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**A HANDBOOK  
on  
JUDICIAL DISPUTE RESOLUTION  
for CANADIAN LAWYERS**

**Justice John A. Agrios  
A Judge of the  
Court of Queen's Bench of Alberta**

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# **A Handbook on Judicial Dispute Resolution for Canadian Lawyers**

## **Preface**

This is the third version of a handbook on Judicial Dispute Resolution that I have written. The first version, in November 2001, was for an Education seminar for judges of the Court of Queen's Bench of Alberta. It has been revised more than half a dozen times as new ideas have developed and judges have suggested additions. It has been used as part of the material for the National Judicial Institute's twice yearly seminar on settlements for judges and can be downloaded by Canadian judges on Judicom, the Canadian judges private site.

The second version was prepared at the suggestion of Professor Trevor Farow of the Faculty of Law at the University of Alberta. It has been used for JDR lectures at the U of A and contains a commentary from Professor Farow. The third version is for lawyers and is, of course, entitled a Handbook on Judicial Dispute Resolution for Canadian Lawyers.

I had a blinding flash one day that this work might be of some benefit to the practitioners in this field particularly as I had received phone calls from Toronto law firms asking where they could obtain the Handbook for Judges (the judges' version has been favourably accepted by some judges of the Superior Court of Ontario). I said they could not have the judges' version and I sent them the students' version. I write this version of the handbook to assist lawyers who practice in this field. It includes many of the procedures and ideas that our judges have learned from experience, both good and bad. It also raises some of the ongoing problems and, hopefully, it will be of some help to the legal profession.

In order to give this version some balance, I enlisted the assistance of one of the brightest lawyers who articulated to the Court about fifteen years ago. She is Janice Agrios, a partner in the Edmonton office of Miller Thomson, and as you have guessed, my niece. She has added the insights of a practicing lawyer who has handled innumerable JDR's in our Court. She has assisted me in taking out the more egregious comments of the Court of Appeal and similarly any scurrilous comments about lawyers that were intended only for the eyes of judges. There are some exceptions for the usual nepotism rule. Thank you Janice.

## **INTRODUCTION**

### **Background**

The Court of Queen's Bench in Alberta has been engaged for over ten years in what we have uniquely named "Judicial Dispute Resolution" (JDR). A culture has been

created in Alberta amongst many of the litigation bar and many judges that sees considerable advantages in these summary proceedings to resolve disputes. I would respectively suggest that Alberta is further ahead in formalized dispute resolution practices than any other superior trial court in the country.

I write about JDR in Alberta for, obviously, that is what I know best. In 1997, during a study leave at the University of Toronto, I surveyed judges in every province in Canada about dispute resolution. I wrote a book setting out the details of my research and survey. Amongst other things, the book included short reviews of the status of dispute resolution in the superior courts in each province. This work is now out of date and it is my fond hope that someone else will carry out a new survey.

Judges in the Province of Saskatchewan have been doing work similar to Alberta, with great success, for twenty years, in what they call Civil Pretrial Conferences. After many years of discussion, the Quebec Superior Court trial judges commenced a dispute resolution program in September 2001. Curiously, the Quebec Court of Appeal had started a similar program four years earlier. This is quite uncommon, as in Canada, the trial courts seem to lead in introducing new concepts. Other courts of appeal are toying with dispute resolution, which is a pity, for their American counterparts have used such programs with great success for years. A section in my 1997 book was devoted to dispute resolution as used by American courts of appeal. This part of the book has been largely ignored. The Court of Queen's Bench in New Brunswick is enthusiastically following the Alberta pattern. The province to our west, strangely enough, is still in the 19<sup>th</sup> century in dispute resolution, (except for the excellent work in the field of family law). Other provinces are involved in varying degrees.

If success can be measured by the demands of the litigation marketplace, JDR has been at least a moderate success, for the demand has grown steadily and there have been times when in Edmonton and Calgary a lawyer could get a short trial date faster than a JDR conference date. The JDR statistics are kept by the trial coordinators on a fairly informal basis and they show settlement rates ranging anywhere from 73 to 83 percent. These statistics may be viewed by some skeptics as unreliable, but it is certainly fair to say that over two-thirds of the matters brought before JDR judges are settled. In the last few years, I have spoken to dozens of lawyers and carried out an informal survey amongst lawyers in both the Plaintiff and Defence bars. I think it is important to know what our constituents think of our efforts. There is almost universal approval of what we are doing. At a Legal Education Society of Alberta session attended by almost 100 lawyers, I asked for a frank opinion of whether or not we should be engaged in dispute resolution. There was only one who showed a negative attitude. One poetically-inclined lawyer who had done about 30 JDR sessions with positive results, said they were like "snowflakes"; no two were ever alike. He added, this is not necessarily a bad thing. While it is true that JDR has been almost universally approved, if we were to cancel the JDR program tomorrow there might not be riots in the streets. There would, however, be much unhappiness in the litigation bar.

Notwithstanding this high degree of approval from the litigation bar, JDR continues to be a hot topic for discussion amongst judges. There is much disagreement on the techniques and approaches that are being used by judges. There is even debate within the broader legal community about whether judges are the best people for the job. There is a constant demand for more education, and there is honest disagreement as to JDR's impact on the judicial system, on judges, and on lawyers and their clients.

This is a good time to review some of the models and practices that have been established and to consider some of the problems that have arisen in a candid fashion (e.g. how far should a judge go in encouraging settlement? what are the outer limits? what is the position of the bar?). Hopefully, by initiating a constructive dialogue, the Bar and Bench together can advance the cause of bringing justice to citizens in a professional and affordable manner.

### **Further Background**

The National Judicial Institute (N.J.I.) has been conducting educational seminars on settlement skills for judges for almost a decade. Arising out of these seminars, N.J.I. has prepared some background material as to the role of judges, which I have condensed. The suggestion is that there is a shift from the traditional view of a trial judge being detached, apart, citing facts and deciding cases totally objectively based on evidence and precedent. Consideration of what a judge brings to decision-making signals a broadened perspective of the role and function of judging. The increase and diversity of roles undertaken and expected of trial judges demonstrates a changing view of judges. We would all benefit if the frank view of the Bar on the changing role of judges could be added to the literature. Much good work has been done by the Alberta Law Reform Institute, but even more would be helpful. In the course of a typical day, most trial judges perform several if not all of the following roles:

- act as a case manager by issuing scheduling and discovery orders;
- provide information about available dispute resolution options;
- encourage or direct parties to attend non-binding dispute resolution conferences;
- talk settlement with the parties;
- inform or advise lawyers or parties about aspects of the law;
- question the lawyers to determine the real interests at stake in the controversy and suggest solutions to lawyers and clients.

Trial judges may act formally as neutral conciliators, or may conduct non-binding mini trials or similar dispute resolution events. Judges may ask questions of lawyers and parties. They may instruct parties to produce information about a case to better understand the parties' positions and identify the real issues in a case and determine if the case has merit. In the role of impartial adjudicator the judge may follow formal procedures designed for a particular dispute in question and render a decision according to the law on the basis of legal argument and evidence gathered and presented.

Indisputably, judges are doing more than trial judging. Trials are no longer seen as the only forum or process of dispute resolution. Change is ever present. There is change in clientele (e.g. an increase in the number of self-represented litigants) and change in the practice of law (e.g. more collaborative lawyering in family law). There are alternatives to the public adjudicator system, namely private arbitration and mediation and now there are, in some areas, new Court or Court-connected programs and services. The system is dynamic. Case management, settlement conferences, mini trials, Court readiness, etc. are all part of the change towards less formal and more flexible methods of dispute resolution. The Canadian Bar Association's System of Civil Justice Transcript Report (1996) included a number of significant recommendations for this kind of move towards increased efficiency, informality and flexibility. The N.J.I. background material concludes that a dispute resolution construct sees judges and judicial adjudication as part of a dispute resolution continuum – capable of learning from, influencing, and impacting upon other parts of that continuum. Court Rules, practices, and case management are factors that influence dispute resolution in and out of the courthouse. Judges themselves are responsible for making informed, independent decisions concerning their individual and institutional roles on and within the dispute resolution continuum.

### **The Myth of Litigation**

A few years back, Michael Fogel, who has been teaching settlement skills to judges for almost ten years and is truly one of the finest adult educators I have ever met, introduced me into the concept of "The Myth of Litigation". It is a novel way of presenting an issue with which many trial judges have been grappling for a long time.

All lawsuits, on their face, are structured as if they were going to trial. People prepare all their pleadings on that basis. They carry out discoveries based on this myth. Their entire lives are predicated on this illusion that some day this case is going to be heard by a trial judge. This illusion continues notwithstanding that the data, from virtually all common law jurisdictions around the world, shows that for many years, fewer than 5% of cases that are commenced actually reach trial. The actual figures may well be closer to between 1% and 3%. What a fascinating charade! Would the litigation world not be better off if the model or structure was one that led to the settlement which was going to happen in the great majority of cases, rather than geared toward trial and adversarial confrontation? If we were ever able to get the computing facilities to help us make great advances in getting to more efficient case management and early evaluation, we could



start streaming litigation in a logical fashion in a settlement model. Some of the logical streams that I can see developing out of an early evaluation scheme would be as follows:

- (1) The parties have a serious dispute and nothing is going to stop them from going to trial. Their minds are made up and the quicker we get them into a courtroom, the better. As well, the dispute is *bona fide*, arguable on both sides, and economical to litigate. The object should be to narrow the issues and make sure that they prepare briefs of their positions on the law, agreements on those matters that can be agreed upon and have the briefs in the hands of the trial judge a week before the trial begins.
- (2) The parties have not examined their cases and are still far from ready to proceed to trial and have to do more work. They should be directed to come back for another pre-trial.
- (3) The parties clearly want to settle the case. What they need is appropriate instructions. A model that could be used is to suggest that counsel come back with their clients for a further pre-trial so that the matter can be resolved without the necessity of further litigation.
- (4) The case is clearly suited for dispute resolution. The sums involved and the issues are ones that are much better handled in a settlement conference and not a trial. The parties should be directed accordingly. In some cases, where particular expertise would be helpful, private mediators or experienced arbitrators may well be a better route to go than the Courts.

The following are additional categories suggested by other judges:

- (5) Cases which are clearly uneconomical to litigate, including ones where large sums are nominally in dispute but are impossible to achieve, no matter who wins. The judge should suggest that either JDR or private mediation would be more cost-effective.
- (6) Cases where there is no *bona fide* dispute and one side knows the other side is right but is either stalling off the inevitable or bluffing, hoping that the opponent will die, run out of money, or lose a key witness. The judge should suggest that an early trial date be directed and that consideration be given to a formal offer to achieve a doubling of the taxable costs.
- (7) Cases where one of the parties will not take realistic advice from his lawyer. The judge should suggest that JDR may be appropriate for the client to hear the "real world" from a judge.

I suspect that there may be other models yet to be structured and I doubt if I am the only one who has been pondering this problem for many years.

Any suggestions?

### **The Advantages of JDR**

It is obvious that JDR is a faster and cheaper alternative to a trial. One suggestion is that a half-day JDR equals a 5-day trial. One judge suggests that a half-day JDR is closer to an 8 to 15-day trial and suggests that the JDR also avoids the lengthy wait for a long trial. It avoids the enormous taxable costs associated with a trial; costs that are so huge that some litigants are subsequently forced into bankruptcy if they are unsuccessful. It affords an opportunity for the parties, in an informal setting, to speak to a neutral third party and express their concerns. It provides parties with an opportunity to have their "day in Court" without having to experience the stress of a trial, and in particular, the stress of being cross-examined in the course of a trial. As the JDR is private, it allows the parties to appear before a judge without the details of their case being made public. It avoids many of the problems associated with the adversarial system and permits, in some cases, creative solutions to disputes using collaborative techniques. Depending on the quality of the briefs and the preparation, it provides a substantial advantage to judges who come to disputes already informed of the issues and, on some occasions, with creative solutions. It does not take long before one realizes that there are solutions possible in JDR that could never be used at a trial. For example, an apology can be given, or a reference letter can be agreed on, or there can be a recommendation for a pain clinic paid for by a Defendant. JDR opens up a whole new world for resolving disputes which can make trials look positively medieval. When clients have been asked about the process, many express the view that they have contributed to and been part of the settlement process, in contrast to trials, where they simply observe their lawyer doing all the talking.

The Chief Justice of the Court of Queen's Bench in New Brunswick has a unique description for trials and JDR. He says JDR avoids the considerable uncertainty of trials. To paraphrase Forest Gump's mother, from the movie Forest Gump, "trials are like a box of chocolates, you never know what you are going to get inside".

