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Introduction

The mandating of Mediation, with or without judicial intervention, puts proponents of judicial efficiency against advocates of integrity, impartiality and justice. In Ontario. mediation is a process which is required under Rules 24.1 and 75.1 of the *Rules of Civil Procedure*[1]. This mandate, known colloquially as Mandatory mediation was mandated by the legislature in Toronto and Ottawa on January 4th, 1999, and in Windsor on December 31st, 2002.[2] While certain civil actions are excluded from mandatory mediation[3], most civil actions in these jurisdictions are subject to the provisions which require that the parties attend before a mediator, in a genuine attempt to settle the matter which is the subject of the action. The mediation is conducted by a private-sector mediator, who may be appointed from a roster of mediators, or selected by the parties. If the parties cannot agree on a mediator, then one will be appointed for them and they will attend. The parties are required to obtain consent of each other if there is any reason to postpone the mediation, otherwise the mediator must be selected within 180 days and the mediation must occur sometime after that[4]. If the parties do not show up, or cause inherent hardships for not participating, then the matter can be referred by the local mediation coordinator and then a Case-Management Master or Judge will deal with the issue[5].

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[1] *Rules of Civil Procedure,* RRO 1990, Reg 194
[2] Ontario Ministry of the Attorney General, "Public Information Notice – Ontario Mandatory Mediation Program" online: <https://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/notice.php>
[3] *Ibid.*
[4] *Supra* Note 1.
[5] *Ibid.*

The purpose behind mandatory mediation is to require every party to genuinely engage in settlement conversations before engaging on a path towards trial, which can continue to accrue unneeded costs and potential hardship.

Ontario also has a small claims court, which hears matters under $25,000.00[6]. This court requires that after pleadings have been exchanged, parties attend at a settlement conference which is similar to mandatory mediation: the only difference being that it is held in a court boardroom, and that a deputy-judge whom does not hear the action, presides as the mediator. Interestingly, some of Ontario's tribunals, do not require mediation but offer it as an option for parties interested in settling matters: landlord and tenant board for instance, will make facilities available for parties if they are interested in attempting to resolve issues without submitting to a formal process.

The benefits of mediation have been very well established, and while parties are not always familiar with them as part of a mediation, they will likely recognize the goals, and the benefits. Mediated settlements are often kept under seal, with portions of the final settlement achieving goals which are not able to be reached through litigation. Additionally, the costs of mediating a settlement are must cheaper and less time consuming then the costs of a full trial or summary judgment motion. And while each party will feel as if they have given up something, most likely, neither party will believe they have fully lost.

But what are the benefits of mandatory mediation. Litigation is often a warlike atmosphere: it is adversarial in nature, and parties who have lawyers often spend money to have an actor on their

[6] *Rules of Small Claims Court, Courts of Justice Act,* Ontario Regulation 258/98

side to protect their interests at all costs. Parties often harbour emotional distain for the opposing parties, feeling as if they have been drawn into the action by an event or issue which they are not at fault in. These types of issues are the reasoning behind parties refusing to settle, or to voluntarily enter mediation. But how successful is mandatory mediation. If the parties resent each other, to a point where they are unwilling to even meet in the same room, then does forcing them to speak with a mediator really bring them any closer to a resolution. Conversely, parties who have distain for each other are no less likely to come to a settlement, if they aren't even placed in the same room with a party who has no ultimate benefit in the action. There are multiple benefits and drawbacks to mandatory mediation. Further, and a matter which is just as vital and perhaps more important, is the role of the judiciary in mediations: whether Judges should act as both mediators and trial judges. This paper will examine whether it is ultimately beneficial to continue both processes.

