Introduction
After two decades of ongoing integration of “alternative dispute resolution” in court systems some conclusions can be drawn from experience and research. Answers to the questions of “How will mediation affect lawyers and courts?” and “Will mediation change by being institutionalized?” are becoming increasingly clear.

A meta-analysis of some of the large body of research into these questions leads me to suggest the following:

1. Court connected mediation is successful, if success is measured by the proportion of cases that settle at, or as a result of, these mediation sessions (Wissler 2004).

2. Court annexed mediation does not save litigants significant time or cost. This is apparent from the lack of persuasive evidence for such benefits despite numerous studies investigating the subject (Wissler 2004).

3. All parties connected with court related mediation (lawyers, litigants, judges and court officials) are generally quite satisfied with it (Dunworth and Kakalik 1994; Wissler 2004).

4. Most mediation conducted under the auspices of courts is evaluative in style and rights based (Welsh 2001; Macfarlane 2002; Brooker and Lavers 2005; Riskin and Welsh 2008). Della Noce (2009) and Charkoudian and colleagues (2009) have documented evaluative behavior by mediators. Wall and Chan-Serafin (2009) explored the dynamics of mediation in civil cases and described some of the techniques mediators use to coax and cajole parties into settlement. Wissler (2002) found that different types of evaluative behavior by mediators led to varying positive and negative reactions in participants. Poitras, Stimec and Roberge (2010) suggested that the presence of lawyers might contribute to evaluative styles being adopted by mediators in litigated cases. The research by McAdoo and Hinshaw found that most lawyers want mediators to evaluate their cases (McAdoo and Hinshaw 2002, 530).

These conclusions are to some extent contradictory. For instance, it is reasonable to think that the level of satisfaction of litigants would be adversely affected by the failure to reduce time or cost. Similarly, lawyers who believe that one of the advantages of mediation is to promote litigants’ underlying or relational interests would be expected to be unhappy with the type of mediation that is occurring. Finally, it seems that the success rate is at best only a partial indicator of the worth of court related
mediation because it doesn’t include a sophisticated calculation of the economic variables of time and cost.

My view is that these contradictions can be explained at least in part if one takes these further findings into account:

1. Most court connected mediation occurs late in the litigation process, at a time when historical data suggest most cases would settle without this intervention. Without control group experimentation settlement as a measure of success is largely meaningless.

2. The reason most often given for late settlement is the need to complete discovery first. If, as the law and economics scholars suggest, settlement occurs because of uncertainty, then it seems the discovery process contributes to uncertainty rather than making the probable outcome more predictable. One reason for this is the lack of a normative theory of precedent (but see Brewer 1996) and the enormous store of reported precedents that are now easily obtainable. The more information that is obtained about a case the more easily it might be distinguished or analogized to existing precedent because there is no generally accepted limit to the level of detail that is relevant to argument by analogy. If this is so then lawyers’, and lawyer mediators’, claims to professional expertise in predicting what judges will decide are not justified (see McEwen 1991). Lawyers also have an economic interest in extended and exhaustive procedures that contribute significantly to the cost of litigation (Winter 1992; Macey 1994). McAdoo and Hinshaw reported that engaging in mediation did not decrease the amount of discovery or pre-trial preparation for almost two thirds of their respondents (McAdoo and Hinshaw 2002, 516).

3. Time and cost are not reduced because of the foregoing factors (Genn et al 2007, 67, 69) A study by Genn and colleagues also noted an increase in administrative time spent on cases as a result of court based processes (Genn et al 2007, 66).

4. Settlement outcomes are primarily monetary without “creative” components (McEwen and Maiman 1981, 253; Welsh 2001; Brooker and Lavers 2005; Genn et al 2007, 63; Riskin and Welsh 2008). In one study 77% of respondents reported that litigation settlements arrived at through mediation never or rarely included non-monetary elements (McAdoo and Hinshaw 2002, 521).

5. Despite all of the above most participants (lawyers and their clients) are satisfied with the experience (Riskin and Welsh 2008).