### **The Disadvantages of JDR**

To paraphrase a well-known Alberta author: If you build it, they will come. To put it another way: if you provide lawyers with a forum where the judge has to do the tough work, they will use it. Critics repeat over and over again that good lawyers in the "good old days" were always able to arrange their own settlement. By creating a judicial dispute resolution forum, we absolve lawyers from reaching their own settlements and simply prolongs the time needed to go to trial. The best criticism that I have seen about the entire

JDR process was written in a private memorandum by one of our judges who has permitted me to paraphrase these very candid comments:

My most recent experiences with JDR tells me that the majority of JDRs involve unrealistic positions by one of the parties. Some claims are utterly fanciful. Too often I see counsel who have little ability to evaluate their file. I see them and their clients coming to the judge in hopes of getting a negotiated or mediated settlement without having to face the legal frailties of their claim. If the judge of the JDR is willing to discuss interests (other than litigation costs) or, in family law, best interests, then the Court becomes a party to the pattern of soft legal claims. My view is that we have raised a generation of lawyers on JDR's, too many of whom have little or no ability to prepare for trial. They prepare for the JDR. If they are lucky enough to get a judge who will deal with interests, they do okay and they return. By engaging in interests, we are creating a new industry in soft legal claims which is bad for the judges, the bar and the litigants. Judges get more work, some of which ought to be weeded out by counsel well before seeing a judge. For the bar, the bar is led to believe it can get away with soft claims. What we want is a bar that can properly legally evaluate their claim and decide whether to engage in interest-based solutions well before hitting the courthouse steps. If we judges stick to evaluating claims legally in our mini-trial style JDR's and settlement conferences, we assist in properly training the bar. For the litigants, they are led astray by those at the bar who cannot properly evaluate evidence.

These are powerful words indeed. I hope they make you feel as uncomfortable as I felt when I first read them. We have to work harder to avoid the pitfalls that this judge has very accurately described. This analysis is regrettably accurate in too many cases. The Bench and the Bar have to combine their best sense to conduct JDR's in a fashion that puts a lie to this criticism.

Another potential disadvantage of a JDR is the approach to JDR by some counsel. JDR is confidential and the parties are free to proceed to trial if they cannot achieve a settlement at a JDR. Unfortunately, some counsel use this confidentiality to their advantage. Their approach to JDR is that if the judge agrees with their position and they can reach a favourable settlement, then they will settle. If not, then the other party will have disclosed its case and they can proceed to trial sometimes with access to otherwise privileged information that was disclosed, in good faith, during the course of the JDR process. Therefore, counsel should be aware that in proceeding with a JDR, there is a risk that information disclosed during the JDR process may be used in this fashion. Hopefully, by asking the appropriate questions in the pre-JDR meeting (which will be discussed in more detail), judges can take steps to actively discourage this type of conduct.

There are often other problems as well. JDR processes are less interested in binding “rights” and more interested in an acceptable resolution. The privacy of JDR is another issue, which cuts both ways. Most parties prefer to keep the details of their dirty laundry out of the public courtroom. But we need to be aware also of the merits of an open and accountable public justice system. And these are not just a few challenges created by JDR. But to the extent that the purpose is to supplement and complement an always available formal court process, adding JDR processes to the dispute resolution toolkit expands the pie of available options to litigants, which in turn (hopefully) facilitates flexibility, creativity and ultimately greater overall satisfaction with the justice system.

### **A Tough Week - Why?**

When I was a lawyer, I seldom gave much thought to the feelings of judges. They were well paid, given respect and they were there to listen and give reasoned decisions. I frankly never ever gave a thought to the idea of a judge having a tough week. Well listen up. Judges generally recognize that a JDR week is a tough week. It is much easier to hear a civil trial for five days and at the end say: “you win - you lose - you get costs”. Some judges find the entire JDR process intimidating. They are naturally hopeful that their efforts will bear fruit and result in a settlement. There can be a feeling of lack of competence if the case does not settle. There is considerable stress in having to render opinions quickly, in anywhere from 4 to 8 cases in one week. Stepping outside of the traditional role of deciding after you hear all of the evidence is uncomfortable to many. The current mantra of those who lecture in the N.J.I. Settlement Skills Seminar is: “Let the lawyers do the work”. In effect, we would prefer that lawyers make their own settlements (with a little help from us of course). I will expand on this concept and make a number of suggestions to decrease the stress level and hopefully in some small way improve the comfort level of JDR judges. Again, education of both judges and lawyers (and their clients) will be key both to the ongoing progress of the process as well as to the quality of the process and its outcome. JDR and ADR in general must become part of the steady diet of law school courses and C.L.E. programs.

### **THE BASICS OF JDR**

In Edmonton, the following guidelines are sent out by the trial coordinators to all lawyers who request a JDR conference. My comments on the guidelines follow. Some judicial districts use different guideline. Please do not ask me why. I am not the Chief Justice.

#### **GUIDELINES FOR JUDICIAL DISPUTE RESOLUTION COURT OF QUEEN’S BENCH OF ALBERTA**

1. The purpose of judicial dispute resolution (JDR) is to reach a settlement on all

issues or to resolve as many issues as possible with the assistance of a judge of the Court. JDR is voluntary and all parties must agree to the process. The conference is strictly confidential and all parties must be present.

2. The JDR judge will assess whether or not the JDR is appropriate in the circumstances and determine the time for delivery of briefs and other materials.
3. The JDR conference is normally conducted informally in a conference room and:
  - (a) gowning is not required;
  - (b) no evidence is heard – just argument based on facts essentially agreed to;
  - (c) evidence from examinations for discovery may be referred to;
  - (d) no costs are assessed, except as noted below;
  - (e) an Agreed Statement of Facts and short written briefs will be prepared and delivered in advance. As well, attached, under separate dividers, there should be copies of expert reports, medical reports and authorities appropriately flagged and highlighted;
  - (f) the non-binding opinion of the judge that may be rendered is strictly confidential and may not be used in any manner whatsoever. It will not be discussed with a trial judge. Statements made by counsel for the parties are also confidential and cannot be used for any purpose. The JDR judge will not hear any application nor the trial of the matter. The JDR judge is not compellable as a witness in any proceedings.

Notes:

1. Except during long vacation, counsel should contact the JDR judge within two weeks of being notified by the trial coordinator of the assigned JDR judge. After they have spoken to the JDR judge, counsel shall confirm to the trial coordinator by letter that appropriate arrangements have been made and the matter is to proceed. Failure to comply with this will result in the allotted time being forfeited.
2. Once assigned, adjournments of all JDR's will require the specific leave of the assigned judge. Counsel should understand that when adjournments are requested close to a hearing date, unlike trials, JDR conferences are not double-booked and the time is wasted. Because of difficulties that have occurred in the past, for late adjournments you should specifically note that many JDR judges, pursuant to R. 599.1 of the Rules of Court, are LEVYING FINES OF BETWEEN \$300.00 to \$500.00 FOR FAILURE TO PROCEED ON THE SPECIFIED DATE. If a matter, however, has been booked prior to a judge being

assigned, counsel in those instances adjourn the JDR by consent.

### **Comments on the Guidelines**

This is a remarkably good piece of work. It is on one page, easily understood by most counsel and effectively sets out the protocol for judicial dispute resolution in Alberta. Let us review this document with some care and precision.

#### **A. The Guidelines**

1. (a) JDR is voluntary. Both sides have to agree. An unwilling party cannot be ordered to participate in JDR. This is the very opposite of the mandatory process in the province of Ontario and other jurisdictions. In Alberta, the voluntary aspect is one of the essences of our JDR practice. We take the position that if no one holds a gun to your head, the parties will come to the JDR willingly with the object of achieving settlement.
  - (b) The purpose is to reach a settlement and the judge is there to help the parties settle.
  - (c) The conference is confidential. A non-binding opinion may be given but, if given, it cannot be used for any purpose. The JDR judge will not speak about the JDR with the trial judge if it goes to trial. Anything that is said at the JDR conference is secret and cannot be used for any other purpose. The JDR judge effectively disqualifies himself or herself from any non-JDR involvement in the case and will not hear any applications and, most certainly, not the trial. The JDR judge is not compellable as a witness. So if the conference is a disaster for either or both sides, all is not lost; they can still have a trial and they start all over again (i.e. what have you got to lose other than the cost of preparing and attending the JDR?). Every once in a while, a lawyer makes reference to a JDR opinion in a trial. If I was tzar, the penalty would be one week suspension from the Bar.
2. The JDR judge will, in advance of the conference, assess whether dispute resolution is appropriate. Effectively, this means that the judge is going to screen the matter and decide if there should be a JDR. You do not have a JDR by right. Some judges may say: "You are wasting your time – you people are not interested in settling. Go to trial or have a stated case or go to private mediation or arbitration. We don't do windows nor do we do the impossible. You have to really want to settle".
3. (a) The conference is informal. It is not in a courtroom, and it will usually be more relaxed. The hope is that there will be less posturing than in a

courtroom and hopefully there will be an aura created of “Let us find a solution to this problem, albeit on the merits of the case”.

- (b) No evidence is heard. Just argument on facts essentially agreed. By implication, this means that there has to be substantial agreement on most of the facts. This is not a fact-finding process. It works best in assessing quantum in personal injury cases, for example. Some types of case, even where there are credibility issues, may be appropriately dealt with in JDR if everyone is prepared to use risk analysis techniques.
- (c) Some counsel have attempted to claim costs for a JDR based on the amount in Schedule “C” of the Alberta Rules of Court. The parties are free to reach an agreement to this effect; however, as the process is voluntary, the Court will not award costs for a JDR regardless of the outcome.
- (d) Material is to be provided in advance of the JDR so that the JDR judge will come to the JDR hopefully well prepared and even possibly with some clever ideas on how to resolve the problem. The actual date will be determined at the discretion of the JDR judge. The material will include:
  - (i) an Agreed Statement of Facts;
  - (ii) short written briefs (I tend to advise counsel that the briefs should preferably not be more than ten pages, and explain that experience has shown that the shorter brief tends to be better received);
  - (iii) portions of the examinations-for-discovery, with all relevant aspects flagged and highlighted;
  - (iv) copies of expert reports, flagged and highlighted;
  - (v) legal authorities, same comments as above apply with respect to flagging and highlighting (I usually say “Pick your best five cases. I don’t need 20 cases. And on matters of quantum, restrict yourself to Alberta decisions”);

I cannot over-emphasize the importance of flagging and highlighting your materials. At the pre-JDR meeting, I specifically advise counsel to flag each page they want me to read and to highlight the portion on that page that they want me to read. This is to save JDR judges from going blind! Many expert reports are 50 pages long and yet there may be only two paragraphs that are significant to the issues in the case. If counsel forget to flag and highlight their briefs, my procedure is to chastise them, then return the material to be corrected. A JDR week is a tough week and requires serious editing on the

part of both counsel;

(e) same comment as point 1(c).

## **B. The Notes**

2. Counsel must contact the JDR judge in advance and arrange the pre-JDR meeting. Some judges insist the meeting be in person. Others are prepared to do it by telephone conference; it matters not. The point is that counsel must arrange the time and date for the pre-JDR meeting and this, plus the reference to the costs, means that the parties have to be really serious. Triflers need not apply.
3. If counsel want to settle before the JDR, that will be tolerated. But if they try for an adjournment, it will cost between to \$300 to \$500, payable to the Clerk of the Court. The citizens of Canada pay judges well and their time should not be wasted by adjournments. Clearly we cannot double-book JDR's so counsel should only come if they are ready and if they are serious. Once a couple of poor souls thought that they could, by agreement, adjourn a JDR scheduled before me. They have learned the error of their ways and have been appropriately sanctioned. Fines maybe imposed as provided for in the Rules of Court. (Note: A number of Calgary judges have stated emphatically that adjournments of JDR's in Calgary are unheard of - is this another urban myth?)

On reflection, these Guidelines are a minor masterpiece. I, together with the help of Justice Dea, drafted the original Guidelines many years ago. Anyway, some person or persons have substantially improved the original work and if I were the Chief Justice, I would give those responsible two extra judgement weeks!

## **BEFORE THE JDR**

### **The Alberta Advantage**

Fairly early on in the development of JDR in Alberta, the Edmonton judges decided it would be a good idea to let the litigants choose their JDR judge. Clearly, the object was to try to reach settlement and one of the means of accomplishing settlement would be for the parties to be able to chose the settlement judge. If this were a perfect world, one would let the marketplace select JDR judges in all cases but, as we all know, it is not a perfect world. In Edmonton, for example, the trial coordinators advise counsel of the JDR weeks of each judge, and the parties have the option of declining to choose to be slotted in during that week or of declining to go forward once the judge is assigned. Often lawyers have requested a JDR session before the assignments have been set. Once the assignments are known, the trial coordinators, in a diplomatic fashion, go back



to the lawyers and ask if they are happy or if they want to change. The judges are not involved in this process and as far as we know, it works quite well.

Different judges have different JDR styles, and the litigation bar becomes aware of the differences. There is, for example, one outstanding judge known for his good results. He is noted as the hardest working, most conscientious judge in achieving settlements. He simply will not quit and will persist for longer than most. He gets superb results and, for the really tough cases, many of the Bar prefer him. Others prefer judges who have specific knowledge in some areas and are noted for their expertise. Still others prefer a number of “fuzzy bear judges” on our Court who are good listening and placating. Some judges are particularly good in family law. On a pragmatic basis we think our advantage works. It has the double advantage that, unlike trials where lawyers simply do not know who their sitting judge is and have sleepless nights as a result, this procedure brings lawyers happiness and contentment. As Martha says, this is a good thing.

For many years, the Calgary JDR approach was not the same. I have had many lengthy discussions with the director of judicial administration. She says the Edmonton procedures creates all sorts of difficulties when there are long trial assignments that have to be changed and judges moved. But I have been told quietly that since the change in administration, there has now been a new regime. If you want a particular JDR judge in Calgary, an informal approach is made to the Associate Chief Justice who, within bounds, makes the necessary assignments. Also, informally, lawyers will approach Calgary JDR judges and ask if appropriate arrangements can be made for them to hear a JDR. Most of the time the case is fitted into the schedule. So in their own quiet way, Calgary also shares in this Alberta advantage.