Voluntary Mediation

Voluntary Mediation is the process whereby two parties enter mediation with or without counsel, to try to have their differences resolved through mediation and a third-party mediator aids them to reach a settlement. Voluntary mediation is governed on consent by all the parties, and the jurisdiction is from any statue or issue[7]. There is no requirement for time-tabling, or the process to occur within a certain time frame (180 days, see Rule 24.01), or for the parties to supply documentations etc. Fees and roles may also be kept to a minimum through this process.[8]

[7] Gary Smith, "Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not." *Osgoode Hall Law Journal* 36.4 (1998): 847-885
[8] *Ibid.*

Ultimately, the most important feature of voluntary mediation is that the parties have resolved to attempt to settle the matter. They are not inclined to leave a matter and simply subsume to litigation. In community based mediation, voluntary mediation is the most likely choice as neighbours and other interested parties often want a resolution which does not negatively effect future relationship, of other parties involved. Also, these conflicts are usually over small amounts, and parties cannot afford to commence legal actions.

In litigation, voluntary mediation is effective because it is not time based. It is not conducted to facilitate the next step of the litigation process. Ultimately, parties can choose to enter mediation on the eve of trial, or even mid-trial, to attempt to resolve issues quicker and less costly. Parties choose the mediator, and are not assigned one at random if they do not do it within a specific time frame.

Mandatory Mediation

Mandatory Mediation is the process where mediation is required. Usually, this is integrated through either Court rules, such as in Ontario[9] and California[10] (and other jurisdictions as well), or through contractual terms which mandate that parties attempt mediation and other forms of Alternative Dispute Resolution ('ADR') before proceedings to litigate a matter. By way of background, Ontario integrated mediation in 1994 into the litigation system due to complaints regarding access to justice[11]. Originally a pilot project, the project grew to become mandatory in

[9] *Supra* Note 1

[10] *California Civil Procedure § 1775.2; Ca Rules of Court Rule 3.870*

[11] *Supra Note 7, Infra Note 13*

Toronto and Ottawa, and then in Windsor. This process mandated mediation in the early stages of litigation, within a period following the close of pleadings, and in any event before being set down for trial. It only allowed litigation to proceed once the parties had completed a genuine attempt to mediate their issues. The objectives of the program were, "to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice."[12] In summary, the objective was to enhance the use of judicial resources, and economically, to be able to reduce the amount of litigation that proceeds too far without resolution.

Contractually, many drafters of contracts believe it be essential that contracts contain ADR clauses to deal with issues at the onset. Collective Bargaining Agreements often contain clauses which mandate that employees and union individuals address issues through mediation before ever proceeding to litigation. Some allow for litigation after mediation has failed, others mandate that the process proceed to arbitration which is binding. In most cases mediation is an early step to deal with problems, before litigation may have begun.

Mediation – History

In 2004, the Toronto Region was appointed a new Regional Senior Justice (W. Winkler). This Justice inherited a system with backlogs of case, insufficient judges, overworked Masters, and no additional government funding. At that time, he issued a practise direction shortly thereafter

[12] *Supra* Note 1, and *Infra* Note 13 and 14

suspending Case Management and Mandatory Mediation rules to begin a review of the process. This changed the period for mediation to, "at the earliest stage in the proceeding at which it is likely to be effective, and in any event, no later than 90 days after action is set down for trial by any party."[13] now, the Mandatory Meditation requirement had already been in place for 5 years. One of the major issues at the time was the effect of the timing of mediation. While the effect of this review has now led to the current state of the mediation system. The Ontario Rules of Civil Procedure require mediation to occur before the setting down for trial, if there is not an Order in place.

Mandatory Mediation – The Necessity Factor

Most litigation lawyers believe that mediation is, "an unwelcome, but invited, guest at the banquet table."[14] It is quite oxymoronic to force parties to mediate, which contradicts the central theme and goal of the mediation process. Mediation addresses many of the parties' needs and goals, but integrates a step which is necessary for the litigation process to continue. It forces the parties, who have at times have not seen each other in months or years, if at all, to come face to face with the issues and to hear from a non-interested third party regarding the possibility of success and failure.

