WHY JUDGES SHOULD NOT MEET PRIVately WITH PARTIES IN MEDIATION BUT SHOULD BE INVOLVED IN SETTLEMENT CONFERENCE WORK

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Why Judges Should Not Meet Privately with Parties in Mediation but Should Be Involved in Settlement Conference Work

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ABSTRACT

Judges support settlement discussions in civil disputes in many parts of the world. This is an important feature of judicial work in many jurisdictions. Sometimes the processes are called ‘mediation’ and involve judges meeting privately with one party in the absence of another. This paper considers the use of private meetings as part of a judicial process and concludes that the use of private meetings can damage the judicial institution and the integrity of the courts. Whilst judges can play an important role in settlement conferences, this work should not include private meetings and such processes should not be defined as mediation but should properly be referred to as judicial or settlement conferences.

Keywords: Judge, mediation, settlement conferences, negotiation, caucus

RÉSUMÉ

Les juges en charge des discussions de règlement dans les litiges civils dans de nombreuses parties du monde. C'est une caractéristique importante du travail judiciaire dans de nombreuses juridictions. Parfois, les processus sont appelés « médiation » et impliquent des juges réunis en privé avec une partie en l'absence d'un autre. Cet article examine l'utilisation des réunions privées dans le cadre d'une procédure judiciaire et conclut que l'utilisation de réunions privées peut endommager l'institution judiciaire et l'intégrité des tribunaux. Alors que les juges peuvent
jouer un rôle important dans les conférences de règlement, ce travail ne doit pas inclure des réunions privées et ces processus ne doivent pas être définis comme la médiation, mais devraient néanmoins être dénommés conférences judiciaires ou de règlement.

Mots-clés : Le juge, la médiation, les conférences de règlement, la négociation, le caucus
INTRODUCTION

The changing role of judges in respect of the settlement, rather than the adjudication, of disputes, and the introduction of judicial conferencing processes, have been prompted in part by a desire to support more effective dispute resolution within our society. Adjudication can be costly, time consuming and may not meet the interests of those in dispute. Judges may be well placed to make strategic interventions that are directed at the resolution of disputes. However, where judges meet privately with parties and their lawyers, in the absence of others, and outside the court room there are significant issues about how this may impact on the role of a judge, perceptions of justice and the potential for justice to be served. These issues can be more pronounced in some jurisdictions and cultures.

There are a range of matters that are relevant in the context of this changing role. First, increasingly processes where judges assist to facilitate discussion are referred to as ‘mediation.’ This ‘catch all’ definition and framing has become increasingly problematic as mediation has become professionalised and is now undertaken by both lawyers and non lawyers. Mediators who operate around the world are often very well trained, bound by standards and ethics and may (as is the case in Australia) be required to deal with and refer complaints from consumers where the mediation process that is used does not meet expectations. In some places the definition of mediation is fairly sophisticated and does not include any advice giving. Where advice is given by the mediator or some form of evaluation takes place, the term ‘conciliation’ or ‘evaluative mediation’ is used to describe the process. Where judges are involved in settlement processes, these definitional variations may not be well understood and consumers of mediation may be involved in a process led by a judge that does not meet legislative and other definitional requirements. It is suggested that at the very least a clear and distinct nomenclature should be adopted to describe the various processes that are used by judges.1 This is explored further below.

1. Although some commentators have suggested that it is not possible to construct a concise definition of mediation, there have been increasing attempts to do so through
Second, there are particular issues where Judges meet privately with one participant in the absence of another. Judges may not have the support system, temperament, training or understanding to deal with mediation processes that often involve private meetings. Private meetings or caucus (in the absence of one party to the dispute) raise both ethical and practical issues for mediators. At a broad level, the development of protocols relating to assessment and screening, standards in relation to disputant power imbalance as well as obligations and requirements in respect of the style of disputant and representative engagement, have primarily been directed at supporting the referral to mediation processes outside the court system. This means that judicial mediation, particularly where caucus or private meetings are a part of the mediation, may not be supported by systemic arrangements and may leave judges and disputants exposed to an environment that may be unfair or even unsafe.

There are other issues with judges conducting mediation or ‘mediation like’ processes that have been articulated elsewhere and are explored in some detail in this paper. One view is that public confidence in the integrity and impartiality of the courts may be reduced by judicial involvement in mediation rather than settlement discussions, particularly if parties are permitted to meet with the judge separately (see discussion below), a procedure that may occur in United States and Canadian courts as well as other countries. Judicial mediation when it involves

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4. For example, Japan.