Kluwer Mediation Blog

Should Mediators Wear Robes?

Geoff Sharp (Brick Court Chambers / Clifton Chambers) · Friday, June 1st, 2012

As you would expect, judges are appointed for their ability to adjudicate, often untested at the time of elevation to the Bench.

Once appointed, many jurisdictions around the world then ask their judges to suspend their adjudication skills in favour of *mediating* controversies coming before the court, often in an effort to reduce backlogs.

And it seems the issue is gathering steam – just take a look at Rick Weiler's excellent piece at this blog on the evolution of mediation a couple of days ago… "Ontario Chief Justice Warren Winkler is mediating the distribution of Nortel assets in an effort to avoid full blown litigation… The controversy here, as some see it, relates to the appropriateness of judicial mediation in a jurisdiction (Ontario) which has a thriving private mediation industry"

Many others have had a lot to say about judges getting involved in the business of settlement from the lofty heights of judicial office – Dame Hazel Genn in the UK and NADRAC in Australia, especially if settlement becomes the principal aim of our civil courts (Owen Fiss still holds up).

To be clear and we are not talking about judges mediating *after* they have left the bench – this debate is about the mediation of matters coming before the court by serving judges. [BTW- for a taste of the debate on judges mediating after they leave, take a look at *Successful Mediators Wanted: No Robe Required* "… among the criticisms of mediators with judicial experience was that the mediator was unfriendly, self-absorbed or self-important, and/or lacked empathy… ".]

But, back to mediating while *on* the bench. So what are the primary arguments, for/against?

1. On the one hand those against judges mediating talk about judges being unsuited to this type of work, their skill (and role) being to resolve cases by a principled application of the law. They are also most concerned that disposition of matters behind closed doors undermines judicial office. Phrases like “the vanishing trial” are bandied about .
2. Those in favour say greater judicial involvement, especially at an early stage, is desirable for reducing growing court lists and also that judges can resolve matters before trial where others cannot.
3. Then, there are a number of controversies around the actual process – primarily whether it is appropriate for judges to tell the parties what they think will happen if they continue to trial (*evaluate*) and whether they should meet with the parties privately (*caucus*).
4. And, drilling down a layer, whether a judge who mediates should go on to hear the matter if it remains unresolved and in particular, considering the judge may have caucused with the parties.

In many jurisdictions, wherever one sits on this debate, judge led mediation is a reality and will stay that way in the medium term.

Although the position may well have changed, the European Commission for the Efficiency of Justice noted in 2008 that 38 European countries reported judicial mediation procedures (only 8 did not have any) and of those 38, 12 involved judges actually delivering the process.

So for my money that ship has sailed and the trend is clear – misguided but clear – and energies are better directed to ensuring that *the way in which judge led mediation is delivered* accommodates as many of the legitimate concerns being voiced as is possible.

While it is not perfect by any stretch of the imagination, New Zealand’s High Court has recently published guidelines for judicial settlement conferences, as judge led-mediation is called in NZ.

The takeaway from the guide is that judges *will not* express a view in the nature of an interim judgement or ruling on the case and *will not* caucus.

While the judge *will not* provide an evaluation or an opinion of the successful outcome of the litigation, the judge may invite the parties to consider important aspects of the case so that the parties’ evaluation is comprehensive.

Given that many litigants embrace judicial settlement conferences because the process provides an authoritative facilitator who could provide a steer as to what might happen at trial, this may not be welcome in all quarters, especially those who will go to a JSC because they have a strong case and want the other side to be told that.

In terms of actual process, the guide does not lay down any bright lines – some judges will do no more than introduce the process and take the ”I’m in my chambers if you need me” kind of approach while others will be much more hands-on, promoting case openings and risk assessment in the usual way and may even be involved in the negotiation itself.

While I do not have the answers, I do think that there should be a c*lear separation between the deciders and the settlers, even if that means having decision judges and settlement judges* and I

believe that once we are through with this interesting experiment, that is where we will end up – with most jurisdictions preferring to have a well thought out and well integrated court-annexed mediation service utilising a mix of public/private mediators .

However, for the moment, if our judges insist on being involved in the settlement of matters in their courts they should not attempt to *mediate*, at least in the way that I understand that concept – by all means convene *settlement conferences*, but those conferences should be very squarely conducted within a legal paradigm with reference to legal rights and obligations leading to an evaluation (by parties?/by the Judge?) of the legal strengths and weaknesses of the case – essentially Prof Riskin's (of Riskin Grid fame) 'the focus being on legal outcomes with an authoritative mediator' in his well known discussion of mediator orientations.

In my view, judges should not attempt to probe – whether in joint or caucus – interests, underlying needs, goals, fears or feelings – that is not a role for our state-sponsored judiciary and leads to inappropriate judicial interaction with parties and counsel. Those cases are better referred to private mediation.

The trick is to identify such cases at intake.

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