[13] Paul Jacobs, Q.C., C. Med., C. Arb, "A Recent Comparative History of Mandatory Mediation vs. Voluntary Mediation in Ontario, Canada" (April 2005) International Bar Association Mediation Newsletter.
[14] Colleen M. Hanycz, "Through the Looking Glass: Mediators Conceptions of Philosophy, Process and Power" (2005) 42 Alta. L. Rev. 819

Before parties enter drawn out litigation procedures, it is practical to attempt to find a solution. Jerry McHale, Assistant Deputy Minister for the Canadian National ADR section states:

"*When clients go to a lawyer with a problem, they want the problem solved, not litigated. Lawyers tend to think in terms of treating cases as if they're going to trial, even though they know chances are the cases will settle before trial. So mandatory mediation encourages lawyers to treat disputes in more problem-solving ways.*"[15]

While mandatory mediation is arguably still voluntary, as parties who do reach settlements are entering them at their own choice, and any resolution is based on their say-so, there are voluntary mediation programs in other jurisdiction which lack the teeth to force individuals to attempt settlement.

The problem with mandatory mediation is that parties will often be advised by a lawyer as to their bottom line, and the lawyer always has the option to leave the mediation if they cannot reach an accurate settlement. Often time mediation works at its best if both parties understand that if the mediation fails, that there are drastic implications for both parties in the event of failure.

There is a Judge in Toronto who is well known for not allowing procedures to continue unless they have settled. She will lock the doors, and force the parties to reach a settlement. Understandably, this can take hours to complete. Her skills are typically reserved for actions

[15] *Ibid, cited in Infra Note 31*

which contain sensitive information which one party or both parties do not wish to be entered the Court file and made public[16].

The writer has not had experience with this Judge, but another case which has some similar merit. A matter before the Commercial List Court of the Superior Court of Justice in which the writer represented the Plaintiffs[17]. It was an oppression remedy case, which had been ongoing for approximately three (3) years with no end in sight. Motion after motion had been brought and the Judge hearing the matter brought both counsel into his chambers and stated that the matter was, "ridiculous." The last motion that was before him was to strike pleadings, and a counter-motion to appoint a receiver. The Judge plainly said to both parties I have the power to dismiss this action in its entirely, or to appoint the receiver, but in any event both parties will suffer as the ownership stake in the company which was subject to the oppression case will still exist. The Judge Ordered that the matter proceed to mediation, by him, and he plainly stated to the parties that if they did not appear prepared, ready to settle, that he would consider the options for the other party. While the concept of mediation is that a third party who has no stake, or power, and who will not hear the case, is involved with the settlement of the case, this instruction by the Judge was quite outside of normality. However, it is also interesting to note that the force of the Judge, together with the instructions and understanding of experienced counsel who recognized that both parties were spinning their wheels, forced the parties to genuinely look to a solution and one was reached. This action had settlement offers made earlier by both parties, but it was

[16] While I can find no articles, which speak to this Judge, her name is Justice G. Spiegel, and I have spoken to multiple lawyers who have been subject to her sessions and can testify as to the choice to be before her.
[17] *Wallerstein v. 2161375 Ontario Inc.* (2012) Toronto 12-CL-9839-00CL (Superior Court - Commercial List)

only once a Judge with adequate power to dismiss the action and to explain to both parties the ramifications of their actions did they see the light, and accept settlement.

This begs the question, is this voluntary mediation, or is this mandatory mediation. And further, is it beyond the scope of true mediation to the point where there are ethical considerations. As there was no proof that the Judge may have taken the actions he said he would, it can be only be accepted for that.

A Judge as a Mediator

Traditional mediation theory has held that a Judge who is hearing a matter should not also be the mediator of that same action. As previously mentioned, in the Ontario Courts this is typically the case in which a Master or another Judge will attend at a pre-trial conference (a soft of quasi-settlement conference), and a Deputy Judge who will not hear the matter will be present for Small Claims Court settlement conference. All mandatory mediation under the Ontario Rules of Civil Procedure occur with trained mediators who are not in themselves sitting judges.

While Judges sitting in mediation may create conflicts, it may also create situations where the parties can genuinely understand the issues at hand, and gain a glimpse into the way the decision maker may decide should the process continue. In an article from the Lawyers Weekly, in Australia, two Australian Barristers, Steve Lancken and Ashna Taneja, argue that the risks of having Judges mediate actions outweigh the rewards. They argue that the risks are[18]:

[18] The Lawyers Weekly, "Judging Mediation: Should Judges be appointed as mediators?" (11 December 2012), online: http://www.lawyersweekly.com.au/opinion/11179-judging-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
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.