6. The success rate (case settled without further litigation) is generally high.

7. If lawyers are satisfied with the process it must not be affecting their practices adversely. If litigants are satisfied perhaps many have nothing else to compare it with. Courts are satisfied if their trial lists are reduced, especially before trial dates are set and then have to be cancelled due to late settlement.

8. Litigation is about disputes based on legally justified claims and defences. It was probably an unrealistic hope that litigants and their lawyers could be encouraged to abandon competitive
behaviour for a problem solving approach, especially in the later stages of lawsuits (see Goldfien and Robbenolt 2007). Welsh concludes that many litigants welcome the application of legal norms in settlement processes provided their procedural justice needs are met (Welsh 2001b, 847-848).

These suggestions are supported by the findings of a recent study of judicial dispute resolution in Canada which will be discussed next. After that I will propose a new approach to civil procedure drawing on the experience and research into ADR in the courts. The conclusion will explore some of the unresolved issues in such a new model that need more thought.

**Judicial Dispute Resolution**

The traditional judicial role was that of a “potted plant”, passively observing the jousting of counsel. That role changed significantly during the twentieth century into one of “managerial judging” which includes interest and involvement in the settlement of litigation before trial. The courts of some jurisdictions such as California and Canada have embraced involvement in settlement efforts. Judges there not only encourage, but preside over, settlement conferences.

The Court of Queen’s Bench of Alberta Canada, a superior trial court, is one of the leaders in judicial activism regarding settlement of litigation. Since 1996 the Court has operated a program called “judicial dispute resolution” (JDR) that originated with the judges themselves. Judges are available on a roster to undertake settlement intervention that ranges from conducting mini-trials to acting as mediators (although some members of the court prefer not to use that term). In some cases judges are prepared to offer opinions on cases that the parties may accept as binding. The program is voluntary and all counsel in a case must agree to use it (Court of Queen’s Bench, 2004).

One of the judges of that court, Justice (now Associate Chief Justice) John Rooke conducted a survey of 606 matters that went through JDR in 2007 (Rooke 2009). The results of that research support the conclusions I have reached above in the following ways:

- JDR in Alberta was customarily conducted only before a case is ready for trial, although it may be requested earlier; in Rooke’s survey about 74% of the JDRs did not proceed until the parties had completed discoveries (corresponding to depositions in the United States), had hired experts, and were ready for trial (Rooke 2009, 199)

- Litigating parties and their lawyers were satisfied with the process; they would use JDR again, and would recommend it to others; Rooke found that 85% of lawyers had positive or very positive views about their experience of JDR and 94% of them would likely or definitely recommend it to others or use it again; the corresponding figures for clients were 84% and 93% (Rooke 2009, 628, 713). However, the dangers of using reported satisfaction as a measure of the value of dispute resolution have long been noted (see Tyler 1989). This is a particularly salient concern where parties are “one shotters”.

- Written materials relating to the litigation are filed with the JDR judge before conferencing including briefs, summaries of evidence, witness statements, agreed statements of facts, and
key documents; the extent of this written preparation is in the discretion of individual judges
(Court of Queen’s Bench 2004, 17; Agrios and Agrios 2004, 14-15)

• The success rate is high; 88% of the lawyers in Rooke’s survey reported that the JDR was
successful in ending the litigation immediately or after the conference (Rooke 2009, 614)

• The largest group of parties in Alberta JDR are those with personal injuries (“one-shotters”) who
likely have little other experience with litigation; Rooke found that the majority of cases (65-69%)
involving claims for personal injuries, 83-86% of which arose out of motor vehicle
accidents; family litigation amounted to up to 20% of the cases (Rooke 2009, 156)

• Most participants desired, and received, an opinion about the strength of their cases; in the
Rooke survey only 36% of lawyers reported that their JDR did not involve any sort of opinion
being given by the judge; 66% stated that judge engaged in evaluative mediation (Rooke 2009,
605); 68% of lawyers and 63% of clients indicated that getting a judicial opinion was one of their
motives for going to JDR (Rooke 2009, 606, 704)

• Rooke calculates the judicial time saved by comparing the expected length of trials to the time
spent on JDR in those cases; he finds a significant saving in time and cost (Rooke 2009, 212-213).
However, he also acknowledges the problem of accounting for those cases which might have
settled without any judicial intervention.