### **Pre-JDR Meetings**

Fairly early on, the Edmonton JDR judges decided that an essential element to a successful JDR was the pre-meeting. Some judges disagreed and wanted to use standing form letters. However, reason and peer pressure prevailed and one of the items in the Edmonton JDR protocol was a mandatory pre-screening meeting. The pre-JDR meeting can be in person or by telephone. In either case, they generally take 15 to 20 minutes.

The primary purpose of the pre-JDR meeting is to screen out those disputes that are not conducive to JDR. In my view, not only are pre-JDR meetings essential, but often a settlement can be achieved during the pre-JDR meeting. If there is not total agreement on the essential facts or if there are outstanding reports, or what have you, I will have a second or even third meeting until I am satisfied that I am not going to be “bushwhacked”. Without that comfort, I will not go ahead. On occasions I will say that “I don’t think that the JDR is going to work, so why waste my time and yours”, and also ruin my settlement statistics (Humor can be quite helpful in this work). Or, I might say that I am

a supernumerary judge and I get to decide what I do, and that I don't want to do this one. I take the view that, unlike a trial, it is acceptable practice to decline a JDR conference in situations that you, as the pre-screening judge, feel are hopeless. Some disputes should go to trial or be resolved in a form other than a JDR. The fact driven cases where there are dramatic differences and there has to be credibility findings often are not amenable to a JDR. Some parties want their day in court be it for any number of valid or invalid reasons and they will not settle for a day in the conference room. Lawyers, however, should not underestimate the power of a client's day in JDR. For those people who want their day in court, be it for any number of valid or invalid reasons, let them go to trial. Let us not waste lawyer's and judge's time with cases that cannot be settled. I have not settled in my own mind if I decline to hear a JDR, whether the parties could go to another JDR judge. I think this is fair enough as long as the lawyers tell the next judge about my decision and reasons for not hearing the JDR.

I have my personal checklist that I use for the pre-JDR meeting. Other judges have their own. I think that it is helpful for lawyers to review the checklist in preparation for the pre-JDR meeting.

I will now set out a version of a pre-JDR Checklist modified for use by lawyers that, over the years, has been helpful to me. Use it if you like. After it, there is a commentary.

### **Pre-JDR Meeting Suggested Checklist**

1. Classify the type of action, i.e. personal injury, wrongful dismissal, family.
2. Establish and list the essential issues.
3. Advise if offers have been exchanged so that the judge can determine how far apart the parties are from reaching a negotiated settlement.
4. Confirm that both parties are willing to move from their stated positions to reach a settlement.
5. Confirm that both parties have disclosed or will disclose all expert reports, documents or other relevant information.
6. Consider the most suitable type of JDR (e.g. mini-trial, settlement conference or early neutral evaluation).
7. Confirm the requirements for the materials to be filed with the judge:
  - (a) Agreed Statement of Facts or summary of relevant facts (indicate who is to

prepare the memorandum - counsel for the Plaintiff or counsel for the Defendant);

- (b) Short briefs, preferably ten pages or thereabouts, setting out the issues and each party's position and the relief claimed;
  - (c) Appendices specifically tabbed and highlighted containing as appropriate:
    - (i) documents and expert reports;
    - (ii) pages of discovery transcripts being referred to;
    - (iii) authorities.
8. Confirm the date for material to be exchanged and for delivery to the judge (varies depending on the judge's requirements – anywhere from one to ten days prior to the JDR). Some judges prefer the Plaintiff to file the brief first and the Defendant a week later.
  9. Advise if the clients wish to speak to the judge during the JDR.
  10. Advise if the attendance of a non-party (eg. spouse) is required.
  11. Advise if these are any technical requirements (eg. television and VCR).
  12. Advise if the parties are adverse to caucusing (if the circumstances make it appropriate and if it is a judge who does caucus).
  13. Confirm the time required for the JDR (half-day, full day or longer).
  14. Advise, if for some reason, the parties prefer to hold the JDR in a courtroom instead of a conference room.
  15. Confirm who will prepare a memorandum outlining what has been agreed or discussed at the pre-JDR meeting. In many cases, the judge will offer to do so. If not, then one of the counsel should volunteer to prepare the draft memorandum to be circulated to both the judge and the other counsel.

As set out above, the primary purpose of the pre-JDR meeting is to screen out those disputes that are not suitable for JDR. If this turns out to be the case, all is not lost. As counsel for both parties are together with a judge, counsel should take the opportunity to explore alternatives to proceeding to trial. One alternative that has become popular in other jurisdictions is to have a trial only on an isolated point that seems to be the key, after which most people agree will resolve the balance of the action once this issue is determined. Some construction cases are simply not easily handled by judges who are not

prepared to sit for days as each board and each nail is examined. Many judges now recommend that the parties choose a qualified mediator or arbitrator who has expertise in the field. There is much to be said for summary trials, stated cases, and private mediation or arbitration. One of these may be a superior method of resolving the dispute than a JDR

### **Commentary on the Checklist**

These comments parallel the numbers in the Checklist:

1. It simply helps the judge to know what type of dispute is involved.
2. Many judges are of the view that JDR will work if there a limited number of issues, say two or three.
3. The vast majority of disputes are over money. What I want to know is whether the matter is “do-able”. If the Plaintiff is asking for \$1 million and the Defendant has offered \$35,000, I have some grave doubts if we should go any further. In fact, on a number of rare occasions, even where there is a very large separation, the parties have persuaded me that they are eager and are willing to make major concessions and to hold a JDR. I have done this, usually successfully. This also puts the judge in a better position because the parties have already agreed that they are prepared to go a long way to reach a settlement.
4. A JDR is not the usual adversarial mode. Counsel should come prepared to proceed in a settlement mode and to avoid posturing. Experience has shown that there will be some situations where one of the parties is unable or unwilling to move from that position. If the judge knows of this situation in advance, he or she can decide whether the case is suitable for a JDR. In some instances, a party will want to attend a JDR with the goal of having the judge tell the other party that he is wrong and that he should accept that parties very “reasonable” offer. If for some reason the judge does not agree, then the party is unwilling to move, but simply intends to go to trial. JDR is not appropriate in these cases. The parties must approach JDR with an open mind which includes accepting that your position may not be as reasonable as you think it is.
5. The purpose of JDR is not to “sandbag” the other side. Rather, both parties should come prepared to “lay all of their cards on the table” in an effort to settle the matter. There maybe situations in which a party is not prepared to disclose certain evidence, such as particular expert’s report or the existence of surveillance. It is unfortunate that some counsel have been known to attend at a JDR, not with a view towards settlement, but rather with a view to obtaining pre-trial discovery of otherwise privileged materials. If you suspect that the other side is using the JDR for this purpose, then you will have to seriously consider whether you are prepared to run the risk of disclosing this otherwise privileged evidence prior to trial in a JDR

or whether you should skip the JDR and simply proceed to trial.

6. Much of the literature in this area has indicated that speaking to a neutral third party is of enormous importance to many litigants. Generally speaking, a mini-trial is the better forum and gives the parties an opportunity to have their day and speak to a judge. In other cases, this is quite unnecessary and the parties want to have an immediate discussion on the strengths and weaknesses of the case with either an opinion or observation as to the likely outcome of a trial.
7. By obtaining and reviewing the briefs and other material, a significant benefit is obtained. The judge gets an overview of the action. By the time of the JDR, the judge will be almost as well informed as counsel and may possibly have identified a number of solutions. It is also possible that after having received the material, the judge will decide it is not an appropriate case for JDR and will tell the parties why. In our jurisdiction, it is theoretically possible to have as many as eight mini-trials in a JDR week, although this is uncommon. Four or five is typical. There is not an awful lot of time to read and prepare and so it becomes a matter of importance to have short briefs and more importantly, to have expert reports and authorities both tabbed and highlighted.
8. There is a variation on how early some judges want the material. This should not be significant. Personal preference should decide. Anywhere from 10 to 30 days makes sense. Whatever works.
9. If the parties wish to speak, a judge should be happy to listen. Some judges will indicate in advance that one-half hour should be sufficient. Other judges have been known to listen to a Plaintiff for over two hours. Again, do not underestimate the power of party participation. It often helps both sides to understand each other and ultimately to help settle the case.
10. In some cases, a party may need to consult with a non-party, such as a spouse, prior to settlement. As the goal of the JDR is settlement, if the party will not or cannot settle without the input of the third party, then that party should advise the JDR judge and if both parties consent, the non-party should be permitted to attend the JDR
11. This comment is self-explanatory.
12. Avoid surprises. Some judges do not caucus and I think that they should advise counsel in advance. Some counsel do not want to caucus and this should not be forced upon them. My experience is that invariably counsel who has been asked have been willing to caucus. They see caucusing as a valuable tool to achieving settlement.

13. This comment is obvious.
14. In most cases, holding the JDR in a conference room is more conducive to discussion. In some cases, if there are multiple parties or large exhibits, it may be necessary to hold the JDR in a courtroom.
15. In Calgary, I am advised that the JDR judges send out a form letter to all counsel in addition to the guidelines setting out their special requirements. The practice varies in Edmonton, but it is generally a good idea to have some confirmation as to what was decided at the pre-JDR meeting in order to avoid any confusion at the JDR.

### **Adjournments**

In our jurisdiction, trial dates are double and triple booked because of last minute adjournments. This is not possible with JDR's and counsel should be warned that if there are last minute adjournments, the date is lost. Fines will likely be imposed as provided for in the *Rules of Court*.

## **THE JDR**

### **Opening Statements for JDR**

I think it wise at the beginning of any JDR session for the judge to make a brief formal statement, once again confirming the confidentiality and the objects of the proceedings. I know that many judges have prepared their own statements and some that I have seen I prefer to mine. However, as a starting point, I have attached my opening statement at Appendix 2. I have added an additional statement to injured parties at Appendix 3. You should expect that the JDR judge will make an opening statement along the lines set out.

### **Basic Approaches: Models of JDR**

I have constructed two models of JDR conferences and a third model for the future. The two current models are not mutually exclusive and my current personal practice is to, in a fashion, use both. But I digress – the models are:

1. **The Alberta Mini Trial**

In the literature, you will find two very good discussions on what I call the Alberta Mini Trial. As Justice Belzil has pointed out, having returned from a North America-wide conference on JDR, the terminology in this area is all over the map. What Americans call a mini trial is quite different from our version, so these comments relate to only an

Alberta mini trial. The Alberta Law Reform Institute in August 1993 published a discussion paper "The Judicial Mini Trial", which is very accurate. The former Chief Justice, Kenneth Moore, did an equally good job in a discussion paper reproduced by C.C.H. Your librarian should be able to find these if you get really interested.

The Alberta Mini Trial is really a summary hearing where all the essential facts are principally agreed and a judge provides a non-binding opinion as to what likely would happen in a formal trial. It is usually held in a conference room rather than in a courtroom. All parties are present, including the clients. In advance, an Agreed Statement of Facts, briefs, expert reports and authorities (tabbed and highlighted) have been exchanged and provided to the presiding judge. Usually the issues have been agreed to in advance. Both the Plaintiff's and Defendant's lawyers are given an opportunity to present their positions in a summary fashion. Some judges prefer to let them introduce their cases and make their comments. I prefer to outline the pertinent facts and the issues as I see them. I then make specific directions to the lawyers as to the points I want dealt with. The parties are given an opportunity to address the judge if they so wish. In the traditional model, the judge then provides a non-binding opinion as to the judgment they would render if the matter went to trial. Many commentators think that it is quite wise to provide short but considered criteria for the non-binding opinion, making reference to specific cases if this is appropriate. The Alberta mini trial is to be distinguished from the formal summary trial process as set out in the Alberta Rules of Court.

At this point any number of things can happen. Some lawyers thank the judge and politely ask that he or she excuse themselves and they will continue the discussion between the lawyers and the parties. Some judges leave the meeting voluntarily to permit the parties to discuss the non-binding opinion with the comment that if they can be of further help, call, and they will return to the conference room. Other judges stay and try to see if, based on the non-binding opinion, a settlement can be reached. Some lawyers will immediately ask the judge if they can caucus to discuss the non-binding opinion. One is best to take a pragmatic approach and go with whatever works.

## 2. Settlement Conferences

Once again, briefs have been exchanged and provided to the judge. There may not be the same agreement on facts. Liability may be in issue and settlement conferences are often utilized when there is a strong possibility of contributory negligence. The technique employed by some judges is risk assessment. This is an attempt, with the assistance of counsel, to, based on the best available information, make a determination of a percentage on the likely outcome of trial. This is an art, not a science. The parties are invited to set out the strengths and weaknesses of the case and the judge hopefully facilitates a frank and open discussion, hopefully to arrive at a meritorious settlement. The clients may or may not contribute to discussions, depending on the circumstances. There is no reason why a settlement conference cannot be held even where there is general agreement on the facts. However, in my models, what distinguishes a settlement

conference from a mini trial is that without general agreement on facts, a judge will not usually be in a position to provide a non-binding opinion at a settlement conference. There will clearly be exceptions and in a settlement conference a judge may well forecast the likely outcome of a trial in percentage terms. For example, "I think the Plaintiff's chances of winning are about 75%." If appropriate, caucusing may also be used during settlement conferences.

These models are my personal creations and are presented in an attempt to analyze the different practices that have arisen by different judges in what will always be a developing field of non-traditional judicial approaches. The anecdotal evidence suggests that mini trials are more favoured in Edmonton while settlement conferences are more favoured in Calgary. I have no idea why.