While the benefits of judicial mediation are

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.”

While the risks that are mentioned (outside of #3) are all just as applicable in Ontario, it is interesting to note that the benefits are quite high. The first two (2) benefits are the same as any other mediation. The third benefit is irrelevant or in the very least negligible. But the forth benefit is very interesting and noteworthy. [19]

It is this writer's opinion that number four (4) is very important to note as Judges have a large amount of sway, not only on the direction of the action but on the perception of litigants. When engaging in mandatory mediation, parties often meet the mediator for the first time. They are told that the mediator is a trained mediator, with skills designed to mediate actions and to attempt to reach amicable settlements. Mediators can at times be retired judges, lawyers, master, or simply individuals who have skills that guide them towards become a mediator. When the parties meet the mediator, they give them some form of respect (hopefully), but they also understand that they are there for a purpose, and if that purpose cannot be achieved then they do not have to go anywhere. In addition, they understand that the mediator does not have an active role in the action, and their opinions are only worth so much.

In mandatory mediation, so called 'roster mediators' are mediators who have enrolled on a roster which allows litigants can choose or be assigned a mediator to satisfy the litigation requirements. Often (although not always), these mediators may not be as experienced or skilled in achieving the goals that are being sought. They are on the roster due to any number of factors, and are not viewed by lawyers as being the most highly sought after mediators.

[19] Cited with Approval in *Infra Note 25*

In her blog, the director of Conflict Coaching International (CCI), Nadja Alexander, discusses the Role of the Woolf and Jackson Reports in England. These specific reports made the case for the courts to play a more active role in encouraging mediation and other forms of ADR. She proceeds to site four (4) models of judicial dispute resolution which have been generally accepted in the common-law and civil-law contexts:

"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."[20]

In countries that do not have an ethical bar to Judges participating in the mediation before the trial, it can very beneficial to the parties to have a true indicator of the case before hand. In an article written by United States District Judge, Dan Aaron Polster, his honour specifically stated that Judges are the only parties who can, "provide the party with a true "day in court" that is far more participatory and satisfying than a trial ever could be. The actors in a trial are the attorneys. The parties themselves are spectators, except for the brief time on the witness stand."[21] While this is inherently a conflict that some critics of this theory will state, it is a benefit that judges with an inherent desire to facilitate prompt settlement and avoid further litigation can do. A Judge can help parties reach a fair resolution of their dispute at a small fraction of the time, costs,

[20] Nadja Alexander, "Judges Mediate and do other things- whether we like it or not" (December 9, 2011) Conflict Coaching International (CCI) blog: <http://kluwermediationblog.com/2011/12/09/judges-mediate-and-do-other-things-whether-we-like-it-or-not/>
[21] Dan Aaron Polster, "The Judge as Mediator: A Rejoinder to Judge Cratsley" (March 2007) Mediate.com <http://www.mediate.com/articles/polsterD1.cfm>

and emotional toll that full litigation will incur. Justice Polster is speaking directly regarding cases which involved juries, as in the United States several civil cases involve juries. In Canada, among many other common-law jurisdictions, this is an extreme rarity. While Justice Polster further proposes that there is a difference between so called bench-trial and jury trials, the author proposes that the concepts and ideologies are the same and that there truly is no difference.[22]

Often parties do not hear the utmost truth from their lawyers in terms of the actual costs of litigation. Pleadings, motions, discoveries, undertaking and trial preparation with or without complications can costs well into the tens of thousands. While lawyers do tell their clients this (and likely have it written into their retainer agreements), they do not repeatedly emphasise this is an effort to settle. A mediator may repeat this to a litigant, but whether they listen will depend on the litigant. Litigants often believe that the mediator is not trying to act in their best interest, but rather attempting to simply settle a matter at whatever the cost is.

