



Judges as Mediators: Retaining Neutrality and Avoiding the Trap of Social Engineering

By

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*Reprinted from
(2007) 73 Arbitration 24–30*

*Sweet & Maxwell Limited
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)*

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by STEVEN A. CERTILMAN¹

1. INTRODUCTION

As the field of alternative dispute resolution (ADR) continues to experience dramatic growth, jurisdictions have begun to adopt specific rules governing the conduct of ADR practitioners and, specifically, mediators. Mediation increasingly plays a role ancillary to adjudicative proceedings and, in their efforts to thin court dockets, judges often remove their robes and don the cap of mediator. While some jurisdictions have begun to regulate laymen and attorneys providing mediation services, regulations rarely provide guidelines specifically applicable to judges serving as mediators. Perhaps this should change.

In common law countries as well as elsewhere, judges are the respected possessors of centuries of jurisprudential wisdom and the gatekeepers of justice. It is therefore often assumed that their dispute resolution skills are as broad as one hopes they are deep. Ironically, judges in mediation proceedings often have difficulty setting aside their broad powers and judicial demeanour and mustering diplomatic skills and powers of persuasion in service of the goal of eliciting compromise. While this is particularly true of sitting judges, retired judges are similarly affected: old habits die hard. As many of the world's top mediation panels are stocked with retired judges, this is a concern that reaches deep into the heart of mainstream mediation.

One particularly vivid example of the complexities that arise when judges act as mediators is *Travelers Casualty and Surety Co v The Superior Court of Los Angeles County*,² (“*Travelers*”), which serves as both a recent example and a cautionary illustration of the challenges judges may face when serving in the dual roles of judge and mediator.

2. BACKGROUND

Travelers involved a mass action civil action known as the “Clergy Cases I”, which asserted claims of more than 300 alleged victims of childhood sexual abuse against four of the Roman Catholic dioceses in California (“the diocese”).³ The case was a high profile, highly charged litigation, a hot potato which the court clearly and reasonably hoped would be resolved prior to trial. In an effort to facilitate its disposition, the Los Angeles County Superior Court appointed Judge Peter D. Lichtman as the settlement judge.⁴ The mediation commenced and, as the discussions unfolded, the difficulty in placing a valuation on the injuries alleged presented itself as a significant impediment to successful mediation. This obstacle, not uncommon in mediations taking place early in the litigation process and particularly in personal injury and other subjectively evaluated claims, could easily have proved an insurmountable barrier to resolution. Undeterred, Judge Lichtman ordered the parties and their respective insurers to:

¹ The author gratefully acknowledges the assistance of Aleksandr Y. Troyb, third-year law student at Pace University School of Law and Articles Editor for the *Pace Law Review*, in the preparation of this commentary.

² 24 Cal. Rptr. 3d 751 (Cal. Ct. App. 2005), available at: <http://caselaw.lp.findlaw.com>.

³ At p.754.

⁴ *ibid.*

“participate in a ‘valuation hearing’ after which the court would ‘render findings reflecting its determination of (i) the verdict potential for the sexual abuses cases if they were to proceed [to a jury trial], and (ii) the reasonable settlement value of such cases’.”⁵

The insurers first presented their objections to the hearing order and valuation process to Judge Lichtman, who turned them aside. Two intermediate appeals concerning the judge’s order resulted in directions to revise the order. The valuation hearing was eventually held and the subject appeal followed.

3. THE ATTEMPTED VALUATION ORDER

In anticipation of the valuation hearing, Judge Lichtman:

“ordered the parties to submit briefs and present live testimony and other evidence relating to the value of these and other sexual abuse cases during a two-day hearing.”⁶

The court’s stated goal of the hearing was to:

“determine and advise the parties, based on an independent adjudicatory proceeding, [of] (i) the nature and extent of the injuries suffered by the various claimants, (ii) the probability that the [Church’s] liability will be established, and (iii) the potential for damages—by verdict or settlement, resulting from any liability.”⁷

It appears, however, that fact-finding was not the only goal of the valuation hearing. The diocese was insured by Travelers, as its primary insurer, and other carriers as excess insurers (collectively the insurers). Under various policies of insurance, the diocese claimed it had the rights of defence and indemnity for the alleged wrongdoing. The insurers had not conceded that their policies provided coverage for the claims and made every effort to keep their options open. They refused to participate in any settlement negotiations⁸ and only agreed to participate in the defence subject to a reservation of rights whereby they retained the option of withdrawing the defence and denying coverage of the plaintiffs’ claims.⁹ As a result, Judge Lichtman believed that the “the insurers had effectively thwarted any settlement because the Church feared that reaching a settlement without the insurers’ participation and without a proper adjudication” would result in a forfeiture of their coverage.¹⁰

As a way to avoid this roadblock, Judge Lichtman ordered the valuation hearing. The California Court of Appeal noted that Judge Lichtman:

“felt that this method was authorised by his inherent powers to fashion new procedures and was warranted by the parties’ inability to reach a settlement.”¹¹

Judge Lichtman recognised that a valuation hearing would not only establish the likely value of the cases (in order to facilitate settlement negotiations), but it would also allow the defendant to use the valuation order as the basis for a proceeding alleging insurer bad faith (discussed below) should the insurers choose to withdraw and disclaim liability as a result of an adverse judgment.