The probability that many of the cases in the JDR survey would have settled without
intervention is supported by research of Genn and colleagues who found that lawyers in
personal injury matters regularly refused court annexed mediation in England because they
believed their cases would settle without it (Genn et al 2007, 83). That English study also
concluded that the parties’ motivation to settle seemed to be one of the strong indicators of
success in mediation. Given that both parties must consent to Alberta JDR this is another reason
to think that they might have settled without it. Other English research on mediations
connected to the Technology and Construction Court asked the question “What would have
happened had the mediation not taken place?” Seventy two per cent of respondents answered
“Would have settled at later stage.” (Gould, King, and Britton 2010, 52) In most Alberta JDRs this
would have been in the short time remaining before trial. Avoiding settlements on the “court
house steps” through late stage mediation or JDR clearly benefits court administrators who
schedule trials and judges, but may have an insignificant effect on the time and cost to litigants.

The findings of this research echo those of other studies of court connected programs. They reveal a
system of court assisted settlement that meets the needs of lawyers to engage in negotiation without
suggesting it, at a convenient time for them, and with the help of an authority figure to bring their
clients down to earth in their expectations. But it also paints a picture of a process that is accepted by
litigants because it seems fair to them. It is a good substitute for their “day in court”.

My conclusion is that settlement processes that provide a voice for parties to be heard and an
authoritative independent assessment of their claims have a place in our legal system. But it is not the
vision that early ADR proponents had in mind. Some (including some judges) insist that it should not be called mediation, and perhaps they are right. However, terminology should not prevent us from acknowledging the value of a process.

Experience to date with court annexed settlement processes such as JDR leads me to suggest that it should be extended and improved. Doing so may be a way to reconcile the tension between the ADR movement and the litigation system. What we need is a new model of civil procedure.

A New Model of Procedure
Let us draw on two foundational thoughts in the modern history of ADR: first, Frank Sander’s vision of a “multi-door courthouse”, and second, Owen Fiss’s view of the social value of adjudication (Fiss 1984). The multi-door courthouse is now perhaps better called the “multi-room courthouse”, acknowledging that ADR happens within it only after a dispute is almost fully processed as litigation. Fiss’s worry that adjudication would disappear is now known as the problem of the “vanishing trial”, and remains a concern for many.

These insights, together with research on the integration of ADR in the courts, lead to the following conclusions:

1. Settlement processes which provide procedural justice to litigants are valued by them and are therefore likely to be considered legitimate (Brazil and Smith 1999; Welsh 2001; Hensler 2002)

2. Experience with administrative law processes and settlement processes within courts shows that public perceptions of procedural justice do not depend on participating in trials (Reuben 1997; Sabatino 1998)

3. The courts have two primary functional roles: resolving disputes between parties according to law; and symbolizing, enunciating (and occasionally developing) widely shared social values

4. Lawyers will adapt to alternatives to litigation in ways that have the least impact on their routine practices and income; Elliott (1986) is the not the only one to note the perverse incentives that traditional litigation procedure gives lawyers, and some litigants

5. People who dispute according to law should not be expected to set law aside when it comes to settlement

First, let’s take Fiss very seriously and ensure that disputes which matter to society culminate in public trials. Second, let’s make Sander’s dream a reality and resolve most private disputes economically and expeditiously. The best way to do both is to establish two paths for all litigation – one reserved for traditional litigation, and the other dedicated to dispute resolution without the excesses of full blown procedure.

The path of adjudication should be reserved for cases in which there is a substantial public interest – not merely a prurient fascination, but a genuine desire to see and know the law in action. In order to select these cases a hearing should be held soon after pleadings are closed in which a judge will make a ruling.
as to which path the case should follow. In the public interest all cases sent to adjudication should be eligible for legal aid, if necessary, and settlement of them should be subject to the approval of the court. Elaboration of the public interest requirement will take time and thought but the starting point could be cases with a constitutional element.

