12-2011

Judges mediate and do other things – Whether we like it or not

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Nadja Alexander (Editor) (Singapore International Dispute Resolution Academy)/December 9, 2011

In his blog post on the 22nd of November, Kenny Aina referred to judges who mediate, commenting that many judges do not possess a mediator's paradigm. To find out what that is, you will have to read Kenny's blog. However, like it or not, many judges do mediate, both retired judges and active judges. In this blog, I am going to write about active judges, that is judges who are still on the bench, who mediate or engage in some type of mediative intervention. This is a relevant consideration for legal representatives who may find themselves in court before a judge who wants to mediate their case. But first, some background to the developing field of judicial dispute resolution or JDR.

Contemporary interest in judicial mediation is part of a wider development of civil and judicial reform characterised by an increase in judicial control over civil trials in both common law and civil law jurisdictions. According to the legal comparativist, Cappelletti (1989), judges from diverse legal traditions continue to be entrusted with more discretion and creativity in judicial decision-making as law, economics and politics become harder to distinguish from each other and new areas of law continue to emerge.

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.

There is a view, largely but not exclusively found in the civil law world, that judges make suitable mediators due to their experience in the traditional judicial settlement role – a role embedded in many civil law jurisdictions. This perspective has significantly shaped legal and cultural attitudes in favour of judicial mediation in numerous civil law jurisdictions and some courts in common law jurisdictions.

In common law jurisdictions, there are signs of interest in judicial mediation within some courts in countries such as the United States, Australia, New Zealand and the common law Canadian provinces. Some judicial codes of conduct expressly recognise the role of judge as mediator. In addition, access to justice initiatives in

common law countries have paved the way for innovations in case management such as hot-tubbing in which expert witnesses present their evidence concurrently and are subject to questions from one another and from the judge (also called concurrent evidence).

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 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'.

So if you are a representing a client in court and your judge suggests that they or a judicial colleague mediate, make sure you are clear about which model of JDR is proposed and that it meets your client's procedural interests. Usually a variety of judicial process options will be available. Good lawyers know that negotiating the right process goes a long way towards achieving a **successful outcome** for their clients.