⁵ *ibid.*

⁶ At p.755.

⁷ *ibid.*

⁸ At p.760.

⁹ At p.754

¹⁰ At p.760.

¹¹ At p.754.

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The second intended purpose of the valuation hearing stemmed from the actions of the insurers in connection with their possible withdrawal. Specifically, by having the valuation hearing conform to certain specific requirements, Judge Lichtman intended to give recourse to the plaintiffs if the insurers chose to exercise their option of withdrawing or later refusing to indemnify the defendant in the event of an adverse judgment.¹²

The Appellate Court observed that one of the dual purposes of the valuation hearing was to enable the defendant to use the valuation order issued by Judge Lichtman in a possible subsequent bad faith proceeding.¹³ California courts have imposed a requirement upon insurers to act in good faith when dealing with their insureds.¹⁴ Thus, the bad faith proceeding is a common law action against an insurer alleging bad faith in the breach of the duty imposed upon California insurers to “defend and indemnify covered claims”.¹⁵ An insured who believes that its insurer has intentionally stalled or refused to participate in settlement negotiations may bring a bad faith action against the insurer. An insurer may be exposed to liability for the entire amount of the damages proximately caused by the breach, even if they exceed the policy limits.¹⁶

In the context of this case, the order requiring the Clergy Cases I insurers to participate in the valuation hearings was designed to place the insurers on the horns of a dilemma: either participate in the settlement process and give up their possible defences to liability, or face the possibility of a bad faith action in which a major element of the case, the issue of settlement value, was documented with issue preclusive effect, courtesy of the court, via the valuation hearing. The dilemma of the insurers was, of course, a very powerful weapon to the diocese. The net effect of the valuation hearing order was a material alteration of the rights, obligations and risks among the parties and a shifting of the balance in favour of the diocese.

4. THE APPEAL

After the court issued the order setting down the valuation hearing, Travelers first objected to the judge, who overruled the objection. This resulted in a first appeal to the Court of Appeal. The judge was directed to remove portions of his order which, because they had adjudicative effect, exceeded the powers granted in the order appointing him as settlement judge. Judge Lichtman modified his order, and the scope of his modifications was challenged in a second appeal. After further direction from the Court of Appeal, Judge Lichtman then conducted the two-day valuation hearing. Despite attending the hearing and having been invited to participate, however, counsel for the insurers chose not to introduce any evidence or examine any of the parties’ witnesses.¹⁷ At the conclusion of the hearing Judge Lichtman issued a formal valuation order, a substantial portion of which was:

“devoted to Judge Lichtman’s belief that the insurers had stymied all attempts at settling the cases through their threat of coverage forfeiture should the Church settle in an amount that had not been properly adjudicated.”¹⁸

The instant appeal resulted.

¹² At pp.749–59.

¹³ At p.760.

¹⁴ See also *Comunale v Traders & Gen. Ins. Co.*, 328 P.2d 198 (Cal. 1958).

¹⁵ *Hamilton v Md. Cas. Co.*, 41 P.3d 128, 132 (Cal. 2002).

¹⁶ *Hamilton* at p.132; see also *PPG Indus., Inc. v Transamerica Ins. Co.*, 975 P.2d 652 (Cal. 1999).

¹⁷ *Travelers*, 24 Cal. Rptr. 3d at 756.

¹⁸ *ibid.*

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Upon review of the record, the Court of Appeal held that “Judge Lichtman had no authority to adjudicate any aspect of the case, conduct an actual trial or render any binding findings” in his role as a mediator.¹⁹ It held that:

“Judge Lichtman exceeded his authority . . . [and] anticipatorily adjudicated certain legal issues that were not properly before him. The net effect was to render the mediation process coercive, at least as to the insurers.”²⁰

The Court of Appeal reasoned that²¹:

“The net effect of . . . [the valuation hearing and subsequent order] was twofold: First they purported to cut off the insurers’ rights to declare a coverage forfeiture in the event of an unauthorised settlement; second they dangled over the insurer’s heads the threat of a bad faith action that was already fortified with the weight of a judge’s findings. This left the insurers backed into a corner where the easiest way out would be to withdraw their reservation of rights and pay money to settle the cases.”

