

Should judges mediate?

Carol Bowen shares her take on the Law Council's panel discussion on whether judges can and should mediate.

Chaired by Ms Mary Walker – Barrister and Chair of the Law Council's ADR Committee; Presented by Mr Henry Jolson QC –

Barrister, Victoria

Panel members:

- Justice Preston, Chief Judge, Land and Environment Court;
- Justice Bergin – Supreme Court of NSW
- Acting Justice Gyles AO – Supreme Court of NSW
- Members of the Law Council of Australia Standing Committee on ADR including Nadja Alexander, Alan Limbury and Sir Laurence Street, AC KCMG QC.

The landscape

The Chair introduced the session by surveying significant features of the court and dispute resolution landscape.

“A controversial new scheme in the Technology and Construction Court (TCC) which will see judges mediating settlements for the first time has sparked a blazing row in the ADR community”.

The Lawyer Vol 20 Issue 22 Joanne Harris
www.thelawyer.com

Former Chief Justice Sir Laurence Street has written:

“The involvement of a custodian of power as mediator imports the real risk of a party feeling a sense of coercion and hence a disenchantment with the mediated outcome that can reflect back adversely on the court.”

The Lawyer Vol 20 Issue 22. Steve Hoare
www.thelawyer.com

Other factors in the landscape include:

- Mandatory referral
- The attempt to change the word ‘alternative’ to ‘appropriate’
- Changing perceptions within and outside of traditional court structure
- Civil justice reform – State and Federal
- Ad hoc developments to manage legal costs and the delay in finalising matters (*The Financial Review* 28 Oct 08 www.afr.com.au)
- The multi-door court provides multiple doors to justice; cases are diagnosed and referred through the appropriate doors for resolution and progressed inside or outside of the Court. This set up considers the interests of the parties with a view to creating value. In the multi door court who are the gatekeepers?
 - The courts;
 - The lawyers;
 - Consumer groups;
 - Government agencies; or
 - All of the above.

The hypothetical

Henry Jolson QC read a very provocative hypothetical which he had developed to highlight the dilemmas facing judge/mediators. At the end of the mediation, when a settlement has been reached, the judge/mediator overhears information that, had it been known earlier, would have changed the course of the mediation, and certainly would have

resulted in a different outcome in court
The judge decides to tell the trial judge.
The matter ends up again in court, and the judge/mediator faces the possibility of being sued for breaching confidentiality.

Comments and discussions

The hypothetical stimulated a robust discussion by panel and audience members.

The difficulties associated with judges mediating

- There is no barrier to access to justice so why blur the lines?
- There is no demonstrated need, no empirical data and no argument to support judges mediating;
- Given that there is no demonstrated need, using judges as mediators is wasteful of resources; As Judicial Officers have very busy lists and an unrelenting workload, how could they afford time to be mediating?
- Judges who mediate should be separate from Court, otherwise we risk compromising the role.
- There is a risk that judges may not provide a quality mediation service. Judges tend to express views as to the merits of the case, leading to a form of mediation that settles the case (efficiency of justice) and yet doesn't satisfy the real interests of the parties;
- Because judges have special knowledge they are inclined to instruct the parties what to do;
- As a judge, there might be implications in mediating with parties and lawyers and seeing the same lawyers in court the next day;
- A court structured mediation has the added risk of adding another layer of cost;
- The role of the courts and judges within the courts is put at risk by judges mediating:

- Judges must maintain the dignity of the judicial office;
- Courts must be ready to judge, mediation is consensus based designed to resolve conflict,. The courts role is to adjudicate and to administer justice – mediation and courts have different roles;
- The public expect judges to be judges;
- The court is an institution and Chief Justice is responsible for that
- Judges have a judicial role in public office and therefore disclosure must be above board;
- Disclosing or not disclosing information from the mediation is a difficult choice for a judge to make

The case for judges mediating

- If the Judge is experienced it's unwise to assume the mediation won't be handled well.
- Some judges think they should mediate as it brings an extra dimension to the role and allows judges flexibility in how they respond to different matters
- The government may direct or advocate for judges to mediate.
- Judicial DR was very much alive and well in NSW. It refines issues and provides a judicial registrar mediation progress which is free. This seems to work well and there are no identified problems.
- There is only one place for Land and Environment (L&E) dispute resolution services and that is the L&E Court.
- Judicial dispute resolution has no agreed definition; empirical studies show that what is done is very variable
- The line between Court referred and judicial dispute resolution is blurred;
- There is no clear definition of mediation in the rules of court;

- In WA in one year 600 cases went to mediation and 60 to trial. The profession needs to respond by introducing pre-trial protocols (resolution in the house of justice);
- Litigants often think they would have gotten more if they had fought the good fight in Court rather than forced to settle through mediation

These comments were recorded by Carol Bowen at the Law Council of Australia's Standing Committee on ADR's seminar, "Should judges mediate" held on 13 November at Selbourne Chambers, Sydney.

About Carol Bowen

Carol Bowen is an ADR practitioner within the Department of Defence who provides conflict management advice and ADR interventions for including training in interest-based negotiation and effective workplace communications.