Some lawyers have a preference for one or the other of these models. The pre-JDR meeting can assist these lawyers. They should ask and reach agreement with the judge as to what is to happen at the JDR. One of the few areas of unhappiness is lawyers who think they are getting a mini trial and instead get a settlement conference. Make your needs known to the judge.

### 3. Early Neutral Evaluation

This model has been used in other countries with considerable success. The literature indicates it has much appeal to non-adversarial lawyers. It usually arises in jurisdictions which have structured case management procedures and involves a judge meeting at an early stage with the lawyers. It will occur before discoveries and before expert reports and clearly requires an attitude of open disclosure based on "will-say" statements. One of the objects is to avoid selection of "hired gun" experts who are known clearly as either Plaintiff or Defence experts. An attempt is made to agree on one expert, e.g. an orthopedic surgeon or a psychiatrist who will provide the same information to both sides, thereby giving a shared basis for future settlement discussions. In some cases frivolous matters can be disposed of quickly and, in others, issues can be delineated and a settlement conference held once the agreed experts' reports have been received.

I suspect that most of the litigation bar would be hesitant to use something as unconventional as E.N.E. So many of the Bar seem to think that they have to go through the entire process of lengthy discoveries, selection of experts and getting all of their ducks in order before they can even consider settlement. Pity!

### **Let the Lawyers do the Work**

As I mentioned earlier, the current mantra in the N.J.I. Settlement Skills Seminars is "Let the Lawyers do the Work". One of the toughest things about JDR is having to come up with a fair opinion in a brief period of time, give reasons, justify them, and in effect "sell" the settlement to the parties. This is very uncomfortable for most judges



as they become part of the process instead of just making a decision. They are anxious not to fail. Who said life was easy, or fair, for that matter?

Some years ago an academic in this field suggested that the judge should hold back the opinion as long as possible. He characterized it as like an atomic bomb, the judge can only use it once. My current model is to start as a mini trial but then without giving an opinion, move into a settlement conference mode. I literally try to get the lawyers to find their own solutions to the problem. Sometimes wondrous things happen and lawyers make some very reasoned compromises, admitting the weaknesses of their case and proposing fair solutions. This is most likely to happen if, in the pre-JDR meeting, the judge has instilled in counsel the concept of a non-adversarial approach. In some cases, after the judge has assisted with resolving a really tough part of the case, he or she may suggest to the lawyers that they try to work out the rest. The lawyers can call the judge back if they have been unsuccessful and further judicial assistance is needed.

The key to this approach is to get the lawyers out of the normal combative, adversarial mode and into a settlement mode of problem solvers instead of problem creators. There are a variety of ways for a judge to create this aura. As I have said earlier, I tell lawyers to take off their adversarial hats and come with their settlement hats. Sometimes I suggest the group problem solving model "We have a problem to solve today, I cannot do it all by myself, I need the help of everyone. We jointly have to create a reasoned solution that is going to be mutually beneficial". Or, I tell the lawyers, "I want you to come with solutions, not problems". Some judges believe it is helpful to have the clients engage in the discussion and be part of creating a solution.

At the end of the day, all I can say is, if you have good lawyers, they will often create solutions. Surely, the approach makes sense. Lawyers become active not passive participants in the process and can use the judge as a sounding board. What a way to impress your clients by your reasoned, open approach (Is this too Polyanna? Please tell me).

## **A Collection of Techniques**

One of the best things about judicial seminars is you get to meet judges from other parts of the country and exchange ideas and often learn some good stuff. For the past few years I have been collecting techniques used by judges across Canada in resolving disputes and here is the current collection. I don't agree with all of them. I don't expect you will be exposed to all of them, but they will give lawyers some idea of what judges are doing. You may find in these techniques something you can use to your advantage.

1. Cost of the Trial: Judges will invariably estimate costs of the trial to a client and

compare these costs to the amounts in dispute. If a ten-day trial is going to cost \$50,000 in legal fees plus expert costs and other disbursements and the amount in issue is considerably less, it makes no sense to go to trial if there is a reasonable offer of settlement. Lawyers can contribute to this approach by preparing hard estimates of the costs for preparation and trial and also by preparation of a Bill of Costs to give the parties some idea of what the taxable costs will be if unsuccessful.

2. Certainty: A settlement achieved in a settlement conference provides immediate certainty to the parties. It is expressed in many different ways, but it is fair to say there is much uncertainty in any trial. In many instances, it is a roll of the dice as to how the evidence comes out and the way it will be looked upon by different judges. All of this uncertainty and the fear of the unknown can be avoided by settlement.
3. Reality Checks: A settlement meeting will often give a judge an opportunity to explain the real facts of life to the parties. Often there are expectations which are simply out of all proportion to current attitudes in the Courts. The meeting gives the judge an opportunity to give a frank assessment to the parties as to what may occur at a trial. (Some lawyers are using this approach as an easy way of giving bad news to their clients. I am not amused. Earn your fees.)
4. Caucusing: There is disagreement amongst judges as to whether or not caucusing should be one of the methods used in judicial dispute resolution. In non-judicial dispute resolution, caucusing is being used less and less. Most matters can be discussed in the presence of all parties. However, in some instances, separating the parties may promote a settlement. There will be less posturing by counsel. Often, the parties will tell you the real amounts they are looking for. It also gives the judge an opportunity to explain to each party the weakness in their cases without doing it in front of the other party and creating embarrassment.
5. Plan "A": Isolate the major issue in dispute, e.g. future wage loss. Do a settlement conference within a settlement conference on this one point. Having overcome a major hurdle, the rest is often fairly easy.
6. Plan "B": Get agreement on smaller matters, build bridges and confidence, and then go after the major issue in dispute.
7. Providing an Opinion: If the judge provides an opinion as an award at a trial, the criteria used should be set out and a careful analysis and reasons for the opinion provided. The parties can then use the opinion as a basis for settlement.
8. Leave Something for the Lawyers: The judge does not have to resolve all the matters in dispute. If the major issues have been substantially covered, the judge can leave something for counsel to do, but remain available if matters get sticky. In some cases, the lawyers prefer to conclude the settlement themselves. In these

cases, it is appropriate for the lawyers to advise the judge that they wish to spend some time without the judge present, but will notify the judge if assistance is needed.

9. Warm Fuzzy Bear: The judge will endeavour to create an aura where everyone involved is attempting to work together to help solve the problems. As noted above, the judge should emphasize to counsel in advance that they should come wearing their settlement hats, not their adversarial hats, and warn their clients in advance that this is a problem-solving conference.
10. Judicial Clout: Private mediators will acknowledge that judges have an enormous advantage. Judges have instant respectability, which can be used to an advantage. Most of the Canadian public still respect the judiciary.
11. The Benefit of Listening to the Aggrieved Party: The judge may provide an opportunity for an aggrieved party, usually the Plaintiff, to tell his story. The literature indicates that a very significant part of the settlement process is that the aggrieved party gets a chance to tell his side to a neutral third party. Not everyone needs a day in court. A day in a conference room may suffice.
12. On-going Settlement Conferences: It may not be possible to resolve complex disputes with but one meeting. There have been instances in some provinces where judges have held settlement conferences for extended periods in excess of a year before a complex matter has been resolved.
13. Hidden Figures: One old technique is, at some point, the judge has the parties write, on a separate piece of paper, their figures as to what they would settle for and provide these in confidence to the judge. The judge then decides if it is worth trying to bring the parties together or if they are simply too far apart.
  - (a) The Wachowich Exhortation: If this technique doesn't work the first time, Chief Justice Wachowich suggests that the judge look both parties in the eye and say "it is time to get serious. You haven't done it yet. I want you to try again and this time remember, we are here to resolve this dispute." This second effort often pays off.
14. Interest-based Resolution: The judge may suggest creative approaches that, in some fashion, introduce and satisfy the real interests of the parties. Sometimes, an apology, coupled with money, will do the trick. Other times, a suggestion such as a Defendant paying for a pain clinic may be appropriate. This technique often requires posing questions to get at the real underlying interest. Be patient and be persistent.
15. The Delayed Judge: A judge in New Brunswick has an interesting approach. He will often send a Judicial Officer or a Bailiff into the meeting room and say that he has

been delayed. He comes in 15 or 20 minutes later. He thinks this delay gives the parties an opportunity to talk amongst themselves as the beginning of a successful settlement conference.

16. A Second Meeting: In one jurisdiction where the dispute resolution process is quite advanced, it is recognized that the process was reached by initial pre-trial meetings that were followed by second meetings with clients present. If, at a particular pre-trial meeting, there seems to be every basis for settlement, the judge may suggest a second meeting with the clients present to see if the dispute can be resolved without a trial. Call it a "settlement conference" rather than a "pre-trial conference".
17. Second Kick at the Can: If the first settlement conference is not successful, but there is an atmosphere and a willingness to try, the judge may suggest (or counsel may request) a further meeting, particularly if there are outstanding facts and information that can be obtained in the interval.
18. Summary of Alternative Judicial Approaches: In some instances, there are disagreements on specific facts that preclude a settlement. It is conceivable that a summary form of trial on those facts only, rather than a full trial, could result in a resolution of the remaining instances. Where there is agreement on facts, why not a stated case to be decided only on questions of law? If quantum is agreed to, is there any point of having a trial on liability only, or *vice versa*?
19. Reverse Role Playing: Some judges in matrimonial disputes suggest reverse role playing and ask the parties to express the other person's point of view. To put it another way, ask the parties to put themselves in the other party's shoes.
20. Flip Charts: Some judges like the use of flip charts. They list the problems on the flip chart and then set up criteria directed to solving the problems.
21. Business Reality: In major commercial transactions, the business reality may be a factor for consideration. Does one side really wish to prove that the C.E.O. of a friendly company is a liar?
22. Use of a mathematical settlement value formula. The judge asks both sides to show in percentage terms the likelihood of the quantum they will get if they proceed to trial, e.g. side "A" shows the following: \$1 million - 10%; \$500,000 - 50%; \$100,000 - 40%. Side "B" shows the following: \$1 million - 20%; \$500,000 - 70%; and \$100,000 - 10%. The suggestion is that using this model you will get a more realistic evaluation of their anticipated claims and also a better way of determining how far the two parties are in their negotiations. I have never used it, it sounds a little complicated, but one judge says it works like heck!

### **Comment on the Techniques**

There should be a careful consideration as to how far a judge should go in pushing for a settlement. There is little point in the judge bullying one side or the other just to achieve a settlement. Most judges would avoid such comments as: "This is the highest figure that any judge in the Court would ever give and you would be unwise not to accept it". On the other hand, a judge might suggest something like: "There is no doubt a range, and different judges would look at a particular case with a different figure but the sum suggested is a reasonable offer and should be given serious consideration. It is within a fair range of what most judges would consider appropriate". As I have said elsewhere, not all cases can be settled. Most judges have the instinct and know when to stop.

### **Judicial Mediation [Sic]**

A most unfortunate term has crept into dispute resolution language, namely "Judicial Mediation". This is an oxymoron and it is also dangerous.

If I may explain. Speaking strictly of classic mediation, it is totally non-judgmental (while there are versions of mediation which are judgmental, I am referring to the "classic" form, for the sake of this argument). In classic mediation, the mediator helps the two parties come to their own solutions. The mediator does not say things like:

"I really think that you have exceedingly high expectations and the chances of getting \$100,000.00 in this lawsuit are totally unrealistic. I think you should modify your offer of settlement.

or

"The Defendant's offer makes some real sense to me. I think you should take a hard look at it before going to trial".

No. The mediator is supposed to skillfully massage the two parties into reaching their own solution. I used to say that fewer than 5% of Canadian judges have the patience and skill to be mediators. As this is anecdotal, I might go to 10% today, but not much higher.

Most trial judges doing JDR are skillful at evaluating a case from the material that is presented to them and have a fairly good idea as to what will happen in Court. Therefore, they can be very effective in terms of bringing a touch of reality to the parties (and their lawyers). Trial judges are naturally judgmental. They are not mediators. Judges also have far more clout than mediators. They have almost instant respect. The most significant difference from mediators is that: at the end of mini trial a judge can say: "If I were sitting as the trial judge on this claim I would award the Plaintiff \$100,000.00." No

mediator can ever use those words. And that again is one of the key benefits of having judges run the JDR session.

I have nothing against the word “mediation”; it is like “motherhood and apple pie”. A very good thing. It is simply not a judicial function or one which comes naturally to most judges. The parties and their lawyers should be informed of this fact so they know exactly the kind of process in which they are engaged. Judges should work hard to avoid pretending they are mediators. There are times I personally think that this is a lost cause. In Lethbridge, Alberta, they put a sign at the meeting room “Judicial Mediation”. I controlled myself and did not rip the sign down.

### **Binding Mini Trials**

Fairly early on in the history of JDRs, some clever lawyers started asking the JDR judges if they would do binding mini trials. The idea is, why go through this summary process and still leave it open for one party to go to trial. What a simple solution – a binding mini trial. There was, however, immediate disagreement amongst the Bench. Some said: “Why not”; others replied: “Over my dead body”. I adopted a pragmatic approach. If I thought the nature of the dispute was sufficiently uncomplicated, and I was comfortable, I would do a binding mini trial, but generally I would avoid them. Some very experienced JDR judges recounted that with this approach much of their persuasive techniques to reach a settlement would be destroyed. It was conceivable that a non-binding opinion would be one quantum figure, but for the sake of settlement, another figure might be appropriate. So the trial coordinators have prepared a list of the judges who will do binding mini trials and those who will not.