Judges carry a prestige which all litigants recognize, whether they are sophisticated or not. They understand that a Judge is bound to do what they believe is strictly right, and they won't skirt the boundaries in a simple effort to settle[23]. Further, litigants will respect what a Judge says over and above any other party. The benefits of Judges being involved with mediation to avoid further litigation is not questionable: but what is questionable is whether they should continue in the matter if the matter fails to be resolved.[24]

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[22] *Ibid.*
[23] *Ibid.*
[24] Otis L., and E. Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice",(2006) 6:3 Pepp. Disp. Resol. L.J. 351.

His Honour PA Smith, member of the Land Court of Queensland, Australia, explains that the rules of Land Court of Queensland allow for a Judge to complete a mediation, but that if the matter does not settle, that the Judge may only continue as the trial judge if the parties consent[25]. He further elaborates in his paper, that this is not typically the case, but that the Land Court may assign the matter to another mediator or Judge, and that the Judge may recuse him or herself as well if they feel conflicted. [26]

The key threshold, and one that is vital to any settlement, is the consent of both parties[27]. If there is a pre-trial in a matter (which is the case in all Ontario litigation) and the parties are given the option of having the trial Judge mediate the matter, this can only be done after all parties understand the process, and the potential risk and rewards that can occur in using the trial Judge as the Judge who will mediate the matter. It is likewise important for the trial Judge to explain to the parties that during the mediation he will act as a mediator, and that matters said within the mediation are without prejudice. Further, that the Judge will not make evaluative decisions within the mediation. That he will not have reviewed the evidence, nor will he have heard from witnesses, reviewed expert reports or heard formulaic submissions from counsel. He will simply, at maximum, hear brief opening submissions from counsel, review brief mediation briefs, and then speak directly with the parties regarding settlement.

There are certainly many other good reasons why the Trial Judge is efficient, and having another Judicial officer hear the case is not. Any preparation for a case takes time and effort: the more

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[25] Justice PA Smith, *Should Judges Mediate? A paper presented to the Centre for International Legal Studies Mediation Conference Salzburg, Austria, 2015*
[26] *Ibid.*
[27] *Supra Note 21*

complex, the more time.[28] Generally, lawyers and parties appreciate that the person they are speaking too is more prepared. They will certainly have more credibility if they are prepared and understand both sides of the argument. They will also have an easier time discussing flaws and issues with each party. Additionally, a Judge can familiarize themselves with the area of law that the case is regarding. If it is one that they are familiar with, then this is an added benefit for the parties.[29] The benefits from this mediation carry forward to the trial. If the matter is unable to be settled then the Judge who had already prepared himself in detail, can try the case having full knowledge of the issues and the law. The Judge will also have the practical knowledge of the issues and the timeline for the trial of the case. He will be able to asses the length of evidence, submissions etc. Certain issues can also be solved in part, if the whole action cannot be settled.

The concern that the Judge could not parse out the 'without prejudice' portion of the matter is easily overcome. Judges are lawyers: trained professionals with years of experience in the profession. They are also at the top of their field in most cases: as they had to apply to become a Judge, and depending on the Jurisdiction, there was some type of evaluative process before they were called to the bench. Lawyers are experts at deciding what is relevant and what is not. Judges will use this ability to set aside matters which are not relevant to the trial at hand, and to come to a fair conclusion; should it be necessary. For clarity purposes, this paper and the author is not suggesting that the trial judges should break in the middle of the trial to attempt to settle matters. While many of the same concepts would be acceptable, it is inherently difficult to ask the trier of fact to simply pause their brain in the middle of the trial, and to attempt to mediate,

[28] *Ibid.*
[29] *Ibid*, and Note 14

and then to revert to trier of fact. Additionally, the parties would simply be to confused and the added benefit would be harmed if the matter was unable to settle.

