

FOCUS

ON

Civil Litigation

The judicial mediation debate

Ontario Bar Association forms taskforce

Ask any group of lawyers, judges or private mediators whether judges should be directly involved in mediating civil disputes and you will ignite fierce debate.

The Chief Justice of Ontario in a recent article described judicial mediation in Ontario as existing in a state of suspended animation, neither formally sanctioned nor precluded (W.K. Winkler, "Some reflections on judicial mediation: Reality or fantasy?" *The Advocates' Journal*, Dec. 2010, 3-5.). He called on the legal profession to debate the issue and help chart the future role of judicial mediation within the dispute resolution options available in the province.

The Ontario Bar Association (OBA) has taken up the issue by forming a Judicial Mediation Taskforce, the aim of which is to:

- Develop a comprehensive understanding of the current judicial mediation landscape;
- Determine whether, and if so how, judicial mediation could improve access to justice and enhance the reputation of the administration of justice; and
- Make appropriate recommendations to the relevant policy makers to further those goals.

Clarifying status of judicial mediation in Ontario

Judicial mediation is practised across Ontario, from the "fireside chat" in chambers in Brockville, to the redoubtable but effective second or third "pre-trial" in Toronto. Yet, the practice is not formally governed by the *Rules of Civil Procedure*



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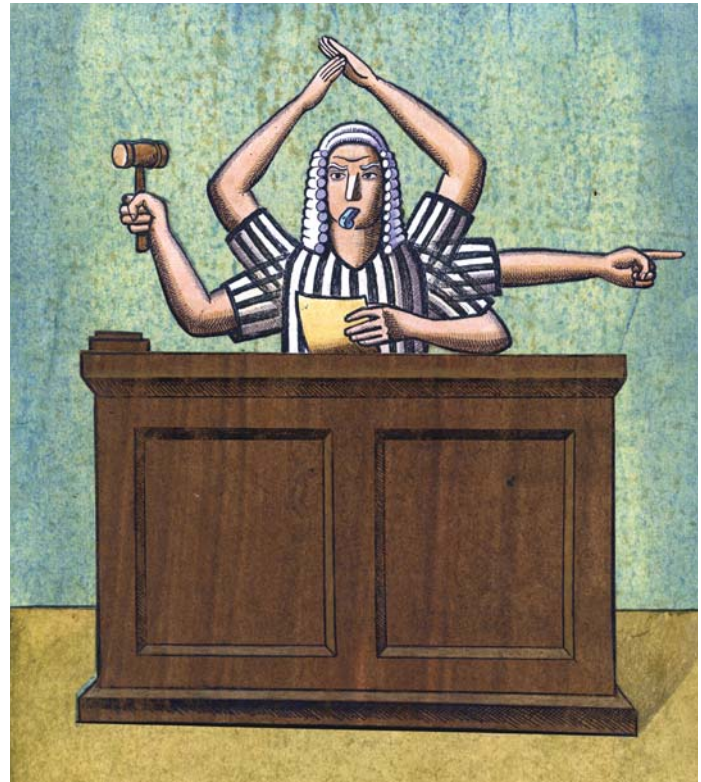
and no guidelines exist as to how and when it is to be conducted.

This unofficial status means, among other things:

- There is no formal way for parties to request judicial mediation. It is sporadically offered, usually on the eve of trial, after substantial preparation costs are incurred;
- The legal profession is uncertain as to what ethical rules apply in a judicial mediation and whether these differ from the rules in a private mediation; and
- There is no formal information on the effectiveness of judicial mediation, with the result that it is difficult to set resourcing and funding priorities.

Most importantly, there is the issue of whether or not a more formalised approach to judicial mediation is in the public interest.

These are only some of the concerns that the taskforce will consider. It will also review how other provinces integrate judicial mediation into their systems.



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Variations across Canada

While many provinces formally recognize the role of the judiciary in settling disputes, there is wide variation in the mandate and directions given.

B.C.'s settlement conference rules, for example, direct the judge or master to "explore all possibilities of settlement of the issues that are outstanding." Quebec's settlement conference judges are to "facilitate dialogue between the parties and help them to identify their interests, assess their positions, negotiate and explore mutually satisfactory solutions." Judges in Alberta are mandated to "actively facilitate" a process in which the parties agree to resolve all or part of a claim.

Provincial rules also vary in terms of whether the judicial dispute resolution process is entirely voluntary. In Quebec, parties must consent even where a judge "suggests" a settlement conference. B.C. courts, on the other hand, can order parties to attend any dispute resolution process.

Some provinces have rules that are very detailed. Quebec goes as far as to specify that settlement conferences are to be conducted "without formality." B.C.'s settlement conference rules are comparatively Spartan leaving the parties themselves to agree on the process subject to the judge's overriding discretion.

While no province requires the judiciary to use mediation techniques in their dispute resolution activities, some provinces encourage an "interest" based as opposed to "rights" or "position" based approach. In Quebec, legal rights are downplayed to such a point that lawyers

are excluded from the process unless invited by their clients to attend and no written materials are submitted. In stark contrast, Nova Scotia's rules keep settlement conferences very much in the rights based arena. The stated purpose is to allow the parties to "request a judge to express opinions on the issues in dispute...." The parties are even given the option of having a trial-like settlement conference in which witnesses are called.

Each province's procedure undoubtedly owes something to its own legal culture and history. It is doubtful whether any of the existing regimes could be transplanted directly into Ontario. Most notably, there can be no proper discussion of the topic without considering the private mediation bar in Ontario that exists to a much greater extent than in other provinces and must remain a vital part of the dispute resolution options.

The OBA Taskforce aims to facilitate dialogue on this complex issue. As part of its consultation and fact-finding mandate, the OBA will host a policy day later this year to hear various perspectives and experiences. Information on the taskforce and policy day is available on the OBA website.

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✉ We want to hear from you!
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