One judge who takes a positive approach to this form of dispute resolution, has illustrated a number of situations that clearly lend themselves to a binding mini trial. For example, he has had lawyers come to the pre-JDR meeting and say that they want the JDR judge, at the end of the mini trial to say, “it is worth either \$25,000 or \$40,000, nothing in between”. This is not dissimilar to final position arbitration and makes good sense. The same judge gives another example of determining the appropriate figure of a professional’s fees. The parties know that a trial is out of the question, as it would be much too costly, but they want to resolve the issue quickly and painlessly. A binding mini trial is their solution. So if you decide, why not opt in? (Some conspiratorial lawyers agree privately that they will accept an opinion as binding, without telling the judge. This is clearly out of our hands and is their business.)

Since this matter was originally considered, much has happened. The Alberta Institute of Law Research and Reform has prepared a draft memorandum which in essence indicates binding mini trials are not a very good idea. This informal review suggests that the minute a judge gets involved in a binding mini trial, this is an adjudicative position not a facilitative position, which is what JDR should be. There is much current discussion

amongst judges in this regard and the debate is still ongoing. After much soul searching , my own simple answer is, if someone wants a binding mini trial ,do the following :go into an open court room with clerk, record the proceedings ,follow the summary trial rules and call it a summary trial. This should solve the problem. .

### **Caucusing**

The biggest red herring in the ongoing arguments surrounding JDR is the concept of caucusing, i.e. “shuttle diplomacy” where the judge meets separately with the parties and discusses their case. Some very highly principled judges refuse to caucus. They simply state that it is not a function of a s. 96 judge to meet separately with the parties and they will not do it. I respect their view. I don't totally agree with it. Many other judges, whom I similarly respect, take a pragmatic point of view that caucusing works and if it is appropriate, do it. Too much time has been spent on this narrow issue and it is up to each judge to decide whether or not they wish to caucus. Before caucusing, the judge should provide full information and instruction on the process and get both parties agreement that it is part of the settlement conference. If anyone involved in a JDR is uncomfortable with it, then they shouldn't do it. Of the hundreds of times that I have asked lawyers in pre-screening meetings if they have any objection to the use of caucusing, I have never had a negative response.

There is very little that has been written about judicial caucusing. The best I have ever read is a writing by Michael Fogel who uses it at the N.J.I. Seminar. I was going to paraphrase it for this book but it would not do it justice so reproduced the entire article with Michael's kind approval as Appendix 1.

### **Suggestions for Lawyers**

It is very difficult for a judge to give advice to lawyers. I am well aware that each judge has his or her own peculiarities. One day you will be praised for a particular action or presentation. The following day the identical procedure will be met with scorn and derision. I have long admired counsel who face such an uncertain world in the judiciary. Having stated this caveat, I will try to make a series of suggestions of steps that would appeal to me and to my recently recreated mythical well-instructed trial judge (WITJ) sitting on a settlement conference:

1. Ensure that your client has realistic expectations. One of the saddest things to witness is a client who has unrealistic expectations. I am never sure if this is the fault of the lawyer at the time. Sure this is a range, but if it is \$50,000 to \$70,000, why would a client think it is worth \$250,000? I have seen a decent human being break down and cry when she realized how little her claim was truly worth, and to add insult to her injuries, her lawyer had spent \$50,000 on experts. The claim was evaluated at \$75,000 and the defence would not be prepared to pay anymore than

the going sum of \$20,000 for experts. I hate to see people cry so be reasonable with your advice to your client.

2. Explain to your client the advantage of a settlement conference as opposed to a trial. Explain to the client the cost of a five day trial and the effect of a formal offer on costs if it is unsuccessful. Explain the law of bankruptcy.
3. Explain to your client that the usual adversary approach will not apply. There will be no grandstanding or badgering. Instead, the client can expect thoughtful and considerate discussion. Further, explain to your client that he must be prepared to be flexible and listen to the other side. Your client must understand that some issues may have to be compromised in the interest of reaching a settlement.
4. Be prepared to disclose your case prior to the JDR. The purpose of the JDR is to settle the case, not to ambush the other side. If you have reports or other evidence, such as surveillance, that you are not prepared to disclose, then you should reconsider whether JDR is appropriate.
5. Be prepared that you (and your client) may be wrong. Explain to your client that after hearing both sides, the judge may find that your client's position is wrong or unreasonable. You and your client should be prepared for this possibility and should come to the JDR prepared to make compromises, if this is the case. If your client's attitude is that he will go to trial "no matter what" if the judge does not agree with his position, then you should seriously re-consider whether a JDR is appropriate.
6. If your client wishes to speak and this has been approved by the trial judge, brief your client on how to make an effective presentation. Although the judge cannot make decisions regarding credibility, the client's presentation at the JDR may have a significant impact on the judge's opinion and, more importantly, on the other side. In many cases, the JDR provides the parties with their first opportunity to address each other directly in a "controlled" setting. This opportunity should not be wasted.
7. If you have a corporate client, ensure that the representative has authority to settle. There is nothing worse than the situation where everyone present is in agreement with a reasonable solution but one party has limited authority and cannot finalize the settlement. The same goes for spouses. If your client will not settle without consulting with his spouse (or mother, father, sister etc.), seek the consent of the judge and other side for these non-parties to attend the JDR.
8. Forget the adversarial role. You are here to settle. I have always respected lawyers who come in and readily acknowledge the weakness in their case and simultaneously show the weakness in their opponent's case. Be objective. Remember if the route taken is "let us jointly solve this problem" you can be a great



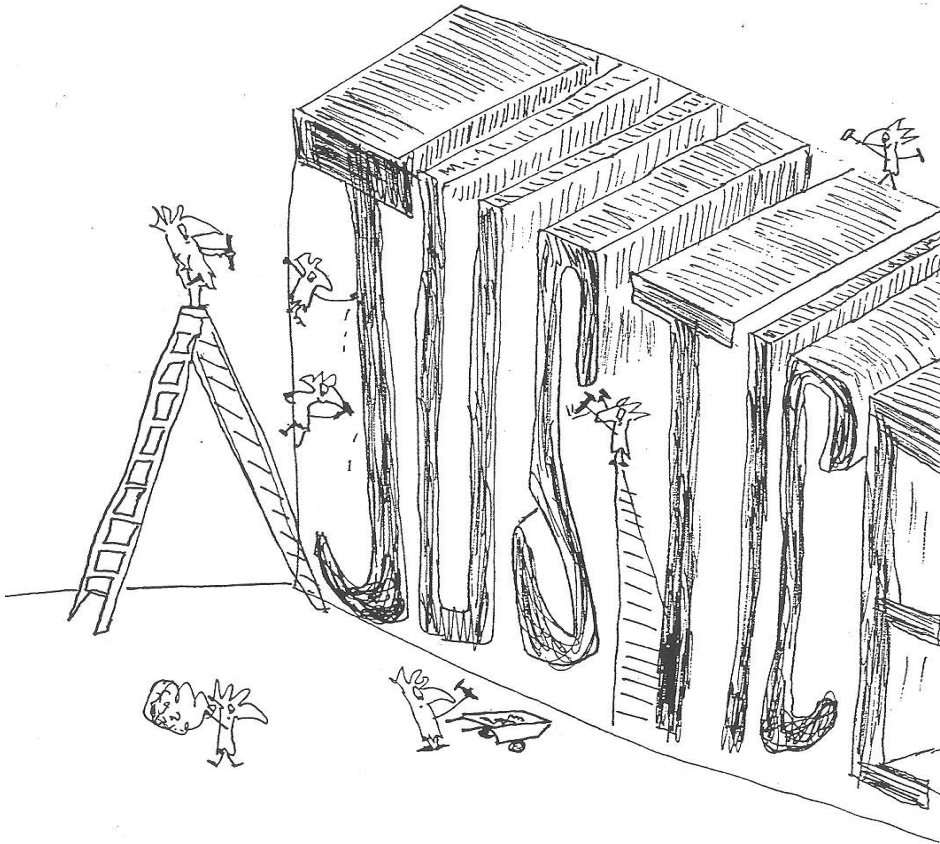
help by making clever suggestions on what is really a fair settlement. If you get good at this someone may suggest you apply for a judicial appointment. Do not hold your breath; in most places the lists for applicants are quite long.

9. As previously noted, ensure that your written material is short and to the point with all transcripts, reports and authorities flagged and highlighted.
10. Avoid citing a rogue decision. Be part of the mainstream. Put forth a valid decision based on available criteria i.e. decisions that are truly applicable. Supreme Court of Canada cases are good. Decisions by the JDR judge are even better.

Many cases are a question of contributory negligence or an apportionment of blame. Often there are good authorities that assist your situation. But if not be creative with an analogy with what you have. Also remember the rule that if the judge cannot determine apportionment of contributory negligence the Act applies and it will be 50/50. This is an easy out though sometimes it is the fair settlement.

11. Timing is everything. Remember this is a summary procedure. Come prepared to make concise, short statements that have been carefully thought out. Also remember, in our system the judge has read your brief and he knows the issues. So get to the point. Set out your strengths and if you are really courageous, your weaknesses. Categorize them on a scale and on a risk assessment.
12. Be persistent. If at first a settlement seems unlikely, keep trying. In some cases, the parties get very close to settling but cannot bridge that final gap due to emotion, stubbornness or any number of reasons. In these cases, it is often beneficial to end the discussions for the day with the understanding that the discussions will resume in the next few days when cooler heads prevail. I am aware that many cases that do not settle on the day of the JDR, settle during the following week.
13. Seek the assistance of the judge, where appropriate. If the judge has not yet offered an opinion, politely indicate that an opinion or even a range would assist.
14. Do not let yourself be brow beaten by the judge if the judge is totally unreasonable. If the facts and law are on your side, stand up on a courteous fashion. There have been instances where judges have made serious mistakes and then forced lawyers into either consent judgments or formal settlements. One of these horror stories is actually reported. If you cannot find it, call me and I will give you the citation. I use this horror story as a training technique. It would be my suggestion that if faced with such an impossible situation the lawyer should as politely as possible indicate that he or she cannot see that there is any purpose in continuing the settlement conference, that they are not prepared at this point to reach a settlement, thank the judge for their help and get the heck out of the settlement room. Once again, who

ever said life is easy. Remember, the opposing lawyer may have some brains and you can always work out a settlement with that lawyer after the conference is over. What the heck, some cases have got to go to trial otherwise why would courts of appeal have been created?



JDR LIBERATES THE FIGUAR FROM THE STONE  
BBA

## **SPECIAL SITUATIONS**

### **JDR for Self-Represented Litigants**

Up until November 8, 2001, I was adamantly opposed to JDR's with one side being a self-represented litigant, (S.R.L.). I could see a pretrial with an S.R.L. turning into a quasi-settlement conference, provided it was in an open courtroom with everything being recorded for the potential benefit of the Judicial Council.

On the day in question, at judges' annual Education Seminar, there was a very civilized impromptu debate where the two sides of the issue were fairly argued. One reasoned position was that we have created JDR's as a less costly and less adversarial means of resolving disputes. Why should S.R.L.'s, who are often those most in need of a

cheaper process, be denied access to JDR's? The equally well-reasoned position was that it would inevitably be unfair to the represented side. The JDR judge would wind up not only providing free legal advice, but to balance the situation, try as they may to be impartial, inevitably they would end up protecting the S.R.L. and therefore end up as his or her advocate. Both sides are correct.

I was impressed that a number of Calgary judges have had settlement conferences with S.R.L.'s and have been successful in the process. Rather than formal briefs, they have requested the S.R.L.'s to provide a short memorandum of two or three pages setting out their views on the problems or issues needing to be resolved. So, my current position is that JDRs with S.R.L.'s are okay provided:

1. The represented side agrees;
2. The issues are carefully screened and are within reasoned limits; (i.e. doable by JDR process);
3. The JDR is in an open courtroom with the proceedings being recorded and the JDR judge sits in the well of the courtroom, not on the bench;
4. The S.R.L. is civilized, open-minded, and flexible to a reasoned settlement, and is moderately literate.

Subject to those conditions, the parties should go for it. After all, to the extent that JDR provides meaningful, relatively pretty cheap and accessible justice then we are fostering the goal of making the justice system accessible to as many people who need it as possible.

One of my colleagues, Justice Marguerite Trussler, has written what I consider a definitive article entitled "A Judicial View in Self-Represented Litigation". It is reported in 19 Canadian Family Law Quarterly. It is a terrific work and if you are interested in the subject of S.R.Ls, it is a must read.

## **Family Law**

I am not the first judge or lawyer to realize that the adversarial process in a courtroom is not the ideal means of resolving disputes in family matters. What is often a sad, unhappy, and occasionally violent marriage, is exacerbated in court through our process of dissolving marriages. Divorce litigation, like most other litigation, takes too long, is too expensive, and is ill-suited for resolving disputes. This is so particularly when children are involved.

Others have, in many ways, attempted to temper the judicial system and its confrontational approach. The rise of collaborative lawyers in family law is one example. The essential arrangement in collaborative family law is the lawyers will not go to court to fight the battle. Rather, the agreement requires the parties to settle their dispute outside of court, and if they fail, the parties must retain other lawyers. (I understand that my hunch that collaborative law is going to creep into other facets of law has already started to play out. We may not need as many judges in the future, but I digress. Professor Farrow notes that it is his understanding that collaborative lawyering techniques are being used outside the family context at least in the US and in some jurisdictions in the wills and estate area as well.)