Public Interest

Finally, another issue which arises in Judges acting as mediators is the public interest. Is it truly in the public interest for members of the Judiciary to be acting as mediators, when there are procedures for Mandatory mediation and there are scarce resources for Judges to rule on legal matters. While this paper does not address the actual lack of resources that the government has committed to the Judiciary, the question of whether judges should be spending their time on matters involving mediations, is an important one. Civil actions fall below criminal actions for their effect on individual's liberties, and meditations, which require time and effort which is not as predictable as a courtroom, and cannot be scheduled to the same effect, have similar consequences. It is only in courts that have flexibility (such as the Commercial List in Toronto) where Judge have the flexibility to change their schedules or allocate further time to a matter based on the need. Further, acting Judges do not receive remuneration for a mediation, as they are paid by the government. Therefore, the tax payers are effectively paying for a civil action mediation which had mediators readily available, and for which Judges could be reassigned for matters which require judicial intervention. While mediation, and a negotiated settlement, may lead to better use of judicial resources in the long term, the costs in the short term only lead to an increase. The cost of litigation, mainly pleadings, discovery, mandatory mediation, motions are generally covered by individuals involved with the litigation. But in the short term, Judges

being used for mediation causes Judicial resources to be expended, and for the public to pay for mediation in a Civil context.

Voluntary Mediation, Mandatory Mediation and Judges as Triers of Fact

If a Judge is a mediator, is it mandatory mediation, or is voluntary mediation. Many proponents of the mandatory mediation program in Ontario, specifically, would state that the success of the program is based on placing parties in an environment where they have little to no choice in addressing the issues, and ultimately facing the question of whether the choices that are being placed in front of them are worth continuing with litigation, or whether they should simply settle the matter and continue.[30] Voluntary mediation isn't that much different from this, only so far as that the parties have entered the mediation at their own choice. They have chosen to engage a mediator, and to meet with the mediator to attempt to resolve the issues at hand: No rule in litigation or clause in a contract has forced them to do so.

When a Judge is involved, this author would argue that it is a mix between the two. The parties have been ushered into the litigation system in some way: either through defending a claim, or initiating a claim. Typically, the matter has progressed through the litigation sphere and depending on the jurisdiction, has ended up in front of a Judge for some type of review. The Judge at that point, has decided to offer his services to mediate the matter externally to his role at that time, in some capacity. Its important to note that the Judge has more then likely given the parties the option of saying no to this proceeding. If either party strenuously objects to a mediation occurring by way the Judge, or the same Judge who will be the trier of fact, it is very

[30] *Supra Note 7.*

unlikely that any Judge would require that the parties attend before him for a mediation on penalty of contempt etc.

This type of mediation only works if the parties want to reach a resolution. The fact that a Judge is involved emphasises the importance of the matter to the parties, but the nature of the actual proceeding is voluntary in nature. They must participate, be engaging, and try to reach an amicable solution that is beneficial to both parties.

Certainly, many judges have advocated against the mixed use of the bench as mediators. There have been views expressed that judges acting as mediators is a contradiction in terms. That Judges are given their titles and are entrusted to judge, to apply law and evaluate the merit of claims, and to make final orders which deal with matters. While this may be true, it is also true that Judges are officers of the Court and if, on the consent of the parties involved, they believe that it is in the best interests of all parties that they mediate an action to reach a conclusion without expanding mass monies and other resources, that this needs to be respected and honoured. Judges should be given the deference to make this decision, and not questioned. There is no value lost in having sitting Judges exercise principles of ADR, especially mediation, before succeeding to evaluate a case based on its merit.[31] The decisions are separate and should be simple enough for most Judge with experience to complete. The risk does not outweigh the benefit as the benefit, in the long term, would decrease the overloaded Justice system and reduce delays if implemented as an option for all cases.

[31] The Honourable Marilyn Warren AC*, Should Judges Be Mediators?,* (2010) 21 ADRJ 77

Dangers in Mandatory Mediation

Mandatory mediation in Ontario does not apply to family proceedings. This is because of the risk of concerns over family dynamics and potential power imbalances that can cause one party to have undue influence over another. By way of comparison, the California mandatory mediation program does apply to family situations, and has been harshly criticized for its application to domestic violence.[32] This program requires mandatory mediation within 60 days of a petition being filed. While there are some settlements in this program, this is an inherent risk in the California program. Since its introduction, California has enacted ways for each party to be protected: namely, the mediator has the discretion to exclude parties, or to have mediation sessions one on one.[33] The risk in this program is that the violence is not identified, or that the mediator is not able to under the risk fast enough.