Thus, even if the settlement court believed that the insurers were acting in bad faith:

“preventing or punishing such conduct is not the job of a mediator. Instead, it is best left resolved by insurer and insured through an action for bad faith.”²²

In effectively forcing the insurers to participate in the valuation hearing and subsequently binding them with the subsequent valuation order, Judge Lichtman violated the principle of “self-determination” and effectively coerced the insurer to participate in the mediation.²³ In doing so, he abandoned his “designated role as a neutral facilitator without decision making authority”.²⁴

The Court of Appeal thoroughly reviewed the role of mediators and the mediation process and observed that self-determination is at the heart of any mediation proceeding.²⁵

“Self-determination enhances commitment to the settlement terms because parties make decisions themselves instead of having a resolution imposed upon them by an authoritative third party.”²⁶

The California Rules of Court reaffirm this idea of “self-determination” by stating that²⁷:

“a mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. For this purpose a mediator must . . . (b) Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and, (c) Refrain from coercing any party to make a decision or to continue to participate in the meditation.”

¹⁹ *ibid.*

²⁰ At p.760.

²¹ *ibid.*

²² At p.761.

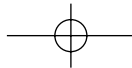
²³ *ibid.*

²⁴ *ibid.*

²⁵ P.A. Kenra, “Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct” (1997) *Brigham Young ULR* 715 at p.718.

²⁶ *ibid.*

²⁷ Cal. Rules of Ct.R. 1620.3 (2006).



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The appellate court faulted judge Lichtman not for holding a valuation proceeding but for characterising his valuations as “findings” and, by implication, attempting to make them binding. It also concluded that the judge should not have taken a position concerning whether the insurers’ conduct was in bad faith. For these reasons, inter alia, the Court of Appeal vacated Judge Lichtman’s valuation order and ordered it sealed. In doing so, the court avoided criticism of Judge Lichtman and graciously omitted to observe such clear and dramatic concerns as how a judge came to so exceed his authority that he persisted in issuing orders that needed to be thrice reversed, how such excess became a burden to the judicial system and its appellate court and how the judge’s lack of objectivity created excessive uncertainty and expense for the parties. All of this while wearing kid gloves to avoid further embarrassing the judge. In short, Judge Lichtman became the issue, not the alleged behaviour of the priests!

5. ROLE OF JUDGE AS MEDIATOR

One wonders why Judge Lichtman did not simply refer the case to an arbitrator or other non-judicial neutral for a non-binding, early neutral evaluation. Such a process would have been a fine example of benefits achieved when branches of the ADR community work together, and it could have yielded the same result without the prejudicial effect on the insurers. Perhaps that, itself, is why.

Also surprising is that Judge Lichtman adhered so firmly to his devised procedures. It seems as though he chose to narrowly construe the appellate court’s orders on two separate occasions, with the result being that after the valuation hearing was conducted and findings were issued the case was again returned to the Court of Appeal for review. The judge’s attachment to the process he developed seems to have benefited from less than the full dispassionate consideration we might have expected.

Did Judge Lichtman’s creative solution to a mediation roadblock promote the administration of justice? It would appear not. This case illustrates why some might question whether a sitting judge can ever be sufficiently detached from the process to effectively act as a neutral facilitator between the parties.²⁸ Due in part to the nature of their everyday role as adjudicators and their connections with other aspects of the judicial process, it is often difficult for sitting judges to create an internal firewall insulating themselves from the powers and tools of the judicial process.²⁹ Part of the difficulty stems from the clear reality that “mediation and adjudication require very different skills”.³⁰ For instance³¹:

“Judges are used to being in charge and making decisions according to set rules and established precedent. By contrast, mediators need to be good listeners and to be open to a broad range of possible solutions, with a view to helping the parties to arrive at an acceptable, custom-made settlement of their case.”

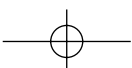
The skills and demeanour of mediators are often at opposite ends of a continuum from those of judges. Where a judge is decisive, a mediator must be diplomatic. Where a judge must control the courtroom, a mediator reads the prevailing winds and attempts to steer the rudder. Where a judge speaks from a position of authority, a mediator offers suggestions which are often best made with a touch of humility. For mediators, unlike judges, expressing an opinion on the merits is a card played late in the game, if at all. Mediators can ill afford

²⁸ J. C. Cratsley, “Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet”, *Dispute Resolution Magazine*, summer 2006, p.17.

²⁹ *ibid.*

³⁰ F. E. A. Sander, “A Friendly Amendment”, *Dispute Resolution Magazine*, autumn 1999, pp.11 & 22.

³¹ Cratsley, p.17.



the potentially show-stopping risk of alienating the party whose merits are held in lesser regard.