Judges, too, have tried in many ways to get divorcing partners out of courtrooms. Early intervention is one attempt. Use of “parenting after divorce” courses is another. Appointment of a case management judge to hear all interlocutory applications before trial is a step in the right direction. The Supreme Court of British Columbia has recently instituted a formal procedure to alleviate some of the harshness of the adversarial approach.

For some reason, family law practitioners in Alberta have been loathe to use our JDR procedures. Our somewhat limited statistics show that personal injury lawyers, Plaintiffs and Defendants, have seen the benefits but not so family law lawyers. In July 2002, N.J.I. held its first seminar directed to settlement conferences in family law disputes. Having seen the results, I support this initiative as a worthwhile adjunct to the current general settlement conference seminars. The judges engaged in family law carry an exceedingly onerous burden. Taking some monies away from parties is one thing, taking someone’s children away is an awesome responsibility.

Settlement conferences in family law differ from other areas of law in a number of significant factors. The following are ones that I have been able to discern:

1. There is seldom any finality in family law. In a personal injury case arising out of a motor vehicle collision, an award of damages is made. The chances of the same two parties colliding again are negligible. But in family law the problems are ongoing. As one of the presenters of the seminar said: “a Final Order in family law is never a Final Order.” In many cases the questions of custody, access and maintenance are almost always open to further adjudication.
2. The emotional factors are heightened beyond comprehension. Civility is often unknown. The desire to hurt, to pay back, to seek revenge, exceed anyone’s imagination. The fear of loss of children drive people to incredible extremes. One family court judge who had practiced for twenty years in family law suggested that many of the participants in divorce actions are clearly irrational. Errant drivers seldom kill each other.

## **Family Law Protocol**

Every divorce case has a typical list of issues, most of which are well-known and for which there are guidelines and precedents that provide sensible criteria for agreement. In light of this, I am currently experimenting with a voluntary protocol for use by judges in family law. The objective is to reduce the length of trials by settling most of the issues in advance and getting them off the table and to shorten trial time by use of either summary trial procedures or JDR. I repeat, this is experimental and not yet tested. It also requires cooperative and skilled lawyers. Here is the protocol:

1. Schedule a meeting with both counsel, review the case, and itemize the issues in dispute. Experienced counsel and a judge will be able to forecast the outcome in a trial of most of the issues. Set out tentative basis of settlement for each issue.
2. Allow counsel to confer with their clients and determine the issues that can be resolved based on the tentative suggestions. For example, hopefully, out of ten issues, seven or eight will be resolved.
3. Have counsel report to you to determine the results of their client meeting. Get the issues that have been resolved out of the action (never to be used again for any negotiations).
4. Proceed to either summary trial or JDR with a judge who is now fully appraised of each client's position on the unresolved issues. A judge who is prepared and knows the background will be in a position to more expediently make a decision or render an opinion.

I sent copies to five experienced family law practitioners. I got back five different opinions. I am still open to suggestions from the family law bar.

## **NEW DEVELOPMENTS**

### **Educating Judges for Settlement Conferences**

Lawyers may be interested to know that, for almost a decade, the N.J.I. has been holding one or two settlement conference seminars a year for small groups of judges, usually about 25 at a time. The principal presenter for these seminars is an icon in the mediation world, Mr. Michael Fogel from Vancouver, who, in his earlier life, was a judge in California. In addition to role-playing sessions where key situations are played out with participants playing the role of judge, plaintiff, defendant, and counsel, the course initiates judges in mediation techniques (note: the object is not to make judges into mediators). Two techniques that are illustrated are:

1. Open-ended questions, and
2. Re-framing.

Judges are taught to be curious in their questioning to understand the reasons for the dispute and if possible, explore underlying motives. It is not easy, after years of asking questions which can be answered “yes” or “no”, to do the opposite. The results are, however, worth the effort. Re-framing is something that comes to judges more easily. Having the judge state a party’s position in his or her own words instills the feeling in the party that his position has been understood and appreciated. What is even better is to reaffirm a position and reduce the expressed antagonism. This is really great stuff and is an eye-opener for most judges. This Handbook is always ongoing and I will try to persuade Michael Fogel to synthesize this concept in a summary fashion for inclusion in a future version.

There is also an expanding amount of literature available that deals with mediation techniques, including questions, techniques, active listening and reframing. Lawyers should become aware of the techniques used by judges and use them to their own advantage. One recent and useful collection of dispute resolution material that includes a section on reframing is Julie McFarlane, Jen. Ed. Dispute Resolution: Readings and Case Studies, *ibid*, (Toronto Imeid Montgomery Publications Ltd. 2003 at 380-390).

## **Innovations**

As judges and lawyers become more comfortable with JDR, new ideas spring forth from innovative minds. As I said earlier, the possibilities of new approaches in JDR are almost limitless compared to conventional trials. A few examples. One of the problems facing judges in both trials and JDR’s is conflicting expert opinion. Sometimes, opposite sides both seem reasonable. More often, it is a war of “hired guns”. One judge took it upon himself to invite the conflicting experts to the JDR session and engage in an informal question and answer session before rendering an opinion. Why not, say I?

Our JDR protocol requires that both decision-makers be present at the JDR conference. We all know that with corporate consolidations often the decision-makers, for example in the insurance industry, are out of province. One of our settlement rooms is equipped for tele-conferencing and recently I held a JDR with the Defendant in Montreal. The amounts involved make good economic sense rather than requiring the client to fly to Edmonton.

Sometimes, the ideas get a little farfetched. Recently, an enterprising counsel asked one of our judges if he would hear *viva voce* evidence from the Plaintiff and Defendant at a JDR conference and then decide who was telling the truth. We kicked this one around and decided no. Firstly, our JDR conferences are not recorded. There is no

clerk present. It is an informal procedure, not one conducive to making credibility findings. Our suggestion for this was a summary trial with defined issues, in a courtroom, with the only two witnesses, being the Plaintiff and Defendant, under oath. Some things are better done in a courtroom.

## **MISCELLANEOUS**

I have plagiarized a policy initiative relating to judicial participation in settlement-promoting activities prepared for Massachusetts trial judges. I hate reinventing the wheel and will not do so here as this information looks good. Some may think it is pure motherhood, but for what it is worth, it is attached as Appendix 4.

Usually, once a year, the Edmonton JDR judges meet and review our protocol for JDR to improve it and include new ideas. The most current protocol is attached at Appendix 5. It is largely a repeat of what has been spelled out above, but it is attached as Appendix 6 as it does include the requirement that all briefs and material be returned to counsel at the end of hearing for the reasons set out therein. As well, this practice has the advantage of saving court storage space.

At the Alberta Education Seminar in November 2001, a select panel of JDR judges had a number of difficult questions put to them. Regrettably, they tended to give the same answers, with a few choice exceptions. A shortened list of the questions is attached as Appendix 7. You are welcome to provide your own answers.

Justice Bonnie Rawlins is one of the most effective and successful JDR judges in Alberta. She was an early believer in the program and today many lawyers in Calgary plead to have her hear their settlement conferences. She has a unique talent and approach and I have prevailed upon her to outline her approach, which is set out as Appendix 7.

## **DISCLAIMER AND APOLOGY**

It goes without saying that the views expressed in this Concise Handbook are mine personally and do not represent the views of the Chief, the Associate Chief, or any other puisne judge of this Court. I know that many fair-minded judges agree with much of what I say. I know many fair-minded judges who disagree. That's life. I feel I should explain the somewhat irreverent manner in which I write. Writing does not come easily to me and the only way I can do it is by adding my peculiar sense of humour. I truly apologize if I offend anyone.



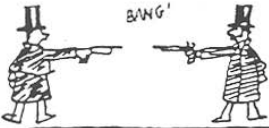




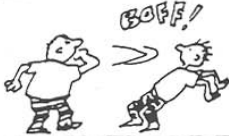
## **ACKNOWLEDGMENTS**

This is an ongoing work. Version 1.3 was prepared for the Alberta Court of Queen's Bench Education Seminar in November 2001, as a working draft. I asked for comments from my colleagues and I received helpful suggestions from the following judges, and have incorporated these suggestions in subsequent versions. In order of receipt of comments, I acknowledge and thank the following Justices: Lawrie Smith, Sal LoVecchio, Bonnie Rawlins, Phillip Clarke, Jean Côté, and Paul Belzil. My editor for this version was the Senior Legal Counsel to the Court of Queen's Bench, the late Charles Pearson. He had a remarkable talent of improving everything he edits. I am truly indebted to him and I and the Court miss him. The cartoons were drawn by Dr. Barry Goodfield, a Ph.D. Psychologist from San Francisco. He has worked with Alberta law firms, and in years gone by, with the Canadian Bar Association. He is an expert in interpreting body language and claims to be able to detect liars by their body movements. We could use him for both criminal and civil trials. My literary agent for this Handbook, as he has been for all of my books, is that erudite, learned and witty Ontario Court of Appeal Justice Marvin Catzman, one of the few people from Toronto and on a Court of Appeal who I can call a friend. Another version of this work for students has been prepared in association with Professor Farow of the University of Alberta, Faculty of Law. He has added some invaluable commentaries which I have included in this version as well. For this lawyers' version, I had the assistance of my niece, Janice Agrios. I chose her not by reason of nepotism but I wanted the best lawyer in the field I could really work with. She has not disappointed me.

Thank you.

# DISPUTE RESOLUTION METHODS - COMPARED

A HANDY REFERENCE TABLE

METHOD	CONS	PROS
<p>DUELING</p> 	<ul style="list-style-type: none"><li>-OUT OF FASHION</li><li>-MIGHT GET KILLED</li></ul>	<ul style="list-style-type: none"><li>-USUALLY DONE AT DAWN - SO WON'T INTERFERE WITH WORKDAY</li></ul>
<p>COIN TOSS</p> 	<ul style="list-style-type: none"><li>-ARBITRARY</li></ul>	<ul style="list-style-type: none"><li>-CHEAP</li><li>-SIMPLE</li></ul>
<p>WAR</p> 	<ul style="list-style-type: none"><li>-MIGHT GET KILLED</li><li>-WORLD MIGHT END</li></ul>	<ul style="list-style-type: none"><li>-GOOD FOR BUSINESS</li><li>-CAN TELL GRAND-CHILDREN ABOUT IT</li></ul>
<p>"ALTERNATIVE DISPUTE RESOLUTION"</p> 	<ul style="list-style-type: none"><li>-SEEN AS FLAKEY</li><li>-NO ONE UNDERSTANDS IT</li></ul>	<ul style="list-style-type: none"><li>-CHEAPER THAN LITIGATION</li><li>-QUICKER THAN LITIGATION</li></ul>
<p>LITIGATION</p> 	<ul style="list-style-type: none"><li>-EXPENSIVE</li><li>-DRAGS ON FOREVER</li></ul>	<ul style="list-style-type: none"><li>-RESPECTABLE</li><li>-MIGHT GET IN <u>LAWYERS WEEKLY</u></li></ul>
<p>BARE FISTS</p> 	<ul style="list-style-type: none"><li>-MIGHT NEED COSMETIC SURGERY AFTERWARDS</li></ul>	<ul style="list-style-type: none"><li>-GOOD EXERCISE</li><li>-CHEAP</li></ul>

Appendix #1

**CAUCUSING IN MEDIATION and BY JUDGES  
An Overview**

Michael Fogel

The inception of mediation in North America grew out of the need to deal more effectively with labour-management disputes. Caucusing, a process of separate meetings between the mediator and representatives of labour and management, was a significant part of that mediation process. This labour mediation “model”, which grew out of highly conflicted circumstances and historically distrustful relationships, focused significantly on the caucus as a means of getting the parties to the negotiating table, but not necessarily at the same time or the same place. In most situations, little of the mediator’s time was spent in session with all of the parties present. The mediator customarily spent a substantial portion of the time working with the parties in separate sessions, moving the parties, inch by inch, closer to agreement. Currently there continues to be considerable reliance on caucusing in labour mediations, but there is a small but growing trend toward viewing caucusing as an important tool to be used when deemed necessary by the mediator and/or the parties.

As the use of mediation began to develop in other conflict situations, the labour-management “model”, with its emphasis on caucusing, was, at first, adopted almost unconditionally. As mediation continues to develop and evolve in Canada and the U.S., the use of caucusing is being modified and viewed by mediators and judges as an important strategy to be implemented, when and if appropriate as opposed to the process relied upon to ensure effective and productive negotiations.

Over the last few years in Canada, many of those involved in providing mediation services, as well as mediation training, have begun de-emphasizing the use of caucusing in the interest of providing the parties the opportunity to negotiate with each other more directly. The underlying premise for this move away from caucusing was that the more directly the parties negotiate with one another, the more potential there was for the agreements reached to be based on a fuller understanding of interests as well as the perspectives related to those interests. Judges are also learning that, through this “one-on-one” negotiating process, the parties can develop new and more effective ways of resolving disputes in the future while building potentially more effective working relationships. There are distinct advantages to the work done in joint session, in which all parties are participating together and, at the same time, there is no reason to discount or negate the benefits of effective caucusing.

