Kluwer Mediation Blog

Should judges mediate?

Alan Limbury (Strategic Resolution) · Saturday, June 22nd, 2019

In the words of the late Sir Laurence Street, former Chief Justice of New South Wales (1974-1988) and subsequently Australia's leading mediator:

"A court that makes available a judge or a registrar to conduct a true mediation is forsaking a fundamental precept upon which public confidence in the integrity and impartiality of the court system is founded. Private access to a representative of a court by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of natural justice and absence of hidden influence that the community rightly expects and demands that the courts observe": *Mediation and the Judicial Institution,* Australian Law Journal Vol. 71, 794-6, Oct. 1997.

As noted here last year, courts in Australia have long had statutory power to order parties to mediate, with or without their consent. The Federal Circuit Court of Australia is no exception. Despite Sir Laurence's warning, one of the (Judge-made) Federal Circuit Court Rules provides that, in such cases, the mediator may be a Judge of that Court.

In a recent case involving 15 private client advisors previously employed by a bank who claimed they had been underpaid to the tune of over AUD 2.6 million, all the parties sought an order, by consent, that their dispute be referred to mediation to be conducted by a Judge. The Judge refused and instead ordered that the mediation be conducted by a Court Registrar.
In comparing the roles of mediator and judge, the Judge said:

"In my experience virtually all mediators are prepared at a mediation over which they preside to advise in general terms, both on the parties' respective prospects of success in any litigation and the reasonableness of the proposed settlement terms".

The Judge concluded that a mediator does not exercise judicial power and hence the Rule is invalid. I will not go into that aspect of the decision here since its application is confined to the Australian statutory regime. Of wider interest, the Judge also decided that even if it is constitutionally permissible for a Judge of that Court to be appointed as a mediator, he would not have made such an order in the exercise of his discretion, saying, by way of introduction to his reasons:

"I am not an accredited mediator. Mediation is a craft in which education and training are regarded as appropriate and invaluable and accreditation usually entails training, competency assessment and ongoing annual professional development requirements. Parties who are to invest time, effort and cost into mediation are entitled to an accredited mediator. The characteristics required of a Judge are of quite a different order from those required of a mediator and it is well known and accepted in the profession that eminence and ability in the judicial role do not necessarily translate into the assumption by a former Judge of the role of a private mediator."

Comment: this reminds me of an occasion when I found myself at a Law Society dinner sitting beside a former-judge-turned-mediator who boasted that he hadn't had any mediation training and didn't need any!

In the words of the late and beloved Harvard Professor Frank E. A. Sander, whose advocacy in 1976 of what became known as "The Multi-Door Courthouse" triggered the modern ADR movement:

"…good mediators should begin by exploring the respective interests of the parties, with a view to "creating value" (or enlarging the pie) before dividing the pie. Often issues that at first appear to be purely distributive turn out to be good candidates for value creation. And value creation requires training and experience different from that which judges usually have. The skills required of judges and mediators are sufficiently different that we cannot assume that even first-rate judges will turn out to be first-rate mediators. Some judges, of course, turn out to be good mediators, but that is surely not the norm": *A friendly amendment*, Dispute Resolution Magazine, Fall 1999, 11 at p.22.

In summary, the Judge's many reasons for declining to appoint a judge as mediator included:

(i) it would appear unseemly and inappropriate to appoint a Judge who is unaccredited as mediator and it was preferable to appoint a Registrar of the Court, who is a trained and accredited mediator;

(ii) there are some 4,000 accredited private mediators in Australia who would have been available to conduct the proposed mediation and the cost of whom could easily have been borne between the 16 parties to the proceeding;

(iii) it was unjustifiable to sacrifice time available for the hearing and determination of other cases in favour of mediating;

(iv) mediation is not for the faint-hearted and there is often little of "the majesty of the law" in evidence at them. As a typical example, the Judge quoted from a recent report of a mediation given to the Judge by a Judicial Registrar, anonymised to protect the privacy of the parties:
"Regrettably, the parties were unable to resolve their dispute as they were too polarised in their expectations. Without disclosing anything confidential, I can indicate that there was a deep animosity and distrust between the parties, which was evinced by what was a very heated group session (thereafter all negotiations were conducted by way of 'shuttle diplomacy' by myself)."

The Judge was of the view that this sort of activity is far removed from the judicial role so a Judge should avoid it;

Comment: this kind of report seems completely at odds with the privacy and confidentiality with which mediation should be cloaked. In New South Wales, the mediator of a court-ordered mediation is required to report when the mediation began and when it ended. No more is required and no more is necessary to enable the judge to determine whether a communication took place within or outside the mediation process and was consequently inadmissible or admissible in evidence. Further, shuttle mediation is common in mediations conducted by Federal Court Registrars. One of the complaints made in a recent case over such a mediation was that the Complainant had no opportunity to speak face-to-face to the other party, his own deceased son's partner. One is left to speculate whether such an opportunity might have restored the relationship and avoided the drawn-out proceedings that followed.

(v) because disputes arise in relation to the conduct of mediations, including the conduct of the mediator and whether or not a party to the mediation has been coerced into settlement, it was inappropriate for the Judge to place himself into a position susceptible to such complaints by accepting the role of mediator, since the Judge might be called as a witness;

(vi) had he agreed to mediate, the Judge would not have been prepared to evaluate the parties' prospects of success. His reasons for this have nothing to do with facilitating an interests-based Pareto-optimal resolution but rather that evaluation would have run the risk that if the mediation failed, a different Judge at trial might take an entirely different view of the case. This would have "a clear tendency to diminish the standing of the Court and its Judges";

(vii) failure to evaluate would have denied the parties "a characteristic function expected of mediators which would be provided by Judicial Registrars and private mediators".

Comment: far from being a "characteristic function", the (voluntary) National Mediator Accreditation System under which Judicial Registrars and private mediators are accredited, requires adherence to a process in which "A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes" (NMAS Practice Standards 2.2). If advice is to be given, the mediator must have additional qualifications and the parties must consent (NMAS Practice Standards 10.2). Hence, mere accreditation under the NMAS prohibits the mediator from evaluating.

That is not to say an accredited mediator may not ask questions which suggest there may be difficulties with a party's case, such as: "Do you really think you have a 95% prospect of success?" and "Might there be a competition law problem with that proposal?" What accredited and other mediators should not do (as has happened in the case of a former Judge) is to say to a party: "You're going to lose this case!" (In that instance, the party left the mediation and went on in court to win the case).

As a facilitative mediator and former litigator myself, it is disappointing that litigation lawyers, judges and former-judges-turned-mediators still regard mediation as aimed merely at settlement, ignoring possible opportunities to achieve interests-based Pareto-optimal outcomes.

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