The other path might be called “judicial determination” and should be modelled on our experience with the hybrid process of mediation followed by arbitration if necessary. Such an approach can be seen as an extension of judges’ increasing involvement in managing and settling cases since the mid twentieth century (Holland 1977; Resnik 1982; Galanter 1985; Menkel-Meadow 1985; Galanter 1986; Rosenberg 1986; Alfini 1986; Macfarlane 2008, 232). Experiences with judicial dispute resolution such as conducted in Alberta are a model for this path if they were made mandatory, early in litigation, and with limits on discovery (if any).

Procedural justice research provides the necessary elements to ensure that the public considers this path legitimate. Relis, as reported in Riskin and Welsh (2008, 895), found that plaintiffs and defendant doctors in medical malpractice cases believed that they both should attend and actively participate in court connected mediation. Rooke (2009, 428) and others (Lynch and Levine 1988; Note 1990; Agrios and Agrios 2004; Otis and Reiter 2006) have suggested procedural guidelines for judicially supervised settlement processes which include party participation. The writer of a Note in the Harvard Law Review suggests that “the basic norms of fairness ... must inform ADR procedures if they are to withstand constitutional scrutiny” (Note 2000, 1871).

A judge’s experience and authority is the guarantee that a binding decision, if necessary in the proposed process, is according to law. Parry notes the importance of “independence, credibility, knowledge and experience” possessed by quasi-judicial tribunal members who conduct “facilitative dispute resolution” in the State Administrative Tribunal of Western Australia (Parry 2010, 115). Schuck explains how a judge’s reputation for fairness can have a beneficial effect on settlement when the judge provides input on “deal-breaker” issues (Schuck 1986, 357). Menkel-Meadow suggests that judge led negotiations may result in fewer “nuisance value” settlements (Menkel-Medow 1985, 501) and Killefer is of the view that judicial involvement may offset “distributional inequalities” in bargaining (and see Otis and Reiter 2006). Posner suggests that a summary bench trial (similar to judicial determination as proposed here) may be a device for facilitating settlement taking into account the incentives of all parties involved (Posner 1986, 374).

If effective, such a model of appropriate procedure may well lead to more trials (of the right kind) and more lawsuits in total as the cost of litigation decreases in the expedited procedure. The requirement of a public interest component in cases proceeding to trial answers the concern that “cutting edge” cases may be sidelined by settlement (see Ingleby 1993). Indeed, court approval of proposed settlements in adjudication track cases might be required, similarly to class actions. We may well need more judges, and lawyers should be busy. The results of summary judicial determinations could be made publicly available as guidance for others in settling cases in the same way as Lande (2006) suggests that settlements could be publicized. A win-win solution for all?
Issues with the proposed procedure

In many jurisdictions constitutional issues may arise if litigants are not allowed to proceed to trial, at least in theory. The United States District Court for the Northern District of California has been a leader in experimenting with court intervention in the settlement process (Rosenberg and Folberg 1994). However, Certilman (2007) discusses the problems a California judge faced in trying to effect binding decisions without trial in the case of Travelers Casualty and Surety Co. v. The Superior Court of Los Angeles County, 24 Cal. Rptr. 3d 751.

In Alberta, attempts to provide binding JDR have been stymied by a decision of the Court of Appeal despite research that indicates many lawyers and their clients would welcome it (Rooke 2007, 115-116, 412). Galanter and Cahill (1994) cite several studies reporting that lawyers approve of judicial intervention and “judicial mediation”. However, they go on to question whether settlement is always fair. The prospects for fairness in settlement would seem to be increased by the participation of a judge with the power to make a final determination. Provided the public is convinced that the expedited settlement and judicial determination procedure is just and fair these legal obstacles should not be insurmountable, but will need addressing (see Reuben 1997). I believe that the supposed yearning for trial is a myth. Rooke comes to this conclusion also as a result of the JDR survey results (Rooke 2007, 314) This aspect of the proposed new model will be contentious and requires wide debate.