Mediation is a “work in progress” and, therefore, in a constant state of assessment and reassessment. There are a significant number of judges who are now looking at caucusing as an important option among various mediation strategies, its use to be determined by the specific circumstances of each individual mediation. Many mediators, working in community, family and commercial settings are finding a renewed interest in caucusing and are experiencing what a significant role the wise and well-directed caucus can play in effectively mediating disputes. The key is maintaining a balance between the use of caucusing and the joint session negotiations. This balance will facilitate the parties’ reaching a mutually satisfactory agreement based on a better understanding of one another, as well as their interests. The more the parties are able to effectively negotiate directly with one another, the more productive their efforts will be.

The most effective way to implement the caucus is by being clear about the objective(s) to be achieved at the particular point in the mediation where the caucus is being used and accomplishing those objective(s). Then move the parties back into joint session in order to effectively utilize the information generated or the insights gained during the separate meetings.

**General categories of goals/objectives that we can accomplish during the caucus:**

1. Reality testing (challenge positions: fairness, reality or practicality)
2. Boundary testing (bottom lines, flexibility, openness to alternatives)
3. Exploration (undisclosed ideas for solutions or agreement, disclosed or undisclosed assumptions, personal issues between the parties that are withheld in the joint session and intuited by the judge)
4. Process issues (discomfort with process, judge-party issues, cooling off period, breather)
5. Building consensus and/or agreement between negotiators on the same “team” (client and counsel; co-counsel)
6. Pre-settlement conference preparation (meeting with the parties separately prior to the first joint mediation session) to gain insights, establish rapport, obtain commitment to the process, begin creating the agenda, gather background information, begin looking for the gaps/barriers to settlement and assist the parties in preparing for their negotiations (identifying information to be gathered, identifying and encouraging the exchange of information)

The following are some crucial factors the judge should consider when caucusing:

1. The effect on the trust level or “What are they saying behind my back?”

Caucusing does allow a level of informality and a connection between the judge and the parties that is often difficult to attain in the joint session. This having been said, it continues to be important to maintain the “perception of neutrality”. There is a distinct difference between empathizing over the difficulty of the situation and taking sides with one party or the other, even in separate sessions. If one party perceives the judge aligning with her/him, there is good reason for that party to wonder if the judge is doing the same with the other party.

The very nature of not knowing what is being discussed can create more distrust between the parties and can even cause damage to the trust between the parties and the judge. It is important for you to be aware of this potential and be prepared to deal with its impact on the settlement conference.

2. The use of confidentiality or “What can or cannot be disclosed in joint session?”

At the beginning of the caucus, the judge may choose whether or not to make everything discussed in the caucus confidential, moving the party(ies) toward joint session disclosure as the caucus ends. This use of confidentiality can increase the potential for the sharing of more information during the separate session. The downside is that this process can leave the judge the repository of information, some of which is confidential and some not. Keeping the information organized based on its confidentiality or non-confidentiality becomes crucial! In addition, it becomes the judge’s task to challenge the parties on the bases upon which they are choosing to keep information generated in the caucus from the other party. The good news is that the parties, through successful challenging by the judge, most often conclude that disclosure will improve the potential for getting to agreement and far outweighs any potential harm.

If the judge chooses to open the caucus with the understanding that all information disclosed will be open for joint session discussion, there is the risk of limiting the disclosure of information that could facilitate effective negotiations. On the other hand, the organization of information is less complex and caucuses become less hazardous by eliminating the possibility of divulging confidential information. Most judges who caucus are choosing the route of confidentiality.

3. An awareness of the time spent with each party in caucus or “What are they talking about in there - it seems like hours!”

Keep in mind that, in most cases, the party or parties with whom the judge is not in caucus feel like they are waiting much longer than the actual time spent. Parties in dispute are anxious and mistrustful; therefore 10 minutes of waiting while the other party is in caucus, seems like 30. The message, therefore, is to have a purpose in

mind for the caucus, get it accomplished as quickly as possible and get back to joint session.

4. Caucus with all parties or sides represented or “Why is he/she meeting with them and not with me?”

Balance is one of the key ingredients of any settlement conference, and in order to maintain that balance, the judge does have to meet with all parties. Inevitably, there is something that can be accomplished from meeting with each party separately even if the goal of the caucus was focused more on one party than the other. If there is more than one caucus in the session, you would be wise to alternate the parties with whom you meet first - balance is everything and they do keep score!

5. Identify your objective(s) in suggesting the caucus, and keep the objective in mind while caucusing. Avoid “fishing expeditions”.

Judges who are not clear about why they have suggested a caucus often wind up on a “fishing expedition”. This can be time-consuming and confusing for the parties. If you are treating caucusing as settlement strategy, it needs to be purposeful.

Caucusing without concrete objectives can often lead to the judge becoming a shuttle diplomat or diplomatic courier which will often lead to diminishing effective party-to-party communication. If you determine, with the parties, that a *conciliation* process will be more effective, then make that decision. Be wary of defaulting to a conciliation because of an unintentional overuse of caucusing.

### **Caucusing Formats:**

1. Judge in separate session with each counsel and his/her client.
2. Judge in separate session with each counsel without client.
3. Judge in separate session with both counsel without their clients.
4. Judge in separate session with parties (if not represented by counsel).
5. Party(ies) and a support person (expert/consultant or family member who may or may not be participants in the joint session) in caucus with or without the judge.
6. Counsel and client in separate session without the judge.
7. Counsel and counsel in separate session without the judge.
8. If co-mediating, a meeting with the co-judge only.

9. Judge in separate session with client only (rarely done when parties are represented by counsel).
10. The parties meeting together without the judge present and without counsel present if represented.
11. If third parties with a vested interest in the outcome are present, the judge may caucus with that third party alone (e.g. the purchaser of a partnership interest in a business that is dissolving).

**Guidelines:**

1. Have a specific purpose (goal/objective) in mind when calling a caucus.
2. Caucus with both (all) sides to maintain balance.
3. Be aware of the length of time spent with each party and be certain that each is not left alone too long.
4. Clarify the issue of confidentiality in relation to the information shared in caucus.
5. If information generated in caucus is to be kept confidential be certain that you clarify with the parties what is or is not to be kept confidential and take special note of that which is to be kept confidential.
6. Maintain an environment of informality and flexibility in the caucus sessions.
7. Encourage the parties to seek information and anything else that would assist them in their continuing negotiations by any reasonable means available.
8. Encourage the participation and input of the client (if represented by counsel).
9. Caucusing can feel more comfortable and less demanding than joint sessions; remain in caucus until you have made progress or accomplished your goal, then return to joint session.
10. Be careful, in the pursuit of building empathy, not to create the perception of aligning with one side or the other while in caucus. She will almost certainly wonder if you are doing the same thing when meeting with the other party, and you will lose her trust. **Example:** "It's pretty clear that they are taking an unreasonable position on the issue of liability; I can understand your losing patience."

## Goals/Objectives

1. Allow cooling-off periods.
2. Challenge each side's perspective of his case. Focus on criteria.
3. Assist each side to check the reality of his position -- judge as the agent of reality.
4. Encourage the seeking of additional relevant information or provide needed information.
5. Explore new possibilities for areas of movement.
6. Discover interests or needs that have not surfaced in joint session. These interests could be directly related to the dispute or issues related to the process.
7. Uncover reasons for resistance to movement.
8. Determine if there are assumptions operating which need clarifying.
9. Determine if there are judge-party issues/dynamics which should be addressed.
10. Determine if "bottom lines" are real and, if not, how much room for movement there is.
11. Non-judgmentally point out behaviour or tactics that are getting in the way of progressing to settlement.
12. Direct attention to areas of where alternatives might be found that would promote movement or, if necessary, suggest alternatives.
13. Allow for a "breather".
14. Exert well-placed judge pressure based on time, consequences of no settlement, etc.
15. If deemed necessary (and part of the process agreed to by the parties), assist the parties with possible recommendations for settlement and determine receptivity.
16. Commend parties for specific behaviour (patience, willingness to move, maintaining reason, etc.); acknowledge their frustration or anger to encourage cooling off without taking sides.



17. Ascertain if there is a history of psychological or physical abuse/coercion which could affect the ability of the party to negotiate effectively on his/her own behalf.
18. Determine if there is any coercion or threat or perceived threat involved between or among the parties.
19. Facilitate a “meeting of the minds” between and among negotiating teams whose members are not seeing eye to eye.

Caucusing, as with so many aspects of settlement conferencing, is being earnestly scrutinized by judges and mediators and is the source of ongoing discussion and debate. Depending upon the contextual nature of the dispute, there are judges that rely quite significantly upon the use of caucus and others who, as a policy, choose not to use caucusing under any circumstances. Most judges do seem to agree on the importance of maintaining the discourse and dialogue; to continue to challenge each other in relation to the use of caucusing in order to optimize each judge’s understanding of the process. This ongoing examination will enable each judge to make more informed decisions related to the use of caucusing in the future.

It is important to note that there are several mediation processes and models being practiced in North America and in other parts of the world. Caucusing is used to a greater or lesser degree depending upon the mediation model being practiced.

Most judges practicing in Canada today and utilizing an interest-based model of settlement conferences are treating caucusing as an important strategic tool and, like any other tool, they are using it when and if they believe it will assist the parties in accomplishing their settlement goals.

Appendix #2

OPENING STATEMENTS FOR MINI TRIAL

\_\_\_\_\_After the lawyers have introduced their clients, the judge should open with some general comments such as the following:

“You should understand that everything that is discussed in this room is confidential. The lawyers will present their cases in a summary fashion as if they were in a trial, setting out what they would hope to be able to prove. We will not hear any evidence. (If it is appropriate, make reference to the briefs that have been filed). The parties will have an opportunity to speak to the matter if they so choose.

At the end of the hearing I may provide a non-binding opinion. This opinion is to be kept secret and not disclosed to anyone else. If any of the parties is unhappy, they are permitted to proceed to a full trial and no reference will be made to the mini trial or the opinion.

If at the end of the mini trial both parties agree, we may discuss the matter of settlement. This is totally up to you.

The object of these proceedings is to see if we can resolve the dispute in a more timely and less costly fashion than would be required by a full trial.

I have also asked the lawyers to come here in a less adversarial manner than they would at a trial, with the understanding that we are all trying to work together to find a solution to this problem and hopefully achieve a settlement.”

Then make opening remarks about the specific case.

**J. A. Agrios**

Appendix #3

May 1999

**Additional Opening Statement to Injured Parties in a Mini Trial**

Mr. or Mrs. \_\_\_\_\_, I have read in your counsel's material and in the medical reports of the injuries that you suffered as a result of this accident. There is, of course, nothing we can do to put you back into the same state of health you were in before the accident.

What we are trying to do is to fairly assess the damage done to you based on previous Court decisions in similar cases. You may think that sometimes we are speaking of you as if you are not here. I assure you this is not the intention. We are trying to fairly quantify the award that you are entitled to. One advantage is that we can discuss your injuries privately in this conference room in confidence rather than in an open court where there is no privacy. I hope that this will help you understand this process and that we are in no way trying to trivialize or make light of the injuries that you received. You should also appreciate that counsel for the defence will question the severity of your injuries and this is to be expected. Your own counsel will have an ample opportunity to present your side.

J. A. Agrios

JAA/mmh

Appendix #4

**Judicial Ethics Relating to Judicial Participation**  
**in**  
**Settlement-Promoting Activities**

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1. A judge should encourage and facilitate settlement in civil cases unless such activity is otherwise prohibited. A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters. A judge shall not coerce parties into giving up any rights or to reach a settlement.
  
2. Consideration should be given to the development of a policy statement on settlement activities of judges to provide an expression of the policy of the Alberta judiciary regarding settlement and some guidance to judges and Court personnel about what activities are permitted and what are prohibited. Something along these lines might be appropriate.

“The public policy of the Court of Queen’s Bench favours the settlement of most disputes in several cases. When appropriate, judges should encourage settlement in a manner that is fair and respects the right of each party to have access to the Courts. Unless otherwise prohibited by law, a judge may participate in settlement discussions or processes with the parties and the lawyers, so long as the judge does not coerce a party to give up any right or to reach a settlement. In no event shall a judge who participates in settlement discussions or a settlement process act in any other capacity with regard to the subject of the dispute in that case or in a future case.”

3. Some suggested guidelines for judicial participation in settlement activities are as follows:
  - (a) the judicial functions in the settlement and trial phases of a case should be performed by separate judges. A judge presiding over settlement conferences is performing judicial functions and as such the applicable provisions of judicial conduct, particularly the disqualification rules, should apply in the settlement context.
  
  - (b) judges should encourage and seek to facilitate settlement in a prompt, efficient and fair manner. They should, however, not take unreasonable measures that are likely, under normal circumstances, to cause parties or their lawyers to feel coerced in the process. The

judge should take reasonable measures to ensure the parties' participation in a settlement conference.

- (c) in settlement conferences judges should establish ground rules at the outset, either orally or in writing, informing the parties and their lawyers of the procedures that will be followed. These should include ground rules covering issues such as confidentiality, disclosure of facts, and positions during and after the conference, and ex parte communications.
- (d) a judge should use settlement techniques that are both effective and fair and be mindful of the need to maintain impartiality in appearance and in fact.
- (e) judges should guide and supervise the settlement process to ensure its fundamental fairness. In seeking to resolve disputes a judge in settlement discussions should not sacrifice justice for expediency.
- (f) a judge should not arbitrarily impose sanctions or other punitive measures to coerce or penalize litigants and their attorneys in the settlement process.