In Ontario, mediation in family proceedings is a voluntary procedure which is still often used to keep the parties out of a litigious atmosphere, and to keep the interests of children in the forefront[34]. In a voluntary mediation setting, the parties have volunteered to attempt to settle their differences by entering the mediation, and the rules are flexible: time of mediation, who must appear, how long, who mediates etc.

[32] Jennifer Winestone, "Mandatory Mediation: A Comparative Review of How Legislatures in California and Ontario are Mandating the Peacemaking Process In Their Adversarial Systems" (February 2015) Mediate.com <http://www.mediate.com/articles/WinestoneJ4.cfm#_ftnref>

[33] California Family Code Section § 6303

[34] *Supra* Note 1.

Conclusion

This author's review of the subject-matter has led to a conclusion that mandatory mediation is a good and vibrant part of the litigation system which facilitates settlement in the face of litigious parties. Of course, most academics and lawyers are familiar with the statistic that approximately 90% of cases settle. But they are not familiar with how these settlements are facilitated. While it is more beneficial to engage in voluntary mediation from both parties, this is not always possible. In the face of adversarial litigants, who intend on proving that they are correct and will not let anyone change their mind, a Judge is certainly an officer of the Court who can provide that uncanny guidance that acts beyond the mediator to push the litigants that much further.

The author's personal experience led to one case of this nature, in which the most fervent and non-inclined litigant to settle individual, half way through a trial in which every key piece of evidence was against him, only listened to a Judge explaining to him that the case was going to end up against him to enter settlement negotiations.[35] While it is easy for each litigant to believe their correct, it is much more difficult for a person to look in the mirror and to overcome blind spots in their own cases which they may not have seen. While a lawyer's job is to support his client, and opposing counsels job to support his client, it is the mediators job to bring the two

[35] *Di Florio v. Di Sano* (2011) Toronto CV-11-435614 (Superior Court)

together in a way that will lead to a settlement in which neither party is happy. Often this is not possible when the mediators power is without any bite to it.

Another of the author's personal experiences was in a recent mediation in which, after multiple offers were exchanged, the Plaintiff simply left. While this seems an odd way to participate, it suggests that the Plaintiff was not genuinely engaged in settlement, and did not believe that there was anything else for him to gain by being present. This may be a failure of the system, or of the mediator, for not achieving the goal that she was trying to achieve. While the goal is always reaching a settlement, a secondary goal would be for each party to come to the table with intent on providing a middle ground, and providing each party with knowledge of their actual interests so that at some point there might be some more fruitful negotiations. If one party simply leaves the negotiation shortly after it has begun, then how can the other party be left with anything by a sour taste in their mouth for both the party, the mediator, and the prospects of successful reaching a mediated solution.

The benefit of inject judicial authority into a mediation of this sorts is that a person is very unlikely to simply leave a mediation when a Judge is present. If anything, the person would ensure that their attempt and influence to settle is conveyed to the Judge so that the Judge is not left with a sour taste for that party, should the Judge try the case further along. The success or failure of mediation is ultimately dictated by the parties: they will decide if it is successful based on how much they are willing to give and take. But a mediator who pushes and pulls a little here and there may be able to help to settle a matter, much more so then a mediator who simply asks for positions and refuses to move.

While family mediations may not be mandatory in Ontario, they can still be of assistance to negotiate and effectively settle matters. Of course, if a Judge was involved, then any question as to a power imbalance would be put to rest due to the Judges involvement, in addition to lawyers. Ultimately, a Judges involvement in the settlement procedure is quite important. Whether the Judge is the trier of fact will depend on the failure of the mediation, and whether consent has been granted by the parties. The success rate will certainly improve if this is the case, and it is the best way to ensure a possible settled outcome.

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