewhere between judicial mediation and judicial moderation. I have always been an activist mediator rather than a purely passive mediator. This shows through in the way that I undertake my judicial mediation. However, having said that, I adhere strictly to the interest based form of mediation as taught by Harvard.

Clearly, as I actively conduct mediations as part of my day to day judicial duties, I fall on the side of the fence in favour of judges being mediators. I do so, however, with some reservations. In my view, it is not appropriate for a person who conducts a mediation to go on and become the decision maker in that same matter if the mediation is unsuccessful. This is a practice adopted by the Land Court of Queensland. Whenever a member of the court undertakes mediation, that member is thereafter disqualified from sitting as the judicial determinator at either first instance or as a member of the Land Appeal Court should the matter progress to the appellant level. The practice of not allowing judicial mediators to undertake further judicial function in a matter which they have mediated in the Land Court has one exception which may rarely occur – that is where all parties to the mediation agree that the judicial mediator may go on to become the decision maker in the matter. However, even in those circumstances, it remains a matter of discretion for the Land Court member. Even in circumstances where all parties agree to the mediator going on to become the decision maker following a failed mediation, the Land Court member may themselves decide that it is not appropriate for them

to be the final decision maker and therefore they may decline to hear the matter, in which case the hearing of the dispute would pass to another Land Court member.

It is important to understand a number of other factors that apply to Land Court mediations. Although the Land Court of Queensland has a relatively narrow legislative basis of jurisdiction, with jurisdiction to the Land Court given by way of approximately 50 individual statutes, the quantum which may be awarded by the Land Court is without limit. Therefore, cases before the court may involve parties who are in dispute over a relatively small sum of money, perhaps only \$100 or so, with all parties being unrepresented, through to multi-national litigants on both sides arguing for a determination of potentially well in excess of a billion dollars. I currently have both extremes before me on my current caseload, as well as many cases which fall somewhere in between.

The approach that the court properly takes to ADR in any matter naturally depends upon many circumstances, including the quantum of the claim and the likely costs which will be incurred by the parties in prosecuting the claim. This can be a significant factor for Land Court mediation, as when the mediation is ordered to be performed by either a member of the court or the judicial registrar of the court, the mediation service is provided to the parties at no charge for the mediation, with the parties simply bearing their own costs of participation in the mediation. Not surprisingly, many parties see great advantages in having an independent mediation service provided to them at no charge.

It should of course be noted that in addition to court supervised mediation conducted by Land Court members or the judicial registrar of the court, the Land Court may also order that parties attend mediation before another mediator in circumstances where the parties share the cost of that mediator. This is also a regular occurrence before the Land Court, and the mediators who engage in those mediations include retired members of the court, as well as other mediators of high experience, particularly in the field of law in which the Land Court operates.

There is a further aspect of judicial mediation, particularly in Australia, which I should mention that I have observed in my practical experience. Frequently matters which come before the Land Court will include one party which can be classified as a “government party”. I have witnessed many parties who have undertaken negotiations with a government party prior to a mediation who enter the mediation very cynical of their prospects in “taking on” the government. However, in Australia, there is a high degree of public confidence in the independence of the judiciary, and an understanding that the separation of powers doctrine means that members of the Australian judiciary are completely separate from, and in no way part of, any government of Australia. Thus a judicial mediator, at least in my home country, enters a mediation with the parties completely at ease that the mediator is fair, unbiased, unconcerned about the outcome of the mediation, and completely independent of all the parties.

I know that many of you will say that of course all mediators bring a completely independent mind to any matter they mediate. That is of course fundamental to the role of a mediator. However, what I am talking about is more the perception of the parties to the mediation. In my

view, a judicial mediator starts with the perception of complete neutrality between the parties, whereas a privately appointed mediator may be viewed, at least subconsciously by the parties, as the preferred mediator of their opponent, or at least not the party's preferred mediator.

For completeness, I should add that the parties to a judicial mediation in the Land Court do not choose which judicial officer they wish to have conduct the mediation. It is entirely a matter for the judicial officer who has the conduct of the case management of the action to determine which other judicial officer in the Land Court should conduct the mediation.

Turning back to the fundamental question of this paper, I can certainly appreciate the reasoning of those who contend that the proper role for a member of the judiciary is to adjudicate matters and thus leave the mediation to others. I also accept that members of the judiciary are a relatively scarce, expensive resource and that their time should not be used in an excessive amount of mediation to the detriment of their more traditional judicial duties. However, as with most things in life, it is possible to strike an appropriate balance.

I also agree that it is appropriate that a member of the judiciary should have a court officer with them whenever they are conducting a mediation. For my part, my Land Court Deputy Registrar is always present with me whenever I conduct a mediation or other ADR process. That Deputy Registrar also does not have any part to play in the proceedings should they progress to a formal hearing thus ensuring a separation between the mediation process and the adjudication process, even if they are essentially "Chinese walls" within the court.

There is another factor which specifically applies to my court which I believe is relevant. In accordance with s 7(b) of the *Land Court Act 2000*, the court is to operate with equity and good conscience "without regard to legal technicalities and forms or the practice of other courts". Judicial mediation, in my view, sits squarely within the mandate of the operation of the Land Court as provided by s 7.

Unfortunately, I am unable to support the view that judicial mediation should only occur when a party's legal representative is present. This assumes that the parties are legally represented, where the reality is that in a growing number of cases before the Land Court, and, I understand, in other courts, the trend is for self-represented litigants to appear. Indeed, it is often the case that neither party to a piece of litigation is legally represented in matters which come before me. This is just another factor in the ever changing nature of litigation in the current age.

There is one further aspect of judicial mediation which I should mention. As I have been undertaking judicial mediation for many years now, I have a wealth of data to show the results of the mediations and other forms of ADR that I conduct as part of my judicial role. Approximately 90% of the matters that I mediate or conduct another form of ADR in (particularly preliminary conferences in the Land Court, which is a form of mini-mediation) result in the finalisation of the proceedings. These results speak for themselves.

In summary therefore it is my view that there can be strong benefits in having a judicial officer undertake a mediation, but that barring exceptional circumstances, any judicial officer who mediates a matter should be precluded from taking any decision making role in the proceedings should mediation fail.

His Honour PA Smith
Member
Land Court of Queensland
5 June 2015