The Court of Queen's Bench should consider adoption of a policy in favour of early Court intervention in civil cases and to require the Court to raise the possibility of settlement conferences.

4. The Council of the Court should consider developing a curriculum for judges in the theory and practice of negotiation and settlement conferences.

Appendix #5

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**Protocol for Judicial Dispute Resolution**  
**in Edmonton, Alberta**  
**Amended November 2002**

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1. **A pre-meeting** prior to the JDR hearing is mandatory. Whether a meeting should be in person or a telephone conference call is at the individual judge's discretion. The experience has shown that as a rule these meetings normally last from 20 minutes to ½ hour. On some occasions a follow-up meeting may be advisable to obtain some additional information.
2. **The object of the pre-JDR** meeting is to determine the issues that are to be dealt with at the JDR, set the parameters for the briefs that are being filed and provide deadlines for submissions of the briefs and hopefully establish realistic positions by both counsel. There will be instances where judges should decline to proceed with a JDR hearing, example; positions are irreconcilable; substantial disagreement on the facts. Other means are preferable to achieve given results such as a stated case when it is a matter of pure law.
3. **Briefs** are to be fact brief, highlighted, tabbed and filed directly with the judge (not the Clerk nor the Trial Coordinators). The types of authorities and numbers should be discussed with the JDR judge (example; on quantum, Alberta authorities are preferable)
4. The JDR judge should inquire if counsel are prepared to **caucus**. Some judges will not caucus and if this is considered vital to the lawyers an alternative JDR judge should be selected.
5. Generally speaking there should be **substantial agreement on the facts**. JDR is not a fact finding process. The essential, factual matrix must be agreed to in advance. JDR is not a credibility exercise nor are all cases suitable for this process. Viva voce evidence has no place in a JDR. Some judges have suggested there is merit in inviting experts to the JDR to explain/debate their opinions particularly in those cases where for example causation as a technical issue dependent upon expert opinion.
6. The **parties, with the authority to settle**, must be present at the JDR hearing and there should be agreement in advance that the parties are prepared to move from their previously stated positions. At the JDR meeting on October 22, 2002, it was noted that any settlement with the City of

Edmonton requires authorization of City Council if the amount exceeds \$25,000.00. It was suggested in such cases we should monitor whether this limitation of authority is impeding the success of JDR's conducted with the City. The issue also arises in cases involving various Provincial Government Departments and the indication is that Treasury Department approval is needed for a settlement. The only suggestion is that in JDR's involving Provincial Government Departments, that persons with influential positions with the Government Department involved should attend the JDR (A possibility being considered by Justice is to get prior approval from the Treasury.)

7. The **format** of a JDR hearing can be flexible but it is preferable to have agreement in advance as to the format between the judge and counsel. It should be anticipated that in a personal injury matter the Plaintiff may wish to speak directly to the judge and obviously the Defendant would have the similar opportunity. There should be clarification with counsel as to whether they wish a mini-trial or a settlement conference and a determination of which is most appropriate for this dispute. Hopefully in the future, early neutral evaluation can be considered. There should be advance notice to a judge and opposing counsel if any counsel intend to use surveillance material such as videos, etc.
8. All the **material**, including the briefs, exhibits and authorities, should be returned to counsel at the end of the hearing to reinforce the position that the hearing is absolutely confidential and nothing is kept on file.
9. There have been two instances where binding JDR opinions were published in law reports. It was agreed that this causes serious concern regarding the confidentiality of the JDR process. It has been agreed that no JDR opinion is to be published and should there be such an opinion in writing, it should clearly indicate it is **not in publication**.
10. Although **costs** are not awarded in JDR, the Rules do provide that if there are late cancellations, costs may be assessed against the offending party. Missed deadlines may result in cancellation and if a deadline for filing of materials is to be missed, counsel must obtain approval of the judge for an extension.
11. Some judges are prepared to hold **binding mini-trials**. A list of such judges is to be kept at the Trial Coordinators office and if a binding mini-trial is requested by both counsel, they should be referred to such a judge. (The last time I inquired the list of judges agreeable to this procedure was

hopelessly out of date. Most of them have withdrawn their name from the list.)

12. It is understood that counsel should be able to **select the JDR judge** to hear their matter. In the event that a JDR hearing has been scheduled prior to the assignments being made, it is understood that the trial coordinators will take such reasonable steps as they may to reassign the matter to a judge who is agreeable to all counsel.
13. The risks of conducting JDR's where one party is **self-represented** have been discussed and identified. It is agreed that judges should approach such sessions with extreme caution. One suggestion is that they should not be referred to as a "JDR" but as an "open pre-trial conference" and they be conducted in a courtroom and taped.
14. The importance of **reading the entirety of the submissions** and appendices before the JDR hearing was reiterated. It is agreed that one of the keys to success of JDR from the perspective of counsel is that a judge has fully assimilated the material and understands the issues.
15. There is no agreement as to whether or not a **case management Justice** should take on the additional obligation of conducting a JDR in the case that they are managing. An obvious concern is the fact that once having given an opinion, the judge may be perceived to be biased and his or her disqualification for further case management responsibilities may be requested. A possible answer is to postpone the JDR until the case management responsibilities of the judge are close to an end.
16. It has been agreed that although some judges use **mediation techniques** in the context of JDR they are not conducting mediation. It is expected that in the majority of cases, a judge will provide an opinion or guidance on the issues. Once again it was agreed that it does not assist the process if a judge weighs in "too heavily" in order to effect a settlement.



Appendix #6

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**Alberta Court of Queen's Bench Education Seminar**

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**Questions to be Asked of Panel**

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1. At the pre-JDR meeting, two counsel agree that \$100,000.00 is a fair settlement figure but they tell you the Plaintiff needs to hear it from a judge. Would you go ahead with the JDR?
2. At the pre-JDR meeting, the Plaintiff says their global claim is \$1 million. The Defendant says this is but a minor whiplash, \$10,000.00 to \$15,000.00 at maximum. All of the problems are really pre-existing. There are no objective findings. The Plaintiff is a malingerer. Both parties are adamant about their positions. Would you go ahead with the JDR?
3. Counsel ask you if you are willing to do a binding JDR? Would you ever do a binding JDR? If so, describe the circumstances under which you would agree to proceed.
4. You have carefully researched the briefs in a complex multi-vehicle personal injury claim. The sums claimed are substantial. You have decided on a fair distribution of liability as to the contributory negligence of various parties, and you have even gone so far as to discuss it with other judges who are knowledgeable in the field. Would you set out your view at the outset of the JDR to speed up the process?
5. Would you ever give your opinion on an important legal position that is one of the issues at the JDR before proceeding with the main conference?
6. Would you ever turn your opinion at the JDR into judgment at the end of the conference?
7. At the pre-JDR meeting, the Plaintiff says that their global claim for personal injuries is \$500,000.00. The Defendant's counsel has assessed the claim at \$100,000.00. You think this is "do-able". When the briefs come in, the Plaintiff's claim has now risen to \$1 million. What would you do?
8. At the pre-screening, the Defendant says that the Plaintiff is a professional litigant; has had eight back claims, three of which were in Court; five involving the Workers Compensation Board. Defence counsel says that the Plaintiff has lied before; tried to have medical records changed; and is not

to be trusted or believed in any manner. The Plaintiff still wants to go ahead.

What would you do?

9. Would you ever say something along the following lines?

Mr. Plaintiff:

The offer of \$100,000.00 is the best that you will ever get. It is inconceivable that any Calgary judge would give you a higher award. Possibly some Edmonton judges might give you more, but since this is a two-week trial, you will never get an Edmonton judge.

10. It has been a long day in a settlement conference. The parties are not that far apart. The Defendants say that they will not go beyond \$200,000.00 and if the Plaintiff wants more, take them to trial. The Plaintiff wants a specific sum in his pocket. You are now in a caucus with the Plaintiff's counsel. Would you consider suggesting to the Plaintiff's counsel? - "If you would reduce your contingency fee by just a few percentage points, your client would get the amount he wants and this matter could be settled".
11. You are in chambers in a contested application. During the Plaintiff's presentation, he mentions in passing that judge "X" gave his opinion at a JDR that \$100,000.00 was a fair settlement. What would you do?
12. At the JDR pre-meeting, facts and issues are agreed upon. In reviewing the briefs the JDR judge realizes that substantially new issues have been raised and facts disputed. What should the judge do?
13. After promising at the pre-meeting to be frank and candid, one party submits a brief containing wildly unrealistic figures for damages. Should the JDR proceed?
14. On reviewing the JDR briefs the judge concludes that the matter is not suitable for JDR and should proceed to trial. What should the judge do?
15. On reviewing the JDR briefs the judge concludes that one of them contains serious misstatements of fact and law and that the party is in fact attempting to mislead both the other side and the judge. When and how should the judge respond?
16. On reviewing the JDR briefs the judge concludes that one side is woefully ill-prepared and is lacking material evidence in support of its position. Should the JDR proceed or should the judge call counsel back for a further

meeting? Would your response change if the ill-prepared party is an insured defendant?

17. Would you ever do a JDR where one of the litigants was self-represented?
18. You are in a JDR on a construction claim that involves 6 parties; the Plaintiff, 3 Defendants and 2 Third Parties. Three days has been set aside for the JDR It is late in the afternoon of the first day. During a meeting which you hold with the Third Parties, one of the clients indicates that if she could talk to the Plaintiff without the Plaintiff's lawyer being present, some of the more difficult issues could be resolved. Do you encourage such a meeting? Do you discourage it? Do you say that that is up to the parties to decide what they want to do? That suggestion precipitates a suggestion from the lawyer for the other Third Party that if the lawyers for the third parties and Defendants (without their client) could meet with the judge some of the issues between the Defendants and the Third Parties might be resolved. Do you agree?
19. At the end of a JDR, if a settlement is reached, do you insist that the lawyers prepare a written memorandum confirming the settlement?

Appendix #7

**How I Run a Settlement Conference**

Justice Bonnie Rawlins  
Court of Queen's Bench (Calgary)

1. When I come into the room I ask counsel if they would mind having their clients sit next to me because I say that this case is all about them and they are the most important people in the room. In some cases I will make a point of actually touching the hand of the Plaintiff during the course of the day. I give them some housekeeping advice, i.e., the men can remove their jackets and roll up their sleeves; they can bring in coffee, tea, whatever, and food, if they want, and say that we are very informal and I want them to be comfortable.
2. I then tell them what my role is and say that I am not there to make them settle or consider them a failure if the matter does not settle. I always say that if they feel pressured in any way throughout the day, they should let me or their counsel know, or simply walk away. Nothing has to happen today other than talking, if that is what they feel comfortable with. I say that no matter what happens they will know more about their case when they leave with information they could not obtain any other way and even if it goes to trial they will all be better prepared to present their case and will have addressed the weaknesses that I have identified. Then I say, if they want, I will advise them what I would do if this matter were heard by me, but then say that I am but one judge out of 85. As a result, I say that in addition to my personal assessment, I will tell them what at least I think the majority of the Bench will do if this case goes to trial so they can further assess their risk of trial.
3. At some point, usually when I am discussing the general damages before caucusing, I will refer to the cases that the Plaintiff has provided. In most cases they are from Edmonton judges. I tell them that because their trial is over five days, only Calgary judges will likely be hearing this case and that to my knowledge the numbers reflected in those judgments have not been followed by the Calgary Bench. I also always add that these few judgments with the really high numbers are not necessarily reflective of the Edmonton Bench or, for that matter, these specific judges and that by and large the majority of the Bench are relatively conservative and predictable. In other words, while there may be a perception that the Edmonton Bench gives higher awards, in reality that is not the case. [I say this latter part to continue to dispel the suggestion that there is a difference in awards between the two

cities]. While the highest awards may be from Edmonton cases, they have just as many lower awards as Calgary and they may not be reported. I use this technique to get the Plaintiffs out of their sky-high expectations early on, and then may, but not always, refer to the Defendant's case if they are in the ballpark. I may refer to the experts who are called. For example, in Calgary, Dr. Bezzant frequently gives evidence for the Defence. I say that his report as filed is innocuous but when he gets on the stand he is very impressive and not biased in favour of the Defendant. I may tell the Plaintiff that it will be risky to proceed with this expert. Sometimes I will tell them that unless the previous tax returns are used, at least as a starting point, all the economic experts in the world will not assist their case and that rarely does the trial judge accept the same assumptions as the economic expert did.

4. After the Plaintiff and Defendant have had their say, I always ask the parties if they would like an opportunity to meet with me separately or would prefer to stay altogether. Not once has anyone opted to stay together. I always tell them to pick a number to determine who meets with me first, even though by that time I have already determined who I should meet first and that depends on who is being the most unrealistic. If I meet with the Plaintiffs first, I always ask first -- Well, what do you want to do now? Would you be interested in what I think or do you want to tell me more about the case that you did not want to share in the open forum? After I have told them what I think, I then ask if they are interested in settling and if so, would they like to make an offer. I am hurrying the process a little here, but I try to get an offer before lunch to give to the Defendants.
5. At the outset of the offer process I tell them to keep the cost and disbursements as a separate amount regardless of the settlement number to avoid the chiseling that goes on at the end, when these numbers cloud the issue. I also ask the parties to give me a \$5,000 cushion that I can use at the end. Sometimes they will, and sometimes not. If I have it, I can use it to settle when they are very close, but will not move.