In spite of the differences between the disciplines, most believe that given appropriate training sitting judges can be successful as mediators.³² Of pivotal importance in determining whether a judge has successfully walked the fine line between mediation and adjudication is whether the judge recognises, consciously and continually, that the mediation process is one of self-determination. This can be especially difficult for sitting judges, often because they are not aware of the influence that their position will subtly exert upon the parties, if not their counsel. While in office this aura is a necessary part of the judicial mystique. Upon retirement, it tends to remain, like a lingering tan, colouring the process and exerting a sub-conscious effect on the behaviour, views, reactions and bargaining positions of the participants.

6. CONCLUSION

Consideration of *Travelers* may lead many to conclude that Judge Lichtman was attempting to reach outside the confines of his mediator role in an attempt to reach a right and expeditious result. One must conclude with regret, however, that in doing so, he unwittingly undermined the mediation process by overlooking perhaps the most fundamental characteristic of mediation—self-determination for the parties. His process, with its quasi-adjudicative valuation hearing and its indirect yet intended coercive effect on the insurers, served as a form of social engineering. In a mediation forum, where self-determination rules, this is not a workable approach. Would it even have been possible for a mediator who was not a judge to have developed this approach? Not with the same coercive effect. It would appear to be of concern to judge-mediators alone.

How, we may ask, can such concerns be averted? Many mediators would support greater use of private or court-annexed mediation by professional mediators. Indeed, opportunities abound for volunteer mediators and some courts engage independent mediators and provide for their payment.³³ Nevertheless, court-annexed mediation and private mediation services remain under-utilised as their benefits are not well appreciated by the public and the litigation bar.

For courts which will continue to use their judges as mediators, the question becomes: what can be done to ensure that sitting judges keep self-determination on the front page of their playbook and avoid the allure of social engineering? Clearly, training is the cornerstone of any system which utilises judges as mediators. While many judges have had some training in the field, “experience tells us that a far larger number will not have had any formal ADR training”.³⁴ Such training must be no less comprehensive than that given non-judges; judicial training and experience offer little overlap with the fundamentals taught in comprehensive training courses for effective mediation. Additionally, and complicating matters, mediator training programs for judges have the additional task of raising awareness of the non-adjudicative nature of the process and training judges to temporarily suspend their judicial demeanour and approaches while serving as mediators. In essence, judges must learn how to identify which of their judicial skills must be deactivated and stored away while their mediator hat is on.

For organisations empanelling mediators such as the American Arbitration Association, the International Institute for Conflict Prevention and Resolution and JAMS in the United States, which eagerly seek to attract retired judges to their panels for the prestige, experience and

³² *ibid.*

³³ For some examples of mediators paid by government see, e.g. USDC, Middle District of Florida, available at www.flmd.uscourts.gov; Ohio, available at www.sconet.state.oh.us; and Maryland, available at www.courts.state.md.us.

³⁴ Cratsley, p.17.



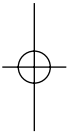
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presumed abilities, the challenge will be twofold: to develop training specifically for retired judges which will bring out the best the judicial experience has to offer while checking at the door its incidental baggage, and to obtain party feedback after the proceedings have concluded (as they should in cases mediated by non-judges) to be cognizant of undesired reactions to individual mediator style.


Jurisdictions should also begin to adopt clear guidelines for judges acting as mediators. A good example of one such guideline is the proposed Rule 2.08 to the ABA Model Code of Judicial Conduct which deals with the right of the parties to be heard. In it, judges are cautioned not to use coercion in encouraging parties and their lawyers to settle disputes where possible. Comment 2 provides that during the course of the dispute, a judge should keep in mind the³⁵:

“effect that the judge’s participation in settlement discussions may have, not only on the judge’s own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts fail. Among the factors that a judge should consider when deciding on an appropriate settlement practice for a particular case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions; (2) the relative sophistication of the parties and their counsel; (3) whether the case will be tried by judge or jury; and (4) whether the parties themselves or only their counsel will be involved in settlement discussions.”

By continually reassessing their role in a mediation proceeding, judges may be able to avoid the pitfalls that often plague sitting judges in ADR roles.



Finally, when it comes to the appeal of reaching outside the prescribed ADR roles in order to achieve the expeditious or equitable solution—which in *Travelers* meant preventing the insurers from stonewalling the settlement proceedings—judges would do well to remember that in mediation, unlike litigation, you can lead a horse to water but you can’t make it drink. Judges can use the wisdom they gain as a potent tool to create and define settlement options. However, if they respect the mediation process, they must not use the weight of their office to drive parties to settlement. To do so is to risk undermining the credibility of that process, which relies at its core on the premise that parties who negotiate an agreement to resolve their differences will accept that agreement with less regret and more equanimity.



³⁵ ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, *AJS Comments on Final Draft Report* (March 2006), available at www.ajs.org (last visited September 26, 2006).