Macey (1994) suggests that judges may be faulted for self-interest in devising rules and procedures that lighten their trial load or which weed out “boring” cases. Alexander (1994) doubts this. Under the proposal advanced in this paper judges would not be able to pick and choose the cases they wished to try because of the public interest test for advancing to trial.

Would the “shadow of the law” become increasingly faint and unreliable as a guide to action? This is not likely if the cases proceeding to trial truly had wide social significance. Business people negotiate around legal rules, if it is in their interests to do so, and settle cases without regard to the legal merits of their positions (Alexander 1991). So long as commercial laws are certain it is not necessary that they be continuously reviewed by the courts. Indeed, some critics point to the downsides of doing so (Boardman 2006). If cases involving “unsettled questions of law of widespread importance” in Sabatino’s words (Sabatino 1998, 1340) continued to be tried then the shadow of the law would not lose its strength.

Judicial dispute resolution and determination would also avoid the danger of court annexed mediation becoming “second class justice” for the poor and disadvantaged as described by Hermann (1990). Access to the panoply of traditional litigation, including a public trial, would not be automatic for the rich and powerful. Public support for litigation that should go to trial would ensure that those cases are not sidelined for lack of resources, and judicial supervision of settlements in such cases would prevent unfair bargaining (see Elliott 1986, 326). In adopting the proposed procedure we would indeed be saying, in Resnik’s words, that “we no longer offer trial-as-of-right to any litigant who so desires and who has the resources and stamina to insist upon one” (Resnik 1986, 550). But the procedure suggested here also does not treat trials as “a ‘failure’ of the legal system” as Hensler puts it (Hensler 2002, 96).
Some critics worry that judges’ involvement in settlement attempts makes it ethically dubious for them to continue with cases in a decision making role (Gabriel 1988; Alfini 1991; Cratsley 2006; Killefer 2009). Brunet (2002) notes that Federal judges in the United States are not prohibited from mediating and then trying the same case. Apart from the specific requirements of canons of judicial ethics, this criticism repeats a major argument against “med-arb” processes in general. Two responses can be given: first, parties would be able to tailor their settlement discussions with full knowledge of the possible consequences of disclosure to a judge, especially if they were to engage in deception or misrepresentation; second, judges are trained to compartmentalize their thought processes such that they, of all people, should be best able to come to a just legal decision, if required, without being affected by legally irrelevant information disclosed during settlement talks (but see Sander 1999). Robinson (2006) discusses reforms to judicial ethics that would empower judges to mediate in cases they will decide.

The proposed procedure would not prevent parties to litigation from engaging in private mediation outside the court. Such an option might always be offered before judicial intervention. Thus, the potential transformational benefits of mediation envisaged by Baruch Bush (1989) need not be overlooked or sacrificed. Indeed, a clear distinction between an evaluative approach to mediation conducted by judges, and different styles used by private mediators might be in everyone’s interests.

Conclusion

In the end, this paper is against trial only for those cases in which full blown litigation and the threat of adjudication is wasteful of society’s resources because it is without widespread social benefit.

Choosing cases that should be tried requires a sound and accepted test for selection. Some cases would be easy – constitutional matters for instance, but many will be less clear. We would have to put our faith in the judiciary to choose wisely. Debate over which issues require public scrutiny of evidence and argument may be beneficial, but it will not be easy. Debate over which disputes should be publicly aired will replace argument over which matters are suitable for mediation (see Lieberman and Henry 1986).

And what will become of mediation of the facilitative, interest-based type? Perhaps honesty about the style of processes to be found in the courts will bring renewed attention to different types offered by the private sector. But some in the ADR movement may not be prepared to abandon litigants to evaluative and directive processes – this also will be a debate to engage in.

Based on the evidence of the past twenty years, I believe these are debates we should have - for the benefit of the rule of law and also of dispute resolution.

References


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